Neutral Citation Number: [2019] EWHC 1636 (QB)

Case No: QB-2019-001070

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 June 2019

Before:

MR JUSTICE LAVENDER

- -

Between:

Mandy C Gray

Claimant

- and -

Hamish George Hurley

Defendant

- -
- -

Jonathan Cohen QC and **Marc Delehanty** (instructed by **Grosvenor Law**) for the **Claimant**
James Bailey QC and **Cara Goldthorpe** (instructed by **Withers LLP**) for the **Defendant**

Hearing date: 11 June 2019

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JUDGMENT

Mr Justice Lavender:

(1) Introduction

1. This is a dispute over jurisdiction. The Claimant, Mandy C Gray, and the Defendant, Hamish George Hurley, were in a relationship from March 2013 to 18 January 2019, when Ms Gray ended the relationship. On 25 March 2019 Mr Hurley commenced proceedings against Ms Gray in New Zealand ("the New Zealand Proceedings"). On 26 March 2019 Ms Gray issued the claim form in the present action and obtained an order for alternative service, pursuant to which she served the claim form on Mr Hurley by Whatsapp message.

2. The parties have made the following applications:

   (1) Mr Hurley:

      (a) challenges the jurisdiction of this Court; and

      (b) applies for:

         (i) the setting aside of the order for alternative service; and

         (ii) a stay of these proceedings.

   (2) If, contrary to her primary contention, she needed permission to serve the claim form out of the jurisdiction, Ms Gray applies for:

      (a) permission to serve the claim form out of the jurisdiction; and

      (b) an order retrospectively validating the service already effected.

   (3) Ms Gray also applies for:

      (a) an anti-suit injunction; and

      (b) a freezing order.

3. The hearing of these applications was adjourned from 8 May to 11 June 2019. Given the limited time available, and the undertakings given by Mr Hurley, the parties sensibly agreed that I should only deal with the jurisdictional issues, leaving the applications concerning service, Mr Hurley's application for a stay and the injunctions sought by Ms Gray to be dealt with after I handed down this judgment.

4. As to jurisdiction:

   (1) Ms Gray contends that this Court has jurisdiction pursuant to Article 4(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Judgments Regulation") because Mr Hurley was domiciled in England on 26 March 2019. Mr Hurley denies that he was domiciled in England and asserts that he was domiciled in New Zealand but, in any event, contends that:

(a) Ms Gray's claim is outside the scope of the Judgments Regulation, by virtue of Article 1(2)(a) thereof; and/or

(b) part of Ms Gray's claim is subject to the exclusive jurisdiction of the Italian courts, pursuant to Articles 24 and/or 25 of the Judgments Regulation.

(2) Alternatively, Ms Gray contends that this Court should assume jurisdiction pursuant to CPR 6.36 and sub-paragraphs (1), (15), (16) and/or (4A) of paragraph 3.1 of Practice Direction 6B. As to this, Mr Hurley contends that:

(a) on parts of Ms Gray's claim, there is no serious issue to be tried;

(b) there is no good arguable case that her claim falls within any of the grounds set out in the sub-paragraphs of paragraph 3.1 of Practice Direction 6B; and

(c) England is not clearly or distinctly the appropriate forum for the case to be tried.

(2) Background

5. It is appropriate to consider Ms Gray's and Mr Hurley's life before, during and after their relationship, with particular attention to the matters at issue in this action, namely:

(1) the acquisition of the following assets ("the Assets"):

(a) a property in Italy known as San Martino;

(b) a farm in New Zealand known as Mount Albert Station;

(c) four cars ("the Cars"), namely:

(i) a Ferrari 458 Speciale;

(ii) a Pagani Huayra Coupe;

(iii) a Pagani Zonda R; and

(iv) a Ferrari F1; and

(d) deposits ("the Deposits") on two more cars:

(i) a Pagani Huayra Roadster; and

(ii) a Ferrari 488 Pista; and

(2) substantial sums ("the Investment Monies"), totalling US$9,151,998, paid to Mr Hurley and others in respect of various investments ("the Investments"), particularly a proposed advertising software business, a proposed skincare business and a proposed business selling powdered juice known as "Zuma Juice", as follows:

(a) a total of US$4,056,591 paid to Mr Hurley;

(b) a total of US$2,354,961 paid to Bell Green Trading Limited;

(c) a total of US$2,435,000 paid to Women of Wukar LLC;

(d) US$1,827 paid to LX Management;

(e) a total of US$151,476 paid to Sidley Austin LLP;

(f) US$12,607 paid to CCA Inter-Serv Ltd;

(g) a total of US$137,508 paid to Chetcuti Tax Advisors; and

(h) US$2,028 paid to BTI Management.

6. The Assets (which are not the only assets acquired during the period of their relationship) have considerable value. San Martino cost €9.5million, and a further €9million has been spent on restoration and renovation. In an affidavit of assets sworn in the New Zealand Proceedings, Mr Hurley ascribed to the other Assets the following estimated values:

(1) NZ$25million for Mount Albert Station;

(2) over €11million for the Cars, made up of:

(a) CHF340,000 for the Ferrari 458 Speciale;

(b) €4.5million for the Pagani Huayra Coupe;

(c) €2.85million for the Pagani Zonda R; and

(d) €4-4.5million for the Ferrari F1;

(3) for the Deposits:

(a) €540,000 or €1million for the deposit on the Pagani Huayra Roadster; and

(b) CHF30,000 for the deposit on the Ferrari 488 Pista.

7. The parties produced a great deal of evidence in advance of the hearing, including three witness statements from Mr Hurley and an affidavit and two witness statements from Ms Gray. Some of the statements which they made appear to be inconsistent with contemporary documents. Many issues are contested. In what follows, I will try to give an outline based on uncontested facts. While I have considered all of the evidence, I do not propose to go into all of the allegations and counter-allegations concerning, for instance, the nature of the relationship between Ms Gray and Mr Hurley or the effect on Ms Gray's claims of any professional advice which she may have received in relation to the various transactions at issue.

8. I gave permission for Ms Gray to produce a short statement after the hearing dealing with one particular point, namely what happened on 8 to 10 April 2013. The statement

which she subsequently made dealt with some other points. I have placed no reliance on those parts of her statement.

(2)(a) Ms Gray

9. Ms Gray was born in May 1969. She was born in the United States, but she is no longer a US citizen (becoming instead a citizen of St Kitts and Nevis in 2014, and also a citizen of Malta in 2017). In 1995 she married Randy Work, who became a successful investment manager. In 1998 she went to live with her husband in Japan. They had two children, born in 2000 and 2003. In 2005 they moved to Hong Kong. In 2008 they came to live in London. Ms Gray has lived in London ever since. Ms Gray met Mr Hurley in 2009 at KX Gym in Chelsea. He was her physical therapist. He started visiting her home for this purpose in 2011. Ms Gray separated from Mr Work in 2013. Her children were by then, and remained, in boarding school in England.

(2)(b) Mr Hurley

10. Mr Hurley was born on 30 October 1972 in New Zealand. He remains a citizen of New Zealand (and also became a citizen of Malta in 2017). He studied physiology and physical education at the University of Otago between 1991 and 1998. He married in 1997. He came to live and work in England in 2002, obtaining a work permit on 5 November 2002, and his wife joined him here. He continued to live at various rented properties in England until early 2013. A document which he created in 2011 indicates that he spent only 491 days out of the United Kingdom in the 9 years between 18 July 2002 and 4 September 2011. In other words, he spent on average over 10 months a year in England during this period.

11. He did not retain a home of his own in New Zealand. When he visited New Zealand, he stayed with his parents. He claims to have visited New Zealand in every year from 2003 to 2011, but the document which he created in 2011 indicates that he only visited New Zealand three times between July 2002 and September 2011.

12. Mr Hurley worked as a neuromuscular therapist. This work was better paid in England than in New Zealand. In 2009 he was earning about £50,000 a year. Moreover, there were international opportunities in this line of work for someone who was able to travel freely from one country to another. Mr Hurley's New Zealand passport did not allow him to do that. A British passport would have done. In 2007 he made an unsuccessful application for indefinite leave to remain in the United Kingdom. Mr Hurley and his wife separated in 2008. He made another application for indefinite leave to remain in 2011 (in respect of which Mr Work paid professional fees of over £21,000), but he effectively abandoned this application (which was deemed to have been withdrawn) when he left England in 2013.

(2)(c) Ms Gray and Mr Hurley Together

13. The relationship between Ms Gray and Mr Hurley began in March 2013. She left the home which she had shared with her husband and children. Mr Hurley ceased work at the gym and has not been employed since. Mr Hurley proposed marriage on several occasions, but Ms Gray refused. Between March 2013 and January 2019 they enjoyed a lavish lifestyle, which included travel to many different locations around the world, and which was paid for by Ms Gray, as Mr Hurley had no source of income.

14. Although they spent considerably more time in London than anywhere else, they spent less than half of the time between March 2013 and January 2019 in London. They did not always travel together. Indeed, they often travelled separately, meeting up in different locations or leaving on different dates or for different destinations. In what follows, I will not attempt to set out where they were at every stage when the various transactions at issue in this case were under consideration. Ms Gray has not pleaded specific acts of undue influence relating to specific transactions, but relies instead on general allegations about the nature of their relationship.

(2)(c)(i) 2013

15. Ms Gray moved into a hotel for about a week and then on 8 April 2013 she moved into a rented flat in London, at 48 Wynnstay Gardens. Her evidence is that in 2013 Mr Hurley only stayed in that flat from 8 to 10 April 2013, after spending a few nights with her in the hotel. He says that his possessions were in storage. She says that he left some of his belongings at the flat. He then went to Costa Rica and for the remainder of 2013 he travelled to various countries, including the United States, Italy and New Zealand. Ms Gray joined him for large parts, but not all, of this time. Holman J described it as "a long and lavish foreign trip": [2015] EWHC 834 (Fam), at [158]. On 2 July 2013 Mr Hurley sent an email to a friend in which he said, "I have left the UK permanently." In September 2013 they first visited the Castello di Reschio estate in Italy, which is the location of San Martino.

16. Meanwhile, in May 2013 Mr Work petitioned for divorce. Mr Hurley provided emotional and practical support to Ms Gray in dealing with what Holman J described as a "terrible conflict": [2015] EWHC 834 (Fam), at [179].

17. 12 November 2013 is the date of the first specific instance of physical abuse by Mr Hurley alleged by Ms Gray. These allegations are disputed and I do not need to go into them.

18. By November 2013 Ms Gray had caused her Swiss bank, Julius Baer, to open an account for Mr Hurley. Two of her rings were sold at auction for CHF423,000 and the proceeds of sale were paid into this account. There is a dispute whether or not she had made a gift of these rings to Mr Hurley.

19. In an email dated 29 December 2013 to an immigration advisor, Ms Gray said that Mr Hurley had left the UK on 10 April 2013 for good. She added:

> "He doesn't work in the UK and has no intention of returning to work or live. … However, he would like to visit occasionally. Specifically, I would like him to come with me to the UK in January."

(2)(c)(ii) 2014

20. On 30 January 2014 Mr Hurley sent an email to a friend in which he stated, "Left UK permanently in April. Best thing ever." However, in 2014 Mr Hurley spent 185 days in the United Kingdom and 30 days in New Zealand. The equivalent figures for Ms Gray are 226 and 24 days. It is not suggested that Mr Hurley spent any significant time between 2014 and 2018 at any other location in the United Kingdom than at Ms Gray's

home in London. He moved his possessions into her flat in Wynnstay Gardens, save for some larger items (such as his surfboard) which remained in storage.

