Neutral Citation Number: [2023] EWHC 177 (Comm)

Case Nos:
CL-2019-000118
(consolidated with CL-2020-000866
and CL-2021-000656)

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

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

Date: 31/01/2023

Before :

MR JUSTICE JACOBS

- -

Between :

THE PUBLIC INSTITUTION FOR SOCIAL SECURITY

Claimant

- and -

(1) MR ELY MICHEL RUIMY
(2) AERIUM FINANCE LIMITED

Defendants

- -
- -

Stuart Ritchie KC and **Christopher Burdin (**instructed by **Stewarts Law LLP**) for the **Claimant**
Adam Kramer KC, Ian Higgins, and **Sophia Dzwig (**instructed by **Latham & Watkins LLP**) for the **Defendants (Mr Ruimy and Aerium Finance Ltd)**

Hearing date: Monday 16th January 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on Tuesday 31st January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE JACOBS

MR JUSTICE JACOBS :

A: Introduction and background

The application

1. Two defendants, Mr Ely Michel Ruimy ("Mr Ruimy") and Aerium Finance Limited ("AFL") challenge the court's jurisdiction, and have applied to set aside or seek to stay two sets of proceedings commenced by the Claimant ("PIFSS"). The first set of proceedings is CL-2020-000866 and it has been consolidated with claim CL-2019-000118, the latter being a substantial action against a very large number of parties. Mr Ruimy and AFL are the 39th and 40th defendants in the consolidated action. The second set of proceedings is CL-2021-000656, where Mr Ruimy and AFL are the 3rd and 4th defendants. The second set of proceedings has yet to be consolidated with other proceedings. It is likely, however, that some form of consolidation will occur if the jurisdictional challenges fail.

2. Those challenges, described in more detail below, raise a large number of issues, but a central and important question is whether the proceedings should be stayed on *forum non conveniens* grounds. A related question, which arises in the context of the first claim commenced by PIFSS against these defendants (CL-2020-000866, later consolidated with CL-2019-000118) is whether the proceedings should be stayed pursuant to Article 34 of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels Recast").

3. Directions were given, at a case management hearing in July 2022, that the *forum non conveniens* and Article 34 issues were to be addressed prior to consideration of any other issues raised by the jurisdictional challenges of AFL/Mr Ruimy.

PIFSS' claim

4. The claim against Mr Ruimy and AFL has been pleaded in detail in Re-Re-Re-Amended Consolidated Particulars of Claim ("RAPOC") served by PIFSS on other Defendants in the context of the first set of proceedings (CL-2019-000118). Those proceedings involve a large number of other parties and a trial is scheduled for March 2025. No similar pleading has been served in the second set of proceedings, but it will obviously be materially similar to the case set out in the RAPOC. The nature of the claim advanced is as follows.

5. PIFSS is a Kuwaiti public institution responsible for Kuwait's social security system and pension scheme. PIFSS alleges that the late Mr Fahad Al Rajaan, its former Director-General, obtained illegal secret commissions totalling US$874.2m, from some 9 separate schemes over a 20-year period. Mr Al Rajaan is the 1st defendant to the proceedings, and he participated fully (at least to the extent that his health permitted) in those proceedings prior to his death on 6 September 2022. The proceedings are continuing against his estate, which is represented by his widow Ms Muna Al Wazzan, who is the 2nd defendant to the proceedings. There are a large number of other defendants who are sued in respect of the various schemes. One of those schemes is alleged to have been operated by AFL/Mr Ruimy. This scheme has been referred to by PIFSS and the parties as the "Aerium Scheme".

6. PIFSS alleges that Mr Ruimy is the chairman and joint founder of the Aerium Group, a European real estate investment manager whose parent company is Aerium Holdings SA ("Aerium Holdings"), a Luxembourg company. Aerium Holdings was at all material times the majority owner and/or controller of AFL, a company incorporated in England. Aerium Holdings is, on PIFSS' case, indirectly owned by Mr Ruimy. PIFSS alleges that Mr Ruimy was in control of Aerium Holdings and thereby the Aerium Group, including AFL. Mr Ruimy was himself a director of AFL between 2004 and 2009 and again between 2017 and 2020. PIFSS also says that Mr Ruimy (either alone or together with members of his family) was the majority owner and/or controller of the Aeriance Group of companies ("the Aeriance Group") which provided services to the Aerium Group and also managed its own Aeriance funds.

7. PIFSS alleges that on various dates from September 2003 onwards PIFSS invested over US$2 billion in 20 funds managed (or in two cases introduced/advised) by the Aerium Group or the Aeriance Group. Those investments have been particularised in Appendix 7.1 to the RAPOC. PIFSS refers to a sharp increase in the amounts invested between January 2008 and March 2010.

8. The claim advanced by PIFSS against AFL/Mr Ruimy in relation to the Aerium Scheme concerns the sum of US$10.1m which is said to have passed as secret commissions from Mr Ruimy to Mr Al Rajaan between March 2008 and December 2010. PIFSS alleges that these payments were improperly made by Mr Ruimy to Mr Al Rajaan in exchange for Mr Al Rajaan's role in influencing PIFSS to invest substantial sums in funds managed and/or introduced by companies in the Aerium or Aeriance Groups. In short, PIFSS alleges that the sums paid were corrupt payments of bribes. Some of the payments from Mr Ruimy to Mr Al Rajaan were financed by AFL, which is sued on the basis that Mr Ruimy's knowledge of the corrupt payments is to be attributed to AFL.

9. The alleged secret commission payments under the Aerium Scheme comprise US$8.7 million taken, according to bank records, in cash, from Mr Ruimy's account, number 410510, at a Swiss bank, Mirabaud & Cie SA ("Banque Mirabaud"), and deposits, (also according to records, in cash) in an account at the same bank in the name of Ms Al Wazzan. This account is said to be held for Mr Al Rajaan. Appendix 7.2 to the RAPOC lists 49 separate payments between 2008 and 2010, all of which were received in account 5049765000 of Ms Al Wazzan. In addition to these payments, there were also two payments made to jewellers, apparently in settlement of two invoices addressed to Mr Al Rajaan; US$460,000 paid on 19 November 2009 to Gemcut SA and US$994,200 paid on 30 November 2009 to Hamilton Associates.

10. Trial of the allegations against Mr Al Rajaan's estate, Ms Al Wazzan, and a large number of other defendants involved in the various alleged schemes will be heard in England in March 2025. That claim will include the claim against Mr Al Rajaan's estate in relation to the Aerium Scheme itself. There are some defendants, originally joined to the proceedings, against whom the claim cannot proceed, in consequence of the decision of Henshaw J (upheld by the Court of Appeal) referred to below. These include Banque Mirabaud (originally the 11th defendant) and a number of individuals associated with that bank, namely Pierre Mirabaud, Thierry Fauchier-Magnan, and Luc Argand (originally the 12th – 14th defendants). I shall refer to these persons collectively as the "Mirabaud parties".

11. Following the Court of Appeal's decision in January 2022 to uphold the successful jurisdictional challenge by the Mirabaud parties, PIFSS have commenced proceedings against three of the Mirabaud parties (Banque Mirabaud, Mr Pierre Mirabaud and Mr Fauchier-Magnan) in Switzerland. It appears that Mr Argand is not a party to the Swiss proceedings. Since nothing turns on this, I will continue to refer simply to the "Mirabaud parties" as including the various Mirabaud-related defendants in the English and Swiss proceedings.

12. As described below, the proceedings commenced by PIFSS against the Mirabaud parties in Switzerland do not, at least any longer, include a claim in respect of the Aerium Scheme. Instead, the claim in those proceedings concerns a large number of other schemes in which the Mirabaud parties are alleged to have participated or assisted. At the heart of the *forum non conveniens* argument of AFL/Mr Ruimy is the proposition that the Aerium Scheme claims should be heard in Switzerland alongside the other claims advanced against the Mirabaud parties.

Procedural background to the present applications

13. There is a protracted and tortuous procedural background to the proceedings against AFL and Mr Ruimy and the present hearing.

14. The first of two claim forms issued in connection with the Aerium Scheme, in proceedings CL-2020-000866, was issued on 29 December 2020. It was consolidated with claim CL-2019-000118 by the Order of Henshaw J dated 22 June 2021 ("the 1st claim form"). There is no dispute that the 1st claim form was properly served on the English company, AFL, in January 2021. Some two years have now passed since service, and the delay in the resolution of AFL's jurisdictional challenge appears largely attributable to issues which have arisen in relation to service on Mr Ruimy.

15. Thus, as far as the 1st claim form is concerned, there are disputes as to whether and when that claim form was validly served on Mr Ruimy. The potential dates of service are:

    (i) January 2021 (London, disputed by Mr Ruimy);

    (ii) June 2021 (Morocco, disputed by Mr Ruimy); and

    (iii) November 2021 (London). Here, the fact of service is admitted, but Mr Ruimy alleges that it fell outside the period of validity of the claim form, if an order extending it made by Bryan J were to be set aside.

16. The second claim, in proceedings CL-2021-000656, was commenced by a further claim form ("the 2nd claim form"). This claim form was issued on 8 November 2021, following Mr Ruimy's contention that the 1st claim form had not been served on him and that the time for service had expired and should not have been extended. The 2nd claim form was served personally on Mr Ruimy in London on 26 or 27 November 2021. The fact of service of that 2nd claim form is now not disputed: following correspondence between solicitors, personal service is accepted as valid.

