

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 2023/0003
(CLAIM NO. BVIHC (COM) 2022/0119)

BETWEEN:

[1] RUSSELL CRUMPLER
[2] CHRISTOPHER FARMER
(AS JOINT LIQUIDATORS OF THREE ARROWS CAPITAL LTD (IN LIQUIDATION))
Respondents/Applicants

and

[1] CHEONG JUN YOONG
Applicant/ (First Respondent)

[2] THREE ARROWS CAPITAL LTD (IN LIQUIDATION)
Second Respondent

IN CHAMBERS

Appearances: Matthew Hardwick KC, Richard Evans, Charles Goldblatt for the Applicant
Richard Fisher KC, Grant Carroll and Daniel Kessler for the Respondents

2023: 18th and 19th July
17th November – Further Written Submissions,
5th, 12th December – Decision and Judgment

JUDGMENT

Mangatal J:

[1] On 18 and 19 July 2023 I heard the application dated 3 February 2023 made on behalf of Cheong Jun Yoong (“**Mr. Cheong**”) by which he seeks to set aside the 2 December 2022 Order of Small-

Davis KC (Ag) (**“the Service Out Order”**). By that Order, Russell Crumpler, and Christopher Farmer, the Joint Liquidators of Three Arrows Capital Ltd (In Liquidation) (together **“the Liquidators”**) were granted leave to serve their 4 November 2022 application (**“the BVI Claim”**) pursuant to sections 274A and 186(5) of **the Insolvency Act 2003** (**“the Act”**) on Mr. Cheong out of the jurisdiction.

[2] This hearing took place over two days, with a number of hearing Bundles, and a Joint Authorities Bundle containing 77 authorities. In August there was further correspondence with the Court about a Ruling in the Singapore Courts (**“the Singapore Ruling”**), and on November 17, 2023, there were further submissions made to the Court in relation to that. I will come to deal with the submissions and the Singapore Ruling later in this Judgment.

[3] By the Set Aside Application, Mr. Cheong seeks various forms of relief as follows:

- (1) A declaration that this Court has no jurisdiction over Mr. Cheong in respect of the Substantive Dispute (as defined in the application papers).
- (2) An order under the ECSC Civil Procedure Rules (**“CPR”**) 7.7 (1) and/or the Court’s inherent jurisdiction setting aside service of the claim against Mr. Cheong.
- (3) An order (under the Court’s inherent jurisdiction) setting aside the Service Out Order.
- (4) Further and/or alternatively, a declaration (under rules 9.7(1) and/or 9.7A(1) and/or the Court’s inherent jurisdiction) that the Court should not exercise its jurisdiction to hear the claim on the ground of forum non conveniens.
- (5) Further and/or alternatively, a declaration that the High Court of the Republic of Singapore (**“the Singapore Court”**) is the more natural and appropriate forum for the trial of the Liquidators’ BVI Claim.
- (6) Further or alternatively, an order under the Court’s inherent jurisdiction staying the claim on grounds of forum non conveniens/lis alibi pendens and/or on case management grounds.
- (7) Further or alternatively, an order under the Court’s inherent jurisdiction that the claim be struck out as an abuse of process (as being duplicative of the Mr. Cheong’s Singapore Claim as defined in the application papers).

[4] The Set Aside Application is supported by the First Affidavit of Mr. Cheong sworn on 3 February 2023 (**“Cheong 1”**). In Cheong 1 there is reference to his affidavit sworn on 10 November 2022 in

proceedings in Singapore (“**Cheong (S) 1**”) where he sets out his position in relation to the underlying dispute. It is also supported by the Second Affidavit of Mr. Cheong sworn on 31 March 2023 (“**Cheong 2**”).

- [5] For their part, the Liquidators rely upon (1) the original 9 November 2022 Notice of Application; (2) the original evidence in support of the Service Out Application, namely the Second and Third Affidavits of Romauld Johnson sworn respectively on 9 November 2022 (“**Johnson 2**”) and 10 November 2022 (“**Johnson 3**”); (3) the evidence in response to the set aside application, namely the Seventh Affidavit of Russell Crumpler sworn on 10 March 2023 (“**Crumpler 7**”).

The Parties

- [6] Mr. Cheong is a citizen of Singapore. He is the managing partner of the investment fund Defiance Capital. Since early 2018 he has specialized in investments in the cryptocurrency industry.
- [7] The Liquidators (Russell Crumpler and Christopher Farmer) are the Joint Liquidators of Three Arrows Capital Limited (In Liquidation) (“**3AC**”) an investment firm, incorporated in the BVI. 3AC was headquartered in Singapore, with a focus on trading cryptocurrency and other digital assets. 3AC was founded by Mr Su Zhu (“**Mr. Zhu**”) and Mr Kyle Davies (“**Mr. Davies**”) who were at all times material to these proceedings also based in Singapore and from where 3AC was for most of the times material to this application, managed. Prior to its collapse 3AC was one of the largest cryptocurrency hedge funds in the world.
- [8] According to its most recent draft annual report dated 31 December 2021 3AC had assets worth US\$6.146 Billion and liabilities in the region of US\$2.968 Billion. However, the Liquidators have indicated that the value of those assets has deteriorated materially since then.
- [9] 3AC carried on business as a master fund through which investments were placed via offshore and onshore feeder funds, namely Three Arrows Fund Ltd (“**TAF**” - a BVI incorporated company) and Three Arrows Fund LP (“**TAF LP**”), - a Delaware incorporated limited partnership). As at 31

December 2021, 99% of the equity in the Company was owned by TAF Ltd (i.e. the offshore feeder), with the remaining equity being held by the onshore feeder fund.

- [10] The Liquidators identified a portfolio of assets which they say are held by 3AC associated with the name “DeFiance”, which are referred to in this application as the “**Disputed Assets**”. Mr. Cheong has provided an updated Schedule of the Disputed Assets as of 18 April 2023 in Schedules 1-3 of his second Singapore Claim. Mr. Cheong is in sole control and possession of many of these investments via his control of the cryptocurrency wallets that they are stored in. The Liquidators say that it appears from a letter dated 28 June 2023 that Mr. Cheong now purports to control these assets via another company, DeFiance Capital Pte Ltd. The Assets consist of cryptocurrency tokens, non-fungible tokens (NFTs), and contracts for future tokens or equity known as “SAFES” or “SAFTS”, where the counterparty has not yet delivered the token or equity. There is a dispute as to the beneficial ownership of these assets.
- [11] According to Crumpler 3, the total value of the Disputed Assets is highly volatile. As of 3 November 2022, the date of Crumpler 3, the Disputed Assets are worth in excess of US\$165,352,777.61.
- [12] On 4 November 2022, the Liquidators applied under ss. 186 and 274A of the Insolvency Act of 2003 (“**the Act**”) for directions and declaratory relief as to the beneficial ownership, and for delivery up, of the assets set out in Crumpler 3, Schedules 4,5 and 6. Those in Schedule 4 are the Disputed Assets. Those in Schedules 5 and 6 are agreed to be owned legally and beneficially by 3AC.
- [13] The Liquidators sought to serve the application on Mr. Cheong via his legal representation in BVI, Conyers, Dill and Pearman (“**Conyers**”) on 4 November 2022, who indicated that they were not instructed to accept service. On 9 November 2022, the Liquidators applied ex parte /without notice for permission to serve Mr. Cheong out of the jurisdiction and the Service Out Order was made on 16 November 2022 by Jack J and was made and perfected by Small-Davis J on 2 December 2022.

Summary of Mr. Cheong's Position

[14] It is Mr. Cheong's position, in summary, as set out in the Skeleton Argument ("**SKA**") filed on his behalf, that:

(1) the Liquidators failed to demonstrate the necessary "good arguable case" that the BVI Claim falls within the gateways identified and relied upon by it ("**the Gateway Issue**").

On the contrary:

- (i) As regards CPR 7.3(6): the BVI Claim does not relate to "property within the jurisdiction": it relates to crypto assets managed, owned and controlled in Singapore;
- (ii) As regards CPR 7.3(7)(a): the BVI Claim has nothing to do with the internal management of 3AC;
- (iii) As regards CPR 7.3(8)(a): no claim is made against 3AC as constructive trustee arising out of acts committed within the jurisdiction- all relevant acts were committed in Singapore; and
- (iv) CPR 7.3(10): neither of the enactments relied upon (Sections 247A and 186(5) of the Act) "confers" jurisdiction", either expressly or impliedly, upon the BVI Court.

(2) The Liquidators have failed to demonstrate that the BVI Court is "clearly and distinctly the appropriate forum" for the trial of the BVI Claim and that the Court should exercise its discretion to permit service out of the jurisdiction ("**the Forum Issue**"). On the contrary, the centre of gravity of the BVI Claim is, in every substantive particular, Singapore.

(3) Although there was a complaint made in the Set Aside Application that the Liquidators breached their duty of full and frank disclosure at the ex parte hearing, Mr. Cheong's SKA indicates, that in the interests of proper focus on the key issues, he is content not to take that complaint forward.

Summary of the Liquidators' Position

[15] In their SKA, the Liquidators argue that plainly the Set Aside Application should be dismissed in its entirety. In particular, and by way of overview, they say:

- (1) that Mr. Cheong has already submitted to the jurisdiction for the purpose of resolving this dispute as a consequence of having submitted a claim form (“**the R184 Claim Form**”) in the liquidation. In doing so, he has required the Liquidators and the BVI insolvency proceedings to resolve identical issues about whether “DeFiance Capital” exists as some form of inchoate trust, and the nature of the relationship between the Company and the “DeFiance” investors. It is clear from the relevant authorities that, having submitted the R184 Claim Form, Mr. Cheong is treated as having submitted to the jurisdiction of the BVI Court for the purpose of resolving any questions of ownership of the Disputed Assets as against the Company. The declaration sought by Mr. Cheong is without merit. As a consequence of submission, Mr. Cheong is precluded from challenging the jurisdiction of this Court to determine this claim;
- (2) In any event, it is plain that there is a good arguable case that, as at the date that permission to serve out was granted, the claim fell within a number of the potentially relevant gateways entitling the Liquidators to serve this claim out of the jurisdiction. The claim is made under specific statutory enactments which are not limited in their territorial scope, relates to the administration and affairs of the Company in a liquidation process to which Mr. Cheong has submitted; concerns property (i.e. crypto - assets) which is to be treated as located in the BVI; and is made in respect of BVI law governed contracts;
- (3) BVI is plainly the appropriate forum in which to resolve this dispute in circumstances where:
 - (i) Mr. Cheong has submitted to the jurisdiction of the BVI for the purpose of the liquidation proceedings by lodging a claim form. This is a factor of overwhelming importance;
 - (ii) The claim gives rise to materially the same underlying issues as the R184 Claim Form which will have to be resolved in the BVI liquidation in any event;

- (iii) The dispute has a strong connection to the BVI since it concerns whether assets legally held by a BVI company acting as a master fund are held in trust for investors in the BVI feeder fund;
- (iv) The proper law of the dispute (i.e. governing the relevant contracts and whether a trust arises) will be BVI law;
- (v) Similar issues are raised in proceedings, referred to as “the Starry Night proceedings” already before this Court;
- (vi) Mr. Cheong’s unparticularized case can be treated as incredible and plainly lacking merit, such that this Court should not be seen to export what appears on the current materials to be a “bad claim” as a matter of BVI law;
- (vii) Mr. Cheong’s unparticularized case is such that there is no proper basis to ascertain the location of potentially relevant witnesses and, in any event, the likely role for (and number of) witnesses is minimal in the circumstances of this case;
- (viii) The dispute that is at the heart of the claim is of wider importance to the liquidation and impacts on potential claimants other than Mr. Cheong (who is but one of the alleged investors). Others, including the liquidators of TAFL (the feeder fund), have expressed an interest in participating. It is desirable that the issues are resolved in the liquidation forum so that a common answer is obtained for all interested parties.

The declarations and relief sought by Mr. Cheong as to forum conveniens are therefore without merit.

- (4) Any suggestion that the proceedings should be stayed or dismissed by reason of duplication, lis alibi pendens or as a matter of case management is misconceived.

Summary of Mr. Cheong’s Case in relation to the BVI Claim

- [16] According to Mr. Cheong’s SKA the most complete exposition of Mr. Cheong’s current case is set out in his 105 page 10 November 2022 Affidavit, Cheong (S) 1 which was prepared in support of his Summons issued in Singapore on 4 November 2022. As summarized, in Cheong (S) 1, Mr. Cheong does the following:

- (1) Mr. Cheong charts the development of his initial modest cryptocurrency holdings in 2017 to his approach to Mr. Zhu in December 2018 and his widely circulated report on the Synthetix Network Token ("**SNX**") dated 3 February 2019;
- (2) Mr. Cheong explains his consideration of setting up his own fund in November 2019, supported by Mr. Zhu of 3 AC; and in particular Mr. Zhu's 21 November 2019 proposal in the course of a meeting in Singapore of a "standalone fund" by the creation of a new class of shares with funds raised being kept in "segregated accounts" whilst using 3AC Group's office infrastructure for administrative and logistical support ("**the Independent Fund Arrangement**"). He explains that Mr. Davies repeatedly told him that a separate and segregated share class (pursuant to the Independent Fund Arrangement) would be sufficient for his fund to be a separate fund from 3AC without express written documents to that effect;
- (3) Explains the benefits of the Independent Fund Arrangement, in particular (1) the use of Mr. Zhu's and Mr. Davies fund management expertise; (2) the saving of costs of setting up his own fund; and (3) the fact that the investment manager Three Arrows Capital Pte Ltd ("**TACPL**") already had a license for fund management in Singapore;
- (4) Cites the many telegram messages exchanged in a Telegram Group Chat between Mr. Cheong, Mr. Zhu and Mr. Davies which emphatically and repeatedly confirmed that (1) risks and rewards of the standalone fund were separate and distinct from those of 3AC Group-in that what would be adopted was "a siloed reputation/risk model" such that "ideally [Mr. Cheong's fund] can blow up and it doesn't affect [3AC] in the sense that ppl are aware that it is u calling the shots"; (2) Mr. Cheong would have "full control" over the fund, paying an agreed fee for use of the 3AC infrastructure of 25 % of the performance and management fees earned by the fund; (3) Mr. Cheong would have full autonomy to dictate the terms of the fund (i.e. management and performance fees and lock up periods); and (4) Mr. Cheong could adopt any investment strategy of his choosing;

- (5) Explains how in May 2020 (in contrast to the Independent Fund Arrangement and at a point in time when Mr. Cheong had still not decided whether to establish his own fund) Mr. Davies (who, with Mr. Zhu, was keen to leverage Mr. Cheong's expertise in DeFi without delay), approached Mr. Cheong with an offer to manage a pool of 3AC Group's funds in a "managed account" ("**the Managed Account**"). Mr. Cheong emphasizes that the Managed Account was not Mr. Cheong's fund. Mr. Cheong agreed to join TACPL as an employee in order to manage the Managed Account (and not his fund);
- (6) Explains how by July 2020 a surge of interest in DeFi's applications had resulted in a surge in the market price of DeFi cryptocurrency tokens, leading to the value of the "Seed Capital" ballooning from USD 1.7m in March 2020 to 20m in July 2020 at which point Mr. Cheong was now ready to launch his standalone fund;
- (7) Explains how DeFiance Capital ("**DC**") was formed by way of the creation of "Class Defiance" in 3AC. However, Mr. Zhu (recognizing Mr. Cheong's value in making money for the Managed Account) requested (and Mr. Cheong agreed) that Mr. Cheong mirror all investments that he made in the fund with the same investments in the Managed Account ("**the Mirror Investment Arrangement**"). There would have been no reason for Mr. Zhu to ask for the Mirror Investment Arrangement if DC was not separate and independent of the 3AC Group. Moreover, in exchange for agreeing to the Mirror Investment Arrangement, Mr. Cheong was paid a salary (as an employee). In contrast, as fund manager of DC, he received substantial management and performance fees essentially for doing the same work;
- (8) Mr. Cheong explains how he raised (and managed) funds from investors in DC (1) in subscriptions by way of stablecoin (in "DC Sub-Accounts" on cryptocurrency exchanges) or (2) (more rarely) subscriptions by way of US dollars (again with transfers to a "DC Sub-Account"). All of these subscriptions were kept in segregated "DC Wallets". By contrast Mr. Cheong did not raise any funds in the Managed Account and did not have exclusive control of the same.

