Neutral Citation Number: [2019] EWHC 2105 (Comm)

Case No: CL-2017-000707

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before :

Andrew Henshaw QC (sitting as a Judge of the High Court)

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Between :

DR MARTIN JOHN COWARD **Claimant**

- and –

MS ELENA AMBROSIADOU **Defendant**

- -
- -

Derrick Dale QC, Christopher Knowles and Ian Bergson (instructed by **BDB Pitmans LLP**) for the **Claimant/Respondent**
Elspeth Talbot Rice QC and Bajul Shah (instructed by **Harcus Sinclair LLP** until 30 April 2019, and thereafter by **Harcus Parker Ltd**) for the **Defendant/Applicant**

Hearing dates: 18-19 March and 10 May 2019

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Approved Judgment

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Mr Andrew Henshaw QC:

(A) INTRODUCTION

1. The Defendant ("***Ms Ambrosiadou***") applies pursuant to CPR Part 11 for the stay or dismissal of claims brought against her by the Claimant ("***Dr Coward***") for breach of contract, breach of fiduciary duty and associated relief.

2. Dr Coward and Ms Ambrosiadou, who were married from 1983 to 2010, started a quantitative trading business in the early 1990s, which prospered. Dr Coward says it was his development of the trading software and model that made the business so successful. It is his case that at the outset, in 1992, he and Ms Ambrosiadou orally agreed to structure the business in a tax-efficient way, following advice, but also agreed to divide equally between them the profits they received from the business ("***the 50/50 agreement****").* Later, he alleges, they orally agreed in 2006 to vary the 50/50 agreement by reducing their own shares to 40% each with the remaining 20% going to their son ("***the 40/40/20 agreement***"). For ease of exposition, I use the terms "*50/50 agreement*" and "*40/40/20 agreement*" in this judgment without the word *"alleged"*, although their existence is strongly contested.

3. Subsequently, Dr Coward's and Ms Ambrosiadou's personal relationship became strained, and in April 2009 Ms Ambrosiadou filed for divorce. Dr Coward left the business in December 2009, and the parties have since then been embroiled in numerous pieces of litigation in England, Cyprus, Greece, Monaco and the BVI.

4. Dr Coward claims that, pursuant to the 50/50 and 40/40/20 agreements, Ms Ambrosiadou had duties to act honestly and in good faith; to disclose to Dr Coward any sums representing profits of the business which she or their son received or had paid in accordance with their instructions; and, if requested by Dr Coward, to ensure that to the extent Dr Coward had not already received or had paid to his order 40% of such sums, then he would do so. Dr Coward alleges that Ms Ambrosiadou breached those duties, and that since he left the business in 2009 Ms Ambrosiadou has accessed or benefited from sums representing profits of the business without disclosing them or procuring that Dr Coward receive his share.

5. Ms Ambrosiadou denies that the 50/50 and 40/40/20 agreements were made. She contends that the parties' actual relationship was governed by express written terms, including a written partnership agreement made in 1992, and a series of companies and trusts set up over time. Ms Ambrosiadou also denies that any payments have been made upon which the alleged agreements could bite, and contends that Dr Coward is issue estopped from advancing his present claim, alternatively that it is an abuse of process.

6. Dr Coward issued this claim on 17 November 2017. He obtained permission to serve out of the jurisdiction from Phillips J on 3 May 2018, on the papers, on the basis that his claim was based on the 50/50 agreement (as varied by the 40/40/20 agreement), which Dr Coward said was made in England and/or governed by English law under Article 4 of the Rome Convention and/or contained an implied jurisdiction clause in favour of England.

7. Dr Coward submits that the present case – based on alleged oral agreements – is a classic example of the type of case that the court should resolve at trial, especially as there are documents said to be consistent with the performance of the agreements, and that Ms Ambrosiadou's counter-arguments rest upon mischaracterisation of Dr Coward's case.

8. Ms Ambrosiadou contends that the court has no jurisdiction, or should decline to exercise any jurisdiction it does have, because Dr Coward:

   i) cannot satisfy the "*good arguable case*" test in relation to any of the gateways in CPR 11 PD 6B;

   ii) cannot show that England is clearly the appropriate forum for the trial of the action; and

   iii) cannot show that his claim meets the relevant threshold merits test of a serious issue to be tried.

9. Alternatively, Ms Ambrosiadou submits that the court should stay these proceedings pending the outcome of proceedings in Cyprus ("***the Cyprus Family Claim***") which are said to raise similar issues to the present claim.

10. Following an application made on behalf of Ms Ambrosiadou for directions to preserve the privacy of certain matters, which is the subject of a separate judgment given on 18 March 2019, short portions of the hearing were held in private. In the event it has not been necessary to refer to any of those matters in the present judgment.

(B) FACTUAL CONTEXT

11. I set out below the essential background to this application, based on the facts as summarised in the parties' submissions (largely those made on behalf of the Claimant). Save where I indicate otherwise later in this judgment, this section of my judgment should not be taken as involving factual findings on matters in dispute. It is intended to serve as an adequate overview for present purposes of the context in which, at least on the Claimant's case, the dispute arises.

(1) 1981 – 1989: the parties' marriage and discussions in Bahrain

12. Dr Coward and Ms Ambrosiadou met in England in 1981, when Dr Coward was studying for a PhD in Control Theory Engineering and Ms Ambrosiadou for a DPhil. They married two years later. Dr Coward began working for a company called Principia Mathematica, and then Goldman Sachs. He used mathematical techniques to value options and develop trading models, and wrote software. Ms Ambrosiadou undertook an MBA at Cranfield.

13. In 1989 Dr Coward began working for Investcorp in Bahrain. He says he developed the data collection techniques, software, models and relationships required to trade Japanese warrants. Later, Ms Ambrosiadou joined Dr Coward in Bahrain. They decided to start a business: a fund, fund manager, or investment advisor to a fund, drawing on their respective skills and experience.

(2) 1991 – mid 1992: IKOS (UK) Limited and Paloma Partners' approach

14. In July 1991 Ms Ambrosiadou set up an English company, IKOS (UK) Limited ("***IKOS UK***"), which was owned by Ms Ambrosiadou and a Mr Brown until 1994, and thereafter solely by Ms Ambrosiadou. Ms Ambrosiadou was also one of IKOS UK's directors. Dr Coward says he and Ms Ambrosiadou intended this company to bear the expenses of activities leading to setting up the anticipated fund, fund manager, or adviser.

15. In early 1992 Paloma General Partners LP ("***Paloma***") contacted Dr Coward about providing investment management services to them. They wanted someone to use mathematical models to trade Japanese warrants for them. In June 1992 Dr Coward and a Mr. Edwin Robertson, whom Dr Coward wished to work with him and Ms Ambrosiadou in the new business, met Paloma about this proposal.

(3) Mid to late 1992: Dr Coward and Ms Ambrosiadou move to England; the 50/50 agreement

16. In August or September 1992, Dr Coward left Investcorp. He transferred sums he had accumulated working offshore to an account held by Ms Ambrosiadou (who was not domiciled in the UK) in Jersey, which he says later helped to fund the development of the business. Dr Coward and Ms Ambrosiadou moved back to England, and planned to take up Paloma's proposal. Dr Coward says he began writing the appropriate software while Ms Ambrosiadou prepared an application to the then regulator, the Securities and Futures Authority ("***SFA***").

17. Dr Coward and Ms Ambrosiadou also took advice from an accountant, Mr. Jeremy Scholl, on how to structure their business in a tax-efficient way. They met Mr. Scholl several times in autumn 1992, including a meeting at Mr. Scholl's offices on 8 September 1992 attended by Mr. Scholl, Dr Coward, Ms Ambrosiadou and Mr. Robertson. I deal later with the details of this meeting. Dr Coward's case is that it gave rise to the 50/50 agreement between Dr Coward and Ms Ambrosiadou, under which they would share equally all sums received by either of them representing the profits of the business. Dr Coward says the 50/50 agreement was made in England and governed by English law.

(4) Late 1992 – 1994: forming IKOS Partners and managing funds for Paloma

18. Subsequently, Dr Coward, Ms Ambrosiadou and Mr. Robertson filed a business plan with the SFA identifying Dr Coward as in charge of trading and Ms Ambrosiadou as in charge of management and administration. For this purpose Dr Coward and Ms Ambrosiadou formed a partnership, which Ms Ambrosiadou says was created informally in September 1992. A partnership deed dated 11 December 1992 was entered into between Dr Coward, IKOS UK and Edwin Robertson Limited ("***the 1992 Partnership Agreement"***). This created an English partnership, IKOS Partners, with

partnership shares split 80% IKOS UK, 10% Dr Coward and 10% Edwin Robinson Ltd..

19. On 15 March 1993, IKOS Partners and Mill Street Partners (through which Paloma was to provide funds for IKOS Partners to manage) executed an agreement for IKOS Partners to manage $50m for Mill Street Partners. IKOS Partners then began trading Japanese warrants.

(5) Late 1994 – mid 1996: the IKOS Fund, IKOS CIF, IKOS AM and the Felix Trust

20. By the end of 1994, however, Paloma had withdrawn its investment from IKOS Partners, and only IKOS UK and Dr Coward remained partners of IKOS Partners. Their interests were split 90:10. Dr Coward and Ms Ambrosiadou decided to launch what became known as the IKOS Fund, and on 29 May 1995 they established the fund in the Cayman Islands.

21. A little over a month later, following advice from Mr. Scholl and a Mr. Angelos Gregoriades of KPMG, Ms Ambrosiadou set up a Cypriot trust: ***the Felix Trust***. Ms Ambrosiadou was the sole settlor and 'nominator' of the trust, and the sole lifetime beneficiary of its income. Initially, a Mr. Stavros Ambizas was the trustee, but later Cymanco Services Limited ("***Cymanco***") replaced him.

22. The IKOS Fund began trading in August 1995. IKOS Partners was its investment manager and charged it management and performance fees.

23. At the end of 1995, a Cypriot company, then known as IKOS OFC but which later became known as IKOS CIF ("***IKOS CIF***"), was formed for the purpose (Dr Coward says) of trading Russian securities. It was a subsidiary of Felix Holdings Limited ("***Felix Holdings***"), 99.9% of whose shares were held by the trustee of the Felix Trust under its terms. A further subsidiary of Felix Holdings, IKOS Asset Management Limited ("***IKOS AM***") was incorporated in the Cayman Islands. At the end of July 1996, IKOS AM became the IKOS Fund's investment manager. It received fees for its services, and in turn appointed IKOS Partners as sub investment manager. IKOS Partners also managed a small number of 'managed accounts'. IKOS AM paid IKOS Partners only its costs plus a small amount for its services. As a result, profits accumulated offshore in IKOS AM, which (Dr Coward says) invested most of them in the IKOS Fund.

24. A son was born to Dr Coward and Ms Ambrosiadou in 1996.

(6) Late 1996 – 2003: growth of the IKOS Fund

25. Thereafter, IKOS launched new funds and the assets under management grew. Meanwhile, Dr Coward says he and Ms Ambrosiadou drew modest sums. As a result, Dr Coward says that by 2003 a large amount of profits had accumulated offshore in IKOS AM, which he and Ms Ambrosiadou were keen to access them without incurring unacceptable tax liabilities. Around $40m of IKOS AM's accumulated profits were transferred to an offshore vehicle for tax reasons. However, it appears HMRC challenged the scheme, and the sums in it were 'ring-fenced' and invested in IKOS

funds. There is a dispute or potential dispute about the fate of, and entitlement to, those funds.

26. During 2003, Ms Ambrosiadou met a Mr. John Vellinga, a pilot, who later came to work for IKOS.

27. In 2004, Ms Ambrosiadou and the parties' son moved together to Greece.

(7) 2005 – early 2006: the move to Cyprus and the 40/40/20 agreement

28. In 2005 Dr Coward and Ms Ambrosiadou had a series of conversations regarding moving and restructuring IKOS. They agreed that IKOS CIF would replace IKOS Partners as sub-investment manager to IKOS AM, and IKOS Partners would be dissolved. Some staff, along with Dr Coward and Ms Ambrosiadou, would move to Cyprus. Dr Coward alleges that Ms Ambrosiadou put Mr Vellinga in charge of the move to Cyprus. Dr Coward's case is that Mr. Vellinga's increasing influence in IKOS, the proposed restructuring of IKOS, the move to Cyprus, and the fact that by this point Ms Ambrosiadou was describing herself as IKOS's CEO, led to Dr Coward orally seeking and receiving assurances from Ms Ambrosiadou that his rights regarding IKOS's profits were not at risk.

29. In about March 2006 Dr Coward moved to Cyprus. Subsequently, following advice from Mr. Gregoriades, he had a BVI company set up, initially called Paperclip Holdings Limited but which came to be known as MFP Limited ("***MFP***"), to charge for his services.

(8) Mid-2006 – early 2007: restructuring IKOS and settling the Eclectic and Hestia Trusts

30. Dr Coward says that between May and August 2006 Ms Ambrosiadou told him that she had been advised that the best way to distribute IKOS's profits to Dr Coward and Ms Ambrosiadou was through trusts. He says that around the same time, he and Ms Ambrosiadou agreed to make provision for their son. Dr Coward's case is that initially Ms Ambrosiadou wished herself and Dr Coward each to each give their son 20% of the profits taken out of IKOS (i.e. 40% in total). Dr Coward, however, was concerned about giving the son so much, and, since 20% of such profits would still be a large sum, he and Ms Ambrosiadou instead decided to give their son 10% each i.e. 20% in total. Thus, Dr Coward says, he and Ms Ambrosiadou orally agreed that instead of splitting withdrawn profits from IKOS 50/50 they would henceforth split them 40/40/20 between themselves and their son ("***the 40/40/20 agreement***").

31. Dr Coward's primary case is that the 40/40/20 agreement was simply a variation of the 50/50 agreement: all it did was change the agreed division of profits. Alternatively, he says it replaced the 50/50 agreement. Either way, he contends, since all that changed was the division of profits, the agreement was subject to English law (as the 50/50 agreement had been) and the jurisdiction of the English courts. Ms Ambrosiadou denies this.

32. On 1 July 2006, IKOS CIF replaced IKOS Partners as sub-investment manager, save in relation to managed accounts.

33. By a deed dated 11 August 2006, accompanied by a letter of wishes bearing the same date, Cymanco as trustee of the Felix Trust settled a new trust: a discretionary Cypriot trust known as the ***Eclectic Trust***. Under the trust deed, Cymanco settled all the class A, B and C shares in a BVI company, Kamper Limited ("***Kamper***"), on Cyproman Services Limited ("***Cyproman***") to be held on the terms of the Eclectic Trust. Kamper owned three companies, MFP, Anaxilea Limited, and Iridanos Limited, who Dr Coward says used their funds for, or distributed them to, Dr Coward, Ms Ambrosiadou and their son respectively.

34. The Eclectic Trust deed provided *inter alia* as follows:

    i) the trust fund included the assets set out in Schedule 1 to the deed, any assets added to the trust, and any assets representing the assets in Schedule 1 or further assets added to the trust;

    ii) Schedule 1 referred to tables A, B and C, which respectively included all the Kamper A shares, the Kamper B shares and the Kamper C shares;

    iii) the beneficiaries (more accurately, the objects of the discretionary power of appointment) were the persons identified in Schedule 2 to the deed, including Ms Ambrosiadou as the sole beneficiary in respect of the assets in table A, Dr Coward as the sole beneficiary of the assets in table B, and their son as the sole beneficiary of the assets in table C;

    iv) both Dr Coward and Ms Ambrosiadou were nominators, whose written consent was required for any change of beneficiaries (provision for which was made by clause 3);

    v) the trustee had the power to pay or apply the income or capital in any manner that was in its opinion for the benefit of all or one or more of the beneficiaries; and

    vi) the trust was governed by Cypriot law and subject to the exclusive jurisdiction of the Cypriot courts.

35. The letter of wishes in relation to the Eclectic Trust, signed by Cymanco and Cyproman, included statements to the effect that:

    i) Cyproman should, subject to certain provisos, follow requests of the nominators (i.e. Dr Coward and Ms Ambrosiadou) regarding the management of and distributions from the trust;

    ii) Ms Ambrosiadou was the ultimate beneficial owner of Anaxilea;

    iii) Dr Coward was the ultimate beneficial owner of MFP;

    iv) their son was the ultimate beneficial owner of Iridanos; and

    v) within 10 days of the addition of any assets to the trust, Ms Ambrosiadou was to receive 40% of such benefits, Dr Coward was to receive 40%, and their son was to receive 20%.

36. By the end of September 2006 IKOS CIF had completely replaced IKOS Partners, having taken over as sub-investment manager for managed accounts. Ms Ambrosiadou says ties with England were intentionally completely severed, which was important for tax reasons. IKOS Partners was dissolved at the end of 2006.

37. Meanwhile, Dr Coward alleges that he and Ms Ambrosiadou discussed setting up a new trust to replace the Felix Trust. They anticipated that rather than the trustee of the Felix Trust holding the shares in IKOS AM and IKOS CIF's parent (Felix Holdings) under that trust, the trustee of the new trust would hold them on the terms of the new trust. Dr Coward's case is that during this period Ms Ambrosiadou told him that for tax-related reasons he should not be a nominator under the new trust.

38. On 22 January 2007 Ms Ambrosiadou set up a discretionary Cypriot trust, the ***Hestia Trust***, by executing a trust deed and settling $100 on Cymanco to hold under the terms set out in the trust deed. Its terms were materially the same as those of the Eclectic Trust, except that (1) Ms Ambrosiadou was the sole nominator, with power to consent (without Dr Coward's concurrence) to changes in the beneficiaries, and (2) the sole beneficiary was Cyproman in its capacity as trustee of the Eclectic Trust.

39. Between then and March 2007, a BVI company known as Flavian Limited ("***Flavian***") bought the shares in Felix Holdings. It then became owned by Cymanco, as trustee of the Hestia Trust. The Felix Trust was terminated.

40. Accordingly, by March 2007:

    i) Felix Holdings owned IKOS AM and IKOS CIF, which generated profits;

    ii) Flavian owned Felix Holdings;

    iii) Cymanco held Flavian's shares on trust for Cyproman, as trustee of the Eclectic Trust, under the Hestia Trust; and

    iv) Cyproman, as trustee of the Eclectic Trust, held its rights and assets under the terms of that trust, of which Dr Coward, Ms Ambrosiadou and their son were the beneficiaries.

41. As a result, through the exercise of the discretionary powers of appointment in the trusts, it was possible for dividends derived from IKOS profits to flow through Felix Holdings, Flavian and the Hestia and Eclectic Trusts, to Dr Coward, Ms Ambrosiadou and their son; or to MFP, Anaxilea and Iridanos, which could distribute or use them for Dr Coward, Ms Ambrosiadou and their son respectively.

