

THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

Claim No BVIHC (COM) 2023/0064

BETWEEN:

[1] NMH

[2] ATG

Claimants

and

[1] PWP

[2] NKT

Defendants

Appearances:

Mr. Ben Valentin KC, and with him, Mr. Andrew Trotter, instructed by Harney, Westwood & Riegels (BVI) LP, Ms. Claire Goldstein and Ms. Isobel McNaught, both of that firm, for the Claimants

Mr. Alex Hall Taylor KC, and with him, Mr. Dean Robson, both of Carey Olsen (BVI) LP, for the Second Defendant

The First Defendant did not appear and was not represented

2026: February 17;
March 5.

JUDGMENT

Introduction

- [1] **MITHANI J KC (Ag.):** In this claim (“the Claim” or “this Claim”), the Claimants are NMH and ATG. I will refer to them collectively or individually as the Claimants. The First Defendant is PWP, to whom I will refer either as “the First Defendant” or “PWP”. The Second Defendant is NKT, to whom I will refer either as “the Second Defendant” or “NKT”.
- [2] [The Claimants apply to strike out paragraphs 2, 6(e), and 34 of the Second Defendant’s Defence, insofar as those paragraphs advance what has been described in the hearing bundles and at the hearing of the application of the Claimants dated 8th July 2025 (“the Application” or “this Application”) as the Second Defendant’s “Iraqi Law Case” or “the Iraqi Law Defence”. As an alternative to the striking out of those paragraphs, the Claimants seek a dismissal of the Second Defendant’s Iraqi Law Case by way of summary judgment.
- [3] The relevant provisions of paragraphs 2, 6(e) and 34 of the Defence are in the following terms.
- [4] First paragraph 2 of the Defence:
- “In general terms the claim is a reverse engineered, hypothetical self-serving fiction seeking to establish by inference alone an alleged BVI trust (without there being any pleaded compliance with the necessities of trust creation, any trust deed or other supporting documentation) in relation to a previously unchallenged and properly documented Iraqi transaction entered into more than 15 years ago between two Iraqis, made in Iraq (a jurisdiction that does not recognise trusts), in relation to and over underlying Iraqi assets.... “
- [5] Then, paragraph 6 of the Defence:
- “As to paragraph 4 ... (e) ... It is denied that any BVI law governed trust has arisen in respect of the Shares whether by reason of the

matters or inferences alleged or otherwise. As a matter of Iraqi law, the trust concept is not recognised and would be unenforceable.”

[6] Finally, paragraph 34 of the Defence:

“... the existence of any such trust does not follow nor can or should it be inferred from the matters relied upon. As above, the Claimants fail to specify when such an alleged trust arose, what type of trust has arisen or to set out the necessary basis for the creation of a trust, and it is in any event denied, should it be contended, that such a trust would be governed by the law of the BVI.”

[7] The issue for this Court is whether it is legally open to the Second Defendant to contend that any alleged trust of shares in a company incorporated in the British Virgin Islands is governed by Iraqi Law, and that, because Iraqi law does not recognise the concept of a trust, no equitable interest in such shares can arise. The Application turns on the proper construction of the Trustee Act 1961 (“the Act”) and, in particular, the relationship between sections 80 and 83A.

[8] This Application does not require the Court to determine whether a trust exists. It requires the Court to determine whether Iraqi law is capable, as a matter of statutory construction, of governing the essential validity of an alleged trust of shares in a BVI company.

[9] Unless otherwise indicated or the context otherwise requires, the references below to: (a) section numbers on their own are to section numbers of the Act; and (b) paragraph numbers on their own are to paragraph numbers of the First Schedule to the Act.

Background

[10] The Claimants obtained an ICC arbitral award in excess of US\$1.7 billion against the First Defendant. The award has been recognised and entered as a judgment of this Court.

- [11] In the course of enforcing the award, the Claimants identified 436 shares in OS International Holding Ltd (“OS International”), a company incorporated in the BVI, registered in the name of the Second Defendant. I will refer to these shares as “the OS Shares”.
- [12] A provisional charging order was granted in favour of the Claimants over the OS Shares. The Claimants contend that the Second Defendant holds those shares on trust for the First Defendant and seek to make the order final.
- [13] The Second Defendant denies holding the OS Shares on trust for the First Defendant. In any event, he contends that if any trust exists, it is governed by Iraqi law, which does not recognise trusts.
- [14] It is common ground that this Application does not determine whether a trust exists. The issue is confined to whether the Iraqi Law Defence is legally sustainable.
- [15] Whether Iraqi law is capable of governing the alleged trust is a pure question of statutory construction. If the Iraqi Law Case is decided in favour of the Second Defendant, the Claimants’ case in respect of the OS Shares must fail. If it is decided against him, the Court must then determine at trial whether a trust exists on the evidence. There is no intermediate category of issue requiring trial.

Applicable principles

- [16] The principles governing a strike out and summary judgment are well-established.
- [17] They were recently considered by me in **Access Bank Plc v Orjiako and others**.¹ They do not require any detailed exposition. For the purposes of the Application, it is only necessary for me to set out the following principles.

