Neutral Citation Number [2019] EWHA 439 (Ch)

IN THE HIGH COURT OF JUSTICE **PT 2018-000722**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
MR M H ROSEN QC SITTING AS A JUDGE OF THE CHANCERY DIVISION
THURSDAY 28 FEBRUARY 2019

BETWEEN:

LADY MOON SPV SRL
(a company incorporated under the Laws of Italy) **Claimant**

-and-

PETRICCA & CO CAPITAL LIMITED **Defendant**

JUDGMENT

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(1) Introduction

1. This is the court's judgment following the hearing of an application by an English Defendant ("Petricca") challenging the Court's jurisdiction to entertain and try Part 8 proceedings by which, in short, the Italian Claimant ("Lady Moon", registered in Treviso) seeks orders against Petricca as manager of an Italian Alternative Investment Fund ("the Fund") by way of the winding up of the Fund and/or the enforcement of Lady Moon's security as creditor over Italian real property in the light of the Fund's alleged insolvency.

2. Lady Moon's Part 8 proceedings are ambitious and novel, and Petricca's jurisdiction challenge fairly bristles with points. Petricca is represented by Stephen Atherton QC and James Mather instructed by Memery Crystal LLP; and Lady Moon is represented by Tom Smith QC and Riz Mokal instructed by Sidley Austin LLP. The parties' submissions were extensive, and included more than one possible paradox, but (with

no disrespect) I do not have to decide everything argued. Theseus did not have to unravel every knot in Ariadne's thread in order to escape the Labyrinth.

3. Among other things, Petricca complains that Lady Moon's Part 8 claim for directions against it as a trustee under CPR Part 64 is misconceived since: (a) the Fund is admitted by Lady Moon to be a "*creature of Italian law*" established under Italian statute, governed by Italian law contracts and regulated by the Italian financial authorities; (b) all its assets (held through Petricca for the benefit of its investor "Unitholders") are immoveably in Italy; and (c) Lady Moon (an Italian company) is suing Petricca in prior and ongoing Italian proceedings to enforce its rights to be paid as a secured creditor.

4. In such circumstances, Petricca contends that there is no proper basis for Lady Moon's Part 8 claim that the Court should (a) treat the Italian legal structure as a trust under English law and (b) subject its manager to an order (by way of supervising it as a trustee) on the application of a (hostile) creditor.

5. The other main issues between the parties (with which I will deal first, for present purposes) are, in summary: (a) whether the Part 8 proceedings fall within the Recast Brussels Judgments Regulation 1215/2012 ("the RBJ Regulation") or are within the insolvency proceedings exception in Article 2(1)(b); (b) if within the RBJ Regulation, whether the Part 8 proceedings should be stayed in favour of the prior Italian proceedings under Article 29; or alternatively (c) if within the insolvency exception, whether the Part 8 proceedings should be stayed (as in a *forum non conveniens*) because the Italian courts are available and clearly and distinctly a more appropriate forum.

(2) Background

6. Petricca is a Financial Conduct Authority-authorised full-scope manager of alternative investment funds, incorporated in England with its headquarters and registered office in London and so domiciled here for the purposes of the RBJ Regulation. It manages many investment funds.

7. The Fund, properly called *Orizzonte Fondo Comune d'Investimento Alternativo di Tipo Chiuso e Riservato*, is an investment fund established under Italian law in 2006 by Santarelli Costruzioni SpA ("Santarelli"), a family owned Italian group which still holds most of the Fund's investment units.

8. As from 29 November 2016, Petricca replaced the previous Italian asset managers of the Fund by virtue of the "passporting" arrangements under the Alternative Investment Funds Managers Directive 2011/61/EU ("AIFMD"). It is common ground

that under Italian law Petricca and its Italian predecessors holds and held the Fund's assets and enters into contracts on its behalf, and liabilities incurred as asset manager of the Fund can only be realised from the assets constituting the Fund and not from Petricca's personal assets.

9. The Fund was established pursuant to the Italian Consolidated Law on Finance ("TUF") as a "*closed-end reserved alternative real estate investment fund*" of a type peculiar to Italy. Its main assets consist of properties located in Lazio (Rome) and Le Marche, including income-producing properties such as a residential and tourist complex in Grottammare (Ascoli Piceno).

10. The Fund is governed by a set of Regulations as amended from time to time, which had to be and were approved by the Bank of Italy as well as by its investing Unitholders, and included the following:
    (a) by Articles 1 and 3, the term of the Fund is until 31 December 2020 but may be extended for a further five years with the approval of the Unitholders, and the management of the Fund is the responsibility of the management company, which shall manage the Fund in the interest of the Unitholders and in compliance with TUF and the Regulations;
    (b) by Article 17, expressly subject to the relevant provisions of TUF, the Fund may be wound up (i) if the manager is wound up and has not been replaced; (ii) if the manager has resigned and has not been replaced; and (iii) if circumstances occur such as to prevent the Fund from achieving its objectives, in which case, "*...liquidation of the Fund shall." decided at the General Meeting of Unitholders"* and the liquidation of the Fund is to be carried out in compliance with the law and the "*Supervisory Authority*" (meaning, according to Petricca, Italian law and the Bank of Italy); and
    (c) by Article 18, jurisdiction in respect of disputes between (among others) the Fund and the management company are allocated, at least according to Petricca, to Italian regional courts in accordance with the Italian Civil Procedure Code ("CPC").

11. Lady Moon is an Italian special purpose vehicle owned by or at least connected with Cerberus, a private equity firm specialising in distressed assets (sometimes called a "vulture fund"). Lady Moon administers a portfolio of debt purchased from institutions with a gross book value of about €760 million including Banca Delle Marche SpA's interest in three loans to the Fund for an outstanding total approaching €35 million.

12. These loans fell into default in 2013 and were terminated in early 2014. They are secured on properties of the Fund, all located in Italy, under agreements governed by Italian law. As I have said, as manager of the Fund, Petricca is liable for the loans, but they are "answerable" only to the extent of the Fund's assets which it holds.

13. Apart from the debt to Lady Moon, other liabilities of the Fund (through Petricca as its manager) are also outstanding. The Fund is presently unable to repay loans out of its general assets but Petricca says that it is solvent on a balance sheet basis and it remains possible to pursue its objectives despite its liquidity problems, and that the interests of neither its Unitholders nor its general body of creditors would be served by an immediate winding up rather than active management of its assets.