(9) Mid-2007 – 2009: operation of the trust structures

42. Dr Coward says that between early September and mid-October 2007, Anaxilea, MFP and Iridanos received $114,425,000 divided 40:40:20; and between late May 2008 and early June 2008 those companies received a further $231,420,000 divided 40:40:20. In addition, Anaxilea, MFP and Iridanos held, in 40:40:20 proportions, shares in various companies which in turn held assets that (at least on Dr Coward's case) Dr Coward, Ms Ambrosiadou and their son used.

43. Dr Coward says that at the end of 2008 Ms Ambrosiadou sacked Dr Coward's research team without informing or consulting him.

44. Subsequently, a company called Fteron Limited ("***Fteron***") bought a Cessna Mustang Aircraft, which Dr Coward (who is a qualified pilot) selected. Another company, Othisis Limited ("***Othisis***"), funded the purchase. Anaxilea, MFP and Iridanos in turn provided in 40:40:20 proportions the funds which Othisis used to fund the purchase of the aircraft (which came to be known as G-Mice).

45. In March 2009 Dr Coward and Ms Ambrosiadou arranged for Cochlias SAM ("***Cochlias***"), a Monegasque family office, to be set up to manage assets for them and their son, which it did for around 6 months. Dr Coward was the ultimate beneficial owner of 49% of Cochlias and Ms Ambrosiadou was the ultimate beneficial owner of the other 51%. Dr Coward alleges that Ms Ambrosiadou later, in May 2010, used her stake in Cochlias to remove Dr Coward as a director of it, with the result that he lost access to many documents dealing with trust distributions and family assets.

(10) Mid-late 2009: Greek divorce proceedings and Dr Coward's resignation from IKOS

46. In April 2009 Ms Ambrosiadou filed for divorce in Greece. These proceedings ("***the First Greek Divorce Proceedings***") ended in August 2010 when Ms Ambrosiadou withdrew her petition.

47. Dr Coward says he then proposed that he start a new Monegasque entity to provide services to IKOS, or that he and Ms Ambrosiadou split IKOS, but Ms Ambrosiadou did not accept those proposals.

48. In November 2009 and March 2010 Dr Coward covertly copied IKOS software and data. Dr Coward resigned from IKOS CIF on 11 December 2009, and since then has not (at least according to Ms Ambrosiadou) worked for any IKOS company though he has continued as a director of certain IKOS companies.

49. On 11 January 2010, Ms Ambrosiadou consented to the addition of a new beneficiary to the Hestia Trust, namely Cyproman acting as trustee of a new trust, the ***Moltke Trust***. In the English IP proceedings referred to below, Asplin J said that if necessary she would have found (despite evidence from Ms Ambrosiadou to the contrary) that Ms Ambrosiadou requested this change to the beneficiaries of the Hestia Trust. As a result of this change, money could now flow from IKOS, to the Hestia Trust and then into the Moltke Trust – of which Dr Coward was not a potential beneficiary– without reaching the Eclectic Trust. Dr Coward alleges that Ms Ambrosiadou requested this change covertly and for unexplained reasons, and has never disclosed what sums have flowed through this route.

50. In May 2010, Ms Ambrosiadou procured Dr Coward's removal as a director of Cochlias. As noted above, Dr Coward says this has limited his access to documents which may be consistent with his case.

(C) THE ISSUES

51. The issues arising on this application are:

i) whether Dr Coward has established, to the applicable standard, a ground or 'gateway' for service of these proceedings out of the jurisdiction;

ii) if so, whether England is the appropriate forum for the resolution of the claims made; and

iii) if so, whether Dr Coward's claims raise a serious issue to be tried.

52. As set out in more detail in section (D) below, the first issue raises a number of sub-issues, for two reasons.

53. First, Dr Coward makes no claim under the 50/50 agreement in unamended form, but only under that agreement as amended, alternatively replaced, by the 40/40/20 agreement. Further, but for the (alleged) existence of the 50/50 agreement, the 40/40/20 agreement would not on any view fall within any of the gateways for service out of the jurisdiction. Dr Coward therefore needs to establish both (a) that a claim under the 50/50 agreement would fall within a gateway and (b) that the claim he actually brings falls within a gateway because (i) it is a claim under the 50/50 agreement as varied by the 40/40/20 agreement, or (ii) the 40/40/20 agreement replicated a choice of English governing law and/or contained an implied English jurisdiction clause.

54. Secondly, several of the issues between the parties about the merits of Dr Coward's claim can also be regarded as going to the 'gateway' issue, because they concern the existence or legal enforceability of the 50/50 agreement upon which Dr Coward's case on jurisdiction depends.

55. I have approached the matter on the basis that those issues include (i) the evidential basis for the existence of the 50/50 agreement, (ii) Ms Ambrosiadou's contention that the 50/50 agreement (if it existed) would be unenforceable as a mere agreement to agreement and/or an unwritten surety obligation, and (iii) Ms Ambrosiadou's argument that Dr Coward is barred by issue estoppel from alleging the 50/50 agreement. I consider these issues in section (D) below.

56. Other merits-related issues have been raised that go wholly or primarily to the question of serious issue to be tried as opposed to the gateway issue, and which I therefore treat as sub-issues of former issue. These are Ms Ambrosiadou's contentions that even if the agreement Dr Coward alleges existed (a) it did not give rise to the duties which Dr Coward alleges, (b) it was terminated upon Dr Coward's departure from IKOS, (c) any claim under the alleged agreement is time barred and (d) it is an abuse of process for Dr Coward to bring this claim bearing in mind previous and current litigation in various jurisdictions (including England) in which Dr Coward has made the same or similar allegations. I consider these issues in section (H) below.

(D) JURISDICTION: THE GATEWAY ISSUE

(1) The Claimant's essential case

57. Dr Coward submits that the court has jurisdiction under CPR PD 6B §§3.1(6)(a), (c) and (d), which provide that:

> "The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where—
>
> …
>
> (6) A claim is made in respect of a contract where the contract—
>
> (a) was made within the jurisdiction;
>
> …
>
> (c) is governed by English law; or
>
> (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract."

58. Dr Coward relies on those gateways for his claims in contract, and also his claims for breach of fiduciary duty, on the basis that the same gateways apply to the latter claims insofar as the duties relied on arise out of an agreement (citing *Twin Benefits Limited v Barker* [2017] EWHC 1412 (Ch) § 113).

59. Dr Coward contends that:

    i) the 50/50 agreement was made in England, at the meeting on 8 September 1992 in Mr Scholl's office;

    ii) alternatively, the 50/50 was governed by English law because it was most closely connected with England pursuant to Article 4.1 and/or Article 4.5 of the Rome Convention of 1980 on the law applicable to contractual obligations, given effect by the Contracts (Applicable Law) Act 1990 (which still applies to contracts made before the Rome I Regulation regime incepted on 17 December 2009: see Regulation 593/2008/EC Article 28);

    iii) the 40/40/20 agreement was merely a variation of the 50/50 agreement, so Dr Coward's claim remains a claim brought under a contract made in England (in 1992) and/or governed by English law pursuant to the Rome Convention;

    iv) alternatively, if the 40/40/20 agreement replaced the 50/50 agreement, there was still no intention to change the applicable law or cut off access to the English courts, and so the 40/40/20 agreement:

        a) was most closely connected with England and therefore governed by English law pursuant to Article 4.1 and/or Article 4.5 of the Rome Convention;

        b) contained an implied choice of English governing law; and/or

        c) contained an implied choice of English jurisdiction.

(2) Applicable test

60. The overall principles to be applied are these:

i) The burden of proof is on Dr Coward to establish the necessary elements to justify service out of the jurisdiction: *Canada Trust Co v Stolzenberg (No. 2)* [1998] 1 WLR 547.

ii) Dr Coward must satisfy the court there is "*a good arguable case*" that the claim falls within one of the gateways in CPR 6B para 3.1. This means showing that Dr Coward has "*a better argument on the material available*" for the application of the relevant jurisdictional gateway.

iii) Dr Coward has to persuade the court that England is the appropriate forum and "*to show that this is clearly so"*; alternatively, to adopt the words of CPR 6.37(3), the court has to be satisfied by Dr Coward that England is the proper place in which to bring the claim: *White* Book vol. 1 Note 6.37.19 numbered point 1 and cases cited.

iv) Dr Coward must satisfy the court that there is a serious issue to be tried on the merits of the claim i.e. a substantial question of fact or law or both. There has to be a real, as opposed to fanciful, prospect of success on the claim.

61. As to (ii) above, the applicable test, including in cases where an issue goes both to jurisdiction and to merits (such as the making and/or location of a contract, as in the present case), has been explored in a series of decisions of the appellate courts, most notably as follows.

62. First, the House of Lords in *Vitkovice Horni A Hutni Tezirstvo v Korner* [1951] AC 869 concluded that the evidential standard for establishing that one of the jurisdictional gateways applied was lower than the civil burden of proof (the application of which would *"in effect amount[] to a trial of the action or a premature expression of opinion on its merits"* (p.879)), but was higher than a mere *prima facie* case based purely on the factual case advanced by the claimant (i.e. disregarding any factual challenge by the defendant). The correct test was variously described as requiring the claimant to show a "*good arguable case*" (Lords Simonds and Normand) or a "*strong argument*" / "*strong case for argument*" (Lords Radcliffe and Tucker).

63. Secondly, in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, the House of Lords endorsed Lord Simonds's formulation as applied to the gateways, and suggested that Lord Radcliffe's formulation meant the same thing. In addition, it held that the existence of a reasonable prospect of success on the merits fell to be determined according to a lesser standard, namely that there should be a "*serious issue to be tried*". The latter test, as Lord Sumption noted in *Brownlie* (see below), has been held to correspond to the test for resisting an application for summary judgment: *Altimo Holdings and Investments Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 § 71.

64. Thirdly, the Court of Appeal in *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555 stated:

> "'Good arguable case' reflects … that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i e of the court being satisfied or as satisfied as it can be having regard to

> the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."

Lord Sumption in *Brownlie* noted that that analysis was approved in general terms when the case reached the House of Lords, but without full argument ([2002] 1 AC 1, 13) and was approved in two later Privy Council decisions.

65. Fourthly, in *Brownlie v Four Seasons Holdings International* [2017] UKSC 80, Lord Sumption (with whom Lord Hughes agreed) stated, first, that the evidential standard applicable to jurisdictional facts relevant to the availability of a gateway, pre and post CPR, must have been and must remain the same whether the jurisdictional fact in question would or would not be in issue at a trial on the merits. In addition, Lord Sumption said of the *Canada Trust* formulation quoted above:

> "In my opinion it is a serviceable test, provided that it is correctly understood. The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof which the House of Lords had rejected in *Vitkovice*. What is meant is
>
> (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway;
>
> (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but
>
> (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context." (§7, paragraph breaks interpolated)

66. Fifthly, in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, Lord Sumption (with whom the other members of the Supreme Court agreed) said:

> "This is, accordingly, a case in which the fact on which jurisdiction depends is also likely to be decisive of the action itself if it proceeds. For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had "the better of the argument" on the facts going to jurisdiction. In *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192, para 7, this court reformulated the effect of that test as follows:
>
> > "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason

> for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."
>
> It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced." (§ 9)

67. Sixthly, in *Kaefer Aislamientos SA v AMS Drilling Mexico SA* [2019] EWCA Civ 10, the Court of Appeal explained that:

i) In applying limb (i) of the *Brownlie* test, namely whether the claimant has supplied a plausible evidential basis for the application of a relevant jurisdictional gateway, the question is whether the claimant has discharged the burden of showing a plausible evidential basis indicating that he has the better argument (but not 'much' the better argument); this does not require proof on the balance of probabilities and is a context specific and flexible test (*Kaefer* §§ 71-76).

ii) Limb (ii) ("*if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so*") is:

> "… an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "reliably" can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The Court is not compelled to perform the impossible but, as any Judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with " due despatch and without hearing oral evidence" …. It should be borne in mind that it is routine for claimants to seek extensive disclosure (as was done on the facts of the present case) from the defendant in the expectation (and hope) that the defendant will resist, thereby opening upon the argument that the defendant has been uncooperative and is hiding relevant material for unacceptable forensic reasons and that this should be held against the defendant. Where there is a genuine dispute judges are well versed in working around the problem. For instance, it might be possible to decide an evidential dispute in favour of a defendant on an assumed basis and ask whether jurisdiction is nonetheless established. Equally, where there is a dispute between witnesses it might be possible to focus upon the documentary evidence alone and see if that provides a sufficient answer which then obviates the need to

> grapple with what might otherwise be intractable disputes between witnesses." (*Kaefer* § 78)

iii) Limb (iii) (if *"the nature of the issue and the limitations of the material available at the interlocutory stage [are] such that no reliable assessment can be made"* then *"there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it"*) arises where the court is unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument (*Kaefer* § 79). As to this situation:

> "… In [*WPP Holdings Italy Sarl v Benatti* [2007] EWCA Civ 263] Lord Justice Toulson stated that the Court could still assume jurisdiction if there were " factors which exist which would allow the court to take jurisdiction " … and in [*Antonio Gramsci Shipping Corp v Recoletos Ltd* [2012] EWHC 1887 (Comm)] Teare J asked whether the claimant's case had "sufficient strength" to allow the court to take jurisdiction (ibid paragraph [48]). The solution encapsulated in limb (iii) addresses this situation. To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits." (*Kaefer* § 80)

68. In deciding whether or not there is a plausible evidential basis for a case based on alleged oral agreements, it is relevant to have regard to the courts' general approach to determining the existence of such agreements, though bearing in mind that these cases (a) generally represent the approach taken at trial as opposed to earlier on in proceedings (such as when deciding jurisdictional issues) and (b) rarely deal with alleged contracts between persons who were married at the time of the alleged agreement.

69. In *Blue v Ashley* [2017] EWHC 1928 (Comm) the issue was whether Mr Blue (an investment banker) and Mr Ashley (the founder of Sports Direct) had concluded a binding contract as the result of a conversation that they had had in a public house in London. Leggatt J concluded that they had not done so. In reaching that conclusion, he observed:

> "[i]t is rare in modern commercial litigation to encounter a claim, particularly a claim for millions of pounds, based on an agreement which is not only said to have been made purely by word of mouth but of which there is no contemporaneous documentary record of any kind" (§ 65)

70. More recently, in *Edgeworth Capital SARL v Aabar Investments PJS* [2018] EWHC 1627 (Comm) Popplewell J said:

> "I would also associate myself with the views in paragraph [65] [of *Blue*], which are of particular relevance in this case, that the absence of a contemporaneous written record by those with

> business experience may count heavily against the existence of an oral contract, because in the twenty-first century the prevalence of emails, text messages and other forms of electronic communication is such that most agreements and discussions which are of legal significance, even if not embodied in writing, leave some form of electronic footprint." (§ 34)

It should be borne in mind, though, that the first of the alleged oral agreements in the present case is said to have been made in 1992, before emails, texts or other forms of written electronic communication, apart from fax, became prevalent.

(3) 50/50 agreement: evidential basis

71. Dr Coward himself did not serve a witness statement in support of his application for permission to serve proceedings out of the jurisdiction, nor in response to Ms Ambrosiadou's present application to set permission aside.

72. Dr Coward did, however, personally sign the statement of truth of his Particulars of Claim in this action, §§ 15 and 16 of which included the following:

> "15. Subsequently, in September 1992:
>
> 15.1 The Claimant and the Defendant moved to England. …Shortly before that, the Claimant had transferred all or substantially all of certain funds … which he had accumulated in Bahrain into a bank account held in Jersey in the Defendant's name, in order to take advantage of her non-UK domiciled status.
>
> …
>
> 15.3 The Defendant undertook, among other things, the preparation of an application to the Securities and Futures Authority ('**SFA'**), including a business plan for submission to the SFA …
>
> 15.4 The Claimant and the Defendant sought advice from Jeremy Scholl (an accountant instructed by the Claimant and/or the Defendant) regarding, among other things, the structuring of their proposed business. On 4 September 1992, the Defendant wrote to Jeremy Scholl, stating, among other things, that *"IKOS"* would act as investment adviser to Paloma …, and that she wanted Mr Scholl to *"look into providing the most tax efficient structure for IKOS …"*
>
> 15.5 On or about 8 September 1992 the Claimant, the Defendant and Mr Robertson attended a meeting at Mr Scholl's offices in London. At that meeting:
>
> 15.5.1 Mr Scholl proposed that the Claimant, the Defendant and Mr Robertson structure their anticipated business as a partnership, with the Defendant and Mr

> Robertson participating through companies which they owned and/or controlled … The Claimant would participate in the partnership as an individual as the SFA and/or its rules and/or regulations required or would have required there to be at least one partner with unlimited liability in order to permit the partnership to operate in the UK.
>
> 15.5.2 Mr Scholl's proposal provided for the net profits of the proposed partnership to be divided 80:10:10 between the company through which the Defendant would participate in the p/s, the Claimant and the company through which Mr Robertson would participate in the partnership.
>
> 15.5.3 The Claimant questioned why the proposed split of profits … was not, as between himself and the Defendant, equal.
>
> 15.5.4 Mr Scholl explained that if the Claimant and the Defendant wanted to split such profits as they were entitled to equally between them, they could, but that in the first instance: (i) it would be preferable if a limited amount of assets were held by the Claimant, as he would be the only partner who would be an individual with unlimited liability rather than a company with limited liability; and (ii) it would, for tax reasons, be beneficial for the Claimant and the Defendant if most of the relevant profits were received by the Defendant, and transferred offshore, and then, later, when the Claimant and/or the Defendant and/or the business moved offshore (as they and Mr Scholl anticipated would happen), were divided equally between the Claimant and the Defendant.
>
> 15.5.5 The Claimant and the Defendant agreed that is what they would do.

16. In the premises the Claimant and the Defendant made an agreement (**'the 50/50 agreement'**) pursuant to which they agreed to divide such profits of the profits of their anticipated fund and/or fund manager and/or investment manager business as they ultimately received or would receive equally between them.

17. It was an express term of the 50/50 agreement, alternatively an implied term, implied to give business efficacy to it, that the Defendant would, on demand, procure or ensure that (to the extent he had not already done so) the Claimant would receive or have paid to his order a sum equal to half of the total amount of any sums paid up to that date to the Claimant and Defendant or to their order which represented the net profits of the IKOS Business."

73. The words *"such profits of the profits … as they ultimately received or would receive"* in paragraph 16 are ambiguous. They might indicate that:

    i) the agreement applied to profits expected to be received by Dr Coward or Ms Ambrosiadou even before Dr Coward or Ms Ambrosiadou actually received them, or

    ii) the agreement applied only to profits actually received, with the words "*or would receive*" simply reflecting the point that as at the time of the agreement those profits had not yet been received.

