[2015 Gib LR 282]

VIZCAYA PARTNERS LIMITED and ASPHALIA FUND LIMITED v. PICARD (as Trustee for BERNARD L. MADOFF INVESTMENT SECURITIES LLC (in Liquidation)), BANK J. SAFRA (GIBRALTAR) LIMITED, ZEUS PARTNERS LIMITED and SIAM CAPITAL MANAGEMENT LIMITED

COURT OF APPEAL (Kennedy, P., Aldous and Potter, JJ.A.): March 11th, 2014

Conflict of Laws—jurisdiction—submission to jurisdiction of foreign court—submission by agreement—if contract identifies governing law, to be construed under that law to determine existence of agreement to submit to jurisdiction of foreign court—if contract governed by New York law, arguable that choice of law plus deemed making in New York is implied agreement to submit to jurisdiction of New York courts under New York law—requires expert evidence from both parties—unsuitable for summary determination

Conflict of Laws—jurisdiction—submission to jurisdiction of foreign court—submission by presence—defendant present if he or representative carries on business in foreign jurisdiction for more than minimal period—insufficient that defendant special purpose vehicle with sole purpose of investing in that country via foreign investor if no investment carried out by foreign investor—not settled law that presence obtained by fraud negatives jurisdiction under ex turpi causa doctrine

The first respondent sought the enforcement in the Supreme Court of New York Bankruptcy Court judgments against the appellants.

The first appellant, Vizcaya, entered into an arrangement with the US company Bernard L. Madoff Investments Securities LLC ("BLMIS") whereby BLMIS would make investments on Vizcaya's behalf in New York. This arrangement was governed by a number of contractual account management agreements, which were signed by BLMIS and Bank Safra Gibraltar as "custodian" for Vizcaya, the most important being the customer agreement, cl. 10 of which stated that "this agreement shall be deemed to have been made in the State of New York and shall be construed, and the rights and liabilities of the parties determined, in accordance with the laws of the State of New York."

Bank Safra Gibraltar instructed BLMIS to pay $180m. from Vizcaya's account with BLMIS to its account with Bank Safra Gibraltar. The money was then transferred to companies associated with Vizcaya, including the second appellant, Asphalia. On December 11th, 2008, Bank Safra Gibraltar instructed BLMIS to remit all further moneys in Vizcaya's account and to close that account.

BLMIS was in fact operating a Ponzi scheme and had never made any investments in New York on behalf of Vizcaya. When this was discovered, BLMIS went into voluntary liquidation in New York and the first respondent was appointed as trustee to administer its affairs.

On April 9th, 2009, the trustee brought an action to recover under New York law the $180m. on the basis it was customer property to be applied to the debts owed by BLMIS, and he obtained default judgments against Vizcaya and Asphalia in the New York Bankruptcy Court. He then sought to enforce those judgments in Gibraltar. Further, in December 2010, he brought another set of proceedings against Asphalia and others in respect of the same sums.

As a result of a decision of the UK Supreme Court, the trustee dropped his claim to enforce the US judgment against Asphalia but submitted that the US judgment was enforceable against Vizcaya as it had submitted to the jurisdiction of the New York Bankruptcy Court by agreement through cl. 10 of the customer agreement, or by being present in New York on April 9th, 2009 when the proceedings were initiated.

Vizcaya applied for summary judgment against the trustee but that application was dismissed by the Supreme Court (in proceedings reported at 2013–14 Gib LR 209) on the basis that the questions of whether Vizcaya had submitted to the jurisdiction of the New York Bankruptcy Court by agreement or by presence required detailed consideration of expert evidence of New York law and were therefore unsuitable for summary determination. The Supreme Court also dismissed one of the trustee's enforcement claims against Asphalia on the basis of the recent decision of the UK Supreme Court.

On appeal against the Supreme Court's decision, Vizcaya submitted that (a) cl. 10 did not amount to submission by agreement to the jurisdiction of the New York courts; (b) Vizcaya had not been present in New York when the trustee instituted the proceedings in the New York Bankruptcy Court; and (c) the trustee's case had been inadequately pleaded in that he had failed to plead the legal basis of his claim that the New York Bankruptcy Court had jurisdiction over Vizcaya. On the submission by agreement point, Vizcaya submitted that (i) it was not a party to the customer agreement because Bank Safra Gibraltar had signed that agreement as "custodian" which indicated that the bank was a trustee rather than an agent for it; (ii) cl. 10 did not amount to an agreement to submit to the jurisdiction of the New York courts because the construction of cl. 10 was a matter of Gibraltar law (*i.e.* English law) not New York law, Gibraltar law required an express agreement to submit to the jurisdiction of a foreign court, and the customer agreement contained no such express

agreement; and (iii) the customer agreement was obtained by fraud as part of BLMIS's Ponzi scheme and was therefore void. On the submission by presence point, Vizcaya submitted, *inter alia*, that (i) actual physical presence was required and it had no offices, employees, or directors in New York and it had no control over and made no contribution to BLMIS's offices or business; (ii) no investment business was in fact carried out for it by BLMIS in New York; (iii) if BLMIS's activities did make it present in New York, that presence was obtained by fraud and could not be relied on to establish jurisdiction pursuant to the *ex turpi causa non oritur actio* doctrine; and (iv) it ceased to be present in New York on December 11th, 2008 when Bank Safra Gibraltar instructed BLMIS to remit all further moneys in its account and to close that account.

The trustee submitted in reply, *inter alia*, that (a) in signing the customer agreement, Vizcaya had submitted by agreement to the jurisdiction of the New York Bankruptcy Court because (i) New York law should be used to construe cl. 10; (ii) under New York law an implied rather than express agreement for a foreign company to submit to the jurisdiction of the New York courts was sufficient; and (iii) cl. 10 was such an implied agreement, as shown in particular by its opening words, "This agreement shall be deemed to have been made in the State of New York"; and (b) Vizcaya was present in New York when the trustee commenced proceedings before the New York Bankruptcy Court on the basis that (i) it was a special purpose vehicle incorporated solely to carry on investment business in New York via BLMIS, all its money went to BLMIS in New York, and BLMIS had authority to enter into binding contracts on its behalf; (ii) its submission based on the *ex turpi causa* doctrine was not supported by authority; and (iii) the arrangements in the account management agreements were not terminated by Bank Safra Gibraltar's instructions of December 11th, 2008.

Asphalia appealed against the Supreme Court's order on the ground that the entire claim against it should have been dismissed once it became clear that, as a result of Gibraltar's following the decision of the UK Supreme Court, the US judgment could not be enforced against it. The trustee submitted in reply that his entire claim against Asphalia should not be dismissed because there were residual issues that remained alive between the parties in relation to his December 2010 claim and the fate of moneys that had previously been paid into court by Asphalia.

Held, allowing the appeal in part:

(1) It was not possible summarily to determine whether Vizcaya had submitted by agreement to the jurisdiction of the New York Bankruptcy Court and Vizcaya's appeal on this point would be dismissed. Clause 10 clearly identified New York law as the governing law of the customer agreement through its opening words, "This agreement shall be deemed to have been made in the State of New York," and New York law would therefore be used to determine whether cl. 10 amounted to an agreement

to submit to the jurisdiction of the New York courts. It was arguable that, under New York law, cl. 10 amounted to an implied agreement to submit, but determination of this issue required expert evidence of New York law from both parties, making summary determination unsuitable (paras. 59–60; para. 65).

(2) By contrast, Vizcaya was not present in New York when the proceedings in the New York Bankruptcy Court were initiated on April 9th, 2009 and this aspect of the appeal would be allowed. To establish presence, the trustee needed to demonstrate that BLMIS, as Vizcaya's representative, had for more than a minimal period been carrying on Vizcaya's business in New York, and he had failed to do so because (a) the fact that Vizcaya was a special purpose vehicle created for the sole purpose of making investments in New York via BLMIS did not by itself mean that BLMIS was carrying on Vizcaya's business in New York; (b) BLMIS did not actually carry out any investment business for Vizcaya as it was operating a Ponzi scheme; (c) the fact that Vizcaya placed money with BLMIS and BLMIS had authority to enter into contracts on Vizcaya's behalf was not sufficient to establish presence because BLMIS never exercised that authority or used Vizcaya's money for the stipulated purpose of investment; and (d) the fact that BLMIS remitted the $180m. to Vizcaya could not be characterized as carrying on Vizcaya's investment business in New York as this was calculated to conceal BLMIS's fraud (paras. 79–85).

(3) Even if BLMIS had carried on investment business for Vizcaya in New York, Vizcaya could probably establish that it ceased to do so on December 11th, 2008, with the result that Vizcaya would not have been present in New York on April 9th, 2009. However, the Supreme Court held that Bank Safra Gibraltar's instructions of December 11th, 2008 were produced too late in the hearing for Vizcaya to rely on them and this was a legitimate case management decision that would be upheld (paras. 96–98).

(4) The relationship between Bank Safra Gibraltar (as "custodian" for Vizcaya) and Vizcaya was that of agent and principal, not trustee and beneficiary, and Vizcaya was therefore a party to and bound by the terms of the customer agreement. "Custodian" did not imply a relationship of trustee and beneficiary. There was no evidence that the parties intended Bank Safra Gibraltar to be a trustee for Vizcaya, and the term "custodian" may have been deliberately adopted to avoid this (paras. 39–40).

(5) Vizcaya's submission that the customer agreement was void because it was obtained by fraud was unsuitable for summary determination. The applicable law was New York law and there was evidence that, under New York law, contracts induced by fraud were voidable but not void, in which case the customer agreement would still have been valid when the trustee commenced proceedings against Vizcaya in the New York Bankruptcy Court. Vizcaya needed to bring contrary expert evidence of New York law

to succeed on this issue, making it unsuitable for summary disposal (paras. 66–68).

(6) Vizcaya's submission on the *ex turpi causa* doctrine was not supported by authority and there was no evidence that the contract between Vizcaya and BLMIS or the payments made by Vizcaya were induced by fraud. Further, there were substantial issues to be resolved as to the room for application of the *ex turpi causa* doctrine, given that the trustee was not seeking to recover damages in the name of BLMIS but was rather seeking to recover moneys wrongly paid to Vizcaya in a situation in which Vizcaya was an innocent recipient without knowledge or notice of BLMIS's fraud. This issue therefore was not suitable for summary disposal (paras. 88–89).

(7) The trustee's pleaded case was adequate because it advanced his claim for the US judgment to be enforced against Vizcaya in Gibraltar. He was not required specifically to plead the legal basis upon which he sought the enforcement of that judgment. If his pleaded case had been inadequate, the court would have granted him permission to amend it to set out the legal basis of his claim because the case law in this area had changed significantly during the course of the proceedings, Vizcaya would not suffer any prejudice by reason of such an amendment and it was well aware of the case now being advanced by the trustee (paras. 29–33).

(8) As regards Asphalia's appeal, the trustee's enforcement claims against Asphalia would be dismissed, but the entire claim would not be dismissed because there were a number of residual issues left to be resolved in relation to the December 2010 claim (paras. 107–110).

Cases cited:

(1) *Actiesselskabet Dampskib "Hercules"* v. *Grand Trunk Pacific Ry. Co.*, [1912] 1 K.B. 222, distinguished.

(2) *Adams* v. *Cape Indus. plc*, [1990] Ch. 433; [1990] 2 W.L.R. 657; [1991] 1 All E.R. 929, considered.

(3) *Cambridge Gas Transp. Corp.* v. *Navigator Holdings plc (Creditors' Cttee.)*, 2005–06 MLR 297; [2007] 1 A.C. 508; [2006] 3 W.L.R. 689; [2006] 3 All E.R. 829; [2007] 2 BCLC 141; [2006] BCC 962; [2006] UKPC 26, not followed.

(4) *Dunbee Ltd.* v. *Gilman & Co. (Australia) Pty. Ltd.*, [1968] 2 Lloyd's Rep. 394, distinguished.

(5) *Emanuel* v. *Symon*, [1908] 1 K.B. 302, referred to.

(6) *IG Index Ltd.* v. *Ehrentreu*, [2013] EWCA Civ 95, referred to.

(7) *Jetivia S.A.* v. *Bilta (UK) Ltd. (In Liquidation)*, [2014] Ch. 52; [2013] 3 W.L.R. 1167; [2014] 1 All E.R. 168; [2014] 1 Lloyd's Rep. 113; [2014] 1 BCLC 302; [2013] BCC 655; [2013] EWCA Civ 968, referred to.

(8) *Okura & Co. Ltd.* v. *Forsbacka Jernverks Aktiebolag*, [1914] 1 K.B. 715, considered.

(9) *Rubin* v. *Eurofinance S.A.*, [2011] Ch. 133; [2011] 2 W.L.R. 121;

[2011] 1 All E.R. (Comm) 287; [2011] Bus. L.R. 84; [2011] C.P. Rep. 2; [2011] 2 BCLC 473; [2011] BCC 649; [2010] EWCA Civ 895; on appeal, [2013] 1 A.C. 236; [2012] 3 W.L.R. 1019; [2013] 1 All E.R. 521; [2012] 2 BCLC 682; [2013] BCC 1; [2012] UKSC 46, applied.