21. In relation to New Zealand, Mr Hurley has said that:

> "I have clothes, sporting goods, exercise equipment, tea sets, kettle, shoes, meditation cushion, backpack, medical equipment, massage table, therapy books, therapy equipment, beard trimmer and other personal items that are permanently in New Zealand for my use when I am there."

22. Ms Gray's evidence about their visits to New Zealand is that they stayed with Mr Hurley's parents, who were originally living in Mr Hurley's childhood home, but who recently moved to a new house. Mr Hurley did not contend that he had any legal or beneficial interest in either house. Ms Gray said that, as far as she was aware, Mr Hurley did not have a bedroom in the new house and that:

> "The house in which Hamish's parents used to live did not have a bedroom for Hamish either and he had no personal possessions there (apart from historic things from his childhood). Hamish's parents converted his childhood bedroom into a bedroom for their grandchildren, who regularly stay with Hamish's parents. When Hamish and I visited his parents, we stayed in a guestroom, which did not have space for us to unpack because Hamish's mother stored her possessions in the wardrobe."

23. Mr Hurley and his wife were divorced in February 2014.

24. In April 2014 the first of the Cars, a Ferrari 458 Speciale, was purchased for CHF303,400 from Loris Kessel Auto SA in Switzerland, whose invoice was dated 9 April 2014 and was addressed to Mr Hurley. The money came from Mr Hurley's account at Julius Baer, but Ms Gray contends that the money belonged to her, since it was part of the proceeds of sale of her rings. Like the other Cars, the Ferrari 458 Speciale was stored in Switzerland with Loris Kessel Auto SA and Ms Gray paid all of their bills for storage and maintenance. It was initially registered to Mr Hurley, with Swiss tourist licence plates, but these were only valid for a year. Mr Hurley became a good friend of Ronnie Werner Kessel of Loris Kessel Auto SA.

25. On 12 May 2014 Mr Hurley sent an email to a friend in which he stated:

> "Life is good. Travelling non-stop which is great. Seeing the world. Glad to have left London behind. …"

26. From 1 to 13 and from 16 to 26 June 2014 Ms Gray and Mr Hurley visited Castello di Reschio. They were together there again from 14 to 28 September 2014 and on 11 and 12 October 2014.

27. On 2 July 2014 Ms Gray made a will, leaving her entire estate to Mr Hurley, except for US$20million which she left to her children.

28. In November 2014 Ms Gray renounced her US citizenship and became a citizen of St Kitts and Nevis.

29. On 11 November 2014 Ms Gray and Mr Hurley signed a Preliminary Sale and Purchase Agreement for the purchase of San Martino. They were in London when they did this. The Preliminary Sale and Purchase Agreement describes them as "jointly the "Purchasers"'. Clause 7 states that "effective as at and from the Completion Date, the Purchasers will acquire the full and exclusive ownership title to" San Martino. Clause 14 provides that:

> "Any dispute between the parties regarding the interpretation, execution or termination of this agreement shall be exclusively reserved to the Tribunal of Rome."

(2)(c)(iii) 2015

30. In 2015 Mr Hurley spent 167 days in the United Kingdom and 36 days in New Zealand. The equivalent figures for Ms Gray are 220 and 30 days. Ms Gray and Mr Work were divorced in 2015.

31. On 14 April 2015 Ms Gray bought a house in London, at 47 Weymouth Mews, for £5.3million. Mr Hurley moved his possessions into the house, including the items which had been left in storage in 2014.

32. On 12 May 2015, when she and Mr Hurley were in London, Ms Gray transferred US$1million from her account at Julius Baer to Mr Hurley's account for the purpose of investing in MML Innovations INC ("MML"), a Californian corporation run by an old friend of Mr Hurley's, Matt Trainer. This investment was proposed by Mr Hurley and concerned the proposed advertising software business. Mr Hurley signed a loan agreement dated 8 May 2015 with MML which described him as the lender of the $1million, but Ms Gray's evidence is that "I was the source of the money and I certainly had not gifted it to Hamish so as to allow him to lend it on as if it were his own money."

33. Ms Gray and Mr Hurley were at Castello di Reschio by 16 May 2015. In an email to Italian lawyers dated 18 May 2015, copied to Ms Gray, Mr Hurley stated as follows:

> "I have New Zealand citizenship and Mandy has St. Kitts and Nevis. … We are looking to spend as long as possible in Reschio each year without falling into the Italian tax net (so just less than six months per year). Mandy is currently resident non-domicile in the UK and has her "home" there. I am currently not resident anywhere in the world but will most likely take up Maltese residency at some point later this year to qualify for a Maltese passport."

34. On 19 May 2015 Ms Gray, who was then in Italy, gave instructions for the transfer of the purchase price for San Martino to an Italian notary. On 21 May 2015 Ms Gray and Mr Hurley signed a Sale and Purchase Agreement for San Martino. They did this before the notary in Rome. Neither party has produced any evidence of Italian law, but it appears that this was the completion of the purchase of San Martino. The Sale and Purchase Agreement provides that they "accept and jointly and legally acquire, the entire full ownership of" San Martino. The price was €9.5million, all of which was provided by Ms Gray. The Sale and Purchase Agreement provided, inter alia, as follows:

> "Furthermore the Purchasers agree that any transfer, in whole or in part, of the ownership of the properties is subject to:
>
> …
>
> b. the right of pre-emption *("diritto di prelazione"*) of the Sellers, and their successors, as well as of Castello di Reschio S.r.l. (or of the person/entity designated by the latter) and undertake hereby not to transfer the properties but in full compliance with such right of pre-emption. …"

35. On the same day, Ms Gray and Mr Hurley signed a "Turnkey" Contract with Castello di Reschio S.r.L. ("the Builders") for the restoration and renovation of San Martino. Ms Gray has to date paid over €9million to the Builders and associated professionals, but the work remains incomplete. Ms Gray referred to it as their home, and they intended to spend time in San Martino (although there is a dispute as to how much time), but by January 2019 neither she nor Mr Hurley had ever spent a night in San Martino.

36. On 15 June 2015 Mr Hurley sent an email to a friend in which he said, "Gave up living in London in 2013." This has to be read in the light of the fact that he had spent 180 days in London in 2014, which demonstrates that even contemporary statements of this nature have to be treated with care.

37. On 7 July 2015 a Swiss company called HK Brothers Sagl ("HK Brothers") was incorporated by Colombo & Partners SA, which appears to have been a Swiss corporate services company, to which Mr Hurley had been introduced by Mr Kessel. The shares in HK Brothers were held by a subsidiary of Colombo & Partners SA, but there was an agreement between Colombo & Partners SA and Mr Hurley (dated 3 July 2015) which stated that Mr Hurley was "the beneficial owner to the extent of 100%" of HK Brothers and by which Colombo & Partners SA undertook to act on Mr Hurley's instructions.

38. HK Brothers became the registered owner of the Ferrari 458 Speciale and of the other Cars. Ms Gray paid the annual administration fees for HK Brothers (in 2016, at least).

39. In 2015 Ms Gray moved her banking from Julius Baer to Rahn + Bodmer. She caused them to open an account for Mr Hurley as well. On 6 August 2015, when she and Mr Hurley were in London, she transferred US$100,000 to his account.

40. In September 2015 the second of the Cars, a Pagani Huayra Coupe, was purchased, again from Loris Kessel Auto SA, whose invoice was dated 17 September 2015 and was addressed to HK Brothers. The price was €1,404,000. Ms Gray was in the Maldives when she gave instructions for the payment of this amount from her account with Rahn + Bodmer. She also paid the expenses associated with this car. It was registered to HK Brothers and stored by Loris Kessel Auto SA in Switzerland.

41. 19 October 2015 was the date on which Ms Gray claims that she signed the purchase agreement pursuant to which she paid the deposit for the Pagani Huayra Roadster. She says that she was in Loris Kessel Auto SA's offices in Lugano when she did this. She has not produced a copy of this agreement, and Loris Kessel Auto SA has said that the contract was signed by Mr Hurley. There is what appears to be a contract dated 23 May

2016 between Mr Hurley and Loris Kessel Auto SA for the purchase of a Pagani Huayra Roadster for €1,740,000, with a deposit of €522,000 (i.e. 30%).

42. The invoice for the first instalment (€160,000) of the deposit was dated 12 November 2015 and she paid this amount on 13 November 2015 from her account with Rahn + Bodmer. She was in London when she gave the payment instruction. She paid the second instalment (seemingly the dollar equivalent of €362,000) on 12 May 2016.

43. Meanwhile, on 5 November 2015 Ms Gray made a further transfer to Mr Hurley for payment to MML, in the amount of US$400,000, this time from her account at Rahn + Bodmer. Ms Gray's evidence is that she and Mr Hurley were in Italy when she gave the instruction for this payment.

44. On 19 November 2015 she paid €2,381,184 to Loris Kessel Auto SA for the Pagani Zonda R. She paid this from her account with Rahn + Bodmer. She was in London when she gave the payment instruction. The invoice from Loris Kessel Auto SA was addressed to Mr Hurley. The car is registered to HK Brothers and is stored with Loris Kessel Auto SA, whose bills have been paid by Ms Gray.

45. On 16 December 2015 Ms Gray transferred US$150,000 to the account of Women of Wukar LLC ("Women of Wukar"), another American company run by Mr Trainer. Ms Gray says that Mr Hurley told her that this related to the advertising software business.

46. Starting in December 2015, and continuing until December 2018, payments were made out of Ms Gray's or Mr Hurley's accounts at Rahn + Bodmer to various professionals instructed in connection with the Investments, i.e. Chetcuti Tax Advisors, CCA Inter-Serv Ltd, BTI Management, LX Management and Sidley Austin LLP. Sidley Austin LLP were retained jointly by Ms Gray and Mr Hurley. I have not been provided with details of the retainers of the other advisors.

47. On 17 December 2015 Mr Hurley made a will in which he stated that he was domiciled in New Zealand.

(2)(c)(iv) 2016

48. In 2016 Mr Hurley spent 161 days in the United Kingdom and 12 days in New Zealand. The equivalent figures for Ms Gray are 186 and 9 days. Mr Hurley says that he spent just under 100 days in Italy in 2016.

49. Between 14 January and 7 April 2016 Ms Gray made four more payments to Women of Wukar LLC, making the total amount paid to that company US$2,435,000. She was in London when she gave the instructions for 3 of these 5 payments, including the largest, of US$1.9million, made on 7 April 2016, following her signature of a loan agreement dated 6 April 2016. She says that Mr Hurley told her that the first three payments were related to the advertising software business, but that the last concerned the skincare business.

50. Also on 14 January 2016, when she and Mr Hurley were in London, Ms Gray transferred US$100,000 to Mr Hurley's account, US$40,000 of which was used to make payments to two prospective business partners in the skincare business, Josh Zucker and Geoff Brandt. She made further transfers, of US$100,000 on 22 February 2019,

when they were in Malta, and of US$110,000 on 3 March 2016, when they were in Italy, which enabled Mr Hurley to make further payments connected with the skincare business and also payments to Luke Jaten, to whom I will return. Ms Gray transferred a total of US$2,459,500 to Mr Hurley in 2016 from her accounts at Rahn + Bodmer.

51. By 14 February 2016 Ms Gray and Mr Hurley had identified Mount Albert Station as a property for sale in New Zealand. Mount Albert Station is a 31,500 acre farm with over 5,000 sheep and 1,000 cattle near Mararora in the Queenstown-Lakes District of the Otago region of the South Island of New Zealand. There are three dwelling houses, two of which are occupied by staff and one of which is uninhabitable.