- [17] In paragraph 12.9 of the SKA, there is also discussion of Mr. Cheong's evidence explaining why he considers that the parties' conduct was consistent with the Independent Fund Arrangement.
- [18] Having set out these summaries, Mr. Hardwick K.C., who appears for Mr. Cheong, observed that the resolution of the dispute as to the beneficial ownership of the Disputed Assets ("**the Beneficial Ownership Dispute**") will turn upon a detailed consideration of (1) the agreements/ arrangements between and the conduct of Mr. Zhu, Mr. Davies and Mr. Cheong; and (2) on the Liquidators' case, of the various fund related documents (SKA-paragraph 13).
- [19] At paragraph 15 of the SKA, there is a very useful Chronology set out. I intend to discuss that chronology from the point of the discussion headed "2022: liquidation" as I think that the way it is set out in the SKA is very useful to look at a glance.

2022: liquidation

- (1) 27 June 2022: 3 AC was placed into liquidation by order of Jack J in the BVI Commercial Court. The Liquidators were appointed.
- (2) 28 Jun 2022: Mr. Cheong (he claims without knowledge of the liquidation of the previous day) requested 3AC to transfer the Disputed Assets by 1 July 2022.
- (3) 30 June 2022: Mr. Cheong's Singapore solicitors, Drew & Napier LLC, notified the Liquidators as to the existence of the Independent Fund Arrangement and in particular that the Disputed Assets were held on trust for Mr. Cheong.
- (4) 1 July 2022: the Liquidators responded stating that they had "reason to believe that there are assets within your control that may be assets belonging to [3AC]".
- (5) 15 July 2022: Drew & Napier on behalf of Mr. Cheong (the SKA says, for the purpose of attending the first creditors' meeting) submitted the R184 Claim Form to the Liquidators in respect of a total loan of USDC 35M pursuant to the MLA. No such form was submitted in respect of the Disputed Assets.
- (6) 16 July 2022: the Wong Partnership (on behalf of the Liquidators) wrote to Drew & Napier stating that "there is no other separate entity known as DeFiance Capital, and any assets of "DeFiance Capital" are part of a sub-portfolio falling within the assets of "[3AC]".

- (7) 19 July 2022: Mr. Cheong provided a voluntary undertaking not to transfer, encumber or otherwise dispose of the Disputed Assets (**“the Undertaking”**).
- (8) 25 July 2022: Mr. Cheong informed the Liquidators that the Managed Account Assets were in his custody and provided the Liquidators with a list of the same (Schedule 6).
- (9) 5 August 2022: Drew & Napier provided the Liquidators with a draft Asset Protocol in an attempt to agree matters relating to the treatment of the Assets pending determination of the issue by a Court. According to Mr. Cheong, the Liquidators failed to engage constructively with the same.
- (10) 29 August 2022: Mr. Cheong voluntarily provided the Liquidators with a 16 page note with 97 pages of annexes setting out the basis for his claim that the Disputed Assets were held on trust by 3AC.

2022: recognition of the BVI Liquidation Proceedings in Singapore and elsewhere.

- (11) 9 July 2022: the Liquidators sought recognition of their appointment and the BVI liquidation proceedings by the Singapore Court and the United States Bankruptcy Court for the Southern District of New York.
- (12) 22 August 2022: by order of Honourable Justice Vinodh Coomaraswamy, the BVI liquidation proceedings were recognized as a foreign main proceeding in Singapore.
- (13) 27 October 2022: the Liquidators obtained the Singapore Court’s approval and adoption of a cross-border insolvency protocol (**“CBIP”**).

2022: The BVI Claim and the Singapore Claim

- (14) 22 September 2022: Drew & Napier wrote to the Wong Partnership expressing their view that “Singapore would be the most appropriate forum for determination “and requesting the Liquidators views by 29 September 2022. The Liquidators responded on 29 September 2022 stating that they were “still considering the most appropriate forum for the determination and will get back to you.”
- (15) 4 October 2022: Drew & Napier wrote to the Wong Partnership chasing a substantive response to their 22 September 2022 email and enquiring “Please let us know when our client can expect the liquidators’ position on the matters stated therein, and in particular on the forum for the determination”. No response was received.
- (16) 2 November 2022: Drew & Napier wrote to the Wong Partnership seeking the Liquidators’ confirmation that they had no objection to commencement of

proceedings to determine the ownership of the Disputed Assets in the Singapore Courts. No response was received.

- (17) 4 November 2022: the Liquidators commenced the BVI Claim.
- (18) 4 November 2022: Conyers wrote to Ogier confirming that they would not accept service of the BVI Claim.
- (19) 4 November 2022: Mr. Cheong filed a summons in the General Division of the High Court of the Republic of Singapore (“**the Singapore Court**”) for leave to commence proceedings against the Liquidators in the Singapore Courts (“**the Leave Application**”) seeking (amongst other relief) a declaration that the Liquidators hold the assets on trust for Mr. Cheong/DC (“**the Singapore Claim**”).
- (20) 7 November 2022: Conyers wrote to Ogier requesting them to set out the Liquidators’ position as to why they claimed to be entitled to serve Mr. Cheong within the jurisdiction of the BVI.
- (21) 8 November 2022: Ogier replied claiming that Mr. Cheong had submitted to the jurisdiction of the BVI Court by reason of his filing of the R184 Claim Form.
- (22) 8 November 2022: the Wong Partnership wrote to Drew & Napier stating that they were “of the view that the Singapore Court is not the appropriate forum for the determination of the ownership of the [Assets] and object to the [Leave Application]”.
- (23) 9 November 2022: Conyers reiterated its position that Singapore would be the most appropriate forum for the determination of the dispute.
- (24) 9 November 2022: the Liquidators applied, ex parte / without notice, for permission to serve the BVI Claim on Mr. Cheong outside the jurisdiction (“**the Service Out Application**”).
- (25) 10 November 2022: Drew & Napier claimed that the substantive dispute had close connections to Singapore and invited the Liquidators to consent to resolving the dispute under the Singapore International Commercial Court.
- (26) 2 December 2022: was the Service Out Order.

2022: Antisuit injunction in Singapore

- (27) 10 November 2022: Mr. Cheong applied for an anti-suit injunction in Singapore to restrain the Liquidators from prosecuting or continuing to prosecute the BVI Claim (**“the Anti-Suit Injunction”**).
- (28) 10 November 2022: a case management conference before the Singapore Court was held for the consideration of the management of the Leave Application, the Singapore Claim and the Anti-Suit Injunction.

2023: The Singapore Claim

- (29) 25 January 2023: Vinodh J in the Singapore Court permitted Mr. Cheong/ DC to bring a fresh originating process in respect of the Singapore Claim. The hearing of the Anti-Suit Injunction was adjourned (by agreement) until the determination of this Set Aside Application.
- (30) 18 April 2023: Mr. Cheong issued the Originating Claim against 3 AC and the Liquidators in the Singapore Court with a Statement of Claim of the same date seeking a declaration that 3AC held and continued to hold assets on trust for Mr. Cheong/DC (**“the Singapore Claim”**).
- (31) 8 May 2023: Mr. Cheong issued a Summons seeking the approval of the Singapore Court to serve the Singapore Claim on 3AC and the Liquidators out of the jurisdiction, as supported by the 8 May 2023 affidavit of Mr. Cheong.
- (32) 9 May 2023: Order of Assistant Registrar Jacqueline Lee approving the service of the Singapore Claim on 3AC and the Liquidators.
- (33) 16 June 2023: 3AC and the Liquidators served their “Defence on Jurisdiction” in respect of the Singapore Claim.

The Liquidators’ Position in relation to the BVI Claim

[20] In their SKA, the Liquidators assert that 3AC's claim to the Disputed Assets is clear and incapable of credible dispute. TAF Ltd and TAF LP each issued "Class DeFiance" shares and limited partnership interests which were sold to external investors. The Liquidators understand that Mr. Cheong paid his subscription monies by way of an in specie transfer of his and others investments, but all subsequent subscriptions were for cash. In return for the subscription money paid (or assets transferred in specie), the investors received rights as shareholders of TAF Ltd. Mr. Cheong signed the subscription agreement for TAF Ltd. shares on 28 August 2020.

[21] The Liquidators point to the key provisions of the subscription agreements and articles of association for the company, TAF Ltd and TAF LP. It was submitted that the subscription agreements were all in materially similar terms. The Liquidators highlight the following:

- (1) Articles 44 to 48 of TAF Ltd.'s Articles of Association provide a mechanism for accounting for contributions and asset acquisitions in a way that they are held within the books of TAF for the benefit of a particular class. When preparing the NAV, the assets and liabilities notionally attributable to each class through the creation of the Separate Accounts fall to be assessed such that each class will benefit from the performance of the particular assets earmarked for their own class; and
- (2) Article 44 provides a permissive power for the directors to establish separate accounts on the books and records of TAF Ltd for each Class and Series of shares, including the ability to apply the proceeds of allotment and issuance of shares to separate accounts, and to treat assets acquired using such proceeds as being held to the credit of a separate account for a particular Class or Series of shares.

[22] Detailed reference was also made to the terms of Articles 45-48, the TAF Ltd Offering Memorandum, and the TAF Ltd Subscription Agreement. The Liquidators submit that these provisions are inconsistent with any form of trust analysis. The Liquidators state that their position in respect of any claim made by external investors, such as Mr. Cheong, is therefore as follows:

- (1) The structure adopted by the Three Arrows Group was a master/feeder fund structure whereby the underlying investors acquired shares in the feeder funds, and the Feeder Funds in turn acquired shares in the master fund (the Company). This is confirmed by the terms of the constitutional documents of the Company and the Feeder Funds, and the investor subscription agreements with the Feeder Funds;
- (2) Thus, investors in 'DeFiance Capital' introduced funds and in exchange received rights as shareholders in TAF Ltd. The feeder funds then transferred the monies beneficially to 3AC, receiving shares in exchange (although the Liquidators note that there was no distinct DeFiance Capital share category in the Company's Articles of Association);
- (3) The Three Arrows Group was in fact operated as a master/feeder structure (with redemptions being made where necessary to enable repayment of the underlying investors);
- (4) The Disputed Assets were acquired by and held in the name of the Company. The Company accounts recorded assets being held by the Company, with the assets of the Feeder Funds simply being recorded as assets being held by the Company, with the assets of the Feeder Funds simply being recorded as shareholdings in the Company;
- (5) There are no provisions in any of the documents (subscription agreements, constitutional agreements of the Company or the Feeder Funds, or the Offering Memorandum) which provide for any assets of the Company to be held on trust for the Feeder Funds or any underlying investors. On the contrary, the terms of those documents are inconsistent with the existence of any direct proprietary claim by investors in the Assets. The subscription agreements preclude reliance by any

underlying investor on alleged representations or other statements contrary to the effect of the subscription agreements;

(6) In practice, certain of the assets held by the Company were dealt with separately for the administrative/accounting purpose of quantifying the rights of TAF Ltd, referable to the DeFiance Class shareholders in TAF Ltd. The holders of that class of shares in TAF Ltd. enjoyed the commercial benefits/downside of DeFiance investments through the share structure and NAV calculation methods; and

(7) As a consequence, investors were in an ordinary contractual shareholder relationship with the feeder funds, and their rights are pursuant to the Offering Memorandum and as holders of the DeFiance Class shares. A consequence of being a holder of the DeFiance Class shares in TAF Ltd was that, in the event the Company could not pay its debts, the assets notionally marked as part of the DeFiance portfolio could be used to pay those debts whether or not they were held as part of the DeFiance portfolio i.e. they were the Company's assets.

[23] The Liquidators state that they do not have complete access to the books and records of 3AC, but they assert that the foregoing analysis is supported by the available contemporary documentary evidence, including:

(1) **The audited financial statements** of TAF Ltd, TAF LP and 3AC do not treat 3AC as trustee over any assets. By way of example, in one of the TAF Ltd financial statements, the sale of Class DeFiance shares was expressly treated as an asset of 3AC. The way investors received their returns was not by way of the distribution of assets in specie through a trust but through the redemption of shares.

(2) **The terms of the SAFEs/SAFTs.** Many of these agreements contained assertions that the Company was beneficially entitled to the future token/equity. By way of example, 3AC entered into a \$300,000 SAFT with Stella Fantasy Ltd where at clause 5(c) the Company represented that "The Purchaser is entering into this Agreement and purchasing the Tokens for its own account, not as nominee or agent."