14. It is also common ground that in Italy creditors of an insolvent investment fund can seek (a) to recover their debts under the Italian Civil Code and Civil Procedure Code ("CPC") by means of injunctions and/or by enforcing mortgages or other security; or (b) to wind up of the Fund under TUF Article 57(6-bis), under which process, the appropriate Italian court will consult with the Bank of Italy with regard to the appointment of a liquidator to carry out the functions prescribed by Italian law.

15. On 22 March 2018 Lady Moon (which has calculated a security shortfall of some €1.5 million in respect of its debt from the Fund) commenced loan enforcement proceedings in Italy ("the Italian Proceedings") followed by attachment applications in respect of the mortgaged properties.

16. The Italian Proceedings will apparently take a considerable time to reach resolution. Lady Moon has stated that if the Fund is wound up in Italy or (as it prefers) England, it will discontinue the Italian Proceedings as then required.

(3) The present proceedings

17. In its present Part 8 claim, issued on 21 September 2018 and served on Petricca in London, Lady Moon asserts among other things that "*... 3... (e) ...The Defendant has failed to take steps to bring about a sale of the ... Properties* [mortgaged to Lady Moon] *and to discharge the Fund's liability to the Claimant*" and "*...4... seeks (a) An order for directions pursuant to CPR Part 64 the Petricca administer and wind up the Fund in accordance with the terms of a draft order attached (b) in the alternative an order for directions for an orderly sale of the Mortgaged properties ...*".

18. The draft order attached to the Part 8 claim form includes (para 10(d)) a requirement for "Final Fund Accounts" which provide for realisation and distributions from the Fund's assets in a certain order of priority after payment of secured creditors such as Lady Moon.

19. In support of such claim, Lady Moon contends the Fund has the characteristics of a trust in English law and is insolvent so that (a) under CPR Part 64 the Court has power to give directions to Petricca (an English domiciled manager/trustee) for the winding

up of the Fund and/or realisation and payment to secured creditors in respect of its (Italian) properties; and (b) Lady Moon as a creditor has standing to seek such directions.

20. These contentions are based on examples outside England which address the position of insolvent trusts whose creditors have limited recourse. The ability of the English court to deal with this issue by giving directions to the trustee to realise the trust's assets and to discharge its liabilities, and the right of a creditor to apply to the court for such relief is recognised in *Lewin on Trusts*, 19 ed. at 22-085 to 22-086 and cases in Jersey such as *The Z Trusts* 2015(2) JLR 108, 175.

21. In its present application pursuant to CPR Part 11 dated 29 October 2018, Petricca submits that the Court lacks jurisdiction, or alternatively should not exercise its jurisdiction in respect of Lady Moon's claims. The application was previously before Mr Anthony Elleray QC (sitting as a Deputy Judge of the High Court), who on 7 December 2018 [2018] EWHC 3678 (Ch), refused Lady Moon's request that its Part 8 claim be listed for substantive hearing consecutively with or immediately following the hearing of Petricca's application.

22. The evidence on this application was contained in witness statements from Petricca's solicitor Joel Seager and reports of Italian law experts Giovanni Bisogni and Maurio Miccoli (together for shorthand, "Bisogni"); and Lady Moon's solicitor Simon Fawell and Italian law experts Marco Ventorusso and Luca Lo Po (together, "Ventoruzzo"). The hearing took place on 11 and 12 February 2019, subject to some subsequent written supplementary submissions

(4) The Recast Brussels Judgments Regulation

23. The present Part 8 claim is a "*civil and commercial matter*" within Article 1(1) of the RBJ Regulation, subject to the exceptions specified. One of the first questions (leaving aside whether Lady Moon's claim is arguable, to which I refer eventually below) is whether the proceedings fall within the exceptions, as involving "*proceedings relating to the winding-up of insolvent companies or other legal persons*" under Article 1(2)(b).

24. If the RBJ Regulation applies and not the Article 1(2)(b) exception, then under Article 4(1) persons domiciled in a Member State must be sued in the Courts of that Member State. As Petricca is an English incorporated company with a registered office in London, it is domiciled in England for the purposes of the RBJ Regulation: Article 63(1) and (2).

25. The RBJ Regulation also provides by Article 7(6) that, in relation to trust matters, the court of the state in which a trust is domiciled has jurisdiction in relation to

proceedings against a trustee. However, this is an additional rather than an exclusive jurisdiction which does not exclude that arising under Article 4(1). *Briggs, Civil Jurisdiction and Judgments* 6th ed, 2.158, correctly states that "*Article 7(6)...operates to confer jurisdiction, but not to deprive a court of it*".

26. "*Civil and commercial matters*" the subject of the RBJ Regulation are to be construed widely, whereas derogations from or exceptions to the RBJ Regulation's "*basic principle*" of domicile-based jurisdiction under Article 4 must be construed restrictively: see the majority in *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 AC 153, 164A and 169F (Lord Goff) and 179G-180A (Lord Clyde).

27. As discussed later, Article 29(1) of the RBJ Regulation requires any court of a member state other than such a court first seised of proceedings of its own motion to stay proceedings before it based on the "*same cause of action*". And the Court's jurisdiction under the RBJ Regulation displaces the common law rules, and where the court of a Member State has jurisdiction under the RJB Regulation, it is not permitted to refuse to exercise jurisdiction on *forum non conveniens* grounds: *Owusu v Jackson* [2005] QB 801 (CJEC) at 809-810, [37]-[46]. This has been applied specifically in the case of proceedings relating to trusts: *Gomez v Gomez-Monche Vives* [2008] EWHC 259 (Ch) at [111]-[113].

(5) The Article 1(2)(b) exception

28. Article 1(2)(b) of the RBJ Regulation provides that it shall not apply to "*proceedings relating to the winding-up of insolvent companies and other legal persons and analogous proceedings*". Petricca submits that the present Part 8 claim against it falls within that exception, although not within the EU's Recast Insolvency Regulations starting with 2015/848 because (under Articles 1(2)(d) and 2(2) of 2015/848) the Fund, like other alternative investment funds, is a "*collective investment undertaking*".

29. Under Preamble 19 of 2015/848, such collective investment undertakings are excluded from its scope "*as they are all subject to special arrangements and the national supervisory authorities have wide-ranging powers of intervention.*" Unlike credit institutions and insurance undertakings, which are also outside the ambit of 2015/848, collective investment undertakings are not the subject of any other EU insolvency regulations relevant to jurisdiction because they are left solely to national supervision and regulation.

30. Lady Moon submits that as a result, proceedings to wind up the Fund as insolvent, through Petricca as its representative "legal person", are not winding up or analogous insolvency proceedings for the purpose of Article 1(2)(b) of the RBJ Regulation,

narrowly construed as an exception to its general application to all civil and commercial matters including trusts.

