IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

In Claim No. CFI 009/2023

(1) BANK SARASIN-ALPEN (ME) LIMITED
(2) SHAHAB HAIDER
(in his capacity as Liquidator of Bank Sarasin-Alpen (ME) Limited)

Claimants

and

(1) MR ELIE VIVIEN SASSOON
(2) MR STEPHANE EMILE ASTRUC
(3) MR EDMOND CARTON
(4) BANK J SAFRA SARASIN LIMITED
(5) BANK J SAFRA SARASIN ASSET MANAGEMENT (MIDDLE EAST) LIMITED

Defendants

In Claim No. CFI 005/2016

(1) MR RAFED ABDEL MOHSEN BADER AL KHORAFI
(2) MRS AMRAH ALI ABDEL LATIF AL HAMAD
(3) MRS ALI MOHAMED SULAIMAN AL RIFAI

Claimants

and

(1) BANK SARASIN-ALPEN (ME) LIMITED

Defendant / First Respondent

(2) SHAHAB HAIDER
(in his capacity as Liquidator of Bank Sarasin-Alpen (ME) Limited)

Second Respondent

(1) BANK J. SAFRA SARASIN ASSET MANAGEMENT (MIDDLE EAST) LTD
(2) BANK J. SAFRA SARASIN AG

Applicants

ORDER WITH REASONS OF JUSTICE SIR JEREMY COOKE

UPON the Fourth Defendant's Application No. CFI-009-2023/1 dated 7 June 2023 seeking a stay of the proceedings (the "Stay Application")

AND UPON the Fifth Defendant's Application No. CFI-009-2023/2 dated 21 June 2023 challenging the jurisdiction of the DIFC Courts in Claim No. CFI-009-2023 (the "Part 7 Claim") and the First Applicant's Application No. CFI-005-2016/7 dated 21 June 2023 challenging the jurisdiction of the DIFC Courts in Claim No. CFI-005-2016 (the "Insolvency Claim") (together the "Fifth Defendant's/First Applicant's Jurisdiction Applications")

AND UPON the Fourth Defendant's Application No. CFI-009-2023/3 dated 7 July 2023 challenging the jurisdiction of the DIFC Courts in the Part 7 Claim and the Second Applicant's Application No. CFI-005-2016/8 dated 7 July 2023 challenging the jurisdiction of the DIFC Courts in the Insolvency Claim, and to set aside the service upon the Fourth Defendant (together the "Fourth Defendant's/Second Applicant's Jurisdiction Applications")

AND UPON the Claimants' Application No. CFI-009-2023/4 in the Part 7 Claim dated 31 July 2023 for an extension of time to serve the Claim Form on the First to Fourth Defendants out of the DIFC (the "EOT Application")

AND UPON Fifth Defendant's Application No. CFI-009-2023/5 dated 16 August 2023 for relief from sanctions in the Part 7 Claim and the First Applicant's Application No. CFI-005-2016/9 3 of 18 dated 16 August 2023 for relief from sanctions in the Insolvency Claim (the "Fifth Defendant's Relief from Sanction Application")

AND UPON paragraph 2 of the Order of Justice Sir Jeremy Cooke dated 25 August 2023, awarding the Claimants their costs of Fourth and Fifth Defendants' letter application sent to the Registry by way of email correspondence dated 4 August 2023 and 9 August 2023 seeking to adjourn the Hearing of their respective Jurisdiction Applications dated and to vary the timetable (the "Letter Application"), subject to agreement or assessment

AND UPON the Claim Form in the Part 7 Claim and the originating application notice (CFI005-2016/6) in the Insolvency Claim being served upon the Fourth Defendant in Switzerland on 9 August 2023

AND UPON the Acknowledgments of Service filed by the First to Fourth Defendants on 6 September 2023 in the Part 7 Claim and in the Insolvency Claim setting out their intention to contest the jurisdiction of the DIFC Courts and to seek an Order setting aside service in Switzerland for being out of time under RDC 7.20

AND UPON reading the evidence and submissions filed on the Court file

AND UPON hearing Counsel for the Claimants and Counsel for the Fourth and Fifth Defendants and First and Second Applicants at the hearing held before me on 7 September 2023 (the "Hearing")

AND UPON the Fourth and Fifth Defendant's/ First and Second Applicants oral application at the end of the Hearing seeking permission to appeal (the "Permission to Appeal Application")

IT IS HEREBY ORDERED THAT:

The Fourth and Fifth Defendants' Jurisdiction Applications

1. The Fourth and Fifth Defendants'/ First and Second Applicants' Jurisdiction Applications are dismissed.

2. The Fourth and Fifth Defendants shall pay the Claimants' costs of the Fourth and Fifth Defendants'/ First and Second Applicants' Jurisdiction Applications on the standard basis, summarily assessed in the sum of AED 760,000, by no later than **4pm on 21 September 2023.**

The Fifth Defendant's Relief from Sanction Application

3. The Fifth Defendant's Relief from Sanction Application is dismissed.

4. The Fifth Defendant shall pay the Claimants' costs of the Fifth Defendants' Relief from Sanction Applications on the standard basis, summarily assessed in the sum of AED 20,000, by no later than **4pm on 21 September 2023.**

Costs of the Letter Application

The Claimants' costs of the Letter Application are summarily assessed, with the consent of the Fourth and Fifth Defendants, on the standard basis in the sum of AED 20,000 and shall be paid by the Fourth and Fifth Defendants to the Claimants by no later than **4pm on 21 September 2023.**

The EOT Application

6. The EOT Application in respect of the First to Third Defendants is adjourned.

7. Time for service of the Claim Form in the Part 7 Claim on the Fourth Defendant out of the DIFC is retrospectively extended to 9 August 2023.

8. The Fourth Defendant shall pay the Claimants' costs of the EOT Application insofar as it relates to the Fourth Defendant on the standard basis, summarily assessed in the sum of AED 60,000, by no later than **4pm on 21 September 2023.**

Permission to Appeal

9. The Permission to Appeal Application is refused.

Further directions

10. By consent, the First to Third Defendants shall file and serve their applications challenging the jurisdiction of the DIFC Courts and to set aside service of the Part 7 Claim and Insolvency Claim in Switzerland for being out of time under RDC 7.20 (the "First to Third Defendants' Jurisdiction Applications") and their evidence in answer to the EOT Application by no later than **4pm on 15 September 2023.**

11. The Claimants shall file and serve evidence in answer to the First to Third Defendants' Jurisdiction Applications and their evidence in reply on the EOT Application (if any) by no later than **4 pm on 29 September 2023.**

12. The First to Third Defendants shall file and serve evidence in reply on the First to Thirds Defendants' Jurisdiction Applications (if any) by no later than **4pm on 6 October 2023.**

13. The Claimants and the First to Third Defendants shall file and exchange skeleton arguments by no later than **4pm on 13 October 2023.**

14. The First to Thirds Defendants' Jurisdiction Applications and the EOT Application, insofar as it relates to the First to Third Defendants, shall be listed together for a remote hearing before Justice Sir Jeremy Cooke on **18 October 2023** with a time estimate of 1 day plus 1 day pre-reading.

15. The parties shall have liberty to apply.

Issued By:
Delvin Sumo
Assistant Registrar
Date of issue: 15 September 2023
At: 11am

SCHEDULE OF REASONS

1. These are the reasons for the decision given orally to the parties at the Hearing for:

1.1. Extending the time for service of the Claim Form on the Fourth Defendant which had the effect of validating service which had been effected on 9 August 2023, pursuant to an application made on 31 July 2023 when the period for service was due to expire on 1 August 2023 (the "EOT Application").

1.2. Refusing the Fifth Defendant relief from sanctions in failing to apply to the court to contest jurisdiction within the time prescribed by the Court Rules the ("Fifth Defendant's Relief from Sanction Application").

1.3. Refusing the Fifth Defendant's Jurisdiction Application and the Fourth Defendant's Jurisdiction Application seeking also to set aside service of the Claim Form on the Fourth Defendant and/or dismiss and/or stay the claims made against both of them in CFI-009-2023 and CFI-005-2016 on the grounds of invalid service on the Fourth Defendant in Singapore and/or lis alibi pendens and/or forum non conveniens.

1.4. Refusing similar applications on the grounds of lis alibi pendens and forum non conveniens by the First and Second Applicants in the Insolvency Proceedings.

Service on the Fourth Defendant in Singapore

2. It was undisputed that the service of the claim form on the Fourth Defendant's branch in Singapore was effected in accordance with the law of Singapore. Under RDC 9.53- 9.55, in circumstances where the DIFC Court has jurisdiction under the Judicial Authority Law, which it undoubtedly has here, the only question for this Court is whether the proceedings were validly served in accordance with its Rules which depends upon the validity of service in the country where the service was purportedly effected.