(3) **Evidence from the former controllers of the Company.** The Liquidators state that they have not been able to interview the former directors of 3AC to obtain their input. However, the Liquidators point out that, when 3AC filed an application seeking the appointment of liquidators on 27 June 2022, its application asserted that:

“The shareholders and Directors, some of whom are also creditors of the Company were made aware that creditors were seeking to preserve their own positions perhaps to the detriment of other creditors. The managers of sub-funds have erroneously been using the assets of the fund as if they were assets of the sub-funds and not the funds to the causing the Company financial damage “ [sic]

- [24] The Liquidators state that their analysis in respect of the “DeFiance Capital” set of assets is identical to the “Starry Night” portfolio, which is another ‘Separate Account’ with its own share class. The Liquidators filed an application on 23 November 2022 (“**the Starry Night Application**”) seeking relief that is similar to that sought against Mr. Cheong, in relation to the “Starry Night” collection of NFTs. The only difference from this application, the Liquidators say, is that Mr. Cheong is in control of the Disputed Assets and not the Liquidators, and therefore, the Liquidators require delivery up. I have set out the Liquidators’ position in relation to the BVI Claim in some detail because of its relationship to the “Starry Night” Application.
- [25] On the application of the Liquidators, a number of separate applications have been assigned new Claim Numbers, in addition to the original Claim Number BVIHC (COM) 2022/0119. The “Starry Night” Application was assigned Claim Number BVIHC (COM) 2023/0058. It was heard by me on 6 June 2023, and I gave an oral judgment on 20 July 2023.
- [26] I should just state that Mr. Cheong and his legal advisors were well aware of the Starry Night Proceedings but they did not consider it necessary to intervene or to make submissions in relation to the subscription agreements and constitutional documents. Mr. Hardwick K.C. indicated that that was a deliberate decision because, as set out in Mr. Cheong’s SKA, at paragraph 90.2, there are no individuals or investors in Starry Night who are claiming a trust or beneficial interest. Further, it

is Mr. Cheong's case that Starry Night was established by Mr. Zhu and Mr. Davies as a 3AC Group Fund that was dedicated to investing in NFTS, and it was not a standalone fund like DC. Further, there was no segregation of assets.

[27] In the event, on 20 July 2023 I held that, amongst other matters, the Liquidators were entitled to the relief sought. I expressly indicated that I was dealing solely with the Starry Night Portfolio. I accepted the following arguments advanced by Mr. Fisher KC on behalf of the Liquidators:

- (1) The subscription agreements and Constitutional Documents of the Company and the Feeder Funds and Investor Subscription Agreements with the Feeder Funds all make clear that underlying investors became shareholders or obtained partnership interest in the Feeder Funds.
- (2) 3AC was, in fact, operated as a master/ feeder structure with the necessary redemptions being made, where necessary, to enable repayment of the underlying investors, and, therefore, in a manner inconsistent with investors having direct interest in the assets.
- (3) There is an absence of any trust provisions in the documents or any properly formulated claim by investors. Not only are there no provisions in any of the relevant documents providing for any assets of the Company to be held on trust for the feeder funds or any underlying investors, but the terms of those documents are also inconsistent with the existence of any direct proprietary claim by approved investors in the assets.

SUBMISSION TO THE JURISDICTION

[28] The first limb of the relief sought by Mr. Cheong is a declaration that the BVI Court has no jurisdiction over him for the purpose of resolving the dispute. This aspect of Mr. Cheong's application involves the question of whether he has submitted to this Court's jurisdiction. In this regard, Mr. Cheong's application differs from many other applications seeking to set aside a

service out order, because the question of submission to the jurisdiction involves its own unique considerations.

The consequences of submitting a proof

The Liquidators' Arguments

- [29] The Liquidators submit that the Court has jurisdiction *in personam* over Mr. Cheong. Reference was made to the decision of the Eastern Caribbean Supreme Court of Appeal (“**the ECCA**”) in a case emanating from the territory of Antigua and Barbuda, **Stanford International Bank Ltd. v Proskauer Rose LLP**¹. At paragraph 50, Blenman J.A., referring to the work of Professor Winston Anderson (now a Judge of the Caribbean Court of Justice), **Caribbean Private International Law**². It was stated that there are three bases upon which jurisdiction is normally founded: (i) the defendant’s presence within the jurisdiction; (ii) voluntary submission; or (iii) where the court allows service of process upon the defendant outside the jurisdiction pursuant to rules governing civil procedure.
- [30] The Liquidators rely upon a number of decisions notably, **Stichting Shell Pensioensfonds v Krys**³ (“*Shell*”), **Erste Group Bank AG London Limited v JSC (VMZ Red October)**⁴, **Rubin v Eurofinance SA**⁵, **Ex p Robertson: In re Morton**⁶, **Swiss Life v Kraus**⁷, and **Briggs on Jurisdiction and Judgments**⁸. Mr. Fisher KC argues that they support the position that by submitting the R184 Claim Form in the Liquidation, Mr. Cheong has submitted to the jurisdiction of the Court.
- [31] Mr. Cheong has submitted the R184 Claim Form in respect of the alleged MLA Loans, but he has not submitted a claim in respect of the disputed assets. The name of the creditor on the R184

¹ ANUHCVP2018/001

² 2nd edn. Sweet and Maxwell 2014

³ [2015] 2 WLR 289

⁴ [2015] 1 C.L.C. 706

⁵ [2013] 1 AC 236

⁶ (1875) LR 20 Eq 733

⁷ 2015] EWHC 2133 (QB)

⁸ para 34.17

Claim Form is identified as DC and/or Mr. Cheong “*in his personal capacity and as trustee for investors of [DC]*”.

Mr. Cheong's Submissions

- [32] Mr. Hardwick KC also relies on an aspect of the decision of the Judicial Committee of the Privy Council in **Shell**, at page 633A, paragraph 31, where the Privy Council stated:

“...The Board would accept that the submission of a proof for claim A does not in itself preclude the creditor from taking proceedings outside the liquidation on Claim B....”

- [33] Learned Counsel submits that this is precisely the scenario here. He submits that as with any banker/customer relationship, the loan funds became the money of 3AC with a contractual obligation to repay. Further, that the R184 Claim Form recognized that there was an absence of any trust.

- [34] It was submitted that (1) the whole point of the Independent Fund Arrangement is that the Disputed Assets were never the assets of 3AC; and (2) the purpose of the Singapore Claim is to prove just that in proceedings “*outside the liquidation*”. Learned Counsel claims that this is the point which Vinodh J in the Singapore Court well understood in his Judgment of 25 January 2023 when he stated that Mr. Cheong’s claim:

“...is an ordinary civil claim asserted between two litigants... or asserted by one litigant against another, which has nothing to do with the overall administration of the insolvency, whether it was a domestic or multi cross-border insolvency and has very little scope to impede with the overall supervision of the insolvency by the court supervising the foreign main proceedings, in this case, the BVI Court.”

DISCUSSION AND ANALYSIS REGARDING SUBMISSION TO THE JURISDICTION

- [35] I think that it is important to put further context on what the decision in **Shell** was concerned with. Interestingly, it involved a liquidation taking place in the BVI Court. A creditor who had submitted a

proof in the liquidation in the BVI was also pursuing proceedings in the Netherlands. This involved a damages claim and a pre-judgment garnishment or conservatory attachment over certain assets. The liquidators sought to restrain the creditor by way of anti-suit injunction. One of the issues was whether the creditor had submitted to the jurisdiction of the BVI court. The creditor accepted that sending a claim form constituted submission for the purpose of all claims under the Insolvency Act and Rules. However, the position was argued that the creditor was entitled to instigate separate proceedings in the Netherlands to pursue a different claim outside of the Act, namely various claims arising out of misrepresentation and breach of warranty in the Netherlands. The ECCA disagreed, and (overturning the decision of the Judge), issued an anti-suit injunction.

[36] The Privy Council upheld the decision of the ECCA to grant an anti-suit injunction and, in doing so, re-affirmed the wide scope of the submission principle established in **Rubin**.

[37] I think it is useful to set out portions of paragraphs 14, 15, 31, and 32 of the judgment as follows:

“Anti-suit injunctions in insolvency cases

*14. In the British Virgin Islands, as in England, the making of an order to wind up a company divests it of the beneficial ownership of its assets and subjects them to a statutory trust for their distribution in accordance with the rules of distribution provided for by statute: **Ayerst v C & K(Construction) Ltd** [1976] AC 167. In the case of a winding up of a BVI company in the BVI, this applies not just to assets located within the jurisdiction of the winding-up court, but all assets world-wide. In England, this follows from the unqualified terms of section 144(1) of the Insolvency Act 1986. In the British Virgin Islands, it is provided for in terms by section 175(1) of the Insolvency Act 2003, combined with the inclusive definition of “asset” in section 2(1) (“every description of property, wherever situated”). **It reflects the ordinary principle of private international law that only the jurisdiction of a person’s domicile can effect a universal succession to its assets.** They will fall to be distributed in the BVI liquidation *pari passu* among unsecured creditors and, to the extent of any surplus, among its members.*

15. This necessarily excludes a purely territorial approach in which each country is regarded as determining according to its own law the distribution of the assets of an insolvent company located within its territorial jurisdiction. The *lex situs* is of course relevant to the question what assets are truly part of the insolvent estate. It will generally determine whether the company had at the relevant time a proprietary interest in an asset, and if so what kind of interest. Thus, if execution is levied on an asset of the company within the territorial jurisdiction of a foreign court before the company is wound up, it will no longer be regarded by the winding up court as part of the insolvent estate. **But short of a transfer of a proprietary interest in the asset prior to the winding up order, it is generally for the law of that jurisdiction to determine the distribution of the company's assets among its creditors and members, at any rate where the company is being wound up in the jurisdiction of its incorporation.** In England and the BVI the court may, and commonly does, assert dominion over the local assets of an insolvent foreign company by conducting an ancillary winding up. But it does so in support of the principal winding up, and so far as it can in such a way as to ensure that creditors and members are treated equally regardless of the location of the assets. It does not seek to ring-fence local assets or local creditors....

.....

31.....A submission may consist in any procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In the present case the defendant lodged a proof. It cannot make any difference to the character of that act whether the proof is subsequently admitted or a dividend paid, any more than it makes a difference to the submission implicit in beginning an ordinary action whether it ultimately succeeds. **This result is neither unjust or contrary to principle, for by submitting a proof the creditor obtains an immediate benefit consisting in the right to have his claim considered by the liquidator and ultimately by the court according to its merits and satisfied according to the rules of distribution if it is admitted. The Board would accept that the submission of a proof for claim A does not in itself preclude the creditor from taking proceedings outside**

the liquidation on Claim B. But what he may not do is take any step outside the liquidation which will get him direct access to the insolvent's assets in priority to other creditors. This is because by proving for claim A, he has submitted to a statutory scheme for the distribution of those assets pari passu in satisfaction of his claim and those of other claimants.

32. Turning to Ms. Newman's reservation, the argument was that Shell had not submitted to the jurisdiction of the BVI courts for all purposes. In particular, it was said to have submitted only for the purpose of claims under the Insolvency Act and Rules, and not for the purpose of claims governed by the general law, such as its claim in the Netherlands for misrepresentation and breach of warranty. This, it was said, was because the BVI courts have no subject matter jurisdiction over the damages claim that is being asserted in the Netherlands. **The Board has no hesitation in rejecting this contention. It has no bearing on the question whether Shell submitted by participating in the injunction proceedings, because that submission necessarily involved an acceptance on its part of the court's jurisdiction to grant the injunction sought in those proceedings. The point appears to the Board to be equally irrelevant to the question whether Shell submitted by lodging a proof of debt for the redemption price. Liquidation is a mode of collective enforcement of claims arising under the general law. There is , in the present context, no relevant difference between the claim for which Shell proved (a debt arising from its redemption notice) and the claim for which it did not prove but which it has put forward in the Dutch proceedings (damages for misrepresentation and breach of warranty). They both arise under the general law. They are both capable of being provide in the liquidation. If they are proved, the BVI courts will have subject matter jurisdiction to adjudicate on them. And so far as they submitted by proving for anything in the liquidation, Shell submitted to a statutory regime which precluded it from acting so as to prevent the assets subject to the statutory trust from being distributed in accordance with it."**

(My emphasis)

[38] The decision in **Erste** usefully summarizes the effect of the decisions in **Rubin** and **Shell** at paragraph 51, as follows:

“a foreign creditor submits to the jurisdiction of the court supervising a company’s insolvency by proving in that insolvency. That, by itself, is sufficient without more (and irrespective of whether the proof has been accepted or a dividend has been received) to require the creditor to have all questions, of whatever kind against the debtor resolved within the insolvency as administered by the court of the jurisdiction of that insolvency.”

[39] As observed in the Liquidators’ Skeleton Argument, at paragraph 68, this is not a new line of reasoning. In **Ex p Morton: in Re Morton**, Bacon CJ, back in 1875, observed (at pages 737 – 738 of the judgment) as follows:

*“what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had signed and sealed and sworn the terms of it-that the bankrupt’s estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the court, **and the court has jurisdiction to decide all questions of whatever kind, whether of law, fact or whatever else the court may think necessary in order to effect complete distribution of the bankrupt’s estate**... can there be any doubt that the Appellant in this case has agreed, as far as he is concerned, the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit.....[The Appellant] is as much bound to perform the conditions of the compact, **and to submit to the jurisdiction of the court, as if he had never been out of the limits of England.**”*

(My emphasis)

[40] Then at paragraph 59 of **Erste**, as pointed out by Mr. Fisher KC, there is a useful discussion in relation to arguments advanced by the creditor as to how different the nature of the claim made in the foreign jurisdiction was. The Judge had accepted that even if the creditor had submitted its claims under a Loan Agreement and Guarantee to the jurisdiction of the Russian Court, where the insolvency proceedings were taking place, the wider claims in conspiracy and torts had not been

submitted. The Court of Appeal held that the Judge's conclusion was erroneous. At paragraphs 59 and 60, Gloster LJ stated as follows:

"59.....contrary to Mr. Salzedo's submissions, it is not a valid argument that the claims being brought in the foreign jurisdiction (i.e. here the conspiracy claims, in Shell the claims for misrepresentation and breach of warranty) could be said to be different in character from the claim in respect of which proof of debt was submitted in the liquidation, or brought under the general law rather than the relevant insolvency rules, or even that such claims are subject to the exclusive jurisdiction of the foreign court, whether by virtue of an exclusive jurisdiction clause or otherwise. As in Shell, in the present case there is no relevant difference between the claims for which the Bank proved or attempted to prove (the debt under the Loan Agreement in the case of D1, and under the Guarantee in the case of D2), and the claims for which it did not prove but which it has put forward in the English proceedings (damages for the conspiracy and the other tort claims) against D1 and D2. We accept Mr. Snowden's submission, that, although they have different labels, they both arise under the general law and relate, and are limited to the same amount. In other words, the claim for damages in the conspiracy claims duplicates the amount claimed under the debt and contractual claims against D1 and D2 in respect of the amounts advanced by, or owing to, the Bank under the Loan Agreement in respect of principal, interest and costs. Both claims are capable of being proved in the liquidations of D1 and D2, or, in the case of D2, would have been so capable, if the Guarantee had not been set aside by the Russian Courts.