¹ BVIHC (COM) 2023/0282 (delivered 1st October 2025).

[18] The Application is made within existing proceedings rather than in an originating claim. The ‘claim’ which Webster J directed by his judgment dated 31st October 2024 to be tried was whether the OS Shares were beneficially owned by the Claimants or by the Second Defendant. That issue did not arise in the Claim itself. In England and Wales, this might have prevented either a strike out or summary judgment being obtained by an applicant. The English authorities have long emphasised that the statutory power to strike out an interlocutory application made within existing proceedings is not available in that jurisdiction because the power to strike out extends only to claims by which processes are initiated or to pleadings within a claim: see, by way of example, **Port v Auger**.² However, in **Port v Auger**, Harman J held that the court had an inherent power to strike out an application that was vexatious and frivolous (in the sense of being wholly unfounded upon legally recognisable grievances).³

[19] The position in the BVI differs from that in England and Wales. ECSC CPR 11.15 allows an application to be made within an application made in an existing claim, to strike out or for summary judgment (or other relief) despite the fact that the application within which such an application is made is not a “claim”, properly speaking. i.e., a claim which is originating in nature: see **Welltech Group Ltd v Techmix Ltd**.⁴ I mention this purely to avoid any argument in the future that this Court did not have the power to grant the relief sought by the Claimants in the Application, this being a jurisdictional matter which it is appropriate for a court to raise even if it is not raised by a party.

[20] In the BVI – as in England and Wales – the power to strike out under ECSC CPR 26.3(1)(b) (i.e., on the basis that it does not disclose any reasonable ground for bringing or defending a claim) is much narrower than the power of the court to grant summary judgment. The power to strike out under the ECSC CPR is primarily restricted to whether a sufficient case for bringing (or

² [1994] 3 All ER 200.

³ [1994] 3 All ER 200 at 214b-f. The decision in *Port v Auger* was decided under the previous Order 18 r. 19 of the RSC of England and Wales. However, it has also been held to apply under the current English and Welsh CPR: see *Re John Holmes, Sadler v Holmes* (unreported 20th February 2006), Ch.D, Mr Registrar Jaques.

⁴ Claim No BVIHC (COM) 2025/0209.

defending) a claim is demonstrated on the face of a statement of case, or, in this case, the Application. As Lord Wilson JSC (with whom Baroness Hale, DPSC and Lords Clarke, Lord Hughes and Lord Hodge JJSC agreed) observed in **Wyatt v Vince (Nos. 1 and 2)**:⁵

“It is indeed common practice in civil proceedings to join an application to strike out under rule 3.4 with an application for summary judgment ... But in *Swain v Hillman*, Lord Woolf MR ... observed that the power under rule 24.2 ... was wider than the power under rule 3.4 and that under the latter, unlike the former, the general focus of the court was only on the statement of case which was alleged to disclose no reasonable grounds for bringing the claim. Or, as my Lady, then Hale J, crisply put it three months later, ‘the essence of a strike out is that one does not look at the evidence on the claim’: *Bridgeman v McAlpine-Brown*.”⁶

[21] The approach of the BVI courts to granting summary judgment is similar to that of the courts of England and Wales. Webster JA set out the main principles in **Nam Tai Property Inc v West Ridge Investment Company Ltd**,⁷ in the following terms:

- “4.1. Does the Defence and Counterclaim have a ‘realistic’ as opposed to a ‘fanciful’ prospect of success?
- 4.2. A claim is ‘fanciful’ if it is entirely without substance. A ‘realistic’ prospect of success carries some degree of conviction beyond being merely arguable.
- 4.3. The object is to winnow out cases that are not fit for trial. The Court must avoid conducting a ‘mini-trial’ without disclosure and oral evidence. The Court should avoid being drawn into an attempt to resolve conflicts of fact. The Court should bear in mind what evidence can reasonably be expected to be available at trial.
- 4.4. The Court should be alive to the warning in **Easyair Ltd (t/a Openair) v Opal Telecom Ltd** that ‘[i]f it is possible to show by evidence that although material... is not currently before the Court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment ...’
- 4.5. The Court must assume disputed questions of fact in favour of the party against whom the application is made ... The

⁵ [2015] UKSC 14, [2015] 2 All E.R. 755, [2015] 1 W.L.R. 1228, at [24].

⁶ 19th January 2000, unreported; [2000] CA Transcript No 39, at p 4.

⁷ BVIHMAP2022/0046 (delivered 27th July 2023), at [20].

conclusion that a defence has no real prospect of success ought only to be reached in the clearest of cases, 'where it is clear that a [statement of case] on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court.' This is a high bar."

[22] For the sake of completeness, I should note that Webster JA went on to say at [21]:

"I will follow this approach and would only add the following qualification from the judgment of Lewison J in **Easyair Ltd (t/a Openair) v Opal Telecom Ltd** (following his reference to the court not conducting a mini trial at this stage) ... This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents ... This qualification is important because it is not every statement that a party, against whom summary judgment is sought, makes in its pleading or evidence that the court should assume in favour of that party. The court must carry out its own analysis to see if there is substance in the statement before assuming it in favour of the party making the statement."