52. On 6 March 2016 Holman J gave judgment in the divorce proceedings between Ms Gray and Mr Work and ordered that Ms Gray was entitled to an equal share of the marital wealth: [2015] EWHC 834 (Fam). Mr Work appealed. In 2016 Ms Gray received approximately US$120million from Mr Work.

53. On 31 March 2016, when they were in London, Ms Gray transferred a further US$200,000 to Mr Hurley's account.

54. On 27 April 2016 Ms Gray and Mr Hurley travelled from Thailand to New Zealand, where they stayed with Mr Hurley's parents. On 2 May 2016 they went by helicopter to look over Mount Albert Station and speak to the manager. On 5 May 2016 a bid was made for Mount Albert Station and on 9 May 2016, when Ms Gray was in London, she and Mr Hurley entered into a purchase agreement with the owner of Mount Albert Station. The price was NZ$17.2million, plus the value of the livestock and plant. Ms Gray funded this and associated fees and sundry items by transferring US$1,175,512.74 from her account with Rahn + Bodmer to her New Zealand solicitors on 9 May 2016 and US$13,400,051 to the account of 4Hector Limited on 24 August 2016, payments which were treated as totalling NZ$19,818,707.50. On each date, she was in London.

55. On 20 July 2016, when Ms Gray and Mr Hurley were in Italy, 4Hector Limited ("4Hector") was incorporated in New Zealand. Mr Hurley was the registered owner of 76% (i.e. 912) of the 1,200 shares and Ms Hurley of the remaining 24% (i.e. 288). The directors of 4Hector were Mr Hurley, Ms Gray and Mr Hurley's father, Roydon Hector Hurley. The reason for the shareholdings was to comply with the requirements of the New Zealand Overseas Investment Act. Mount Albert Station was transferred to 4Hector. The funds provided by Ms Gray were treated in its accounts as a shareholder's loan in the amount of NZ$20,626,675.

56. On 2 August 2016, when they were in London, Ms Gray transferred US$300,000 to Mr Hurley's account, which Mr Hurley paid on to Mr Jaten in connection with the Zuma Juice business. Mr Hurley proposed this investment to Ms Gray. He had transferred sums of US$90,000, US$10,000 and US$40,000 to Mr Jaten earlier in the year.

57. In addition, a number of companies had been incorporated. These included Bell Green Trading Limited ("Bell Green"), incorporated in Malta on 8 July 2016. Bell Green was intended to be the vehicle for the Zuma Juice business and had contractual relationships with Mr Jaten, his company, Zuma Juice LLC, and the suppliers of ingredients, materials and services for the Zuma Juice business. Ms Gray held 1 share in Bell Green. The remaining 1,499 shares were held by BellTower Trading Limited ("BellTower"), incorporated in Malta on 22 April 2016. Mr Gray held 1 share in BellTower and the

remaining 1,359 were held by Saint Martin PTE Ltd ("Saint Martin"), a company incorporated in Singapore on 18 March 2016, of which Mr Hurley was the only shareholder.

58. On 1 September 2016 Bell Green entered into a Manufacturing and Sales Agreement with Arizona Nutritional Supplements LLC ("ANS") and on 2 September 2016 Mr Hurley transferred US$200,000 from his account to ANS. Ms Gray transferred US$50,000 to Mr Hurley's account on 2 September 2016 and US$99,500 on 23 September 2016. These were both days on which they were in London.

59. On 26 September 2016 Ms Gray rented an apartment in Malta. She and Mr Hurley needed to spend time in Malta in connection with their application for Maltese citizenship.

60. On 1 December 2016 Ms Gray paid €2,250,000 from her account at Rahn + Bodmer to Loris Kessel Auto SA as the price of the Ferrari F1, a car which had been driven in Formula One races in 2003 by Michael Schumacher. She was in London when she gave the instruction for this payment. She made a further payment of €278,000 in January 2017 in respect of import duty and VAT. Again, the car was registered to HK Brothers and stored by Loris Kessel Auto SA.

61. On 6 December 2016 Ms Gray transferred US$1.5million to Mr Hurley's account. She was visiting her grandmother in hospital in California on that day and Mr Hurley was in Italy. On the following day Mr Hurley transferred US$200,000 to Mr Jaten. Then on 16 December 2016 he transferred US$1.3million to the account of Bell Green, which in turn paid US$1,086,095 to ANS and (on 9 February 2017) US$200,000 to Mr Jaten.

62. I note that Ms Gray claims that their relationship began breaking down from late 2016 and that they were arguing a lot. Mr Hurley denies this, pointing to many affectionate text messages written throughout their relationship. Again, I do not propose to go into disputed issues of this nature, which concern the merits of Ms Gray's claims rather than the issue of jurisdiction.

(2)(c)(v) 2017

63. In 2017 Mr Hurley spent 65 days in the United Kingdom and 15 days in New Zealand. The equivalent figures for Ms Gray are 63 and 15 days. The reason why they spent so little time in England in 2017 compared to other years is that they went on a cruise round the world. Ms Gray does not claim to have transferred any money into Mr Hurley's account in 2017 in connection with the Investments.

64. Ms Gray and Mr Hurley became citizens of Malta in February 2017. In Mr Hurley's case, this was on the basis of being Ms Gray's dependant.

65. Between 20 March 2017 and 19 September 2017 Ms Gray transferred a total of US$2,124,960.84 to Bell Green at Mr Hurley's request. Ms Gray was in Panama, the United States, Tahiti or Fiji when she gave the instructions for these payments.

66. On 11 April 2017 the Court of Appeal dismissed Mr Work's appeal against Holman J's judgment: [2018] Fam 35.

(2)(c)(vi) 2018

67. In 2018 Mr Hurley spent 200 days in the United Kingdom and 63 days in New Zealand. The equivalent figures for Ms Gray are 188 and 63 days. Ms Gray says that she transferred US$97,091 to Mr Hurley's account in 2018 in connection with the Investments. This included transfers of US$50,000 on 13 February 2018 and of US$11,000 on 5 July 2018. These were both days on which they were in London.

68. On 21 February and 24 April 2018 Ms Gray transferred US$140,000 and US$90,000 to Bell Green. She was in London when she made these transfers.

69. On 15 May 2018 Ms Gray and Mr Hurley rented a different apartment in Malta.

70. On 31 August 2018 CHF30,000 was paid from Mr Hurley's account at Rahn + Bodmer as the deposit on a Ferrari 488 Pista. Ms Gray contends that Mr Hurley made this payment against her instructions with what was her money, the balance on his account being made up of money transferred by him from the account of 4Hector which she contends she had instructed him to transfer to her account, not his.

(2)(d) Ms Gray and Mr Hurley since January 2019

71. Ms Gray and Mr Hurley were in Malta when she ended their relationship. She asked him to return the keys to her house in London and to San Martino. It is not suggested that he failed to do so. He has not entered the house in London since then. He remained in Malta until 8 March 2019.

72. I have been shown the texts which they exchanged between 19 January and 13 February 2019, which dealt, inter alia, with the return of Mr Hurley's belongings and what was to be done with the Assets. Mr Cohen drew attention to the following message, sent by Mr Hurley on 19 January 2019:

> "I am not interested in playing games. I want to spend my life with you if you want to commit to us. If not, whilst I feel that you are making the biggest mistake of your life (breaking up) for the stupidest reason (money), I respect you enough to allow you the space to do this."

73. Individual messages like this have to be seen in their context. For example, 5 days later, on 24 January 2019, Mr Hurley sent messages which read:

> "I am not interested in trying to talk you out of your decision.
>
> I accept your choice."

74. On 24 January 2019 Ms Gray made a new will, leaving nothing to Mr Hurley. She cancelled his credit card with Rahn + Bodmer with effect from 24 January 2019.

75. Ms Gray and Mr Hurley had telephone conversations on 21, 25 and 26 January 2019, which she recorded. The conversations have to be considered as a whole, but a persistent theme was sorting out their affairs. For instance, on 21 January 2019 they had the following exchange:

> "Ms Gray: Yeah but are you going to return the things that are mine to me?

> Mr Hurley: Well I don't know, what are you going to give me? Like you say, that you've got a bunch of lawyers and they're going to, it's going to be super easy for them to do that, well how are you going to take a farm where you're not allowed any more than 25% ownership in in the first place? Right? It seems a little –
>
> Right so you're going to go to Court in New Zealand and say this is my asset and I actually own it all and it was just a front and I told lies that …"

76. At the end of the conversation on 26 January 2019 there was the following exchange:

> "Mr Hurley: So you robbed me of six years of me being able to do things, yeah?
>
> Ms Gray: OK, I have to go
>
> Mr Hurley: So where's my compensation for that?
>
> Ms Gray: That's just frankly, like, shocking, shocking. …""

77. In January and February 2019 she sent some of his belongings from London to Malta.

78. On 10 February 2019 Mr Hurley wrote a 13-page letter to Ms Gray. This, together with the exchange of text messages, is relied on by Ms Gray, inter alia, as indicating that Mr Hurley would have instantly returned to live with her in London if she had acceded to his request not to end their relationship. The letter has, of course, to be read as a whole. Mr Hurley responded at length to the charge that he had only been with Ms Gray for her money. He dealt with the individual assets and the Investments. He described how he had been since the break-up. There was no express request or suggestion that they should get back together. At best, there were hints, but coupled with expressions of acceptance of the break-up. For example, he said as follows:

> "Today I walked along the waterfront completely happy and truly content for perhaps the first time ever. I felt more in love with you than ever before, yet, also at peace in you leaving me and simply wanting the very very very best for you, no matter what you do to me or how you treat me going forward."
>
> "When I look back on all of the shit that we went through together as a team, you and me, I can see why everything never worked out. I understand it. I wish I could have figured that out when we were together but I couldn't and didn't and for that I am truly sorry. I think you would really like who I am now.
>
> And now I understand what I have to do to make things work for me.
>
> I can't be with someone who thinks I used them."
>
> "I do know that we will be together again in some future life because we are supposed to be. Who else do you know can spend every second of every day with another person and be 100% fulfilled and in love with that person. All I wanted was to drink tea with you and we could have done that on the deck of our one room house for the rest of our lives like we did at Torretta and it was

> more than enough. If that memory is all I have left of us, then that is worth more than all the money in the world can buy and I feel rich."

79. On 13 February 2019 Ms Gray emailed Mr Hurley indicating that she wished to close a joint account which had been opened in their names in Malta with Sparkasse Bank and to transfer the €150,000 investment held in that account to a new account in her sole name. Once advice was received that this would not affect his Maltese citizenship, Mr Hurley agreed to the closure of the account, although it appears that this has not yet been done.

80. On 15 February 2019 Ms Gray's solicitors, Grosvenor Law, wrote to Mr Hurley, asking him to cease all direct communication with her, telling him that she had cancelled his credit card with JP Morgan and his Travel Card, asking him not to transfer any money from his accounts with Rahn + Bodmer and asserting claims to the Cars and other assets. Grosvenor Law wrote a further letter on 19 February 2019.

81. Also on 15 and 19 February 2019 Grosvenor Law wrote to Loris Kessel Auto SA, asserting that the Cars had been purchased with Ms Gray's funds and for her benefit and seeking an undertaking that the Cars would not be disposed of. On 4 March 2019 Grosvenor Law wrote to Colombo & Partners SA, seeking an undertaking that it would not assist Mr Hurley or HK Brothers to dispose of the Cars.