74. Paragraph 17 of the Particulars of Claim indicates that interpretation (ii) is the correct one, since the pleaded obligation bites only on *"any sums paid up to that date [i.e. the date of any demand] to the Claimant and Defendant or to their order".*

75. The description of the agreement given in paragraphs 15.5.4 and 15.5.5 of the Particulars of Claim might appear to indicate that the agreement would not apply, or would not catch any sums received, unless and until Dr Coward and/or Ms Ambrosiadou and/or the business actually moved offshore. However, paragraph 16 appears to contain no such limitation and suggests that the agreement operated immediately. Counsel for Dr Coward made clear that the latter is the position:

> "MR. DALE: However, the point in terms of the agreement is that the agreement envisages, at the time, that they will potentially be moving on shore [sc. offshore], so thereafter to refer to offshore as being a material change of circumstance that takes place is not, in fact, a point that is good against us at all. They have rights in England, we say, but they are going to be exercising those rights offshore later, potentially.
>
> THE JUDGE: Later?
>
> MR. DALE: Well, once there are -- what they are agreeing to is that they are agreeing that they are going to ultimately divide sums representing the profits that have been made, and if they are offshore then they will no doubt be distributed offshore, but if once they are demanded, if they were onshore still, they would be demanded in the jurisdiction if it came to it. However, the point is that the agreement arises because they are planning on taking the profits offshore, and they are planning on maximising the tax advantageous effects of that, but at the same time, and that is once the moneys have gone through the corporate structures, they are agreeing between themselves -- and these are personal rights between themselves, they did not affect the partnership rights or the partnership entitlements or any of that, that they agree between themselves -- that if she or he holds more than their equal share, then they have a personal right against each other for ensuring that the sums are paid to their order, which represent their equivalence of the sums representing the profits of IKOS. It is not difficult, actually, I mean we can get tied up on the language.

> THE JUDGE: But is it an agreement that the 50/50 sharing will happen immediately, or only that it will happen if and when they move offshore?
>
> MR. DALE: Well, it happens -- there are a series of rights which arise -- it is envisaged that they will be going offshore. If you imagine that they, I suppose, had split up while in England, we are not saying that Mr. Coward could not have demanded his 50% then. It is irrespective. I mean, they are currently envisaging that they are going to move offshore, but the rights are the rights for an immediate right upon demand for his sums that would represent the profits.
>
> THE JUDGE: Because paragraph 16 seems to suggest it is an immediate sharing.
>
> MR. DALE: Well, it is a right to call for your share of what would represent the profits of the IKOS business.
>
> THE JUDGE: Let us take a hypothetical example. Supposing in year 1 the business makes £1 million of profit. Under this agreement, does the claimant have a right immediately to ensure that he receives half of what the defendant receives from that profit, or does he only have a right that he will receive it when they move offshore?
>
> MR. DALE: He can ask for it -- well, what would happen, of course, is that the moneys would get paid to IKOS UK.
>
> THE JUDGE: Let us assume that they get paid in the direction of the defendant.
>
> MR. DALE: Then let us assume that they get into her hands.
>
> THE JUDGE: Yes.
>
> MR. DALE: Then he would have the right to call upon them.
>
> THE JUDGE: Yes, immediately.
>
> MR. DALE: Wherever he was." (Day 2 pp199-201)

76. If that was the agreement, it is not clear how it follows (as the words "*In the premises*" in Particulars of Claim § 16 indicate) from the exchanges pleaded in Particulars of Claim §§ 15.4 and 15.5. Mr Scholl's suggestion, to which the Dr Coward and Ms Ambrosiadou are said to have agreed, appears to have been that for the time being most profits would be received by Ms Ambrosiadou and transferred offshore, and then *"later, when the Claimant and/or the Defendant and/or the business moved offshore"* they would be divided equally between Dr Coward and Ms Ambrosiadou. By contrast, Dr Coward's case in fact seems to be that he would have, from the outset, a right to a

50% share of any profits he or Ms Ambrosiadou received from the business: an outcome markedly different from the one Mr Scholl is said to have suggested.

77. Essentially the same feature appears in the first witness statement of Dr Coward's then solicitor, Mr John Bennett, served in support of Dr Coward's application for permission to serve proceedings on Ms Ambrosiadou out of the jurisdiction. At §§ 40 to 42 he refers to Mr Scholl at the meeting on 8 September 1992 having answered Dr Coward's question about the proposed 80:10:10 profit split by giving two reasons:

> "40. … The first was that by adopting his proposal less assets would be exposed. Most of the profits would, in the first instance, pass through IKOS to Ms Ambrosiadou. Only a limited amount of assets would be held by the unlimited partner, Dr Coward. The second was that Dr Coward and Ms Ambrosiadou could properly benefit from Ms Ambrosiadou's non-domiciled status. She would be the initial recipient of most of the profits, and would not be taxed in the same way as Dr Coward. Those profits could then be retained offshore, or be paid to offshore companies. Then, if Dr Coward and Ms Ambrosiadou and/or IKOS moved offshore (or another way to mitigate any tax liability was found) those profits could be split equally between Dr Coward and Ms Ambrosiadou. In the meantime, Dr Coward and Ms Ambrosiadou could be paid relatively modest salaries.
>
> 41. Dr Coward and Ms Ambrosiadou orally agreed that that is what would happen, and what they would do. Indeed, it was important that Dr Coward and Ms Ambrosiadou finally agreed the position between them. This is because the deal to manage funds for Paloma was soon to be done, and profits generated.
>
> 42. Dr Coward's case is that in such circumstances there was an express oral contract between him and Ms Ambrosiadou to divide the net profits of the IKOS Business equally between them. This agreement is referred to below as the 50/50 agreement."

78. That description seems to indicate that any 50/50 division of sums representing profits would occur (leaving aside the question of whether it would cover profits already taken out or only future profits) only if and when the parties and/or the business moved offshore. However, in §§ 43 to 45 Mr Bennett explains that Dr Coward says on the proper interpretation of this agreement, if either Dr Coward or Ms Ambrosiadou received (or had paid in accordance with their instructions) sums representing net profits of the IKOS business, then Ms Ambrosiadou would ensure that any sums received by Dr Coward were "*topped up*" so that he had received (or had paid to his order) 50% of the profits taken out of the business. That agreement would appear to catch any sums received or paid to the order of Dr Coward or Ms Ambrosiadou at any time, regardless of whether or not any offshore move had yet taken place.

79. As with Dr Coward's pleaded case, therefore, the 50/50 agreement is said to have arisen from the course of action suggested by Mr Scholl, and yet differs from that course of

action in that it is said to have taken effect immediately whereas Mr Scholl's suggestion was for a 50/50 sharing of receipts only when the parties and/or the business moved offshore.

80. Dr Coward himself did file a witness statement, making reference *inter alia* to an agreement said to have been made with Ms Ambrosiadou in around 1992, in an action in England relating to copyright in the software used by IKOS ("***the English IP proceedings***"). Dr Coward issued those proceedings on 27 August 2010 against Ms Ambrosiadou, IKOS UK (by this time known as Phaestos), IKOS AM and IKOS CIF. Dr Coward alleged that he owned the copyright, that he had written a substantial part of the software, that it was never partnership property of IKOS Partners, and IKOS CIF did not own it. Dr Coward said that IKOS used it under an implied licence from Dr Coward, which ended when he left in December 2009. The IKOS entities counterclaimed against Dr Coward that he had copied IKOS code.

81. In his Particulars of Claim in the English IP proceedings, signed by him on 27 August 2010, Dr Coward alleged that:

> "… in 1992 Dr Coward jointly started an investment management business with his now estranged wife … ("*Ms Ambrosiadou*"). The nature and corporate structure of this business has changed over time but throughout the implied legal arrangements have reflected the fact that the principal or sole partners in the business were at all times Dr Coward and an entity and/or entities beneficially owned by Ms Ambrosiadou. …" (§ 2)

82. In his Amended Reply and Defence to Counterclaim in the same proceedings, Dr Coward stated:

> "The Defendant's case … fails to reflect the fact that at all material times IKOS was a family business, the real partnership being one between Dr Coward and Ms Ambrosiadou ("*the Family Partnership*"), and fails to reflect the legal consequences of that fact." (§ 4.1)

83. In response to § 23 of the Defence of the First to Fourth Defendants, in which they had alleged that *"Insofar as [Dr Coward] created any intellectual property in the course of working for IKOS Partners, any Defendant company or any associated company or partnership, that intellectual property became the property of the said partnership or company …"*, Dr Coward pleaded that that allegation:

> "fails to reflect the fact of the Family Partnership, and fails to reflect the legal consequences of that fact.
>
> For the purposes of the Particulars of Claim and the Reply, Dr Coward's case as to those legal consequences is that each of Dr Coward and Ms Ambrosiadou retained the rights to the intellectual property that he or she had created." (Amended Reply §§ 6.1 and 6.2)

84. Similarly, Dr Coward alleged that he owned and/or was entitled to use the software based on:

> "the position in respect of ownership of intellectual property rights (as well as the content of the rights and duties of Dr Coward and Ms Ambrosiadou in respect of entities within the IKOS structure) being determined having regard to the Family Partnership" (Amended Reply § 24.6)

and that:

> "The partnership of substance underlying the IKOS business was a partnership between Dr Coward and Ms Ambrosiadou, the Family Partnership so defined.
>
> At all material times, all IKOS entities were controlled and beneficially owned by Dr Coward and Ms Ambrosiadou, alternatively Dr Coward, Ms Ambrosiadou and their son …" (Amended Reply §§ 36.1 and 36.2)

85. Dr Coward also signed a Response to the Defendants' Request for Further Information in the English IP proceedings, which included his answers to questions about whether Dr Coward alleged that alongside the corporate structure of the business there was in law a different and separate partnership between Dr Coward and Ms Ambrosiadou, and, if so, its terms and how it came into existence. Dr Coward stated:

> "1. It is [Dr Coward's] case that the IKOS business was in substance since 1994 a business being carried on by Dr Coward and Ms Ambrosiadou in common with a view to profit. Dr Coward and Ms Ambrosiadou were at all times free to choose the underlying corporate and partnership structure for that business, and did so, but in substance the IKOS business was run as a family business.
>
> [Dr Coward] will say that (as it happens) sufficient indicia are met for these to be in law a different and separate partnership referred to as the Family Partnership. It is to be remembered that partnerships are not in law themselves legal entities.
>
> For the avoidance of doubt, for [Dr Coward] to succeed on [his] case … it is not necessary for [Dr Coward] to establish that the Family Partnership is or ever was a separate partnership as such, as opposed to a factual reality informing the proper analysis of duties owed by [Dr Coward] and Ms Ambrosiadou and ownership of intellectual property rights relating to the IKOS business.
>
> 2. If in law the Family Partnership is a different and separate partnership between [Dr Coward] and Ms Ambrosiadou personally:

> (a) It came into existence as a result of the agreement, to be implied from conduct, that [Dr Coward] and Ms Ambrosiadou would carry on the business together in common with a view to profit. It came into existence at the latest by late 1994 when the only partners in IKOS Partners were Dr Coward and the corporate representative of Ms Ambrosiadou.
>
> (b) One of the terms to be implied into the Family Partnership is that each of [Dr Coward] and Ms Ambrosiadou retains the intellectual property rights that he (or she) created. Alternatively it is a term to be implied that each could exploit all of the intellectual property rights created in the course of the Family Partnership. …"

1994 was the year in which Mr Robertson had departed from the business.

86. In his witness statement in the English IP proceedings, dated 7 December 2012, Dr Coward stated *inter alia*:

> "20. … Although in fact, the funding for the business was provided by monies from Paloma, IKOS Partners was structured as a 10% (Edwin), 10% (me) and 80% (IKOS (UK) Ltd) partnership, in terms of capital provision recorded in the partnership deed. So far as Edwin was concerned, this reflected the fact that he was very much a junior partner. So far as I was concerned, the structure reflected the advice Elena and I had had from Jeremy. I had myself been in favour of forming a partnership … Elena and I had discussed this in Bahrain, on the basis that we would be equal partners in the business and all monies we made would be ours jointly on a 50:50 basis. When I returned from Bahrain we had a meeting at Jeremy's office in London. It was he who proposed the structure and the split to be found in the partnership deed. I do not recall any substantial discussion of the 80:10:10 split recorded in the deed, but it was certainly not intended to reflect the split of assets between Elena and me that she and I had agreed between ourselves. Nor was it suggested that the structure could not be adjusted later to reflect that agreement. If the arrangement between Elena and me had been at arm's length, I would have expected to receive 80% of the profits of the business. As it was, Elena and I had agreed that, as husband and wife, and both intending to work in the business, we should own everything – the business and its profits – 50:50, even if for tax or similar reasons assets or monies were put into her name. As I recall, it was Jeremy who at the meeting suggested the particular structure we adopted for IKOS Partners for reasons of sheltering assets and tax efficiency.
>
> 21. We later, over the years, adopted additional and different structures but these were all intended to shelter assets and/or

> achieve tax efficiency against the background of our agreement as to 50:50 shares in everything (later 40:40:20 shares …) …
>
> 22. Before my return from Bahrain, I had transferred to Elena's account with Standard Chartered in Jersey all or most of the money I had accumulated offshore. This was intended to take advantage of Elena's non-UK domiciled status and to reduce our UK tax liability. I cannot recall precisely how much money this was – perhaps £400,000 or £500,000.
>
> 23. From September 1992, after my return from Bahrain, I focused on writing the software to be used in our business."

87. In oral evidence in the English IP proceedings, Dr Coward stated that the formal business structures were convenient for tax and other reasons, including limited liability, but nonetheless he regarded everything as equally owned *"as a result of the marriage and as a result of discussions we had about it".* In response to the suggestion that there was no express agreement to the effect that everything was jointly owned, Dr Coward said *"There was, absolutely. Elena represented it quite clearly to me on several occasions."*

88. The case was tried before Asplin J between 5 and 21 March 2013, by which stage Ms Ambrosiadou was no longer a party. Both Dr Coward and Ms Ambrosiadou gave oral evidence. Asplin J on 17 May 2013 handed down a 69-page judgment rejecting Dr Coward's central claim that he owned the copyright in the software written by him and used by IKOS in its business (*Coward v Phaestos* [2013] EWHC 1292 (Ch)). Asplin J also rejected Ms Ambrosiadou's claim that the business was hers alone. Asplin J ordered Dr Coward to hand over or destroy copies of IKOS software he had created, transfer the title to any copyrights and pay £1,000 for copyright infringement and breach of confidence.

89. I return to Asplin J's judgment in more detail later in the context of issue estoppel, but at this stage highlight certain points relating to Dr Coward's evidence in the English IP proceedings relating to the events of autumn 1992 and his interest in the partnership business.

i) Asplin J outlined Dr Coward's evidence as to the nature of his business relationship with Ms Ambrosiadou, drawing partly on Dr Coward's witness statement as quoted in § 86 above and partly on his oral evidence:

> "74. With regard to the partnership shares, Dr Coward explained that despite his 10% share, he considered himself to be equally interested in the business with Ms Ambrosiadou on a 50:50 basis. He stated that had the parties been at arm's length he would have expected to have been entitled to at least 80% of the profits of the business but because they were husband and wife they should own everything equally, even if for tax reasons, assets or monies were put in her name. He said that they had been advised as to their relative percentage interests by Jeremy Scholl their tax advisor and accountant. Dr Coward gave two reasons for having been recorded as having a 10% share. The first was an attempt

> to limit liability as the only non-corporate partner and the second was tax planning based upon Ms Ambrosiadou's status as a non-UK domiciliary. He also mentioned that they had been advised that in any event, the partners could agree to pay themselves whatever they thought fit.
>
> 75. In this regard, he was referred to correspondence on his behalf between Jeremy Scholl & Co, Chartered Accountants and the Complex Personal Returns Team of the Inland Revenue dated 18 July 2006 ... He was also referred to correspondence between an international tax adviser and HM Customs and Revenue in October 2010 in which it was stated that Dr Coward held a 10% interest in the IKOS Partnership. He accepted that both letters were accurate and reflective of his 10% share in the partnership business.
>
> …
>
> 80. It was Ms Ambrosiadou's evidence that she and Dr Coward agreed with Mr Robertson that he would be allowed to continue to use and further develop the back office software which he had developed whilst either he or his company was a partner in the business. Dr Coward accepted in cross examination that this may well have been correct. However, he denied that they had necessarily treated the software created by Mr Robertson as partnership property or that that would have any bearing on whether the software created by Dr Coward himself was treated in the same way. In this regard, he stated that he saw IKOS Partners as being at arm's length with people like Edwin Robertson and that its other function was in relation to Dr Coward himself and Ms Ambrosiadou. In this context, he saw it as a family partnership and stated that he and Ms Ambrosiadou did not consider that the documents and agreements which applied to others such as Edwin, applied to them."

ii) Asplin J did not accept Dr Coward's evidence that, despite the formal ownership arrangements in place, he in fact owned the business jointly with Ms Ambrosiadou:

> "88. Ms Ambrosiadou's evidence was that by this time, IKOS AM was the lead company in the IKOS hierarchy, that she discussed the business plans and structures with Dr Coward frequently. It was Dr Coward's evidence that he considered himself to have an interest in IKOS AM and that the arrangements were convenient for tax purposes, but did not reflect the real state of affairs. He accepted that he had enjoyed the benefit of that structure through Ms Ambrosiadou because she had been the one receiving the money but he had enjoyed it indirectly through her. He also stated that he treated everything as jointly owned partly as a result of their marriage and also as a

> result of an agreement between them. There was no other evidence of any kind of such an agreement and I reject Dr Coward's evidence in this regard."

iii) Asplin J made adverse findings in relation to the evidence of both Dr Coward and Ms Ambrosiadou:

> "38. The two principal witnesses were Dr Coward and Ms Ambrosiadou themselves. They were cross examined extensively. It was quite clear that they are both highly intelligent and astute individuals. Unfortunately, their approach to giving evidence was tainted by their obvious and deep animosity and the extremely close correlation between their business and their personal affairs.
>
> 39. Dr Coward is quite clearly a highly intelligent and articulate man. However, at times, I found his approach to giving evidence to be cavalier. Despite his involvement in the creation and development of the software at the heart of his claim, he showed a lack of attention to the detail of that claim in relation to authorship. He appeared both to have reviewed the expert evidence scantily and late in the day and to have failed to give detailed attention to the code in Annex 4 of which he claims to be the author. In cross examination he also altered his evidence in relation to the use of comment styles in the code in a way which was clearly designed to suit the moment and was unsupported in any way. I also found him to be evasive when cross examined as to his knowledge of the content of various agreements which he had signed and public documents relating to the IKOS business. In all therefore, I did not find Dr Coward to be an entirely satisfactory witness.
>
> 40. Ms Ambrosiadou is also clearly, a highly intelligent and sophisticated person who had a detailed knowledge of the facts surrounding this matter. She quite clearly found giving evidence extremely stressful and difficult. I found Ms Ambrosiadou to be extremely evasive and prone to making lengthy speeches in order to avoid answering questions which did not suit her, in what often appeared to be an attempt to obfuscate and confuse. Accordingly, I did not find her to be an entirely satisfactory witness any more than Dr Coward.
>
> 41. In the case of both Dr Coward and Ms Ambrosiadou, unless their evidence is consistent with the contemporaneous documents I prefer the oral evidence of others where it differs from their account of events."