[23] So far as this paragraph of Webster JA's judgment is concerned, it has no practical application in the present case. The question for the Court on this Application is whether the Iraqi Law Defence is sustainable as a matter of law. If it is not, then the Second Defendant should not be entitled to rely upon it. As I have already indicated, I do not agree with the parties (if that is what was suggested in their oral submissions) that there is any residual issue for this Court to decide in the Iraqi Law Case once that issue is determined by me. In other words, where, as here, the issue is one of statutory construction and the material facts are undisputed, it is appropriate for the Court to determine the matter summarily.

[24] There is authority for the proposition that a strike out or summary judgment should not be granted where the argument between the parties involves a substantial point of law which does not admit of a plain and obvious answer, or the law is in a state of development, or where the strength of the case may not be clear because it has not been thoroughly investigated: see, by way of

examples, **Citco Global Custody NV v Y2K Finance Inc**⁸ and **Didier v Royal Caribbean Cruises Ltd.**⁹ However, this is not such a case. No part of the Iraqi Law Defence depends on the Court making factual findings about that issue. This Court is, therefore, just as well-equipped to make the decision on a summary basis if it has provided the parties with a full opportunity to make submissions on that issue. The Court has done so in this case. What is more, the parties have been represented by two eminent silks who have drawn every likely construction of the Act to the Court's attention.

[25] In my judgment, therefore, the Court must be able to make its determination on the Iraqi Law Defence without hearing evidence (a premise accepted, as I understand it, by both parties) and without receiving further written or oral submissions from the parties, not already advanced to it. There is also some authority for the premise that it is not appropriate to determine a claim or issue summarily in an area of developing jurisprudence, but that principle is based on the argument that decisions as to novel points of law should be based on actual findings of fact: see, for example, **Briefline Assets Ltd v Falin**.¹⁰ I cannot see that the Claim involves any new areas of law or any developing jurisprudence, based on any disputed facts. In any event, so far as it is contended that complex points of law, *simpliciter*, should be left to trial, I consider that this is to state the contention too broadly. In my view, the correct approach is for the Court not to shrink from its responsibility (whether under the overriding objective or otherwise) to give judgment on an issue where the position of the parties is unlikely to be improved either by any factual evidence or further legal submissions. That conclusion follows from the plain wording of the relevant provisions of the ECSC CPR relating to striking out and summary judgment. In the course of argument, I drew the attention of counsel to the former E&W RSC Order 14A, which stated, *inter alia*, that a civil court could “determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appear[ed] to the Court that (a) such question [were] suitable for determination without a full trial of the action, and (b) such determination [would] finally determine (subject to

⁸ BVIHC VAP 2008/0022 (delivered 19th October 2009).

⁹ SLUHC VAP 2014/0024 (delivered 6th June 2016), at [25], [37], per Pereira CJ.

¹⁰ BVI HC (COM) 2020/0223 (delivered 15th February 2022), at [26], per Jack J.

any possible appeal) the entire cause or matter or any claim or issue therein”, provided the parties had an opportunity of being heard on the question. Although this provision is not replicated in the E&W CPR (or included in the ECSC CPR), the summary judgment provisions of the E&W CPR and ECSC CPR capture much of what Order 14A was used for in practice – i.e., disposing of cases or issues where a pure point of law was determinative.

The Statutory Scheme Under the Act

[26] Section 80 of the Act sets out the general rule for determining the proper law of a trust. Section 83A establishes a specific regime in respect of defined categories of property. Section 83A(8) provides that the formal and essential validity of a disposition of intangible movable property shall be determined in accordance with the First Schedule, which provides, *inter alia*, that, in the case of shares in a body corporate, the applicable law is the law of the state of incorporation.

[27] The material terms of sections 80 and 83A state as follows:

- “80 (1) The proper law of a trust or a particular aspect of a trust is:
- (a) the law of the jurisdiction expressly designated by the terms of the trust as being the law that is to govern the trust or the particular aspect of the trust, as the case may be;
 - (b) if the terms of the trust do not expressly designate the governing law for the trust or the particular aspect of the trust, then the law of the jurisdiction that may reasonably be inferred from the terms of the trust as being the law that is to govern the trust or the particular aspect of the trust, as the case may be; or
 - (c) if the terms of the trust do not expressly designate the governing law for the trust or the particular aspect of the trust and no reasonable inference may be drawn from the terms of the trust as to the governing law, then the law of the jurisdiction with which the

trust at the time it was created had the closest connection.

- (2) For the purposes of paragraph (c) of subsection (1) in ascertaining the law with which a trust is most closely connected at the time it was created reference shall be made in particular to:
- (a) the place of administration of the trust designated by the settlor;
 - (b) the situs of the assets of the trust;
 - (c) the place of residence or business of the trustee; and
 - (d) the objects of the trust and the places where they are to be fulfilled.