82. Mr Hurley visited London between 8 and 10 March 2019 to collect some more of his belongings, which Ms Gray had placed in a storage unit, to which he was given the keys. He did not stay in, and was not allowed to enter, Ms Gray's house. It is not clear where he did stay. From 11 March to 1 April 2019 Mr Hurley was in the United States.

83. By 11 March 2019 Mr Hurley had instructed English solicitors, Withers LLP, who wrote to Grosvenor Law on that day. There followed an exchange between the solicitors which was in part about the return of any of Mr Hurley's remaining possessions. As part of that correspondence, Grosvenor Law wrote on 12 March 2019 asking whether Withers LLP were instructed to accept service of proceedings and saying:

> "Our client has also instructed us in respect of the potential funding of your firm by your client. Our client asserts a proprietary right to all of the assets set out above as well as to other monies provided to your client for the sole purpose of investing in corporate opportunities. She is unaware of any other source of capital or revenue that your client has (save for very limited cash funds he holds from her). We put you on notice that should our client be left with no alternative but to make proprietary claims, she will seek to trace and follow any of her funds used by your client, including to your firm."

84. On 18 March 2019 Withers LLP wrote a long letter setting out the basis on which Mr Hurley claimed: (i) to have a legal and beneficial interest in San Martino in equal shares with Ms Gray; (ii) to be the legal and beneficial owner of 76% of the shares in 4Hector; (iii) to be the beneficial owner of HK Brothers; and (iv) to have a beneficial interest in the Cars and the Deposits.

85. By 19 March 2019 Ms Gray had instructed lawyers in Switzerland, Borel & Barbey, who wrote to Loris Kessel Auto SA and Colombo & Partners SA.

86. On 19 March 2019 Grosvenor Law wrote to Withers LLP to say that Ms Gray was no longer prepared to fund Mr Hurley's living in the Maltese apartment, which she intended to return to the landlord, and that Ms Gray would be in Malta on 21 March 2019 to clear the Maltese apartment of its contents. On 23 March 2019 Mr Hurley signed an agreement terminating the lease of the Maltese apartment, which he had not occupied after 8 March 2019.

87. By a second letter of 19 March 2019 Grosvenor Law stated that they did not consider that there was anything further to be gained by litigating the matter in correspondence, repeated their request for confirmation whether Withers LLP were instructed to accept service and stated that, if not, Ms Gray would apply for permission for alternative service.

88. On 25 March 2019 Mr Hurley commenced the New Zealand Proceedings by issuing a Notice of Application for Orders in Respect of Relationship Property in the Family Court at Queenstown. The grounds for this application were that he and Ms Gray were in a de facto relationship from April 2013 to January 2019 and that they had permanently separated.

89. On the same day, Mr Hurley, who was then in Honolulu, swore two affidavits in support of his claim in the New Zealand Proceedings. In the affidavit of assets he stated that he owned 76% of the shares in 4Hector and that he had a 50% beneficial interest in San Martino, the Cars, the Deposits and also:

    (1) a yacht which was then on sale for £4.2million;

    (2) Ms Gray's bank accounts with Rahn + Bodmer (with balances which were allegedly about US$10million at least) and Arbuthnot Latham (with balances which were allegedly about US$1.9million);

    (3) various paintings and other art works purchased during their relationship, which he said had a value of over US$9million; and

    (4) various other items in Ms Gray's house, including knives, pots and pans, tea, wine and glasses, a light and some lamps, diving equipment, books, a kindle, a sauna, an ozone generator, a ring and a mattress.

90. By 26 March 2019 Mr Hurley had no house or flat in England. He had a bank account with HSBC in Richmond which had a balance of £5,426.16 according to his affidavit of assets. He had £730 in an ISA.

91. At some point after 26 March 2019, Mr Hurley went to live in New Zealand at his parents' home.

92. Ms Gray swore her affidavit on 9 April 2019. It makes some very serious allegations against Mr Hurley, including that he was manipulating and controlling, that he intimidated her, that he pressured her sexually, that he abused her physically, that he has a delusional sense of self and that he used their relationship as a vehicle to get access to the trappings of a lifestyle which he could not otherwise attain. All of these allegations are denied.

93. On 15 April 2019 Mr Hurley sent a text message to Ms Gray which read:

> "I love you.
> I'm sorry.
> Please forgive me.
> Thank you."

94. On 17 April 2019 Mr Hurley sent a video to Ms Gray which began with his saying:

> "Hi Bunny, I am reaching out to you on a without prejudice basis in the hope that we can amicably settle this, in a way that works for us."

95. Ms Gray contended that, despite this opening, the video, or parts of it, were not covered by the without prejudice privilege. In order to assess that submission, I have read the transcript of what Mr Hurley said in the video. In my judgment, it is a communication made for the purpose of a genuine attempt to compromise the dispute between the parties. Mr Hurley talked about his feelings, but that is hardly surprising in the context of a dispute arising out of the break-up of a romantic relationship, and it was part of the way in which he sought to convey his desire for a settlement. I do not accept Mr Cohen's submission that Mr Hurley was thereby abusing the without prejudice privilege by seeking to manipulate Ms Gray emotionally. Mr Hurley did not make a specific settlement offer, but he clearly communicated, and would be understood by a reasonable recipient of the video as communicating, his desire to "see if we can work this out in a way that works for you and for me".

96. Ms Gray sought to rely on the video as evidence that Mr Hurley wanted to resume his life with her. Mr Cohen described it as "the classic "take me back" form of communication." I do not agree. If I had concluded that the video was not privileged, then I would have found that it did not contain an express request to Ms Gray to take him back and that I was not persuaded that such a request should be implied.

97. On 29 April 2019 Ms Gray's solicitor, Daniel Philip Astaire, made his second witness statement, in which he stated, no doubt on Ms Gray's instructions, that:

> "On or about 19 January 2019, the parties' relationship irretrievably broke down …"

98. On 30 April 2019 Ms Gray commenced proceedings against Mr Hurley in the District Court in Lugano, seeking an interim order against him, HK Brothers and Loris Kessel Auto SA preventing disposal of the Cars. This order was granted on the same day.

(3) Ms Gray's Claims

99. Ms Gray claims that each of the Assets was purchased with her money and that the Investment Monies were paid from her money. She contends that none of these payments were made by way of gift and that all of these payments were made as a result of the exercise by Mr Hurley of undue influence on her. In relation to the Investments, she contends that Mr Hurley acted as her advisor, despite having no ability to do so, but she does not make a claim for negligent advice.

100. On that basis, Ms Gray seeks the following relief, as set out in paragraph 34 of the Particulars of Claim:

"(a) A declaration that she is absolutely entitled to the Italian Property, alternatively an order that Hurley holds any interest in the Italian Property that he may have on resulting trust for Ms Gray.

(b) A declaration that she is absolutely entitled to the shares currently registered in Hurley's name in 4Hector, alternatively an order that Hurley holds any interest in those shares that he may have on resulting trust for Ms Gray.

(c) A declaration that she is absolutely entitled to the Supercars and the Deposits alternatively an order that Hurley holds those Supercars and Deposits on resulting trust for Ms Gray.

(d) Restitution of any interest that Hurley may have in the Italian Property, 4Hector, the Supercars and the Deposits.

(e) Restitution of the sum of USD $9,151,998."

101. Mr Cohen described these as three categories of claim:

(1) the Resulting Trust Claims (i.e. sub-paragraphs (a) to (c)), based on the allegation that a resulting trust was presumed to arise when Ms Gray paid for the purchase of an asset which was not intended as a gift;

(2) the Restitutionary Claims (i.e. sub-paragraph (d)), based on undue influence, which Ms Gray contends gave rise to constructive trusts; and

(3) the Investment Monies Claims (i.e. sub-paragraph (e)), based on undue influence, which Ms Gray again contends gave rise to constructive trusts.

102. Mr Cohen stressed that Ms Gray was not seeking in this action any change in the legal ownership of any of the Assets.

(4) The New Zealand Proceedings

103. In the New Zealand Proceedings, Mr Hurley seeks an order under the New Zealand Property (Relationships) Act 1976. Ms Gray has produced a report from a New Zealand lawyer, Margaret Casey QC, which explains the following:

(1) Under the Property (Relationships) Act, when the parties to a relationship separate, their property is classified as either relationship property or separate property.

(2) The classification is made in accordance with the rules set out in the Property (Relationships) Act. Assets acquired during the relationship are generally relationship assets, but may constitute separate property if acquired using separate property. On the other hand, increases in the value of such property may be treated as relationship property.

(3) Once property has been classified, the general rule is that relationship property will be divided equally between the parties.

104. Ms Casey has also stated that:

(1) The claims made by Ms Gray in these proceedings cannot be determined within the context of the New Zealand Proceedings.

(2) Nor can they be taken into account in classifying assets.

(3) It is conceivable that they might be taken into account by the New Zealand court in deciding whether and, if so, to what extent to depart from the general rule of equal shares of relationship assets.

105. As to jurisdiction, Ms Casey has stated that:

(1) The New Zealand courts have jurisdiction to make orders regarding relationship property where: (i) in the case of immovable property, it is situated in New Zealand; or (ii) in the case of moveable property, one of the parties is domiciled in New Zealand.

(2) For the purposes of determining domicile, the New Zealand courts will apply their internal law. Ms Gray will have the burden of showing that Mr Hurley is not domiciled in New Zealand.

(3) In the case of moveable property, the New Zealand courts have a discretion to decline jurisdiction if orders are sought against a person who is neither domiciled nor resident in New Zealand.

(5) Good Arguable Case

106. It is for Ms Gray to show that she has a good arguable case that this Court has jurisdiction under the Judgments Regulation or that her claim falls within one of the grounds set out in paragraph 3.1 of CPR Practice Direction 6B. The meaning of the expression "good arguable case" has been considered in a number of recent cases. In particular, Lord Sumption said as follows in *Brownlie v Four Seasons* [2018] 1 WLR 192, at [7]:

> "…What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

107. This was explained by the Court of Appeal in *Kaefer v AMS Drilling* [2019] EWCA Civ 10 at [72]-[80], and the resulting position was helpfully summarised by Carr J in *Tugushev v Orlov* [2019] EWHC 645 (Comm), at [59] (where paragraphs (i) to (iii) in Lord Sumption's judgment were referred to as limbs 1 to 3):

"i) The reference to "a plausible evidential basis" in limb 1 is a reference to an evidential basis showing that the claimant has the better of the argument;

ii) Limb 2 is an instruction to the court to overcome evidential difficulties and arrive at a conclusion if it reliably can. Not every evidential lacuna or dispute is material or cannot be overcome. Judicial common sense and pragmatism should be applied, not least because the exercise is intended to be one conducted with due despatch and without hearing oral evidence;

iii) Limb 3 arises when the court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument. It would be unfair for the claim to jurisdiction to fail since, on fuller analysis, it might turn out that the claimant did have the better of the argument. The solution encapsulated in limb 3 moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. This is a more flexible test which is not necessarily conditional upon relative merits."

(6) Article 1(2)(a) of the Judgments Regulation

108. Article 1(2)(a) of the Judgments Regulation provides that the Judgments Regulation does not apply to matters relating to:

> "…rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage."

109. Mr Hurley and Ms Gray were not married, but Mr Hurley submits that the dispute between him and Ms Gray is a matter relating to rights in property arising out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage.

110. What is the law applicable to the relationship between Ms Gray and Mr Hurley? She contends that it is English law (which does not deem their relationship to have comparable effects to marriage) and he contends that it is New Zealand law (which does).