17. The above claim forms and their respective (admitted and disputed) events of service gave rise to multiple applications, which can be summarised as follows.

18. *"The First Application"*: AFL and Mr Ruimy made an application dated 10 March 2021 to challenge jurisdiction in respect of the 1st claim form. AFL did not dispute that service had been effected, but contested jurisdiction on the grounds that: (i) PIFSS' claim was not justiciable; (ii) the claim should be stayed on *forum non conveniens* grounds; and (iii) the claims should be stayed under Article 34 of Brussels Recast or on case management grounds. Mr Ruimy disputed the validity of service at his address in London on the basis that he had permanently left the UK in March 2020 and officially taken up residency in Morocco in April 2020 and raised other objections in the alternative.

19. As a result of the dispute as to service on Mr Ruimy, PIFSS applied for permission to serve the 1st claim form on Mr Ruimy in Morocco. This was granted pursuant to the Order of Bryan J dated 22 April 2021 ("the Bryan J Order"). The Bryan J Order further granted PIFSS an extension of time to effect service. PIFSS proceeded to post the 1st claim form to Mr Ruimy's address in Morocco where it was signed for on 30 June 2021.

20. *"The Second Application"*: Mr Ruimy made an application dated 11 October 2021: (i) for a declaration that the 1st claim form had not been served on him in Morocco on 30 June 2021; (ii) to set aside the permission to serve the claim form on Mr Ruimy in Morocco granted pursuant to the Bryan J Order; (iii) to set aside the extension of time for service pursuant to the Bryan J Order; and (iv) for a retrospective extension of time for Mr Ruimy's acknowledgement of service and/or relief from sanctions.

21. *"The Third Application"*: Mr Ruimy made an application dated 8 February 2022 to challenge jurisdiction arising out of personal service of both claim forms in November 2021. As to the 1st claim form, Mr Ruimy repeats the arguments from the First Application, and asserts that service in November 2021 occurred during the extension granted by the Bryan J Order, which should be set aside. As to the 2nd claim form, Mr Ruimy contested jurisdiction on the grounds that: (i) PIFSS' claim is not justiciable; and (ii) PIFSS' claim should be stayed on *forum non conveniens* grounds.

22. A case management hearing took place in July 2022 in order to consider the approach to be taken to the three applications. Despite the abundance of points raised by AFL and Mr Ruimy, there were two matters of particular significance. First, AFL did not dispute that it had been validly served with the 1st claim form in January 2021 and with the 2nd claim form in February 2022. AFL is an English company, and therefore service can be, and appears to have been, effected with relative ease. Secondly, Mr Ruimy did not dispute that he had been validly served, by personal service, with the 2nd claim form in November 2021. This meant that both AFL and Mr Ruimy accepted that they had been served as of right, albeit that Mr Ruimy did not accept the validity of service of the 1st claim form.

23. This meant, in practical terms, that the key issue raised by the various applications was *forum non conveniens* where, applying the principles in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, AFL/Mr Ruimy bore the burden to show that there is another available forum which is clearly or distinctly more appropriate than the English forum.

24. The result of that hearing was an order that the following issues should be determined at a hearing, with the various applications being otherwise stayed:

> "1.1 Whether the English court is the appropriate forum to hear the claims against AFL and Mr Ruimy in connection with each of the First and Second Claims. For the avoidance of doubt, this issue will not include consideration or determination of any disputed issue: (i) as to the validity of service of the First Claim on Mr. Ruimy; (ii) arising out of the Claimant's application to serve the First Claim on Mr. Ruimy out of the jurisdiction or its application to extend time for service of the First Claim.
>
> 1.2 Whether the First Claim should be stayed on the basis of Art. 34 Brussels Recast Regulation ("Brussels Recast")."

25. The Article 34 issue in paragraph 1.2 of the above order was selected because it was closely related to the *forum non conveniens* issue set out in paragraph 1.1. It is common ground that, in consequence of Brexit, Brussels Recast is not applicable to the 2nd claim form. There are also issues between the parties as to whether Brussels Recast is applicable to the 1st claim form. AFL/Mr Ruimy contend that it is not, on the basis that the present proceedings do not concern a civil and commercial matter (and for Mr Ruimy on the basis of domicile). For present purposes, however, the argument on Article 34 has been approached on the hypothesis and assumption that Brussels Recast is indeed applicable to the 1st claim form.

26. The parties exchanged written skeletons and oral submissions were made by Mr Kramer KC for AFL/Mr Ruimy and Mr Ritchie KC for PIFSS. Before discussing the detail of their arguments, I will briefly describe the relevant proceedings which have taken place in Switzerland.

B: The Swiss proceedings

27. I will briefly describe, in chronological sequence, the proceedings which have been commenced in Switzerland. I use the expression "proceedings" for convenience, albeit that there is a substantial dispute (relevant to the Article 34 arguments) as to the nature of the "commandements de payer" process described below.

Commandements de payer

28. In January 2020, commandements de payer were issued by PIFSS against Banque Mirabaud and other Mirabaud parties in Geneva in the sum of CHF 228,200,000. The sum claimed is described as:

> "Compensation resulting from the debtor's involvement in complex, hidden structures put in place in order to channel towards Fahad Al-Rajaan, the former Director General of the creditor, and to his wife certain undue benefits granted in exchange for investments between 1994 and 2015 having a countervalue of CHF 228 million originating in particular from the Mirabaud Group."

29. A commandement de payer is an instrument issued, in this case, by the Geneva "Office des Poursuites" ("Debt Collection Office"), pursuant to the Swiss Federal Act on Debt Enforcement and Bankruptcy 1889 ("DEBA"). Article 67 of DEBA entitles a party to

make a request for debt enforcement to the Debt Collection Office. Article 69 provides for the issue by the Debt Collection Office of a payment order, following the request. Article 71 provides for service of that order on the debtor. Article 75 entitles the debtor to object, and makes it clear that this need not be a reasoned objection. Articles 78 and 79 provide as follows:

> **"Art. 78** Objection to the payment order
>
> Effects
>
> The objection to the payment order will lead to the suspension of the debt enforcement proceedings.
>
> If the debtor only objects to part of the claim, the debt enforcement may be continued for the undisputed amount.
>
> **Art. 79** Setting aside of the objection to the payment order
>
> In civil or administrative proceedings
>
> A creditor against whose debt enforcement an objection to the payment order has been made, must assert their claim in civil or administrative proceedings. They may only obtain the continuation of debt enforcement on the basis of an enforceable decision which expressly sets aside the objection to the payment order."

30. In his evidence, Mr Walsh (the partner with responsibility for the proceedings on behalf of PIFSS) described the background to the commandements de payer, based on his discussions with Swiss lawyers and the relevant legislation (which was available to me in translation in the hearing bundles).

31. In short, in 2016 and thereafter, PIFSS and the Mirabaud parties had agreed rolling annual "tolling" or standstill agreements to stop time for limitation purposes. After the Mirabaud parties refused a further extension, the commandements de payer were issued in January 2020. These have the effect of stopping time running for limitation purposes for 12 months, but without the need for court proceedings to be commenced. They are therefore a commonly-used procedure in Switzerland in such situations.

32. A commandement is issued pursuant to Article 67 of DEBA. They are filed at the Debt Collection Office, not (at least in the eyes of Swiss law) at any court. The Debt Collection Office is an administrative office, not a judicial function. It does not perform any assessment of the merits of the claim. As described above, the debtor can dispute the commandement by filing an objection. In the present case, Mr Walsh's evidence is that an objection was indeed filed. As provided for in DEBA, if the issuer wishes to pursue the matter further, it would then be required to issue proceedings in the Swiss courts. As described below, this is what PIFSS in fact did, but subsequent to service in England of the proceedings on both AFL and Mr Ruimy.

33. No commandements de payer have been issued against AFL or Mr Ruimy. Mr Walsh's evidence was that PIFSS could not do so, as the process is only available in respect of

debtors domiciled in Switzerland and, generally speaking, commandements cannot be served outside Switzerland.

34. Following directions given at the July 2022 hearing, the parties exchanged letters in relation to certain propositions of Swiss law regarding commandements de payer. As summarised in the skeleton argument of AFL/Mr Ruimy, the following is now common ground.

35. Commandements de payer:

    i) may be issued by a claimant who seeks payment (whether or not there is a written and signed acknowledgment of debt).

    ii) have the effect of restarting the applicable limitation period (as do ordinary civil proceedings), even if the process is not pursued or an objection is sustained.

    iii) if following service the recipient does not object (within a period), the applicant can request the Debt Collection Office to move to enforcement.

    iv) if the recipient objects, enforcement by the Debt Collection Office (who, as set out below, enforce all money claims) is suspended pending the result of either (i) ordinary civil proceedings or administrative proceedings or (ii) or *mainlevée provisoire / definitive*. The latter is a summary proceeding where (in the case of a written and signed acknowledgment of debt or pre-existing judgment) the objection to the commandement de payer may be lifted by the court (allowing the Debt Collection Office to proceed to enforcement).