- 83A (8) The formal and essential validity of a disposition, not being a testamentary disposition, of intangible movable property, and the capacity to make the disposition, shall be determined in accordance with the First Schedule, or, in the case of intangible movable property not provided for in the First Schedule, in accordance with the law under which the property came into existence.
- (9) The capacity to subject property to a trust, not being a testamentary trust, as distinct from the capacity to dispose of that property, shall be determined in accordance with the law governing the essential validity of the trust.
- (10) Where a person declares a trust of his own property, there shall be no requirement for compliance with the rules on formal or essential validity or capacity applicable to a disposition of that property or of any interest in it.
- (11) Where, under subsections (6) to (10) and the First Schedule, an issue falls to be determined by the law of the Territory, the choice of law rules of the Territory shall designate the internal law of the Territory to determine the issue.
- (12) Subject to subsections (6) to (11) and the First Schedule, all questions arising in regard to a trust, whether the administration is conducted in the Virgin Islands or elsewhere, including all questions regarding the validity, construction, effect or administration of the trust and, in particular, but without limitation –

- (a) questions relating to any of the following matters, being matters specified in Article 8 of the Hague Trusts Convention: (i) the appointment, resignation and removal of the office-holders, the capacity to act of the persons internal to the trust relationship and the devolution of the office of the office-holders under the trust; (ii) the rights and duties of the persons internal to the trust relationship among themselves; (iii) the right of office-holders to delegate in whole or in part the discharge of their duties or the exercise of their powers; (iv) the powers of the office-holders to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets; (v) the powers of investment of the office-holders; (vi) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust; (vii) the relationships between the office-holders and the beneficiaries; including the personal liability of any of the office-holders to the beneficiaries or to other office-holders or otherwise in relation to the trust; (viii) the variation or termination of the trust; (ix) the distribution of trust assets; and (x) the duty of the office-holders to account for their administration or otherwise in relation to their duties under the terms of the trust, and
- (b) to the extent that they do not fall under paragraph (a), questions as to (i) the fiduciary or non-fiduciary powers, obligations or duties of the office-holders or to the liabilities or rights of the office-holders; (ii) the existence and extent of powers conferred or retained, including powers to vary or revoke the trust and powers of appointment, and questions as to the validity of any exercise of any such power,

are to be determined by the proper law of the trust or, where there are different proper laws for different aspects of the trust, the proper law applicable to the area in which the question falls; and

- (c) to the extent that Virgin Islands law applies to the trust, or to the issue in question, no other rule of the law of any other jurisdiction shall be applicable to such questions.

- (13) Subject to any express provision to the contrary in the trust or disposition, no Virgin Islands trust, and no disposition of property to be held upon the trusts of such a trust, is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any persons internal to the trust relationship in relation to the trust or disposition to be questioned, nor is any person internal to the trust relationship or any other person to be subjected to any liability or deprived of any right, claim or interest by reason that –
- (a) the law of any foreign jurisdiction prohibits or does not recognise the concept of a trust; or
 - (b) the Virgin Islands trust or the disposition (i) avoids or defeats any right, claim or interest conferred by foreign law upon any person by reason of a personal relationship to the settlor or any beneficiary or by way of heirship rights, or (ii) contravenes any rule of foreign law or any foreign judicial or administrative order or arbitration order or action intended to recognise, protect, enforce or give effect to such a right, claim or interest.

...

- (16) Subject to subsection (17), the law designated as applicable to succession by virtue of the Territory's choice of law rules shall apply to a Virgin Islands trust, not being a testamentary trust, only to the extent that it does not contain rules conferring any right, claim or interest upon any person by reason of a personal relationship to the settlor.
- (17) Subsection (16) shall not apply where the law so designated is that of the Territory.
- (18) In the case of a conflict between any of the provisions of subsections (13) to (17) and any of the provisions of subsections (6) to (11) and the First Schedule, the provisions of subsections (13) to (17) shall prevail.
- (19) To the extent that it is inconsistent with subsections (13) to (18), a foreign judgment shall not be recognised or enforced or give rise to any estoppel, and both its recognition and its enforcement shall be regarded as contrary to the public policy of the Territory and, for the avoidance of doubt, a judgment of a foreign court varying a Virgin Islands trust without

the consent of the adult sui juris beneficiaries shall be considered inconsistent within the meaning of this subsection.”

[28] The material provisions of the First Schedule are in the following terms:

“FIRST SCHEDULE

(Section 83A)

No.	Type of Intangible Property	Law to Determine Questions of Essential and Formal Validity and Capacity
1.	Shares in a body corporate.	The law of the State of incorporation (and in the case of a corporate body whose place of incorporation has changed, the law of the State of incorporation at the time of the disposition).
2.	Rights of all descriptions arising from a contract (not being rights attaching to shares in a body corporate). This category includes, in particular— (a) rights to subsisting contractual debts; (b) rights to payments under a contract that might fall due in the future; (c) rights, subsisting or future, under policies of insurance or assurance.	The law governing the essential validity of the contract.
3.	Rights to non-contractual debts.	The law under which the debt was created.
4.	Interests in trusts and other equitable interests.	(A) As regards disposability: the law governing the essential validity of the trust or interest. (B) As regards the disposition itself: the law of

		the State in which the equitable interest is situated.
5.	Patents, trademarks, designs, and similar rights required to be deposited or registered.	The law of the State in which the deposit or registration has been applied for, or has taken place, or is under the terms of an international convention deemed to have taken place.
6.	Intellectual property not falling within item 5.	The law under which the property came into existence.
7.	Claims in tort.	The law of the State in which the tort occurred.”