31. For this purpose Lady Moon relies on EU principles of interpretation and in particular the so-called "dovetailing principle" by which it is presumed that EU legislation is intended to cover an entire subject without gaps or overlaps. Thus it is argued that the allocation of jurisdiction in relation to proceedings to wind them up collective investment undertakings such as the Fund, it is said, must be subject to the RBJ Regulation, because such proceedings are not the subject of allocation of jurisdiction under EU insolvency regulations.

32. In this regard Lady Moon refer by way of authority to *In re Rodenstock GmbH [2011] Bus LR 1245 at [47] ff; Tchenguiz v Grant Thornton* [2018] 2 WLR 834 at [34]-[42]; and in Europe, *Nickel & Goeldner Spedition GmbH v Kintra UAB* [2015] QB 96 at [21] *Comite d'Enterprise de Nortel Networks SA v Rogeau* [2015] BCC 490.

33. I reject Lady Moon's submissions in this respect, which misinterpret the relevant EU rules. The fact that the regime of EU regulation expressly leaves collective investment undertakings such as the Fund to national supervision and regulation does not mean that proceedings to wind them up as insolvent are outside the exception of Article 1(2)(b) of the RBJ Regulation however narrowly construed. It does not create any gap or overlap in the EU regulatory regime for the purpose of the dovetailing principle of interpretation. On the contrary, it points clearly to a choice by the EU regime, as regards jurisdiction for winding up proceedings in respect of an insolvent collective investment undertaking, which is not subject to the RBJ Regulation.

34. Whether this may also be prayed in aid of Petricca's position on the application of *forum non conveniens* or alternatively Article 29 as dealt with below, and possibly on whether Lady Moon has an arguable claim to wind up the Fund in the English courts, to which I will return relatively briefly towards the end of this judgment, it is sufficient at this stage to conclude that the RBJ Regulation does not apply to the present Part 8 proceedings because they are clearly within the insolvency exception in Article 1(2)(b).

(6) *Forum non conveniens*

35. Petricca next submits that if, as it contends, the RBJ Regulation does not apply by reason of the Article 1(2)(b) insolvency proceedings exception, the English Court should decline to exercise its jurisdiction and stay the Part 8 proceedings in favour of the Italian courts on *forum non conveniens* grounds, even if it has a discretionary jurisdiction arising from the service as of right on Petricca within the English jurisdiction.

36. The relevant common law principles are still as set out in *Spiliada Maritime Corporation* [1987] 1 AC 460 at 475–478, in particular as follows:

> *"(a) The basic principle is that a stay will only be granted...where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice ...*
>
> *(b) ... in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay ...*
>
> *(c) ... the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum.*
>
> *(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum ... being 'that with which the action had the most real and substantial connection.' So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction ... and the places where the parties respectively reside or carry on business.*
>
> *(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay ...*
>
> *(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted...".*

37. Petricca argues that the Italian courts provide an available forum which is clearly more appropriate for the trial of Lady Moon's claims if arguable. Its Italian law experts explain that the procedure for winding up an Italian investment fund is under TUF Article 57 (6-bis) which provides that:

> *"Should fund or segment activities not enable their obligations to be met and should there be no reasonable prospects that this situation will be overcome, one or more creditors or the asset management company may request the liquidation of the fund before the court of the place in which the asset management company has its registered office."*

38. Of course in the present case, whilst liquidation is not the only relief sought by Lady Moon (and any claims by it in England would have to be reconciled with its ongoing

Italian Proceedings), the Defendant asset management company Petricca has its registered office (as referred to in TUF Article 57) in London and not in Italy. But Petricca says that this anomaly (arising from the failure to update TUF in the light of possible Italian investment fund management outside Italy) can be addressed under the Italian CPC in particular because the courts of Lady Moon's registered office in Treviso may assume jurisdiction under CPC Article 20 and liquidate the Fund if necessary, because Lady Moon's claim is based on "obligations" owed to it as secured creditor of the Fund managed by Petricca.

39. As for the relevant factors concerning the appropriate forum for any such proceedings, whilst the location of the current asset management company is clearly significant (see also Article 182-bis of the Italian Bankruptcy Law which confers jurisdiction on the court of the city where the debtor has its registered office or centre of management, so that it is unclear that the Italian courts have jurisdiction thereunder over an Italian fund managed by an English company), Petricca submits that everything else points "overwhelmingly" to the Courts of Italy.

40. Thus it contends that:
    (a) the Fund's connections generally are overwhelmingly with Italy, its assets, investors and creditors are mainly in Italy and Lady Moon is itself an Italian company, seeking to enforce security over Italian real property;
    (b) the terms of the Fund, the relationships between the Unitholders, Petricca and the Fund and the Loans and the security documents in relation to them are all governed by Italian law; and
    (c) the Regulations as the constitutional agreement governing the Fund, contain a jurisdiction agreement in favour of the Italian courts which, by which Lady Moon must be bound insofar as it is permitted to stand in the shoes of Petricca as the putative trustee.

41. Petricca emphasises that the governing law is an important factor in forum challenges because it is generally preferable, all other things being equal, that a case should be tried in the country whose law applies and in some cases – for example *VTB Capital v Nutritek International* [2013] UKSC 5 at [46] - this may be decisive, especially if potentially complex and developing matters of foreign law come into play.

42. In the present case, the duties owed by a manager of a fund towards its creditors where the fund is allegedly insolvent may well be different in Italian law and in English law. Italian law may accord greater primacy to the interests of the Unitholders in a fund than English law, and this might be crucial in determining how far Petricca was permitted to carry on trading at potential risk to creditors, but (especially given the disputes between the parties' respective Italian law experts) it would be unsatisfactory for this to have to be decided outside Italy.

43. Furthermore, even if a winding up order was to be contemplated by the English court, the form of that winding up might be dependent on Italian law regarding, for example, priorities between creditors and the treatment of security interests, and the steps needed to get in the property of the estate by realising the Fund's Italian assets, involving supervision and/or consultation by both the courts and the Bank of Italy.

44. Against these submissions, Lady Moon argues that Petricca has not discharged the burden lying firmly upon it (see *The Spiliada* at 476D) to demonstrate both that this Court is not the natural or appropriate forum to try the Claim and that there is another available forum which is clearly or distinctly more appropriate to do so.