60. Thus, in our view, in the light of Shell, the conclusion reached by the judge in paragraphs 121 and 128 of his judgment that, on any basis, even if the Bank had submitted its claims under the Loan Agreement and the Guarantee against D1 and D2 to the jurisdiction of the Russian courts, it would not have submitted its wider claims in conspiracy and other torts, is erroneous"

[41] It is also useful to note the observation of Green J in **Swiss Life v Kraus**, cited by the Liquidators, that:

“The gist of the authorities referred to do not, unambiguously, speak with one voice. However, the test involves looking at all the facts from the perspective of fairness and whether there is a sufficient nexus between the facts of the case in which the submission to jurisdiction is established, and the related litigation in terms of time, space, origin or motivation or whether their “treatment as a unit” conforms to the parties’ expectations or business understanding or usage.”

CONCLUSION ON THE JURISDICTION OVER MR. CHEONG ISSUE

- [42] In my judgment, as was the case in respect of the claims considered by the Privy Council in **Shell**, there is in the present context no relevant distinction to be drawn between the claim that Mr. Cheong has submitted a proof i.e. the R184 Claim Form, and the claim which he is making in Singapore regarding the Disputed Assets. They both arise under the general law. These claims are both capable of being proved in the liquidation.
- [43] Further, whilst the issues that the BVI Court will need to determine in relation to the Claim Form are not identical to the issues involved in the substantive application, I agree with the Liquidators’ submission that this is an issue which the Liquidators must have resolved in order to effect a distribution of the Company’s assets. The issues raised in the substantive Singapore claim are plainly issues that will impact on whether Mr. Cheong should have direct access to the Disputed Assets in priority to other creditors, or as connected with the insolvency of the Company in the sense required by the authorities. I agree with the Liquidators that it makes no difference that the dispute relates- in part- to 3AC/Mr. Cheong’s pre-insolvency entitlement to the beneficial interest in the Disputed Assets. Most disputes with creditors (indeed as was the case re the dispute in **Shell** and **Erste**), relate to pre-insolvency entitlements.
- [44] Further, albeit that there is no duplication of amounts of Loan Agreement Claim and Trust Claim, as there was in **Erste**, the claims have a sufficient nexus. In other words, as described in **Swiss Life**, looking at all the facts from the perspective of fairness, and whether there is a sufficient connection by the relevant measurements between the R184 Claim Form, i.e. the case in which

the submission to jurisdiction is established, and the substantive claim, I find there is sufficient connection or nexus.

- [45] In my view a claim relating to trusts, much less one being made based on an oral arrangement, as Mr. Cheong's case is, relates directly to the assets of the insolvent, unlike the claims for conspiracy or for misrepresentation and breach of warranty. This makes the nexus even more plain than in those cases, i.e. in **Shell** and **Erste**. In addition, as Mr. Cheong's SKA explained, the resolution of the dispute as to the beneficial ownership of the Disputed Assets will turn upon not only a detailed consideration of the agreements/ arrangements between and the conduct of Mr. Zhu, Mr. Davies and Mr. Cheong; but also, on the Liquidators' case, of the various fund related documents - see paragraph [18] above.
- [46] This is particularly so because, as the Liquidators discuss in paragraph 74 of their SKA, Mr. Cheong also submitted his Claim Form in his purported capacity as "*trustee for the investors of DeFiance Capital*". In order to identify who the creditor is, the Liquidators will need to ascertain whether there is indeed any such Trust in existence and that Mr. Cheong acts as Trustee. Whilst the subject matter differs in the R184 Claim Form and the BVI application; the Claim Form is limited to US\$35M, and the application concerns other assets associated with "*DeFiance Capital*", the issues plainly overlap.
- [47] I also accept that it makes no difference whether Mr. Cheong submitted the Claim Form in order to attend the first meeting of creditors. The act of filing the Claim Form /proof is itself a request for substantive determination of the claim and as noted in **Shell**, suffices whether or not the claim form is accepted. Here Mr. Cheong's claim was admitted for the purpose of voting at the meeting of creditors and Mr. Cheong was so permitted by the Liquidators.

Consequences of Submission to the Jurisdiction

- [48] In my judgment, Mr. Cheong is therefore not entitled to the declaration sought that this Court has no jurisdiction over him for the purposes of resolving the dispute. This is the normal consequence of voluntary submission. Indeed, as shown in the passage quoted above from **Robertson**, the

creditor is treated as if they had always been in the jurisdiction and could therefore have been served as of right.

- [49] These are quite complicated points and there is also a certain amount of interplay between some of the issues. So, for example, it may be that the principles do not go as far as meaning that Mr. Cheong could be served as of right (although I am of the view that they do). However, in my judgment Mr. Cheong's submission is in any event, as Mr. Fisher KC argues, relevant to the Liquidators' case that (i) there is a good arguable case that the claim falls within one or more of the jurisdiction gateways (to my mind, the most relevant one is the enactment gateway); and (ii) whether BVI is the most appropriate forum in which to resolve the dispute.

PERMISSION TO SERVE OUT, THE LAW

- [50] The parties are on the same page when it comes to the requirements for service out of the jurisdiction, although reference has been made to different cases. The hearing of an application to set aside permission to serve out is effectively a rehearing of the original application, at which the Claimant carries the onus of satisfying the Court that permission to serve out should have been granted-see Briggs on *Jurisdiction and Judgments* at paragraph 24.04, cited by the Liquidators.
- [51] In the decision of the Court of Appeal of the Eastern Caribbean Supreme Court, in **Amerinvest International Forestry Group Ltd. v Kwok Ka Yik**⁹, Pereira CJ approved the formulation of Lord Collins in **Nilon Ltd. v Royal Westminster Investments S.A.**¹⁰, that:
- “In an application for service out of the jurisdiction, three requirements have to be satisfied. **First**, the Claimant must satisfy the court that, in relation to the foreign Defendant, **there is a serious issue to be tried on the merits**, i.e. a substantial question of fact or law, or both. **Second**, the Claimant must satisfy the court that there is **a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given**. In this context, “good arguable case” connotes that one side has a much better argument than the other. **Third**, the Claimant must satisfy the court that in all the

⁹ BVIHMAP 2014/0033 at paragraph 7

¹⁰ [2015] UKPC 2, at paragraph 13

circumstances the forum which is being seised (here the BVI) **is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.**"

(my emphasis)

[52] An application to set aside the Service Out Order falls to be determined by reference to the position at the time when permission was granted- see **Briggs** at 24.04.

[53] What "good arguable case" means has, as learned Counsel Mr. Fisher KC points out, been the subject of extensive consideration in recent years, including twice by the Supreme Court in respectively, in **Brownlie v Four Seasons Holdings Inc**¹¹, and in **Goldman Sachs International v Novo Banco S.A.**¹². Good arguable case means that: (1) that the Claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (2) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (3) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. As the Liquidators point out, Lord Sumption specifically doubted (as indeed many judges had previously) whether anything was gained by the use of the word "*much*" in the test, which suggests "*a superior standard of conviction that is both uncertain and unwarranted in this context.*"

[54] The **Brownlie/Goldman Sachs** formulation was approved of and applied by the ECSC Court of Appeal in **Stanford International Bank Ltd. v Proskauer Rose LLP**¹³.

SERIOUS ISSUE TO BE TRIED

¹¹ [2018] 1 W.L.R. 192

¹² [2018] UKSC 34

¹³ ANUHCVP2018/0011 at paragraphs [68] – [69]

[55] As stated at paragraph 54 above, Mr. Cheong is content, for the purposes of this hearing only, not to challenge the claim that there is the requisite “*serious issue to be tried on the merits*”. It is plain to me that there are clearly serious issues to be tried.

THE GATEWAYS

[56] When obtaining the Service Out Order, the Liquidators relied on four sub-paragraphs of CPR 7.3; sub-paragraphs 6, 7(a), 8 (a) and 10, which read as follows:

“Claims about property within the jurisdiction

(6) *A claim form may be served out of the jurisdiction if the whole subject matter of the claim relates to property within the jurisdiction.*

Claims about companies

(7) *A claim form may be served out of the jurisdiction if the subject matter of the claim relates to-*

- (a) *The constitution, administration, management or conduct of the affairs; or*
- (b) *The ownership or control of a company incorporated within the jurisdiction.*

Claims about trusts

(8) *A claim form may be served out of the jurisdiction if-*

- (a) *a claim is made for a remedy against the defendant as constructive trustee and the defendant’s alleged liability arises out of acts committed within the jurisdiction.*

Claims under an enactment conferring jurisdiction on the Court

(9) *A claim is made under an enactment which confers jurisdiction on the court and the proceedings are not covered by any of the other grounds referred to in this Rule.”*

[57] The Liquidators indicate that at this hearing, they also rely, to the extent necessary, upon CPR 7.3(3). The argument is that they are entitled to rely upon any gateway which would have been applicable at the date that permission was sought, whether or not originally relied upon at the ex

parte hearing. Reference was made to, by analogy, the approach of the UK Supreme Court in **NML Capital Ltd v Argentina**¹⁴, **Ansis Sormulis v Hinch Invest and Finance**¹⁵.

[58] CPR 7.3 sub-section (3) provides as follows:

Claims about contracts

(3) *A claim form may be served out of the jurisdiction if:*

.....

(b) *A claim is made in respect of a contract where the contract-*

(i) *contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract; or*

(ii) *is by its terms or by implication governed by the law of any member State Territory.”*

Mr. Cheong’s Arguments concerning the Gateways

7.3(6) – The Property Gateway

[59] Mr. Hardwick KC refers to Johnson 2, which was relied upon by the Liquidators at the *ex parte* hearing, in particular by reference to paragraph 2(a) where it was stated that “*there is very little case law on the situs of the beneficial interest in the cryptoassets*” and conceding that “*I do not consider the matter settled as a matter of BVI law.*” Johnson 2 goes on to make reference to a view expressed by HMRC in the UK in its manual CRYPTO226000 for the purposes of UK tax as the basis for stating that “*...I believe that there is a good arguable case that the situs is the location of the residency of the beneficial owner...*”

[60] The point was developed in the Liquidators’ SKA prepared for the Service Out Application. Reference was made to the decision of Butcher J in the English Commercial Court in **Ion Science Limited v Persons Unknown** (21 December 2020) at paragraph [13] where the Judge held that there was a serious issue to be tried that the “*...lex situs of a cryptoasset is the place where the*

¹⁴ [2011] 2 AC 495

¹⁵ BVIHCV 2006/2001, **Dicey** at 11 – 108

person or company who owns it is domiciled” .Reference was also made to the decision of HHJ Pelling QC (Sitting as a Judge of the High Court) in **Fetch.ai Limited v Feth.ai Foundation Pte Ltd.** ¹⁶ citing and relying upon **Ion Science**.

- [61] In Cheong 1, Mr. Cheong disputes the Liquidators’ case, stating (at paragraph 91) that “*at all material times, I was in Singapore and have possession and custody of the relevant private cryptographic keys*”.
- [62] Mr. Hardwick KC pointed out that in **Ion Science**, Butcher J claimed that his analysis was supported by Professor Andrew Dickinson’s Book “*Cryptocurrencies in Public and Private Law, 2019* at paragraph 5.108 (“*Dickinson*”).
- [63] However, learned Counsel submits that Butcher J’s claim in this respect was wrong. Reference was made to **Tulip Trading Limited (‘TTL’) v Van Der Laan & Ors**¹⁷ (“**Tulip Trading**”) which involved the same property gateway. Falk J considered the conclusion of Butcher J and *Dickinson* and she concluded that place of residence or business and not domicile is the key determining factor. She considered that the discussion in *Dickinson* did in fact refer to domicile but which was part of a section which “*considers the proprietary character of cryptocurrencies.*’
- [64] Ultimately Falk J found (at [148]) that TTL had the better of the argument that place of residence is the key determining factor, being the place where its central management and control is exercised. Accordingly, although TTL was a company incorporated in the Seychelles, in circumstances where its CEO was resident in England, and it had not carried on any business in the Seychelles, Falk J found that the bitcoin was, for the purposes of the Property Gateway property within the jurisdiction of England and Wales.
- [65] Reference was also made to the “*Legal Statement on cryptoassets and smart contracts*” published by the UK Jurisdiction Taskforce and also to the UK Law Commission’s “*Digital Assets: Consultation Paper*”, published 28 July 2022.

¹⁶ [2021] EWHC 2254(Com)

¹⁷ [2022] EWHC 667 (Ch)

- [66] It was submitted that the Liquidators cannot show that they have “*much the better of the argument*” that the Disputed Assets are “*property within [the BVI]*”.

The Companies Gateway

- [67] Reference was again made to Johnson 2, where, in relation to this Gateway, it was stated that “*This is an application for directions by the officeholders of a BVI Company about how to conduct its affairs. The directions are sought in order to properly administer the liquidation of the Company...*”
- [68] In his brief evidence on this point, Mr. Cheong disputes this, stating that: “...*A claim for a declaration in relation to and delivery up of the Assets does not relate to the internal workings of 3AC.*”
- [69] Mr. Hardwick KC correctly points out that CPR 7.3(7) has two distinct limbs: CPR 7.3(7)(a) relates to “*the constitution, administration, management or conduct of the affairs*” of a company (“**the Constitution/Administrative Limb**”). CPR 7.3(7)(b) relates to “*the ownership or control of a company incorporated within the jurisdiction.*” (“**The Ownership/Control Limb**”). It is only the former upon which the Liquidators relied at the hearing.
- [70] Learned Counsel submitted that some light was cast upon the operation of the relevant limb in the speech of Lord Collins in **Nilon v Royal Westminster**¹⁸. At first instance Bannister J had remarked that “... *if foreigners incorporate companies in the BVI they must expect to have to come to the BVI to litigate disputes going to the membership and administration of such companies...*” and this view was approved and relied upon in the Court of Appeal.
- [71] However, Lord Collins explained that the context of Bannister J’s remarks were made while considering the question of forum non conveniens if (contrary to his view) there was a viable cause of action against Nilon for breach of contract. Lord Collins referred to the matters generally

¹⁸ [2015] UKPC 2

considered under the rubric of organization and administration, as being domestic issues, such as issues arising between members, or issues relating to the powers of organs of a company, the appointment of directors, the extent of members' liabilities for debts of the company, or the right of shareholders to bring derivative actions. In ***Nilon*** the Privy Council concluded that (in the context of a dispute about shares and a rectification claim), the issues in the case before it were not about the organization or administration or internal management of a company.

[72] Reference was also made to the decision of Ramdhani J (Ag.) in **Chan v Noble More Group Ltd.**¹⁹, delivered March 2017, where the judge held (at [44]), that declarations related to resolutions to remove a director and appoint new directors “*surely related to the ‘constitution, administration, management or conduct of the affairs of the company.’*”

[73] It was submitted that the application for directions pursuant to s 186(5) of the Act has nothing to do with the Constitution/ Administrative Limb.