36. The Swiss Debt Collection Offices:

    i) are entities existing in each Swiss canton whose existence is mandated by Swiss Federal Law. They may fall within the judicial branch or the wider administrative branch (this varies between cantons: in Vaud they are within the judicial branch, whereas in Geneva they fall under the Department of Finances and Human Resources), but as a matter of Swiss law, are not "courts" and are not staffed by "judges".

    ii) are subject to duties of *et altera pars audiatur* and impartiality.

    iii) are responsible for all enforcement of monetary debts by the Swiss State, including (but not limited to) those following a conventional court decision on the merits after ordinary civil proceedings.

Contribution proceedings

37. Chronologically, the next development in Switzerland was the commencement of proceedings by Mr Mirabaud and Banque Mirabaud against AFL/Mr Ruimy in January 2021. These proceedings were commenced subsequent to the issue by PIFSS of the 1st claim form in December 2020 (although shortly before its service on AFL and the disputed service on Mr Ruimy).

38. PIFSS is not party to the proceedings commenced by Mr Mirabaud and Banque Mirabaud, and found out about them as a result of AFL/Mr Ruimy's evidence in the

present proceedings. The proceedings seek declarations that those Mirabaud parties are not liable to AFL/Mr Ruimy in relation to the claims advanced against them by PIFSS in the present proceedings. Similar proceedings were commenced by Mr Fauchier-Magnan: he is Mr Mirabaud's cousin who succeeded him in 2009 as senior partner at Banque Mirabaud. No progress has been made in those proceedings. The evidence of Mr Davies, on behalf of AFL/Mr Ruimy, is that these proceedings will not progress substantively until PIFSS' claims (i.e. in the English proceedings) are resolved.

Proceedings by PIFSS against the Mirabaud parties

39. In January 2022, the English Court of Appeal dismissed PIFSS' appeal against the decision of Henshaw J in relation to the jurisdictional challenge of the Mirabaud parties (and certain other parties): see [2020] EWHC 2979 (Comm), upheld on appeal [2022] EWCA Civ 29. Shortly thereafter, PIFSS commenced proceedings in Switzerland against various Mirabaud parties. In February 2022, a "Conciliation Request" was filed by PIFSS seeking payment of sums totalling US$78,903,639 from Banque Mirabaud, Pierre Mirabaud, and Thierry Fauchier-Magnan for their role in facilitating the payments of the alleged secret commissions. This Conciliation Request intimated a claim in respect of various schemes, including the Aerium Scheme.

40. The Conciliation Request was filed in Switzerland whilst PIFSS was still intending to pursue a further appeal from the order of the English Court of Appeal. Article 62 of the Swiss Civil Procedure Code is headed "Start of Pendency". Under Article 62 (1), a case becomes pending when an application for conciliation, an action, an application, or a joint request for divorce is filed.

41. Subsequently, on 31 October 2022, PIFSS filed a "Payment Claim" against the Mirabaud parties. The claim was accompanied by an expert report and supplemental expert report of a Mr Alexander. The claim document contains no claim in respect of the Aerium Scheme. However, the supplemental expert report does contain 19 pages of material on Mr Ruimy and his companies, including AFL. As described below, PIFSS has made it clear that the Aerium Scheme is not a part of its claim against the Mirabaud parties in Switzerland, and it will not be a part of its claim unless the jurisdictional challenge of AFL/Mr Ruimy succeeds.

42. I start by considering the *forum non conveniens* arguments, to which the majority of the parties' written and oral submissions were directed.

C: *Forum non conveniens* - the parties' arguments

AFL/Mr Ruimy's submissions

43. On behalf of AFL/Mr Ruimy, Mr Kramer accepted that, applying the well-known *Spiliada* principles, it was for AFL/Mr Ruimy to show that Switzerland was clearly or distinctly more appropriate than the English forum: see Lord Goff at 477E and *Dicey, Morris & Collins: The Conflict of Laws* 16th edition paragraph 12R-001 (Rule 41). Mr Kramer submitted that this was indeed the case, and that Switzerland was the forum in which the case could suitably be tried for the interests of all the parties and for the ends of justice. This was so because: (1) the torts/wrongs alleged took place in Switzerland; (2) Switzerland was the centre of gravity and evidence; (3) relevant evidence would be heard in Swiss civil proceedings, and there was a risk of irreconcilable judgments; and

(4) Swiss law may be the governing law of the claims, and this was a pointer, albeit minor, to the appropriateness of Switzerland.

44. In his oral submissions, Mr Kramer described the "landscape" as one where the Aerium Scheme claim was likely to be "hitched" to one of the sets of ongoing proceedings, either in Switzerland or England. The appropriate set of proceedings, for the purpose of this hitching, was the Swiss proceedings, which concerned the Mirabaud parties. That was clearly more appropriate given that the case involves events in Switzerland, and accounts at Banque Mirabaud. The case in Switzerland involved an allegation that the Mirabaud parties were up to their necks in fraud, and were concealing the nature of the payments being made. The case involving the Aerium Scheme involved similar allegations, even if PIFSS had now decided for tactical reasons not to make that case against the Mirabaud parties themselves, but to confine their focus to Mr Al Rajaan and AFL/Mr Ruimy. Switzerland was the source of the richest evidence on the issues which will arise in the case, and England brings nothing to the party.

45. In more detail, on the main points, Mr Kramer submitted as follows:

46. The place where the wrongs were committed – here the payment of alleged bribes in terms of the withdrawal and depositing of cash, as well as the alleged disguising of payments pleaded in paragraph 338BBB (h) of the RAPOC – is an appropriate starting point in the forum analysis. Those wrongs were committed in Switzerland.

47. Taken overall, Switzerland was the centre of gravity of the claims. The fundamental focus would be Switzerland as the events happened there and many of the witnesses were there. The core events and documentation relating to the alleged bribery and concealment are sited in Switzerland. That is where the cash was allegedly paid. The question of whether the payments were disguised as cash withdrawals and deposits, or whether that was a false narrative on the bank documents, would require documents and witness evidence which would principally be in Switzerland. There were also two alleged payments to jewellers in (or likely to have been in) Switzerland; and documents and witness evidence relating to this would principally be in Switzerland. PIFSS' case also involved looking at the money flows into Mr Ruimy's Mirabaud bank accounts. These money flows were alleged to have involved various Swiss banks. Documents and witness evidence in relation to this would principally be in Switzerland. The evidence relating to the Mirabaud accounts would therefore be critical, and PIFSS had not explained how it would elicit the substantial documentary and witness evidence on the Aerium Scheme in the absence of the Mirabaud parties, who had extricated themselves from the English proceedings and could now only be sued in Switzerland.

48. The involvement of Swiss banks meant that issues would arise on Swiss banking secrecy. Issues on Swiss banking secrecy had already delayed aspects of the English proceedings. Those issues were best determined in Switzerland.

49. There were other links to Switzerland. Mr Al Rajaan was or may have been living in Switzerland at relevant times, and a substantial number of documents relating to Mr Al Rajaan himself would be in Switzerland. There have been criminal proceedings in Switzerland against Mr Al Rajaan, and this led to a company associated with Mr Ruimy having its accounts provisionally frozen in 2019. There are ongoing issues relating to a request by the Kuwaiti Attorney-General for Mutual Legal Assistance, and Mr Ruimy has been entitled to make (and has made) submissions on that issue.

50. In contrast, there is a lack of evidence available in England and a lack of connection with England. Mr Al Rajaan may have been living here, but he is now deceased. Ms Al Wazzan, his widow, has been joined in order to ensure that remedies against Mr Al Rajaan are effective, but no substantive claims are brought against her. Whilst Mr Ruimy had been based in England, he moved away in March 2020 and no longer holds substantial ongoing business interests here. The Aerium Group's operations in England were only "limited", according to Mr Ruimy, and it had offices in various jurisdictions (including Switzerland) and headquarters in Luxembourg.

51. Overall, there was no substantial evidence available in England in relation to the Aerium Scheme and the claims against AFL/Mr Ruimy. In contrast, Switzerland was the place where some of the main witnesses (such as Mr Mirabaud, as well as the jewellers and others at Banque Mirabaud, and other Swiss banks such as Rothschild), were located. The documents and bank accounts are in Switzerland, and the core of the events took place there.

52. AFL/Mr Ruimy also submitted that, as there were multiple sets of extant Swiss proceedings, there was an obvious risk of inconsistent judgments. The evidential overlap, and inefficiencies resulting from trying the same questions twice, were clear factors in favour of the Swiss court taking jurisdiction.

53. In that regard, AFL/Mr Ruimy placed reliance first, and primarily, upon the proceedings by PIFSS in Switzerland against the Mirabaud parties. Those proceedings had, as described above, resulted from the successful jurisdictional challenge by those parties, culminating in a decision of Henshaw J upheld on appeal, and a refusal by the Supreme Court to grant permission to appeal. The majority of the claims proceeding in England will also proceed in Switzerland, because PIFSS contends that the Mirabaud parties are liable as accessories on various schemes. Although PIFSS had, for tactical reasons, taken the Aerium Scheme out of the Swiss proceedings against the Mirabaud parties, there was nevertheless a huge area of overlap in relation to all the other schemes. Although PIFSS had offered an undertaking not to pursue the Aerium Scheme in Switzerland – unless the present jurisdiction challenges succeed – this was not satisfactory. There was a possibility that, following a successful outcome for PIFSS on the present application, it would reintroduce the claim. Furthermore, the Swiss court – following an inquisitorial process – may decide to investigate the Aerium Scheme itself, irrespective of whether or not it forms part of PIFSS' claim in Switzerland. Indeed, prior to its decision to withdraw the Aerium Scheme claim from the Swiss proceedings against the Mirabaud parties, PIFSS had served an expert report which addressed the Mirabaud parties' involvement in that scheme. Given that Ms Al Wazzan's bank account received proceeds from the scheme which directly involved the Mirabaud parties, and the same bank account was used for the Aerium Scheme, it is inevitable that the cash paid as part of the Aerium Scheme would be a live issue in the Swiss proceedings against the Mirabaud parties.