3. Whilst various arguments were advanced in relation to service on the Fourth Defendant in Singapore as a means of avoiding the need for service on the Fourth Defendant at its registered Office in Switzerland, and in relation to the unenforceability of any judgement rendered by the DIFC Court in Switzerland where service had not been affected in accordance with that law, such matters are irrelevant to the question which this Court has to decide. Enforceability, whether in Switzerland or Singapore, is an entirely distinct matter from validity of service for the purpose of the DIFC Court Rules. 7 of 18 The Court took fully into account all the points made in the Fourth Defendant's skeleton argument and orally but none of them advanced the Fourth Defendant's position and the Court therefore concluded that there was no basis for setting aside service of the Claim Form on the Fourth Defendant in Singapore which occurred on 23 May 2023.

Extending the time for service of the Claim Form on the Fourth Defendant in Switzerland

4. There is no need for me to recite the full history relating to the attempts by the Claimants to serve the Claim Form on the First - Fourth Defendants in Switzerland, following issue of the Claim Form on 1 February 2023 and an application in the existing insolvency proceedings (CFI-005-2016) raising claims against the Defendants. On the evidence, advice was sought by the Claimants on the means of service in Switzerland within a week of such issue but attempts to obtain translation of documents and to obtain assistance from the DIFC Court for service by diplomatic/ judicial channels did not commence until April 2023.

5. Service was then effected on the Fourth Defendant in Singapore, as previously outlined, on 23 May 2023 at the same time as serving the Fifth Defendant in the DIFC on the same date. From that date onward, all the defendants, including the Individual Defendants who were then and are now, as at today's date, represented by the same lawyers as each other, can be taken to have been fully aware of the nature of the claims being made against them. The Second Defendant is the Fourth Defendant's current General Counsel. The First Defendant is a member of the Group Executive Board of the Fourth Defendant and a director of the Fifth Defendant. A letter before action had been sent on 1 February 2022 to all five Defendants and a standstill agreement had been negotiated between lawyers acting for all the parties which was operative between 7 April 2022 and 27 January 2023 in circumstances where the Defendants were saying that the issue of proceedings would be premature pending discussions between the parties. Without prejudice discussions took place which did not result in a settlement.

6. On 15 April 2022, draft Particulars of Claim were sent to the lawyers then acting for all the Defendants, albeit not in identical form to the Particulars of Claim subsequently issued. Nonetheless, the substance of the claim was perfectly clear from that draft. Although the Third Defendant is no longer employed by the Fourth and/or Fifth Defendant, he has been represented by the same lawyers who issued "Conciliation Proceedings" in Geneva in Switzerland on 19 January 2023, prior to the expiry of the standstill agreement which, by its terms, only operated to prevent the Claimants from 8 of 18 initiating proceedings in the standstill period. The Conciliation Proceedings, under Swiss Law constitute a lis pendens although providing for an initial period in which a form of mandatory mediation should take place. In the event of failure to reach agreement, the Defendants are able to proceed with the claims made in those proceedings which take the form of seeking negative declarations of liability in respect of the matters raised in the letters before action. As appears below, the Fourth and Fifth Defendants rely on these proceedings to argue that the action in the DIFC should be dismissed or stayed to allow the Geneva Court to decide the disputes between the parties.

7. The Claimants were made aware of the existence of the Swiss Proceedings through without prejudice correspondence on 20 January 2023 but did not receive a copy of the initiating document until requested by them in June 2023. Service of those proceedings has not yet been effected through diplomatic channels, which is a time-consuming process, whether initiated in the DIFC for service in Switzerland or in Switzerland for service in the DIFC.

8. On 6 June 2023, the Fifth Defendant filed an acknowledgement of Service indicating its intention to challenge the jurisdiction of the court. On 7

June 2023, the Fifth Defendant applied for a stay of the proceedings against it pending service of the proceedings on all the other defendants, which was determined against it on 3 July 2023. On 7 July 2023, the Fourth Defendant submitted its application contesting the Court's jurisdiction in relation to the service of the Claim Form in Singapore.