(10) *Sfeir & Co.* v. *National Ins. Co. of New Zealand Ltd.*, [1964] 1 Lloyd's Rep. 330, distinguished.

(11) *Singh* v. *Rajah of Faridkote*, [1894] A.C. 670, referred to.

(12) *South India Shipping Corp. Ltd.* v. *Export-Import Bank of Korea*, [1985] 1 W.L.R. 585; [1985] 2 All E.R. 219; [1985] 1 Lloyd's Rep. 413; [1985] BCLC 163; (1985), 1 BCC 99350, distinguished.

(13) *Stone & Rolls Ltd. (In Liquidation)* v. *Moore Stephens (A Firm)*, [2009] 1 A.C. 1391; [2009] 3 W.L.R. 455; [2009] 4 All E.R. 431; [2009] Bus. L.R. 1356; [2009] 2 Lloyd's Rep. 537; [2009] 2 BCLC 563; [2009] 2 C.L.C. 121; [2009] B.P.I.R. 1191; [2009] P.N.L.R. 36; [2009] UKHL 39, referred to.

(14) *Vogel* v. *R. & A. Kohnstamm Ltd.*, [1973] Q.B. 133; [1971] 3 W.L.R. 537; [1971] 2 All E.R. 1428, referred to.

M. Driscoll, Q.C., *R. Vasquez, Q.C.* and *J. Gomez* for the appellants;
S. Fatima, *O. Smith* and *K. Power* for the first respondent;
L. Baglietto, Q.C. for the second respondent.

1 **POTTER, J.A.:**

Introduction

This is an appeal from the written ruling (hereinafter called "the judgment") of Dudley, C.J. dated June 19th, 2013 (reported at 2013–14 Gib LR 209), and his subsequent oral ruling upon the same date, respectively dismissing the applications dated December 18th, 2012 of Vizcaya Partners Ltd. ("Vizcaya"), the first defendant, and Asphalia Fund Ltd. ("Asphalia"), the fourth defendant, whereby they sought the summary dismissal, pursuant to the Civil Procedure Rules, Part 24, of claims made against them by Mr. Irving Picard ("the trustee") who, on December 15th, 2008, was appointed the trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") by the US Bankruptcy Court, Southern District of New York. Those claims are set out in detail in the trustee's amended complaint dated September 30th, 2009 in the New York liquidation proceedings, pursuant to which a default judgment was granted against these defendants on August 3rd, 2010.

Background

2 The actions arose as a consequence of the fraudulent "Ponzi" scheme operated by Mr. Madoff through the medium of BLMIS which had for a number of years falsely represented to its many investor clients (including

Vizcaya) that it was investing their funds by a purchase of securities under a so-called "split-strike" conversion trading strategy. However, in the words of the trustee's counsel's written statement of May 31st, 2011:

> "In fact, no securities were purchased in connection with the strategy and all investor moneys were co-mingled into a single account held at the New York branch of J.P. Morgan Chase & Co. and used for Madoff's own purposes. The basic methodology of the fraud was that Madoff would transfer moneys to older investors from moneys supplied by newer investors. In turn as he exhausted the moneys paid in by these investors he would then pay off any later requests for 'redemptions' by those investors from moneys paid in by subsequent investors. The whole BLMIS scheme was therefore a massive chain of fraud. As such, moneys transferred to investors from those accounts were not redemptions of their segregated investments or profits but merely transfers from a pot of co-mingled stolen property. In reality, therefore, BLMIS did not enter into any securities transactions on behalf of its customers at all."

3 The brief history of the matter is as follows. Vizcaya is a company incorporated in the British Virgin Islands ("BVI") and is a recognized mutual fund under the BVI Mutual Funds Act (1996). It opened an investment account designated No. IFR083 with BLMIS on December 21st, 2001. It is asserted by the trustee and it is not in dispute that at that time BLMIS was already massively insolvent.

4 During the period that the Vizcaya investment account was purportedly operative, 26 wire transfers of Vizcaya's moneys were sent successively from Banque Safra (France) S.A. ("Banque Safra France") and Bank J. Safra (Gibraltar) Ltd. ("Bank Safra Gibraltar") via UBS AG Stamford branch to BLMIS in New York for investment on behalf of Vizcaya. None of the sums transferred was in fact paid into Vizcaya's designated account or invested on its behalf. All sums received from "investors" generally were simply paid into and co-mingled in a single BLMIS account, No. 703 at J.P. Morgan Chase in New York. Any purported investment "returns" or "redemptions" made to or for the investors were simply paid from that account out of other investors' funds as they came in. Over the period, the 26 separate wire transfers made to the account of Vizcaya totalled $327,249,925. All were made for the purposes of investment in securities but none was so used, nor were they credited to Vizcaya's account.

5 On August 27th, 2008, Bank Safra Gibraltar, as "custodian" for Vizcaya, instructed BLMIS to pay $30m. from the Vizcaya account and transfer the funds from the BLMIS bank account in New York to UBS Stamford Connecticut, the beneficiary being Bank Safra (Suisse) for further credit to Bank Safra Gibraltar for Vizcaya as beneficiary.

6 On or about October 29th, 2008, Bank Safra Gibraltar, as custodian for Vizcaya, instructed BLMIS to pay out a further sum of $150m. from the Vizcaya account and transfer the funds from the BLMIS bank account in New York to Deutsche Bank Trust Co. with the beneficiary being Bank Safra (Suisse) for further credit to Bank Safra Gibraltar for Vizcaya as beneficiary. The transfer was made on October 31st, 2008.

7 Over the years, neither Vizcaya, Banque Safra France nor Bank Safra Gibraltar made any withdrawals from the Vizcaya account with BLMIS apart from the two transfers above mentioned, totalling $180m., which I shall refer to collectively as "the two transfers."

8 By proceedings issued on April 9th, 2009, the trustee seeks the recovery of the two transfers. He does not allege any fraud or impropriety on the part of Vizcaya. He asserts that the moneys are recoverable under US bankruptcy law on the basis that they constituted fraudulent transfers and/or preference by BLMIS and that they comprise "customer property" to be administered by him. The moneys received by Vizcaya under the two transfers were placed in the account it held at Bank Safra Gibraltar. Bank Safra Gibraltar then transferred various sums onwards to Asphalia, Zeus Partners Ltd. ("Zeus") and Siam Capital Management Ltd. ("Siam"), associated companies of Vizcaya incorporated in the Cayman Islands, BVI and Bermuda respectively.

9 At the time Vizcaya opened its investment account with BLMIS on December 21st, 2001, Banque Safra France acted as Vizcaya's banker and, on behalf of Vizcaya, executed three separate documents with BLMIS. In March 2005, Vizcaya changed its banker from Banque Safra France to Bank Safra Gibraltar, and, on March 23rd, 2005, Bank Safra Gibraltar, on behalf of Vizcaya, executed three successor documents in similar terms as follows: a customer agreement anticipating the opening of a securities account with BLMIS; a trading authorization authorizing Mr. Madoff to buy, sell and trade in stock, bonds, options and other securities until such authorization was revoked in writing; and an option agreement anticipating the opening of an option account with BLMIS. These documents are collectively referred to hereafter as the "account management agreements."

10 The only one of the account management agreements identified above from which it is necessary to quote in detail for the purposes of this appeal as it has been argued before us is the BLMIS customer agreement, dated March 23rd, 2005, which was headed with the name and details of BLMIS, executed by Bank Safra Gibraltar "as custodian for Vizcaya Partners Ltd.," and provided, *inter alia*, as follows:

"*Customer Agreement*

In consideration for you (the 'broker') opening or maintaining one or more accounts (the 'customer'), the customer agrees to the terms and conditions contained in this agreement. The heading of each provision of the agreement is for descriptive purposes only and shall not be deemed to modify or qualify any of the rights or obligations set forth in each such provision. For purposes of this agreement, 'securities and other property' means, but is not limited to, money, securities, financial instruments of every kind and nature and related contracts and options. This definition includes securities or other property currently or hereafter held, carried or maintained by you or by any of your affiliates, in your possession or your control, or in the possession or control of any such affiliate, for any purpose, in and for any other accounts now or hereafter opened, including any account in which I may have an interest.

1. APPLICABLE RULES AND REGULATIONS

All transactions in the customer's account shall be subject to the constitution, rules, regulations, customs and usages of the exchange or markets, and its clearing house, if any, when the transactions are executed by the broker or its agents including its subsidiaries and affiliates. Also, where applicable, the transaction shall be subject (a) to the provisions of the Securities Exchange Act 1934, as amended, and (b) to the rules and regulations of (1) the Securities and Exchange Commission and (2) the Board of Governors of the Federal Reserve system.

2. AGREEMENT CONTAINS ENTIRE UNDERSTANDING/ASSIGNMENT

This agreement contains the entire understanding between the customer and the broker concerning the subject matter of this agreement. The customer may not assign the rights and obligations hereunder without first obtaining the prior written consent of the broker.

. . .

5. DELIVERY OF SECURITIES

Without abrogating any of the broker's rights under any other portion of this agreement and subject to any indebtedness of the customer to the broker, the customer is entitled, upon appropriate demand, to receive physical delivery of fully paid securities in the customer's account.

. . .

7. BROKER AS AGENT

The customer understands that the broker is acting as the customer's agent, unless the broker notifies the customer in writing before the settlement date for the transaction that the broker is acting as dealer for its own account or as agent for some other person.

8. CONFIRMATIONS AND STATEMENTS

Confirmation of transactions and statements to the customer's account(s) shall be binding upon the customer if the customer does not object in writing within ten days after receipt by the customer.

. . .

10. CHOICE OF LAWS

This agreement shall be deemed to have been made in the State of New York and shall be construed, and the rights and liabilities of the parties determined, in accordance with the laws of the State of New York.

. . .

12. ARBITRATION DISCLOSURES

Arbitration is final and binding on the parties.

The parties are waiving their right to seek remedies in court, including the right to jury trial.

. . .

13. ARBITRATION

The customer agrees, and by carrying an account for the customer the broker agrees that all controversies which may arise between us concerning any transaction or the construction, performance, or breach of this or any other agreement between us pertaining to securities and other property, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration under this agreement [and] shall be conducted pursuant to the Federal Arbitration Act under the laws of the State designated in para. 10 before the American Arbitration Association . . ."

11 So far as the trading authorization and the option agreement are concerned, each was similarly executed by Bank Safra Gibraltar "as custodian for Vizcaya Partners Ltd." In the case of the trading authorization, it provided that "The authorization . . . is also a continuing one and shall remain in full force and effect until revoked by [Bank Safra Gibraltar] by a written notice." In the case of the option agreement, the anticipated option account was to be "subject to all the terms and

conditions of all other agreements . . . entered into with [BLMIS] relating to the sale of securities, except to the extent that such other agreements are contrary to or inconsistent therewith."

12 Shortly after execution of the account management agreements, Bank Safra Gibraltar and Vizcaya executed an additional document headed "Custody Agreement" dated April 18th, 2005. It is a long document which it is not necessary to quote in full. However, it provided, *inter alia*, as follows:

> "BETWEEN
>
> VIZCAYA PARTNERS LTD. . . . (hereinafter called the 'client') of the first part
>
> And
>
> BANK JACOB SAFRA (GIBRALTAR) LTD. . . . (hereinafter called the 'custodian').
>
> WHEREAS—
>
> The client wishes to establish a custody account to hold and maintain certain property which the custodian holds as custodian for the client, which account may consist of a number of sub-accounts, each designated as being held for the client;
>
> The client has empowered the custodian to hold the property and to buy and sell securities (as defined herein) on their behalf as per proper instructions (as defined herein); and
>
> The client wishes the custodian to effect the settlement of such investment transactions.
>
> For the purpose of the agreement, it should be understood that:
>
> 'Proper instructions' shall mean written instructions sent by hand, post or facsimile transmission in the English language given by the authorized representatives of the client for the account maintained with the custodian.
>
> 'Property' shall mean cash, bullion, coin, precious metals, securities and other property of the client.
>
> 'Securities' shall mean that part of the property consisting of stocks and shares and other equity related securities and bonds, debenture notes or other securities including rights arising as a result of bonuses, preferences and options.
>
> 1. APPOINTMENT OF CUSTODIAN
>
> The client HEREBY APPOINTS the custodian to be and the custodian HEREBY APPOINTS to act as custodian of the property delivered to it

upon the terms and conditions hereinafter contained from the date hereof.

. . .