45. First as regards the availability of the Italian courts, it is at best uncertain (and on this even Bisogni is notably tentative) whether Article 57 (6-bis) of TUF and the Italian CPC allows jurisdiction to order liquidation of the Fund in favour of any court which is not "*the court of the place in which the asset management company has its registered office*", that is, in the present case, England, even if it is accepted that TUF has not been updated to take account of the fact that under AIFMD an asset manager located in one member State can now act in relation to a fund governed by the law of another member State.

46. Secondly, as regards the relative appropriateness of the English and Italian courts, Lady Moon emphasises that as asset manager for the Fund, Petricca represents its controlling mind and will, holds all of its assets, and enters into contracts on its behalf. So the location of its asset manager is the heart of the Fund's business operations and the scheme under Article 57(6 bis) of TUF itself acknowledges the need for winding-up proceedings in respect of a fund to take place where the asset manager is located: it is its decisions, based on facts and materials within its power, which are sought to be questioned by Lady Moon.

47. Lady Moon accordingly contends that the most significant factor is that Petricca is an English company, based in London and regulated by the FCA and - whilst the English Court will take account of any foreign elements in deciding what relief to grant (see *Lewin* at 11-007 and *Dicey Morris & Collins on Conflict of Laws*, 15th ed, at 7-011 to 7-012) - since Lady Moon's claim seeks to engage the Court's *in personam* powers over Petricca as a trustee, it is only the English Court which has that jurisdiction; and moreover any judgment in Lady Moon's favour would fall to be enforced against Petricca in England.

48. Lady Moon also argues that the ongoing Italian Proceedings are irrelevant, being attempted enforcement by a secured creditor over particular property, rather than an application by a creditor for the *collective* remedy of winding up in the interests of *all*

creditors of the Fund which it accepts, if it is successful, would supersede the Italian Proceedings, such that the latter would then be discontinued.

49. In considering these rival submissions, I bear in mind that the Court should not engage in any kind of mini-trial: as it was put in *Cherney v Deripaska* [2009] EWCA 849 at [29] -

> "*... the judge is not conducting a trial. It is not a situation in which he has to be satisfied on the balance of probabilities that facts have been established. He is in many instances seeking to assess risks of what might occur in the future. In so doing he must have evidence that the risk exists, but it is not and cannot be a requirement that he should find on the balance of probabilities that the risks will eventuate ... he has to make an evaluation taking account of all factors as to whether the claimant ... has discharged the burden of showing that England is 'clearly the proper forum'...* ".

50. In my judgment the Italian courts are an available forum for the claims made in the present Part 8 proceedings, if they are arguable under the applicable law (as to which see a little more below). As part of or alternative to the winding up of the Fund, Lady Moon seeks to enforce its rights as a secured creditor over the Fund's Italian properties, duplicating or at least overlapping with the Italian Proceedings.

51. Although there is some uncertainty, I evaluate the risk of the Italian courts not having or declining jurisdiction under TUF Article 57 as highly unlikely. I consider that CPC Article 20 provides an appropriate route to such jurisdiction in order to supplement TUF. Whilst Bisogni is indeed tentative on this (and I was not impressed by the prior routes suggested, via Articles 18 and/or 19) this was not contradicted by Ventoruzzo.

52. If that is wrong and for any reason the Italian courts decline jurisdiction, the stay on the Part 8 proceedings here can be re-examined. In the meantime, I am comforted by Petricca's offer of an undertaking that in the event that Lady Moon requests a winding up order in the Italian courts under TUF Article 57, it will not dispute the jurisdiction of the Italian courts to determine such request and will submit to such jurisdiction.

53. Lady Moon points out that if there is no jurisdiction available to the Italian courts under TUF Article 57 to wind up an Italian fund through a foreign asset manager (as Ventoruzzo suggests), such an undertaking by Petricca cannot create jurisdiction. However, as I have said, I prefer the argument, supported by the undertaking that the Italian courts do have jurisdiction if the case for winding up is appropriate.

54. As for which courts are the more appropriate forum, the factors relied on by Petricca in support of the Italian courts in my judgment clearly outweigh the domicile of Petricca in England, as regards the present dispute. First, an Italian forum must be

what the Unitholders and creditors bargained for and a winding up process in the English court is wholly alien to what they could have anticipated. I do not ignore the importance of Petricca's domicile and that has changed the centre of the Fund's administration but whilst this impacts at every stage of the argument in this matter, it is far from crucial as regards the appropriate forum in this case.

55. All the connections are with Italy save that the Fund's manager has, for the past two years or so out of its 12 year history, been an English company. It does not appear that relevant matters have fundamentally changed otherwise in that few years. Whilst Petricca and therefore decision-making and administration in relation to the Fund is now based in London, it is not disputed that judgments and orders of the Italian courts will be recognised here. It should not be forgotten that Lady Moon and its predecessor and original lender Banca Della Marche are both Italian. And potentially more difficult practical steps will be in Italy, both in connection with the financial position (possibly involving the Bank of Italy, Unitholders and other creditors) and in connection with immovable property.

56. To my mind, certainty of legal arrangements is vital in the financial markets and, (particularly if I may say so, at this time of our European history) it might risk further destabilisation for the English courts to assume a jurisdiction to wind up an investment fund on the basis that, although agreed to be subject to foreign laws and regulation, it should be treated as a trust in England so as to permit extreme orders against it.

57. In the EU context (at least whilst it continues to have legal importance), this would offend against the AIFMD, which was designed to promote a single market in fund management services but not to harmonise the regulation of funds which were to "*continue to be regulated and supervised at national level*". It cannot have been the intention behind those arrangements to subject the fund thereby managed to legal processes which were not within the reasonable expectation of its investors, its creditors and its regulators.

58. To my mind it is no answer to repeat that the manager is now English and that the Fund has no legal personality of its own and so cannot found in Italy its main centre of interests. That the relevant decisions were and are made by Petricca based in London rather than Italy, is in this context a relatively abstract and less significant consideration.

59. I also disagree with Lady Moon's claim that the Italian Proceedings are irrelevant to these questions. I sense a strong whiff of old-fashioned forum-shopping and even potential oppression about its position. It chose to seek to pursue its legal rights in Italy, apparently the appropriate forum even though Petricca is an English company, but has now issued wider, overlapping proceedings in England, against the same

defendant - but liable more directly to affect others, probably incurring greater disruption and expense of resources although raising at least some of the same issues. A stay on *Spiliada* grounds is made out and in my judgment well justified.