9. It was on 24 July 2023 that the Fourth Defendant received two letters from the Geneva Court dated 20 July 2023 in relation to service of the DIFC Claim Form on it requiring it to collect the documents to be served upon it by 11 August, failing which they would be served by the police. On 26 July 2023, the Claimants requested the First - Fourth Defendants to collect the documents by 1 August 2023, failing which an application in the DIFC for extension of the time for service would be necessitated. The Fourth Defendant was under no legal obligation to collect the documents immediately and did not do so, having said on 28 July 2023 that it declined to comply with the request. That led to the application by the Claimants on 31 July 2023 for an extension of time of three months. The First - Fourth Defendants collected the Claim Form from the Geneva Court on 9 August 2023 which meant that they would be required to file an acknowledgement of service by 6 September 2023, the day before the Hearing, which they duly did, stating an intention to contest jurisdiction.

10. It is also right to note that, on 25 May 2023, having served the Claim Form on the Fifth Defendant in the DIFC and on the Fourth Defendant at the registered office of its Branch in Singapore, HFW, the lawyers for the Claimants wrote to Clifford Chance, the lawyers for all of the Defendants at that time, enclosing a copy of the Claim Form and Consolidated Particulars of Claim, inviting the Individual Defendants to make an appointment for personal service. This resulted in a reply from Clifford Chance on 26 May 2023, saying that it had no instructions on behalf of the Defendants. On 9 June 2023, HFW wrote to each of the individual Defendants directly enclosing the Claim Form and Consolidated Particulars of Claim, again inviting them to make an appointment for personal service. The Swiss lawyers for all of the Defendants responded on 23 June 2023 saying that the Individual Defendants would not agree to be served otherwise than at their place of domicile in Switzerland.

11. The terms of RDC 7.20 require service of a claim form on a defendant within six months after the date of issue where the claim form is to be served outside the DIFC or Dubai. RDC 7.21 provides that the claimant may apply for an order extending the period within which the claim form may be served and states the general rule in RDC 7.22 that an application to extend the time must be made within the period required for such service or any extension thereof by court order. No criteria are specified in relation to the grant of such an extension save where the application to extend is made after the time for service specified. Nonetheless, if a claimant unduly delayed in serving proceedings and acted unreasonably in doing so, the court would be unlikely to grant an extension. The Fourth Defendant contended that a claimant seeking an extension had to show that there were good reasons why it had been unable to serve the claim form in time and suggested that the Court should ask whether the applicant was seeking the court's help to overcome a genuine problem or was seeking relief from the consequences of his own neglect.

12. In the present case, it is clear to me that the Claimants did not act unreasonably in the stance they adopted and whatever the initial delay in instituting the steps required for service on the Fourth Defendant in Switzerland, it would be wholly unjust not to extend time for service in circumstances where the Defendants have been deliberately uncooperative in declining to accept service by other means than through diplomatic/judicial channels which are known to be dilatory. Although no defendant is bound to accept service by any means other than those provided by the statutory or treaty regime which applies, it does not lie in the mouth of an uncooperative defendant, who is fully aware of the claims made against it and who is seeking to gain advantage 10 of 18 by being uncooperative, to complain at an extension of time sought and obtained by a claimant who needs it because of the delay inherent in the process of service through such diplomatic/judicial channels. There was here no undue delay by the Claimants.

13. The timing of service has no impact here upon any time-bar issues so as to potentially deprive the Fourth Defendant of any limitation defence and the claims are substantial fraud claims made by the Liquidator of the First Claimant as an officer of the court with Counsel putting his name to the particularised pleading in the Consolidated Particulars of Claim. There are plainly serious issues to be tried on the basis of those Particulars and it is noteworthy that the Defendants have failed to put forward any basis for their claim for a negative declaration in the Swiss Proceedings, or in these proceedings in the DIFC. It can be said that there was no obligation to do so in this Swiss Proceedings at this stage and there is no obligation to file a defence in the DIFC at this stage, but the result of the Defendants declining to put in any direct evidence from any one of their number or to outline in any affidavits or witness statements the nature of the case to be made in opposition to that of the Claimants is that the Court proceeds on the basis of the allegations in the Consolidated Particulars of Claim, supported as they are, by a statement of truth on the part of the Liquidator.

14. In the circumstances, I have no hesitation in extending time for service on the Fourth Defendant at its head office, which has the effect of validating the service on the Fourth Defendant in Switzerland in addition to the service upon its branch office in Singapore.

Lis Alibi Pendens and Forum Non-Conveniens.