3. OPENING OF ACCOUNT

The custodian is authorized and directed to open and maintain one or more custodial accounts in the name of the client which shall be a special custody account for the exclusive benefit of the client and which shall be entitled 'Vizcaya Partners Ltd.' (the 'account'), or as otherwise notified by the client to the custodian for the receipt and separate maintenance of property delivered to the custodian for the client's account. The custodian may entrust property held in such account to a foreign securities depository. Any property held by the custodian should be subject only to proper instructions given in accordance with this agreement and any property entrusted by the custodian to a foreign securities depository shall be subject only to instruction of the custodian and the proper instructions of the client.

4. RECEIPT OF PROPERTY

The custodian shall receive, record, and hold in safekeeping the account all property received by it and shall arrange for all such property to be deposited in its vault or, subject to cl. 3 above, otherwise held by or to its order as it may think proper for the purpose of providing for the safekeeping thereof.

5. TRANSFER OF SECURITIES

The custodian shall transfer, exchange, or deliver in the required form and manner securities held by it hereinafter only upon receipt of the proper instructions and only,

(a) upon sales of such securities and receipt by the custodian of payment therefor;

(b) upon receipt by the custodian of payment in connection with any repurchase agreement related to such securities entered into by the client . . .

(f) for the purpose of collecting all income and other payments with the respect to the securities;

(g) for other proper corporate purposes;

. . .

In addition the custodian shall, upon proper instructions, make a free delivery of any of the property held by it hereunder to or to the order of the party specified in such proper instructions; and provide custodian services in connection with the purchase or issue of

options by the client and the purchase or sale of futures contracts or foreign exchange contracts or options by or on behalf of the client."

13 Thereafter there follows a variety of detailed provisions relating to transfer of securities (cl. 5), receipt and disbursement of cash (cl. 6), records (cl. 7) ("the custodian shall keep or cause to be kept such books, records and statements as may be necessary to give a complete record of all property held in transactions carried out by or on behalf of the client"), and standard of care (cl. 10). It is to be noted that, from cl. 11 (liability of custodian) onwards, by what is assumed to be an error on the part of the draftsman, references to "the client" (Vizcaya) are superseded by references to "the fund." The remaining clauses deal in turn with liability of the custodian (cl. 11), duties of the fund (cl. 12), indemnification of the custodian (cl. 13), remuneration of the custodian (cl. 14), confidentiality (cl. 15), and the custodian's representations (cl. 16). By cl. 17 (termination), it is provided that the agreement remains in force for two years, terminable thereafter by either party on 60 days' written notice with provision for earlier termination in the event of breach by the custodian unremitted within 30 days of service of notice or in the event that the custodian should go into liquidation or receivership. By cl. 20 (proper law), it was provided that the agreement should be governed and construed according to the laws of Gibraltar.

14 It is right to record that, by a further "amendment to custody agreement" dated February 9th, 2007, Bank Safra Gibraltar and Vizcaya made certain amendments and additions to the custody agreement. However, it does not appear to me, nor has it been argued, that they significantly affect the issue between the parties to which I now turn.

15 It is common ground between the parties that the account management agreements created a relationship whereby BLMIS was intended to be constituted as an agent with the authority to trade in securities. However, the identity of BLMIS's principal has been a matter of dispute as between the trustee and Vizcaya. The trustee has throughout contended that the principal was Vizcaya, Bank Safra Gibraltar having entered into the account management documents for and on Vizcaya's behalf and as its agent. Bank Safra Gibraltar shares this view. As set out in the statement of Roy Clinton, the Chief Executive Officer of Bank Safra Gibraltar, the bank's position is that—

". . . the entire relationship of the bank with Vizcaya was custodial in nature, as is clear from the terms of the custody agreement . . . and the account-opening documentation with BLMIS which the bank executed expressly as custodian for and at the request of Vizcaya . . . Likewise, any transmission of moneys by the bank to withdraw the moneys from the account with BLMIS was necessarily subject to

> Vizcaya's express instructions, the bank having no discretion to act otherwise."

16 Vizcaya, on the other hand, has argued before this court, as it argued below, that the (later) custody agreement created or evidenced a relationship of trustee/beneficiary between Bank Safra Gibraltar and Vizcaya; that, as a matter of law, a trustee is not an agent; and therefore that when Bank Safra Gibraltar entered into the account management agreements, albeit earlier signed, it did so as the contracting party and as the principal of BLMIS. There are plainly considerable difficulties in relation to that assertion and I shall return to them below.

17 As already indicated, when this action was instituted on April 9th, 2009, the trustee did not seek a substantive determination of entitlement to the moneys transferred as set out at paras. 5 and 6 above, but rather sought ancillary relief supportive of US adversary proceedings issued in New York by the trustee (also on April 9th, 2009) against Vizcaya and Bank Safra Gibraltar to avoid and recover the transfers. Initially, the trustee sought freezing orders for payment into court of the moneys transferred, disclosure orders, and other relief. The claim was issued as a Part 8 claim, as required of an applicant for relief under s.17 of the Civil Jurisdiction and Judgments Act 1993: see CPR, r.25.4(2). It was subsequently amended in September 2009 to join Asphalia, Zeus and Siam. By permission of the court dated February 2nd, 2011, pursuant to a ruling by the Chief Justice dated January 28th, 2011, the trustee was granted permission to amend the Part 8 claim form to add claims seeking the enforcement of US default judgments which the trustee had subsequently obtained against the various parties on August 3rd, 2010. Thereafter, Zeus transferred into the custody of the US Bankruptcy Court moneys already paid into court in Gibraltar and the trustee no longer seeks to enforce its default judgment against Zeus. The trustee also settled the claim against Siam, leaving alive only the claims for enforcement of the US default judgments against Vizcaya and Asphalia.

18 On May 28th, 2009 and October 28th, 2009, Vizcaya and Asphalia respectively paid into court sums of $10,020,591.05 (Vizcaya) and $1,854,006.90 (Asphalia) in order to abide by the outcome of these proceedings.

19 As a result of the various recoveries, orders and/or payments made in respect of the sums claimed by the trustee, the issues which remain extant in these proceedings relate to paras. 6 and 8 of the claim form by which the trustee claims—

> "6. . . . that the judgment or order of the New York court dated August 3rd and 6th, 2010 against the first [and] fourth . . . defendants for payment by the said defendants to the claimant of such sums as are specified therein ['the US judgment'] be registered and/or

> enforced in Gibraltar as if it were a judgment or order of the Supreme Court of Gibraltar.
>
> . . .
>
> 8. Further, pursuant to CPR, r.72.10, that the funds paid into court pursuant to the orders of May 28th, 2009 and October 28th, 2009 by the first and fourth defendants totalling the sum of approximately $11,874,597.05 and such accrued interest thereon subsequent to payment into court ['the funds in court'] be paid to the claimant in part satisfaction of the US judgment,"

together with claims for:

> "10. Further or other relief as the court should deem fit.
>
> 11. Costs."

I shall refer to paras. 6 and 8 as "the enforcement claims."

20 It is to be noted that, at the end of his written ruling dated January 28th, 2011 in relation to the trustee's application for permission to amend and directions to progress the action to final hearing, the Chief Justice stated as follows (2010–12 Gib LR 144, at para. 17):

> "The only remaining issue is whether I should make directions to convert the trustee's action into a Part 7 claim. Although, undoubtedly, there are substantive issues in dispute between the trustee and some of the defendants as regards matters which fall to be determined in the trustee's claim, there are to my mind no substantial disputes of fact, other than possibly consideration of questions of New York law which may require the parties to rely upon expert evidence. That of itself would not merit converting the action into a Part 7 claim."

21 The trial of the trustee's enforcement claims was originally set down for June 6th–10th, 2011. However, on May 24th, 2011, Vizcaya and Asphalia obtained an adjournment of the trial. The basis for that adjournment was that the recently decided case of *Rubin* v. *Eurofinance S.A.* (9), in which the English Court of Appeal had applied the principles enunciated by the Privy Council in *Cambridge Gas Transp. Corp.* v. *Navigator Holdings plc (Creditors' Cttee.)* (3) (to the effect that bankruptcy judgments are neither judgments *in rem* nor judgments *in personam* and hence that rules of private international law concerning their recognition and enforcement do not apply) was the subject of an appeal awaiting hearing before the UK Supreme Court and it was common ground that the outcome of that appeal would be highly material, if not determinative, in the instant action.

22 In that appeal, *Rubin*, the trustee in this case was permitted to intervene by way of written submission because of the relevance of its outcome to these proceedings and to similar proceedings in the Cayman Islands. In the result, a majority of the UK Supreme Court held that the *Cambridge Gas* case was wrongly decided. That being so, the primary issue to be decided in these proceedings is whether the trustee is entitled to seek to enforce the US default judgment against Vizcaya on the basis of the traditional common law principles which it is common ground are set out in Rule 43 in 1 *Dicey, Morris & Collins on The Conflict of Laws*, 15th ed., at para. 14R–054 (2012), as expressly approved by Lord Collins in *Rubin.*

23 Against that background, on December 18th, 2012, Vizcaya and Asphalia made an application to the court for summary judgment dismissing the trustee's claims against them pursuant to CPR, Part 24 and for release to each of them of their moneys paid into court.

24 At this point, it is appropriate to note that the issues of substance which were live between the parties in these proceedings and which require consideration on this appeal are different so far as Vizcaya and Asphalia are concerned. That is because, following the decision of the Supreme Court in *Rubin,* the trustee indicated that he would not seek to enforce the default judgment he had obtained against Asphalia, the position being that, as a matter of Gibraltar law, the New York Bankruptcy Court had no jurisdiction over Asphalia. So far as Asphalia was concerned, the trustee did, however, indicate that he reserved his position to ask the Gibraltar court for some form of assistance (unspecified) and that he would resist a dismissal of the entire claim against Asphalia for reasons set out in a letter dated December 14th, 2012.

25 When the matter came before the Chief Justice for hearing, it was confirmed that the trustee no longer sought to argue that the US default judgment against Asphalia was enforceable and the Chief Justice's judgment states (2013–14 Gib LR 209, at para. 1) that "the matter . . . proceeded on the basis that, in the first instance, I would deal with the summary judgment application seeking dismissal of the claim for enforcement of a US default judgment against Vizcaya." That is what the Chief Justice did. Nothing further appears in his judgment about how the application of Asphalia should be disposed of and I propose to return to that question having first dealt with Vizcaya's appeal.

The appeal of Vizcaya

26 The text of Rule 43 (*Dicey, Morris & Collins*, *op. cit.*) relevant to this case, as advanced before the Chief Justice and this court, reads as follows:

> "RULE 43—Subject to Rules 44 to 46 [which are not material for present purposes], a court of a foreign country outside the United

Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition as against the person against whom it was given in the following cases:

First Case—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.

. . .

Fourth Case—If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country."

27 The principles applicable when dealing with a Part 24 application on a point of law were stated by Lewison, L.J. in *IG Index Ltd.* v. *Ehrentreu* (6) ([2013] EWCA Civ 95, at para. 13) as follows:

". . . [I]t is not uncommon for an application under CPR Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction*: ICI Chemicals & Polymers Ltd. v. TTE Training Ltd.* [2007] EWCA Civ 725 . . ."

28 Before the Chief Justice below, there were three limbs to the arguments of Vizcaya in support of its application to dismiss (the first being a technical matter of pleading). They were dealt with in the Chief Justice's judgment under the following heads:

(1) The pleaded case;

(2) Submission by agreement (Rule 43, *Fourth Case*); and

(3) Submission by presence (Rule 43, *First Case*).

Head (1) may be briefly disposed of.

The pleaded case

29 Mr. Driscoll for the appellants submitted below (as he submits before us) that the burden which lay upon the appellants of establishing no real prospect of success fell to be measured against the case as pleaded, and he took the point that in the Part 8 details of claim there had been a fatal failure to plead that the New York Bankruptcy Court had, as a matter of Gibraltar law, competent jurisdiction over Vizcaya or Asphalia. He surmised that the reason for that failure was that, until the UK Supreme Court had reversed the English Court of Appeal decision in *Rubin* (9) on the basis that *Cambridge Gas* (3) had been wrongly decided, there had been no need to advance the case on the basis of such a plea. Mr. Driscoll submits to us that, as no application was made to the Chief Justice to amend the claim, it should have been dismissed.

30 The Chief Justice found little merit in Mr. Driscoll's submissions on this point and neither do I. As pointed out by the Chief Justice, item 6 of the endorsement in the amended Part 8 claim form advances the following claim: "that the judgment or order of the New York Court dated August 3rd and 6th, 2010 against [Vizcaya] . . . for payment . . . be registered and/or enforced in Gibraltar, as if it were a judgment or order of the Supreme Court of Gibraltar."

31 Thereafter, in attached details of claim, particulars of the US judgments and of letters of request from the US Bankruptcy Court were provided, with the basis for the relief set out at para. 31: "Further the claimant seeks to register and/or enforce the US judgments against the first, fourth and fifth defendants pursuant to such powers vested in the court at common law and/or in its inherent jurisdiction . . ."