Issue on the Application

[29] This is not a trial about whether a trust exists. Instead, the application concerns whether parts of the Second Defendant’s Defence — specifically his “Iraqi Law Case” — should be struck out or summarily dismissed.

[30] The Second Defendant asserts that any trust of the OS Shares would be governed by Iraqi ILaw. As Iraqi law does not recognise the concept of a trust, it follows that no trust can arise. Consequently, no beneficial interest capable of enforcement exists.

[31] The Court must decide on this Application:

- (a) whether section 83A automatically requires BVI law to govern any alleged trust of BVI shares;
- (b) whether the Iraqi Law Defence is legally untenable; and
- (c) whether the issue is suitable for determination on strike out or summary judgment principles.

[32] The Claimants rely centrally on section 83A(8) of the Act, a so-called “firewall” provision. In summary, they say that: (a) section 83A(8) provides that the formal and essential validity of a disposition of shares in a BVI company is governed by BVI law; (b) the creation of a trust involves a “disposition” (i.e.,

the creation of an equitable interest); (c) therefore, the validity of any trust of OS Shares must be governed by BVI law; (d) section 83A(13) expressly prevents a BVI trust from being invalidated merely because foreign law does not recognise trusts; (e) accordingly, Iraqi law is irrelevant; (f) the Iraqi Law Defence is legally hopeless and should be struck out.

[33] The Claimants emphasise that: (a) the shares are in a BVI company; (b) section 83A is designed to ensure certainty for trusts of BVI property; (c) allowing Iraqi law evidence would cause unnecessary cost and complexity. They characterise the issue as a pure question of law suitable for summary disposal.

[34] The Second Defendant opposes the Application on several grounds.

[35] He argues that the position advanced by the Claimants proceeds on a misinterpretation of section 83A. He states that the Claimants conflate the law governing the disposition of property into a trust with the law governing whether a trust exists and its proper law. He asserts that section 83A(8) concerns the validity of a disposition of BVI shares. It does not determine whether a trust exists. Section 83A(12) makes clear that questions of validity and administration of a trust are governed by the proper law of the trust. The proper law is determined under section 80. Accordingly, section 83A does not automatically impose BVI law on every alleged trust involving BVI shares.

[36] Under section 80, the proper law of a trust is: (a) the expressly designated law; (b) the law reasonably inferred from the terms of the trust; or (c) failing that, the law with the closest connection at the time of the “creation” of the trust. In the present case: (i) there is no trust deed; (ii) there are no express terms of the trust; and (iii) the alleged trusts arise purely by inference. Thus, section 80(1)(c) applies, i.e., the existence or otherwise of the alleged trust is determined by reference to the law of closest connection.

[37] The argument of the Second Defendant continues that Iraqi law is plainly a realistic candidate because: (a) the parties are in Iraq and are Iraqi nationals; (b) the key commercial transaction (sale of 50% of Oilserv Iraq, the

circumstances of which are summarised, *passim*, in the Second Defendant's skeleton argument and do not require any treatment in this Judgment) occurred in Iraq; (c) Oilserv Iraq is Iraqi; (d) the restructuring approvals occurred under Iraqi law; and (e) the underlying business assets are in Iraq.

[38] The Second Defendant states that whether Iraqi or BVI law has the closest connection is a mixed question of fact and law unsuitable for summary determination.

[39] The Second Defendant's principal defence is, of course, that no trust of any type existed between him and the First Defendant. He maintains that the Claimants' case is inconsistent with the alleged trust having said by the Claimants to exist over companies that, at the time, held no assets and that the timing of the matters which are said to support the existence of a trust is inconsistent with the Claimants' narrative.

[40] The Second Defendant also asserts that the Claimants' pleaded case is unclear and inadequately particularised and has applied to strike out their case on that basis. That application is not yet listed. It is therefore not relevant to the determination of the Application. Further, and in any event, the Second Defendant maintains that even if BVI law is ultimately found to govern the trust question, Iraqi law may remain relevant to whether it was intended to create a trust and to whether businessmen operating in Iraq intended to create a legal structure not recognised by Iraqi law. Accordingly, he maintains that the evidence on Iraqi law may remain material at trial.

[41] I respectfully disagree with the Second Defendant for the reasons set out in this Judgment.

[42] I do not accept that Iraqi Law would remain relevant in such a case. The effect of section 83A is clear. If it applies, any issues relating to the application of Iraqi law on the creation or existence would be struck down in favour of the application of BVI law.

[43] As already noted, the Court does not have to decide, on this Application, whether a trust exists. Rather, it must determine whether:

- (a) section 83A automatically mandates BVI law for any alleged trust of BVI shares;
- (b) the Iraqi Law Defence has “no real prospect of success” and/or discloses no reasonable grounds for defending that part of the Claimants’ case against the Second Defendant; and
- (c) the issue involves contested factual and mixed legal questions unsuitable for summary determination.