15. Whilst the Fourth and Fifth Defendants contended that there was a lis alibi pendens in Geneva which should take precedence over the claims in the DIFC whether on the basis of a dismissal or stay of the DIFC action and Insolvency Application, pending the determination of the dispute by the Swiss Court or at least its determination of its own jurisdiction, only the Fourth Defendant argued that Geneva was a more appropriate forum for the determination of the disputes between the parties. The Fifth Defendant, having been served in the DIFC made no such argument, with the result that, if its lis alibi pendens argument is unsuccessful, the claims will continue against it here, in any event. As I conclude below, on its own, the lis alibi pendens argument cannot bring about the result that the Fifth Defendant seeks, the claims against it will proceed in the DIFC.

16. It is not necessary for me to set out the relevant test for forum non-conveniens cases which appears primarily in the House of Lords decision in *Spiliada v Cansulex* [1987] 2 AC 460 as endorsed in the DIFC in *Protiviti Member Firm (Middle East) Limited v Mohammed Been Hammad Abdul-Karim al-Mojil* [2016] DIFC CA 003 at paragraphs 21 -24. Because all service of proceedings, whether inside or outside the territory of the DIFC falls within the statutory jurisdiction of the DIFC Courts where the gateway provisions of the Judicial Authority Law are satisfied, it was accepted by both parties that the burden was on the Fourth Defendant to show that there was another available forum, having competent jurisdiction, which was the appropriate forum for the trial of the action, namely the place where the case might be tried more suitably for the interests of all parties and the ends of justice. The burden on the defendant is to show not only that the forum chosen by the claimant is not the appropriate forum, but that there is another forum which is clearly or distinctly more appropriate and the Court must look to see what connecting factors point to the chosen forum or the other rival forum. The factors include those affecting the convenience and expense of the trial, including the availability of witnesses and issues such as the governing law and the places where the parties carry on business. A comparison of the procedures

in the rival courts is not an appropriate course on which to embark and the existence of a legitimate personal or juridical advantage in one court or the other is not persuasive unless it can be shown that substantial injustice will be shown if the proceedings take place in one location rather than the other. There are considered to be two stages to the enquiry. First whether there is another available for which is clearly seen to be more appropriate than the forum chosen by the claimant which is to be judged by reference to factors connecting it to the parties and which has the most real and substantial connection with the proceedings. A second stage arises where there is such another available forum but factors which militate against a stay in favour of it, namely where injustice would result in ordering a stay.

17. The first point arises in relation to the Fourth and Fifth Defendants' argument on the basis of lis alibi pendens. It has never been part of the law of the DIFC that a case should be stayed on that ground alone. It is nothing to the point whether proceedings were begun first in another forum or not. The question is always which is the most appropriate forum in the interests of the parties and the ends of justice. The DIFC has never been a party to the Brussels Regulation or the Lugano Convention and the concept of "the court first seized" plays no part, as such, in its considerations. If proceedings were far advanced in one court rather than another, this would be a factor to be taken into account, as is the very existence of proceedings elsewhere for the 12 of 18 purposes of the forum non-conveniens decision, but this is in no way determinative. In the present case, neither set of proceedings in the DIFC nor Switzerland is very far advanced and in fact, the Swiss proceedings have not yet been served on it either of the Claimants, whereas the DIFC proceedings have now been served on all the defendants. On this basis alone, the Fifth Defendant's application cannot succeed but I must look at the position of forum conveniens in the light of all the evidence before me, including its impact on all the parties including those not before me, the First - Third Defendants, as well as the Fifth Defendant who does not pursue that argument.

18. When the connecting factors are examined, the following points are evident:

18.1. The First Claimant is a DIFC incorporated company in liquidation. It was regulated by the DFSA and was licensed to market financial products and arrange credit.

18.2. The Second Claimant is the Official Liquidator of the First Claimant and an officer of the DIFC Court who is bound to administer the insolvent estate of the First Claimed in accordance with the insolvency law of the DIFC. The litigation impacts not just on the immediate parties but on the body of creditors of the First Claimant, which includes the Al Kharafi interests which are owed in excess of USD 35 million as the result of proceedings in the DIFC.

18.3. The Fifth Defendant is a DIFC incorporated company, which does what the First Claimant used to do prior to liquidation.

18.4. The Fourth Defendant is a Swiss Bank but was the majority shareholder in the First Claimant and is the 100% owner of the Fifth Defendant, where both of the latter were DIFC incorporated companies. It is an international bank with foreign branch offices in Guernsey, Hong Kong and Singapore with representative offices in Turkey, Mexico, and Israel with subsidiaries in other locations. If enforcement ever becomes relevant, it has assets in the DIFC and elsewhere than Switzerland.

