Neutral Citation Number: **[2021] EWHC 188 (Ch)**

Case No: BL-2018-002614

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS LIST(ChD)**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **3 February 2021**

**Before** :

**Mr Justice Morgan**

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**Between :**

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| **Joseph Benkel (trustee in bankruptcy of Eliezer Fishman)** | **Claimant** |
| **- and -** | |
| **(1) East-West German Real Estate Holding** | |
| **(2) Mirella Elena Helbet** | |
| | **Defendants** |

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**Simon Colton QC and Sam O'Leary** (instructed by **Fieldfisher**) for the **Claimant**
**Jamie Riley QC and James McWilliams** (instructed by **Asserson Law**) for the **Defendant**

Hearing dates: **2 and 3 February 2021**

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**Mr Justice Morgan** **Wednesday, 3 February 2021**

(**11.00** am)

Judgment by **MR JUSTICE MORGAN**

1. This is an application by the claimant to join a Mr Dikautschitsch as a third defendant to these proceedings. The application is opposed by Mr Dikautschitsch, and I will proceed on the basis that it is also opposed by the existing defendants. Mr Dikautschitsch has been represented on this application by Mr Riley QC and Mr McWilliams. They are the counsel who are also acting for the existing defendants.
2. It is necessary to set out some of the procedural history of this litigation. I will begin by referring to the parties to the claim.
3. The claimant is a Mr Benkel, an Israeli attorney, who is the trustee in bankruptcy of Mr Eliezer Fishman, an Israeli citizen who has been made bankrupt in Israel. The Israeli bankruptcy proceedings have been recognised in this jurisdiction as foreign main proceedings by an order made in the Chancery Division on 7 December 2018.
4. The first defendant has been referred to as East-West UK which is a company incorporated in this jurisdiction as a company limited by guarantee. East-West UK owns all the shares in a company incorporated in Germany and known as East-West Germany.
5. The second defendant is Ms Helbet. She is the sole member of East-West UK. Before these proceedings, she was the managing director of East-West Germany but she has since been removed. Ms Helbet is a Romanian national who lives in Ibiza.
6. The proposed third defendant is Mr Dikautschitsch. He is a German citizen, and he lives with Ms Helbet in Ibiza. Together they have a young daughter who lives with them there.
7. The claim form was issued on 11 December 2018. The claim form claimed the following relief: {A/1/2}

   "The claimant seeks a declaration that ...(1) the First Defendant held its powers, rights and interest in ... [East-West Germany] as trustee and nominee for Mr Fishman and now holds such powers,

right and interest as trustee and nominee for the Claimant (as Mr Fishman's trustee in bankruptcy). (2) The Second Defendant held her powers, rights and interest in the First Defendant as trustee and nominee for Mr Fishman and now holds such powers, rights and interest as trustee and nominee for the Claimant (as Mr Fishman's trustee in bankruptcy).

Alternatively (3) that the Second Defendant held a beneficial interest in [East-West Germany] on trust for Mr Fishman and now holds such interest as trustee and nominee for the Claimant (as Mr Fishman's trustee in bankruptcy)."

8. The claim as pleaded continues with the following head of relief:

"The claimant further seeks an order that the shares in East-West Germany and the full ownership and control of the First Defendant be transferred to him in his capacity as Mr Fishman's trustee in bankruptcy."

9. I will next refer to the claim as it appeared in the amended particulars of claim, the amendment being made in March 2020 pursuant to permission given on 20 February 2020.

10. The amended particulars of claim {X/3/1} identify Mr Benkel and Mr Fishman. They also refer to East-West UK and Ms Helbet. They then refer to East-West Germany. They refer to the alleged circumstances in which East-West UK acquired the shares in East-West Germany. Paragraphs 11 and 12 of the amended particulars of claim {X/3/3} refer to a further corporate entity, JURAG Chemnitz GmbH & Co KG. That has been described as a form of limited partnership, but it may be necessary in due course to have a deeper understanding of exactly what form that legal entity takes.