90. The account of events which Dr Coward gave in the English IP proceedings is markedly different from the case he seeks to advance in the present proceedings.

i) The agreement Dr Coward alleged in the English IP proceedings was that he and Ms Ambrosiadou *"should own everything – the business and its profits – 50:50, even if for tax or similar reasons assets or monies were put into her name"*. By contrast, the agreement which Dr Coward presently alleges did not result in ownership of the business assets and profits, but was confined to a 50:50 share of such sums as he or Ms Ambrosiadou might actually receive (or have paid to their order) representing the profits of the business.

ii) According to Dr Coward's Response to the Defendants' Request for Further Information in the English IP proceedings, the agreement was *"implied from conduct"*. According to his witness statement in those proceedings, it was something he and Ms Ambrosiadou *"had discussed"* and/or *"had agreed"* (my emphases), apparently in Bahrain, prior to the meeting with Mr Scholl on 8 September 1992. In the present proceedings, however, Dr Coward alleges that the agreement was made at the meeting on 8 September 1992.

iii) Although Dr Coward dealt specifically with the 8 September 1992 meeting in his evidence in the English IP proceedings, he did not suggest that any kind of 50/50 agreement was made at that meeting. It might be said that the agreement Dr Coward now alleges was not relevant in the context of the English IP proceedings. Nonetheless, it is striking that an agreement to share net receipts 50/50 reached at that meeting would not have been mentioned, if only because of its potential interaction with the alleged family partnership: if Dr Coward and Ms Ambrosiadou had already made an agreement covering all business assets and profits, why would there have needed to be a further agreement made on 8 September 1992 to share net receipts?

91. Dr Coward also addressed these events in his evidence in the proceedings in Cyprus relating to the Moltke Trust ("***the Cyprus Moltke proceedings"***). Dr Coward issued those proceedings in October 2010 against various defendants including IKOS AM and Ms Ambrosiadou. As against Ms Ambrosiadou, Dr Coward sought damages for breach of the 40/40/20 agreement, a declaration that it was binding, and specific performance. Dr Coward discontinued those proceedings in 2013 without prejudice to his right to bring further claims concerning the same subject matter.

92. In the context of the Cyprus Moltke proceedings, Dr Coward made a without notice application in October 2010 for interim relief, supported by a sworn affidavit of a Cypriot lawyer, Mr Loucas Paschalides. Mr Paschalides deposed that the facts and matters set out in the affidavit were either within his own knowledge, or came to his knowledge from information he obtained from Dr Coward and documents he had studied, and in accordance with legal advice from another Cypriot lawyer, Mr Triantafyllides. Mr Paschalides' affidavit included these passages relating to the relationship between Dr Coward and Ms Ambrosiadou:

> "3. In 1992 [Dr Coward] and [Ms Ambrosiadou] jointly established a family business called IKOS Partners in London for the management of investment of funds and related activities. Before their separation they worked together in the promotion and development of the family business. The business was established with initial capital in the region of USD 500,000

provided by [Dr Coward]. In addition, [Dr Coward] designed, prepared and implemented innovative and highly efficient systems and programmes used for conducting IKOS' business.

…

5. During the course of 2006 the business and functions conducted by IKOS Partners, were transferred to IKOS CIF Limited in Cyprus ("IKOS CIF"). IKOS CIF is a lawfully registered and regulated Cypriot Investment Firm based in Limassol.

…

8. After [Dr Coward] moved to Cyprus with IKOS in March 2006, he and [Ms Ambrosiadou] entered into discussions in relation to how the profits of the business would be split between them. An agreement was eventually around the end of July/beginning of August 2006 whereby [Dr Coward] and [Ms Ambrosiadou] would share 80% of the profits of the IKOS group equally between them, ie 40% each with 20% going to their under-age son … ("the Agreement").

9. The underlying premise was that as [Dr Coward] and [Ms Ambrosiadou] had co-founded and co-managed the business, [Dr Coward] and [Ms Ambrosiadou] would, as between themselves, share the profits equally with a share of 20% going to their son … - 10% coming from each of them resulting in the split 40%-40%-20% respectively.

10. In order to implement the Agreement, [Dr Coward] and [Ms Ambrosiadou] agreed to set up a trust under the name the Eclectic Trust in August 2006. …

…

20. From its inception in July/August 2006 the Agreement was put into practice and was followed consistently. On or about the dates shown in the table below, six distributions were made out of the Eclectic Trust representing a sequence of payments whereby, between September 2007 and July 2008, a total of US$345,845,000 was paid by the Hestia Trust into the Eclectic Trust out of which US$138,338,000 was distributed to each of [Dr Coward] and [Ms Ambrosiadou] and a total of US$69,169,000 was distributed to their son … The sums received by the Eclectic Trust and distributed to Anaxilea, MFP and Iridanos was derived from the profits of the business of the IKOS Group … and were paid into the Eclectic Trust which was the sole beneficiary of the Hestia Trust pursuant always to the provisions of the Agreement between the parties. …"

93. This account makes no mention of the 50/50 agreement, and presents the 40/40/20 agreement as having been newly made in 2006. It contains no suggestion that the 40/40/20 agreement, made in 2006, was merely a variation of an existing agreement made in or about 1992; and the 50/50 agreement is not mentioned even as part of the "*premise*" of the 2006 agreement, referred to in quoted paragraph 9 above.

94. Similarly, paragraph 20 of Mr Paschalides' affidavit refers to the alleged performance of the 40/40/20 agreement, but the affidavit contains no suggestion that the parties had, during the preceding 14 years, been performing the 50/50 agreement of which Dr Coward now alleges the 40/40/20 agreement was a mere variation.

95. The written submissions of Dr Coward's counsel in the Cyprus Moltke proceedings, in February 2011, took the same approach, relying on the Paschalides affidavit quoted above and making no mention of any pre-existing agreement.

96. Dr Coward submits that there is documentary evidence consistent with the 50/50 agreement and 40/40/20 agreements being partially performed, in particular:

    i) board minutes dated 10 October 2007 signed *inter alia* by Ms Ambrosiadou resolving that Felix, which owned IKOS AM and IKOS CIF, pay an interim dividend of $14m (representing, Dr Coward says, IKOS profits it had received) to Flavian; a written resolution of Flavian's director of the same date for Flavian to pay an interim dividend in the same amount to Cymanco as trustee of the Hestia Trust; a resolution of Cymanco of the same date, signed by Ms Ambrosiadou to indicate her consent as nominator, to pay the same amount to Cyproman as trustee of the Eclectic Trust; and a resolution of Cyproman of the same date, signed *inter alia* by Ms Ambrosiadou, to distribute the same sum to Dr Coward, Ms Ambrosiadou and their son as beneficiaries in 40:40:20 proportions;

    ii) payment instructions dated 22 May 2007 providing for the payment of $35m from Felix to Flavian, from Flavian to Cymanco, from Cymanco to Cyproman, from Cyproman to Kamper, and then in 40/40/20 proportions from Kamper to MFP, Anaxilea and Iridanos (i.e. the companies that, on Dr Coward's case, used their assets for Dr Coward, Ms Ambrosiadou and their son respectively);

    iii) confidential documents verifying the trust distributions of just under $346m to MFP, Anaxilea and Iridanos in 40:40:20 proportions, September 2007 and July 2008, referred to in quoted paragraph 20 in § 92 above; and

    iv) the letter of wishes in relation to the Eclectic Trust, which Dr Coward says is consistent with his case insofar as it provides for the benefit of any additions to the trust to be split 40:40:20 between Dr Coward, Ms Ambrosiadou and their son.

97. However, none of these documents relates to the period before the 50/50 agreement was alleged to have been varied by the 40/40/20 agreement. Nor was Dr Coward able, at the hearing, to refer to any other contemporaneous documents evidencing the making or existence of the 50/50 agreement, as distinct from the 40/40/20 agreement.

98. Conversely, evidence from Ms Ambrosiadou's solicitor, Mr Parkes, indicates that Dr Coward's tax returns for the years ended 5 April 2002 to 2008 in England and Cyprus were consistent with holding a 10% interest in the partnership but no more.

99. There is also no evidence of actual performance of the 50/50 agreement as distinct from the 40/40/20 agreement. It is not clear whether any payments were in fact received by Ms Ambrosiadou from the business during the period 1992 to 2006. Dr Coward submits that the accumulation of profits in the business is evidence of performance of the 50/50 agreement. However, such accumulation is equally consistent with there being no such agreement.

100. Dr Coward submitted that if there is a plausible evidential basis for the 40/40/20 agreement (a matter to which I return later), then that in itself provides a plausible evidential basis for the 50/50 agreement. He refers to emails showing discussions between himself and Ms Ambrosiadou in late 2015 about the proposed 40/40/20 agreement split, and says they show the parties discussing as equals how large a share to allocate to their son: as distinct from Dr Coward seeking a 40% share from a starting point of zero. In particular, on 16 November 2005 Ms Ambrosiadou sent an email to Dr Coward and others listing actions to be taken, with the subject *"Minutes of meeting regarding the family trust"*. The actions points included:

> "The following actions needed to be completed by EA [Ms Ambrosiadou]
>
> Names for 3 BVIs DONE
>
> Directors of BVIs are Eos (EA), Melos (MJC [Dr Coward]), Iridanos ([their son]) (EA + MJC DONE unless something else is needed)
>
> Trustee Ampizas, To appoint/discuss
>
> Family office advisers (3 member board) AMG [Angelos Gregoriades], EA, MJC DONE
>
> Trustee Admin services company STILL TO DO …
>
> The following actions to be completed by KPMG/IKOS Legal
>
> 1) Agreement between BVIs and Trust, for services provision plus cost sharing STILL TO DO, Legal
>
> 2) Letter of wishes for Trustee (Provided, EA MJC will review)
>
> 3) Trust Document (Settlement letter provided, EA, MJC will review)
>
> 4) EA promised a PowerPoint presentation of the Trust which is DONE please find attached
>
> 5) Set up BVIs STILL TO DO, Legal

> 6) Pool of assets now in Felix Holdings needs to be distributed to FO BVIs, STILL TO DO, KPMG, Legal
>
> Your comments and feedback are welcome."

101. The following day Dr Coward replied:

> "Don't like my Trust name! I'll think of another one.
>
> I think 40% for [the son] is too much, in fact something closer to zero would make sense. Once it's in his name that's it, and I would worry about the effect of that when he is growing up."

102. Dr Coward submits that the tenor of these discussions supports the view that Dr Coward had a pre-existing equal entitlement to share in the business. Moreover, he says that view is consistent with commercial sense. Dr Coward was a key part of IKOS, and was referred to in an IKOS CIF announcement dated 1 February 2006 as *"the architect"* of its *"unique trading structure"*. It is unlikely that Dr Coward would have committed to IKOS on the basis that Ms Ambrosiadou might get all the profits, leaving him to hope that she might be generous enough to share some, or that if their relationship broke down he might recover sums in family proceedings, while he took only a modest salary (which was much less than he previously earned at Investcorp). It is similarly implausible, Dr Coward says, that Ms Ambrosiadou would put herself in the same position of carrying out work for IKOS, for a below-market salary, in the hope that either some profits might come to her, or that if they went or mostly went to Dr Coward instead he might be kind enough to share them.

103. Elaborating slightly, Dr Coward submits that the 50/50 agreement is plausible because:

i) he and Ms Ambrosiadou co-founded the business, both leaving their existing jobs to do so: for example, the SFA business plan for IKOS Partners stated that Dr Coward had left Investcorp in order to establish IKOS Partners;

ii) Dr Coward's contribution was central to the business, which would not have existed without the software he devised;

iii) Dr Coward provided approximately £400-500,000 of funding to the business, and gave up an income of about £250,000 he had been earning at Investcorp in return for a salary of only £100,000 a year with IKOS in the period 1996 to 2002;

iv) the fact that Dr Coward and Ms Ambrosiadou agreed that Dr Coward would be the person accepting unlimited liability for SFA purposes is consistent with Dr Coward's case as to the nature of the parties' business relationship as co-founders; and

v) because Ms Ambrosiadou was not domiciled in the UK for tax purposes, whereas Dr Coward was, there was an opportunity for them both in relation to taking profits offshore. They were dealing with things in the most tax advantageous way for themselves.

104. However, in my view it is not at all implausible that Dr Coward and Ms Ambrosiadou, who by 1992 had been married for about nine years, would have cast their business in the form of a partnership in which Dr Coward had only a 10% share, in order to achieve the very important objectives of (a) taking advantage of Ms Ambrosiadou's tax position and (b) limiting their exposure under the SFA's regulatory regime, without making any collateral legally binding oral agreement of the kind Dr Coward alleges. They may have intended, at some later stage when they and/or the business moved offshore, to alter the sharing proportions from those set out in the written partnership agreement. It does not follow, though, that the arrangement as it stood from 1992 until 2006 was commercially implausible in the absence of a legally binding collateral agreement. Nor is it implausible that the 40/40/20 agreement may have been entered into as a fresh agreement, in effect superseding the 80/10/10 shares previously established by the written partnership agreement. Indeed, Dr Coward's case in the Cyprus Moltke proceedings, as noted above, put forward the 40/40/20 agreement as a fresh agreement that was neither legally or logically dependent on any prior collateral agreement such as the 50/50 agreement.

105. Conversely, a binding agreement to share equally any sums received from the business would have risked undermining the very reasons for agreeing the 80/10/10 partnership split – tax and limited liability – unless perhaps there had been a further understanding (of which there has been no suggestion) that the parties would ensure that no such payments would in fact be received, even by Ms Ambrosiadou, until the parties and/or the business moved offshore such that the tax and limited liability concerns fell away.

106. Drawing these various strands together, I have come to the conclusion based on the matters set out above that Dr Coward has neither the better of the argument nor a plausible (albeit contested) evidential basis for his allegation that the parties entered into the 50/50 agreement. I highlight the following points in particular.

    i) Dr Coward's case is that the parties made the 50/50 agreement by agreeing to follow a suggestion made by Mr Scholl at the meeting on 8 September 1992. However, upon examination, the agreement Dr Coward alleges is markedly different from the solution Mr Scholl is said to have proposed (see §§ 75-79) and no explanation is provided for the difference. That is a factor counting against its plausibility.

    ii) The account of events that Dr Coward gave in the English IP proceedings is markedly different from the case he seeks to advance in the present proceedings: see §§ 80-90 above. There, he alleged a completely different kind of collateral agreement as having governed his business relations with Ms Ambrosiadou prior to 2006. Moreover, Dr Coward dealt specifically in his evidence with the meeting in Mr Scholl's office on 8 September 1992, at which he now alleges the 50/50 agreement was made, yet made no suggestion that <u>any</u> kind of agreement was made at that meeting.

    iii) Dr Coward's case in the Cyprus Moltke proceedings presents the 40/40/20 agreement as having been newly made in 2006, makes no suggestion that that agreement was merely a variation of an existing agreement made in or about 1992, and contains no mention of the 50/50 agreement at all, even as part of the "*premise*" of the 40/40/20 agreement (§§ 91-95 above).

iv) There is no contemporaneous document evidencing the making or existence of the 50/50 agreement at any time during, or after, the 14-year period (1992 to 2006) for which it is alleged to have subsisted. I do not consider that documents that might be prayed in aid as evidencing the subsequent 40/40/20 agreement can be regarded as evidencing the 50/50 agreement (see §§ 96-97 and 100-104 above).

v) There is no evidence of performance of the 50/50 agreement (see §§ 99-104 above).

vi) The inherent probabilities point against, rather than in favour of, the 50/50 agreement (§§ 104-105 above).

107. I do not consider it sufficient for Dr Coward to say that these are matters that can and should be tested at trial. In order to found jurisdiction over Ms Ambrosiadou on the basis of the 50/50 agreement, the court must at a minimum be persuaded that there is a plausible (even if contested) evidential basis for finding the agreement to have been entered into. In my judgment no such basis exists.

108. Ms Ambrosiadou made a number of other points in support of her case on this issue, two of which I mention here for completeness. She argued that the 50/50 agreement could not plausibly have been made because neither Dr Coward nor Ms Ambrosiadou had control over the distribution of the profits of the business. That was a matter for the decisions of the relevant companies' directors as to declaration of dividends and of the relevant trustees as to the exercise of their discretionary powers. However, that factor would not in my view preclude or render unlikely an agreement of the kind Dr Coward alleged regarding the disposition of such sums as he and Ms Ambrosiadou might in fact receive (and, in practice, might well expect to receive).

109. Ms Ambrosiadou also argued that Dr Coward is estopped by deed, namely the provisions of the written partnership agreement of December 1992, from asserting that the profit shares were anything other than those recorded in that agreement. However, the 50/50 agreement, as put forward by Dr Coward, would not alter the interests of the parties in the property and profits of the partnership. Instead, it would amount to a collateral agreement creating obligations in respect of any sums paid out of the partnership assets to, or to the order of, Dr Coward and Ms Ambrosiadou, who as at the date of the alleged agreement were two of the three members of the partnership.

(4) 50/50 agreement: where the agreement was made

110. Dr Coward alleges in Particulars of Claim § 15, quoted in § 72 above, that the 50/50 agreement was made at Mr Scholl's office in London. Had I concluded that there was a plausible case of such an agreement having been made, I would have concluded that it was made in England.