54. Overall, the huge overlap between the English and Swiss proceedings gave rise to a risk of inconsistent findings. If the present proceedings against AFL/Mr Ruimy were stayed, that would avoid the risk; since it would likely lead to the Swiss proceedings being consistently managed such that there would be a single set of findings there as to the activity of the Mirabaud parties and related issues. Whilst there would still be a risk of inconsistent findings in relation to the Aerium Scheme, because of the proceedings against Mr Al Rajaan's estate and Ms Al Wazzan in England, this would be "reduced";

because, as Mr Kramer submitted, "material evidence would be provided in Swiss proceedings and likely then adopted in the English proceedings". But in any event, the risk of inconsistent findings is generally inevitable, and it stems from PIFSS choosing not to seek to pursue all Aerium Scheme defendants in Switzerland, its natural home.

55. Additionally, AFL/Mr Ruimy relied upon the proceedings, and potential proceedings, between the Mirabaud parties and AFL/Mr Ruimy in Switzerland. The former had begun proceedings in Switzerland for a declaration of non-liability. The claim asserts that the Mirabaud parties have no liability for any losses which AFL/Mr Ruimy may incur as a result of the claim against them by PIFSS. There was also a real possibility that AFL/Mr Ruimy would bring contribution proceedings against the Mirabaud parties in Switzerland. There was a risk of inconsistent judgments; for example, the English court may hold that AFL/Mr Ruimy are liable to PIFSS, but the Swiss court may take a different view.

PIFSS' submissions

56. PIFSS submitted that AFL/Mr Ruimy could not show that Switzerland was clearly or distinctly a more appropriate forum. PIFSS was advancing a substantial fraud claim which is well established in this jurisdiction, and where the claims against the primary wrongdoer (and person whom PIFSS alleges was paid bribes by AFL/Mr Ruimy under the claims which PIFSS pleads) will go to trial in England in a trial scheduled to start in March 2025. AFL is an English company of which Mr Ruimy was a director between 2004 and 2009, and ultimately the majority owner/controller at all material times. Mr Ruimy accepts that he was resident and living the majority of his time with his wife and children in London between 2007 and 2020; i.e. during the period of time when the bribes were alleged to have been paid. The evidence shows that (at minimum) he retains connections and property in this jurisdiction. Mr Ruimy does not live, and has not at any material time lived, in Switzerland.

57. The claim has strong connecting factors to England. There were also strong factors pointing to Kuwait, although these do not assist AFL/Mr Ruimy because they do not point to Switzerland. PIFSS submitted that those factors were: (a) the claims already proceeding in England; (b) the factual connection of the events in England; and (c) AFL/Mr Ruimy's connections to England.

58. PIFSS also submitted that it was relevant to consider the legitimate juridical advantage in permitting the English proceedings to continue: the evidence served by AFL/Mr Ruimy indicated an intention to rely upon a limitation defence and PIFSS' position would be made worse if, having issued in England, it must now start afresh in Switzerland in 2023.

59. PIFSS accepted that the claim had some connection with Switzerland, since the payments relied upon (the alleged bribes) were paid in Switzerland by means of Swiss bank accounts of the payor (Mr Ruimy) and the payee (Mr Al Rajaan's wife, Ms Al Wazzan). However, this did not make Switzerland clearly or distinctly the more appropriate forum. Whilst the (alleged) bribes may ultimately have been paid in Switzerland, this did not tell the full story. There was nothing to suggest that the agreement for payment of the bribes was made in Switzerland: the dealings between Mr Ruimy and Mr Al Rajaan may well have taken place in London (where Mr Ruimy was living at the time of the payments, and where Mr Al Rajaan had a property) or

indeed elsewhere. Other elements of the tort, such as the place where the damage was suffered, were not connected to Switzerland. Overall, the fact that the alleged bribes were sent from Mr Ruimy's bank account in Switzerland to Mr Al Rajaan's account (in the name of Ms Al Wazzan) in Switzerland was not a substantial factor in favour of staying the English proceedings.

60. PIFSS submitted that the existence of proceedings in Switzerland by PIFSS against the Mirabaud parties was not a significant factor. PIFSS' case against the Mirabaud parties in Switzerland did not concern the Aerium Scheme. Its case in England did not require any finding to be made against the Mirabaud parties at all, and its case in Switzerland did not require any findings as to the Mirabaud parties' alleged involvement in the Aerium Scheme. The key protagonists of the Aerium Scheme were Mr Al Rajaan and Mr Ruimy. The case against the Mirabaud parties in Switzerland, involving different schemes, did not make Switzerland clearly the more appropriate forum, particularly bearing in mind that the case against one of the two main protagonists of the Aerium Scheme (Mr Al Rajaan) would be proceeding in England. PIFSS had confirmed its intention that the Aerium Scheme would be pursued in England against all defendants to it (namely, the estate of Mr Al Rajaan, Ms Al Wazzan, AFL and Mr Ruimy); and that any claim that might arise against the Mirabaud parties in respect of the Aerium Scheme payments would not be brought in Switzerland either.

61. The other aspect of the Swiss proceedings relied upon by AFL/Mr Ruimy, namely possible contribution proceedings against the Mirabaud parties, was of no significance. Although Mr Mirabaud and Banque Mirabaud had commenced proceedings in January 2021 seeking declarations of non-liability to AFL/Mr Ruimy, this had clearly been done with a view to ensuring that the Swiss courts were first seised of any contribution claim. However, those proceedings would not progress substantively until the English proceedings were resolved, and there was no relevant risk of inconsistent judgments.

62. PIFSS accepted that it was possible, depending upon the case advanced by AFL/Mr Ruimy on the merits, that some evidence would be found in Switzerland. Since there had been no indication by AFL/Mr Ruimy as to the defence to be advanced, it was not possible to say whether there would be any significant evidence located there. However, even if some evidence may be located in Switzerland, there was nevertheless significant and extensive evidence that would be available in England.

63. When considering the Swiss proceedings and Swiss evidence as a whole, there was no relevant risk of fragmentation or inconsistent findings between the English court (against AFL/Mr Ruimy) and the Swiss Court (against the Mirabaud parties). Even if there was a relevant risk, it would not outweigh all of the other factors pointing to England. Furthermore, the risk of conflicting judgments would be far more acute if AFL/Mr Ruimy were to be sued in Switzerland given the issues already before the English court between PIFSS, Mr Al Rajaan's estate and Ms Al Wazzan.

64. PIFSS acknowledged that issues had been raised by some defendants concerning Swiss banking secrecy. Those issues have not yet been fully considered by the court, and they are to be addressed at a CMC in 2023. However, there was nothing to suggest that these would present a practical problem in relation to the case against AFL/Mr Ruimy. Furthermore, any problems presented by Swiss banking secrecy in the context of the English proceedings, if they did exist, would be likely to exist in Switzerland as well.

D: *Forum conveniens* - discussion

65. As stated above, it was common ground that, applying the *Spiliada* test, it was for AFL/Mr Ruimy to establish that Switzerland was another available forum which was clearly or distinctly more appropriate than the English forum. I do not consider that AFL/Mr Ruimy have established this, and broadly speaking, I accept the submissions of PIFSS as summarised above. The matters which, in my view, are of most significance are as follows.

(1) The relevance of the existing proceedings in England

66. It is clear on the authorities, both prior and subsequent to the decision of the Supreme Court in *Vedanta Resources Plc v Lungowe* [2019] UKSC 20, that the avoidance of fragmentation and the risk of inconsistent judgments is often a significant factor in the *forum conveniens* analysis. This is so both in the context of applications to serve proceedings out of the jurisdiction (where the claimant bears the burden of establishing the appropriateness of England), and in applications such as the present where the burden lies upon the defendants, here AFL/Mr Ruimy.

67. A detailed review of these authorities, pre-*Vedanta*, is contained in the judgment of Carr J in *Tugushev v Orlov* [2019] EWHC 645 (Comm) at [261] – [264]. Carr J said, at [267], that:

> "Fragmentation of disputes leads to increased time and cost, increased demands on parties and witnesses, the risk of different *fora* proceeding on the basis of different evidence, and the key danger of inconsistent outcomes".