11. At any rate, what is pleaded in paragraphs 11 and 12 is that East-West Germany became the general partner of this entity, to which I will refer as "JURAG", and it is also pleaded that Mr Dikautschitsch became the limited partner of JURAG. There is then a further pleading as to the connection between East-West Germany and JURAG.

12. Paragraphs 13, 14 and 15 of the amended particulars of claim {X/3/3} plead the alleged trust which binds East-West UK in favour of Mr Fishman, or now Mr Benkel, the alleged trust which binds Ms

Helbet in favour of Mr Fishman or now Mr Benkel, and an alternative description of how there is a trust relationship under which Mr Fishman, or now Mr Benkel, is the ultimate beneficiary. Those three paragraphs are intended to repeat the matters identified in the claim form to which I have referred.

13. The prayer for relief in paragraphs (a), (b) and (c) essentially refers back to the allegations in paragraphs 13, 14 and 15 of the amended particulars of claim. Paragraph (d) in the prayer for relief repeats the relief claimed in the claim form to the effect that the claimant seeks an order that the shares of East-West Germany and full ownership and control of East-West UK be transferred to Mr Benkel as trustee in bankruptcy of Mr Fishman.

14. East-West UK and Ms Helbet served a joint defence, and following the amendment to the particulars of claim they amended their defence. The defendants denied that the claimant was entitled to the relief which he sought. The defence pleaded to the allegations in paragraphs 13, 14 and 15 of the amended particulars of claim. It was said that the detail in the particulars of claim was very far from adequate, indeed was vague and embarrassing, but no application was made to strike out the paragraphs in the particulars of claim to which I have referred. Indeed, those paragraphs have come forward for trial and of necessity have to be dealt with.

15. In paragraph 9 of the joint defence, {A/3/3} there is a specific pleading about the position of Ms Helbet. It is pleaded as follows:

"It is averred that Ms Helbet has no experience of real estate ownership or management, and has no known connection with Germany or the United Kingdom, other than by her directorship of E-W UK and E-W Germany and by virtue of her relationship with Mr Dikautschitsch with whom she intended to carry on business involving minor property construction and refurbishment projects in Germany."

16. The defendants requested further information in relation to the case advanced in the particulars of claim. The request was dated 10 September 2019, and what was said to be a response to it was served on 6 November 2019.

17. The response to the request does contain some information about the shareholdings in and financial position of East-West Germany, but in relation to the case pleaded under paragraphs 13, 14 and 15 of the particulars of claim, the claimant asserted that the defendants were not entitled to the further information which they sought.

18. Again, there was no application to strike out any part of the particulars of claim, and indeed they were amended after the response to the request for information, and the particulars of claim, whether they are detailed or whether they are not, have to be dealt with at this trial.

19. The next thing that happened was that on 22 May 2020 Mr Benkel applied for an order joining Mr Dikautschitsch as a party to this claim. The application was accompanied by a draft amended claim form. The draft amended claim form added a further declaration that Mr Dikautschitsch held his powers, rights and interest in JURAG as trustee and nominee for Mr Benkel as trustee for Mr Fishman. I note, however, that the draft amended claim form did not assert any case against Mr Dikautschitsch in relation to East-West UK or East-West Germany.

20. The application to join Mr Dikautschitsch as a party which was made in May of 2020 was also accompanied by a draft re-amended particulars of claim. What is relevant for today's purposes is that the draft pleading contained paragraphs 16 and 17. Paragraph 16, which I will summarise, was an averment that Mr Dikautschitsch held his interests in JURAG as trustee or nominee for Mr Fishman and now Mr Benkel. Paragraph 17 I will read was in these terms:

    "Alternatively, it is to be inferred from all the circumstances that each of Ms Helbet and E-W UK hold their respective interests in E-W UK and E-W Germany on trust for Mr Dikautschitsch who, in turn holds his interests in those trusts on trust for Mr Fishman."