111. Ms Ambrosiadou submits that if (contrary to her case) the 50/50 agreement was made, then it was made in Bahrain. She refers to Dr Coward's evidence in the English IP proceedings quoted in § 86 above, in which he stated that he and Ms Ambrosiadou *"had discussed … in Bahrain"* and prior to the meeting in Mr Scholl's office *"had agreed between ourselves"*, that they would be equal partners in the business and that *"all*

monies we made would be ours jointly on a 50:50 basis". Similarly, Ms Ambrosiadou's evidence in the English IP proceedings on this point was:

> "There was a short period of a few weeks in Bahrain where we had intense discussions about our plans, and I gave notice to KPMG. We used this time together to build on the plan I had already made to launch the investment business … I recall that we considered whether or not we should return to the United Kingdom or move to Greece …."
>
> and:-
>
> "I acknowledge that Mr Coward and I talked about the business that I was hoping to start whilst we were in Bahrain …"

112. That, however, appears to have related to a different case, namely Dr Coward's allegation of a "*family agreement*" involving joint ownership of assets. His present case is based squarely on an agreement said to have been reached during the course of, and in reaction to, the discussion in Mr Scholl's office on 8 September 1992. In my view the consequence of his earlier evidence is not that the 50/50 agreement now alleged must have been made in Bahrain: rather, it is, as set out above, one of the factors undermining the plausibility of Dr Coward's current version of events.

(5) 50/50 agreement: governing law and/or jurisdiction clause

113. Dr Coward contends that the 50/50 agreement was governed by English law under subparagraphs (1) or (5) of Article 4 of the Rome Convention:

> **"Article 4 Applicable law in the absence of choice**
>
> 1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.
>
> 2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.
>
> …

> 5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country."

114. Dr Coward says the 50/50 agreement was most closely connected with England because it was made here and concerned the profits of IKOS, which then consisted of IKOS UK and soon, the parties anticipated, IKOS Partners i.e. an English law partnership.

115. Ms Ambrosiadou contends that Dr Coward cannot show an arguable case that the 50/50 agreement was governed by English law, because (if made at all):

    i) it was made in Bahrain (see above);

    ii) the presumption in Article 4(2) (the habitual place of residence of the party who is to effect the performance which is characteristic of the contract when the agreement was made) operates to give the agreement a closest connection with Bahrain; and

    iii) there was nothing to connect it to England specifically: it was always intended to be a global business, and its home jurisdiction had not been decided; contenders included Ireland and Greece.

116. If the agreement had been made while Dr Coward and Ms Ambrosiadou were living in Bahrain, then there would be some force in the suggestion that the Article 4(2) presumption should apply: where both parties to a bilateral agreement are to effect its characteristic performance, and both are habitually resident in the same country, then it is logical that the presumption should apply. That would, however, be subject to consideration of whether Article 4(5) pointed to English law on the basis that by the time of the agreement the parties intended (notwithstanding their current residence in Bahrain) to form a business in England and move back to England.

117. All of that presupposes, however, that the agreement was made while Dr Coward and Ms Ambrosiadou were living in Bahrain. Dr Coward's Particulars of Claim state that he and Ms Ambrosiadou moved to England in *"September 1992"*. Ms Ambrosiadou in her first witness statement in the English IP proceedings referred to the parties' discussions in Bahrain as having occurred in around August or September 1992. The sequence of events as set out in Mr Bennett's first witness statement suggests that Dr Coward and Ms Ambrosiadou had moved back to England by the date of the meeting on 8 September 1992.

118. In any event, it is apparent that by that date IKOS UK had already been formed, and the parties were planning to form a partnership, which in due course was formed as IKOS Partners – an English partnership – in December 1992. Dr Coward's pleaded case as to the discussion with Mr Scholl on 8 September 1992 is to the effect that a UK partnership was already envisaged by that date; and in the English IP proceedings Asplin J found that an unwritten partnership was already in existence by September 1992 (*Coward v Phaestos* § 180) and referred to *"the fact that all three of them have moved back to England with the intention of commencing the partnership business"*

(*ibid.* § 181). Moreover, the alleged discussion with Mr Scholl proceeded on the basis that Dr Coward was UK tax resident.

119. As Ms Ambrosiadou points out, that is not in itself determinative, because Dr Coward's case is that the 50/50 agreement does not directly concern the partnership assets but, rather, is a personal agreement between Dr Coward and Ms Ambrosiadou as regards sums taken out of the partnership. Nonetheless, weighing up such connecting factors as on Dr Coward's case existed, the 50/50 agreement was an agreement between a UK resident (Dr Coward) and a non-UK resident (Ms Ambrosiadou) with regard to the sharing of monies they expected to receive from a UK partnership. On that basis, had Dr Coward established a plausible case for the existence of the 50/50 agreement, I would have concluded that he had the better of the argument that it was most closely connected with England and therefore subject to English law under Article 4(1) of the Rome Convention.

(6) 50/50 agreement: enforceability

120. Ms Ambrosiadou makes two points about the enforceability of the 50/50 agreement.

121. First, she contends that on Dr Coward's case, the parties agreed that profits were split 80 (IKOS (UK) Ltd): 10 (Dr Coward): 10 (Edwin Robinson Ltd) on the basis that *if* Dr Coward and Ms Ambrosiadou moved offshore, then they *could* agree to split the profits differently (if it was tax efficient to do so): in other words, that if in the future certain conditions were met then they could revisit the agreed profit split. Ms Ambrosiadou submits that that was no more than an unenforceable agreement to agree, and could not have been intended to create binding legal obligations. It was simply a conversation as to what Dr Coward and Ms Ambrosiadou might do in the future, if they moved, in relation to a business which had not even been started and which might have been a failure.

122. I read Dr Coward's case as being that he and Ms Ambrosiadou agreed that the future 50/50 split is what they *would* do, not merely what they *could* do. On the other hand, I would have been inclined to consider that the alleged agreement, if made on the basis apparently set out in Particulars of Claim §§ 15.5.4 and 15.5.5 (i.e. to share equally when the parties and/or the business moved offshore), was too vague to have constituted a binding contract. Dr Coward alleges there that the agreement was to share the relevant sums equally *"when [Dr Coward] and/or [Ms Ambrosiadou] and/or the business moved offshore (as they and Mr Scholl anticipated would happen"*. That would seem to leave hopelessly vague the critical question of who or what would need to move offshore before the sharing arrangement would incept. However, I think it preferable not to reach a decided view on this point, because (a) it was made clear at the hearing that the alleged agreement did not contain that condition (see §§ 75-78 above) and (b) although Ms Ambrosiadou's solicitor Mr Parkes arguably alluded to the point in his witness statement (stating that the alleged agreement, as "*as agreement to agree to split the IKOS Partners profits differently from the deed at some indeterminate point in the future, contingent upon tax mitigation steps or structuring being taken*", was not a valid, binding contractual agreement), the parties' submissions before me as to vagueness, which focussed on intention to create legal relations, did not directly address this point.

123. Secondly, Dr Coward alleges that it was a term of the 50/50 agreement that Ms Ambrosiadou would, on demand, "*procure or ensure*" that he would receive (or have paid to his order) a sum equal to 50% of the total sums representing IKOS business profits paid out to Ms Ambrosiadou or to her order. The obligation was not for Ms Ambrosiadou to pay Dr Coward out of sums which she herself received (i.e. it was not an obligation for Ms Ambrosiadou to share her receipts with Dr Coward), but to procure or ensure that sums were paid to Dr Coward by someone or something else. Ms Ambrosiadou says Dr Coward's case is thus that she was answerable for the obligations of another: she was obliged to procure or ensure that the paying party paid Dr Coward sufficient to ensure that what he received amounted to 50% of the total paid out, and, on Dr Coward's case, she is liable in damages for a breach of that obligation if the paying party did not pay sufficient out to Dr Coward. As such, Ms Ambrosiadou argues, her alleged obligation is within the scope of section 4 of the Statute of Frauds 1677 and is unenforceable as it is not evidenced in writing signed by Ms Ambrosiadou. Section 4 provides that:

> "No Action shall be brought whereby to charge the Defendant upon any special promise to answer for the debt default or miscarriages of another person unless the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writing and signed by the party to be charged therewith or some other person there unto by him lawfully authorized."

124. I do not accept this submission. Dr Coward's case is not that Ms Ambrosiadou is answerable for the debt or default of any third party. He makes no allegation that any third party owes a relevant obligation to him. His case is simply that Ms Ambrosiadou agreed to ensure that he received at least 50% of any sums she received from the business.

(7) 50/50 agreement: issue estoppel

125. Ms Ambrosiadou submits that Dr Coward is precluded from advancing his case on the 50/50 agreement by issue estoppel, in the light of the conclusion reached by Asplin J in *Coward v Phaestos* § 88 quoted in § 89.ii) above, the critical part of which was:

> "… It was Dr Coward's evidence that he considered himself to have an interest in IKOS AM and that the arrangements were convenient for tax purposes, but did not reflect the real state of affairs. He accepted that he had enjoyed the benefit of that structure through Ms Ambrosiadou because she had been the one receiving the money but he had enjoyed it indirectly through her. He also stated that he treated everything as jointly owned partly as a result of their marriage and also as a result of an agreement between them. There was no other evidence of any kind of such an agreement and I reject Dr Coward's evidence in this regard."

126. Thus, Ms Ambrosiadou says, Dr Coward's claim that there was an agreement outside the partnership agreement pursuant to which he and Ms Ambrosiadou were entitled to everything equally has already been rejected. As set out earlier, Dr Coward pleaded

and argued in the English IP proceedings that there was a "*Family Partnership*" which operated outside IKOS Partners and pursuant to which he was entitled to everything equally with Ms Ambrosiadou. Asplin J's finding was a necessary element of the judgment in the English IP proceedings dismissing Dr Coward's claims. Further, although Ms Ambrosiadou was not ultimately a party to the English IP proceedings, IKOS UK was and there is privity of interest between Ms Ambrosiadou and IKOS UK.

(a) The test

127. The principles were summarised in *Virgin Atlantic Ltd v Zodiac Sets UK Ltd* [2014] AC 160 by Lord Sumption (with whom the other members of the Supreme Court agreed) as follows:

> "17. Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. … 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: *Duchess of Kingston's Case* (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197–198. …"
>
> [quoting the analysis of Lord Keith in *Arnold v National Westminster Bank plc* [1991] 2 AC 93, 105E] "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."
>
> "*Arnold* is accordingly authority for the following propositions:
>
> …
>
> (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

128. It follows that issue estoppel can apply only where the current case raises the same issue as arose in the earlier case, and in the earlier case the issue formed a necessary ingredient of the claim. See also, to the same effect, the decision of Morgan J in *Inhenagwa v Onyeneho* [2018] 1 P. & C.R. 10 at §§ 47-49, albeit *Virgin Atlantic* does not appear to have been cited in that case.

(b) The issues before Asplin J

129. The central questions in the English IP proceedings were whether Dr Coward wrote the software and whether he owned the copyright in it (*Coward v Phaestos* § 17). As to the latter issue, the starting point under section 11 of the Copyright Act 1988 was that if Dr Coward wrote the software in the course of his employment, then his employing company was the first owner of the copyright subject to any agreement to the contrary (*ibid.* § 22).

130. Dr Coward admitted that if there was a partnership from September 1992, then the software he wrote during the relevant period was written 'as a partner' and in some sense 'in the course of' the partnership business; however, he denied there was any express or implied agreement to the effect that the software was to be a partnership asset (*Coward v Phaestos* § 189). Asplin J found that he did write the software in the course of the partnership business (*ibid.* § 192), and went on to consider Dr Coward's argument that it was nonetheless not partnership property because the parties had not so agreed. That was an issue on which the alleged family partnership had a bearing:

> "195. However, [Mr Bloch QC, counsel for Dr Coward] emphasises that the inference depends upon the particular facts and in this case, he says that the relationship between the parties was unusual and very special. He termed it "the family partnership". This term was intended to encompass a business relationship which it was submitted arose from the fact that Dr Coward and Ms Ambrosiadou were and are married, their close association in the development of the IKOS business, that they were both termed Founders, the tax efficient structure which was adopted, the ultimate beneficial entitlement through the offshore trust structure and Dr Coward's claim that he was remunerated through those offshore structures, other than directly as a partner, employee or director of the respective IKOS entities. Mr Bloch QC submits that in such circumstances, it is not necessary as a matter of business efficacy to infer that the software was a partnership asset. He submits that all that was necessary for business efficacy was a terminable licence from Dr Coward to IKOS to use the software.
>
> 196. Further, Mr Bloch QC says that even if the test is not one of necessity, on the facts, the partners of the September Partnership are not to be taken as having agreed to treat the software as a partnership asset and the matter is also informed by the December Partnership Deed which dealt expressly with partnership property. Lastly, it is said that an analysis based on fiduciary duties cannot carry the matter further, since the scope and effect of the fiduciary duties will mould themselves to the contractual position." (*Coward v Phaestos* § 195)

(c) Asplin J's findings

131. Asplin J's conclusions on this part of the case were as follows:

"213. It is not in dispute that the software which was created by Dr Coward, was created for the purposes of the partnership and was the bedrock of that business. The trading could not have been undertaken without it. It was the central tool by which the trading and investment operations of the business were to be carried out.

214. If one tests the proposition further by applying the criteria set out by Jacob J in *Robin Ray*, in my judgment, it is equally clear that it is necessary to infer that the software was partnership property. The software was the foundation of the business without which there would have been no business at all. It was consistent with this that Dr Coward accepted in cross examination that a potential purchaser of the business would have required ownership of the software and in fact, it is more likely than not that the value attributed to the business in 2007 was on that basis. Secondly, as a result of the uniqueness of the software, its positive effect upon the trading record of the business and consequent value, it was and is essential that Dr Coward and any successor in title to him be prevented from using the software in order to compete with the IKOS business and to enforce the copyright against third parties. After all, that is what this action is all about. If another business whether run by Dr Coward or a third party, were able to access the mathematical models employed, it would seriously prejudice the IKOS business, if not destroy it.

215. As I have already mentioned, in this regard, Mr Bloch relies heavily upon what he has called the family partnership in the sense that it was always appreciated, not just in the initial few months of the IKOS business but throughout its very successful development, that Dr Coward and Ms Ambrosiadou were its founders and in fact, its ultimate owners through the offshore company and trust structures. As a result it is said that the inference is that the software remained in Dr Coward's ownership and that only a licence to IKOS Partners to use it was necessary.

216. In such circumstances, it seems to me that it would never have been relevant to seek to hold the ownership of the copyright in the software back from the "family business", nor was there any indication of an intention to do so until the breakdown of the relationship between Dr Coward and Ms Ambrosiadou. There is no indication that Dr Coward ever asserted ownership during the period 1992 to 2009. As Dr Coward put it, he considered himself and the business to be one and the same.

217. It seems to me that even if one takes such a factor into consideration, it makes it all the more likely that the essential bedrock of the business, the software would be owned by it and

> not separately from it. As Jacob J pointed out in Ibcos this is all the more so in circumstances in which Dr Coward allowed that software to become intermingled, a matter to which I shall return below."

132. It is not entirely clear how the alleged 'family partnership' discussed in these paragraphs is linked to the alleged joint ownership agreement for which Asplin J in paragraph 88 of her judgment (quoted in § 125 above) found there to be no evidence. However, if and in so far as those issues are linked, it appears that Asplin J's findings on the central question of ownership of the software did not require her to reach any conclusion on them: Asplin J concluded that even if there was a 'family partnership', IKOS still owned the software.

(d) Relevance to the present case

133. Asplin J's findings in *Coward v Phaestos* do not in my view create an issue estoppel precluding Dr Coward from alleging the existence of 50/50 agreement, for two reasons.

134. First, the joint agreement that Dr Coward alleged in the English IP proceedings was a different agreement, alleged to have been made at a different time, from the 50/50 agreement: see § 90 above. Briefly, the former was an agreement made prior to 8 September 1992 that all the business assets and profits would be jointly owned. The latter was an agreement made on 8 September 1992 relating to sums taken out of the business by Dr Coward or Ms Ambrosiadou. Although both alleged agreements involved alleged personal rights as between Dr Coward and Ms Ambrosiadou, they were different agreements with different legal consequences.

135. Secondly, I am not persuaded that Asplin J's finding at § 88 of *Coward v Phaestos*, made in the course of her chronological narrative, was necessary for her decision. The point does not reappear in Asplin J's analysis of the issues, save insofar as the alleged joint ownership can be equated or linked to the alleged family partnership. Insofar as it can, Asplin J's decision on ownership of the copyright did not depend on reaching a conclusion on the family partnership: see §§ 131-132 above.

(e) Privity

136. As a result, it is not strictly necessary to decide whether Ms Ambrosiadou was privy to the English IP proceedings, by the time of trial, such as to make issue estoppel a possibility. In view of the submissions made, however, I comment briefly on that point below.

137. Ms Ambrosiadou submitted that although she had ceased to be a party to the proceedings by trial, she remained privy to the proceedings through IKOS Limited (by then known as Phaestos Limited), a company which she had wholly owned and controlled from 1994 and which was the vehicle through which Ms Ambrosiadou had participated in IKOS Partners and on whose behalf she gave evidence at the trial of the English IP proceedings. It appears that the reason why Ms Ambrosiadou ceased to be a party was that Dr Coward at one stage sought to discontinue the proceedings against all parties, but a number of parties excluding Ms Ambrosiadou successfully resisted this.

138. Dr Coward in his Particulars of Claim in the English IP proceedings stated that Ms Ambrosiadou at all material times wholly owned beneficially the share capital of Phaestos, was a director or shadow director of it, and had since 11 December 2009 been *"the directing mind and will in all material respects"* of Phaestos and the other corporate defendants; and that *"relevant acts done since that time by those entities are and/or have been done on the direction of Ms Ambrosiadou"*. Dr Coward claimed the same relief against all the defendants.

139. Privity may be established through blood, title or interest, the latter being relevant here. In order to establish privity of interest, it is not enough to show that Ms Ambrosiadou had a "*mere curiosity or concern*" regarding the English IP proceedings, nor that she had "*some interest in the outcome of litigation*": see *Gleeson v Wippell & Co Ltd* [1977] 1 WLR 510, 515 per Megarry V-C. Megarry V-C in that case said:

> "… 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. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. 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. It is in that sense that I would regard the phrase 'privity of interest'. Thus in relation to trust property I think there will normally be a sufficient privity between the trustees and their beneficiaries to make a decision that is binding on the trustees also binding on the beneficiaries, and vice versa." (p515)

That formulation was approved by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 32.