18.5. The First and Second Defendants were directors of the First Claimant at the material time of the wrongdoing alleged against them. They were not resident in the DIFC. The Third Defendant was based and resident in the DIFC and was the Chief Executive Officer and Senior Executive Officer of the First Claimant in the DIFC. His contract of employment contained an exclusive jurisdiction clause in favour of the DIFC.

18.6. The First and Third Defendants became directors of the Fifth Defendant in March and April 2015. The First Defendant continues to be a director of that company.

19. Neither party has identified those whom it would intend call to give evidence in the proceedings save that the Liquidator himself would inevitably testify and the documents in the possession of the Claimants and the Fifth Defendants in the DIFC, as well as the documents in the hands of the other Defendants elsewhere would plainly play a large part in any trial. If the Defendants were to do more than seek to put the Claimants to proof of their claim, it might be expected that the First - Third Defendants would give evidence, but that has not been stated by the Defendants thus far. Indeed, I cannot assume that either the Claimants or the Defendants will necessarily participate in any trial in the jurisdiction which they do not favour.

20. The Consolidated Particulars of Claim reveal the issues which will arise should the matter go ahead in the DIFC. The summary of the Claim states as follows:

"10. From a time currently unknown to the Liquidator in the latter half of 2013 onwards, the Defendants formulated and subsequently embarked upon a fraudulent scheme by which BSA's business was transferred to [the Fifth Defendant] for no consideration (the "Scheme"). As set out further below, the Scheme was enacted by [the Fourth Defendant and Fifth Defendant] exploiting BSA's confidential information in order for [the Fifth defendant] to poach BSA's client facing employees and, thereby, to divert the client relationships that form the essence of its business. The Scheme was enacted for the purpose of allowing [the Fourth Defendant] to "relaunch" its private banking operations in the Middle East by misappropriating BSA's existing client base in order to operate in the DIFC without the involvement of ACCL as joint venture partner, and to shield the business to be appropriated from BSA from a significant contingent liability arising from legal proceedings brought against BSA. In those circumstances the effect and purpose of the Scheme was to misappropriate BSA's business through [the Fourth Defendant's] wholly owned subsidiary [the Fifth Defendant].

11. As set out in these Consolidated Particulars of Claim, by enacting the Scheme, the Individual Defendants acted in breach of the directors' and/or fiduciary duties that they owed under DIFC law to BSA, a DIFC registered company and DFSA licensed establishment, by causing and/or permitting its business to be misappropriated by [the Fifth Defendant], a DIFC registered company and DFSA licensed establishment. Said breaches of duty were fraudulent and enacted in combination with [the Fifth Defendant and Fourth Defendant], both companies acting in breach of DIFC Law. On the basis of the matters set out in these Consolidated Particulars of Claim, the Scheme was primarily executed in the DIFC. BSA is now compulsory liquidation under the supervision of the DIFC Court and, together with its Liquidator, seeks relief (including under 14 of 18 the DIFC Insolvency Law 2019) to have its wrongfully misappropriated assets (or the value thereof) restored together with any profits derived from that misappropriated business, for the benefit of BSA's insolvent estate

12. BSA brings the following claims in relation to the Defendants' participation in the scheme:

12.1. As against the Individual Defendants, for fraudulent breach of dutiess owed to BSA through their involvement in the Scheme;

12.2. As against [the Fourth Defendant, the Fifth Defendant and Mr Sassoon for dishonest assistance in the aforementioned fraudulent breaches of duty;

12.3. As against [the Fifth Defendant] for knowing receipt of BSA's business;

12.4. As against all Defendants for unlawful conspiracy.

13. Further, the Liquidator brings applies [sic] for relief against the Individual Defendants for fraudulent breach of duty and transactions in fraud of creditors; against [the Fifth Defendant] for entering into a transaction with BSA at an undervalue; against [the Fifth Defendant and the Fourth Defendant] for misapplying or retaining or becoming accountable for BSA's property; and against all Defendants for fraudulent trading."

21. There are, in my judgement, a number of features of the action and the Insolvency Application in the DIFC which render the DIFC a more appropriate forum than Geneva for the ends of justice and the interests of the parties, quite apart from the connecting factors of the parties themselves referred to above. It was argued on behalf of the Claimants that Geneva was not in fact an available forum with personal and subject matter jurisdiction over the Defendants in relation to the claims which are advanced in the Consolidated Particulars of Claim which was served both in the 2023 Action and in the Insolvency Proceedings.