68. The desirability of avoiding fragmentation and inconsistent judgments may therefore result in proceedings being commenced or continued in England, notwithstanding substantial links with another jurisdiction. In that regard, a distinction can be drawn between major and minor players in the litigation. In *JSC BTA Bank v Granton Trade Ltd* [2010] EWHC 2577 (Comm), cited in paragraph [261] of *Tugushev*, Christopher Clarke J said at [28]:

> "28. I do not accept that the second proposition can be taken as a rule. It fails to distinguish the case in which the anchor defendant is the chief protagonist from the case where he is a minor player. A decision that permission should be granted to serve the protagonist out of the jurisdiction because the minor player is domiciled within the jurisdiction would indeed allow the tail to wag the dog. But if the anchor defendant is the protagonist a decision to allow a minor player to be served outside the jurisdiction may be entirely appropriate. That would be, to continue the metaphor, to allow the dog to wag the tail. Just as it may make little sense to have the venue determined by where the claim against the most insignificant player will be heard, so it may make little sense to have the venue where the most significant will be sued passed over in favour of another jurisdiction to whose jurisdiction a lesser player is subject. I do not mean thereby to suggest that whether or not jurisdiction

> should be exercised against a foreign defendant is necessarily determined by whether the anchor defendant, or the defendant sought to be joined, fits into some particular descriptive category ("major/minor"; "principal/secondary"); only that a decision as to appropriate forum must necessarily take account of the relative importance in the case of different defendants and particularly those against whom proceedings in England are practically bound to continue."

69. In *Vedanta* itself, Lord Briggs said at [70]:

> "In cases where the court has found that, in practice, the claimants will in any event continue against the anchor defendant in England, the avoidance of irreconcilable judgments has frequently been found to be decisive in favour of England as the proper place, even in cases where all the other connecting factors appeared to favour a foreign jurisdiction".

70. In *ED&F Man Capital Markets Ltd v Straits (Singapore) Pte Ltd* [2019] EWCA Civ 2073, the Court of Appeal regarded this passage of Lord Briggs' judgment as expressing "the general principle". The court in that case upheld the judge's decision that the need to avoid multiplicity of proceedings, and the risk of irreconcilable judgments, should bear considerable weight in the evaluation of proper forum.

71. I consider that, in the present case, these are factors of very significant weight. The allegations against AFL/Mr Ruimy are already part of a US$874.2 million claim in England against Mr Al Rajaan's estate and Ms Al Wazzan, who (with 20 other defendants) have submitted to the jurisdiction. The court gave directions at CMCs in June and November 2022, and the trial is listed for March 2025 (time estimate 26 to 30 weeks). The claim in respect of the Aerium Scheme concerns alleged bribes or secret commissions (at least US$10 million between 2008 and 2010), paid by Mr Ruimy to or for the benefit of Mr Al Rajaan. At the forthcoming trial, this court will hear evidence about a number of schemes. One of those schemes is the Aerium Scheme itself, and the court will therefore be determining issues regarding whether Mr Ruimy paid unlawful bribes to Mr Al Rajaan. That will include determination of issues concerning the extent and purpose of payments, and the relationship of Mr Al Rajaan and Mr Ruimy.

72. Prior to his death, Mr Al Rajaan pleaded a defence, including to the details of the Aerium Scheme. The court can therefore identify the issues which, as between PIFSS and Mr Al Rajaan's estate, will arise. Mr Al Rajaan accepted that the payments which were listed in Appendix 7.2 to the RAPOC were indeed made to him. That appendix listed 49 payments made between 2008 and 2010 to an account of Ms Al Wazzan. The payments total around USD 8.6 million. In addition, Mr Al Rajaan accepted that two payments were made to jewellers, amounting to USD 1.454 million. Mr Al Rajaan's defence does not therefore dispute the fact of the payments being made. Rather, it concerns the nature of the arrangements which were made, and which resulted in these payments. The defence is that Mr Ruimy offered to make payments to Mr Al Rajaan; that such payments were not made at Mr Al Rajaan's request; and that Mr Al Rajaan provided Mr Ruimy with "general investment advice" and believed that the money he received from Mr Ruimy was related to the provision of that advice.

73. Accordingly, the issue which arises in relation to Mr Al Rajaan is, principally: what was the purpose of the payments which were, admittedly, made for the benefit of Mr Al Rajaan? Were they made in the circumstances described by Mr Al Rajaan? Or were they paid, as PIFSS contends, pursuant to a corrupt arrangement between Mr Ruimy and Mr Al Rajaan, in return for Mr Al Rajaan causing or influencing PIFSS to invest in funds managed or introduced by the Aerium/Aeriance Group. The determination of that issue, as between PIFSS and Mr Al Rajaan, will require findings by the English court as to Mr Ruimy's and Mr Al Rajaan's state of mind and intentions.

74. AFL/Mr Ruimy's application, if accepted, would therefore result in a duplication of proceedings in relation to the Aerium Scheme, with the allegations against the recipient of the alleged bribe (Mr Al Rajaan) being investigated and determined in England, but the allegations against the payor of the alleged bribe being investigated and determined in Switzerland. There would be a clear risk of inconsistent findings in relation to the conduct of the key protagonists on each side of the alleged transaction. This is not a promising start for an application where AFL/Mr Ruimy have the burden of proving that Switzerland is clearly more appropriate. The authorities to which I have referred strongly suggest that it is not a result which is likely to appeal to an English court, and I consider that it is undesirable.

75. Mr Kramer, rightly in my view, did not seek to suggest that this was a case which had any parallel with *Vedanta*. In that case, as the Court of Appeal said in *ED&F Man* (para [46]), the critical factor was that the anchor defendant was offering to submit to the jurisdiction of Zambia, with which the case was intimately and indeed wholly connected. In the present case, Mr Al Rajaan (and now his estate) is the anchor defendant. The proceedings were served upon him in England because he was resident here (having left Kuwait), and at no stage was there any challenge by him to the exercise of the English court's jurisdiction. Nor has there ever been any offer by Mr Al Rajaan of an undertaking to submit to the jurisdiction of the courts of Switzerland. That is hardly surprising, in view of the fact that criminal proceedings against him were commenced there. Furthermore, there are a large number of other defendants in the overall proceedings, and the vast majority (leaving aside those who were successful before Henshaw J) have accepted the jurisdiction of the English court.

76. Mr Kramer's submissions sought to downplay the importance of Mr Al Rajaan's involvement as anchor defendant. There can be no doubt, however, that Mr Al Rajaan is not (to use Christopher Clarke J's terminology) a "minor" player in the events which have led to the present litigation whether one is looking at the schemes generally or only the Aerium Scheme. Mr Al Rajaan can reasonably be regarded as the central player, and indeed the, or a, principal protagonist.

77. Mr Kramer submitted, however, that his significance, in a *forum non conveniens* context, was now diminished because he has recently died and therefore will not be giving oral evidence. I disagree. PIFSS is pursuing the case against his estate, and it is obviously reasonable and proper for them to do so. PIFSS will therefore be seeking to establish its case, as against Mr Al Rajaan, as to his involvement in corrupt arrangements. Success on that argument, as against Mr Al Rajaan, is likely to be important if not critical to PIFSS' case as to the corrupt involvement of other parties, including AFL/Mr Ruimy. Although Mr Al Rajaan is deceased, there will remain obligations on the part of his estate to provide disclosure in accordance with orders made at earlier CMCs. The documentation for the 2025 trial will therefore include such

documentation as Mr Al Rajaan (via his estate) himself provides, as well as significant documentation from many other parties which relates to Mr Al Rajaan and the payments he received. Furthermore, it is reasonably possible that Mr Al Rajaan's evidence, as to the relevant events, will have been captured in some way by those who have been advising him, particularly bearing in mind that (as was frequently submitted to me in the context of arguments as to the time for the accomplishment of interlocutory steps being ordered by the court) Mr Al Rajaan had been ill for some time before his death. If so, then his evidence will be before the court. Accordingly, the involvement or otherwise of Mr Al Rajaan in corrupt schemes will be important and will not (despite his death) be decided in an evidentiary vacuum. I therefore do not accept that Mr Al Rajaan's death diminishes his importance as a significant and major defendant in the context of the *forum non conveniens* application.

78. Furthermore, a significant aspect of PIFSS' case as to why the payments by AFL/Mr Ruimy to Mr Al Rajaan were corrupt is its reliance on Mr Al Rajaan's alleged "modus operandi". This is reflected in PIFSS' plea, in paragraph 338BBB of the RAPOC, that reliance will be placed on:

> "the similar fact pattern of Secret Commissions as pleaded in relation to and evidenced by the other Schemes pleaded herein".

79. Mr Al Rajaan's modus operandi, in the context of a large number of schemes, will therefore be the subject of scrutiny at trial. This, too, highlights his importance as a significant and major defendant. The evidence in relation to those other schemes will be front and centre at the forthcoming trial, and it cannot be suggested that all of that evidence is in Switzerland. Indeed, the documentary evidence will have been assembled for the purposes of the English trial, and no doubt there will be a significant amount of oral testimony as well.

80. It is also relevant to consider the stage which the English proceedings have reached. They have been underway for some time. The proceedings in England in respect of the Aerium Scheme have been underway since 2020. Pleadings have closed against Mr Al Rajaan and Ms Al Wazzan. Mr Al Rajaan's case was therefore articulated before he died. I have already noted that he does not dispute that the relevant payments were made. However, he asserts that the payments were neither bribes nor corrupt, but were for the provision of investment advice. Subsequent to the close of pleadings, at the CMC on 9 June 2022 the English court approved a list of issues for trial and ordered issues for disclosure including (for example):

> "In what circumstances, for what reason or purpose, pursuant to what communications, arrangements or agreements (and with whose knowledge, approval, instructions or advice) were payments made by Aerium/Mr Ruimy (or at his / their direction) to Mr Al Rajaan or companies or accounts nominated by him or on his behalf?"