140. In *Resolution Chemicals v Lundbeck* A/S [2013] EWCA Civ 924, Floyd LJ said:

> "29. It can be seen that Sir Robert Megarry's test: "*having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two*" embraces two concepts. The first is concerned with the interest which the subsequent litigant, Dr Coward, has in the subject matter of the first action. In *Gleeson*, Wippell was very interested, in one sense, in the subject matter of the action against Denne, as its design of shirt was impugned in that action. But that was not a sufficient interest in circumstances where there was what Sir Robert Megarry described as "*a trade relationship between the*

> *two, in the course of which Denne, at Wippell's request, copied a Wippell shirt: but that is all*". The second concept concerns the identity of the parties. Thus in *Zeiss No 2* [1967] 1 AC 853 at pages 911–2 Lord Reid suggested:
>
> > "A party against whom a previous decision was pronounced may employ a servant or engage a third party to do something which infringes the right established in the earlier litigation and so raise the whole matter again in his interest. Then, if the other party to the earlier litigation brings an action against the servant or agent, the real defendant could be said to be the employer, who alone has the real interest, and it might well be thought unjust if he could vex his opponent by relitigating the original question by means of the device of putting forward his servant."
>
> 30. In this example the new party has no interest in the previous litigation, but would be estopped because, in effect, he represents the party in the first action. That party has the identical interest in the previous action. In *Gleeson*, there was no identity of parties in this sense.
>
> 31. It is not necessary for the purposes of this appeal to seek to define precisely what interest in the subject matter of the previous litigation is required. The sort of interest dismissed by Sir Robert Megarry in *Gleeson* in his first principle is clearly inadequate. ... At one level Arrow and Resolution had the same legal interest in the revocation of the Patent, but that was a legal interest which they shared with all the world. If Resolution is to be bound, it must I think be possible to identify some more concrete consequence for its business which revocation of the Patent would have achieved. Unless that is so, although it can be said that Resolution could have joined the 2005 proceedings, there is no reason to hold that they should.
>
> 32. Drawing this together, in my judgment a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (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 to ask whether it is just that the new party should be bound by the outcome of the previous litigation."

141. Floyd LJ went on to refer to *Johnson v Gore Wood*, where the House of Lords rejected a submission that the claimant's claim was an abuse of process following claims brought and settled by his company. The majority of the House of Lords did, however,

consider that Mr Johnson had privity of interest with the company (albeit it appears Mr Johnson had so conceded: see p60D per Lord Millett). Lord Bingham, with whose judgment on abuse of process Lords Goff, Cooke and Hutton agreed, said:

> "Two subsidiary arguments were advanced by Mr ter Haar in the courts below and rejected by each. The first was that the rule in *Henderson v Henderson* 3 Hare 100 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. The correct approach is that formulated by Sir Robert Megarry V-C in *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 ..."

and, after quoting the passage from *Gleeson* quoted in § 139 above:

> "On the present facts that test was clearly satisfied" (p32)

142. In *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2016] EWCA Civ 411 the Court of Appeal held that subsidiary companies (SCBHK and SCBMB) were not estopped from bringing English proceedings by their parent company SCB's acceptance, in proceedings in New York, that Tanzania was the most appropriate forum. After citing *Resolution Chemicals*, the court said:

> "31. … 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. If one asks whether they were "in reality the party to the original proceedings", the only answer can be a negative one. Unlike SCB, SCBHK was not itself present in New York and were thus, in principle, not available to be sued in New York; but, whether or not, if sued, they could have been made subject to New York's jurisdiction, the fact is that they were not sued. That was a decision made by VIP for whatever reason; it hardly lies in VIP's mouth now to assert that they were in reality parties to the original proceedings.
>
> 32. Mr Coleman made much of the fact that SCB's motion to have the New York proceedings stayed or dismissed was supported by a declaration of Mr Casson who was the manager of SCBHK and a Memorandum of Law which stated that all VIP's claims concerned SCB's or SCBHK's equity rights in IPTL and relied on the fact that VIP itself had contended that the Tanzanian court was the only court which could establish SCBHK's rights regarding IPTL and in which all parties could be heard. ...

> 33. I cannot accept these submissions; it was natural that Mr Casson, who had all the material knowledge relating to the loans made for the construction of the power plant in Tanzania, should be the person to deal with the proceedings brought in tort in New York; his knowledge of the history and his position as managing director of SCBHK may show that SCBHK did indeed have a general commercial interest in the litigation but that is not enough to show that SCBHK was "in reality party to the proceedings" against their parent company in tort. As the judge said, that would be a failure to recognise the distinct corporate personalities in the case and lead to a piercing of the corporate veil contrary to the limited scope ascribed to that doctrine in Prest v Prest [2013] 2 AC 415. …"

143. It is therefore apparent that the mere fact of ownership, even 100% ownership, of a company does not in itself create privity of interest. At the same time, privity may exist where a company is, in practical terms, the corporate embodiment of an individual. It may accurately be said that the question is highly fact dependent (*Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch) § 721).

144. Applying the *Resolution Chemicals* approach:

i) Ms Ambrosiadou had a strong interest in the subject matter of the English IP proceedings, both because she was originally a party and because she remained directly interested by virtue of her interest in Phaestos;

ii) on the basis of Dr Coward's allegation that Ms Ambrosiadou was the directing mind and will in all material respects of *inter alia* Phaestos, it would be reasonable to regard Ms Ambrosiadou as in substance having been party to the English IP proceedings; and

iii) against that background, it would have been just that Ms Ambrosiadou would be bound by the outcome of the English IP proceedings, and it is just that she should be entitled to take the benefit of their outcome vis a vis Dr Coward.

145. Accordingly, had it been relevant I would have concluded that Ms Ambrosiadou was privy to the English IP proceedings so as to be entitled to assert an issue estoppel against Dr Coward.

(f) Conclusion on issue estoppel

146. For the reasons given under subheading (c) above, Dr Coward is not issue estopped from alleging the 50/50 agreement.

(8) 40/40/20 agreement: evidential basis

147. Dr Coward does not advance a case that the English court has jurisdiction based on the 40/40/20 agreement independently of the 50/50 agreement. He does not contend that the 40/40/20 agreement was governed by English law other than by reference to the 50/50 agreement, which he says it varied or replaced. However, in case I am wrong

about the lack of a plausible evidential basis for the 50/50 agreement, I go on to consider the position under the 40/40/20 agreement.

148. The first issue is whether there is a plausible evidential basis for Dr Coward's claim that the 40/40/20 agreement was made. This issue therefore arises only on the footing that (contrary to my findings above) there is a plausible evidential basis for concluding that the 50/50 agreement was made.

149. Dr Coward states that during a conversation or series of conversations in or around the period May to August 2006, he and Ms Ambrosiadou orally agreed that they would continue to divide the net profits of the IKOS business equally between them, in accordance with the 50/50 agreement but subject to their son now receiving or having the use and/or benefit of 20% of the net profits of the IKOS business, so that those profits would be divided 40/40/20 agreement as between Dr Coward, Ms Ambrosiadou and their son (Particulars of Claim § 48). That division is said to have followed discussions in which Ms Ambrosiadou had originally wished Dr Coward and Ms Ambrosiadou each to give 20% of the withdrawn profits to their son, giving him a 40% share in total.

150. If the parties made the 50/50 agreement, then there would be a plausible basis for the claim that the 40/40/20 agreement was made:

i) The 50/50 agreement, if made, was an agreement for the sharing between Dr Coward and Ms Ambrosiadou of sums received, ultimately, from the IKOS business. Starting from that premise, it is plausible that Dr Coward and Ms Ambrosiadou would in 2006, after they had moved offshore, have decided to set up a new structure and to vary the sharing proportions in order to allocate a share to their son.

ii) The letter of wishes in relation to the Eclectic Trust, and the payments referred to in § 96.iii) above are capable of providing corroboration for an agreement between Dr Coward and Ms Ambrosiadou that sums taken out of the business should be shared in 40/40/20 proportions between them and their son, even though whether they in fact amount to such corroboration is hotly contested.

iii) The emails referred to in § 100 above are also capable of amounting to such corroboration, even though whether they in fact corroborate the alleged 40/40/20 agreement is again strongly disputed. For example, Ms Ambrosiadou makes the point that the emails date from well before the Eclectic Trust was set up, and some of the entities named in the emails do not figure in the structure as it finally emerged.

iv) On the basis that Dr Coward, Ms Ambrosiadou and the business were by this stage offshore, the tension between the alleged sharing agreement and the reasons for the original 80/10/10 partnership shares (limited liability and tax) would be likely to have fallen away. Such an agreement would now be consistent with, rather than potentially at odds with, the advice Mr Scholl gave in 1992.

151. These pieces of evidence certainly do not point unequivocally in favour of the 40/40/20 agreement having been made. They may instead be explicable, for example, on the

basis that Dr Coward and Ms Ambrosiadou decided to set up a structure which broadly envisaged a 40/40/20 division of interest but without any legally binding agreement to that effect. Ms Ambrosiadou makes a number of cogent points against the alleged existence of the 40/40/20 agreement, including that:

i) there is no documentary evidence of it;

ii) the detailed ownership structure in fact put in place militates against it: Dr Coward and Ms Ambrosiadou did not have any right or entitlement to direct how the net profits should be divided;

iii) in addition, if the 40/40/20 agreement was made then there was no point in the ownership structure actually put in place: the shares in IKOS AM and IKOS CIF could simply have been transferred to or for the benefit of Dr Coward, Ms Ambrosiadou and their son in 40/40/20 proportions;

iv) the Eclectic Trust letter of wishes was not written by Dr Coward or Ms Ambrosiadou and does not mention or otherwise evidence any contract between them;

v) the payments made, on which Dr Coward relies, do not evidence such an agreement either: they simply show companies declaring dividends to their shareholders, the Hestia trust making a distribution to its beneficiary and the Eclectic trustee transferring funds to its subsidiaries;

vi) Dr Coward had at most the mere expectation of a discretionary beneficiary that the trustee would make distributions in 40/40/20 proportions; and

vii) the alleged 40/40/20 agreement is inherently improbable: the parties could not have intended, for example, that if £10,000 was paid for their son's school fees then Ms Ambrosiadou would be obliged to procure that £20,000 was paid to Dr Coward.

152. There is considerable force in some of these points, and I would not conclude on current evidence that Dr Coward has the better of the argument. However, they are not conclusive against the existence of the 40/40/20 agreement. The ownership structure put in place, involving discretionary trusts and corporate vehicles, plainly could not give Dr Coward or Ms Ambrosiadou legal control over the disbursement of sums representing the profits of the business, nor confer any legal entitlement on Dr Coward to a 40% share of any such profits. However, the practical reality may have been that Dr Coward and/or Ms Ambrosiadou were in a position to direct what sums were paid out, and to whom, and it is not implausible to suggest that in the circumstances existing in 2006 following their move offshore they made a binding agreement as to how to share such sums as they ultimately received via this structure. Whether there is any documentary evidence for the 40/40/20 agreement depends on how the payments and documents referred to in § 150 above are characterised. Viewing the matter in the round, had it been relevant to decide the point, I would have concluded that there was a plausible evidential basis, albeit contested, for the 40/40/20 agreement.

153. For completeness, Dr Coward also referred to a market announcement in February 2006 referring to him and Ms Ambrosiadou as the principals of IKOS CIF, and to an IKOS

Due Diligence Questionnaire of September 2007 discussed in § 116 of Asplin J's judgment in the English IP proceedings. The latter stated that IKOS AM and IKOS CIF were owned by the trust of the founders; and in cross-examination in the English IP proceedings Ms Ambrosiadou accepted that the 'founders' referred to herself and Dr Coward, and that *"there is a beneficial interest within [the trust] structure which includes Martin Coward and me"*. However, I do not regard statements of this nature as indicating the existence of the 40/40/20 (or 50/50) agreements: they are at least equally consistent with the legal position being simply that set out in the formal ownership structure, under which Ms Ambrosiadou and Dr Coward were potential beneficiaries of discretionary trusts. Similarly, Asplin J referred to an earlier due diligence questionnaire from March 2005, in respect of the IKOS Financial Fund Strategy and the IKOS Currency Fund Strategy, IKOS Partners and IKOS AM having been identified as the relevant organisations, which in response to questions as to the company's current ownership stated: "*wholly owned by Martin Coward and Elena Ambrosiadou*." Asplin J concluded that this referred to IKOS Partners: which would be consistent with the formal ownership position set out in the partnership deed and thus not probative of the 50/50 agreement.

(9) 40/40/20 agreement: variation or replacement of 50/50 agreement

154. This issue too arises on the footing that (contrary to my findings above) there is a plausible evidential basis for concluding that the 50/50 agreement was made.

155. Dr Coward's case is that the 40/40/20 agreement took effect as a variation of the 50/50 agreement; alternatively, it was a new agreement replacing the 50/50 agreement, but its terms were the same apart from the different sharing proportions.

156. The question whether a later contract varies or replaces an earlier one is a question of construction of the later contract, in its context, applying ordinary principles of construction in the light of business common sense: looking at the matter objectively and in the light of the relevant background, what meaning would the later contract convey to a reasonable person? What were the intentions of the parties indicated by the subsequent agreement and from all the surrounding circumstances? Replacement rather than variation will be presumed where the new agreement is so inconsistent with the earlier one that it goes to its very root: see *Viscous Global Investments v Palladium Navigation Corp* [2014] EWHC 2654 (Comm), in which Males J had held that an arbitration clause in a P & I Club Letter of Undertaking was intended to replace the arbitration clauses incorporated into four bills of lading. Males J said:

> "18. … clause 1 of the LOU contains a binding agreement between the parties which at the least varied the parties' pre-existing agreement to arbitrate contained in whichever of the charterparty arbitration clauses was incorporated into the bills of lading. The question whether the parties intended the LOU to replace the existing agreements in their entirety or merely to vary them in limited respects while leaving the existing agreements otherwise in force is one of construction of the LOU in its context, applying ordinary principles of construction in the light of business common sense. The context includes the pre-existing contractual position. There is no reason in principle why the

terms of an LOU should not operate as a complete replacement of an existing dispute resolution clause. ...

19. I do not accept that there is any principle of construction that unless a variation is "fundamentally inconsistent" with, or "goes to the root of", an existing clause, it will be construed as having only limited effect. … Rather the principle is simply one of construction – looking at the matter objectively and in the light of the relevant background, what meaning would the contract convey to a reasonable person?

20. Mr Kulkarni relied also on the more recent case of *Ginns v Tabor* (CA, 22 November 1995, unreported). The issue there was whether a later agreement (for the sale of a barn) was intended to rescind an earlier agreement (for a payment to be made on the grant of planning permission to convert the barn). Auld LJ said:

> "Whether a subsequent agreement amounts to a rescission or a variation of an earlier one depends on the intention of the parties indicated by the terms of subsequent agreement and from all the surrounding circumstances. See *United Dominions Trust (Jamaica) Ltd v Shoucair* [1969] 1 AC 340, PC. However, rescission will be presumed when the parties enter into a new agreement so inconsistent with the earlier one that it goes to its very root. See *British & Benningtons Ltd. v N.W. Cachar Tea Co. Ltd* [1923] AC 48, HL, per Lord Atkinson at 62."

21. The first sentence of this citation states the principle, that the question is one of construction of the later agreement — in the present case, the LOU. The final sentence gives an example of when a later agreement may be presumed to be intended to replace the earlier agreement in its entirety, but I do not read this passage as stating a rule that unless the new agreement is fundamentally inconsistent with the earlier agreement it cannot have this effect.

22. The arbitration agreement in the LOU is perfectly capable of operating as a new and free standing agreement, containing everything that is needed in such a clause. It appears to be comprehensive, dealing as it does with the seat of the arbitration (London), the procedure to be applied (LMAA), the constitution of the tribunal (three arbitrators, appointed in the usual way), the time for the defendant to appoint its arbitrator (14 days) and the substantive law to be applied (English law, with specific reference to the Hague-Visby Rules and the Carriage of Goods by Sea Act 1992).

> 23. Given such a comprehensive set of provisions, there would appear to be no reason why the parties should not have intended the LOU to replace the charterparty arbitration clauses in their entirety. That is the natural meaning of the relevant provisions of the LOU. There are also compelling reasons why the parties should have intended this."

157. The compelling reasons in that case included that there was no apparent reason why the parties should have intended their arbitration agreement to be located in two places, partly in the LOU and partly in the head charter arbitration clause; that in circumstances where the parties knew that the overall sum claimed was modest, it would make no sense for them to have agree to four separate arbitrations; and that the application of the LOU arbitration clause resolved a potential doubt about whether the arbitration clause in the head charter or the voyage charter applied.

158. In the present case, very significant matters had changed as between the 50/50 agreement and the 40/40/20 agreement:

i) The only real express term of the 50/50 agreement was the agreement to share profits and to procure that those shares were given effect. That provision was replaced in the 40/40/20 agreement by a sharing arrangement in different proportions and now including a new participant in the form of Dr Coward's and Ms Ambrosiadou's son.

ii) The addition of the son as a new participant altered the *nature* of Dr Coward's and Ms Ambrosiadou's duties under the alleged agreement: either of them henceforth might incur duties to procure payments to the other as a result of money paid to (or at the direction of) their son, whereas previously the obligation on (say) Ms Ambrosiadou arose only where she herself had received (or directed the disposition of) money.

iii) The ownership structure of the business, and hence the corporate source of the funds representing profits to which the 40/40/20 agreement applied, was radically different by 2006, as outlined earlier. By the time of the 40/40/20 agreement, for example, there were several IKOS hedge funds in Cayman, plus IKOS AM and IKOS CIF. The new trust and corporate arrangements involving the Eclectic Trust, Kamper Ltd. and its subsidiaries had been set up and, it appears, was envisaged as the (or at least a) primary route for the extraction of funds from the business.

iv) The focus of the business was now Cyprus, and the parties had severed their links with England (which was important for tax reasons). This point has slightly lesser weight since, as Dr Coward points out, it was contemplated from the outset, i.e. September 1992, that the parties and/or the business would move offshore at some stage.

159. In these circumstances, it would in my judgment be artificial to describe the 40/40/20 agreement as a mere variation of the 50/50 agreement. The reality was that the 50/50 agreement had been entirely superseded and replaced by the 40/40/20 agreement.

160. Ms Ambrosiadou also makes the point that in his witness statement in the English IP proceedings, Dr Coward stated:

> "… we also wished to make provision for our son, hence the 40:40:20 agreement replacing the previous 50:50 agreement."

161. I would not attribute much weight to Dr Coward's use of the word "*replaced*" in this context, which might simply have been a layman's shorthand for the transaction. Perhaps more substantively, as described in §§ 91-95 above, Dr Coward's case in the Cyprus Moltke proceedings described the 40/40/20 agreement as being a new, freestanding agreement rather than a variation of an earlier agreement made in 1992. These subsequent events provide some further, albeit extrinsic, support for the view that the parties intended the 40/40/20 agreement to replace the 50/50 agreement (if, of course, either agreement was in fact made).

(10) 40/40/20 agreement: governing law and jurisdiction

(a) If the 40/40/20 agreement replaced the 50/50 agreement

162. Dr Coward submits that even if, as I have concluded, the 40/40/20 agreement replaced rather than varied the 50/50 agreement (assuming, again, that either or both agreement actually existed), it was governed by English law and/or contained an implied English jurisdiction clause. He says the 40/40/20 agreement was intended to do no more than change the split of profits, and there is nothing to indicate that it was meant to change the applicable law or deprive either party of access to the English courts. Equally, it was not meant to sever any pre-existing connections to England.