[44] The dispute between the parties on this Application crystallises into two competing conceptions of section 83A: the Claimants maintain that section 83A locks the trusts of BVI shares to BVI law, rendering foreign non-recognition irrelevant. In contrast, the Second Defendant states that section 83A governs dispositions of property, not the antecedent question of whether a trust exists or what its proper law is. That question falls to be determined under section 80 and requires a closest-connection analysis.

[45] I accept that the Application presents a focused but important conflict-of-laws question:

- (a) Does the BVI statutory “firewall” conclusively determine the governing law of any alleged trust of BVI shares?

Or

- (b) must the proper law first be determined under section 80, potentially leading to the application of Iraqi Law?

[46] The Claimants submit that section 83A did not emerge in a vacuum. Its introduction was accompanied by a presentation to the Legislative Council of the British Virgin Islands in 2003, which identified the conflict of laws provisions as a matter of particular significance, observing that, given the BVI's position as a leading international financial centre, such rules were of considerable importance since BVI trusts invariably have connections with

more than one jurisdiction. The provision was designed by Professor Jonathan Harris (then of Birmingham University), also a contributing editor to **Dicey, Morris and Collins on the Conflict of Laws**,¹¹ the leading UK work on Conflict of Laws, with a view to achieving international acceptance and placing the BVI ahead of other jurisdictions in the conflict of laws sphere. Critically, section 83A came into force on the same day as the Virgin Islands Special Trust Act (the "VISTA Act"), and the two instruments are properly understood as complementary components of a coherent legislative scheme. That juxtaposition is itself instructive as to construction: the legislature made a deliberate choice to anchor certain trusts – specifically those holding BVI-based trust property – to BVI law, and that choice was necessary not only for the purposes of section 83A itself but to ensure the effective operation of the wider statutory framework introduced by the VISTA Act.

- [47] The Court must decide whether the Iraqi Law Defence is legally untenable and suitable for immediate dismissal, or whether it raises a realistic, triable issue that must proceed to trial alongside the factual dispute as to the existence of any trust. The issue is a short but important one. The Claimants allege that the Second Defendant holds shares in OS International, a BVI company, on trust for the judgment debtor, i.e., the First Defendant. The Second Defendant contends that any such trust would be governed by Iraqi law, which (he says) does not recognise the concept of a trust, and therefore no equitable interest can arise.

Analysis

- [48] It is common ground that OS International is incorporated in the BVI.
- [49] The Claimants contend that the Second Defendant's Iraqi Law Defence is untenable in the light of section 83A of the Act. That provision sets out a statutory "firewall" designed to ensure that certain trusts connected with the BVI are governed by BVI law and are not undermined by foreign law.

¹¹ Dicey, Morris and Collins on the Conflict of Laws, 16th Edition, 2022, Eds: Lord Collins of Mapesbury, Professor Jonathan Harris *et al.*

[50] In more detail, the Claimants' argument boils down to the following few points.

[51] Section 83A(8) provides that the formal and essential validity of a disposition of intangible movable property is to be determined in accordance with the First Schedule.

[52] The First Schedule specifies that, for shares in a body corporate, questions of essential and formal validity are governed by the law of the place of incorporation. OS International is incorporated in the BVI. Accordingly, the validity of any disposition of its shares – including the creation of a beneficial interest by way of trust – is governed by BVI law.

[53] The central issue raised by the Iraqi Law Defence is whether the existence or validity of the alleged trust of the OS Shares is governed by Iraqi law or by BVI law.

[54] In this context, it is material to note the explanation provided in **Lewin on Trusts, 20th Edition, 2023, Eds: Lynton Tucker *et al*, Sweet and Maxwell ("Lewin on Trusts")**, at 12-173 (disregarding the footnotes in that paragraph):

"It is a primary purpose of firewall legislation to ensure that challenges to the validity of a trust are governed in the local court by the local law. The use of the term 'trust' involves some circularity: an invalid trust is not a trust at all but the term cannot be confined to a trust which is valid by the law which would apply under the choice-of-law rules of the local court in the absence of a firewall, since the firewall would be to that extent nugatory. The term must extend to a purported trust. Similarly, the dispositions into trust (as distinct from the creation of a trust) which are protected by a firewall are described as a 'disposition of property upon the trusts thereof' or a 'disposition of property to a trust or a 'disposition of property' to or upon such a trust'. The use of the term 'disposition' involves the same circularity and the term must extend to a purported disposition. The same applies to other matters, such as the exercise of powers, the validity of which is required to be governed by the local law."