Disclosure on such approved issues will be given on 31 May 2023. Having made such progress, it is in my view desirable that AFL/Mr Ruimy are added to the English litigation rather than PIFSS having to sue them afresh in Switzerland.

81. Viewed overall, I consider that the fact that the English proceedings will be continuing against Mr Al Rajaan's estate (and Ms Al Wazzan), and will be investigating the detail of the Aerium Scheme itself, as well as a large number of other schemes, is a very significant factor in the *forum conveniens* analysis. If AFL/Mr Ruimy had to be sued outside England, that would lead to an undesirable fragmentation of the case and create a high risk of inconsistent findings, including on the critical issue as to the nature and purpose of the payments, which would be live in both sets of proceedings. As between AFL/Mr Ruimy and the anchor defendants (Mr Al Rajaan and Ms Al Wazzan), England is the only available forum, in circumstances where the English proceedings are well under way. Mr Al Rajaan and Ms Al Wazzan have submitted to English jurisdiction but are not party to the litigation in Switzerland. They have not undertaken to submit to being sued there, and it would obviously be undesirable and impractical to require PIFSS now to start proceedings against those parties in Switzerland.

82. Against this background, I consider that it would require factors of some strength, given the nature of the claims proceeding in England, to result in Switzerland nevertheless being considered to be clearly or distinctly the more appropriate forum, notwithstanding the proceedings in England. I do not consider that any of the matters relied upon by AFL/Mr Ruimy, whether taken alone or in combination, produces that result. Indeed, as discussed in the following sections, I consider that (as PIFSS submitted) there are other factors which reinforce the appropriateness of the proceedings continuing in England. I start with those factors which reinforce the appropriateness of England, before turning to key matters relied upon by AFL/Mr Ruimy in support of the argument that Switzerland is clearly or distinctly the more appropriate forum.

(2) Factual connections of the events to England

83. I agree with PIFSS that the factual context of the Aerium Scheme has strong connections with England. There were, of course, some connections with Switzerland, in that the actual payments were made from and to bank accounts which were there. However, this does not negate the strength of the connection with England.

84. AFL was an English company and therefore was present in England during the entire pleaded duration of the Aerium Scheme. Mr Ruimy was also living in England throughout that period, albeit that (for tax purposes) he relied upon a foreign domicile. Mr Ruimy's evidence is that he was resident in England (2007 to 2020) and spent the majority of his time living in London with his wife and family. On that basis, I consider that it is a reasonable inference that he was present in England when he is alleged to have agreed, orchestrated and instructed payment of the bribes to Mr Al Rajaan. Mr Ruimy's case has yet to be articulated, beyond a denial of any wrongdoing. He has not put in any evidence that he was in Switzerland at any relevant time, or that any agreement for the payment of monies to Mr Al Rajaan was made there.

85. Mr Al Rajaan spent time in England on business during the period covered by the claims. He was at all material times a director of an English bank, Ahli United Bank (UK) PLC. He also had substantial assets in England, including a property in Knightsbridge acquired in 2006 for £6.69 million. All of PIFSS' investments into the Aerium Group were funded through PIFSS' UK bank accounts at Ahli United Bank, so that it is reasonable to infer that Mr Al Rajaan arranged for the majority of investment capital to be paid from accounts in London.

86. For his part, Mr Ruimy accepts that the source of funds for PIFSS' investments was England, although he says that the monies were received in Luxembourg and that PIFSS' relationship with the Aerium Group was contractually governed via Luxembourg special purpose vehicles. If true, that is not a weighty factor and it would in any event point towards Luxembourg not Switzerland.

(3) Defendants' connections to England

87. AFL is an English company. It is alleged to have financed at least some of the payments from Mr Ruimy to Mr Al Rajaan, and to be liable in circumstances where Mr Ruimy was its director at the material times (2004 to 2009), and his knowledge and conduct in relation to the payment of the alleged secret commissions to Mr Al Rajaan is attributable to AFL pursuant to English rules of attribution.

88. Mr Ruimy has strong personal connections with the English forum. He, or at least his wife, has for some years owned a family property in Chester Square, London, and this was where Mr Ruimy and his wife lived prior to their move to Morocco. The property has not been sold. Mr Ruimy's evidence is that he moved to Morocco in 2020 for tax reasons. This was in order to avoid his domicile being deemed to be English, on the basis of his residence in England for at least 15 of the previous 20 years. He is a UK citizen, although he is also a citizen of Morocco and France. By contrast, Mr Ruimy's evidence does not suggest any substantial connection with Switzerland. Mr Ruimy and his family still use the Chester Square property, and his evidence is that his wife comes to London from time to time, albeit (like Mr Ruimy himself) subject to a limit (for tax reasons) on the number of days that can be spent here. During PIFSS' ultimately successful attempts to serve Mr Ruimy in November 2021, he was staying with his wife and children at Chester Square; attending offices at 28 Savile Row; and attending Sadler's Wells theatre for a performance his wife was involved in. Mr Ruimy's evidence, in his third witness statement, is that he moved away from the UK in March 2020, but nevertheless spent "some time" in London between September and December 2020, and then some 60 nights between May and September 2021.

89. I accept PIFSS' submission that both AFL and Mr Ruimy have strong connections to England. I now discuss the particular points on which the submissions of AFL/Mr Ruimy placed emphasis.

(4) Place of the torts/wrongs

90. AFL/Mr Ruimy say that Switzerland was the place where the alleged bribes were paid. I accept that this is the case, since the actual payments were made there. I do not consider that this fact (in itself or in combination with the other matters relied upon) makes Switzerland clearly the more appropriate forum. Whilst the bribes (if that is what they were) may ultimately have been paid in that jurisdiction, there are substantial connections to England (as already discussed) and it is reasonable to infer that the agreement to pay the monies was made in England. There is on any view a strong possibility that this is the case. England is also the place where the alleged briber had knowledge of Mr Al Rajaan's agency on behalf of PIFSS.

91. Furthermore, as PIFSS submitted, the tort also had connections to Kuwait (rather than Switzerland) as being the place where Mr Al Rajaan failed to disclose or account for the bribes to his principal, and the place where the damage was suffered.

92. Overall, therefore, this is not a case where all elements of the alleged wrong are connected with Switzerland.

(5) Switzerland as the centre of gravity of the dispute

93. AFL/Mr Ruimy submitted that Switzerland was the centre of gravity of the dispute, and that documents and witnesses would primarily be located there. I do not consider that this is the case, either for documents or witnesses. However, to the extent that there are documents or witnesses in Switzerland, I again do not consider that this (in itself or in combination with the other matters relied upon) makes Switzerland clearly the more appropriate forum.

94. As far as documents are concerned, it does not in my view follow from the fact that the relevant payments involved (both on the payor and payee sides) Swiss bank accounts, that the relevant documents are all in Switzerland. This is in my view too simplistic a conclusion.

95. The payor in this case is alleged to have been Mr Ruimy, with AFL being involved in some of the payments. Both Mr Ruimy and AFL will, almost certainly, have to give disclosure of their own documents relating to the bank transfers. Neither AFL nor Mr Ruimy are in Switzerland, and there is nothing to suggest that their own documents will be found there.

96. As far as the payee is concerned (Mr Al Rajaan, using an account in his wife's name), the position is that neither the late Mr Al Rajaan nor his wife are in Switzerland. Moreover, as Mr Walsh explained in his 15th witness statement, and Mr Ritchie explained in his submissions (and as can be seen from my judgment in relation to the freezing order obtained against Mr Al Rajaan – [2019] EWHC 2886 (Comm)), PIFSS has previously obtained substantial documentation relating to Mr Al Rajaan's accounts at Banque Mirabaud and it has also had access to other documentation in Switzerland. It is because PIFSS already has obtained and has access to relevant documentation that it has been able to plead, with precision and detailed particulars, the 49 payments (plus two payments to jewellers) which are listed in Appendix 7.2 to the RAPOC, and which Mr Al Rajaan admitted. The documentation relating to the transfers therefore exists, at least to a significant extent, in the hands of PIFSS and its advisers outside Switzerland, even if it is also the case that it exists in Switzerland as well.

97. Mr Kramer submitted that, in the context of the flow of funds, PIFSS has not sought to explain how it would elicit the substantial Swiss documentary evidence in relation to the Aerium Scheme for the English proceedings against AFL/Mr Ruimy. There was in my view no force in this submission. There is ample documentation outside Switzerland – in the form of the materials already obtained by PIFSS and materials which will need to be disclosed by AFL/Mr Ruimy – which can be relied upon to demonstrate the flow of funds. Furthermore, PIFSS will be able to rely upon the admission of Mr Al Rajaan that the transfers which are particularised in Appendix 7.2 were indeed made.

98. As far as witnesses are concerned, it did not seem to me that AFL/Mr Ruimy had identified any factual witnesses that PIFSS would need to call in order to prove the various particulars which are currently set out in RAPOC paragraph 338BBB in support of the case that there was a corrupt arrangement and corrupt payments. PIFSS' case will require proof of the payments made, but (as indicated above) these are documented and

indeed admitted by Mr Al Rajaan. These payments will need to be seen (as alleged in that paragraph of the pleading) in the context of the investments made by PIFSS. There is nothing to suggest that the documentation relating to those investments will be, substantially, in Switzerland. PIFSS will also rely upon "the similar fact pattern of Secret Commissions" relating to other schemes. The documentary materials in this respect will comprise the materials which will be gathered from various sources for the purposes of the forthcoming trial.