163. Accordingly, Dr Coward submits, even if it was a free-standing contract: (i) it included an implied English jurisdiction and/or choice of law clause; or (ii) it was most closely connected with England in any event, so the applicable law under Article 4.1 or 4.5 of the Rome Convention would be English law.

164. As to implied choice of law and/or jurisdiction, the Supreme Court in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 reaffirmed that for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract (§§ 18 and 21, reiterating the test set out by the majority of the Privy Council in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20, 26). The Supreme Court added the following commentary:

> "First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "*not critically dependent on proof of an actual intention of the parties*" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable

> people in the position of the parties at the time at which they were contracting.
>
> Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term.
>
> However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable.
>
> Fourthly, … although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied.
>
> Fifthly, if one approaches the issue by reference to the officious bystander, it is "*vital to formulate the question to be posed by [him] with the utmost care*", to quote from Lewison, The Interpretation of Contracts 5th ed (2011), para 6.09.
>
> Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence." (paragraph breaks interpolated)

165. In addition, Article 3(1) of the Rome Convention requires a party-chosen governing law to be express or *"demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case"*.

166. In the present case there is no need to imply a choice of governing law or English jurisdiction into the 40/40/20 agreement in order to give it business efficacy, or commercial or practical coherence, nor would any such term be obvious.

167. First, the fact (assumed for present purposes) that the 40/40/20 agreement replaced the 50/50 agreement, which was governed by English law pursuant to Article 4 of the Rome Convention, creates no such necessity or obviousness. As noted earlier, Dr Coward does not suggest that 50/50 agreement contained an express or implied choice of law or jurisdiction clause. It would have been governed by English law only because that was

the most closely connected law. The 40/40/20 agreement was a different agreement, made in a different location and different circumstances.

168. Secondly, the governing law of the 40/40/20 agreement can be found by applying the Rome Convention, making no implied choice necessary, and in any event by 2006 it was far from obvious that the parties would have chosen English law.

169. Thirdly, there is no necessity to imply a jurisdiction agreement (jurisdiction can always be founded on whatever connecting factors suffice under the law of the putative forum) and in any event by 2006 it was far from obvious that the parties would have chosen English jurisdiction.

170. It was held in *Aeolian Shipping v ISS Machinery Services* [2001] EWCA Civ 1162 that:

> "The circumstances which may be taken into account when deciding whether or not the parties have made an implied choice of law under Article 3 of the Rome Convention (whether by initial choice or subsequent change) range more widely in certain respects than the considerations ordinarily applicable to the implication of a term into a written agreement, in particular by reason to the reference in Article 3(1) to 'the circumstances of the case'. As stated in the Giuliano-Lagarde Report at p.17, the provision 'recognises the possibility that the court may, in the light of all the facts, find that the parties have made a real choice of law although this is not expressly stated in the contract', but that it 'does not permit the court to infer a choice of law that the parties might have made where they had no clear intention of making a choice'; see also the general discussion in Dicey & Morris: The Conflict of Laws (13th ed) , paras 32–089 — 32–097. …" (§ 16)

171. *Dicey, Morris & Collins* makes sets out the three examples of relevant circumstances given in the Giuliano-Lagarde report, one of which is a previous course of dealing between the parties under contracts containing an express choice of law, and another is *"an express choice of law in related transactions between the same parties"*.

172. Dr Coward submits that since the December 1992 partnership deed contained an express choice of English governing law with an English arbitration clause, it is to be inferred that the parties intended to continue in the same vein when making the 40/40/20 agreement (even if it replaced rather than varying the 50/50 agreement).

173. However, the parties, subject-matter, context, and timing of the two agreements were very different:

i) the partnership deed was made in 1992 between an English resident (Dr Coward) and two English companies, and related to the ownership and governance of the business;

ii) the 40/40/20 agreement is said to have been made in 2006, between Dr Coward and Ms Ambrosiadou, and related to their personal rights and obligations *inter se*;

iii) the 40/40/20 agreement was made in Cyprus, between parties who had deliberately left England: Dr Coward was by the time of the 40/40/20 agreement living in Cyprus, with Ms Ambrosiadou living in Greece;

iv) the main operating company (IKOS CIF) by this stage was a Cypriot company and was operating from Cyprus;

v) the agreement concerned the profits generated by Cayman and Cypriot companies (IKOS AM and IKOS CIF);

vi) the profits were to be generated from investment management and sub-investment management services provided from Cayman and Cyprus to a Cayman fund; and

vii) the entity through whom those profits were expected to be channelled was the Cypriot trustee (Cyproman) of a Cypriot discretionary trust (the Eclectic Trust) whose trust instrument contained an exclusive jurisdiction clause in favour of the courts of Cyprus.

174. It is also pertinent to note that, on Dr Coward's case, the 50/50 agreement which the 40/40/20 agreement replaced had contained no express or implied choice of English law (or jurisdiction): it was governed by English law solely based on closest connection.

175. In all these circumstances, I do not consider there to be a plausible case that a choice by the parties of English governing law for the 40/40/20 agreement could be demonstrated with reasonable certainty. On the contrary, I consider it very unlikely that such a choice of law could be found to exist.

176. Turning to closest connection (Article 4 of the Rome Convention), the factors set out in § 173 above also clearly indicate that the 40/40/20 agreement was most closely connected not with England but with Cyprus.

177. As a result, there is no plausible argument that the 40/40/20 agreement under which Dr Coward's claim is brought (if made, and if it replaced the 50/50 agreement) was governed by English law or contained an English jurisdiction agreement. Since there is no suggestion that any other ground of jurisdiction exists, that is a further reason why this court lacks jurisdiction over the claim.

(b) If the 40/40/20 agreement varied the 50/50 agreement

178. For completeness, I also consider briefly the governing law of 40/40/20 agreement if it was merely a variation of the 50/50 agreement, which I have found would have been governed by English law pursuant to Article 4 of the Rome Convention. Ms Ambrosiadou submits that even on that footing, the 40/40/20 agreement was governed by Cyprus law. She contends that:

i) the variation in 2006 was made in such changed circumstances and produced such a different agreement that it is appropriate to reconsider the governing law of the varied agreement afresh; and

ii) as the Guiliano-Lagarde report on the Rome Convention pointed out, it is permissible to take account of factors which supervened after the conclusion of the contract to determine the country with which the contract is most closely connected. That re-appraisal results in the law of Cyprus being the governing law for the reasons set out above.

179. The Guiliano-Lagarde report stated:

> "The first paragraph of [Article 4] provides that, in default of a choice by the parties, the contract shall be governed by the law of the country with which it has the closest connection.
>
> In order to determine the country with which the contract is most closely connected, it is also possible to take account of factors which supervened after the conclusion of the contract" (p20, LH col, 3rd and 4th full paragraphs)

180. I do not read that passage as necessarily indicating that the governing law of a contract, based on closest connection, can change. It may indicate only that subsequent events can be considered in deciding which law governs a contract once and for all. I note that the topic is discussed in Dicey, Morris & Collins, *The Conflict of Laws* (15th ed.) in the following terms:

> "32-036 It seems also from the speeches of Lord Reid and, especially, Lord Wilberforce, in [*Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] A.C. 583], and from the speech of Lord Wilberforce in *Amin Rasheed Shipping Corp v Kuwait Insurance Co.* that, in considering with what system of law a contract had its closest and most real connection, the only factual circumstances which could be taken into account were contemporary surrounding circumstances, and events subsequent to the conclusion of the contract were not relevant. In that case it does not appear to have been suggested that under the law of Kuwait (the only other potentially applicable law) evidence of subsequent conduct was admissible. It has been held in a different context that the admissibility of subsequent conduct to determine "the true intention" of the parties depended, not on English law as the lex fori, but on Chilean law as the law governing the contract. But it would be very odd if when a question arose as to whether a contract was governed by English law or Chilean law, subsequent conduct would not be taken into account in determining whether a choice of English law could be inferred, but it could be taken into account in determining whether Chilean law applied.
>
> 32-037 The Rome Convention and the Regulation do not deal expressly with the question. The Giuliano-Lagarde Report recognises that a choice of law may be inferred "in the light of all the facts", and that in order to determine the country with which the contract is most closely connected *"it is also possible*

> *to take account of factors which supervened after the conclusion of the contract."* The English view that subsequent conduct cannot be taken into account in construing a contract is not shared in other countries, and it would not be in keeping with the spirit of the Regulation to apply it so as to defeat the intentions of the parties. It is suggested, with some hesitation, that the English court should be entitled to take subsequent conduct into account, at least to the extent that it sheds light on the intention of the parties (or on the country with which the contract is most closely connected) *at the time the contract was concluded*." (footnotes omitted) (emphasis in original)

181. Dicey notes that the view expressed in corresponding paragraph in the previous edition was adopted in *FR Lurssen Werft GmbH & Co KG v Halle* [2009] EWHC 2607 (Comm.), affd. [2010] EWCA Civ 587, [2011] 1 Lloyd's Rep. 265. Simon J in that case stated, in the context of Article 3 of the Rome Convention dealing with the parties' choice of governing law:

> "38. As Dicey, Morris & Collins notes, consideration of subsequent conduct to construe an earlier transaction runs counter to principles of English law; but it seems to me (albeit with some diffidence in view of the cautious expression of opinion in Dicey, Morris and Collins) that it is legitimate to consider the terms of a later contract between the parties as part of the 'circumstances of the case' under Article 3.1."

The Court of Appeal declined to comment on this point (§ 22).

182. Even the cautious statements in Dicey and in *Lurssen Werft* go no further than to suggest that subsequent events may cast light on the parties' intentions at the time of the contract and/or on the contract's connecting factors. Neither they nor the passage from the Giuliano-Lagarde report suggests in terms that the governing law can change during the life of the contract. Nothing in the text of Article 4 supports the view that it can, and it would seem undesirable as tending to undermine legal certainty.

183. Since this matter is not necessary for my decision, and was not the subject of detailed argument, I prefer not to express a concluded view on it. I would, though, incline to the view for the reasons outlined above that Article 4 of the Rome Convention does not have the effect that the governing law can be reassessed: and, therefore, that if the 50/50 agreement was governed by English law pursuant to Article 4, then that remained the position after the variation brought about by the 40/40/20 agreement.

184. Further, on the hypothesis that the 40/40/20 merely varied the 50/50 agreement, Dr Coward would have a cogent argument that it remained a contract made in England: see *Dicey, Morris & Collins* § 11-181(1) and *Sharab v Al-Saud* [2009] 2 Ll. Rep. 160, 168.

(E) FORUM

185. In the light of my conclusions on jurisdiction, it is not necessary to decide whether England is the proper place for Dr Coward to bring his claims. However, I consider this issue below in case I am wrong on the question of jurisdiction.

186. *White Book* note 6.37.19 sets out the following points as being important in this context:

i) The burden is on the claimant, not merely to persuade the court that England is the appropriate forum, but "*to show that this is clearly so*" (*Spiliada Maritime Corporation v Cansulex Ltd (The 'Spiliada')* [1987] A.C. 460, HL at p.481); alternatively, in the words of CPR 6.37(3), "*the court has to be satisfied by the claimant that England is the proper place in which to bring the claim*" (*VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808 §131); see also *Erste Group Bank AG (London) v JSC (VMZ Red October)* [2015] EWCA Civ 379 §78(viii).

ii) The "*fundamental principle*" (applicable to both "*service out*" and "*service in*" cases alike) is that the court "*has to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice*" (*The Spiliada* p.474A).

iii) The determination of the appropriate forum in a given case requires the proper application of relevant private international law rules on the doctrine of *forum conveniens* as derived from extensive case law. It is not a simple "*exercise of discretion*". The court is required to reach an evaluative judgment upon whether, in the light of the relevant considerations, England is clearly the more appropriate forum (*VTB Capital* §§ 97 and 156).

iv) Each case depends on its own particular facts (*Jong v HSBC Private Bank (Monaco) SA* [2015] EWCA Civ 1057 § 18).

187. Lord Mance in *VTB Capital* confirmed that the ultimate overarching principle is that stated in *The Spiliada*, and if the court is not satisfied at the end of the day that England is clearly the appropriate forum, then permission to serve out must be refused or set aside.

188. Dr Coward submits that, applying those principles, England is the appropriate forum. If the court arrives at this stage then it will have concluded that Dr Coward has established, to a good arguable case standard, that he is suing under an agreement made in England, and/or governed by English law and/or breaches of which are subject to English jurisdiction. That suggests England is the appropriate forum. There are also logistical factors which point towards that England, though Ms Ambrosiadou disputes them.

189. Dr Coward added that his argument as to forum is reinforced by the fact that the alternative that Dr Coward identifies – Cyprus – does not have jurisdiction. He made the point that whilst Ms Ambrosiadou had stated in her evidence that she was willing to submit to the jurisdiction of the Cypriot courts, she had offered no undertaking to that effect. However, counsel for Ms Ambrosiadou at the hearing stated explicitly that she was instructed to offer that undertaking.

190. As to governing law, Ms Ambrosiadou made the points that:

i) on full evidence and argument, it may well turn out that the alleged 40/40/20 agreement is governed by Cypriot law, not English law. The alleged existence of an English law agreement cannot therefore be relied upon as establishing England as clearly the most appropriate forum;

ii) even if the alleged agreement was governed by English law, that bare fact is not a strong pointer in favour of the English Courts (see *Briggs & Rees, Civil Jurisdiction and Judgments, 6th ed,* para 4.89: *"The identification of the applicable law is a variable part of the overall evaluation, but in the end it is no more than that"*; see also *VTB v Nutriek Capital* § 10);

iii) no particular issue of English law is likely to be in issue – the dispute is a factual dispute about whether an oral agreement was made and if so what its terms were and whether there has been a breach; and

iv) even if any issue of law arose, the court in Cyprus could easily apply English law (just as the English court is used to applying foreign law where applicable). It is not even likely that expert evidence of English law would be needed in Cyprus given that Cyprus is a common law jurisdiction which borrows heavily from English law.

191. I agree with submissions (ii), (iii) and (iv) above: the governing English law would be a factor pointing in favour of England, but on the facts of the present case not a particularly weighty one.

192. As to other factors:

i) Neither Dr Coward nor Ms Ambrosiadou is habitually resident in the UK, nor has lived here for at least 13 years.

ii) It is unclear what other witnesses might be called to give evidence. During the course of the hearing Dr Coward's solicitors sent a letter setting out a list of potential witnesses. These included Mr Scholl, who it is said would give evidence (albeit he did not give evidence in the English IP proceedings). No evidence as such was adduced in connection with this letter, and it is difficult for the court to assess with any confidence which of these potential witnesses would in fact be likely to be called, and what relevant evidence they might be able to give. It is notable that Mr Bennett's witness statement in support of Dr Coward's application for permission to serve out did not refer to any English-resident prospective witnesses.

iii) As to language, the evidence of Ms Ambrosiadou's solicitor Mr Parkes, based on information from Ms Ambrosiadou's Cypriot lawyers, is that written evidence in Cyprus courts is often submitted in English with a Greek translation annexed, and oral evidence is often given in English with the assistance of a translator. It is also notable that Dr Coward has previously commenced proceedings in Cyprus and Greece.

iv) It is unclear what, if any, relevant documents would be located in England. It is likely that key documents relating to the operation of the business and its ownership structure would be abroad. The evidence before me indicated that neither Ms Ambrosiadou nor the Hestia and Eclectic trustees keep documents in England.

v) Dr Coward suggested that the fact that the English IP proceedings took place here might give rise to efficiencies were the present claim to be litigated here. Apart from, possibly, the ability to use the same legal representation, it is not clear what those efficiencies might be.

vi) There is some factual overlap between the present case and the Cyprus Family Claim, which Dr Coward issued against Ms Ambrosiadou in Cyprus in January 2010 seeking a share of the increase in Ms Ambrosiadou's assets between the date of their marriage and the date of their separation. Dr Coward's application in those proceedings referred to an agreement between him and Ms Ambrosiadou that they would jointly own IKOS, and to an agreement or understanding that they would both share in its income and profits. However, the evidence of Mr Bennett, Dr Coward's solicitor, is that the Cyprus court will not deal with allegations of breach of those agreements because it lacks jurisdiction to do so. The hearing of the Cyprus Family Claim began on 27 September 2016, but the court adjourned the trial to hear an application by Ms Ambrosiadou to strike out the claim, based on alleged problems with the writ. On 28 March 2018 Ms Ambrosiadou filed an application to amend her Defence and Counterclaim. Ms Ambrosiadou says if Dr Coward succeeds both in the Cyprus Family Claim in the present case, he will make double recovery. However, I see no reason to expect either the English court or the Cyprus court to permit double recovery. In all the circumstances, I do not consider that the Cyprus Family Claim is a strong factor pointing away from an English forum for the present case.

193. Viewing the matter in the round, I would have concluded that I was not satisfied that England was clearly the appropriate forum, having regard in particular to the point that the parties and most of the documents are likely to be located abroad, and bearing in mind that the documentation would be likely to be of considerable significance in this case.

(F) STAY

194. Ms Ambrosiadou submitted that, if the court were otherwise minded to assume jurisdiction, it should stay the proceedings in favour of the Cyprus Family Claim. Dr Coward pleads in that claim that:

> "It was an express and/or implied agreement and/or understanding of the parties that the control, management and beneficial ownership of the IKOS business and the companies and/or entities constituting the same, would be conducted by and would belong jointly to the parties. …
>
> In any event, it was an express and/or implied agreement and/or understanding between the Parties that the IKOS Group would

> be managed by both parties and would belong to them and that they would both share its income and profits."

195. Dr Coward claims in the Cyprus Family Claim that the assets of the Felix trust, the Hestia trust, the companies, assets and business of the IKOS Group, the Eclectic trust and various companies in Cyprus and elsewhere (including Anaxilea) and real properties, worth in aggregate in the region of US$500 million, are held by Ms Ambrosiadou on trust for him or on behalf of him by agreement or arrangement in proportion to his contribution to them or in equal share with Ms Ambrosiadou.

196. As noted above, however, it appears the Cyprus family court will not rule on whether or not the alleged sharing agreement existed: certainly there is no evidence that it will. At most, it appears Dr Coward is asking the court to grant financial relief on the basis that the agreement existed, and so will seek to promote it as part of his case for financial relief.