21. Paragraph 16 was in accordance with the draft amended version of the claim form dealing with JURAG. Paragraph 17 went beyond what was in the draft amended claim form, and it did raise in the alternative to the JURAG claim an allegation that Mr Dikautschitsch had an interest in East-West UK and East-West Germany and held those interests on trust for Mr Fishman and now I suppose Mr Benkel.

22. The application to join Mr Dikautschitsch came before a Deputy High Court Judge, Mr Charles Morrison. He heard the application on 4 June 2020 and he handed down a judgment on the application on 12 June 2020. He dismissed the joinder application. I have been referred to his judgment.

23. At paragraph 42 of his judgment {C/11A/8} he referred to the draft re-amended particulars of claim and he summarised the intended pleading as per paragraphs 16 and 17 of that document. At paragraphs 45 and 46 of his judgment, the deputy judge referred to the case that was being put by Mr Benkel as to the connection between Mr Dikautschitsch and Mr Fishman. Then at paragraph 47 of his judgment {C/11A/9}, the deputy judge explained the case that had been made to him. He described the claimant's case for joinder as being based upon there being an issue between the claimant and Mr Dikautschitsch in relation to JURAG which he described as the "JURAG Issue".

24. That description of the way in which the claimant put his case for joinder fits in with paragraph 16 of the draft re-amended particulars of claim but does not incorporate any submission as to the possible relevance of paragraph 17 which was pleaded in the alternative to paragraph 16.

25. It seems from what the deputy judge said that the claimant put the case before him in relation to the JURAG issue and there was no freestanding application to join Mr Dikautschitsch absent the JURAG issue and on the basis that paragraph 17 had implications for Mr Dikautschitsch in relation to East-West UK and East-West Germany.

26. At any rate, if one reads through the remainder of the deputy judge's judgment, the claim is considered on the basis that what is relevant is the allegation in relation to JURAG and no significance is attached to paragraph 17 of the draft pleading.

27. The deputy judge considered that the claim in relation to JURAG was separate from the claim as originally pleaded. He also referred to the fact that if he joined Mr Dikautschitsch, who was not formally represented before him, not being a party, then Mr Dikautschitsch would subsequently assert that the court had no jurisdiction over him and that assertion by Mr Dikautschitsch would take a considerable time to be resolved, and the consequence of that would be that the existing parties would lose the trial date, and that would be to the considerable prejudice of the existing defendants.

28. Mr Benkel did not appeal the deputy judge's decision. The result has been that Mr Dikautschitsch has not been made a party to these proceedings for any purpose. Further, the proceedings do not claim relief in relation to JURAG. On the application before me, it remains the position that the claimants do not ask the court at this trial to deal with the position in relation to JURAG.

29. On 22 September 2020, Ms Helbet served the witness statements of herself and Mr Dikautschitsch. While the matter may not have been absolutely clear, one reading of those witness statements supported the idea that Ms Helbet was saying, and Mr Dikautschitsch was agreeing, that Ms Helbet held all of her rights and powers in East-West UK and East-West Germany as a mere nominee for Mr Dikautschitsch. Even if that was not clear from the witness statements, it has become clear from the events at this trial that that is indeed the position of Ms Helbet and Mr Dikautschitsch.

30. There was a pre-trial review in this case on 14 January 2021. I conducted that pre-trial review.

31. The trial began on 26 January 2021. I had the opportunity to pre-read the day before the trial began in open court. Based on my pre-reading, I raised with counsel at the outset of the trial the possibility that one possible outcome of the trial would be that it would emerge that the shares of East-West Germany were held by East-West UK without there being any trust of those shares. Further, it might emerge that Ms Helbet's interest in East-West UK was held by her on trust for Mr Dikautschitsch.

That, after all, was the case that she and Mr Dikautschitsch appeared to be putting in their witness statements. It might, therefore, be a case that in the event was accepted by the court. That would mean that when I considered whether Ms Helbet was a trustee for someone, the answer would be that she was a trustee for Mr Dikautschitsch, and she was not a trustee for Mr Fishman. That would leave unanswered the question whether Mr Dikautschitsch was the beneficial owner of the relevant interests or whether he held them for Mr Fishman.