(7) Article 29 of the RBJ Regulation

60. Petricca's application notice and evidence did not also refer (as a fall-back) to Article 29 of the RBJ Regulation under which "*where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States*" requires the court of a member state other than the court first seised "... *of its own motion* [to] *stay its proceedings until such time as the jurisdiction of the court first seised is established.*"

61. However, the question was fully argued (albeit without separate Italian legal expert opinion) as to whether this applies in the event that Petricca's primary submission that the RBJ Regulation is inapplicable (and my finding above to that effect) is wrong, and the present Part 8 proceedings involve "*the same cause of action*" as well as the same parties as the Italian Proceedings.

62. Lady Moon contended that these Part 8 proceedings did not "*involv*[e] *the same cause of action*" as the Italian Proceedings for the purpose of Article 29 because the two proceedings had neither identity of 'cause' nor of 'object' (terms derived from the French text, which applies generally).

63. In *Starlight Shipping Co v Allianz Marine AG* [2014] 1 All ER 590 at [28]-[31], Lord Clarke explained that:
    (a) the phrase "same cause of action" has an independent and autonomous meaning as a matter of European law, to be assessed only by reference to the claims in the actions and not defences nor common issues; and
    (b) 'identity of cause' means that the proceedings have the same facts and rules of law relied upon as their basis, and 'identity of object' means that the proceedings must have the same end in view.

64. In the present case, Lady Moon argues that the cause for the Italian Proceedings is its rights in respect of its secured loans and the mortgaged properties and Petricca's breach of its repayment obligations, whereas the cause for the present Part 8 proceedings is its status as creditor of an insolvent fund vested in Petricca; and that the object of the Italian Proceedings is repayment of monies owed to it, whereas the object of the present Part 8 proceedings is "a collective resolution of the Fund for the benefit of all of its stakeholders".

65. I again disagree. The cause in both proceedings is Lady Moon's rights as secured creditor and the object of both is for it to be paid the debt owing to it out of the realisation of its security. The intervening mechanism – individual enforcement in the Italian Proceedings and collective *and* individual liquidation and realisation processes in the Part 8 proceedings, do not create a material difference between the cause and object of both, but are procedural (thus giving rise to much of the controversy as regards TUF Article 57 and the English courts trust powers).

66. It is one of the possible paradoxes in Lady Moon's position that it contends that its present Part 8 trustee proceedings are not "insolvency" proceedings under regulations or statutes for the purpose of Article 1(2)(b) of the RBJ Regulation, but are (collective not individual) insolvency-based proceedings in order to avoid among other things the application of Article 29. This is but one of several aspects of its case, some veering close to self-contradiction, which make me wary of the effect which its present Part 8 proceedings may have if not stayed, at least until the Italian courts consider the jurisdictional questions under TUF Article 57 and relating to the Italian Proccedings.

67. Accordingly, in case the RBJ Regulation applies (against my finding above) I would in any event stay the present Part 8 proceedings, if not under the common law doctrine of *forum non conveniens*, then under Article 29. This is a matter not of discretion but (unlike Article 30 in respect of related actions) an obligation as far as the English courts are currently concerned, which may make the order of issues as tackled by the parties on this application somewhat ironic.

(8) Lady Moon's right to seek the winding up of the Fund

68. A similar observation may apply in the case of the arguments as to whether there is anything in the alleged procedural basis of Lady Moon's Part 8 claim – that it can seek, as creditor or at all, to have Petricca treated as a trustee subject to the English court's supervision – and indeed many of the key factors in the matter feed into the different aspects analysed in this judgment.

69. Whilst Petricca put this at the forefront of its Part 11 application, and it occupied a large part of the parties' submissions, and is further background by way of some substantive legal issues between the parties, I have left it until last, partly because (as presaged above) I do not consider it necessary or appropriate to decide it at this stage. So, and as the reader may also be tiring, I shall be relatively brief.

(a) Petricca's submissions

70. Petricca contends in summary first that Lady Moon's attempt to invoke a putative English law jurisdiction to compel a trustee to wind up a trust at a creditor's behest is

unprecedented, even putting aside the crucial foreign (Italian) elements, and no such jurisdiction exists, not could it conceivably avail Lady Moon in the present case.

71. It claims that this is very different from the possibility that, exceptionally:
    (a) the Court can give directions on the application of a trustee as to how the assets of the trust fund are to be realised and applied towards the payment of liabilities where the trust fund is insufficient to meet those liabilities; and
    (b) a creditor might be capable of being brought before the Court under CPR Part 64 as subrogated to the trustee's right of indemnity from the trust fund.

72. Secondly Petricca seeks to argue that even if there were such an English jurisdiction, it would be inapplicable given the Italian elements in the present case. Not only does Petricca have no personal liability to the fund's creditors and (consequently) no right of indemnity against the Fund in respect of any such liability, but also, more fundamentally:
    (a) there is no basis for applying English law to any aspect of the relationships between Petricca, Lady Moon, the Unitholders, any other creditors and the Fund, which are entirely governed by Italian law; and
    (b) it must also follow that there cannot conceivably be any trust, since Italian law as the governing law provides for no such thing. There is no authority for the proposition that the English Court can, by imposing its own domestic law, recognise a foreign law structure as a trust in those circumstances.

73. The central principles of English trust law have been recently and authoritatively expressed in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] 2 WLR 1465 (PC) at [59] by Lord Hodge (with whom Lords Sumption and Lord Carnwath agreed) so that, says Petricca, it is well-established as a matter of English trust law that:-
    (a) Even where a debt is incurred by a trustee for the benefit of the beneficiaries, it is the trustee who incurs the liability personally and to whom the creditor must look for repayment.
    (b) The trustee is liable to meet the debt from his or her personal estate, in general without limit of liability (by reference to the size of the trust estate or otherwise). However, he is entitled (other things being equal) to seek an indemnity out of the trust assets for liabilities properly incurred (or to procure their payment from the trust fund).
    (c) The creditor has no direct access to the trust assets to enforce his or her debt. His or her only ability to obtain recourse to the trust assets is by way of subrogation to the trustee's right of indemnity, if and insofar as such exists in the context of the particular debt.

(d) The beneficiaries under a bare trust have a vested proprietary interest in the property of a trust and are entitled to have the trustee convey to them the legal title to the trust assets.

74. Accordingly, says Petricca, there cannot strictly speaking be any such thing as an insolvent trust: if the trustee is unable to meet the liabilities incurred in connection with the trust, it is he and not the trust who will become insolvent and against whom insolvency proceedings may ensue. It is inappropriate in these circumstances to contemplate a winding-up order against the trust itself: *Lewin on Trusts* at 22-08.

75. Petricca develops its first argument as follows:-

(a) The only circumstance in which it has been suggested that the Court may give directions in relation to the winding up of a trust in circumstances of insolvency is where the trustee's liability is limited to the value of the trust assets (which limitation may arise by contract or, in some other jurisdictions, by statute) and he or she has incurred liabilities exceeding the value of those assets.