111. Both parties referred to recital 10 to the Rome II Regulation (i.e. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations). The Rome II Regulation contains an equivalent exception to that in Article 1(2)(a) of the Judgments Regulation. Recital 10 states that this exception:

> "should be interpreted in accordance with the law of the Member State in which the court is seised."

112. Ms Gray contends that this means that in this Court English law is the law applicable to any quasi-matrimonial relationship which is being considered by the Court. This proposition is supported by footnote 254 to paragraph 2.59 of Briggs, *Civil Jurisdiction and Judgments* (6th Edn.).

113. Mr Hurley contends that this Court should apply the relevant English choice of law rules. Moreover, Mr Hurley submits that:

(1) Under the relevant English choice of law rules, there is a starting presumption that the law of the husband's domicile applies to govern the mutual property rights of the spouses: see *In Re Egerton's Will Trusts* [1956] Ch 593.

(2) The Court should apply the same presumption when identifying the law applicable to a quasi-matrimonial relationship.

114. I am not persuaded by this argument. *In Re Egerton's Will Trusts* is a controversial decision. There is an argument that it would be contrary to section 6 of the Human Rights Act 1998 for a Court to apply a choice of law rule which discriminates on the ground of sex. I do not need to decide that point. Whatever the status of the decision in *In Re Egerton's Will Trusts*, I do not consider that it would be appropriate to extend it to non-matrimonial relationships.

115. Mr Bailey acknowledged that, if I was not prepared to extend the decision in *In Re Egerton's Will Trusts* in this way, then his argument that Article 1(2)(a) of the Judgments Regulation applied could not succeed. I do not consider that the relationship between Ms Gray and Mr Hurley was a relationship deemed by the law applicable to such relationship to have comparable effects to marriage. Article 1(2)(a) of the Judgments Regulation is inapplicable.

(7) Article 24(1) of the Judgments Regulation: Rights in Rem

116. Article 24 of the Judgments Regulation provides, inter alia, as follows:

> "The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:
>
> (1) in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated."

117. Mr Hurley contends that Ms Gray's claim in relation to San Martino is, in substance, a claim which has as its object rights in rem in San Martino and is therefore a claim to which Article 24(1) applies.

118. Mr Cohen submitted that Article 24(1) does not apply because Ms Gray's claim in relation to San Martino does not have as its objects right in rem (i.e. rights against the world). Her claim is on all fours with the position in *Webb v Webb* (C-294/92), in which the Court of Justice held that an English claim for a declaration that the defendant held immovable property in France on resulting trust for the claimant did not relate to rights in rem and so did not engage the predecessor provision to Article 24(1) in the Brussels Convention 1968. Mr Cohen also relied on *Lightning v Lightning Electrical Contractors Ltd* (1998) unreported, 23 April, CA.

119. Mr Bailey submitted that:

(1) When it comes to determining whether a claim has as its object a right in rem for the purposes of Article 24(1), the court must conduct a careful analysis of what it is in substance that a claimant is seeking, but without concentrating "overly upon the exact wording used in the claim" (see *Magiera v Magiera* [2017] Fam 327, at [47]).

(2) The substantive effect of the declarations which Ms Gray seeks from the English court would be to transfer a right of ownership in San Martino and to terminate the co-ownership of San Martino.

(3) Ms Gray is seeking to reverse the effect of the Preliminary Sale and Purchase Agreement, which declared that she and Mr Hurley would be joint owners of San Martino.

(4) *Webb v Webb* has to be read in the light of the subsequent decisions in *Weber v Weber (Case C-438/12)* [2015] Ch 140, *Komu v Komu (Case C-605/14)* [2016] 4 WLR 26 and *Magiera v Magiera*.

(5) Ms Gray's claim is analogous to the claim in *Komu v Komu*, where the Court of Justice decided that an action for termination of co-ownership of immovable property fell within Article 24(1) because the action was "designed to bring about the transfer of a right of ownership in immovable property" (at [29]).

(6) The right of pre-emption in the Sale and Purchase Agreement meant that any transfer of the ownership in San Martino would have consequences for third parties. Mr Bailey referred in this context to paragraphs 44 to 47 of the Court of Justice's judgment in *Weber v Weber*.

(7) In paragraph 54 of her judgment in *Magiera v Magiera* Black LJ agreed that *Webb v Webb* could be distinguished because in *Magiera* the wife was a joint owner of the property in question, and accordingly the action "could be said to involve the external relations of the trust, rather than (or at the very least, as well as) the internal relations of the trust" (emphasis added).

120. In paragraphs 45 and 46 of her judgment in *Magiera v Magiera*, Black LJ identified two important features of the context for any consideration of Article 24(1), namely that:

(1) as an exception to the general rule and as a provision which removes choice of forum, Article 24 must be narrowly construed; and

(2) the interpretation must not be broader than is required by its objective, and the essential reason for giving exclusive jurisdiction to the courts of the state where the property is situated is that those courts are best placed to ascertain the facts satisfactorily and to apply the "rules and practices … of the state in which the property is situated" where they are apposite.

121. In paragraph 11 of its judgment in *Reichert v Dresdner Bank AG* (Case C-115/88) [1990] ECR I-27 the Court of Justice held that what is now Article 24(1) only applied to:

> "actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with the protection of the powers which attach to their interest."

122. *Webb v Webb* concerned a claim by a father for a declaration that his son held a flat in France on trust for the father, the flat having been purchased with the father's money

but transferred to the son. The Court of Justice stated in paragraphs 18 and 19 of its judgment that:

> "18. … the immovable nature of the property held in trust and its location are irrelevant to the issues to be determined in the main proceedings which would have been the same if the dispute had concerned a flat situated in the United Kingdom or a yacht.
>
> 19. The answer to be given to the question submitted to the Court must therefore be that an action for a declaration that a person holds immovable property as a trustee and for an order requiring that person to execute such documents as should be required to vest the legal ownership in the plaintiff does not constitute an action *in rem* within the meaning of Article 16(1) of the Convention."

123. *Weber v Weber* concerned an action which sought to determine whether the holder had validly exercised a right of pre-emption attaching to property. Such an action was held to fall within the scope of Article 24(1).

124. *Komu v Komu* was an action by three out of five co-owners of two properties for an order appointing a lawyer to sell the properties and fixing a minimum price. The Court of Justice held in paragraph 33 of its judgment that:

> "an action for the termination of co-ownership in undivided shares of immovable property by way of sale, by an appointed agent, falls within the category of proceedings "which have as their object rights in rem in immovable property" within the meaning of [Article 24]."

125. *Magiera v Magiera* concerned an application, following a divorce, made by the wife for an order under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 for the sale of the property in London of which the husband and wife were joint owners and for the equal division of the proceeds. This was held to fall within the scope of Article 24(1). In paragraph 54 of her judgment, Black LJ said as follows:

> "Fortified by the decision in *Komu v Komu* [2016] 4 WLR 26, I agree with Bodey J that the present case should be distinguished from *Webb v Webb* [1994] QB 696. The wife is already a joint owner of the property here, whereas the father in *Webb v Webb* was not. If it is appropriate to analyse what the "principal subject matter" of the claim is here, it is to achieve a sale of the property, as it was in *Komu v Komu*. It would be wrong, in my view, to put too much weight on the fact that the application is technically under section 14 of TLATA for an order relating to the exercise by a trustee of his functions, when such an application is conventionally coupled with, or followed swiftly by, an application for an order for sale by order of the court. The action could be said to involve the external relations of the trust, rather than (or at the very least, as well as) the internal relations of the trust. Reflecting the language of para 29 of *Komu v Komu*, I think it would be fair to describe the wife, as one of the two joint owners of the property both in law and in equity, as having "rights in rem which have effect erga omnes". She is seeking to "protect the powers attached to [her] interest" by "bring[ing] about a transfer of a right of ownership" in the house by a sale of it. Moreover, viewing the matter as a whole, it is clear that

> "the considerations which underlie the first paragraph of article 22(1)" apply here, as they did in *Komu v Komu*."

126. In this paragraph, Black LJ identified several factors in the case of *Magiera v Magiera* which together led her to distinguish *Webb v Webb*:

(1) Mrs Magiera was already a joint owner of the property, and consequently had "rights in rem which have effect erga omnes".

(2) The "principal subject matter" of the claim was to achieve a sale of the property.

(3) "The action could be said to involve the external relations of the trust, rather than (or at the very least, as well as) the internal relations of the trust." It seems that the reason why this was the case was that the property was to be sold.

(4) Mrs Magiera was seeking to "protect the powers attached to [her] interest" by "bring[ing] about a transfer of a right of ownership" in the house by a sale of it.

(5) Viewing the matter as a whole, it was clear that the considerations which underlie Article 24(1) applied.

127. The first of these factors is present in relation to Ms Gray's claim, but the others are not:

(1) It is not the principal subject matter of her claim to achieve a sale of San Martino.

(2) Consequently, her claim does not involve the external relations of the trust (if there is a trust).

(3) Ms Gray is not seeking to bring about a transfer of a right of ownership by a sale of property.

(4) Viewing the matter as a whole, it is not at all clear that the considerations which underlie Article 24(1) apply to Ms Gray's claim, just as they did not apply in *Webb v Webb*.

128. I am not persuaded that the fact that Ms Gray is a joint legal owner of San Martino is sufficient in itself to distinguish this case from *Webb v Webb*.

129. Putting the matter another way, *Komu v Komu* and *Magiera v Magiera* were cases in which there was no dispute, as there was in *Webb v Webb*, about the beneficial ownership of the property in question. Rather, they were cases in which both the claimants and the defendants were acknowledged to have an interest in the property, as joint owners, and the claimants were seeking to give effect to that interest by obtaining an order for the sale of the property. Ms Gray is not seeking an order for the sale of San Martino (and it does not appear that the right of pre-emption would be triggered by a judgment in her favour, as it would be by an order for sale). Nor is she seeking to give effect to her existing interest in San Martino. Rather, she claims that Mr Hurley holds his interest in San Martino on trust for her.

130. Consequently, I have come to the conclusion that Ms Gray's claim, like Mr Webb's claim, falls outside the scope of Article 24(1).

(8) Article 25(1) of the Judgments Regulation: Jurisdiction Agreements

131. Article 25(1) of the Judgments Regulation provides as follows:

> "If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. …"

132. Mr Bailey contended that Article 25(1) applies to Ms Gray's claim in relation to San Martino because article 14 of the Preliminary Sale and Purchase Agreement provides that:

> "This agreement shall be governed by Italian law. Any dispute between the parties regarding the interpretation, execution or termination of this agreement shall be exclusively reserved to the Tribunal of Rome."

133. Mr Bailey accepted that this article was primarily intended to cover disputes between the sellers and the purchasers, but submitted that it was not limited to such disputes. I am not persuaded that Ms Gray's claim falls within the scope of this article. Ms Gray's claim does not involve a dispute as to the interpretation, execution or termination of the Preliminary Sale and Purchase Agreement. Consequently, Article 25(1) is not applicable.

(9) Article 4 of the Judgments Regulation: Domicile

134. Article 4(1) of the Judgments Regulation provides as follows:

> "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

135. The first question which I have to consider is whether Ms Gray has a good arguable case that Mr Hurley was domiciled in England on 26 March 2019. A second question emerged in the course of submissions. If Mr Hurley was not domiciled in England on 26 March 2019, does Ms Gray have a good arguable case that England was his last known domicile, despite Mr Hurley's contention that he was then (and always had been) domiciled in New Zealand?

(9)(a) Domicile for the Purposes of Article 4

136. Article 62(1) of the Judgments Regulation provides as follows:

> "In order to determine whether a party is domiciled in a Member State whose courts are seised of a matter, the court shall apply its internal law."