The Trust Gateway

[74] For the purposes of the Service Out Application, the Trust Gateway is addressed at Johnson 2, paragraph 20(c). After making reference to Mr. Cheong's allegation that the Disputed Assets are held on trust, the Liquidators go on to assert that “.... *In so far as there is a trust, it appears likely it was created through [3AC] accepting investments and making payments in the BVI.....*”

[75] Mr. Cheong disputes this, and says, as stated earlier in this judgment, that the Key Independent Fund Arrangement was discussed and agreed as between the relevant parties in Singapore, the Disputed Assets are in Singapore, and at all material times 3AC conducted its operations and was headquartered in Singapore.

[76] It was submitted that the Liquidators cannot show that any trust liability “*arises out of acts committed within the jurisdiction*”.

¹⁹ BVIHC 228 of 2016

The Enactment Gateway

[77] For the purposes of the Service Out Application, the Enactment was addressed at Johnson 2 at paragraph 20(d) where it is stated that “ss 186 and s274A confer jurisdiction on this Court to determine the application. This is an application made in insolvency proceedings subject to the jurisdiction of this Court.”

[78] As pointed out in Mr. Cheong’s SKA, the Liquidators SKA for the Service Out Application did put the matter rather differently, where, (at [41]) it is stated that:

“The [Act] does not expressly confer jurisdiction to serve applications under these two sections outside of the jurisdiction. However, insofar as there are necessary respondents to an application under either section located outside of the jurisdiction, it is possible to serve them so that they can participate in the application...”

(Learned Counsel’s emphasis)

[79] Mr. Hardwick KC referred to **Dicey** 11 – 235 where the similar English provision at para 3.1(20(a)) is addressed. That paragraph of **Dicey** indicates that the scope of the clause was considered by the English Court of Appeal in **Orexim Trading Ltd. v Maavir Port and Terminal Pte Ltd**²⁰ (“**Orexim Trading**”). At paragraph [33] Lewison LJ explained that it was “*implicit in this paragraph that the enactment in question must allow such proceedings to be brought against persons not within England or Wales, otherwise it would be of extraordinary width*”. At paragraph [35] the Court indicated that the answer to that question depended upon the proper construction of the provision in question (in that case s423 of the Insolvency Act 1986).

[80] Learned Counsel opined that the Liquidators were, in their SKA, right to concede that neither s 186 nor s 274A expressly allow such proceedings to be brought against persons not in the BVI. The next stage in the analysis therefore involves an examination of whether the sections implicitly confer jurisdiction.

²⁰ [2018] EWCA Civ 1660

[81] The argument advanced here was that this facility to apply for directions under s.186 applies to the liquidator of a BVI company in respect of directions from the BVI Court in relation to a “*particular matter*” arising in a BVI liquidation. It was submitted that there is nothing in this provision that implicitly confers jurisdiction on this Court to bring such proceedings against persons not in the BVI.

[82] Mr. Hardwick KC asserts that the same is true of section 274A. Further, that this is an important provision for reconstituting the assets of an insolvent company by making an order against a person with possession or control of assets or documents to which the “*company appears to be entitled*”. However, 3AC is a BVI company, the Court is the BVI Court and the Act is a BVI enactment. There is nothing, the argument continues, which states or suggests that the enactment or these particular provisions, confer jurisdiction on the BVI Court for proceedings to be brought against persons not in the BVI.

Liquidators’ reliance on new gateway, Contract Gateway

[83] Mr. Hardwick KC accepted that the Liquidators are entitled to rely upon another Gateway even if it was not relied on at the time of the Service Out Application, and he accepts that the decision in ***Argentina*** supports that position. However, learned Counsel points out that the Liquidators have not specified precisely which ground in Rule 7.3(3) they rely upon. He assumed it is (3)(b)(ii) which provides:

“*Claims about contracts*”

(3) *A claim form may be served out of the jurisdiction if-*

(b) *a claim is made in respect of a contract where the contract*

....

(ii) is by its terms or by implication governed by the law of any Member State or Territory...”

[84] It was submitted, with reference to the ordinary application by which the claim is made, and referring to the cases cited by the Liquidators as to the meaning of the phrase “*in respect of*”, that

the BVI Claim is an awkward and unlikely fit into this Gateway. The Court was asked to reject the Liquidators' claim under this Gateway.

THE FORUM ISSUE

[85] For the purposes of the Service Out Application, Mr. Hardwick KC correctly points out that in relation to the Forum Issue, 4 points were relied upon by the Liquidators, namely:

- (1) Proof of Debt: Johnson 2, paragraph 21 (a): the claim that Mr. Cheong “*as submitted to the jurisdiction by filing a proof of debt*” with particular reliance upon the decision of the Privy Council in **Stichting Shell Pensioenfonds v Krys**²¹;
- (2) The Act: Johnson 2, paragraph 21(b): that the BVI Claim “*is made under two sections of the BVI Insolvency Act*”;
- (3) BVI Assets (legal): Johnson 2, paragraph 21(c): “*that the BVI Claim concerns assets which, on any view, are legally held by the BVI company*”; and
- (4) BVI Assets (beneficial): Johnson 2, paragraph 21(d): that the BVI Claim “*also concerns certain assets which, on any view, are beneficially held by a BVI company*”- being the Managed Account Assets set out at Schedule 6 of Crumpler 3 with a value (as at 3 November 2022) of approximately USD 24.2 million.

These points were also dealt with in the SKA for the Service Out Application.

Mr. Cheong's Response BVI Connecting Factors

(i) The Proof of Debt

²¹ [2015] AC 616

[86] I have already dealt with Mr. Cheong's position regarding the proof of debt and the question of submission. As stated above, I have found that there is a sufficient nexus between the claim in the R184 Claim Form and the dispute regarding the Disputed Assets.

(ii) The BVI Insolvency Act

[87] It was argued on behalf of Mr. Cheong that the acknowledgment at Crumpler 7, paragraph 6.1(b) that in Singapore "*a similar declaration to the Beneficial Ownership Dispute can be obtained*" is important. This was said to be the key substantive question raised in the Singapore Claim. The fact that there is no direct Singapore statutory equivalent to s 274A(1) which empowers a transfer of the Disputed Assets is said to be immaterial. This is because, argues, Mr. Hardwick KC, it cannot sensibly be suggested that, should the Singapore Court determine that the Disputed Assets are in fact the assets of 3AC, the Singapore Court would not (as an obvious consequential order) order Mr. Cheong to transfer the same to the Liquidators.

[88] On the contrary, points out learned Counsel, paragraph 12 of the Cross-Border Insolvency Protocol CBIP expressly provides that the Singapore Court will seek to cooperate and coordinate with the BVI Court in good faith. Plainly such cooperation and coordination would extend to any appropriate transfer order.

(iii) BVI Assets (legal)

[89] It has already been stated that for the purposes of the application, Mr. Cheong has been prepared to accept that the Liquidators have a serious issue to be tried in relation to the merits of the BVI Claim. However, Mr. Cheong's SKA asserts that the reality is that in every substantive particular, the Disputed Assets are held and controlled and accessed in Singapore. That the Disputed Assets have no substantive / practical connection with the BVI at all.

(iv) BVI Assets (beneficial)

[90] Mr. Cheong avers that there is a fundamental difference between the undisputed Managed Accounts (3AC funds) and the Disputed Assets. Accordingly, since there is no dispute as to the Schedule 6 assets, no part of the BVI Claim (or for that matter) the Singapore Claim will relate to the Schedule 6 assets. It was submitted that they provide no meaningful connection with the BVI at all.

(v) The Starry Night Proceedings

[91] In Cheong (S), Mr. Cheong 's evidence is that, while the Liquidators alleged that the subject matter of these proceedings are “*closely connected*” with the BVI Claim, in fact:

- (a) “*there is no dispute over the ownership of the Starry Night portfolio of assets*”, in circumstances where the Starry Night share/interest class invested directly in the 3AC Group;
- (b) No third party has been identified that “*may assert a beneficial interest in those assets*”;
- (c) A 5 October 2022 notice published by the Liquidators on the 3ACliquidation.com website states that “*...all Starry Night NFTs... have been accounted for and are in possession or are being transferred to [the Liquidators] ...*”; and
- (d) Starry Nights was established by Mr. Zhu and Mr. Davis as a 3AC Group Fund that was dedicated to investing in NFT's: it was not an independent standalone fund like DC and there was no segregation of assets;
- (e) There is nothing in the Liquidators' evidence that states or suggests that the individuals or investors in Starry Night are claiming a trust or beneficial interest.

[92] Accordingly, the argument continues, the Liquidators are wrong to claim (expressly or impliedly) that there is anything about the Starry Night Proceedings that creates a connecting factor with the BVI.

(vi) Mr. Cheong's Conclusion on BVI Connecting factors

[93] It was submitted that the Liquidators have failed to discharge the burden which rests on them to show that the BVI is clearly and distinctly the most appropriate forum in all of the circumstances.

[94] Further, Mr. Hardwick KC argues that it does not make any difference to the analysis that the BVI Claim was issued earlier in time (on 4 November 2022), because, as previously noted in the Chronology provided, Drew & Napier had been corresponding with the Wong Partnership since 22 September 2022 openly stating their view that Singapore was the appropriate forum. It was further submitted that it was only the non-engagement of the Liquidators that led to the situation where the BVI Claim was issued prior to the Singapore Claim.

Mr. Cheong's Analysis: the Singapore Connecting Factors

[95] Mr. Cheong's SKA reminds that first and foremost, in this Service Out Application, no burden at all falls upon Mr. Cheong to establish that there is some other more appropriate forum.

[96] Nonetheless, it was asserted that there are a number of connecting factors with Singapore.

(i) Governing law

[97] Reference was made to the decision of the ECCA in **Livingston Properties Equities Inc. v JSC MCC Eurochem**²², where Webster J.A., giving the judgment of the Court, stated as follows:

"47. The usual starting point in determining the governing law of the claims in an action is the place of commission of the acts leading to the filing of the action...."

²² BVIMAP 2016/ 0042-0046

[98] In Cheong 1, it was asserted that the Independent Fund Arrangement was discussed and agreed as between the relevant parties in Singapore, and that no acts were committed in the BVI, BVI being merely the place of incorporation of 3AC.

(ii) Witnesses

[99] Reference was made to **VTB Capital Plc v Nutritek International Corp**²³, and **Nilon v Royal Westminster** for the well-established proposition that the question of the location of the witnesses is a factor at the core of the appropriate forum.

[100] It was submitted that again, the location of the witnesses militates against the BVI as the most appropriate forum and in favour of Singapore. Reference was made to Cheong 1, where Mr. Cheong observed that a number of key witnesses are located in Singapore, including (i) 3AC's fund administrator, Ascent, with documents and correspondence evidencing the independent Fund Arrangements; and (2) key employees of 3AC such as Ningxin.

[101] Reference was made to the suggestion in Crumpler 6.2 (c) and (d) where it was suggested that "*If live witness evidence proves necessary, it can be delivered via video-link in the BVI*". It was submitted that this is no answer because clearly, the trial would be an in-person trial. Yet in a fully in-person trial (in contrast with a fully remote hearing) the physical attendance of key witnesses is certainly preferable- attendance by video link representing, according to Mr. Cheong's SKA, a "distinctly second class option".

(iii) Assets

[102] The point has been made and repeated for this aspect of the analysis, that the Disputed Assets are located in Singapore.

(iv) Other Singapore Connections

²³ [2013] UKSC 5

[103] It was submitted that the issues also have strong connections with Singapore through the Liquidators' Repatriation Application, the CBIP application as granted by the Singapore Court on 27 October 2022, and the orders made by the Singapore Court to date.

(v) Discretionary Factors

[104] It was submitted that here, the importance of the Singapore Claim looms large. It was submitted that there is no question of the Liquidators being denied access to the Courts: on the contrary the Singapore Court will be entirely capable of adjudicating upon the Singapore Claim and making the appropriate orders and directions. It was submitted that there is no need for this parallel BVI Claim. In conclusion, Mr. Hardwick KC submitted that in every material particular Singapore is the natural forum for this dispute.

The Liquidators' Position on the Forum Issue

[105] The Liquidators submit that the question of the more convenient forum is a question that arises as the third limb of the test to be applied on an application to serve out/set aside order for service out, and that it also arises on Mr. Cheong's application for declarations.

[106] Reference was made to the **Spiliada** decision and numerous others. It was submitted that the exercise is ultimately one of discretion considering all factors, including typically, per Auld LJ in **Limit (No. 3) Ltd. & Ors v PDV Insurance Co.**²⁴:

“the nature of the dispute, the legal and practical issues likely to arise, or that could cause significant difficulties in one jurisdiction rather than another if they did arise; questions as to local knowledge: availability of evidence; and efficiency, expedition and economy, not only in the trial of the instant proceedings, but also in related proceedings that, in the interests of justice should be tried in the same jurisdiction and/or with it.”

²⁴ [2005] 1 CLC 515 at paragraph 67

[107] It was further submitted on behalf of the Liquidators that, although the Court cannot form any sort of binding view on the ultimate merits, it is inevitable (and right) that some degree of merits analysis is undertaken when forming a view on the jurisdiction dispute. Further, that whilst an evidential analysis is necessarily part of the assessment of good arguable case, it also has a role to play at the forum stage. Thus, although a defendant is not required to particularise their defence, if he does not do so, or does not do so adequately, the assessment of the jurisdictional challenge can only be on the claimant's case. Reference was made to **Limit (No. 3)** paragraph 72, and **VTB Capital** at paragraphs 90 and 91.

[108] In this regard, argues Mr. Fisher KC, the nature of the issues raised by the defendant, and therefore the apparent strength of the claim at the time of the jurisdiction dispute is a factor which a Court is entitled to place weight on when considering the second and third states of the jurisdiction analysis: the Court should not deliberately export bad litigation. Reference was made to **Baturina v Chistakov**²⁵, where at paragraph 82, Clarke L.J. stated:

"We should not export to a foreign jurisdiction-on the supposed footing that it is a clearly more appropriate forum-a claim which, to English eyes, is (a) governed by English law in relation to both tort and contract; and (b) appears in English law to be unsustainable. For such a claim there is no natural forum, not because several factors point to different jurisdictions but because the claim itself is bad."

BVI is the more appropriate forum for the resolution of the dispute

[109] In maintaining that BVI is the more appropriate forum than Singapore for resolution of the dispute between the parties, the Liquidators make numerous points, including that, even if (contrary to the Liquidators' case) Mr. Cheong's submission by way of filing a claim form in the liquidation does not preclude him from challenging jurisdiction at all, it is a factor of overwhelming significance when it comes to assessing whether BVI is the more appropriate forum.