99. It is of course possible that AFL/Mr Ruimy will wish to call witnesses, and Mr Kramer's submissions suggested that various Swiss witnesses, in particular from Banque Mirabaud, might be called. The present position, however, is that AFL/Mr Ruimy have given no insight into the shape of their defence at trial. They are not required to do so at this stage: see *VTB Capital plc v Nutritek International Corpn* [2013] UKSC 5, para [39] (Lord Mance), [91] (Lord Neuberger), and [193] (Lord Clarke). However, if no insight is given, then Lord Clarke's judgment indicates that the focus of the court should be on the ingredients of the claim to be established by the claimant, and that the court should not speculate about the nature of any positive case that might be advanced in the future. Similarly, Lord Neuberger said that if a defendant is "wholly reticent about his case, he can have no complaint if the court does not take into account what points he may make, or evidence he may call, at any trial".

100. Against a background where, despite the service of a very large amount of evidence on different issues, AFL/Mr Ruimy have not indicated the nature of their defence, I do not consider that it is appropriate to speculate as to the witnesses who may be called. If it were necessary to do so, then I am far from persuaded that there is any likelihood of large numbers of Swiss witnesses, and in particular Swiss witnesses from Banque Mirabaud, being called. This seems to be rather unlikely, given the existence of proceedings commenced by the Mirabaud parties against AFL/Mr Ruimy as described above. Leaving that point aside, however, the need to call Swiss witnesses, and the likelihood of this happening, should be considered in the light of the documentary evidence. There is documentary evidence that the relevant payments were indeed made, and this has been admitted by Mr Al Rajaan. It must be highly doubtful as to whether AFL/Mr Ruimy will put in issue the fact that payments were made, and they have not hitherto done so. It is possible that they might, but this would be a bold if not foolish thing to do if the documentary evidence is to the contrary effect. If it is right that the fact of the payments will not be disputed, it is highly doubtful that they will seek to call evidence from witnesses who were concerned with the mechanics of the payments. Indeed, given that the payments were made so long ago, it would seem improbable that any witness would be able to give material evidence which added to the documentary record.

101. More realistically, as it seems to me, AFL/Mr Ruimy may put in issue the nature of the payments made; i.e. to dispute that they were for corrupt purposes. This is the nature of Mr Al Rajaan's defence, and this is therefore a matter which will be explored in the English proceedings in any event. Assuming that AFL/Mr Ruimy also put this matter in issue, and run a positive case that the payments were not corrupt, then the most obvious witness will be Mr Ruimy, who was the payor of the payments in issue.

102. AFL/Mr Ruimy submitted that evidence, as to the nature of the payments, would also need to be given by individuals from Banque Mirabaud. To my mind, this is far from self-evident, particularly in the absence of any clear indication from AFL/Mr Ruimy as

to the nature of their defence. I accept that (as Mr Kramer submitted) there is a potential claim by PIFSS against the Mirabaud parties in respect of the payments made under the Aerium Scheme. Indeed, the indication from Mr David Alexander's expert evidence (served in the context of the Swiss proceedings) is that PIFSS was originally intending to advance such a claim in Switzerland, albeit that it is now no longer to be pursued. However, the claim, which PIFSS seeks to bring in this jurisdiction against Mr Ruimy, is a claim against the payor of bribes under a corrupt arrangement, and against the company which that payor is alleged to have owned and controlled and which was allegedly involved in funding the bribes. It is not necessary for PIFSS to prove the involvement or possible liability of accessories: it does not require any findings to be made against Mr Mirabaud or any other of the Mirabaud parties. It is also far from clear, in my view, that Mr Ruimy or AFL will gain any assistance, in support of their currently unidentified defence, by seeking to prove the knowledge, or lack of knowledge, of an alleged accessory who was neither a payor nor a payee.

103. Accordingly, I do not consider that any of the points relied upon by AFL/Mr Ruimy are of any significant weight in showing that Switzerland is clearly more appropriate.

(6) The Swiss proceedings

104. As summarised above, AFL/Mr Ruimy rely upon two aspects of the Swiss proceedings: the proceedings commenced against the Mirabaud parties, and potential contribution proceedings against those parties (the latter foreshadowed by the existing claim by the Mirabaud parties for a declaration of non-liability).

105. Again, I do not consider that either of these matters is of any significant weight, whether on its own or in conjunction with the other matters relied upon.

106. As far as PIFSS' proceedings against the Mirabaud parties are concerned: there is no dispute that, as presently formulated, those proceedings do not include any pleaded claims against the Mirabaud parties in respect of the Aerium Scheme payments by Mr Ruimy to Mr Al Rajaan. Nor has any claim been brought in Switzerland against AFL/Mr Ruimy in respect of the Aerium Scheme. PIFSS has also made clear, in Mr Walsh's 20th witness statement, that the Aerium Scheme will be pursued in England against all the defendants to it (the estate of Mr Al Rajaan, Ms Al Wazzan, AFL and Mr Ruimy), and that any claim which might arise against the Mirabaud parties in respect of the Aerium Scheme payments will not be brought in Switzerland either. In its skeleton argument, PIFSS stated that it was also prepared to undertake not to pursue in Switzerland allegations concerning Mr Ruimy's payments to Mr Al Rajaan, unless those allegations are not permitted to proceed against AFL/Mr Ruimy in England. Accordingly, the Aerium Scheme payments will not be the subject of any proceedings against the Mirabaud parties in Switzerland, whereas they are already the subject of proceedings against Mr Al Rajaan's estate and Ms Al Wazzan in England.

107. Accordingly, since the Aerium Scheme forms no part of the claim against the Mirabaud parties in Switzerland – and will in fact be investigated in the context of the English proceedings against Mr Al Rajaan's estate and Ms Al Wazzan – the existence of the Swiss proceedings against the Mirabaud parties does not provide a reason, let alone a significant reason, for regarding Switzerland as clearly the more appropriate forum for the resolution of the present dispute. Since they are not in issue, it cannot realistically

be said that there is a risk of inconsistent findings as between the two sets of proceedings.

108. Mr Kramer submitted that the Swiss judge, in the context of an inquisitorial system, would or may want to investigate for himself the Aerium Scheme, even if PIFSS was advancing no claim in respect of it. There was, however, nothing in the evidence which clearly indicated that this was so. Mr Walsh's evidence was that the Aerium Scheme would not be a live issue in the Swiss proceedings.

109. As described above, Mr Kramer accepted in his written argument that if there were a stay of the present proceedings, there would indeed still be "a risk of inconsistent findings in relation to the Aerium Scheme because that is still pursued against D1 – 2 in England". He went on to submit, however, that material evidence would be provided in Swiss proceedings and likely then adopted in the English proceedings, and therefore the risk of inconsistent findings is reduced. I do not consider that this is the case. The court's decision in the proceedings against Mr Al Rajaan and Ms Al Wazzan in relation to the Aerium Scheme will depend upon the whole of the evidence adduced in the English proceedings. It is not clear what evidence will be adduced in Switzerland, and it is not possible to say that this evidence will in some way be adopted by the English court. Moreover, the Swiss proceedings are still at a very early stage: the "Payment Claim" document and expert reports were only served in late 2022. There was nothing in the evidence to suggest that they would reach a resolution, still less a resolution in relation to the Aerium Scheme, prior to the time of the trial scheduled in England in March 2025.

110. I do not think that matters are advanced, from AFL/Mr Ruimy's perspective, by the claims or possible claims between AFL/Mr Ruimy and the Mirabaud parties *inter se*. The current position is that the Mirabaud parties have begun proceedings for a declaration of non-liability. The evidence indicates that those proceedings will not progress substantively until the English proceedings are resolved. There is therefore no relevant risk of inconsistent judgments, because the English judgment will come before any progress is made in those proceedings. If AFL/Mr Ruimy have no liability, then the proceedings started by the Mirabaud parties will be academic. If PIFSS succeeds in establishing liability, then that will presumably be the premise of any Swiss judgment in contribution proceedings: there is nothing in the evidence to suggest that the Mirabaud parties would be permitted to relitigate the issue of whether AFL/Mr Ruimy have a liability to PIFSS.

111. In any event, it seems to me that the potential contribution proceedings are somewhat speculative. Such proceedings would involve a claim by a principal protagonist (here Mr Ruimy) who (on this hypothesis) had decided to pay and had paid a bribe. The claim would be against another party (Mirabaud) who had not received the bribe, but who may in some way have facilitated the payment which the protagonist had decided to make. It is far from obvious that a successful claim for contribution could be made by the protagonist in those circumstances, and indeed far from certain that any such claim will actually be advanced and pursued. The current position is that Mr Ruimy and AFL have not commenced any such proceedings in Switzerland. Indeed, they do not appear to have responded substantively to the Mirabaud parties' claim for a declaration of non-liability.