32 The Chief Justice rightly stated that, following the Supreme Court decision in *Rubin* (9), what now fell to be determined was whether the US judgments were capable of enforcement under the traditional rules. He stated that the traditional rules were common law rules and properly encompassed in the pleaded case. That statement is fortified by reference to Atkin, 12(2) *Encyclopaedia of Court Forms in Civil Proceedings*, 2nd ed., issue form 43, at 149–150, which does not suggest that it is necessary specifically to plead the basis upon which recognition and enforcement of a foreign judgment is sought. I agree and would only add that the position is still said to be the same in Atkin,19(1) *Encyclopaedia of Court Forms in Civil Proceedings*, 2nd ed., at 160–161 (2010). It is there made clear that it is the written evidence in support of the application, rather than the application form itself, which must set out the grounds on which the judgment creditor is entitled to enforcement.

33 The Chief Justice went on in his judgment to state that, if it were necessary to do so, he would grant permission to amend the pleadings as requested, in light of the procedural history. In my view, he was right to take that view. If there were any need to amend, it arose as a consequence of the UK Supreme Court's determination in *Rubin* that the *Cambridge Gas* (3) case was wrongly decided. Against that backdrop and the manner in which the trustee now sought to progress his claim, it could not be said that the application for amendment (if necessary) could properly be described as coming too late. Further, Vizcaya could point to no specific prejudice which it would suffer by reason of such amendment and it was well aware of the case now being advanced by the trustee. I therefore agree with the observations of the Chief Justice in that regard. However, as I have already indicated, I do not consider that any necessity for amendment has been demonstrated.

Submission by agreement

34 Before the Chief Justice it was argued for the trustee that, by reason of the provisions of the customer agreement, Vizcaya (through the agency of Bank Safra Gibraltar which signed "as custodian for Vizcaya") had submitted to the jurisdiction of the New York court. The Chief Justice summarized the position in this way (2013–14 Gib LR 209, at para. 9):

> "The submission advanced on the trustee's behalf is that the BLMIS/Safra [Vizcaya] customer agreement is subject to New York law and jurisdiction, and that the effect and construction of the agreement and general factual matrix underpinning the BLMIS/Vizcaya relationship is such that it constitutes submission by agreement. Reliance is also placed upon the use of the word 'determined' in cl. 10, and it is said that premised upon that, the submission can be advanced that the clause goes beyond a choice of law clause but is also capable of being interpreted as a New York jurisdiction clause. Reliance is also sought to be placed upon the limited jurisdiction clause by which there is exclusive submission to arbitration by a US tribunal. In this regard, it is, I think, accepted that contractual submission to arbitration by a US tribunal does not necessarily amount to submission to the New York court generally, but that rather, as put in *Dicey, Morris & Collins* (*op. cit.*, at para. 14–076), '. . . the question is one of construction of the contract.' However, the primary submission advanced for the trustee is that, the jurisdiction agreement and the arbitration agreement being governed by the law applicable to the contract of which it forms part, it will in due course be necessary to adduce evidence of New York law on the relevant questions of construction."

35 The Chief Justice then turned to the four separate reasons advanced by Mr. Driscoll for Vizcaya in support of the proposition that Vizcaya had not submitted to the New York court. I propose to deal with each in turn.

Reason 1

36 Mr. Driscoll relied on the proposition that Vizcaya was not a party to the customer agreement on the basis that Bank Safra Gibraltar, the signatory "as custodian for Vizcaya," was acting as trustee for Vizcaya and not as Vizcaya's agent, and in this respect he relied upon the terms of the custody agreement between Bank Safra Gibraltar and Vizcaya. However, the Chief Justice declined to entertain the point on the basis that it had been raised too late in the proceedings to receive adequate treatment in argument. His judgment reads (2013–14 Gib LR 209, at para. 11):

> "11 The customer agreement is between BLMIS and Safra Gibraltar; Vizcaya is not a party, as Safra Gibraltar is a trustee for Vizcaya, and a trustee is not an agent for a beneficiary. The general proposition of law advanced by Mr. Driscoll is in my view right (see *Ingram* v. *Inland Rev. Commrs.*). However, in the present case, what falls to be determined is whether the custody agreement of April 18th, 2005, as amended by the further agreement of February 9th, 2007 (both subject to Gibraltar law with the Gibraltar courts having non-exclusive jurisdiction), which govern the 'client'/'custodian' relationship between Vizcaya and Safra Gibraltar, makes the latter a trustee of the former. I accept that the nature of the relationship is a matter of interpretation and construction of the agreements, ascertainable from their four corners. The difficulty is that I was only referred to the custody agreement by Mr. Driscoll in his reply, and then only after I queried the basis upon which it was being asserted that Safra Gibraltar was a trustee. In my view, there has been inadequate opportunity to address this point in argument, and I decline the opportunity to consider the agreements and make a determination as to their effect in the absence of substantive submissions."

37 Mr. Driscoll demurs at the Chief Justice's observations that the point was only raised in the course of his reply and he is correct in that respect. The point was taken in Mr. Driscoll's skeleton argument below and relied on in argument, albeit briefly. At all events, the matter is now before this court, the parties having had an opportunity to consider it and prepare additional submissions. It is, in my view, a point ready to be dealt with on that basis, given that, as the Chief Justice correctly observed, it is a matter of construction of the agreements before the court.

38 In this respect, it is right to say that the submissions of Mr. Driscoll and Ms. Fatima have in the event been spare indeed. Mr. Driscoll's skeleton argument limits itself simply to the assertion that Bank Safra's

role, being defined in cl. 1 of the custody agreement as "to act as custodian of the property delivered to it," was that of a trustee and not a mere agent. It does not refer the court to any authority in that respect. Nor has Mr. Driscoll elaborated the submission in oral argument, reserving the thrust and detail of his submissions to his argument that Vizcaya did not submit to the jurisdiction of the New York court for Reason 3 (referred to below at para. 42 *et seq.*). Ms. Fatima has similarly declined to engage in detail with the issue, preferring to submit that, in the light of the differences which exist between the parties, the matter could or should not be resolved summarily. In my view, the question is appropriate for decision now, given that both parties have had the opportunity to address it and, as both parties have accepted, it is a question of construction of the relevant agreement(s).

39 I consider that the pattern, nature and effect of the custody agreement is no more or less than a detailed agreement between banker and customer as to the method by which Bank Safra Gibraltar will deal with the moneys and property of its client, Vizcaya, in connection with investment and other transactions anticipated to be carried out by the bank on Vizcaya's behalf, strictly in accordance with Vizcaya's instructions and as its agent for that purpose. In the world of banking, the term "custodian" is not a term of art and it is certainly not a term which automatically implies or involves the status or obligations of a trustee so far as the custodian is concerned. Certainly, Mr. Driscoll has identified no principle or argument beyond mere assertion as to the intention behind the use of the word, let alone any authority as to its effect. Indeed, in my view, the word custodian may well be a term deliberately adopted by the bank to avoid any suggestion of trustee status in respect of properties and securities which it is plain are to be held and dealt with on the client's behalf in accordance with the client's instructions, as made clear in great detail in the custody agreement. Nor, in my view, does the custody agreement, which is intended to regulate the relationship of the bank and Vizcaya as its customer, contain terms which are inconsistent or incompatible with the terms of the account management agreements and in particular the customer agreement, nor has either party suggested that it does. I would therefore conclude that, by reason of Bank Safra's signature on the customer agreement "as custodian for Vizcaya," Vizcaya became bound by its terms.

40 In those circumstances, I consider that, had the Chief Justice thought it right to deal with the argument of Vizcaya that, in so signing, Bank Safra Gibraltar was contracting as a trustee, rather than as the agent of Vizcaya, he should and would have rejected it, holding that Vizcaya was indeed bound by the terms of the customer agreement.

Reason 2

41 This reason related to a point resolved in the course of the proceedings below (2013–14 Gib LR 209, at para. 12) and no longer pursued by Mr. Driscoll.

Reason 3

42 Reason 3 lies at the heart of this aspect of the appeal. The judgment reads as follows (2013–14 Gib LR 209, at paras. 13–14):

> "13 Mr. Driscoll submits that the customer agreement is not, as a matter of words, an agreement to submit to the jurisdiction of the New York Bankruptcy Court, and that as a matter of Gibraltar law there must be an express agreement to submit to the jurisdiction of a foreign court. In support of that proposition, reliance is placed upon a passage in *Dicey, Morris & Collins* (*op. cit.*, at para. 14–079):
>
> > 'It may be laid down as a general rule that an agreement to submit to the jurisdiction of a foreign court must be express: it cannot be implied. If the parties agree, expressly or by implication, that their contract shall be governed by a particular foreign law, it by no means follows that they agree to submit to the jurisdiction of the courts which apply it.'
>
> There is undoubtedly merit in the submission advanced that although cl. 10 of the customer agreement expressly provides that New York law applies, it does not on terms expressly establish submission by the parties to the courts of New York. The argument is developed further, and reliance is placed upon cl. 12 by which the parties waive their rights to seek 'remedies in court,' and it is submitted that, of itself, that clause demonstrates that no reliance can be placed upon the customer agreement as an agreement to submit to the jurisdiction of the New York Bankruptcy Court. Reliance is also placed upon the arbitration clause which, it is said, plainly shows that there is no agreement to submit to the jurisdiction of any court.
>
> 14 However, in my judgment, the possible flaw in Mr. Driscoll's submission is his contention that determination of whether there is an agreement to submit to the New York Bankruptcy Court is a matter of Gibraltar law and not New York law. I have previously alluded to Mr. Azopardi's primary submission that the jurisdiction agreement is governed by New York law, and that there is some merit in that is evident from the passage in *Dicey, Morris & Collins* (*op. cit.*, at para. 12–103):
>
> > '. . . [A]s a matter of common law, normally a jurisdiction agreement (like arbitration agreements . . .) is governed by the law applicable to the contract of which it forms a part.

> Accordingly, and as a matter of the common law principle of the conflicts of laws, the law which governs the contract will also generally govern the jurisdiction agreement.'

Whether or not this case falls within the general rule may require further argument, but for the purpose of this application it is apparent that the trustee can reasonably argue that New York law governs the jurisdiction agreement and, premised upon that, rely upon the expert evidence of Mr. Zeballos who, at para. 20 of his witness statement, opines—

> 'As a matter of New York law (*i.e.*, since it is the applicable law of the account management documents), Vizcaya agreed to the jurisdiction (and venue) of the New York courts. This is apparent from, *inter alia*, the fact it executed and agreed to the account management documents that explicitly establish a contractual agency relationship governed by New York substantive law . . .'

And later, at para. 22:

> 'It is well settled under New York law that by agreeing to a contract governed by New York law, involving the transaction of business in New York by an agent, a party submits to the "specific jurisdiction" of New York courts for adjudication matters arising from that contract.'

Whether that factual matrix is in due course made out, or Mr. Zeballos' expert opinion evidence is accepted as fact is not capable of determination at this juncture but, in my view, the trustee has a prospect of succeeding on this issue."

43 Before this court, Mr. Driscoll has repeated submissions which he made below to the effect that, for the purposes of *Dicey, Morris & Collins* (*op. cit.*, at para. 14R–054), Rule 43, there is nothing in the customer agreement which amounts to an agreement to submit to the jurisdiction of the New York Bankruptcy Court or the courts of New York generally and that the Chief Justice should have so held as a matter of English (Gibraltar) law. Mr. Driscoll further submits that the "possible flaw" in that submission which the Chief Justice identified (2013–14 Gib LR 209, at para. 14) was illusory, the Chief Justice having relied on a passage from *Dicey, Morris & Collins* (*op. cit.*, at para. 12–103) which addressed a situation premised on the existence of a jurisdiction agreement in the contract concerned, whereas here the question to be decided was whether such a jurisdiction agreement exists at all. I pause to observe that I do not regard that as an error of significance (if error it was) in the context of the Chief Justice's observations (2013–14 Gib LR 209, at para. 9; see para. 34 above). It seems clear to me that the Chief Justice was using the

expression "jurisdiction agreement" (*ibid.*, at para. 14) as a shorthand reference back to the argument of Mr. Azopardi that cl. 10 could and should be so interpreted.

44 In that respect, Mr. Driscoll submits that whether there is such an agreement is a question governed by English (Gibraltar) rules on the conflict of laws rather than the foreign (New York) law: see *Dicey, Morris & Collins* (*op. cit.*, at paras. 14–055 and 14–058, and the cases there cited); see also *Dicey, Morris & Collins* (*op. cit.*, at para. 14–129) where it is stated: "It is not enough, it must be again emphasised, that the foreign court is duly invested with jurisdiction under the foreign legal system. It must also have jurisdiction according to the English rules of the conflict of laws."