(b) In Jersey such applications have been made by the trustee (or executor of a deceased's estate), and address the question of convening the creditors to the application so as to bind them into directions in relation to a fund in which they have a stake by reason of their rights of subrogation or as to the priority of distributions.

(c) The Court's jurisdiction to give directions to the trustee in these particular circumstances is simply a reflection of its more general jurisdiction to give directions to trustees as to the appropriate exercise of their powers. The effect of approval, if given, is that no beneficiary may thereafter complain that the exercise of the power so approved was a breach of duty on the part of the trustees. This has an obvious role to play where the trustees are concerned with proposed distributions between competing creditors whose claims to the trust estate are, in turn, competition with those of the beneficiaries.

(d) Absent improper motives, however, the Court will not restrain or compel the trustees in relation to the exercise of their discretionary powers. Nor will the Court exercise such powers itself, unless authorised by statute to do so. This is reflective of a fundamental principle of non-intervention by the Court in the trustees' exercise of their discretionary powers. The mere fact that the Court would not have acted as the trustees have done is no ground for interference, since the settlor has chosen to entrust the relevant powers to the trustees and not to the Court.

(e) A jurisdiction whereby the Court could, at the behest of a creditor, compel the trustee - against his or her wishes - to realise the assets of the trust, distribute their proceeds and thereby terminate the trust, would undermine and run counter to those principles.

(f) The law of winding up and the power of the Court to make winding up orders is the subject of extensive legislation, but Parliament has not legislated to create a means by which a creditor (or beneficiary) may petition for the compulsory winding up of a trust.

(g) In theory, it might be open to the Court to develop a new rule on the basis of its inherent jurisdiction, but "... *any judge should think long and hard before extending and adapting an existing rule, and even more before formulating a new rule*": *Re Brothers International (Europe) (in Administration)* [2017] UKSC 38 at [13]. Moreover, it cannot do so if this would "*constitute ignoring the scheme of the legislation which has been put into place*": *Re Zinc Hotels (Investment) Ltd* [2018] BCC 968 at [61].

76. In any event, Petricca submits, Lady Moon's Part 8 claim does not present this Court with an opportunity to develop new law, not least because it does not concern a trust and even if there is such jurisdiction as a matter of English law, Lady Moon would lack any standing to invoke it, because Petricca's relationship with the Fund and with Lady Moon (as governed by Italian law) differs in crucial respects from the trustee's relationship with the trust assets and with creditors that have advanced money for the benefit of a trust under English law.

77. Thus:-

(a) Petricca as the asset management company is liable under TUF Article 36 only to answer for obligations undertaken on behalf of the Fund with the assets of that Fund. It has no substantive personal liability for the debts of the Fund and it follows that there can be no question of any right of indemnity as between Petricca and the Fund in respect of such liabilities.

(b) Unlike the position as between creditor and trustee under English law, it is open to Lady Moon to enforce its debt directly against the assets of the Fund under Italian procedure. That is what it is already doing through the Italian Proceedings and, as found above, it is also open to Lady Moon to invoke a winding-up procedure in respect of the Fund under Article 56(6-bis).

(c) Accordingly, in contrast to the English law of trusts and subrogation, there is no basis and no route for permitting a creditor (in this case Lady Moon) to have recourse to assets of the Fund, no need to permit enforcement against the Fund, and no lacuna or vacuum to be filled, given the remedies available to Lady Moon in Italy under Italian law.

78. Petricca's second main point is that there is no basis on which the English Court could recognise the Fund as a trust or apply English law to its administration as if it were a trust:-

(a) It is not in dispute that Italian law does not itself recognise the concept of a trust as such, but any putative trust would, whether applying the Hague

Convention on the Law applicable to Trusts 1985 (as incorporated into English law by the Recognition of Trusts Act 1987) or as a matter of common law, be governed by Italian law.

(b) Under the Hague Convention the applicable law is primarily that expressly or impliedly chosen by the settlor in the instrument creating the trust, and given the terms of the Regulations, there is here an implied choice of Italian law.

(c) Article 6 goes on to provide that where the law chosen by the settlor does not provide for trusts that choice shall not be effective and the applicable law should be that specified in Article 7 which provides that where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.

(d) In ascertaining the law with which a trust is most closely connected, "*reference shall be made in particular to - (a) the place of administration of the trust designated by the settlor; (b) the situs of the assets of the trust; (c) the place of residence or business of the trustee; and (d) the objects of the trust and the places where they are to be fulfilled*".

(e) These connecting factors are to be considered as at the moment of creation of the trust: *Dicey, Morris & Collins on Conflict of Laws* 15th ed at 29-023. it cannot have been the intended effect of these choice of law provisions to bring about a change in the governing law merely by virtue of a change in residence of the supposed trustee.

(f) The fact that the connecting factors point to a law which does not provide for trusts is not a reason to disapply the test or give greater weight to other connecting factors. Whilst Article 5 provides that the Hague Convention does not apply to the extent that the law specified by Articles 6 and 7 does not provide for trusts or the category of trusts involved, the common law approach (see *Re Hewitt's Settlement* [1915] 1 Ch 228 at 223-4) is materially identical in ascribing the proper law based on the law with which a trust is most closely connected.

79. Petricca seeks to conclude that, whether applying the Hague Convention test or that under common law, all the relevant connecting factors point clearly to Italy. The Regulations contain no indication that the place of administration of the Fund was intended to be anywhere other than Italy; the situs of the trust assets is Italian; the place of residence of the manager was, at the relevant time, Italy; and the objects of the Fund are to pursue investments in Italian immovable property. The only factor pointing to another jurisdiction Petricca's incorporation and domicile, postdates the creation of the Fund (as the putative trust) and is therefore irrelevant.

80. It follows, according to Petricca, that the structure of the Fund cannot be recognised as a trust under English law principles and even if, as is alleged on behalf of Lady Moon, the Fund "*has the characteristics of a trust as a matter of English law*", as a matter of Italian law as the proper law of the structure, there are no circumstances in

which it could be a trust. The fact that a trust can be created over assets located in a jurisdiction which does not recognise trusts (see *Akers v Samba* [2017] UKSC 6 at [34]) does not affect this question.

81. As for *Chelleram v Chelleram* [1985] Ch 409, in which the English Court (prior to the Hague Convention) ordered the removal and replacement of a trustee of a foreign law trust, it was not in dispute in that case that there was a trust and the power invoked was one (of "*a rather special nature*") to remove and replace the trustees, which was not a power conferred by the settlement in that case, which would have been governed by the proper law of the settlement.