112. By contrast with the position in Switzerland, the claim made by PIFSS against AFL/Mr Ruimy in the present proceedings is clearly being made, and the question is whether Switzerland is clearly the more appropriate forum for the resolution of those proceedings – in circumstances where both the payor and payee of the payments can be before the English court, and where the English court will be determining the nature of the Aerium Scheme payments in a forthcoming trial against the payee. Against this background, I do not consider that the possible existence of contribution proceedings between the payor and an accessory (if indeed the payor were ever to assert wrongdoing on the part of any of the Mirabaud parties) is of any significant weight, whether considered alone or in conjunction with other factors.

(7) Swiss law restrictions on the use of evidence

113. Issues have arisen in the English proceedings in relation to Swiss banking secrecy. A small number of defendants, including the estate of Mr Al Rajaan, have raised arguments in this regard. They are to be considered at the next CMC. However AFL and Mr Ruimy have produced no evidential material, in the context of the present application, as to how any Swiss restrictions impact upon the claim against them. AFL and Mr Ruimy are not Swiss banks, and there is no evidence (for example) that Swiss banking secrecy will prevent or cause difficulties in their disclosing their own documents. There appears to be no reason why Mr Ruimy and AFL could not waive any banking secrecy, and this court could if necessary order a waiver: see *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114, 126 (judgment of Hoffmann J at first instance). Furthermore, as PIFSS submitted, the English court could require the disclosure of documents pursuant to the court's inherent powers to conduct proceedings in accordance with English procedural law, notwithstanding the provisions of foreign law (and notwithstanding a risk of prosecution in a foreign State): see *Bank Mellat v HM Treasury* [2019] EWCA Civ 449 at [63].

114. Even if some problem did exist, notwithstanding the court's powers, AFL/Mr Ruimy have not identified any problem which would not also eventuate in Switzerland. In any event, even if Swiss banking secrecy is of some relevance to the case against AFL/Mr Ruimy, I do not consider that it leads to the conclusion that Switzerland is clearly the more appropriate forum for the resolution of the claim against them. It is simply a point which the English court may have to consider, in due course, in the context of the claim being made, in circumstances where the approach to Swiss banking secrecy is to be considered by the court in any event in 2023.

(8) Swiss law

115. AFL/Mr Ruimy accept that this is, at best, a minor pointer towards the appropriate forum. There are substantial arguments that Swiss law is not applicable in the context of the present bribery claim, and that the relevant applicable law is Kuwait. In any event, Swiss law is pleaded by other parties in the overall PIFSS case, and therefore the English court will be receiving Swiss law evidence in any event.

(9) Conclusion

116. I therefore conclude that AFL/Mr Ruimy have failed to show that Switzerland is clearly the more appropriate forum. Indeed, I consider that England is (to say the least) a very appropriate forum in view, in particular, of the following matters discussed in more

detail above: (i) the English proceedings are well-advanced; (ii) the Aerium Scheme, and in particular the nature of the payments made under that scheme, are to be considered in the English proceedings in the claim against the estate of the recipient; and (iii) the other connections with England described above, and in particular Mr Ruimy's strong connections with this jurisdiction.

117. I reach those conclusions without needing to consider PIFSS' additional argument as to its legitimate juridical advantage, in continuing in England, by reason of potential limitation defences in Switzerland. There is some uncertainty as to exactly what, if any, limitation defence will be advanced, although AFL/Mr Ruimy's evidence indicates that this will be a point raised. If limitation is to be raised, then I agree with PIFSS that it is a relevant consideration that PIFSS' position may be worse if the present proceedings are stayed – at least if the claimant acted reasonably in commencing proceedings in England and did not act unreasonably in not commencing proceedings in the foreign country: see *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 para [88]. Here, I consider that PIFSS acted reasonably in suing an English company, and a long-time English resident, in England in the context of substantial proceedings which were already underway. I do not consider, however, that the loss of a juridical advantage is a significant factor in the present case because: (i) PIFSS does not need this point, in order to defeat the stay application; and (ii) the nature of the foreshadowed limitation defence, and for example whether it might equally apply in England, is unclear.

E: Other issues

118. In view of my conclusions as set out above, it is not necessary to address all of the parties' arguments concerning Article 34 of Brussels Recast. (The text of Article 34 is set out below). Mr Kramer accepted that if his *forum conveniens* arguments failed, Article 34 was of no assistance to the position of AFL/Mr Ruimy. This is because even if Article 34 were applicable, it would only give rise to a discretionary stay of the present proceedings. The stay would only be imposed if I were to be satisfied that a stay is "necessary for the proper administration of justice". Conversely, the proceedings could continue if "the continuation of the proceedings is required for the proper administration of justice". Mr Kramer, rightly, did not suggest that it would nevertheless be appropriate to stay under Article 34 in circumstances where I was not satisfied that Switzerland was clearly more appropriate than England.

119. Since I take the view that Switzerland is not clearly more appropriate, and indeed that England is a very appropriate forum for the reasons discussed above, I would not exercise any discretion to stay, even assuming that Brussels Recast applies to the 1st claim form. In view of this conclusion, it is not necessary to consider the parties' detailed arguments as to whether Article 34 is applicable at all, so as to give rise even to the possibility of the exercise of a discretion in AFL/Mr Ruimy's favour in relation to the 1st claim form.

120. I will, however, state my conclusion on the Article 34 issue, and briefly my reasons for reaching the conclusion that Article 34 is not applicable in the present case.

121. Article 34 provides as follows:

> "1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the

> time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:
>
> (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
>
> (b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
>
> (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.
>
> 2. The court of the Member State may continue the proceedings at any time if:
>
> (a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;
>
> (b) the proceedings in the court of the third State are themselves stayed or discontinued;
>
> (c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
>
> (d) the continuation of the proceedings is required for the proper administration of justice."

122. I agree with PIFSS that the only potentially relevant "proceedings", in the context of Article 34, are the proceedings commenced by the service of the commandements de payer. The other Swiss proceedings relied upon by AFL/Mr Ruimy (the Mirabaud v AFL/Ruimy proceedings for a declaration of non-liability, and the claim by PIFSS against the Mirabaud parties commenced in 2022) come too late. As AFL/Mr Ruimy's submissions acknowledged, those Swiss proceedings were only started after the English court became seised of the proceedings commenced by the 1st claim form.

123. Mr Kramer submitted, however, that Article 34 was not confined to the case where the proceedings in the third State (here Switzerland) were commenced prior to the courts of the Member State (here, pre-Brexit, the English court) becoming seised. I do not accept this argument. In my view, Article 34 is only capable of applying to proceedings in the court of a third State (here Switzerland) which were already in existence at the time when the court in the Member State (here England) became seised of the proceedings commenced by the 1st claim form.

124. This proposition has been treated as uncontroversial in the case-law, and was applied most recently by the Court of Appeal in *Municipio de Mariana and others v BHP Group (UK) Ltd* [2022] EWCA Civ 951, paras [237] – [241]. At [241 (2)], the Court of Appeal stated in terms that:

> "The action in the third state must be pending before the third state court when the member state court becomes seised of the action".

125. Furthermore, in reaching its decision, the Court of Appeal stated (at [282]) that certain liquidation proceedings "could not engage article 34 because they were not pending when the English court became seised of the current action".

126. A similar approach had previously been taken by Henshaw J in *Viegas v Cutrale* [2021] EWHC 2956 (Comm) at [149]. It is also the legal position as stated in *Dicey* para 12-008.

127. Given that there is a recent decision of the Court of Appeal which sets out and applies the relevant principles, I do not consider it appropriate for me to depart from that decision and to apply a different approach. In any event, I have not been persuaded that any different approach should in fact be taken, that the Court of Appeal (or Henshaw J) somehow fell into error because the relevant point was not taken, or that *Dicey* is wrong.

128. AFL/Mr Ruimy can say, however, that the commandments de payer were requested and issued by the Debt Collection Office prior to the English court becoming seised. However, I do not consider that the commandement de payer process meant that, for the purposes of Article 34, "an action is pending before a court of a third State at the time when a court in a Member State is seised of an action …" (emphasis supplied). In order for a court to be deemed to be seised, Article 32 of Brussels Recast requires that "the document instituting the proceedings or an equivalent document is lodged with the court".

129. I agree with PIFSS that the request and issue of the commandements de payer did not mean that proceedings were "pending before a court" of Switzerland. In short, this is because there was no document lodged with any court. Commandments de payer are issued by administrative authorities, not a court. I agree with the approach of David Donaldson QC, sitting as a Deputy High Court Judge, in *Mackew v Moore* [2012] EWHC 1287 (QB), in particular paragraph [31]. That case concerned the Lugano Convention, but I do not think that this makes a material difference to the analysis. In my view, a commandement de payer is at most a precursor to an action in court. In the present case, there was an objection by the recipient, with the result that court proceedings were then necessary if the requesting party wanted to take matters forward. This is what happened in the present case, when PIFSS did issue civil proceedings against the Mirabaud parties in 2022. But there were no relevant court proceedings issued by PIFSS in Switzerland prior to that time.

Conclusion

130. I therefore conclude that AFL/Mr Ruimy have failed to show that Switzerland is clearly or distinctly the more appropriate forum to hear the claims against those defendants. Accordingly, the English court is the appropriate forum to hear those claims, and I determine issue 1.1 (as set out in the July 2022 order) in favour of PIFSS.

131. I also conclude that the 1st claim should not be stayed on the basis of Article 34 of Brussels Recast, and I therefore also determine issue 1.2 in favour of PIFSS.