[55] **Lewin on Trusts** further states, at 12-183 (disregarding the footnotes in that paragraph):

"Where the firewall applies, that is, where the trust is governed by the local law and the question is one of those required to be determined

by that law, the effect is not necessarily to validate the trust or any other disposition or act which may be challenged but only to apply the local law to that question. Some of those questions, such as the validity of the exercise of a power conferred by the trust, would be governed by the proper law of the trust even if there were no firewall. The Hague Convention on the Law Applicable to Trusts and on their Recognition, which applies both in England and in a number of offshore jurisdictions, refers many such questions to the proper law; and even in jurisdictions to which the Convention does not extend, the common-law rules, which will usually be adopted, are similar. But firewall legislation requires the local law to determine other questions, such as the validity of the trust or the settlor's capacity, which would, or might well, be 'preliminary issues' for the purposes of the Convention, falling outside its provisions and which the common-law rules would not refer to the proper law. In those cases, the firewall provisions will make a significant difference."

- [56] Those passages directly answer the suggestion that section 83A presupposes an already valid trust. The statutory language must extend to a purported trust and a purported disposition; otherwise, the firewall protection would be deprived of practical effect.
- [57] The Second Defendant submits that section 80 of the Act governs the proper law of the alleged trust and that, applying section 80(1)(c), Iraq is the system of law with which the trust has its closest connection.
- [58] Section 83A(12) provides that, subject to subsections (6) to (11) and the First Schedule, questions concerning validity, construction, effect and administration are governed by the proper law of the trust.
- [59] The Claimants submit that section 83A(8) applies and that the essential validity of any disposition of the OS Shares is governed by BVI law pursuant to paragraph 1 of the First Schedule.
- [60] The resolution of this issue turns on the proper construction of section 83A and its relationship with section 80.
- [61] Section 83A(8) provides that the formal and essential validity of a disposition of intangible movable property shall be determined in accordance with the First Schedule. Paragraph 1 of the First Schedule provides that, in the case of

shares in a body corporate, the applicable law is the law of the state of incorporation.

[62] OS International is incorporated in the British Virgin Islands. It follows, on the face of the statutory language, that the essential validity of any disposition of the OS Shares is governed by BVI law. The Second Defendant contends, however, that section 83A(8) addresses only the validity of a transfer or disposition and not the existence of a trust. In this regard, reliance is placed upon the distinction drawn in paragraph 12-010 of **Lewin on Trusts** between the act by which property is transferred and the trust relationship itself.

[63] That paragraph of **Lewin on Trusts** states (disregarding the footnotes in that paragraph):

“Article 4 requires distinguishing between the preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee and issues concerning the validity of the trust, which by article 8 are referred to the proper law. Questions of validity are therefore not all within or all outside the Convention; some are preliminary issues, some are not, and drawing the distinction is not always easy. The metaphor usually employed is that of rocket-launcher and rocket: the trust is the rocket, which has to be launched by a launcher in the form of a will, a gift or some other act. Questions as to the effectiveness of the launcher are the preliminary issues. “The essential distinction to be drawn is between those rules which are applicable to any disposition of property and those which specifically affect the ability to create a trust of property.” That distinction is now established by decision and in consequence it is perfectly possible to have a trust of assets of which the general alienability is governed by the law of a jurisdiction which does not recognise trusts.”

[64] The definition of “disposition” in section 83A(1) includes any transaction by which an interest in property is created or extinguished. The creation of an equitable proprietary interest in shares, whether by express declaration, resulting trust, or constructive trust, constitutes the creation of an interest in property.

[65] I accept that, as a matter of orthodox private international law analysis, a distinction may be drawn between questions concerning the validity of a

transfer of property and questions concerning the existence and proper law of a trust. However, section 83A is a statutory modification of ordinary conflict-of-laws principles.

[66] The “rocket-launcher and rocket” metaphor illustrates the distinction drawn under the Hague Convention between preliminary issues and trust validity. Section 83A, however, is a domestic statutory intervention which alters the ordinary common law analysis. The question for this Court is not how the matter would be characterised under the Convention absent statute, but how the Act directs the Court to determine the essential validity of the creation of an equitable interest in BVI shares.

[67] It follows that an allegation that the OS Shares are held on resulting or constructive trust necessarily asserts that such an equitable interest has arisen. That proprietary consequence falls squarely within the statutory concept of “disposition”.

[68] The language of section 83A(8), therefore, extends to the creation of equitable interests relied upon by the Claimants. The opening words of section 83A(12) – ‘subject to’ – are of central importance. Subsection (8) falls within subsections (6) to (11). The asset-based rule in subsection (8), therefore, takes priority over the general proper law rule in subsection (12). Section 83A(12) cannot be construed so as to displace subsection (8).

[69] The Second Defendant submits that section 83A applies only where BVI law is already the proper law of the trust under section 80.

[70] I reject that submission.

[71] Section 83A(8) does not refer to the trust's proper law. It identifies governing law by reference to the nature of the property. If subsection (8) were confined to cases already governed by BVI law under section 80, it would add nothing of substance to the statutory scheme and would be largely redundant. The deliberate drafting of subsection (12) confirms that subsection (8) operates independently of section 80. Section 83A, therefore, modifies the ordinary

operation of section 80 in defined circumstances. A construction which confines subsection (8) to cases where BVI law is already the proper law would render the subsection largely otiose. Firewall legislation exists precisely to address cross-border cases in which foreign systems might otherwise apply.