22. The evidence of the Swiss Lawyers appointed by each of the parties to give expert evidence of Swiss law was to the same effect, namely that the Geneva Court did not have jurisdiction to hear the claims brought against the Directors for breaches of duty in misappropriating the First Claimant's business and diverting it to the Fifth Defendant unless the First Claimant' business was administered in Geneva. Whilst it was suggested in the argument on behalf of the Defendants that there was an issue of fact about this, the reality is that the Claimants have much the better of the argument on the evidence put before this Court. As pointed out by the Claimants, the First Claimant was incorporated in the DIFC, its head office and registered office were located there, it was regulated by the DFSA and that's where most of its staff were based. The Shareholders Agreement to which the Fourth Defendant was a party required the management and control of the First Claimant to be exercised in the Emirate of Dubai, the UAE and required the shareholders to use all reasonable endeavours to ensure that it was 15 of 18 treated for all purposes including taxation as a UAE resident. Contrary to the submissions made on behalf of the Fourth and Fifth Defendants, there is no evidence that "many of BSA's board meetings were held in Switzerland" and only two are shown to have taken place in Z&#65533;rich. More were shown to have taken place in the DIFC and General Meetings, whether attended or not by some individuals by telephone from elsewhere, appear also to have been held in the DIFC as would be expected for a DIFC company. On the evidence currently available, the First Claimant's business was run and administered within the DIFC and certainly not in Geneva. This claim for breach of duty by the directors would therefore not appear to be available in Geneva at all.

23. Similarly, the tort claims which, as both the Swiss expert lawyers agreed, were subject to the jurisdiction of the Geneva Court only if the torts could be located within its territory. Investigation of the location of the acts in question and the damage suffered is required in order to define the location of the tort. Whereas the Fourth and Fifth Defendants tried to depict the issues as being shareholder issues, because the shareholders instructed or influenced the directors to act in the way they did, that does not assist them in their arguments. The claim does not arise in relation to the winding up of the company by shareholders' resolution but is made in relation to the diversion of the business of the First Claimant to the Fifth Defendant by the Directors inducing Relationship Managers employed by the First Claimant in the DIFC to move to the Fifth Defendant and to induce the first Claimant's clients to do likewise. Whether or not evidence will be available from any of these Relationship Managers, the essence of the Scheme was to effect the movement of business from one company in the DIFC to another and it was the directors who took the necessary action to bring this about as alleged by the Claimants. It was the First Claimant which lost revenue in the DIFC. Agreement may have been made in emails between the various individuals involved wherever they were located at the time, for which the Fourth Defendant is vicariously liable, but the Third Defendant ran the business in DIFC where he and his office was located and the acts effected pursuant to the Scheme were centered on the DIFC with loss suffered by the Frist Claimant there.

24. When regard is then had to the Insolvency Claims, it seems to me that the DIFC is inescapably the more appropriate forum. Claims are made for fraudulent trading against each of the Defendants under Article 112 of the DIFC Insolvency Law 2019 so that Article 115 applies to them. These claims are not available to the Claimants in Switzerland per se and it would be necessary to obtain recognition in Switzerland of the DIFC Liquidation and for the nearest equivalent forms of claim to be utilised there 16 of 18 as a matter of Swiss law, if such matters were to be pursued. Transactions in fraud of creditors under Article 108 and 115, transactions at an undervalue in breach of Article 131 and breaches of duty/misfeasance of the directors under article 115 of the Insolvency law are all made in the DIFC. Claims for the return of company property are pursued under the DIFC statute. There is no equivalent in Switzerland to the fraudulent trading claim at all, and claims to avoid transactions, in their Swiss form, are subject to different time limits and conditions which would make them incapable of pursuit now. For a Liquidator who can only investigate issue of this kind over an extended period of time and take the necessary advice whether to pursue such claims, to be time barred in the circumstances set out above in Switzerland and compelled to proceed there, if at all, would be unjust.

25. There are additional points in favour of DIFC as opposed to Geneva, in the use of English language in the proceedings, the essential documentary record being in English and the relevant law of the claims being that of the DIFC. Although the Fourth Defendant will have relevant documents in Switzerland, the preponderance of the connecting factors and the nature of the claims made under DIFC law makes the DIFC Courts the more appropriate forum within the meaning of the *Spiliada* test as enunciated in the DIFC.