137. The relevant internal law is to be found in paragraph 9 of Schedule 1 to the Civil Jurisdiction and Judgments Order 2001, which provides, insofar as material, as follows:

> "(2) An individual is domiciled in the United Kingdom if and only if—

(a) he is resident in the United Kingdom; and

(b) the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom.

(3) … an individual is domiciled in a particular part of the United Kingdom if and only if—

(a) he is resident in that part; and

(b) the nature and circumstances of his residence indicate that he has a substantial connection with that part."

"(6) In the case of an individual who—

(a) is resident in the United Kingdom …; and

(b) has been so resident for the last three months or more,

the requirements of sub-paragraph (2)(b) … shall be presumed to be fulfilled unless the contrary is proved."

138. It was not suggested that Mr Hurley was resident or domiciled in any part of the United Kingdom other than England. Both limbs of the test for domicile must be satisfied, and they have to be considered separately and independently: see *High Tech International AG v Deripaska* [2006] EWHC 3276, at [6].

139. As to the meaning of "residence", Carr J helpfully reviewed a number of the relevant authorities in paragraphs 116 to 126 of her judgment in *Tugushev v Orlov* [2019] EWHC 645 (Comm) and Simon Bryan QC set out the following propositions in paragraph 44 of his judgment in *Bestolov v Povarenkin* [2017] EWHC 1968 (Comm) (original emphasis):

"(1) It is possible for a defendant to reside in more than one jurisdiction at the same time.

(2) It is possible for England to be a jurisdiction in which a defendant resides even if it is not his principal place of residence (ie even if he spends most of the year in another jurisdiction).

(3) A person will be resident in England if England is for him a *settled or usual place of abode*. A settled or usual place of abode connotes *some degree of permanence or continuity*.

(4) Residence is not to be judged according to a "*numbers game*" and it is appropriate to address the *quality* and *nature* of a defendant's visits to the jurisdiction.

(5) Whether a defendant's use of a property characterises it as his or her "residence", that is to say the defendant can fairly be described as residing there, is a *question of fact and degree*.

(6) In deciding whether a defendant is resident here, regard should be had to any *settled pattern of the defendant's life* in terms of his presence in England and the reasons for the same.

(7) If a defendant visits a property in England on a regular basis for not inconsiderable periods of time, where his wife and children live, in order to see his wife and children (including where the centre of the defendant's relationship with his children is England), such property has the potential to be regarded as *the family home* or *his home when in England*, which itself is evidence which may go towards supporting the conclusion that England is for him a settled or usual place of abode, and that he is resident in England, albeit that ultimately it is a question of fact and degree whether he is resident here or not, having regard to all the facts of the case including any discernible *settled pattern of the defendant's life* or as it has also been put *according to the way in which a man's life is usually ordered*."

140. The meaning of "substantial connection" is considered in paragraph 4.92 of Briggs, *Civil Jurisdiction and Judgments* (6th Edn.), in a passage relied on by Singh J in *Panagaki v Apostolopoulos* [2015] EWHC 2700 (QB), at [51]:

> "In sum, the point of principle is that 'substantial' should be interpreted as indicating a connection to the United Kingdom which is sufficient to make it appropriate for the courts of the United Kingdom to exercise general jurisdiction over the defendant, without the possibility of being able to stay proceedings in favour of a *forum conveniens* elsewhere, in any and all civil or commercial proceedings brought against him. If that is the consequence of a finding that an individual has a domicile in the United Kingdom, the meaning of 'substantial' should not be diluted or read as meaning only marginally more than *de minimis*."

141. An issue of particular relevance in the present case is how to determine whether someone who was at one stage domiciled in England continues to be, or has ceased to be, so domiciled. As to this Barling J gave the following guidance in his judgment in *Shulman v Kolomoisky* [2018] EWHC 160 (Ch), at [28]:

> "i. The inquiry is a multi-factorial and fact-dependent evaluation, in which all relevant circumstances are considered in order to see what light they throw on the quality of the individual's absence from the UK:
>
> ii. For residence to cease there should be a distinct break in the sense of an alteration in the pattern of the individual's life in the UK
>
> iii. This may well encompass a substantial loosening of social and family ties, but does not require a severance of such ties
>
> iv. The individual's intention to cease residing in the jurisdiction is relevant to the inquiry but not determinative

v. Actions of the individual after the material time (here, the issue of the claim form) may be relevant, if they throw light on the quality of the individual's absence from the UK

vi. If the individual has in fact ceased to be resident according to the applicable criteria, the fact that his motive for doing so was unworthy or even unlawful will not affect the position

vii. One should be careful to avoid the risk of over-analysis in applying what are ordinary English words."

142. In addition, Mr Cohen drew my attention to paragraphs 33 to 35 of the judgment of Teare J in *JSC BTA Bank v Ablyazov* [2016] EWHC 230 (Comm) as an example of a case in which what might be called a conditional intent to return to England was relevant to the question where a person was domiciled. The case concerned a man who left England to escape committal for contempt of court, but who arguably remained domiciled in England until his appeal against the committal decision had been decided, on the basis that he would have returned to England if his appeal had been successful.

(9)(b) The Defendant with No, or Unknown, Domicile

143. In his skeleton argument, Mr Cohen submitted that a person cannot as a matter of law have no domicile and that, as a result, Mr Hurley could not establish that he had ceased to be domiciled in England until he could show that he was domiciled in another state. I invited the parties to consider this issue further and each made written submissions. Mr Cohen's preferred formulation of his submission was that the court of a Member State in which a defendant was known to have been domiciled must take jurisdiction under Article 4(1) of the Judgments Regulation unless and until that person can couple apparently broken domicile in the Member State with positive domicile in another Member State or a Third State. He relied for the purposes of this submission on paragraphs 40 to 46 of the Court of Justice's judgment in *Hypotecni banka a.s. v Lindner Case* C-327/10 and on paragraph 40 of the Court of Justice's judgment in *G v de Visser* [2013] QB 168.

144. *Lindner* was a case concerning what is now Article 18(2) of the Judgments Regulation (Article 16(2) of its predecessor regulation), which provides as follows:

> "Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled."

145. Mr Lindner was a German national who was sued in the Czech courts. He had been domiciled in the Czech Republic, but by the time the action was brought he was not staying at any known address and he was adjudged to be a person whose domicile was unknown. In paragraphs 39 to 45 of its judgment, the Court of Justice said as follows:

> "39 In this regard, as the case in the main proceedings concerns an action brought against the consumer by the other party to the contract, it must be borne in mind that Article 16(2) of Regulation No 44/2001 provides that such proceedings may be brought only in the courts of the Member State in which the consumer is domiciled.

> 40 Thus, where proceedings against a consumer are brought before a national court, that court must, first of all, determine whether the defendant is domiciled in the Member State of that court by applying, in accordance with Article 59(1) of Regulation No 44/2001, that Member State's own law.
>
> 41 Secondly, where, as is the case in the main proceedings, that court concludes that the defendant in the main proceedings is not domiciled in the Member State of that court, it must then examine whether he is domiciled in another Member State. To this end it applies, in accordance with Article 59(2) of Regulation No 44/2001, the national law of that other Member State.
>
> 42 Lastly, where the national court, on the one hand, is still unable to identify the place of domicile of the consumer and, on the other hand, also has no firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union, a situation in which Article 4 of Regulation No 44/2001 may be applicable, it is necessary to examine whether Article 16(2) of that regulation may be interpreted as meaning that, in a case such as that envisaged, the rule on jurisdiction of the courts of the Member State in which the consumer is domiciled, laid down in the latter provision, also covers the consumer's last known domicile.
>
> 43 Such an approach appears to be based on the logic of that regulation and is in keeping with the system established by it.
>
> 44 It is, above all, in accordance with the objective, pursued by Regulation No 44/2001, of strengthening the legal protection of persons established in the European Union, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (see, inter alia, Joined Cases C‑509/09 and C‑161/10 eDate Advertising and Others [2011] ECR I‑0000, paragraph 50).
>
> 45 Such a solution, while promoting the application of the uniform rules laid down by Regulation No 44/2001 as opposed to that of divergent national rules, then enables a situation to be avoided in which the fact that it is not possible to identify the current domicile of the defendant precludes determination of the court having jurisdiction, thereby depriving the applicant of his right to bring proceedings. Such a situation may arise, inter alia, in a case such as that in the main proceedings, in which a consumer who, pursuant to Article 16(2) of that regulation, ought to be sued in the courts of the Member State in which he is domiciled, renounced his domicile before the proceedings against him were brought.
>
> 46 Lastly, for the purpose of applying Article 16(2) of Regulation No 44/2001, the criterion of the consumer's last known domicile ensures a fair balance between the rights of the applicant and those of the defendant precisely in a case such as that in the main proceedings, in which the defendant was under an obligation to inform the other party to the contract of any change of address occurring after the long-term mortgage loan contract had been signed."

146. Mr Cohen submitted that the same reasoning applied to Article 4(1) and that it should be read as extending to the defendant's last known domicile in a case where the Court:

(1) is unable to identify the defendant's place of domicile; and (2) has no firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union. I agree. Mr Bailey pointed out that the decision was based in part on the particular feature of the *Lindner* case that Mr Lindner was under a contractual obligation to notify the bank of any change of address on his part, but I do not read the decision as limited to cases in which there is such an obligation. The Court of Justice's judgment in *G v de Visser* [2013] QB 168 lends support to this view.

147. I do accept Mr Bailey's submission that the burden of proof remains on Ms Gray and that the wording of the judgment in *Lindner* should not be read as imposing a burden on Mr Hurley to prove that he is domiciled in New Zealand.

148. In considering whether Mr Hurley was domiciled in New Zealand, the test to be applied is that set out in paragraph 9(7) of Schedule 1 to the Civil Jurisdiction and Judgments Order 2001, which provides as follows:

> "An individual is domiciled in a state other than a Regulation State if and only if—
>
> (a) he is resident in that State; and
>
> (b) the nature and circumstances of his residence indicate that he has a substantial connection with that state."

(9)(c) Is there a Good Arguable Case that Mr Hurley was Domiciled in England?

149. Mr Cohen submitted that:

(1) Mr Hurley had been resident in England since 2002.

(2) He did not reside anywhere else. In particular, he was not resident in New Zealand.

(3) His principal relationship for nearly 6 years had been with Ms Gray, who was resident in England.

(4) He had worked in England for 10 years.

(5) He claimed in his affidavit of assets to be the joint owner of various personal possessions in her home. (This does not seem to me to be a factor which carries much weight. There was no suggestion that she would voluntarily part with any of these possessions. She had returned everything which belonged to him.)

(6) There was no clean break in 2019. In particular, Mr Hurley had not gone to New Zealand by 26 March 2019 and had not by then established a significant connection with New Zealand.

(7) As to Mr Hurley's intentions:

(a) He was unlikely to stay in New Zealand. He had left for work-related reasons, which no doubt still applied.

(b) He would come back to London if Ms Gray would have him back. Mr Cohen relied, in particular, on the text message dated 19 January 2019, on the letter dated 10 February 2019 and on the email dated 15 April 2019. He also sought to rely on the video sent on 19 April 2019, but that video is privileged and, even if it were not privileged, it would not assist.

150. Mr Bailey submitted that:

(1) Mr Hurley had retained his New Zealand domicile throughout his life. He went back there regularly and stayed with his family. All of his family were in New Zealand. There was a permanent connection to New Zealand. He was resident there and not merely stopping over as a traveller. He considered himself to be domiciled in New Zealand.