45 Of the cases cited, it is sufficient to refer to the earliest decision, that of the House of Lords in *Singh* v. *Rajah of Faridkote* (11) ([1894] A.C. at 683–684, *per* Lord Selborne):

> "All jurisdiction is properly territorial . . . In a personal action . . . a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced . . ."

and to the more recent decision in *Adams* v. *Cape Indus. plc* (2) ([1990] Ch. at 513–514, *per* Slade, L.J.):

> ". . . [I]n deciding whether the foreign court was one of competent jurisdiction, our courts will apply not the law of the foreign court itself but our own rules of private international law . . .
>
> Subsequent references in this section of this judgment to the competence of a foreign court are intended as references to its competence under our principles of private international law, which will by no means necessarily coincide with the rules applied by the foreign court itself as governing its own jurisdiction. As the decision in *Pemberton* v. *Hughes* [1899] 1 Ch. 781 shows, our courts are generally not concerned with those rules."

46 Mr. Driscoll goes on to submit, as he submitted below, that, in order to establish an agreement on the part of Vizcaya to submit to the jurisdiction of the New York court, the trustee must under English (Gibraltar) law demonstrate an express agreement to refer the particular dispute to the New York court: see *Dicey, Morris & Collins* (*op. cit.*, at para. 14–079) where it is stated: "It may be laid down as a general rule that an agreement to submit to the jurisdiction of a foreign court must be

express: it cannot be implied." See also the *Singh* case ([1894] A.C. at 686); *Emanuel* v. *Symon* (5) ([1908] 1 K.B. at 314); and *Vogel* v. *R. & A. Kohnstamm Ltd.* (14) ([1973] Q.B. at 145, *per* Ashworth, J.). In this connection, it is right to observe that in *Adams* v. *Cape* ([1990] Ch. at 465–466), whilst Scott, J. noted the views stated in "[t]he leading text books" that an agreement to submit to the jurisdiction must be express and could not be implied and that the *dicta* in the *Singh* and *Emanuel* cases supported that view, he refrained from endorsing it himself. However, he went on to observe, "nonetheless it is, in my judgment, a clear indication of consent to the exercise by the foreign court of jurisdiction that is required."

47 It is pertinent to note in this respect the view expressed in Briggs & Rees, *Civil Jurisdiction & Judgments*, 5th ed., at para. 7–52 (2009):

> "It is sometimes said that there cannot be an implied agreement to submit to the jurisdiction of a foreign court. It is hard to see why this should be so. The better version of the proposition might be that the court will not infer an agreement to submit in the absence of good evidence. To agree that the contract is governed by New York law is certainly not to agree to submit to the jurisdiction of the New York court."

48 Whilst no authority is cited by Briggs in support of the last sentence of that quotation, Mr. Driscoll relied on two authorities in that respect, the first being an Australian decision in the New South Wales Court of Appeal, *Dunbee Ltd.* v. *Gilman & Co. (Australia) Pty. Ltd.* (4), a case in which an English company and a New South Wales company entered into an agreement in England which provided that it was to be "governed by and construed under the Laws of England." In dealing with the submission that the clause amounted to an agreement as to forum as well as governing law, Walsh, J. observed ([1968] 2 Lloyd's Rep. at 398):

> "In my opinion, the clause cannot be given that construction. Its language does not suggest that the parties were making any bargain as to the forum in which any action, whether brought by one party or the other, was to be litigated. It says nothing as to the Court in which action is to be taken."

49 The second authority was *Sfeir & Co.* v. *National Ins. Co. of New Zealand* (10). In that case it was held that, in respect of a marine insurance policy issued by New Zealand insurers, the fact that (a) the law of the relevant contract was Ghanaian law, and (b) it contained a "claims payable" clause providing for performance in Ghana did not amount to an implied submission by the insurer to jurisdiction of the Ghanaian courts.

50 It has been submitted for Vizcaya that, construed under English (Gibraltar) law, there is equally nothing in the customer agreement in this

case which amounts to a submission to the jurisdiction of the New York court, whether express or implied. The particular points made may be summarized as follows. Clause 10, the choice of law clause, is in somewhat longer form than that in *Dunbee* v. *Gilman*, but it is to similar effect and is similarly inadequate to amount to an agreement to submit to the jurisdiction of the New York court. There is no other provision contained in the customer agreement which remotely improves the trustee's position in that respect. To the contrary, cl. 13 contains an agreement to submit all disputes to arbitration, the parties waiving their rights to seek remedies in court, and cl. 12 provides that such arbitration shall be final and binding.

51 If it were indeed the case that cl. 10 is similar in its terms and effect to the choice of law clause considered in *Dunbee* v. *Gilman* (4) and that the matter falls to be decided according to English (Gibraltar) law, I would consider Mr. Driscoll's submissions to be correct and supported by the authorities cited.

52 However, that is not the position in this case. As Ms. Fatima rightly submits, cl. 10 differs materially in its terms from the "choice of law" clause in *Dunbee* v. *Gilman*, in particular by the express provision contained in its opening words, "This agreement shall be deemed to have been made in the State of New York" and it is upon those words, coupled with the balance of the clause requiring that the agreement be construed under New York law, that she relies as amounting to an (implied) agreement to submit to the jurisdiction of the New York court. In this connection, as the judgment makes clear (2013–14 Gib LR 209, at para. 14; see para. 42 above), the Chief Justice had before him (and Ms. Fatima invokes) the so far uncontradicted expert evidence of Mr. Zeballos for the trustee to the effect that, by agreeing to a contract governed by New York law and involving the transaction of business in New York through its agent (BLMIS), Vizcaya submitted to the specific jurisdiction of the New York courts for adjudication of matters arising from that contract.

53 It is right further to record that Ms. Fatima has made clear in her submissions that, in the event of the matter proceeding to trial, the trustee will also assert that, as a matter of New York law, the proper construction of "deemed to have been made in the State of New York" is to ensure that the application of the New York long-arm statute would result in the exercise by the New York courts of jurisdiction over the parties pursuant to §302 of the New York Civil Practice Law and Rules which, under the heading "Personal jurisdiction by acts of non-domiciliaries," states as follows:

> "(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

(1) transacts any business within the state or contracts anywhere to supply goods or services in the state . . ."

However, Ms. Fatima did not develop this argument, nor does it appear by way of expert evidence in Mr. Zeballos's witness statement. Like the Chief Justice, therefore, I limit my consideration to those passages from Mr. Zeballos's witness statement quoted by him (2013–14 Gib LR 209, at para. 14; see para. 42 above).

54 In an effort to avoid the force and effect of Ms. Fatima's submissions, Mr. Driscoll has submitted as follows. First, he repeats his submission that, by wrongly dubbing cl. 10 "the jurisdiction agreement" (*ibid.*), the Chief Justice assumed what was required to be established, namely that what was appropriately described as a "choice of law" clause amounted also to an agreement as to jurisdiction. Accordingly, he lost sight of the fact that the question of whether or not that was so was a matter for the application of the English (Gibraltar) common law rather than the law of New York.

55 In support of that proposition, Mr. Driscoll relies on a passage from *Dicey, Morris & Collins* (*op. cit*., at para. 12–103), not cited by the judge, as follows:

> "Difficulty arises in cases in which it is necessary to take a preliminary decision as to whether there is a jurisdiction clause in a contract in order to help identify the law which governs that contract. It has been held, and appears to be correct, that this preliminary assessment has to be undertaken by reference to English domestic law principles."

56 Secondly, Mr. Driscoll relies upon the final sentence of the passage from *Civil Jurisdiction & Judgments* (*op. cit.*) to which I have already referred at para. 47 above.

57 Finally, Mr. Driscoll submits that the cases of *Dunbee* v. *Gilman* (4) and *Sfeir & Co.* v. *National Ins. Co. of New Zealand* (10) (see paras. 48 and 49 above) demonstrate that the jurisdiction test is that of the English (Gibraltar) common law even if the governing foreign law has a different jurisdiction test which, unlike the common law test, would treat the parties as having agreed to submit to the jurisdiction of the foreign court.

58 Upon analysis, I do not consider that Mr. Driscoll makes good his submissions.

59 As to the first point, it appears to me that the quotation from *Dicey, Morris & Collins* (*op. cit.*, at para. 12–103) upon which Mr. Driscoll relies is inapposite and that, if the words of the text relied on are considered in context, they do not establish the submission he makes. They are inapposite because the first sentence of the passage quoted contemplates a

situation where the purpose of the exercise and the court's primary task is to ascertain the law governing the contract *in a case where no such law is identified.* That being so, the court is looking to see whether there is a jurisdiction clause in the contract in order to assist in its task; in such a case, no governing law having been specified, it is both necessary and appropriate for the English court to apply principles of English law in ascertaining it. However, in this case, there is a clause in the contract which unequivocally identifies its governing law, and that is therefore the law to be applied in order to make the definitive assessment of whether or not the clause also amounts to an agreement to submit to the jurisdiction of the New York courts: *cf.* the words preceding the passage quoted by Mr. Driscoll from *Dicey, Morris & Collins* (*op. cit.*, at para. 12–103) ("as a matter of the common law principles of the conflict of laws, the law which governs the contract will also generally govern the jurisdiction agreement. This means, as will be seen below, that this law governs the construction and interpretation of the agreement"). That is the position in this case. The court is concerned not with a simple choice of law clause (despite its heading) but with the effect of a clause which also expressly provides that the agreement shall be deemed to have been made in the State of New York and it is upon that part of cl. 10 that Ms. Fatima bases her primary submission.

60 As to Mr. Driscoll's second point, my first observation is that, in the light of the wording of cl. 10, it does little to advance the matter in relation to Ms. Fatima's primary submission. That is because her argument is founded upon the provision that the agreement shall be deemed to have been made in New York, rather than simply resting upon the part of cl. 10 which provides that the rights and liabilities of the parties shall be determined in accordance with New York law. It is on that basis that one must look to New York law for the purposes of determining whether the terms of cl. 10 constitute not simply an express choice of governing law but, by implication or importation, an agreement as to jurisdiction.

61 In this connection, as the judgment makes clear (2013–14 Gib LR 209, at para. 14), the Chief Justice had before him the uncontradicted (though untested) expert evidence of Mr. Zeballos to the effect that, by agreeing to a contract governed by New York law and involving the transaction of business in New York by an agent (BLMIS), a party (Vizcaya) submits to the specific jurisdiction of the New York courts for adjudication of matters arising out of that contract.

62 As to the final point made by Mr. Driscoll, I do not consider that the cases he cites establish the proposition which he seeks to make good.

63 In *Dunbee* v. *Gilman* (4), the question before the New South Wales Court of Appeal was whether cl. 11 of the agreement in question ("THIS AGREEMENT is governed by and construed under the Laws of England")

amounted to an agreement by the defendant to submit to the jurisdiction of the English court. In reaching its decision, it is clear that the New South Wales court applied the English common law test as provided under the contract. However, there was simply no issue raised, or considered, as to whether Australian law might be applicable, let alone that it might have produced a different answer if applied.

64 In the case of *Sfeir & Co.* (10), the court was dealing with a clause where there was no express submission to the Ghanaian jurisdiction in the insurance policy under consideration by the court. An issue was raised as to whether the proper law of the contract was Ghanaian. However, the court did not decide it, but rather held that, even if the proper law was the law of Ghana, that could not give rise to the implication that the parties had agreed to submit to the jurisdiction of the Ghanaian court. It is right that the English court applied the rules of English private international law in reaching that conclusion. However, it did so in circumstances where there was no issue raised or suggestion made that Ghanaian law was different from English law in any material respect, or that its application would call for any different conclusion. That being so, I do not consider that the decision supports Mr. Driscoll's submission.

65 In summary, therefore, I consider that the Chief Justice was correct to hold that the question of whether or not cl. 10 was properly to be interpreted as a submission by agreement to the New York court was well arguable, involved a question of construction requiring the adduction of evidence of New York law by both sides, and was unsuitable for summary determination pursuant to CPR, Part 24.

Reason 4

66 Mr. Driscoll's final reason advanced in opposition to the trustee's contention that the customer agreement was subject to the jurisdiction of the New York court is that the agreement, having been obtained by fraud pursuant to the BLMIS Ponzi scheme, was void and of no legal effect. However, the Chief Justice (having expressed doubt as to the position under Gibraltar law) rightly observed that, in any event, the applicable law to be applied in considering that matter was New York law. So far as that was concerned, according to the expert evidence of Mr. Zeballos, under New York law contracts induced by fraud are voidable and fraud does not by operation of law "terminate or void the contract or the contractual relationship."