197. On the footing that it is not possible to be confident that the Cyprus court will in fact decide the issue raised in the present proceedings before me – whether the 40/40/20 agreement existed and, if so, its full financial consequences – and *a fortiori* if account is taken of the extremely slow progress of the Cyprus Family Claim, I would not have been minded to grant a stay.

(G) SERIOUS ISSUE TO BE TRIED

198. In addition to the points discussed earlier, in the context of jurisdiction, about whether there is a plausible evidential basis for the alleged 50/50 agreement and 40/40/20 agreement, Ms Ambrosiadou advanced a number of further bases for concluding that Dr Coward had not shown a serious issue to be tried on the merits such that he should have permission to serve proceedings on her out of the jurisdiction. I consider these briefly below.

(1) Whether any duty could have arisen

199. Ms Ambrosiadou submits that no duty could in any event have arisen to procure the making of payments to Dr Coward or to his order, for two further reasons.

200. First, because she, Dr Coward and their son are not shareholders of IKOS AM or IKOS CIF, and so will never receive profits of those companies.

201. However, the case Dr Coward seeks to advance does not depend on Ms Ambrosiadou receiving sums direct as dividends. The alleged sharing agreements are said to bite on such sums as Dr Coward or Ms Ambrosiadou may receive which represent, in the sense of being derived from, net profits of the underlying business.

202. Secondly, Ms Ambrosiadou says no duty has arisen because neither she nor their son, nor any entities under their ownership or control, have received any trust distributions. Ms Ambrosiadou relies on a letter from Cyproman stating that that the trustees of the Eclectic and Hestia Trusts "*or any trust structure arising from* [those trusts]" have not received "*dividends originating from IKOS AM or IKOS CIF*" and have not made any "*distributions*" at to Dr Coward, Ms Ambrosiadou, and their son, "*on their behalf or at their instruction*" or to any companies or entities "*within their ownership or control*".

203. However, I agree with Dr Coward that this evidence is untested and may give rise to further questions, such as whether the reference to "*any trust structure arising from the Hestia or Eclectic Trusts*" includes the Moltke Trust or any other trusts set up at Ms Ambrosiadou's instigation; and whether the phrase "*dividends originating from IKOS AM or IKOS CIF*" includes, for example, dividends of Felix or Flavian, or any sums that may have found their way into the trustees' hands other than by way of dividends. Dr Coward makes that point that Ms Ambrosiadou has to date not stated in terms that she has not benefitted from or accessed IKOS AM's and IKOS CIF's profits since Dr Coward left IKOS.

204. In any event, even if all the net profits have continued to accumulate in the business without being paid out to (or to the order of) Ms Ambrosiadou or the son, the declaratory relief Dr Coward seeks would be sufficient reason for the case to go forward.

(2) Termination

205. Ms Ambrosiadou draws attention to the point that Dr Coward's pleaded case is that he and Ms Ambrosiadou discussed setting-up *"a family business … in which they would both be equally involved…*" (Particulars of Claim § 5.1) and in his solicitor's evidence as referred to the 50/50 agreement as *"a long-term relational contract, regulating a joint venture between Dr Coward and Ms Ambrosiadou*".

206. It follows, Ms Ambrosiadou submits, that any oral agreement for sharing the net profits of a business in which they were jointly to be involved must have come to an end when Dr Coward left the business, taking software with him, and set up a rival business. The parties cannot have intended the joint venture to operate with only one of them working for it (and the other positively working against it) whilst both were still entitled as of right to an equal share of its profits, particularly when the venture must have involved duties of good faith. At the very least, Dr Coward's departure from the business constituted reasonable notice of termination of the alleged joint venture and profit sharing agreement.

207. Dr Coward responds that the court might conclude at trial that the parties granted each other rights in relation to withdrawn profits in recognition of their role in founding the business, in which case it would not necessarily make sense for the agreement to become terminable or indeed terminated on one party leaving the business. In any event, whether Ms Ambrosiadou's argument is right will turn on what was agreed, in what circumstances.

208. It strikes me as unlikely that the court would find the parties' alleged agreement had the effect that Dr Coward would continue to be entitled to a profit share following his departure from the business. However, there would still be a live issue, on which large sums would depend, as to whether Dr Coward was entitled to a share of profits paid out to Ms Ambrosiadou (whether before or after Dr Coward's departure) derived from profits made by the business while Dr Coward was still there. According I do not consider that the termination issue could be a reason for concluding that Dr Coward lacks a good arguable case.

(3) Limitation

209. Ms Ambrosiadou contends that any claim in respect of any payments made before November 2011 is time-barred, and that there have been no payments since November 2011 (indeed, since July 2008). Further, any duty to disclose was a duty to disclose as soon as a payment had been received or instructed, and a cause of action arose as soon as that duty had been breached.

210. However:

i) it is arguable that the duty would indeed have been a continuing one, or (if not) that the limitation period would be postponed on the basis that Ms Ambrosiadou committed a deliberate breach in circumstances where Dr Coward was not likely to discover the breach for some time (Limitation Act section 32(1)(b));

ii) in any event, the court cannot assess on present evidence whether there have been payments made to, or at the direction of Ms Ambrosiadou, since November 2011: that would have to be resolved at trial; and

iii) even if there have been no such payments, Dr Coward may (on his case) be entitled to a declaration of entitlement to a share if and when any funds representing profits (or, at least, profits made during Dr Coward's tenure with the business) are paid to or at the direction of Ms Ambrosiadou.

211. Accordingly, the limitation argument would not in my view be a reason for concluding that Dr Coward has not shown a serious issue to be tried.

(4) Abuse of process

212. Ms Ambrosiadou submits that Dr Coward's current claim is an abuse of process. She says the claim should have been brought earlier in proceedings between the parties, and that it raises allegations which have already been raised, and which she should not have to answer them again.

213. Lord Bingham of Cornhill in *Johnson v Gore-Wood* [2000] UKHL 65, [2002] 2 AC 1, 31 said:

> "… *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any

> additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. …"

214. Clarke LJ in *Dexter v Vlieland-Boddy* [2003] EWCA Civ 14 summarised the principles to be derived from *Johnson v Gore-Wood* at paragraphs 49–53.

> "49 …:
>
> i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.
>
> ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.
>
> iii) The burden of establishing abuse of process is on B or C or as the case may be.
>
> iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.
>
> v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.
>
> vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.
>
> 50. Proposition ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B, C, D, E, F and G) in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others.

> 51. Those reasons include, for example, the cost of proceeding against more than one defendant, especially where B is apparently solvent and the case against B seems stronger than against others. More defendants mean more lawyers, more time and more expense. This is especially so in large commercial disputes. It by no means follows that either the public interest in efficiency and economy in litigation or the interests of the parties, including in particular the interests of C, D and E, is or are best served by one action against them all.
>
> 52. It seems to me that the courts should be astute to ensure that it is only in a case where C can establish oppression or an abuse of process that a later action against C should be struck out. I could not help wondering whether the defendants in this case would have given their lawyers the same instructions on the question whether they should have been sued in the first action if they had been asked before that action began as they have given now that a later action has been begun.
>
> 53. It is clear from the speeches of both Lord Bingham and Lord Millett that all depends upon the circumstances of the particular case and that the court should adopt a broad merits based approach, but it is likely that the most important question in any case will be whether C, D, E or any other new defendant in a later action can persuade the court that the action against him is oppressive. It seems to me to be likely to be a rare case in which he will succeed in doing so."

215. The authorities were reviewed more recently by the Court of Appeal in *Kamoka v The Security Service* [2017] EWCA Civ 1665. After referring, as part of this review, to the judgment of Moore-Bick LJ in *Amin v The Security Service* [2015] EWCA Civ 653 § 44, the Court of Appeal said:

> "70. That restatement of principle recognises that the doctrine is a flexible one which is not dependent upon identity of parties or issues and in an appropriate case is equally applicable whether the previous proceedings were criminal or civil. Accordingly, I reject any suggestion by Mr de la Mare QC that *Hunter* -type abuse cannot arise where the earlier proceedings were civil and there is no identity or privity between the parties. The authorities to which I have referred do not support any such wide proposition.
>
> 71. Nonetheless, when the subsequent litigation does not involve an issue previously decided between the same parties or their privies, that subsequent litigation will rarely be an abuse of process. That is clear from the speech of Lord Hobhouse (with whom the other Law Lords agreed) in *In re Norris* [2001] UKHL 34; [2001] 1 WLR 1388. …"

216. The cited passage from *In re Norris* concluded:

> "These are illustrations of the principle of abuse of process. Any such abuse must involve something which amounts to a misuse of the litigational process. Clear cases of litigating without any honest belief in any basis for doing so or litigating without having any legitimate interest in the litigation are simple cases of abuse. Attempts to relitigate issues which have already been the subject of judicial decision may or may not amount to an abuse of process. Ordinarily such situations fall to be governed by the principle of estoppel per rem judicatem or of issue estoppel (admitted not to be applicable in the present case). It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse."

217. As noted in *Kamoka*, that analysis was approved and applied by the Court of Appeal in *JSC BTA Bank v Ablyazov (No. 15)* [2016] EWCA Civ 987 §§ 57-62.

218. The Court of Appeal revisited abuse of process in *Michael Wilson & Partners v Sinclair* [2017] 1 WLR 2646 at § 48:

> "(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; see Lord Diplock in *Hunter v. Chief Constable,* Lord Hoffmann in the *Arthur Hall* case and Lord Bingham in *Johnson v. Gore Wood*. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in *Hunter v. Chief Constable*. Both or either interest may be engaged.
>
> (2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse, see *Bragg v. Oceanus*; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the *Arthur Hall* case.
>
> (3) To determine whether proceedings are abusive the Court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in *Johnson v. Gore Wood* and Buxton LJ in *Taylor Walton v. Laing*.
>
> (4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the

> same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the *Arthur Hall* case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-Dr Coward in the *Bairstow* case; or, as Lord Hobhouse put it in the *Arthur Hall* case, if there is an element of vexation in the use of litigation for an improper purpose.
>
> (5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in *In re Norris*.
>
> To which one further point may be added.
>
> (6) An appeal against a decision to strike out on the grounds of abuse, described by Lord Sumption JSC in *Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd* [2014] AC 160 at [17] as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not to the exercise of a discretion. Nevertheless, in reviewing the decision the Court of Appeal will give considerable weight to the views of the judge, see Buxton LJ in the *Taylor Walton* case, at [13]."

219. Ms Ambrosiadou says Dr Coward has made the allegations of an alleged oral agreement for sharing profits and assets in, among other proceedings, the English IP proceedings, the BVI Proceedings, the Monaco UBS Claim and the Second Greek Divorce Proceedings, where they were dismissed. He also raised them in proceedings which he then did not pursue e.g. the Cyprus Moltke Proceedings and Dr Coward's 2013 English Claim, and they feature in current, live proceedings elsewhere, notably in the Cyprus Family Claim.

220. In these circumstances, Ms Ambrosiadou submits that Dr Coward is guilty of abuse of process in the following respects.

i) Even if Dr Coward is not issue estopped from litigating against Ms Ambrosiadou the very same issue which he litigated in the English IP proceedings against Ms Ambrosiadou's privy, IKOS UK, it is vexatious to put Ms Ambrosiadou to the trouble of having to deal with these allegations yet again.

ii) The present claim could and should have been litigated in one of the other sets of proceedings in which it was raised. Dr Coward has caused Ms Ambrosiadou to incur costs in defending the claim (successfully in the English IP proceedings and until he discontinued the Cyprus Moltke Claim) but is now vexing Ms Ambrosiadou again with the same claim.

iii) The present proceedings are a collateral attack on the judgment and finding made in the earlier English IP proceedings. Dr Coward is seeking, on the basis of the same material he had in the English IP proceedings, a ruling contrary to the judgment of Asplin J that there was no evidence of any kind of oral agreement as alleged.

iv) Where there are concurrent English and foreign proceedings outside the scope of the Recast Judgments Regulation, the approach of the Court at common law is set out in *Australian Commercial Research & Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65: the plaintiff was ordered to discontinue the later English proceedings when he had already commenced proceedings in Queensland in relation to the same placement agreement.

221. So far as the English IP proceedings are concerned, the critical issue there was ownership of copyright to software. The case Dr Coward unsuccessfully advanced there of a 'family partnership' was of potential relevance to that issue. However, the agreements Dr Coward now seeks to establish, relating to the sharing as between himself, Ms Ambrosiadou and their son of sums representing profits taken out of the business, would not have been pertinent to the issues in the English IP proceedings. I do not therefore consider that Dr Coward's present claim either involves allegations he should have pursued in those proceedings, or amounts to a collateral attack on Asplin J's decision.

222. The Cyprus Family Claim does involve potential overlap with the present claim, insofar as Dr Coward in that claim alleges not only joint ownership but also that he and Ms Ambrosiadou agreed that they would share the IKOS group's income and profits. However, as noted earlier, there are grounds to doubt that the Cyprus court will deal with the issues raised in the present case. In addition, Dr Coward points out that eight years after the claim was commenced, pleadings have not yet closed. In these circumstances I do not consider it abusive for Dr Coward to turn to this court to resolve his claims.

223. In the Cyprus Moltke proceedings, Dr Coward sought as against Ms Ambrosiadou damages for breach of the 40/40/20 agreement, a declaration that it was binding, and specific performance. Dr Coward discontinued these proceedings in 2013 without prejudice to his right to bring further claims concerning the same subject matter. According to his solicitor's evidence, discontinuance on that basis is effective under Cypriot procedure. Dr Coward says his discontinuance does not make this claim abusive because he was not abandoning his claims once and for all, citing *Spicer v Tuli* [2012] 1 WLR 3088. In that case a party made clear that proceedings were being withdrawn on the basis that further proceedings could be brought if it turned out that the tenancy agreement the subject of the action was not genuine: a matter which required more time to investigate. Unsurprisingly it was held that no abuse of process occurred.

224. In the present case, however, it appears that Dr Coward obtained a without notice injunction in support of his claim, the injunction was discharged on an *inter partes* hearing, and then when faced with an application to strike out his claim Dr Coward discontinued it. In those circumstances, the analogy with *Spicer* is inapt, and Ms Ambrosiadou would have a cogent argument that an attempt to relitigate the issue of

the 40/40/20 agreement in the present proceedings is abusive because Dr Coward in substance seeks to vex her again with substantially the same claim. Although it could not be said that the issue had been decided in the Cyprus proceedings, I consider that seeking to litigate again, against the same defendant, a claim advanced in previous proceedings that one has discontinued – other than in particular circumstances such as arose in *Spicer v Tuli* - is likely to constitute an abuse even though the earlier case never reached the stage of a judicial decision.

225. So far as other proceedings are concerned, and leaving aside those in which no issues as to the 50/50 agreement or the 40/40/20 agreement arose or arises, the evidence and submissions before me indicate that:

i) The first Greek divorce proceedings, issued by Ms Ambrosiadou in April 2009, included a counter-petition by Dr Coward alleging breach of an agreement to, among other things, share the "*fruits of the results of…the IKOS Group*" equally, but these proceedings ended without a decision on the merits when Ms Ambrosiadou resigned from the proceedings in August 2011.

ii) In a second set of divorce proceedings in Greece, issued by Ms Ambrosiadou in October 2010, the Athens Court of Appeal when dissolving the parties' marriage stated that "[Dr Coward's] *allegation about having reached an agreement with his spouse to distribute equally the financial results of the IKOS group was not proven*". However, on appeal, the Greek Supreme Court held that that finding (among others) was not *res judicata*, and dismissed the parties' appeals for that reason.

iii) In custody proceedings issued by Ms Ambrosiadou in December 2010, Dr Coward's counterclaim referred to the 50/50 and 40/40/20 agreement, and at the hearing he contended that he, Ms Ambrosiadou and their son held all 'family assets' in 40:40:20 proportions; but the court rejected the claim and counterclaim on the basis that it was not competent to try them.

iv) On 1 March 2013, just before the trial of the English IP proceedings, Dr Coward issued but did not serve a claim form against Ms Ambrosiadou alleging, among other things, breach of fiduciary duty "*in connection with the IKOS business and/or the management of family assets*" and stating that Ms Ambrosiadou had "*…subverted the agreed split of family assets (including profits of the IKOS business)*". Dr Coward says he issued this claim because of exchanges in skeleton arguments in the English IP proceedings in which he perceived the IKOS entities to be raising points regarding his, and, logically, Ms Ambrosiadou's, fiduciary duties. The IKOS entities (Ms Ambrosiadou by then having dropped out of the proceedings) objected to the court hearing the claim, and Dr Coward allowed it to lapse.

v) Dr Coward issued proceedings in the BVI in February 2013 against, among others, Anaxilea, MFP and Iridanos. His claim concerned the ownership and control of assets held by MFP, and his claim was based on he and Ms Ambrosiadou having set up the Eclectic Trust to manage distributions of IKOS's profits. Dr Coward alleged that he and Ms Ambrosiadou put the trust structure in place to distribute profits to MFP, Anaxilea and Iridanos in 40:40:20

proportions. Bannister J struck the claim out, apparently based on pleading points. Ms Ambrosiadou was not a party to the proceedings.

vi) Dr Coward issued proceedings in Monaco in April 2014 against UBS and MFP. seeking an order requiring UBS to comply with an earlier disclosure order. Ms Ambrosiadou was not a party. The Monaco court dismissed the claim. In doing so, it found that Dr Coward was not the beneficial owner of MFP. That, however, does not in my view have any bearing on Dr Coward's present claim, which is not based on ownership of the underlying business assets.

226. I do not consider that any of the proceedings referred to in § 225 above would have made Dr Coward's pursuit of his present claim abusive. Conversely, as I indicate above, in my view Ms Ambrosiadou would have had a cogent argument that an attempt to relitigate the issue of the 40/40/20 agreement in the present proceedings, having attempted to do so in the Cyprus Moltke proceedings, is abusive because Dr Coward in substance seeks to vex Ms Ambrosiadou again with the same claim. In the light of my earlier findings it is not necessary to reach a concluded view on this point, and I prefer not to do so because an essentially similar issue may in due course arise for the Cyprus court to determine should Dr Coward decide, following this judgment, to seek to pursue his claim there.

(H) OVERALL CONCLUSION

227. I therefore conclude that this court lacks jurisdiction to hear this claim because, in brief summary:

i) Dr Coward does not have a plausible evidential basis for the alleged 50/50 agreement, on which his argument for jurisdiction depends; and

ii) even if there were a plausible evidential basis for the 50/50 agreement, Ms Ambrosiadou has the better of the argument that the alleged 40/40/20 agreement (under which Dr Coward's claim is actually brought) replaced rather than merely varied the 50/50 agreement, was not made in England or governed by English law, and did not contain an English jurisdiction clause.

228. I am grateful to both parties' counsel for their clear and helpful written and oral submissions.