(2) If he had become domiciled in England by 2012, Mr Hurley lost that domicile in 2013.

(3) Mr Hurley did not reacquire an English domicile after 2013. He led an international lifestyle. He did not work or pay tax in England. He did not have any significant assets in England. They thought of San Martino as their home.

(4) In any event, Mr Hurley ceased to be domiciled in England in January 2019. He lost his only residence in England. He only returned to England to collect the remainder of his belongings. He has now gone home to New Zealand. He has not bought himself a home there because he has no money.

151. I have no doubt that there is a good arguable case that Mr Hurley was domiciled in England from 2014 down to the middle of January 2019. I need not reach a decision as to whether he was domiciled in England before that, but I bear in mind the nature of his connections with England before 2014 when considering the position in 2019.

152. Mr Bailey quite properly accepted that by the beginning of 2019 Mr Hurley was resident in England. He was resident in Ms Gray's house, where he spent a considerable amount of time. Moreover, in my judgment the nature and circumstances of his residence indicated that he had a substantial connection with the United Kingdom. He was resident in England because that was the home of the woman with whom he was in a long-term relationship. He had been resident in England for 10 years before that relationship began. The facts that he and Ms Gray spent time travelling and that they had acquired assets overseas did not prevent him having a substantial connection with the United Kingdom.

153. By 26 March 2019, however, Mr Hurley had ceased to be resident in England and therefore had ceased to be domiciled in England. He had been excluded from his only residence in England. He had taken no steps to acquire an alternative residence in England. Many of his belongings had been sent to him in Malta. He had only returned to England briefly to collect the remainder of his belongings. His principal connection with England since 2013 had been his relationship with Ms Gray, and that was at an end. He had stated in the New Zealand Proceedings that they had permanently separated. Ms Gray's evidence in this action, in the form of Mr Astaire's second witness statement, is that that relationship had broken down irretrievably. I am not persuaded that the evidence shows that Mr Hurley seriously believed that there was a

prospect that they would get back together and that he would come back to England to live with Ms Gray, but in any event the effect of Ms Gray's evidence is that any hope which he may have had for a reconciliation was a forlorn one and is not, in my judgment, a basis for finding that he continued to be resident in England.

154. For the sake of completeness, I add that, if Mr Hurley had been resident in Malta, he had ceased to be resident there by 26 March 2019.

(9)(d) Is there a Good Arguable Case that he was not Domiciled in New Zealand?

155. Mr Hurley spent time in New Zealand in each of the five years from 2014 to 2018, as well as on three occasions between July 2002 and September 2011. On each occasion, he stayed with his parents. Was the nature and quality of the time which he spent there such as to constitute residence? This is a question of fact and degree. I have already set out the evidence as to the nature of the domestic arrangements in his parents' house. I conclude that his visits to New Zealand over the years were not of such a nature that he was resident there during the period of his relationship with Ms Gray

156. Following their break-up, Mr Hurley did not return to New Zealand before 26 March 2019, and so it remained the case that he was not resident there. Consequently, in my judgment, Mr Hurley was not domiciled in New Zealand on 26 March 2019.

(9)(e) Conclusion on Article 4

157. I conclude that Ms Gray was entitled to serve the claim form on Mr Hurley out of the jurisdiction on the basis that England was his last known domicile, pursuant to Article 4, as extended in the manner set out in the judgment of the Court of Justice in *Lindner*.

(10) Permission to Serve the Claim Form out of the Jurisdiction

158. My conclusion that Ms Gray was entitled to rely on the Judgments Regulation renders redundant her application pursuant to CPR 6.37 for permission to serve the claim form out of the jurisdiction. However, it is appropriate to state how I would have dealt with that application, in case I am wrong on the application of the Judgments Regulation. In order to obtain such permission, she would have to show:

(1) that there is a serious issue to be tried on the merits of her claims;

(2) that there is a good arguable case that the claims fall within one or more of the grounds set out in paragraph 3.1 of Practice Direction 6B; and

(3) that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute and that the Court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

159. Had I found that the claim in respect of San Martino was subject to Article 24(1) or 25(1) of the Judgments Regulation, then Ms Gray would not have been able to apply for permission to serve the claim form out of the jurisdiction insofar as it raises that claim. However, given my conclusion in relation to Articles 24(1) and 25(1), that issue does not arise.

(11) Serious Issue to be Tried

160. Mr Hurley accepts that there is a serious issue to be tried in respect of Ms Gray's claims: that each of the Assets was purchased with her money; that the Investment Monies were paid from her money; that none of these payments were made by way of gift; and that all of these payments were made as a result of the exercise by Mr Hurley of undue influence on her.

161. However, Mr Hurley contends that there is no serious issue to be tried on:

(1) Ms Gray's claims in respect of the Cars, since Mr Hurley is not the registered legal owner of the Cars;

(2) Ms Gray's claims in respect of the Investment Monies, insofar as those monies were not paid directly to Mr Hurley; and

(3) Ms Gray's claim in respect of the shares in 4Hector, since her claim ought properly to be a claim in debt against 4Hector.

162. I deal with each of these submissions in turn.

(11)(a) Serious Issue to be Tried: the Cars

163. I do not consider that the fact that the Cars are registered in the name of HK Brothers means that there is not a serious issue to be tried between Ms Gray and Mr Hurley in relation to the Cars. Whatever the effect of the registration of the Cars as a matter of Swiss law, Mr Hurley's own case, as set out in Withers' letter of 18 March 2019 and in his affidavit of assets in the New Zealand Proceedings, is that he has a beneficial interest in the Cars. Necessarily, therefore, he himself regards HK Brothers as a mere nominee. Moreover, it is a nominee which he controls.

164. The real dispute about the beneficial ownership of the Cars is between Ms Gray and Mr Hurley. It would be surprising if a defendant who had used undue influence to cause a claimant to buy him a car could defend the claimant's claim against him simply by virtue of the fact that he had arranged for the car to be purchased in the name of a nominee company. *Goff & Jones: The Law of Unjust Enrichment* (2018) 9th Edn., para. 4.65 cites the dictum by Lord Sumption in *Prest v Petrodel Resources ltd* [2013] 2 AC 415, at [32] that:

> "… receipt by a company will count as receipt by the shareholder if the company received it as his agent or nominee, but not if it received it in its own right."

165. Mr Bailey submitted that Ms Gray's claim as formulated was merely a device to avoid bringing a claim against HK Brothers, but that is not an answer to the question whether the claim against Hurley raises a serious issue to be tried. Nor were Mr Bailey's references to the fact that: (a) Ms Gray has proceeded against HK Brothers in the Swiss Proceedings; (b) Ms Gray is not claiming ownership of the shares in HK Brothers; and (c) legal title to the Cars is not vested in Mr Hurley. I conclude that Ms Gray's claims in respect of the Cars each give rise to a serious issue to be tried.

(11)(b) Serious Issue to be Tried: the Investment Monies

166. Ms Gray's pleaded case in relation to the Investment Monies is that she paid a total of US$4,056,591 direct to Mr Hurley and US$5,095,407 to third parties. I will refer to her claims for restitution of the monies paid to Mr Hurley as the Direct Investment Monies Claims and to her claims for restitution of the monies paid to third parties as the Indirect Investment Monies Claims. Mr Bailey submitted that there was no serious issue to be tried on the Indirect Investment Monies Claims, because it could not be said that Mr Hurley had been enriched by payments made by Ms Gray to third parties, in particular to Women of Wukar and Bell Green.

167. Mr Cohen did not contend that either of these companies were nominees of Mr Hurley. (Mr Hurley had a substantial indirect interest in Bell Green, but it was a trading company and did not simply receive money to be held for him.) Instead, Mr Cohen relied on paragraph 27 of the judgment of Lord Clarke in *Menelaou v Bank of Cyprus UK Ltd* [2016] AC 176, which is in the following terms:

> "I would accept those submissions, which support the conclusion in para 24 above. I would reject the submission that there must be a direct payment by the bank to Melissa. Such a requirement, while sufficient, is not in my view necessary because it would be too rigid. As I see it, whether a particular enrichment is at the expense of the claimant depends on the facts of the case. The question in each case is whether there is a sufficient causal connection, in the sense of a sufficient nexus or link, between the loss to the bank and the benefit received by the defendant, here Melissa."

168. This paragraph has to be read in its context. Lord Clarke identified in paragraph 20 of his judgment the four questions to be asked in a case of unjust enrichment. The first two questions are: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? As Lord Clarke said in paragraph 20 of his judgment, there was no doubt that the claimant, Melissa Menelaou, had been enriched. The essential question in that case was whether she had been enriched at the expense of the defendant, the Bank of Cyprus Plc.

169. The present case is different. The essential question in this is case is whether Mr Hurley was enriched at all. Mr Bailey drew my attention to paragraphs 46 to 51 of Lord Reed's judgment in *Investment Trust Companies v Revenue & Customs Commissioners* [2018] AC 275, which seem to me to be more pertinent. In particular, having referred to cases of payment to an agent or payment in discharge of another's debt, Lord Reed said as follows in paragraphs 50 and 51 of his judgment:

> "50. It has often been suggested that there is a general rule, possibly subject to exceptions, that the claimant must have directly provided a benefit to the defendant. The situations discussed in the two preceding paragraphs can be reconciled with such a rule, if it is understood as encompassing a number of situations which, for the purposes of the rule, the law treats as equivalent to a direct transfer, in the sense that there is no substantive or real difference. So understood, the suggested rule is helpful. It may nevertheless require refinement to accommodate other apparent exceptions, and it would be unwise at this stage of the law's development to exclude the possibility of genuine exceptions, or to rule out other possible approaches.

> 51. Where, on the other hand, the defendant has not received a benefit directly from the claimant, no question of agency arises, and the benefit does not consist of property in which the claimant has or can trace an interest, it is generally difficult to maintain that the defendant has been enriched at the claimant's expense. …"

170. In the present case, when, for instance, in April 2016 Ms Gray signed a loan agreement with Women of Wukar and paid US$1.9million to Women of Wukar, it is difficult to see how it can be suggested that Mr Hurley was thereby enriched. Paragraphs 30 to 33 of the Particulars of Claim, which assert that Mr Hurley's role was that of advisor to Ms Gray and that he exercised undue influence over her, do not provide an answer to this question. For instance, it is not alleged that these payments went to pay Mr Hurley's debts or that they were made to Mr Hurley's agents or nominees. On the contrary, it is Ms Gray's case that these were her investments, albeit made as a result of what she says was Mr Hurley's undue influence and bad advice.

171. In all the circumstances, it does not seem to me that there is any arguable basis on which it could be said that Mr Hurley was unjustly enriched by the payments which Ms Gray made to Women of Wukar, Bell Green or the associated professional advisors. Consequently, I conclude that there is no serious issue to be tried on the Indirect Investment Monies Claims.

(11)(c) Serious Issue to be Tried: 4Hector

172. I do not regard the fact that Ms Gray has a potential claim against 4Hector for repayment of the shareholder loan as meaning that her claim against Mr Hurley in respect of the shares in 4Hector does not give rise to a serious issue to be tried. The claim against 4Hector would be a personal claim for payment of a debt, rather than a claim to a beneficial interest in the shares in 4Hector.