67 Mr. Zeballos's evidence in this respect is to be found at paras. 26–30 of his fourth witness statement, paras. 29–30 of which read as follows:

> "29 The distinction [between void and voidable contracts in this context] is based on whether there was a meeting of the minds when the contract was formed. For example, if '[t]he contracts are each

> clear on their face as to the obligations of the parties, and both parties duly executed the contracts, indicating that they understood their obligation' then there was a meeting of the minds. This is true even if one of the parties never intended to honour the contracts: *IPCON Collections LLC* v. *Costco Wholesale Corp.* . . . And one who argues that an agreement can 'be rescinded on the basis of fraud, has conceded that the contract is at most voidable.' *ACE Capital Re Overseas Ltd.* v. *Central United Life Ins. Co.* . . .
>
> 30 Therefore, as a matter of New York law, the account management documents and the contractual relationship they establish could at most be considered voidable because of the BLMIS Ponzi scheme; however, the legal obligations and relationships created by the account management documents were still valid when the trustee commenced the adversary proceeding against Vizcaya on April 9th, 2009."

68 For reasons which appear briefly set out in the Chief Justice's judgment (2013–14 Gib LR 209, at para. 16), it appears that the reliability of the evidence of Mr. Zeballos was questioned by Mr. Driscoll in the court below. However, Mr. Driscoll has not pursued those reasons before us and it is clear that, if the effect of Mr. Zeballos's evidence is to be successfully challenged, it will require contrary expert evidence to be obtained on behalf of Vizcaya. As with Reason 3, therefore, the issue is not appropriate for summary disposal.

Submission by presence

69 Before the Chief Justice, it was argued for the trustee that an investigation of how (if at all) Vizcaya transacted business in New York was necessary in order to see whether it was present there. It was submitted that Vizcaya was a special purpose vehicle ("SPV") which in no real sense carried on business in BVI where it was registered, but rather did business solely "through its agent, BLMIS, under a contract subject to New York law and US/New York arbitration"; that, although Vizcaya held an account with Bank Safra Gibraltar, the money went to New York via Bank Safra (Suisse); and, "against that factual matrix," Vizcaya was present for the purposes of the test in *Adams* v. *Cape Indus. plc* (2) (see further below).

70 Vizcaya advanced six alternative reasons why, as a matter of Gibraltar law, Vizcaya was not present in New York for the purposes of *Dicey, Morris & Collins* (*op. cit.*, at para. 14R–054), Rule 43 (2013–14 Gib LR 209, at paras. 20–24).

(1) It was again asserted that, by virtue of the custody agreement, Bank Safra Gibraltar was trustee for Vizcaya, rather than simply acting as agent for Vizcaya. As previously indicated, the Chief Justice refused to entertain

the point on the grounds that it had been raised late by Vizcaya with insufficient opportunity for consideration by the court (2013–14 Gib LR 209, at paras. 11 and 21).

(2) That "presence" meant some manifestation of actual physical presence and not merely "notional" presence. In this respect, Vizcaya had no office, employees or directors carrying on its business in New York, had no control over BLMIS's offices or business and made no financial contribution towards them.

(3) Alternatively to (1), Vizcaya merely transferred (via Bank Safra Gibraltar) moneys to BLMIS in New York for investment in securities.

(4) That in fact no such investment was effected or intended to be effected for Vizcaya by BLMIS, which fraudulently obtained and misapplied Vizcaya's moneys for BLMIS's own purposes.

(5) That, even if "presence" could be established simply by virtue of Vizcaya's transferring moneys to BLMIS in New York for investment, such presence was obtained by deception or fraud and, as such, should not be regarded and could not be relied on as presence for the purposes of establishing jurisdiction.

(6) That, as at April 23rd, 2009, Mr. Madoff had been arrested and BLMIS put into liquidation and that, if Vizcaya was indeed to be regarded as having traded through BLMIS, it had ceased to do so in December 2008.

71 The Chief Justice dealt shortly with the above arguments as follows. In respect of (1) he stated (2013–14 Gib LR 209, at para. 21):

> "It is said [for Vizcaya] that the moneys sent to New York were sent by Safra Gibraltar, as trustee for Vizcaya, which invested in New York and that a trustee is not an agent for its beneficiary. From this, it follows that by virtue of the customer agreement, BLMIS may be Safra Gibraltar's agent but not Vizcaya's agent. For the reasons I gave at para. 11 above, at this stage this submission fails."

I have already dealt with this aspect of the appeal (see paras. 36–40 above).

72 In respect of (6), in the light of expert evidence of New York law by Mr. Zeballos on behalf of the trustee to the effect that the relevant account management documents remained valid and operative under New York law at the time the trustee commenced adversary proceedings in New York, the Chief Justice considered that summary judgment on the point would be inappropriate.

73 In respect of points (2)–(5), which lie at the heart of this aspect of the appeal, the Chief Justice observed as follows (*ibid.*, at paras. 23–24):

"23 All these are undoubtedly relevant factors premised upon which persuasive submissions can legitimately be advanced. Whether, however, the customer agreement makes BLMIS Vizcaya's agent or whether BLMIS, by purportedly undertaking investments on Vizcaya's behalf, establishes presence in New York requires detailed consideration of the facts and, to the extent that the customer agreement falls to be interpreted, evidence of New York law. If, as a matter of New York law, BLMIS was Vizcaya's agent, then the passage in *Dicey, Morris & Collins* (*op. cit.*, at 14–064) is apposite:

> 'The question whether at common law a foreign court has jurisdiction over an individual who is neither resident or present within the foreign jurisdiction but who carries on business regularly there through an agent has been raised but not decided . . .'

24 Alternatively, if it is established that Vizcaya was an SPV created for the sole purpose of investing in New York with BLMIS, the trustee can, in my view, properly advance the submission that it was carrying on business in New York. That, in fact, business was not transacted by BLMIS may be a material factor, but one which need not of itself necessarily negative presence, in that if Vizcaya, by placing the moneys with BLMIS, was discharging its contractual obligations, that might suffice to establish presence. That such presence may have been obtained by fraud because BLMIS was engaged in a giant Ponzi scheme is the somewhat distinct point which is also advanced. In that regard it is noteworthy that the learned editors of *Dicey, Morris & Collins* do not interpret the passage in *Adams* v. *Cape* relied upon by Mr. Driscoll as establishing a point of principle, but rather state (*ibid.*):

> 'The Court of Appeal referred to the "voluntary" presence of the defendant as being one not induced by compulsion, fraud or duress, but it is clear from the context that it was not finally decided that the presence of these factors would negative jurisdiction.'"

74 In argument before this court, there has been no real difference between the parties as to the principles governing the question of "presence," namely those set out in *Adams* v. *Cape Indus.* (2) ([1990] Ch. at 530–531, *per* Slade, L.J.). The difference between the parties lies in their proper application. Those principles were set out verbatim in the judgment below (2013–14 Gib LR 209, at para. 18) and I repeat them here:

> "In relation to trading corporations, we derive the three following propositions from consideration of the many authorities cited to us relating to the 'presence' of an overseas corporation.

(1) The English courts will be likely to treat a trading corporation incorporated under the law of one country ('an overseas corporation') as present within the jurisdiction of the courts of another country only if either (i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a 'branch office' case), or (ii) *a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation's business in the other country at or from some fixed place of business.*

(2) In either of these two cases presence can only be established if it can fairly be said that the *overseas corporation's* business (whether or not together with the representative's own business) has been transacted at or from the fixed place of business. In the first case, this condition is likely to present few problems. In the second, the question whether the representative has been carrying on the overseas corporation's business or has been doing no more than carry on his own business will necessitate an investigation of the functions which he has been performing and all aspects of the relationship between him and the overseas corporation.

(3) In particular, but without prejudice to the generality of the foregoing, the following questions are likely to be relevant on such investigation: (a) whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the overseas corporation; (b) whether the overseas corporation has directly reimbursed him for (i) the cost of his accommodation at the fixed place of business; (ii) the cost of his staff; (c) what other contributions, if any, the overseas corporation makes to the financing of the business carried on by the representative; (d) whether the representative is remunerated by reference to transactions, e.g. by commission, or by fixed regular payments or in some other way; (e) what degree of control the overseas corporation exercises over the running of the business conducted by the representative; (f) whether the representative reserves (i) part of his accommodation, (ii) part of his staff for conducting business related to the overseas corporation; (g) whether the representative displays the overseas corporation's name at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation; (h) what business, if any, the representative transacts as principal exclusively on his own behalf; (i) whether the representative makes contracts with customers or other third parties in the name of the overseas corporation, or otherwise in such manner as to bind

it; (j) if so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations.

This list of questions is not exhaustive, and the answer to none of them is necessarily conclusive. If the judge . . . was intending to say that in any case, other than a branch office case, the presence of the overseas company can *never* be established unless the representative has authority to contract on behalf of and bind the principal, we would regard this proposition as too widely stated. We accept Mr. Morison's submission to this effect. Every case of this character is likely to involve 'a nice examination of all the facts, and inferences must be drawn from a number of facts adjusted together and contrasted': *La Bourgogne* [1899] P. 1, 18, *per* Collins, L.J.

Nevertheless, we agree with the general principle stated thus by Pearson, J. in *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139, 146:

'A corporation resides in a country if it carries on business there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the agency is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval . . .'

On the authorities, the presence or absence of such authority is clearly regarded as being of great importance one way or the other. *A fortiori the fact that a representative, whether with or without prior approval, never makes contracts in the name of the overseas corporation or otherwise in such manner as to bind it must be a powerful factor pointing against the presence of the overseas corporation.*" [Emphasis supplied.]

For convenience, I shall refer to the passage quoted as "the *Adams* v. *Cape* test."

75 In making their submissions as to whether, by reason of BLMIS's appointment and/or dealings, the presence of Vizcaya in New York had been established for the purpose of *Dicey, Morris & Collins* (*op. cit.*, at para. 14R–054), Rule 43, *First Case*, the parties have made reference to a number of authorities in elucidation or illustration of the *Adams* v. *Cape* test cited above. For Vizcaya, particular reliance is placed upon a passage in *Okura & Co. Ltd.* v. *Forsbacka Jernverks Aktiebolag* (8) ([1914] 1 K.B. at 718–719, *per* Buckley, L.J.):

"The third essential, and one which it is always more difficult to satisfy, is that the corporation must be 'here' by a person who carries

on business for the corporation in this country. It is not enough to shew that the corporation has an agent here; he must be an agent who does the corporation's business for the corporation in this country."

76 For the trustee, we have been referred to cases (including *Okura*) where, by reason of the particular facts, emphasis has been placed (and indeed the matter has turned) on the question of the agent's authority to contract in the name of his overseas principal. However, two observations fall to be made in that respect. First, in none of those cases is there any suggestion that the "third essential" referred to in *Okura* is not indeed an essential step in order to establish "presence" on the part of the principal. Secondly, none of the cases to which we have been referred has involved, or indeed considered, the position where the "agent" through whose activities presence is sought to be established, far from doing or purporting to do his principal's business, has throughout been acting in fraud of his principal, receiving, misappropriating and using the principal's funds for his own purposes rather than investing or otherwise applying them to the account or for the purposes of the principal.

77 In addressing us on the question of "presence," a number of Ms. Fatima's submissions as set out in her skeleton argument were directed to the argument of Vizcaya that, in transmitting funds from Vizcaya to BLMIS for investment, Bank Safra Gibraltar acted not in the role of Vizcaya's agent but rather as "trustee" for Vizcaya. I have already dealt with that question under the heading "Submission by agreement" at paras. 34–40 above. In relation to the issue of "presence" however, we were realistically invited in the course of Mr. Driscoll's reply to proceed on the basis of the case advanced by the trustee and supported by Bank Safra Gibraltar namely that, in forwarding Vizcaya's funds to BLMIS for investment over the years, Bank Safra Gibraltar did indeed act as Vizcaya's agent. I therefore turn at once to the key passages in the judgment of the Chief Justice quoted at para. 73 above.

78 The Chief Justice highlighted (2013–14 Gib LR 209, at para. 23), as issues needing "detailed consideration of the facts" and therefore as barriers to judgment under CPR, Part 24, (1) whether the customer agreement made BLMIS Vizcaya's agent, and (2) whether BLMIS, by *purportedly* undertaking investments on Vizcaya's behalf, established the presence of Vizcaya for the purposes of *Dicey, Morris & Collins* (*op. cit.*, at para. 14R–054), Rule 43. As to the first issue, as it seems to me, the Chief Justice erred when he observed that the question of whether the customer agreement made BLMIS Vizcaya's agent required detailed consideration of the facts. On the state of the evidence before him, no detailed consideration of the facts, as opposed to analysis of the relevant documents and legal principles, was required. So far as the second issue was concerned, the essential facts were not in dispute. That was because it was from the start, and remained throughout, the case for both the trustee

and Vizcaya that, while purportedly undertaking investments to the account of Vizcaya and the many other victims of the Ponzi scheme, BLMIS in fact did no such thing, simply retaining the funds received and using them for its own purposes. The question for decision was whether, in those circumstances, the trustee could establish the presence of Vizcaya in New York through the agency of BLMIS for the purposes of *Dicey, Morris & Collins* (*op. cit.*, at para. 14R–054), Rule 43.