82. In the present case, by contrast, the Regulations make express provision for winding up and the relevant rights to seek a winding up are governed by Italian law and are inseparable from the manner of their enforcement. It was held long ago, in *Grey v Manitoba* [1897] AC 254, that the English Court will not attempt to enforce a trust of foreign immovable property by an order for sale if it cannot supervise the execution of the order. The power to administer a trust by removal of the trustee is a well-established one in English law, whereas a power to compel a winding up of a trust is at best nascent.

83. Finally, Petricca seeks to gain support from an analogy with the correct approach if the Fund was a foreign company over which the English Court had a discretionary jurisdiction to wind up under section 221 of the Insolvency Act 1986 which may only be exercised where various core requirements are fulfilled (see for example *Re Buccament Bay Resort Ltd* [2015] 1 BCLC 646).

84. None of these requirements - namely (a) a sufficient connection with England (which may but need not consist of assets within the jurisdiction) and no alternative more appropriate forum; (b) a reasonable possibility of benefit accruing from the winding up process to the persons seeking the winding up; and (c) one or more persons interested in the distribution of the assets in the winding up who subject to the jurisdiction of the English Court – are present as regards the Fund in the present case and thus it is said by analogy that any exercise of a winding up jurisdiction by the English Court in such circumstances would be exorbitant.

(b) Lady Moon's submissions

85. All the above arguments, and probably others which I have not managed to encapsulate, are disputed by Lady Moon, which maintains that they are in any event not fit for this Part 11 application and should be left until trial (which is what it failed to achieve before Mr Elleray QC on 7 December 2018).

86. Lady Moon begins by contending that the Fund has the characteristics of a trust, including the fact that the manager as legal owner is not entitled to deal with or dispose of its assets of its own benefit: *Ayerst (Inspector of Taxes v C & K (Construction) Ltd* [1976] AC 167 at 177-8.

87. The prohibition on own use was also identified in *Westdeutsche v Islington LBC* [1996] AC 669 at 705 as being the characteristic of a trust and also underlies the *Quistclose* trust, which arises upon receipt of specific assets or money which is not freely available for the recipient's or a third party's benefit but is only to be applied for a stipulated purpose: *Twinsectra v Yardley* [2002] 2 AC 164 at [13]-[14] and [73]-[74].

88. A trust may arise if specific assets are provided subject to a prohibition on own use arising from the provisions of a legal system that does not recognise trusts. In *Lehman Brothers International (Europe) (in administration)* referred to above, it was held that, given the imperative to provide full effect in English law to its requirements of (the then) Directive 2004/39/EC on Markets in Financial Instruments, a trust must have arisen as soon as client money to an investment firm thereunder was received.

89. Lord Neuberger stated at [199] that:

> *"It is true that the Directives nowhere refer to the creation of a trust, but that seems to me to be irrelevant. The Directives are intended to apply across the European Union to all member states, and the concept of a trust is not familiar even in Scotland, let alone in other civil law jurisdictions ...the prohibition on a firm using client money for its own purposes is enough to create a trust in English law, so article 13(8) of MiFID, rather like M. Jourdain speaking prose without realising it, appears to ensure the creation of a trust without appreciating it."*

90. In *Lehman v CRC* [2012] 1 BCLC 487. Lord Collins stated at [189]:

> *"...all that might be meant by the use of the word 'trust' was giving property that essential characteristic which distinguishes trust property from other property; namely, it cannot be used or disposed of by the legal owner for his own benefit but must be used or disposed of for the benefit of others..."*

91. Secondly, according to Lady Moon, Article 2 of the Hague Convention describes a trust as referring to the legal relationship created "*when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a particular purpose*". A trust thereunder has three main characteristics: (a) the assets subject to the trust constitute a separate fund and are not part of the trustee's own estate; (b) title to the relevant assets stands in the trustee's name or in the name of another on the trustee's behalf: this simply identifies the trustee, viz, the person who holds specific assets subject to the prohibition on own use; and the trustee has the power and the duty, in respect of

which he is accountable, to manage, employ, or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

92. The Fund being a creature of Italian law, it is a question for that law whether its nature is such as to satisfy the English law requirements for recognition as a trust, as a matter of common law or the Hague Convention or both; and the Italian law experts are unanimous that the Fund meets the relevant requirements.

93. Thus it is said among other things that:
   (a) the Fund conforms with the structure familiar in common law and identified in Article 2 of the Hague Convention as characterising a trust, whereby a pool of assets has been entrusted to a management company to be administered in the interests of Unitholders;
   (b) the Fund satisfies the requirement that there be specific assets which are the subject matter of the trust - the assets constituting the Fund are vested in Petricca as owner; and
   (c) Petricca is subject to a prohibition on own use in relation to the Fund by virtue of Italian law and regulations and by the Fund's constitution, by reference to all of which it is accountable; while the asset manager is the "*formal owner*" of the fund's assets, the fund's Unitholders are their "*fundamental owners*" – indicating that Italian law itself has a conception of ownership that is merely *formal* because subject to the prohibition on own use, whereas the right to benefit from the assets is vested in others.

94. Thirdly, as to whether the Court has power to grant the relief sought in the Part 8 Claim, Lady Moon relies on the basic principles as stated in *Lewin on Trusts* at 11-007:

> *"As to subject-matter, since equity acts in personam, working on the conscience of the trustee to compel performance of the trust, the general rule is that the English court can enforce a trust whenever the trustee can be brought before it. Once the trustee is before the court, the full trustee remedies are generally available (though it may of course be difficult to enforce an order if both trustee and trust property are abroad). It does not matter that the governing law of the trust is not English or that the trust property is not in England and Wales."*

95 In *Ewing v. Orr Ewing* (1883) 9 App Cas 34, it was held that the English Court had jurisdiction to administer a trust whose proper law was Scots law and which consisted of Scottish immovable property, since (according to Lord Selborne at 40-41):

> "... *the jurisdiction of the English court is established upon elementary principles. The courts of equity in England are, and always have been, courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the*

performance of contracts and trusts as to subjects which were not either locally or ratione domicilii within their jurisdiction."