[72] This conclusion is reinforced by section 83A(11), which provides that where an issue falls to be determined by the law of the Territory under subsections (6) to (10) and the First Schedule, the choice-of-law rules of the Territory shall designate the internal law of the Territory to determine the issue. The subsection makes clear that once BVI law is selected under section 83A, there is no further recourse to external connecting factors or to the general proper law analysis under section 80.

[73] Section 83A establishes a structured hierarchy. The essential validity of a disposition of defined categories of intangible movable property is determined first by subsection (8) and the First Schedule. Subsection (11) then directs that the internal law of the Territory applies. Only subject to subsections (6) to (11) does subsection (12) refer questions of validity and administration to the proper law of the trust. That structure leaves no room for section 80 to override the asset-based rule prescribed by section 83A(8).

[74] The Second Defendant also submits that difficulties arise in the case of a trust holding mixed assets, potentially leading to competing firewalls.

[75] I do not accept that submission.

[76] The First Schedule is structured on an asset-by-asset basis. Different categories of property attract different governing laws for questions of essential validity. That is entirely consistent with orthodox principles of private international law. There is no requirement under private international law that a single system of law govern every proprietary aspect of every asset comprised within a trust. It is inherent in private international law that proprietary questions are frequently asset-specific.

- [77] Section 83A(13)(a) provides that no Virgin Islands trust and no disposition to such a trust is void or defective by reason that foreign law does not recognise the concept of a trust. Section 83A(18) states that, in the event of conflict between subsections (13) to (17) and subsections (6) to (11) and the First Schedule, the former shall prevail. This underscores the strength of the statutory policy: foreign non-recognition or heirship doctrines cannot override the statutory allocation of governing law for the trust's essential validity. The Iraqi Law Defence is premised upon foreign non-recognition of trusts. If the essential validity of the OS Shares is governed by BVI law, foreign non-recognition is irrelevant. Section 80 applies only where no other statutory provision determines governing law. Here, section 83A(8) does so. Section 80 remains relevant to questions of administration, construction and internal governance once a trust relationship is established. It does not govern the threshold question of essential validity of a disposition of BVI shares where subsection (8) applies.
- [78] The connecting factors relied upon by the Second Defendant may be relevant at trial to factual questions concerning intention or beneficial ownership. However, they are not relevant to the statutory determination of the essential validity of dispositions of BVI shares.
- [79] For these reasons, the Iraqi Law Defence discloses no reasonable ground for defending the claim insofar as it asserts that Iraqi law governs the existence or validity of the alleged trust of the OS Shares. In other words, it has no real prospect of success. Nor – even applying the narrow strike-out test – can the Iraqi Law Defence constitute a proper basis for defending the Claim insofar as it concerns the alleged trust of the OS Shares.
- [80] In short, section 83A(13)(a) confirms that foreign non-recognition of trusts cannot invalidate a Virgin Islands trust. Accordingly, whether Iraqi law recognises trusts is irrelevant to the validity of an alleged equitable interest in BVI shares. Essential validity is determined separately for each category of property. The existence of other assets in a trust does not affect the statutory rule applicable to shares in a BVI company.

[81] On behalf of the Second Defendant, Mr Alex Hall Taylor KC, advances several points of real force. Chief among them is the contention that, taken to its logical conclusion, the argument advanced by Mr Ben Valentin KC, on behalf of the Claimants, would produce the result that any trust, wherever situated in the world, would be subject to the BVI firewall provisions if its assets happened to include shares in a BVI company, however peripheral those shares might be to the trust's overall composition. I recognise the force of that concern. However, it does not arise on the facts of this case and, therefore, does not require determination. The OS Shares are the sole property alleged to be held on trust. This Court is not required, in the present case, to determine how section 83A would operate in a complex, multi-asset global trust in which BVI shares were merely incidental. It is sufficient to decide that where the alleged trust property consists of shares in a BVI company, section 83A governs the essential validity of their disposition.

[82] The position may be stated shortly: the Iraqi Law Defence is premised on the proposition that Iraqi law governs the existence or validity of an alleged trust of BVI shares. That proposition is inconsistent with section 83A(8) and the First Schedule. On that issue, those paragraphs of the Defence have no real prospect of success and disclose no reasonable ground for defending the claim.

Conclusion

[83] For the reasons given above, I conclude as follows:

- (a) Section 83A governs the essential validity of the alleged creation of an equitable interest in the OS Shares.
- (b) BVI law applies to determine whether such an equitable interest has arisen.
- (c) Iraqi law is irrelevant to that validity question.
- (d) The Iraqi Law Case advanced in paragraphs 2, 6(e), and 34 of the Defence has no real prospect of success.

[84] Paragraphs 2, 6(e), and 34 of the Second Defendant's Defence, insofar as they advance the Iraqi Law Case, are struck out. Accordingly, the Claimants' application for strike out and summary judgment in respect of the Iraqi Law Case is upheld.

[85] I will hear counsel on costs and consequential matters.

[86] I am grateful to counsel for the clarity of their written and oral submissions and for their assistance throughout the hearing of this Application.

Abbas Mithani KC
High Court Judge (Ag)

By the Court

Registrar