79 In addition, I would observe that it does not seem to me that the passage quoted by the Chief Justice from *Dicey, Morris & Collins* (*op. cit.*, at para. 14–064) (2013–14 Gib LR 209, at para. 23) was apposite, relating as it does to the case of an individual who is neither resident nor present in the jurisdiction. The position in relation to a corporation (such as Vizcaya) appears at *Dicey, Morris & Collins* (*op. cit.*, at para. 14–065), which makes clear the necessity to demonstrate that the "representative [BLMIS] . . . has for more than a minimal period of time been carrying on *the overseas corporation's* [Vizcaya's] business . . ." [Emphasis in original.]: see para. 1(ii) of the *Adams* v. *Cape* (2) test set out at para. 74 above.

80 In that connection, in none of her submissions, as it seems to me, has Ms. Fatima overcome the hurdle presented by that essential requirement. Nor does it appear to me that the Chief Justice attached to it the significance it bore in relation to the case advanced by the trustee and maintained before us. In her submissions, Ms. Fatima acknowledged the need for the trustee to demonstrate that BLMIS was carrying on Vizcaya's business within the jurisdiction. In this respect, she referred us to two decisions of the Court of Appeal, namely *Actiesselskabet Dampskib "Hercules"* v. *Grand Trunk Pacific Ry. Co.* (1) and *South India Shipping Corp. Ltd.* v. *Export-Import Bank of Korea* (12). However, in the *Hercules* case, the court was concerned with a situation where the defendant, a Canadian railway construction company with offices in Montreal where its main business was conducted, was also engaged in raising loan capital in England through a London committee consisting of four of its directors working in offices for that purpose. The court held that the raising of such moneys was a subsidiary object of the company, albeit its paramount object was that of running a railway, and that in those circumstances, it was carrying on business in England for the purposes of proceedings. In the *South India* case, the court was concerned with a foreign defendant bank which carried on its banking business outside the jurisdiction, but had a London office where various activities incidental to its main banking business were carried on by permanent employees of the bank. Neither authority, as it seems to me, assists in this matter by affording any parallel with the factual situation in this case.

81 I do not agree with the Chief Justice (2013–14 Gib LR 209, at para. 24) that, if (as may well be the case) Vizcaya was an SPV created for the sole purpose of investing in New York via BLMIS, that can, without more,

justify the submission that Vizcaya was carrying on business in New York. What it is necessary for the trustee to show in addition is that, by some authorized action or activity, in this case the investment of funds forwarded to BLMIS for that purpose, BLMIS was in fact carrying on Vizcaya's business in New York: again, see para. 1(ii) of the *Adams* v. *Cape* test. If, in fact, Vizcaya's investment business was not being transacted by BLMIS (and plainly it was not), the money being received, retained and applied by BLMIS for its own purposes, that would not merely be a "material factor," as indicated by the Chief Justice; on the test laid down in *Adams* v. *Cape* (2), it would be fatal to the trustee's submissions.

82 In that connection, I do not consider that the situation postulated by the Chief Justice (*ibid.*) and supported before this court by Ms. Fatima ("that if Vizcaya, by placing the moneys with BLMIS, was discharging its contractual obligations, that might suffice to establish presence") can save the day for the trustee. First, the Chief Justice did not make clear, nor has Ms. Fatima identified, any contractual obligation on the part of Vizcaya to place funds with BLMIS for investment. Secondly, Ms. Fatima simply cites three matters which she asserts are of critical importance: (a) that BLMIS had authority to bind its principal and enter into contracts on its behalf; (b) that Vizcaya transferred moneys to BLMIS in New York for the purpose of carrying on its sole business of investment; and (c) that transfer of the moneys to BLMIS for investment meant that the authority of BLMIS to bind its principal was real and not fictional. However, accepting all that to be so, Ms. Fatima notably does not suggest that the authority with which BLMIS was endowed was ever exercised, or intended by BLMIS to be exercised, for the purpose of effecting any investment on Vizcaya's behalf. Indeed, it is the case for the trustee that it was not (see paras. 2–4 above).

83 I reject the proposition necessary to sustain the trustee's case that BLMIS, simply by reason of its contractual arrangements with Vizcaya and the fact of its receipt in New York of funds from Vizcaya for the purpose of fulfilling those arrangements (which purpose was never embarked upon, let alone carried out), should be regarded, without more, as carrying on Vizcaya's business in New York. For the purposes of, and in relation to, its arrangements with BLMIS, the business of Vizcaya was that of an investor, not in BLMIS but in such stocks, securities *etc.* as BLMIS was authorized and expected to acquire on Vizcaya's behalf, maintaining and dealing through a numbered investment account for that purpose. It is common ground that BLMIS did, and throughout intended, no such thing. It is also common ground that such "accounts" as were from time to time supplied by BLMIS in purported discharge of its role as Vizcaya's investment agent were in fact fictional accounts in respect of bogus investment transactions calculated to conceal rather than to give an

account of the true position, namely the retention and misapplication by BLMIS of funds obtained from Vizcaya pursuant to the Ponzi scheme.

84 Finally, I do not consider that, in remitting to Vizcaya the sums of $30m. and $150m. requested by Bank Safra Gibraltar on Vizcaya's behalf on August 27th and October 29th, 2008, BLMIS can or should in any sense be characterized or regarded as carrying on Vizcaya's investment business in New York, when in reality, as is also common ground, the business being carried on by BLMIS was not the business of Vizcaya but its own (fraudulent) business, the payments made to Vizcaya being calculated to conceal the improper use by BLMIS of funds originally entrusted to it by Vizcaya for investment.

85 I therefore conclude that, for Reasons 2–4 advanced by Vizcaya (see para. 70 above), the trustee was unable for the purposes of *Dicey, Morris & Collins* (*op. cit.*, at para. 14R–054), Rule 43, *First Case* to establish the presence of Vizcaya in New York.

86 That being so, it is strictly unnecessary to resolve the questions raised by Reasons 5 and 6 relied on by Mr. Driscoll, in relation to which it is plain that the Chief Justice took the view that further evidence would be necessary for their proper resolution. However, I turn to address them shortly for the purposes of completeness.

The effect of fraud upon presence

87 As to Reason 5, as already indicated, before the Chief Justice Vizcaya asserted that there could in any event be no "presence" for the purposes of *Dicey, Morris & Collins* (*op. cit.*), Rule 43, *First Case* where such presence had been obtained by deception or fraud. In support of that assertion, reliance was placed upon an observation made by the court in *Adams* v. *Cape* (2) ([1990] Ch. at 518) as follows: "that the temporary presence of a defendant in the foreign country will suffice provided at least that it is voluntary (i.e. not induced by compulsion, fraud or duress)." However, the Chief Justice had in turn cited and relied upon the reservations expressed in *Dicey, Morris & Collins* (*op. cit.*, at para. 14–064) in that respect (see para. 73 above). In this court, Mr. Driscoll has in his written skeleton argument at paras. 53–63 amplified the basis of his submissions by reference to the wider principle of common law and public policy, *ex turpi causa non oritur actio.* In that respect, he makes the broad submission that, in the context of the enforcement in an English or Gibraltar court of a foreign judgment, it is clear that presence induced by fraud cannot be relied on to found jurisdiction. In this connection, at para. 59 of Mr. Driscoll's skeleton argument he submits that, since the claimed jurisdiction based on Vizcaya's presence relies upon the account management documents and the wiring of funds to New York by Bank Safra

Gibraltar on its behalf, "all of which were procured by the fraud of BLMIS," such presence cannot be relied on to found jurisdiction.

88 It is, however, the position, as Ms. Fatima rightly submits, that there is no authority which directly or persuasively supports the broad proposition that presence induced by fraud can never be relied on to found jurisdiction. Further, so far as the documents are concerned, there is before the court no evidence as to the circumstances surrounding, or any representations made in connection with, the signing of those documents to support the assertion of presence induced by fraud. Nor is there evidence of any representation made on the part of BLMIS to procure the sums forwarded to it by Vizcaya for investment from time to time. In such circumstances (at least without further evidence), there are substantial arguments to be raised as to the room for application of the broad *ex turpi causa* doctrine in respect of an allegation of presence for the purpose of establishing jurisdiction. This seems to me of particular importance in a context where the central issue is not an asserted right by the trustee to recover in the claimant's name damages or other relief in respect of fraudulent or illegal activities (*cf. Stone & Rolls Ltd. (In Liquidation)* v. *Moore Stephens (A Firm)* (13) and *Jetivia S.A. (In Liquidation)* v. *Bilta (UK) Ltd.* (7), cited by Mr. Driscoll) but the recovery by a liquidator of moneys alleged to have been wrongly paid away by way of alleged fraudulent preference to an otherwise innocent recipient untainted by knowledge or notice of fraud.

89 In my view, were it appropriate or necessary to resolve the issue at this stage, it would merit far deeper examination and more lengthy argument than accorded to it in the submissions of Mr. Driscoll briefly set out at paras. 55–62 of his skeleton argument, to which he added little if anything by way of oral submission. For her part, Ms. Fatima stood on her submission that the necessary evidence was incomplete, that none of the authorities referred to directly supported Mr. Driscoll's argument, and that, as matters stood, the *ex turpi causa* issues raised were not suitable for resolution by way of appeal from a summary judgment application. I would accept those submissions.

Presence on April 9th, 2009

90 It is common ground between the parties that, whatever the position may have been earlier, the relevant time at which it was necessary for the trustee to establish the presence of Vizcaya in New York was April 9th, 2009 when the US adversary proceedings were commenced against it. It is the case for Vizcaya that any basis for alleging its presence in New York through the agency of BLMIS ceased in December 2008 when, by letter dated December 11th, 2008, Bank Safra Gibraltar (as "custodian" for Vizcaya) wrote to BLMIS seeking to "immediately redeem all positions from the account IFR 083, close the account and transfer the proceeds to

. . . Deutsche Bank Trust Company." This was a letter which only came to light late in the course of the proceedings during the adjourned hearing.

91 The trustee, on the other hand, asserts that the arrangement in the account management documents by which the agency of BLMIS on Vizcaya's behalf was constituted was not terminated by reason of the receipt and content of that letter; it continued valid and extant (albeit the affairs of BLMIS were in the hands of the liquidator). For the purposes of this submission, the trustee relied and relies on the third affidavit, dated April 29th, 2013, of Prof. Klee, an expert in US bankruptcy and reorganization law, setting out his opinion in relation to (1) the effect, if any, which the commencement of the liquidation of BLMIS on December 15th, 2008 had upon the rights and interests of BLMIS under the account management documents, and (2) the question of who held and controlled BLMIS's rights and interests under those documents on April 9th, 2009.

92 Extracts from Prof. Klee's affidavit read as follows:

> "21. A trustee appointed to administer a SIPA liquidation is 'vested with the same powers and title with respect to the debtor and the property of the debtor . . . as a trustee in a [bankruptcy case]': 15 US Code, §78fff–1(a). Thus, upon the commencement of a SIPA case, the SIPA trustee (like the trustee in a case under the Bankruptcy Code) steps 'into the shoes' of the debtor, accedes to all of the rights and interests of the debtor in property (including rights and interests under contracts), and obtains the exclusive power to exercise, control and/or dispose of those rights and interests on behalf of the estate. Commencement of the SIPA case does not terminate these rights and interests but instead transfers them to the control of the trustee.
>
> . . .
>
> 23. It is my expert opinion that under US law, on the commencement of the SIPA case for BLMIS on December 15th, 2008, all of the rights and interests of BLMIS in and under the account management documents became property of the BLMIS estate and subject to the exclusive control of trustee, with same forced effect such rights and interests held immediately prior to such date.
>
> 24. Nothing in the account management documents, SIPA or the Bankruptcy Code resulted in the alteration or termination of those rights and interests; the only result of the commencement of the SIPA case was to transfer those rights and interests to the trustee. In particular . . . all terms and provisions of the account management documents are still in effect, including those terms creating an agency relationship between BLMIS and Bank Safra. This expert opinion is based on my being informed and assuming that none of

> the parties attempted to terminate the account management documents, but any unilateral attempt by Bank Safra or Vizcaya to terminate the account management documents would have been void as a violation of the automatic stay arising under Bankruptcy Code, §362.
>
> . . .
>
> 26. Based on all of the foregoing, it also is my expert opinion that, under US law, as of April 9th, 2009, the date the trustee commenced the adversary proceedings in the Bankruptcy Court, all of the rights and interests of BLMIS in and under the account management documents were property of the BLMIS estate and subject to the exclusive control of the trustee, just as they were on December 15th, 2008. Nothing in SIPA, the Bankruptcy Code, or the account management documents altered or terminated such rights and interests as a result of the commencement of the adversary proceedings. As noted above, I have been informed, and have been asked to assume, and have assumed, that none of the parties attempted to terminate the account management documents prior to such date."