96. In *Chellaram* at 425-427, Scott J (as he then was) stated in relation to an Indian trust that:

> *"As to subject matter also there is in my judgment no doubt that the court has jurisdiction ... the principle that the English court has jurisdiction to administer the trusts of foreign settlements remains unshaken. The jurisdiction is in personam, is exercised against the trustees on whom the foreign trust obligations lie, and is exercised so as to enforce against the trustees the obligations which bind their conscience... The jurisdiction which I hold the court enjoys embraces, in my view, jurisdiction to remove trustees and appoint new ones."*

97. Fourth, Lady Moon claims standing to seek the relief sought, on the basis that the Court's supervisory jurisdiction over English trustees at the behest of a creditor is not limited to cases where the creditor has a right to be subrogated to the trustee's right to be indemnified from the trust property, since:
    (a) on proper analysis and in principle, the position of Lady Moon as a creditor is no different from that of any creditor of a trust in respect of which the creditor's recourse is limited to trust assets; and
    (b) Petricca is wrong to say that it is a requirement for the Court to exercise its discretion to give directions of the type sought in the Part 8 Claim, that that the creditor has a technical right to be subrogated to the trustee's right of indemnity from the trust property.

98. The position of Petricca as asset manager of the Fund - legally liable as borrower in respect of the debts due in the sense of being liable to be sued for recovery of the debts by a creditor which is not entitled to have recourse to Petricca's personal assets but is entitled to have recourse to the Fund's assets - is essentially the same (claims Lady Moon) as that of a trustee of a typical English or Jersey law trust, where the liability of the trustee under contracts entered into on behalf of the trust is limited to the trust assets; and as a matter of English law (and in common law jurisdictions generally), a trustee's personal liability in relation to obligations incurred on the trust's behalf may readily be limited by contract (as by the words "*as trustee only*") or be excluded in other ways, such as by statute:; see *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] 2 WLR 1465, at [61].

99. Lady Moon contends that the fact that, whilst as a creditor it would be required to sue Petricca for the recovery of the relevant debts owed to it, its recourse in satisfaction of those debts is to the Fund assets (and not to the assets of Petricca personally, gives it sufficient standing to engage the Court's jurisdiction to give directions to Petricca, as

trustee, to wind up the Fund. It disputes the proposition that the only basis on which the obligee of an obligation incurred on behalf of a trust may have standing under CPR 64 is the obligee's right to subrogation to the trustee's right to indemnity from trust assets.

100. It suggests that the fallacy in Petricca's argument is that it mistakes sufficiency for necessity: even where creditors of an insolvent trust do not have direct recourse to trust assets, their right to be subrogated to the trustee's indemnity rights against trust assets may be sufficient to establish a legitimate interest in the administration of the trust and thus standing under CPR 64. It does not follow that the absence of direct recourse to trust assets is necessary to establish such legitimate interest and therefore standing to ask the Court for directions.

101. On the contrary, the Court's jurisdiction pursuant to Part 64 is particularly wide, extending to "*any question arising in the execution of a trust*" (CPR 64.2(a)(ii)); it is clear from the opening words of CPR 64.4(1)(b) ("*if the claim is made by trustees*") that persons other than the trustees may bring a claim; nor is standing restricted to trustees *and beneficiaries*, as the use of the general term "*the claimant*" in CPR 64.4(1)(c) indicates, especially in contradistinction to the reference in the same provision to "*any persons with...an interest under the trust*", who may be made parties to the claim.

102. Lady Moon submits that creditors of an insolvent trust have standing under Part 64 because they have a legitimate interest in the determination of questions arising in the execution of the trust, particularly as to how the trust funds ought to be applied. Creditors with immediate recourse to trust assets — which is how Petricca itself seeks at E above to classify Lady Moon — have this legitimate interest every bit as much as do creditors whose access to trust assets is mediated through subrogation to the trustee's indemnity rights.

103. Any difference between a creditor in the position of Lady Moon and a creditor of a typical English law trust with a right of subrogation to the trustee's right of indemnity against the trust assets is more apparent than real. In both cases, the creditor has to first proceed against the trustee and only then can seek recourse to the trust assets. There does not appear to be any substantive difference between the two situations.

(c) Discussion

104. As might already be obvious, I harbour severe doubts as to whether the present application requires argument and resolution in respect of the myriad substantive and procedural points raised as above (or as otherwise better expressed).

105. Petricca relied upon *Hoddinott v Persimmon Homes (Wessex Ltd* [2008] 1 WLR 806 in which the Court of Appeal allowed an appeal by a Claimant whose claim had been struck out by a district judge who held that an extension of time for service was unjustified notwithstanding that the defendant had been served and had filed an acknowledgement of service indicated an intention to defend without contesting jurisdiction. Lord Dyson held at [22] that CPR Part 11 was engaged because the word jurisdiction was not limited to territorial jurisdiction but also included "the court's power or authority to try the claim" and thus, under CPR Part 11, the acknowledgement of service had waived the claimant's delay.

106. I am not convinced that this comment extends to the present case. If this application was about service outside England and Europe, involving discretionary permission, the arguability of the substantive claim might be germane. But in my view whilst Petricca may have the better of some of the above arguments - and the apparent novelty of the Part 8 claim, not limited to its foreign (that is, Italian) elements, features in some of the twists-and-turns in the jurisdictional issues above - it is unnecessary and inappropriate for me to express a concluded view as to whether, apart from their background significance as regards jurisdiction over the defendant and the subject of the claim, and any choice between the English and Italian courts, they mean that Lady Moon's claim for an order that the Fund be wound up under the English court's inherent power to supervise trustees would be bound to fail (whether as regards its standing or the extent of the Court's powers) and I decline to do so.

107. In short, I do not accept Petricca's submission that, in effect, its contention that the claimant does not have an arguable right to seek the relief claimed can and should be disposed of by way of an application under CPR Part 11. That is particularly not the case where the issues go to standing and/or substantive rights and liabilities and are not without complication and more general importance.

108. In any event, I was not addressed by Petricca as to the burden and standard for satisfying a court on a Part 11 application (necessarily interlocutory and indeed before a defence is filed whether by formal statement of case or Part 11 evidence) that allegedly fatal deficiencies in those respects are made out; and without purporting finally to decide the point, it seems to me in principle, and on the facts of this case, that if they ever have to be decided before trial, that should be dealt with on a strike out or reverse summary application or preliminary issue, not on a Part 11 application.

(9) Conclusion

109. For the above reasons, I allow the Defendant Petricca's Part 11 application and will stay the Claimant Lady Moon's Part 8 proceedings against it, on Petricca's undertaking regarding the Italian courts referred to in paragraph 52 above. The parties should

submit a draft order. If they cannot agree on any consequential matters such as costs, I can deal with them on paper, with concise written submissions being exchanged within 7 days, or if they think it necessary, at a short further hearing.

I certify that the above is the only record of my judgment [signed, MHR]