²⁵ [2014] C.L.C. 209

- [110] The Liquidators submit that the connection of this application to the BVI is obvious. This is an application in existing BVI insolvency proceedings, concerning the affairs and assets of a BVI company in liquidation, made under two sections of the Insolvency Act.
- [111] The Liquidators further say that the fact that the Liquidators have obtained recognition in Singapore (and a stay) by virtue of recognition, and have entered into a cross-border protocol, does not clothe Singapore with a form of appropriate jurisdiction status that it would not otherwise have.
- [112] The Liquidators assert that the proper law for the dispute is BVI law. They submit that this is a factor of material significance and reference was once again made to *Livingston*. On the Liquidators' case, BVI law governs because the dispute can be resolved by construing the BVI-law governed Memorandum of Association for the Company and TAF Ltd, together with the BVI-governed subscription agreement and offering memorandum. The provisions it was submitted, exclude any trust as alleged.
- [113] This court, the Liquidators argue, is already seised of the issues in the Starry Night proceedings i.e. the effect of the relevant subscription agreement and constitutional documents. Indeed, this Court has already made the Declaration sought by the Liquidators and made findings as set out in paragraph [27] above.
- [114] It was submitted that Mr. Cheong's case is incredible and lacking in merit. Further, that the Court should not export bad claims and, absent a particularized case from Mr. Cheong, there is no tenable basis to suggest that the claim is viable. The Liquidators submit that Mr. Cheong's case is obviously a bad claim in this sense, for a number of reasons, including the following:

- (1) Because Mr. Cheong has provided no answer to the Liquidators' primary case, which is that the various legal instruments preclude the existence of a trust. He has simply declined to do so, in favour of repeating his evidence about his discussions giving rise to an "*Independent Fund Arrangement*". However, the legal relations between the Class Defiance investors and the Company are governed by the legal

instruments they signed, and these show no restrictions on the Company's beneficial entitlement to the subscription monies;

- (2) Because there are no contemporaneous documents supporting any such alleged trust, and the contemporaneous documents such as there are (i.e. the Company's accounts) are inconsistent with the existence of any such trust;
- (3) Because a trust relationship was not necessary in order to accomplish the commercial purpose of the arrangement as identified in the original brief sent to the Liquidators,
- (4) Because although Mr. Cheong has had at least three formal opportunities to articulate his case-in the BVI, and in two sets of Singapore proceedings-he has failed to answer critical questions about how, on his own case, a trust is meant to operate. Mr. Cheong's own case is incomplete and conceptually incoherent; he cannot explain (for example) how many trusts there were, who the beneficiaries of each trust were, and what the terms of these trusts are said to be; and
- (5) Because Mr. Cheong's case has shifted, radically, according to the Liquidators, in the retelling. The definition of "*DeFiance Capital* "and "*Independent Fund Arrangement*" has hardly been consistent in any two sets of documents.

[115] The DeFiance application has been sealed by the order of Small-Davis J (Ag). However, the Liquidators say that once this preliminary question of jurisdiction is resolved, they would seek to lift the seal and advertise the claim more broadly once they are able to. More individuals, the submission continues, may wish to participate in the dispute, which is possible in the BVI by adding more respondents to the application. The Liquidators also say that they consider it proper to also use this forum for an application for directions to allow parties without legal representation the opportunity to convey their views, as took place with the Starry Night Portfolio. This, they claim is a distinct advantage of continuing in the BVI: all BVI creditors of the Company can participate.

[116] In these circumstances, they submit that the BVI is the more appropriate forum or that Singapore cannot be shown to be the more appropriate forum.

The Singapore Ruling

[117] As referred to earlier in this judgment, by letter dated 10 August 2023, Conyers informed the Court that there had been the Singapore August Ruling. There was subsequent correspondence from both Ogier and Conyers.

[118] The Singapore Ruling is a very short *ex tempore* Ruling, the substance of which consists of 4 brief paragraphs in which an application by the Joint Liquidators seeking to set aside service of proceedings issued against them, out of the jurisdiction, was dismissed by Justice Chua Lee Ming.

[119] Having understood from the correspondence that the parties would wish to make Further Written Submissions if and when a written judgment was obtained, the Court invited the parties to file further written submissions limited to 10 pages each in relation to a written judgment, and if none was forthcoming, on the *ex tempore* Singapore Ruling. The parties requested to do so by 17 November 2023, and the Court agreed.

[120] As pointed out by Conyers in the Further Submissions advanced on behalf of Mr. Cheong, the only record of the *ex tempore*, oral ruling is contained in the certified notes of evidence of the hearing at which it was delivered ("**the Notes of Evidence**"). No written judgment has been issued, none is required, but one may issue, depending on whether the Liquidators are granted permission to appeal. In the circumstances, that is not a certainty, so what this Court has to go on is the decision of the Singapore Court as contained in the Notes of Evidence.

[121] The Notes of Evidence run to 11 pages, and the dispositive section of the Ruling can be found between page 9, line 21, and page 10, line 22 for convenience and ease of reference, I will just set the Singapore Ruling here, in its entirety:

"This is my decision with brief reasons which I will supplement if full grounds are issued.

With respect to nexus to Singapore, in my view, the question whether [3AC] is ordinarily resident or carrying on business in Singapore has to be determined at the time that the application for service out of Singapore was filed or heard. I therefore disagree with [Mr. Cheong] that this gateway has been satisfied.

However, I agree that a good arguable case has been made out that:-

- (a) The crypto-assets are property located in Singapore, since [Mr. Cheong] controlled and controls these assets; and*
- (b) The cause of action arises in Singapore because in substance the trust arose in Singapore.*

With regard to forum conveniens, I agree with [Mr. Cheong] that the relevant factors point to Singapore being the more appropriate forum. The material witnesses are in Singapore. Compellability of documents also point to Singapore as the more appropriate forum. The applicability of BVI law (to the extent that it applies) is not sufficient to shift the balance. Neither is the fact that there are parallel proceedings in BVI given the early stage of those proceedings.

With the merits of the case. I note the [Liquidators'] submissions regarding the fund structure and fund documents. However, I agree with [Mr. Cheong] that the evidence raises serious questions to be tried. I note, in particular, [Mr. Cheong's] involvement in the DeFiance Capital Fund, the extent of his control over the DeFiance Capital fund, the discussions between the parties and the steps taken.

Finally, I do not think there has been any failure to make full and frank disclosure. Accordingly, the application is dismissed."

The Submissions on behalf of Mr. Cheong

[122] Mr. Hardwick KC helpfully, gives a short chronology, repeating some of the earlier chronology set out above, but adding that on 11 July 2023, the Liquidators filed an application seeking to set aside the Order for Service Out. The hearing took place on 8 August 2023 and that is what gave rise to the Singapore Ruling on 8 August 2023.

[123] At the end of the day, whilst Mr. Cheong's Further Submissions make a number of points, in my view the following are the relevant stand-out points:

- (1) A Court of competent jurisdiction has considered the arguments and concluded, on the issue of forum, that Singapore is the more appropriate forum, applying tests analogous to those applied by the BVI Court.
- (2) It is important to acknowledge what the effect of the Singapore Ruling is not. It is not Mr. Cheong's case that the Singapore Ruling requires this Court to decline jurisdiction. Notwithstanding the Singapore Ruling, it remains entirely a matter for this Court as to whether it stays the BVI proceedings in favour of those in Singapore.
- (3) ***Lis alibi pendens***. Reference was made to ***Dicey & Morris***²⁶, where it is stated as follows:

*“The common law approach is that existence of simultaneous proceedings is no more than a factor relevant to the determination of the appropriate forum. In **The Abidin Daver** Lord Diplock said that, where proceedings were pending in a foreign court between the parties, and the defendant in the foreign proceedings commenced proceedings as claimant in England, then the additional inconvenience or expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different jurisdictions, where the same facts would be in issue and the testimony of the same witnesses required, could in principle only be justified if the would-be claimant in England could establish objectively by cogent evidence that there was some personal or juridical advantage that would be available to the claimant only in the English action and which was of such importance that it would cause injustice to deprive the claimant*

²⁶ 16th Edition, at paragraph 12 – 501

of it. Then, in **de Dampierre**, Lord Goff, delivering the judgment of the House of Lords, held that the Spiliada principles apply whether or not there are other proceedings already pending in the alternative forum. The foreign proceedings may be of no relevance at all, for example, if one party has commenced them for the purpose of demonstrating the existence of a competing jurisdiction, or if the proceedings have not passed beyond the stage of initiating process. But if genuine proceedings have been started and have had some impact on the dispute between the parties, especially if it is likely to have a continuing effect, then this may be a relevant (but not necessarily decisive) factor when considering whether the foreign jurisdiction provides the appropriate forum. Regardless of whether the two claims constitute a lis pendens or are simply closely related, the court will attach importance to the risk of irreconcilable judgments arising from parallel proceedings whilst recognizing that this cannot be avoided in all cases.”

(Mr. Cheong’s emphasis)

- (i) From the above analysis of **Lis Alibi Pendens**, Mr. Cheong says that a number of observations flow. Firstly, whilst it is not determinative, it is submitted that where possible, if one of two “competing” Courts has already accepted jurisdiction, all other things being equal, it is highly desirable, if possible to avoid the risk of duplicative determinations of the same issues.
- (ii) Secondly, although a claim that has commenced in one jurisdiction “for the purpose of demonstrating the existence of a competing jurisdiction”, may be discounted, as noted above, the endorsement of the Singapore Court of the proceedings before it removes this as a credible argument for the Liquidators.
- (iii) Thirdly, that even if this Court were to accept jurisdiction, the Singapore Proceedings would, absent any further development, continue to trial independently. Such an outcome may not be ideal, but it is one that is

perfectly possible. As noted at the end of the extract from *Dicey & Morris*, there are some cases where the overlap of jurisdictions simply cannot be avoided. However, Mr. Cheong urges that this can be avoided here.

(4) Comity

[124] Mr. Cheong's leading Counsel submits that comity has an important part to play in the consideration of the Singapore Ruling.

[125] He goes on to submit that applying comity principles would require this Court to consider carefully the Singapore Ruling (as, of course it will) and, to the extent that it faces similar issues, to consider and record whether its view on such issues is the same as those reached by the Singapore Court. Further, says learned Counsel, if this Court were to take a different view on such issues, it may well consider it appropriate to explain why its conclusions are different.

[126] I would just deal with this latter point regarding comity from the outset. This Court will of course have regard to the Singapore Ruling; comity so dictates. However, with the greatest of respect I can see no sound reason why if I come to different conclusions, I should have to explain that. No authority has been cited for that proposition and I do not accept that in these circumstances comity goes that far. This Court has to decide for itself as to the appropriateness of the BVI as the forum. In any event, at the time that the Singapore Application was being heard on 8 August 2023, the Singapore Court had been informed, and knew that this Court had reserved its judgment, and therefore was already seised of its own jurisdiction issue. This Court was therefore the Court that was first in time to hear the jurisdiction challenge, albeit because of the complexity of the matters argued, and the volume of work assigned to me in the BVI, I had to reserve my judgment. However, secondly, and perhaps more fundamentally, whilst the Singapore Ruling has certainly swiftly decided the application and reached conclusions, respectfully, it does not contain detailed reasons and thus there is not a lot of reasoning upon which I can rely or compare or agree with or distinguish. No doubt a written ruling would/will have more detail, but I have to deal with the Ruling as it is. From a plain reading of the Ruling, and indeed the Notes of Evidence, it is obvious that whilst there were some similar issues that this Court will have to consider, the issues were not

identical. I see no discussion, for example, of the issue of the R184 Claim Form or the Liquidation or Submission to the BVI Jurisdiction and insolvency regime. The hearing seems to have been concluded in under a day, and there is no reference to relevant case law, even case law cited about for example, the very topical subject of the location of cryptocurrency. In this jurisdiction, the hearing took place over 2 days, and there are 77 authorities in the Parties' Joint Authorities Volumes.

The Liquidators' Submissions

- [127] The Liquidators have indicated that they have applied for permission to appeal the Singapore Ruling. The Liquidators in a letter to the Court had said that they had suggested that the jurisdiction dispute in Singapore be delayed to await the outcome of the hearing in the BVI, but this was rejected by Mr. Cheong's Singapore Counsel.
- [128] The Liquidators too have set out a Chronology, which ends with 22 August 2023, when they filed an application for permission to appeal the Singapore Ruling. That application is extant.
- [129] The Liquidators assert that on any basis, Mr. Cheong's conduct is remarkable and highly unsatisfactory. They say that the chronology of events demonstrates that Mr. Cheong: (i) applied to set aside an order of the BVI Court; (ii) issued a new claim ten weeks later (and five months after the BVI Claim) in a foreign court, notwithstanding the pending application before the BVI Court and (iii) obtained a decision on jurisdiction before his own application is determined in the BVI. The Liquidators submit that it is Mr. Cheong's conduct which has created a situation in which similar (albeit not identical) issues are live before both Courts. They say that this situation is to be deprecated.
- [130] In any event, the Liquidators take the position that the Singapore Ruling is either entirely irrelevant or should be given little or no weight for the purposes of determining Mr. Cheong's application in the BVI. That is because:
- (1) Mr. Cheong has already submitted to the jurisdiction of this Court, such that he is precluded from challenging jurisdiction by virtue of submission, or submission is in any

event determinative of any questions of whether the BVI is clearly the most appropriate forum for resolution of the dispute. The Singapore Ruling makes no difference in this regard.

- (2) In any event, as a matter of law, the only material relevant to challenging the decision to serve out is material which was or could have been available as of the date of the decision to grant service out, i.e. November/December 2022. The Singapore Ruling post-dates that period, and relates to litigation which was not ongoing at the time when the Liquidators obtained permission to serve out but which was commenced many months after they is so (i.e. it was not pending litigation at that time). In those circumstances, the Singapore Ruling can have no legal relevance;
- (3) Further and in any event, if (contrary to the above) the Court considers the Singapore Ruling to have any relevance to the question of appropriate forum, it is a matter that should be given little or no weight. While *lis alibi pendens* is a potentially relevant factor in the *Spiliada* test, it is not a bar on the BVI Court maintaining its otherwise correctly established jurisdiction and should be given little weight here given the timing of Mr. Cheong's conduct and embryonic stage of the Singapore litigation.

[131] Insofar as the Court was otherwise minded to dismiss Mr. Cheong's application, it should therefore do so. As a matter of case management, the BVI Court should let these proceedings continue and give directions to progress the matter accordingly. If at some future point the Singapore Court rejects the Liquidators appeal, and parallel proceedings continue, it may be desirable for the BVI Court and the Singapore Court to entertain discussions as to the procedure to minimize the risk of inconsistent decisions. There is, the Liquidators point out, a vehicle for doing so via the Judicial Insolvency Network Protocol which has been adopted for these cross-border proceedings by Small-Davis J on 2 December 2022 in the BVI, and by Justice Vinodh Coomaraswamy on 27 October 2022 in Singapore.