93 In connection with the reservation of Prof. Klee expressed in the last sentence of paras. 24 and 26 as quoted, it was and is the submission of Vizcaya that, whatever the position prior to December 11th, 2008, upon that date Bank Safra Gibraltar "as custodian for Vizcaya" wrote a letter to BLMIS headed "entire holdings redemption request" instructing BLMIS "to immediately redeem all positions from account IFR085, close the account and transfer the proceeds to Deutsche Bank Trust Company," and that such instruction amounted to the effective termination of any agency activity or arrangement between Vizcaya and BLMIS as a basis for any assertion of presence on the part of Vizcaya through the agency of BLMIS.

94 In relation to this material, the Chief Justice stated as follows (2013–14 Gib LR 209, at paras. 25–26):

> "25 The final basis upon which it is said that presence is not made out is that as at April 23rd, 2009 [the difference in date from April 9th is immaterial], Mr. Madoff had already been arrested, and BLMIS gone into liquidation, and that if Vizcaya had ever traded through BLMIS it had ceased to do so in December 2008. There is undoubtedly apparent merit in this submission; the applicable law of the account management documents is, however, New York law—and at this stage the trustee relies upon expert evidence of New York law by Mr. Zeballos [this appears to be in error for Prof. Klee] that these were valid when the trustee commenced the adversary proceedings. Undoubtedly, detailed expert evidence will be required on this

> issue but at this stage on the material before me it would be inappropriate to give summary judgment.
>
> 26 Towards the conclusion of the hearing, Vizcaya sought to rely upon a letter dated December 11th, 2008 from Safra Gibraltar, *qua* custodian to BLMIS, in which it sought to 'immediately redeem all positions.' Following the conclusion of the hearing a witness statement was filed by Mr. Vasquez, explaining how the existence of the letter came to his attention at the lunchtime adjournment of the hearing. I do not ignore its potential relevance, but, given the nature and value of this litigation, it would be unfair on the trustee if I were to place any reliance upon it without giving him the opportunity to properly consider his position. In any event, it strikes me that this letter may well require interpretation in line with the account management documents, and therefore likely that issues of expert evidence of New York law will also arise."

95 It is the submission of Mr. Driscoll for Vizcaya that the position, so far as the issue of presence was concerned, was in fact clear on the basis of the materials already before the Chief Justice and could and should have been decided by him without the necessity for the further expert evidence envisaged at the end of each paragraph of his judgment. As Mr. Driscoll submits, the essentials of the position so far as "presence" was concerned were well established and they were these. BLMIS was in liquidation. The trustee was in control. He had no trading positions to retrieve because there were none. He had begun the task of collecting in money for the creditors who were to file claims in the bankruptcy, where he accepted those claims. Mr. Madoff was in prison, having pleaded guilty to fraud. Furthermore, by the letter dated December 11th, 2008, Bank Safra Gibraltar had instructed BLMIS to redeem all positions, close Vizcaya's putative though non-existent account, and effect a transfer (value December 12th, 2008) as directed in the letter. There was thus no basis for saying that, on April 9th, 2009, BLMIS was carrying on Vizcaya's business. Even accepting, as Prof. Klee asserted, that the agency arrangement in the account management documents had not been terminated or formally avoided, there was in fact no continuing trading activity by or on Vizcaya's behalf, nor, following Bank Safra Gibraltar's letter of December 11th, was there any basis on which to assert that BLMIS or the trustee was in fact acting or required to act as Vizcaya's agent in respect of any trading or other activity as at April 9th, 2009. Accordingly, there was no "presence" on the part of Vizcaya through the agency of BLMIS or the trustee on that date.

96 In my view, those submissions are likely to prove correct and the further evidence which the Chief Justice anticipated as being necessary (2013–14 Gib LR 209, at para. 25) does not go to the question of "presence" for the purposes of *Dicey, Morris & Collins* (*op. cit.*, at para.

14R–054), Rule 43, *First Case*. I say that because it does not seem to me that further evidence as to whether the account management documents were extant and valid on April 9th, 2009 goes to the factual question of presence which, in the circumstances of this case, hinges on the issue of whether and in what, if any, respect BLMIS acted or purported to act as Vizcaya's agent. In that respect, whether or not the account management documents were still valid, Vizcaya had sought to "withdraw" its moneys from its (non-existent) account by its letter dated December 11th, 2008 and all purported investment activity (authorized or otherwise) appears to have ceased so far as BLMIS or the trustee was concerned.

97 On that last issue, in view of the critical role of the late-produced letter of December 11th, 2008, the Chief Justice was concerned not to place reliance upon it without the trustee having been afforded an opportunity to consider its content and, if thought appropriate, to call expert evidence as to its effect in conjunction with the effect of the still extant account management documents (2013–14 Gib LR 209, at para. 26).

98 It might have been open to the Chief Justice to take a more robust line than he did and to treat the letter of December 11th, 2008 as sufficiently straightforward in its terms as to require no assistance in its interpretation or effect from an expert in New York law. However, the course which he took was, as it seems to me, a legitimate case management decision having particular regard, as he did, to the nature and value of the claim and his view that the trustee should have proper opportunity to consider the position and obtain further expert evidence of New York law in light of the letter. In the event, therefore, I do not consider that the Chief Justice can be faulted for forming the view he did when reviewing the state of the case as a whole.

The appeal of Asphalia

99 Before considering the Asphalia appeal, it is necessary to make clear that, whereas by his claim form in the Part 8 action (issued on July 9th, 2009 and amended on February 14th, 2011) the trustee sought a number of interim measures numbered 1–9, together with a claim 10 for further or other relief, and 11 for costs, by the time of the proceedings below the only substantive matters in respect of which relief was sought (save for costs) were the claims under paras. 6 and 8, as set out at para. 19 above. However, on December 9th, 2010, the trustee had also issued "long stop" Part 7 proceedings against Asphalia and others ("the Vizcaya B claim") in which the cause of action had not been identified beyond the assertion that relief was sought "at common law and in equity" in respect of the two money transfers by BLMIS to Bank Safra Gibraltar in 2008 (see paras. 5 and 6 above).

100 In that connection, at paras. 24 and 25 of the first witness statement of Grace Ann Parody for the trustee dated December 13th, 2010, in support of his application for an extension of time to serve a claim form in the action (which has still not been served), it is recognized that "it may be impossible to achieve an enforceable US judgment against parties such as Vizcaya and Asphalia who do not submit to US jurisdiction" and the claim in Vizcaya B is described as "a protective substantive claim that the trustee would seek to rely on if it is absolutely necessary as a last resort."

101 As already indicated, in the light of the decision of the UK Supreme Court in *Rubin* (9), the trustee has accepted that he cannot enforce in Gibraltar the default judgment obtained against Asphalia. However, in the supplemental skeleton argument before the Chief Justice, it was stated on his behalf: "[He] does however intend to pursue Asphalia via [the Vizcaya B claim] and in the interim moneys paid in should be frozen and paid into [the Vizcaya B claim]."

102 Before the Chief Justice, Asphalia made clear that, while it sought dismissal of the whole claim, it was content that the fate of the funds which it had previously paid into court should be left over to subsequent argument as to the merits of the Vizcaya B claim (or any other claim to the funds) so that an appropriate order or orders could then be made. That has remained the position of Asphalia throughout the proceedings.

103 On the handing down of the Chief Justice's ruling in relation to Vizcaya, there followed argument as to the appropriate form of order to be made, Mr. Vazquez for Asphalia maintaining the position I have outlined above. So far as concerns Mr. Azopardi, who appeared for the trustee, I have read carefully the transcript of the submissions made to the Chief Justice in relation to the proper form of the order and am unable to find any passage where Mr. Azopardi engaged with the problem of the precise form of the order sought by Mr. Vazquez, given that there appeared to be no issue on the broad proposition that the question of the fate of the moneys in court should be dealt with separately later. It appears from the transcript that the Chief Justice was also focusing on the question of the timing and mechanics of subsequent submissions as to what should be done with the moneys in court.

104 At all events, after a relatively short discussion, the Chief Justice made an order to the following effect so far as Asphalia was concerned:

> "3. The claim made against the fourth defendant in para. 6 of the amended claim form dated February 14th, 2011 be dismissed with the costs as between the claimant and the fourth defendant of and occasioned by the withdrawal and the claim in para. 6 be reserved.
>
> 4. The hearing of the application for case management directions and other orders filed by the claimant dated January 9th, 2013 be set

down for hearing for the first available date after October 15th, 2013 for a time estimate of one day."

105 It is the case for Asphalia that the Chief Justice ought to have dismissed the entire claim, there being nothing left in it to proceed to trial save for the question of costs and the fate of the funds in court which it accepts were to be reserved for argument before the judge.

106 In resisting an order for dismissal of the whole of the trustee's claim, Ms. Fatima has accepted that para. 8 of the amended claim, as well as para. 6, should be dismissed, since both paragraphs relate to the enforcement issue which the trustee no longer pursues against Asphalia. However, she submits that the state of the proceedings is such that it would be inappropriate at this stage to make an order dismissing the entire action as against Asphalia, given the residual issues that remain alive for argument in relation to the amended claim and the Vizcaya B claim. In that respect, Ms. Fatima made a number of submissions in her written skeleton argument which do not sustain analysis, but in her oral submissions she made the following points of substance so far as the future of the proceedings is concerned.

107 Having expressly accepted that it is appropriate for the claims made against Asphalia in both paras. 6 and 8 of the amended claim to be dismissed, Ms. Fatima submits that the Chief Justice was nonetheless correct in his view that the action should remain alive for the purposes of considering the directions appropriate in respect of the Asphalia moneys in court, there being a number of competing interests yet to be resolved. These include:

(i) the interest of the trustee that the moneys paid into court by Asphalia should not be released to Asphalia but should be paid into court or otherwise secured against the outstanding ("long stop") claim of the trustee in the Vizcaya B claim;

(ii) a competing claim by Bank Safra Gibraltar to a lien over the moneys paid into court by Asphalia under orders previously made for the payment of those moneys into court in which specific provision was made for the right of the bank to claim an indemnity and/or lien over those moneys pursuant to contractual rights asserted by the bank; and

(iii) a possible (though remote) liability of Asphalia in respect of certain aspects of the trustee's costs and expenses.

108 The position in respect of those matters is, as the Chief Justice (and indeed the parties) clearly intended, that they should be dealt with in a hearing to be fixed for that purpose, as referred to in para. 4 of the Chief Justice's order quoted above. That hearing has yet to take place following the handing down of judgment in this appeal.

109 In the light of Ms. Fatima's concession, rightly made, that the appropriate order is one which dismisses the claims in paras. 6 and 8 of the amended claim as against Asphalia, I consider that the form of para. 3 of the Chief Justice's order should be amended to reflect that position. In the course of argument, Mr. Vasquez proffered to the court a typed draft order which he indicated was appropriate to reflect the submissions he had made and with which he would be content. It simply consisted of the wording of the order as made, altered to the limited extent of substituting the words "paras. 6 and 8" for the words "para. 6" in lines 1 and 4 of para. 3 of the order.

110 Upon that basis, and with a slight further change in the wording in lines 3 and 4 of the order as made for the purposes of clarity, I would allow Asphalia's appeal to the extent of substituting for para. 3 of the order as made an order in the following terms:

> "3. The claims made against the fourth defendant in para. 6 and para. 8 of the amended claim form dated February 14th, 2011 be dismissed, and the costs as between the claimant and fourth defendant of and occasioned by those claims and their withdrawal be reserved."

Conclusion

The claim against Vizcaya

111 I am satisfied that it was appropriate for the Chief Justice on the evidence before him summarily to determine, and that he should have determined, that Vizcaya was not "present" in New York for the purposes of *Dicey, Morris & Collins* (*op. cit.*, at para. 14R–054), Rule 43, *First Case*, and that the trustee thereby failed to establish on that ground that the default judgment obtained by the trustee in the New York court was capable of enforcement against Vizcaya in Gibraltar. The appeal of Vizcaya should therefore be allowed in that respect and to that extent.

112 Nonetheless, I am also satisfied that, on the state of the evidence then before the Chief Justice in relation to *Dicey, Morris & Collins* (*op. cit.*, at para. 14R–054), Rule 43, *Fourth Case*, he was right to hold that—

(1) whereas the trustee could reasonably argue (a) that New York law governed the customer agreement, (b) that under the terms of the customer agreement construed according to New York law Vizcaya had agreed to submit to the jurisdiction of the New York courts, and (c) that upon that basis the New York default judgments obtained by the trustee against Vizcaya were enforceable against Vizcaya in Gibraltar,

(2) those issues were not suitable for final determination summarily for the purposes of judgment under Part 24.

113 Save as set out in para. 111 above, the appeal of Vizcaya fails and the matter should be restored to the Chief Justice for further directions as to final trial of the remaining issues.

The claim against Asphalia

114 The appeal of Asphalia succeeds to the extent set out at paras. 109–110 above and the order of the Chief Justice dated June 19th, 2013 should be varied accordingly.

115 **KENNEDY, P.** and **ALDOUS, J.A.** concurred.

Appeal allowed in part.