26. There is an additional point raised as a result of the Fourth Defendant submitting its proof of debt in the liquidation of the First Claimant and thus submitting to the jurisdiction of the DIFC Courts in relation to that debt, as shown by the decisions of the English Court in *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41 at paragraph 32 and *Erste Group v JSC Red October* [2015] EWCA Civ 379. The ambit of such submission is unclear from the terms of the latter Court's judgment at paragraphs 9,10, 51-59 in relation to other claims made by the creditor and even less clear in relation to claims made by the Liquidator but, as a matter of logic it ought to cover any cross claims which could be set off by the Liquidator against the debt claimed in the liquidation in respect of which a proof has been submitted. I need not decide this point and do not do so,

but merely reflect that if some claims under the Insolvency Act which would undoubtedly be capable of being set off in a liquidation cannot be pursued in Switzerland as appears to be the position, then Switzerland cannot be the natural forum for the claims made, whether in positive or negative format.

27. I am not persuaded that there is anything in any of the other points made by the parties as to the time that would be taken in one set of proceedings or the other, or difficulties which might arise in relation to disclosure in one place or the other or difficulties in third 17 of 18 party funding. The Courts in Geneva are the courts of a civilized democratic country where the rule of law is respected and even banking secrecy law may slowly be becoming more relaxed. Its procedures are not to be criticized nor compared favourably or unfavourably with those of the DIFC courts. Disclosure issues may arise as a result of banking secrecy, whether the action takes place in DIFC or Switzerland. Witnesses used to international travel can readily come to the DIFC if they so wish, whether domiciled in Switzerland or not.

28. All in all, it is clear to me that the centre of gravity of this dispute is in the DIFC. The connections to Switzerland are not as strong as those with the DIFC and the very nature of the claims, and the alleged rationale (or part of it) for the dispersal of assets to avoid payment of the major judgement creditor as the result of DIFC litigation reinforces the point.

29. In the circumstances and for these reasons I refuse the Fourth and Fifth Defendants' applications for dismissal or stay of the claims made against them both in the 2023 action and the Insolvency Proceedings.

The Fifth Defendant's Relief from Sanction Application

30. It will be noted that I have not, hitherto, referred to the application made by the Fifth Defendant for relief from sanctions in failing to launch its application to contest jurisdiction within the time prescribed by the DIFC Rules of Court. The reason for this is that, at the outset of the Hearing, after discussion with the Parties, I indicated that I would hear the substantive applications for dismissal and/or stay because, in my judgement, the question whether relief from sanctions would be granted could well depend upon the effect of depriving the Fifth Defendant of a remedy which, in all justice, it ought to be granted. I therefore heard the jurisdiction application on a de *bene esse* basis.

31. Put shortly, the application to contest jurisdiction was filed by the Fifth Defendant three hours out of time after the close of business on the last day permitted by the rules. It therefore took effect on the following day. There is no adequate excuse for that failure, although the failure is very limited in scope. It might be seen as more important that no step was taken to apply for relief until some eight weeks later. Nonetheless, had I been of the view that Geneva/Switzerland constitutes a more appropriate forum for the determination of the disputes between the parties, my inclination would have been to 18 of 18 grant the relief from sanctions on the basis that it would be disproportionate to disallow the relief on the basis of a default of three hours.

32. Having reached the conclusion however, that the applications for dismissal and/or stay must be refused, I consider that no purpose would be served in granting relief from sanctions when inadequate reason has been adduced for the failure both to file the application in time and to make a timely application for relief.

Costs

33. It follows that the Claimants must be entitled to their costs on all of these applications. After hearing the argument, I determine that costs should be paid by the Fourth and Fifth Defendants on the standard basis and not the indemnity basis as submitted by the Claimants. With the agreement of the Fourth and Fifth Defendants, I proceeded summarily to assess the costs in relation both to the applications before me and the application which I determined at the beginning of July.

The First- Third Defendants (the Individual Defendants)

34. It was submitted and agreed between the parties that, in circumstances where the First - Third Defendants had only just filed acknowledgments of service with an expressed intention to contest jurisdiction, that any issues between them and the Claimants on the issue of extension of time for service of the Claim Form and other issues of jurisdiction should be determined, if pursued, on an inter partes basis. These reasons are to be made available to them so that they can evaluate the prospects of success in taking such points against the conclusions that I have reached involving other defendants.