DISCUSSION AND ANALYSIS

The Gateways

- [132] There are some authorities that appear to suggest that if the applicability of a jurisdictional gateway depends on a question of law or construction, there is no room for the application of the good arguable case: that the court must decide the question on the application to set aside- see in the Joint Authorities Bundle, **Dicey, Section 5, Permission to Serve Out of the Jurisdiction**²⁷, and some of the cases there cited. However, in my view, in novel areas of the law such as raised in this case, that is not the appropriate exercise. Indeed, in the same footnote, the learned authors also refer to cases and state that but perhaps that should not be the approach where the application raises controversial questions of law in a developing area, especially when the facts have not been found. Further, neither of the eminent Kings' Counsel who have led in this case have asked me to look at anything except whether there is a good arguable case. That is therefore how I have approached the case and focused on the question whether there is a good arguable case made out in relation to any of the Gateways relied upon.

The Enactment Gateway

- [133] The Liquidators argue that this is the Gateway that they can most easily satisfy, although they do argue that they satisfy all of the other gateways. The Liquidators are correct that they need not satisfy all the Gateways; satisfaction of any one of them will suffice.

- [134] Section 186(5) of the Act provides as follows:

“186(5) The liquidator of a company, whether or not appointed by the Court, may at any time apply to the Court for directions in relation to a particular matter arising in the liquidation.

- [135] Section 274A of the Act provides as follows:

“274A Where any person has in his possession or control assets or documents to which the company appears to be entitled, the Court may, on the application of the office holder,

²⁷ paragraph 11-106, footnote 339

require that person forthwith, or within such period as the Court may direct, to pay, deliver, convey, surrender or transfer the assets or documents to the officeholder.”

- [136] This gateway applies where a claim is made “*under any enactment which confers jurisdiction on the court, and the proceedings are not covered by any of the other grounds referred to in this rule.*” CPR 7.3(10) operates as a “catchall” in respect of any enactment which “confers jurisdiction on the Court.
- [137] The meaning of Rule 7.3(10) has not been the subject of any detailed ruling in this jurisdiction. This gateway is materially similar to that considered by the English Court of Appeal in **Orexim Trading v Mahavir Port**²⁸. In that case, the English Court of Appeal found that a claim for fraudulent trading under s.423 IA 1986, was a claim which fell under PD6B para 3.1(20) (i.e. permitting service out where “*the claim is made under an enactment which allows proceedings to be brought and those proceedings are not covered by any other grounds referred to in this paragraph*”). The Court held (at paragraph 35) that the application of the gateway depended on the construction of the enactment in question, and whether or not it permits proceedings to be brought against people outside of the jurisdiction. If it did, then there was then a separate question as to whether the court should exercise that power (i.e. going to the appropriateness of permitting a section 423 IA claim to be brought, and /or to forum conveniens). At paragraphs 23 and 24 in **Orexim**, it was pointed out that there are few statutes in which it is made explicit that the reach of the legislation extends beyond its territory. At paragraph 25 it was pointed out that s. 423 had been considered in previous cases and that on its face, the legislation is of unlimited territorial scope.
- [138] In **AWC Fund v ZCM**²⁹, the Privy Council had before it for consideration certain Bahamian avoidance provisions. The Court indicated that proceedings to challenge transactions are now generally regarded as extra-territorial under Insolvency legislation. In **ZCM**, the Board held that “*it made no sense*” (paragraphs 37 – 42), to treat the Bahamian avoidance provisions as being territorially limited.

²⁸ [2018] 1 WLR 4847

²⁹ [2019] UKPC 37

[139] The question for this Court is therefore whether, as a matter of construction, ss. 186 and 274A of the Insolvency Act 2003, can permit the grant of relief against persons outside of the BVI.

[140] In my judgment, it is plain that as a matter of construction, seen in context, and looking at the scheme of the legislation, the sections do permit of such a construction, and this is made clear from the following considerations:

(1) there is no limitation (express or implied) on the face of those provisions preventing relief being granted against persons outside the jurisdiction. The language used is without limit;

(2) Read in context, as part of an Insolvency Act providing for liquidations which are intended to have worldwide effects, both provisions are bound to be well capable of enabling the Court to grant relief against third parties who are not in the BVI, i.e. it is possible to (i) seek delivery up from an individual outside of the jurisdiction, or (ii) issue proceedings for directions, to which persons outside the jurisdiction are made respondents so as to bind them/facilitate participation. Otherwise, (as the Liquidators point out), the liquidation could not have worldwide effect:

(1) The intended worldwide effect of liquidation proceedings (on both domestic and foreign creditors) is well-established. Just as it made no sense in **ZCM** to treat the Bahamian avoidance provisions as being territorially limited, it makes no sense to treat ss. 186 and 274A as territorially limited. Those provisions would otherwise be inapplicable and of no use where creditors or third parties were abroad and held assets that appeared to be those of the company, or were directly interested in an issue that the Liquidators wished to raise with the Court for directions;

(2) The fact that the Insolvency Rules 2005 specifically envisage that ordinary applications made under the provisions of the Insolvency Act 2003 may be the subject of orders for service out under Part 7 further supports the position.

[141] I agree with the Liquidators submission that appropriate protection for third parties does not arise from construing Ss. 186 and 274A narrowly, and without extra-territorial effect. Protection is provided by the need for the applicant to persuade the Court that the BVI is the appropriate forum for the dispute. Whether the Court will permit the pursuit of proceedings against a third party abroad under these provisions may depend on whether, in relation to that particular claim, there is a sufficient connection with the jurisdiction (i.e. *forum conveniens*). But in principle, I accept that relief must be capable of being granted against a foreign third party because of the nature of the relief capable of being provided for in Ss 186 and 274A of the IA.

[142] As I had alluded to earlier in discussing the question of submission to the jurisdiction, it seems to me that the conclusion as to relevant enactment provisions is fortified on the facts of this case by the fact that relief is sought against a person who has submitted to the jurisdiction. In the alternative to the general proposition put forward above, in my view the Liquidators are correct in their analysis that seeking relief under either section 186 or section 274A against a defendant who has submitted to the jurisdiction should be regarded as seeking relief under an enactment which confers jurisdiction on the Court, i.e. Ss. 186 and 274 A apply for the purpose of the winding up and enable relief to be granted against those participating in the liquidation wherever they are located. Those within the scope of relief which may be granted under those provisions include all creditors who have submitted wherever they are geographically located.

[143] Thus, in my judgment the Liquidators have succeeded in establishing a good arguable case under the Enactment Gateway.

The Property Gateway

[144] In order to properly analyze this aspect of the matter, it is important to delve into the decision in **Tulip Trading** a bit more deeply. In that case, Falk J made the point that in **Ion Science**, Butcher J relied upon paragraph 5.108, but that in fact that paragraph does not refer to “domicile” but was part of a section which “*considers the proprietary character of cryptocurrencies*.” In my view, it is useful to set out paragraphs [142] to [147] of **Tulip Trading** where Falk J discussed relevant matters as follows:

[142]... the Defendants do challenge TTL's claim that the bitcoin should be regarded as located in the jurisdiction. TTL's claim to that effect, although not well developed at the stage of the application to serve out, is based on it being resident in the jurisdiction. Its position is that, rather than being located in its country of domicile, which is its place of incorporation (see Dicey & Morris on the Conflict of Laws (15th edn. 2012), Rule 173(1)), its place of residence is the key determining factor, being the place where its management and control is exercised (r. 173(2)). The Defendants maintain that domicile is the correct test, and therefore that the assets should be regarded as located in the Seychelles.

[143] In **Ion Science** Butcher J concluded at [13] that there was at least a serious issue to be tried that 'the *lex situs* of a cryptoasset is the place where the person or company who owns it is domiciled.' He said that this was supported by Professor Andrew Dickinson's book **Cryptocurrencies in Public and Private Law** (2019) at para 5.108. Butcher J's comment was adopted by Judge Pelling QC... in **Fetch.AI** at [14]. (Counsel for the Defendants) submitted that I should follow the same approach as adopted in those two cases and determine that domicile is the correct test.

[144] However, the discussion in Professor Dickinson's book does not in fact refer to domicile. It is part of a section that considers the proprietary character of cryptocurrencies. At para 5.107 there is an interesting observation describing the value of cryptocurrencies as being reliant on a legitimate expectation that the consensus rules underpinning the system will not be altered fundamentally to deprive participants of their association with particular units and the power to deal with them. He suggests that although this is a factual and not legal benefit it could be characterized as a species of intangible property, in the same way as goodwill. Paragraph 5.108 continues the goodwill analogy and refers to the **lex situs** rule for that, which is where the business is situated (see **IRC v Muller & Co's Margarine Ltd. [1901] AC 217 at 235**).

[145] Paragraph 5.109 continues as follows:

‘ 5.109. The analogy with goodwill supports the submission that the benefits accruing to a person who is a participant in a cryptocurrency system such as

Bitcoin or Ripple (i) are a species of intangible property in the English conflict of laws, which (ii) arises from the participation of an individual or entity in the cryptocurrency system, and (iii) is appropriately governed by the law of the place of residence or business of the participant with which that participation is most closely connected. Rather than deciding a fictional situs, the choice of law rule can be more straightforwardly and appropriately, expressed in the terms that the proprietary effects outside the cryptocurrency system of a transaction relating to cryptocurrency shall in general be governed by the law of the country where the participant resides or carries on business at the relevant time or, if the participant resides or carries on business in more than one place at that time, by the law of the place of residence or business of the participant with which the participation that is the object of the transaction is most closely connected.”

This passage obviously refers to place of residence or business, not domicile.

[146] Paragraph 5.109 was also set out by Judge Pelling in **Fetch. AI** at [14], and he went on to apply what it says to the facts in that case.

[147] I would observe, with respect, that the distinction between domicile and residence or place of business appears not to have been material in **Ion Science**, a case in which Butcher J was also considering the position of both an individual and a corporate claimant. I further note that Butcher J referred at [21] to ‘the argument which I have already identified which is that the bitcoin are or were here and that the *lex situs* is where the owner resides or is domiciled.’ In other words, Butcher J himself referred to residence in the same judgment strongly indicating that he was not intending to say that domicile was the sole relevant test...”

[145] I note that **Tulip Trading** was the subject of a successful appeal in **Tulip Trading Ltd v Van Der Laan and Ors**³⁰. However, the appeal related only to the issue as to whether “the developers who look after bitcoin may arguably owe fiduciary duties or duties in tort to an owner of that cryptocurrency” (at paragraph 1). Although obiter, I note that in the Court of Appeal Birss LJ at

³⁰ [2023] EWCA Civ 83

paragraph 7 expressly referred to the conclusions of Falk J on the property gateway point as “*now unchallenged conclusions*”.

[146] An important point made in the Court of Appeal decision has to do with how the Court should approach points of law, whether to do with the merits test aspect of a jurisdiction application or whether to do with the gateways. At paragraphs 14 and 15, these matters were discussed as follows:

*14. In my judgment, the same principles, about how to approach points of law, should apply to the merits test aspect of a jurisdiction application as to the test under the gateways, and I believe that view is supported by the first sentence of paragraph 86 of **Altimio** as follows:*

‘86. There is no reason why the same principle [that it is not normally appropriate in a summary procedure to decide a controversial question in law in a developing area] should not apply to the question whether, in a service out of the jurisdiction case on the ‘necessary or proper party head’, a claim is ‘bound to fail’ as well as to the question whether there is a ‘serious issue to be tried’ in the claim against D2.”

15. Therefore the court may, but is not bound in law to, decide any legal question arising, whether it is under the merits limb or the gateway limb. No doubt an important factor in deciding whether to do that will be the fact that the question goes to the jurisdiction of the court. If the point goes to jurisdiction and it can be decided summarily then no doubt it should be. However, another important factor is the warning against deciding controversial points of law in a developing area on assumed or hypothetical facts. This concern does not cease to apply simply because the point arises in a jurisdiction application (whether under the merits test or the gateways). It is always an important factor to bear in mind.”

[147] At paragraph 16 of **Tulip Trading**, Falk J referred to the “*Legal Statement on cryptoassets and smart contracts*” as published by the UK Jurisdiction Task Force (“**the Taskforce Statement**”).

[148] The authors of the Taskforce Statement expressed the view that cryptoassets are “*to be treated in principle as property*”. When treating with the question as to ownership of cryptoassets, as Mr. Cheong’s SKA points out, at paragraphs 43 and 86(b) it is stated as follows:

“43. The starting point, in our view, is that a person who has acquired knowledge and control of a private key by some lawful means should generally be treated as the owner of the associated cryptoasset, in much the same way that a person lawfully in possession of a tangible asset is presumed to be the owner.

86(b) We would expect that the person with the knowledge of a private key would generally be considered the owner of the cryptoasset (or the right in the asset) that the key controls.”

[149] In **Smith & Kardachi v Torque Group Holdings Limited (In liquidation)**³¹, Wallbank J had regard to the Taskforce Statement. He cited and applied paragraph 86(b) of the Taskforce Statement (at [27]). Similarly, in the New Zealand case of **Ruscoe v Cryptopia Ltd. (In Liquidation)**³², Gendall J at page 810 held that “*The degree of control necessary for ownership of [the relevant cryptocurrencies] was achieved by the allocation of a public and private key.*”

[150] Mr. Hardwick KC also referred to the UK Law Commission’s paper “*Digital Assets: Consultation Paper*” on 28 July 2022. In particular, he referred to Chapter 11, entitled “*Control*”, where he submits, consistent with the observations on control considered above, the Paper explained:

“(at 11.1 and 11.77 and 11.90) that for the purpose of personal property law “the most suitable concept for data objects is control” and “A person in control of a data object stands in the same factual relationship to that object as a person in possession stands to a tangible object”;

(at 11.112) the provisional proposal that “broadly speaking, the person in control of a data object at a particular moment in time should be taken to be the person who is able sufficiently : (1) to exclude others from the data object; (2) to put the data object to the

³¹ BVIHC(COM) 0031 of 2021

³² 2 NZLR 809

uses of which it is capable (including, if applicable, to effect a passing of, or transfer of, that control to another person, or a divestiture of control); and (3) to identify themselves as the person with the abilities specified in (1) and (2) above”, and

(at 11.122) that “Currently, in the context of data objects, the concept of control is likely to be an evolving concept.... Currently, users might combine a variety of different security features such as physical security, hardware wallets, multi-signature arrangements, or custody arrangements”.

[151] It is common ground that for the purposes of this Set Aside Application, the Disputed Assets constitute property.