173. Mr Bailey also referred to the Overseas Investment Act and the advice which Ms Gray received in relation to it when Mount Albert Station was purchased. These matters may give rise to arguable defences to her claim. It may be alleged either: (a) that her true intention, unaffected by any undue influence, was to comply with the Act by making a gift to Mr Hurley of 76% of the shares in 4Hector; or (b) that her claim should fail because her beneficial ownership of more than 25% of the shares in 4Hector would involve illegality under the law of New Zealand. These are matters to be addressed when Ms Gray's claim is tried, but it does not seem to me that they mean that there is no serious issue to be tried.

(12) Grounds set out in paragraph 3.1 of Practice Direction 6B

174. Ms Gray submits that she has a good arguable case that:

(1) all of her claims fall within ground (1) (domicile); alternatively

(2) her claims fall within:

(a) ground (15) (trusts), which applies to the Resulting Trust Claims and the Restitutionary Claims; and/or

(b) ground (16) (restitution), which applies to the Restitutionary Claims and the Investment Monies Claims; and

(c) ground (4A) (additional claims), which applies to any claims to which grounds (15) and (16) do not apply.

175. I deal with each of these in turn.

(12)(a) Ground (1): Domicile

176. Ground (1) is in the following terms:

> "A claim is made for a remedy against a person domiciled within the jurisdiction."

177. Ms Gray only sought to rely on this ground in the event that I decided (which I have not) that the Jurisdiction Regulation was inapplicable by reason of Article 1(2)(a). So I need say no more about ground (1).

(12)(b) Ground (15): Trusts

178. Ground (15) is in the following terms:

> "A claim is made against the defendant as constructive trustee, or as trustee of a resulting trust, where the claim arises out of acts committed or events occurring within the jurisdiction or relates to assets within the jurisdiction."

179. Mr Cohen submitted that both the Resulting Trust Claims and the Restitutionary Claims fell within this ground, but not the Investment Monies Claims. The parties agreed that the law is correctly stated in Briggs, *Civil Jurisdiction and Judgments* (6th Edn.) at paragraph 4.80 insofar as it states that what are required are "substantial and efficacious acts, even if accompanied by substantial acts done elsewhere."

180. It seems to me that there is a good arguable case that substantial and efficacious acts were committed in the jurisdiction when:

(1) Ms Gray signed the Preliminary Sale and Purchase Agreement on 21 November 2014 for the purchase of San Martino (even though she was in Italy when she gave instructions on 19 May 2015 for the transfer of the purchase price to the Italian notary and when the sale was completed by the signature of the Sale and Purchase Agreement on 21 May 2015);

(2) Ms Gray signed the purchase agreement for Mount Albert Station on 9 May 2016 and gave instructions on 24 August 2016 for the transfer of the balance of the purchase price (even though she was in Italy when 4Hector was incorporated).

(3) Ms Gray gave instructions for the payment of:

(a) the price of the Pagani Zonda R (on 19 November 2015);

(b) the price of the Ferrari F1 (on 1 December 2016); and

(c) the first instalment of the deposit on the Pagani Huayra Roadster (on 12 November 2015).

181. Consequently, ground (15) applies to Ms Gray's claims in respect of those assets. On the other hand, I am not persuaded that ground (15) applies to Ms Gray's claims in relation to the purchase of the Ferrari 458 Speciale or the Pagani Huayra Coupe or the payment of the Deposit on the Ferrari 488 Pista.

(12)(c) Ground (16): Restitution

182. Ground (16) is in the following terms:

> "A claim is made for restitution where –
>
> (a) the defendant's alleged liability arises out of acts committed within the jurisdiction; or
>
> (b) the enrichment is obtained within the jurisdiction; or
>
> (c) the claim is governed by the law of England and Wales."

183. Mr Cohen contended that this ground applied to the Restitutionary Claims and the Investment Monies Claims. As to the latter, I need only consider the Direct Investment Monies Claims.

(12)(c)(i) Ground (16)(a): Acts Committed within the Jurisdiction

184. I have already dealt with the question whether Mr Hurley's alleged liability on the Restitutionary Claims arises out of acts committed within the jurisdiction. As for the Direct Investment Monies Claims, Ms Gray's evidence is that she and Mr Hurley were in London when she gave instructions for the following transfers to Mr Hurley's account:

(1) US$1million on 12 May 2015:

(2) US$100,000 on 6 August 2015;

(3) US$100,000 on 14 January 2016;

(4) US$200,000 on 31 March 2016;

(5) US$300,000 on 2 August 2016;

(6) US$50,000 on 2 September 2016;

(7) US$99,500 on 23 September 2016;

(8) US$50,000 on 13 February 2018; and

(9) US$11,000 on 5 July 2018.

185. I accept that there is a good arguable case that the claims for restitution of these payments arise out of acts committed in the jurisdiction. Ms Gray was not in London

when she made the other payments which are subject to the Direct Investment Monies Claims, including the payment of US$1.5million on 6 December 2016, and I am not persuaded that her claims for restitution of those payments arise out of acts committed within the jurisdiction.

(12)(c)(ii) Ground (16)(b): Enrichment Obtained within the Jurisdiction

186. Mr Cohen submitted that Mr Hurley was enriched in England because:

(1) he was resident in England; and/or

(2) he was in London when many of the transfers were made.

187. It seems to me that an enrichment is obtained where the transferred asset is located, and not where the Defendant happens to be, or to be resident, when the transfer is made. It follows that ground (16)(b) does not apply to any of Ms Gray's claims.

(12)(c)(iii) Ground (16)(c): Claim Governed by English Law

188. The relevant choice of law rules are to be found in Article 10 of the Rome II Regulation, which provides as follows:

> "1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.
>
> 2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.
>
> 3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.
>
> 4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply."

189. Mr Cohen submitted that paragraph 1 did not apply. Mr Bailey submitted that it did, but that it operated to apply different laws to different claims. For instance, he submitted that Ms Gray's claims in respect of San Martino arose out of the purchase of an Italian property by means of an agreement subject to Italian law, and so the applicable law was Italian law. I do not accept this submission. The relevant relationship between Ms Gray and Mr Hurley was their romantic relationship, which either did or did not lead her to make gifts to him, and which either did or did not involve him exercising undue influence over her. I have already rejected Mr Bailey's argument that that relationship was governed by New Zealand law. I agree with Mr Cohen that this is not a suitable case for the application of paragraph 1.

190. As to paragraph 2, I accept Mr Cohen's submission that both Ms Gray and Mr Hurley were habitually resident in England when the events giving rise to the alleged unjust enrichments occurred. As I have said, Mr Bailey rightly conceded that Mr Hurley was resident in London by 2019. I find that he had been so since 2014. Mr Bailey submitted that this residence was not of such a nature that Mr Hurley was habitually resident in England, but it seems to me that it was. During those five years, Mr Hurley spent more time in London than anywhere else (763 days in total, an average of 152 days per year) and, whereas his residences overseas were all brief or temporary or both, the house in London was a home.

191. Accordingly, I conclude that ground (16)(c) applies to all of the Restitutionary and Direct Investment Monies claims.

(12)(d) Ground (4A): Additional Claims

192. Ground (4A) is in the following terms:

> "A claim is made against the defendant in reliance on one or more of paragraphs (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts."

193. I have concluded that:

(1) ground (16)(c) applies to all of the Direct Investment Monies Claims (and ground (16)(a) also applies to many of them);

(2) ground (16)(c) applies to all of the Restitutionary Claims (and grounds (15) and (16)(c) apply to many of them); and

(3) ground (15) applies to all of the Resulting Trust Claims except those in respect of:

(a) the Ferrari 458 Speciale;

(b) the Pagani Huayra Coupe; and

(c) the Deposit on the Ferrari 488 Pista.

194. Ground (4A) applies to these last three Resulting Trust Claims. As a result, all of the Resulting Trust Claims, the Restitutionary Claims and the Direct Investment Monies Claims fall within one or more of the grounds.

(13) Appropriate Forum

195. It is for Ms Gray to show that England is clearly the appropriate forum for the trial of her claims. Mr Cohen submitted that:

(1) Ms Gray and Mr Hurley were both habitually resident in England between 2014 and 2018.

(2) Some of the relevant acts and events took place in New Zealand, Italy, Switzerland and elsewhere, but, looking at the dispute as a whole, more of the relevant acts and events took place in England than in any other country.

(3) Ms Gray's claims are subject to English law. In relation to the Resulting Trust Claims, he relied on the Court of Appeal's judgment in *Lightning v Lightning Electrical Contractors Ltd* (1998) unreported, 23 April, CA.

(4) Potential witnesses are likely to be situated in several different countries, making their location a neutral factor.

(5) England is the only forum in which all of Ms Gray's claims can be heard together. He questioned whether some, at least, of Ms Gray's claims could be heard at all if they were not heard in England, but there was no evidence on this point, save for Ms Casey's report, which indicates that the New Zealand court dealing with the New Zealand Proceedings will not have jurisdiction to deal with San Martino, would not consider Ms Gray's claims in unjust enrichment and might not deal with the claims concerning the Cars or the Investments, since those concerned moveable property outside New Zealand.

196. Against that, Mr Bailey submitted that:

(1) Mr Hurley was not habitually resident in England. (I have already rejected that submission.) He is no longer resident in England and has no assets here.

(2) None of the Assets are in England.

(3) Most of the witnesses are outside England.

(4) The governing law is not necessarily English law and, in any event, is not a significant factor in this case. (There will be a dispute as to the governing law of the Resulting Trust Claims, with Mr Bailey relying, inter alia, on *Martin v Secretary of State for Work and Pensions* [2009] EWCA Civ 1289, but I have already held that the governing law for the Restitutionary Claims and the Direct Investment Monies Claims is English law. It strikes me that there would be significant savings in this case if English law were to be applied by an English court rather than a court unfamiliar with English law.)

(5) There are already proceedings on foot in Switzerland and New Zealand. (However, the Swiss Proceedings are for interim relief only and the New Zealand Proceedings are subject to the limitations identified by Ms Casey.)

(6) The Italian courts have exclusive jurisdiction over the claim concerning San Martino. (I have already decided that that is not the case.)

(7) A trial of the whole dispute in one jurisdiction might be desirable, but it would not be possible. (That submission was primarily based on the contention that the Italian courts have exclusive jurisdiction over the claim concerning San Martino, but it is right to recognise that the claim under the New Zealand Property (Relationships) Act is unlikely to be litigated anywhere except in New Zealand: I say nothing at this stage about Ms Gray's application for an anti-suit injunction.)

(8) Any judgment given in England might be unenforceable in New Zealand, whose courts would apply the Property (Relationships) Act in any event.

197. Having weighed up all of these factors, I have come to the conclusion that England is clearly the appropriate forum for the trial of Ms Gray's claims. The parties and their dispute had a substantial connection with England, it was in England more than anywhere else that the relationship at issue was carried on and that Ms Gray entered into transactions or authorised payments (allegedly acting under Mr Hurley's undue influence and without intending to make gifts to him) and many (if not all) of the claims are governed by English law. No other forum appears to be suitable for the trial of the dispute as a whole. The fact that the parties acquired assets in different jurisdictions, where some of the potential witnesses are located, including Mr Hurley's country of origin, does not detract from the conclusion that England is clearly the appropriate forum.

(14) Conclusion

198. For the reasons which I have given, I conclude that Ms Gray was entitled to serve the claim form on Mr Hurley out of the jurisdiction. If I were wrong about that, I would have granted permission to serve the claim form out of the jurisdiction, save insofar as the claim form asserts the Indirect Investment Monies Claims.

199. I wish to record my gratitude to all solicitors and counsel for the manner in which this case was prepared and presented. There was a great deal of evidence to be considered and a large number of arguments to be addressed. It is to their credit that all of this could be dealt with in a single day's hearing.