[152] All told, I accept that for the purposes of the Property Gateway, the better argument is that the place of central management and control is the key determining factor. I accept Mr. Hardwick’s submission at paragraph 42 of the SKA, that the fact of 3AC being incorporated in the BVI, is of less significance than the following factors:

- (1) 3AC was co-founded and 100% owned by Mr. Zhu and Mr. Davies, both resident in Singapore.
- (2) 3AC conducted its operations in, and was headquartered in Singapore, where its central management and controllers, Mr. Zhu and Mr. Davies were based. 3 AC’s Headquarter address was stated to be Suntec Tower One, 7 Temasek Boulevard, 21-04, Singapore 038987.
- (3) The 3 AC Group’s fund administrator, was Ascent Fund Services (Singapore) Pte. Ltd. (“**Ascent**”).
- (4) 3AC’s financial statements were prepared by Oakfiend & Associates in Singapore.

- (5) Until 20 August 2021, 3 AC's Investment Manager was TACPL (Three Arrows Capital Pte Ltd.), operating out of Suntec Tower in Singapore, it was only thereafter that Three AC Ltd. (BVI) ("**3ACL**") became the new investment manager.
- (6) At all material times Mr. Cheong managed the Managed Account Assets out of Singapore.
- (7) At all material times Mr. Cheong retained and exercised full power, control and authority to manage DC's funds in Singapore.

[153] I also accept Mr. Hardwick's submissions at paragraph 43 of the SKA that, in relation to the important issue of the "control of a private key":

- (1) In their evidence, the Liquidators have acknowledged that the Disputed Assets are currently under the control of Mr. Cheong.
- (2) Mr. Cheong in his evidence has explained that:
 - (i) *"the cryptocurrency tokens and NFTs in issue are either in DC hardware wallets located in Singapore, or in various other digital wallets, including DC's Fireblocks Workspace";*
 - (ii) *in order to access the hardware wallets "It is essential to have possession and custody of the private cryptographic keys" which are stored in hardware devices over which "I and/or DC presently have control and possession";*
 - (iii) *as for the Fireblocks Workspace "the cryptocurrency tokens and DFTs are kept in multi-party computation wallets created by [Fireblocks]" the private keys to which are in the possession of the 3 authorised signatories Mr. Cheong, Jacob Goh and Joh Hoong NG" all of whom reside in Singapore". At no point was Mr. Zhu or Mr. Davies or any employee of 3AC an authorized signatory; and*

- (iv) On or around 26 June 2022, all private keys relating to the Fireblocks Workspace were backed up to physical hard drives which are stored in Singapore.

[154] For the reasons set out above, I accept the arguments advanced on behalf of Mr. Cheong to the effect that the Liquidators have not demonstrated on a plausible evidential or legal basis, that they have the better argument in relation to the Property Gateway. I wish to make it abundantly clear that my ruling and discussion of the cases on this complex topic go strictly towards examining the Gateway Issue, the Property Gateway Issue, and should not be taken as in any way constituting findings or holdings on the substantive issues or the BVI Claim.

The Companies Gateway

[155] In my judgment the Liquidators have not demonstrated a plausible evidential or legal basis that they have the better argument that their case falls within Gateway 7.3(7). It is in my view plain that the application for directions pursuant to s 186(5) of the Act, and specifically a declaration as to the beneficial ownership of the Disputed Assets and seeking a transfer of them, are difficult to fit under the Constitution/ Administrative Limb.

[156] The BVI Claim, does not, for example, as pointed out by Mr. Hardwick KC, relate to:

“the powers or organs of a company, the appointment of directors, the extent of the members’ liabilities for debts of the company, or the right of shareholders to bring derivative claims; or

(1) *“the organization of internal management”* of 3AC; or

(2) Resolutions to remove a director or appointment of new directors.”

The Trust Gateway

[157] It is Mr. Cheong that has raised the notion of a trust situation. The basis for the trust allegation is summarized in Cheong 1 with reference to the detail at Cheong (S)(1). The key elements to the allegation are that there was a meeting at Olivia’s café in Singapore on 21 November 2019 in

which the discussion was had about the Independent Fund Arrangement. Mr. Cheong raised (and managed) funds from investors in DC in subscriptions, all of which, he claims, were kept in segregated “DC Wallets”-which could only be accessed by Mr. Cheong and other DC representatives based in Singapore.

- [158] I accept the submissions advanced on behalf of Mr. Cheong that the Liquidators do not have the better argument demonstrated by a plausible evidential basis, as the most plausible evidence suggests that the alleged Independent Fund Arrangement, which is the bedrock of the trust allegation, was made in Singapore. I am of the view that the position stated in Mr. Cheong’s SKA, that no reliance is placed on any meeting or conversation in the BVI, and that Mr. Zhu, Mr. Davies and Mr. Cheong were at all material times based in Singapore, has the better of the argument. It is therefore my view that the Liquidators cannot meet the threshold required for this Gateway either. I wish to make it clear that my conclusion in relation to this gateway is a separate question from what law will govern the alleged trust, given the underlying documentation governed by BVI Law.

The Contract Gateway

- [159] In my judgment, it does seem that the obvious sub-section that the Liquidators rely on in relation to this Gateway is 7.3(3)(b)(ii).

- [160] That sub-section provides as follows:

“Claims about contracts

(1) *A claim form may be served out of the jurisdiction if-*

(b) *a claim is made in respect of a contract where the contract*

....

(ii) is by its terms or by implication governed by the law of any Member State or Territory...”

- [161] I accept the submission that, with reference to the ordinary application by which the claim is made, and referring to the cases cited by the Liquidators as to the meaning of the phrase “*in respect of*”, that the BVI Claim does not fit well into this Gateway and I am satisfied that the Liquidators do not have the better argument in relation to this Gateway either.

The Liquidators have succeeded under the Enactment Gateway

- [162] As discussed above, I am satisfied that the Liquidators definitely have the better of the argument, and have a sound, plausible, good arguable case under the Enactment Gateway, at Rule 7.3(10) for the reasons discussed.

The Forum Issue

The Singapore Ruling

- [163] As stated clearly by both parties, in deciding on this application to Set Aside I have to look at the material, facts and circumstances as they obtained at the time when permission was granted in November/December 2022. Subsequent events may throw light on considerations which were relevant at that time, but such event or development or further evidence must be directed at the situation at the date when permission was originally granted. The Singapore Ruling, whilst I have taken note of it as having occurred, and as a matter of comity, it really has no relevance for the overall consideration of whether BVI was clearly or distinctly the appropriate forum or the natural forum with which the claim has the most real and substantial connection, at the time when permission was given for service out.

Lis alibi pendens

- [164] As to the issue of ***Lis alibi pendens***, whilst the Singapore Ruling means that that Court has rejected the Liquidators' application to set aside the Service Out Order, the Liquidators are seeking to obtain permission to appeal that order. Further, as both sides accept, the existence of simultaneous foreign proceedings is but a relevant factor to be considered in determining the appropriate forum. In any event, the Singapore Proceedings are themselves at a very early stage.
- [165] One important consideration is the risk of irreconcilable judgments. It is important to note that in this regard, this Court has already made a ruling and granted Declarations as to the Fund

documents in the Starry Night Proceedings. Thus, to that extent the BVI Court may be thought to have reached further along in the resolution of issues that would be involved the BVI Claim since there is some overlap with regards to the Fund documents in both the Starry Night Application and in the BVI Claim.

RESOLUTION OF THE FORUM ISSUE

[166] In looking at this issue, I place on one side the factors connecting the claim to Singapore at the time when the Service Out Order was made. These are Mr. Cheong being in Singapore, the founders having been there at material times, and the question of Mr. Cheong's control over the Disputed Assets. There is also the fact that Mr. Cheong claims that the discussions and agreements, relevant text messages, as to the alleged Trust took place in Singapore.

[167] In my judgment, having considered the many considerations involved, when viewed closely, for almost an avalanche of reasons, the BVI is clearly and distinctly the most appropriate Forum for the trial of the BVI Claim. Amongst the reasons are the following:

- (1) Even if, contrary to the Liquidators' primary case and my finding that by way of filing the R184 Claim Form Mr. Cheong is not entitled to the Declaration he has sought as to the Court's lack of jurisdiction over him, and if Mr. Cheong is not precluded from challenging jurisdiction at all, his submission is a factor of overwhelming significance when it comes to assessing whether BVI is the more appropriate forum.
- (2) The counterpart to this submission is that the Liquidators may be entitled to seek an anti-suit injunction preventing Mr. Cheong from continuing with any proceedings in Singapore aimed at giving him direct access to assets which this Court considers should be distributed as part of the estate. Having submitted to the BVI Court's jurisdiction, the appropriate forum for resolving a dispute between a creditor and the estate as to whether assets are those of the creditor or the estate is the BVI.

- (3) It is highly undesirable that there be multiple judgments on the same or very similar issues from different courts where they have been invoked by/ against the same parties; or that the same issues be carved up artificially and litigated separately in two forums.
- (4) The connection of this application to the BVI is obvious. This is an application in existing BVI insolvency proceedings, concerning the affairs and assets of a BVI company in liquidation, made under two sections of the Insolvency Act. The application concerns, on any view, assets (those in Schedule 6 of Crumpler 3) which are legally held by a BVI company.
- (5) The fact that the Liquidators have obtained recognition in Singapore (and a stay) by virtue of recognition, and have entered into a cross-border protocol, does not clothe Singapore with a form of appropriate jurisdiction status that it would not otherwise have. The BVI liquidation proceedings have been recognized as foreign main proceedings.
- (6) The Liquidators assert that the proper law for the dispute is BVI law. They submit that this is a factor of material significance and reference was once again made to **Livingston**. On the Liquidators' case, BVI law governs because the dispute can be resolved by construing the BVI-law governed Memorandum of Association for the Company and TAF Ltd, together with the BVI-governed subscription agreement and offering memorandum. The provisions it was submitted, exclude any trust as alleged.
- (7) The start of the analysis even on Mr. Cheong's case, should be that the funds were invested by Mr. Cheong and others under BVI law governed subscription agreements. Even if there were discussions and agreements reached by Mr. Cheong and the Founders in Singapore, the relevant parties then chose to structure the investment through the Defiance class of shares in TAFL and to require investments to be made using the subscription agreements. A BVI Master/Feeder

structure was adopted. The allegation must be that there was an incomplete transfer of assets notwithstanding the BVI subscription agreement. But, having chosen BVI law to govern the investments, it may well be that to see whether a trust arises one may have to look at BVI law. The system of law with the closest connection to any alleged express or implied trust is in my view likely the BVI because of this, irrespective of where day-to-day control of the relevant assets was taking place.

- (8) This court is already seised of the issues in the Starry Night proceedings i.e. the effect of the relevant subscription agreement and constitutional documents. Indeed, this Court has already made the Declaration sought by the Liquidators and made findings as set out in paragraph [27] above. It is accepted that the outcome of that dispute may not necessarily dictate the result in this instance insofar as Mr. Cheong is relying on alleged discussions and agreements that were not raised by the Starry Night investors as altering what might otherwise be the impact of those documents. However, the same answers should be made in terms of the relevant documents. Consistent resolution of the issues as to the effect and meaning of the relevant documents by this Court is plainly desirable.
- (9) Having failed to particularize the dispute in any clearer manner, the relevance of potential witnesses to Mr. Cheong's cases lacks any real weight or significance as a factor in terms of pulling towards Singapore. I agree with Mr. Fisher KC that it is not obvious which witnesses will be relevant or need to be cross-examined in person or at all. Indeed, if witness evidence is required, it is capable of being given remotely and in any event, the only key witnesses appear (on Mr. Cheong's unparticularized Claim) to be Mr. Cheong and the Founders. This Court can see many good reasons why, if the Founders are to give any evidence, they should be made to do so in this jurisdiction.
- (10) The substantive dispute is broader than simply the Beneficial Interest between Mr. Cheong and the Liquidators, in at least two respects:

- (1) The Liquidators also seek delivery up of assets. It appears that, while a similar declaration to the Beneficial Ownership Dispute can be obtained, there is no equivalent to s.274 available to the Liquidators in Singapore. While Singapore allows liquidators of companies similar access rights under s.242 of the Insolvency, Restructuring and Dissolution Act 2018, the Liquidators are not automatically entitled to rely on this under their recognition order. The Liquidators would need to make an additional application simply to obtain this power. If this was to be replicated in Singapore, the Liquidators would need to issue a second set of proceedings; and
- (2) Mr. Cheong is not the only party affected by the application, which the Liquidators say, should not be characterized as a private dispute between two parties. The Liquidators say that they have given notice of the DeFiance application to all relevant investors. More individuals, the submission continues, may wish to participate in the dispute, which is possible in the BVI by adding more respondents to the application. The Liquidators also say that they consider it proper to also use the forum of application for directions to allow parties without legal representation the opportunity to convey their views, as took place with the Starry Night Portfolio. This, they claim is a distinct advantage of continuing in the BVI: all BVI creditors of the Company can participate.

DISPOSITION

- [168] In all of the circumstances, the Liquidators have satisfied me that the Court has jurisdiction over Mr. Cheong such that he could be served as of right. Alternatively, even if I am wrong about that point, the Liquidators have met the threshold requirements for obtaining an order for service out of the jurisdiction. Mr. Chong has submitted to the jurisdiction of this Court by filing the R184 Claim Form and this is also of relevance when considering the enactment gateway and the question of

forum. The Liquidators have established that there are serious issues to be tried in the BVI Claim between themselves and Mr. Cheong (indeed, Mr. Cheong conceded that point for the purposes of arguing the Set Aside Application). The Liquidators have a good arguable case under the Enactment Gateway, Rule 7.3.(10), and they have shown that the BVI is clearly and distinctly the most appropriate forum. I have considered the fact that there are simultaneous proceedings going on in the Singapore Court but that is but a factor in the Court's consideration and it is not such as to shift the balance, particular given the early stage of the proceedings there, as compared with the stage and the state of proceedings in the BVI. I accept the Liquidators' submission that, if it becomes necessary, it may be desirable at some future point for the BVI Court and the Singapore Court to utilize the CBIP and other available protocols. This would be with a view to minimizing inefficiencies and managing the respective proceedings. In my judgment, in all of the circumstances, it was just and convenient for the Court to exercise its discretion as it did in November /December 2022 to permit service of the proceedings out of the jurisdiction. The Set Aside Application dated 3 February 2023, filed on behalf of Mr. Cheong is therefore dismissed.

- [169] It would seem to me that the general rule as to costs should apply here and thus the Liquidators are entitled to their costs from the Applicant Mr. Cheong to be assessed if not agreed within 21 days.
- [170] There will need to be a Case Management Conference or a Directions Hearing at some point in the New Year and that should be arranged with the Case Management Unit on the first available date convenient to Counsel, not before 15 January 2024.
- [171] It just remains for me to thank leading Counsel and their teams for the thorough and thought-provoking submissions. The Court was greatly assisted by the high quality of the arguments, both written and oral.

Ingrid Mangatal
High Court Judge

By the Court

Registrar