32. On the second day of the trial, Mr Colton QC for the claimant applied to re-amend the particulars of claim. Again, the relevant paragraphs of the draft amended pleading, being a re-amended particulars of claim, are paragraphs 16 and 17. These are not to be confused with paragraphs 16 and 17 of the pleading put before the deputy judge. However, the new paragraph 16 is the same as the old paragraph 17, and one of the things which appears in the new paragraph 16 is the averment that Mr Dikautschitsch does hold interests in East-West UK and East-West Germany on trust for Mr Fishman.

33. In paragraph 17, {X/9/3} there is a new plea which I will read:

"Further or alternatively, it is to be inferred from all the circumstances that Ms Helbet and E-W UK have contractually agreed with Mr Fishman (alternatively with Mr Dikautschitsch acting as agents for Mr Fishman, whether on a disclosed or undisclosed basis) to exercise their powers, rights and interests in E-W UK and/or E-W Germany (as the case may be) as directed, and to transfer those interests as instructed."

34. There was detailed argument at the hearing as to whether I should give permission to make these further amendments. In the event, I was persuaded that I should permit part of paragraph 16 but not permit the part which contained the averment that Mr Dikautschitsch held his interests in certain trusts on a further trust, that is a sub-trust, for Mr Fishman. I was persuaded to permit the claimant to amend in accordance with paragraph 17 of the draft.

35. I gave a short judgment explaining my reasons for my decision. Perhaps the most relevant part of that judgment is in paragraphs 25 and 26 where I gave my reasons for refusing permission in relation to what I had described as the second part of paragraph 16. I referred to it as raising a claim that a non-party -- Mr Dikautschitsch -- held certain interests on trust for Mr Benkel. I considered it was not appropriate to permit an amendment which involved an issue as to the obligations of a non-party to Mr Benkel. I expressed the view that was the wrong way to go about bringing that issue into the case, whereas the correct way to do so was to make Mr Dikautschitsch a party and then claim appropriate relief against him. I also indicated that if there were to be an application to join Mr Dikautschitsch, I would wish that application to be made in circumstances where he was represented so that questions of jurisdiction would be dealt with on the hearing of the application and not subsequently leading to inappropriate delay and prejudice.

36. I understand that the defendants have not served a further amendment to their defence to deal with what was added as paragraphs 16 and 17 of the re-amended particulars of claim.

37. Mr Dikautschitsch gave evidence on the third and fourth days of the trial. He was cross-examined in detail, and the cross-examination explored his relationship, whether direct or indirect, with Mr Fishman. There was no objection to the questions put to Mr Dikautschitsch. It was accepted that they were all questions which were relevant to the issues on the pleadings as they then stood. Mr Dikautschitsch's case was and is that he is the beneficial owner of East-West UK which is the beneficial owner of East-West Germany.

38. At the end of the fourth day of the trial, which was a Friday, the claimant made the present application to join Mr Dikautschitsch as a third defendant. On the following Monday, the fifth day of the trial, there was discussion as to when the application to join Mr Dikautschitsch would be dealt with, and it was agreed that it would be dealt with on the following day, and that is what occurred. As I have explained, Mr Dikautschitsch was represented on the joinder application. He was represented by the same legal team as had acted throughout for the first and second defendants.

39. The application to join Mr Dikautschitsch was supported by a further draft amendment. I can summarise the position by saying that the further draft seeks to insert into the particulars of claim what I had described as the second part of paragraph 16 for which I had refused permission to amend on the earlier occasion.

40. That, I think, is a sufficient indication of the procedural history which is relevant to the present application.

41. I will now deal with the jurisdiction of the court in relation to the proposed claim against Mr Dikautschitsch.

42. The parties are now agreed that the question of jurisdiction is to be determined by applying the provisions of Council Regulation (EU) No 1215/2012, the Recast Brussels Regulation.

43. Although today the United Kingdom is not a member state of the EU, the parties agree that the effect of regulation 92 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 is that these proceedings continue to be governed by the Recast Brussels regulation and given that the proceedings are governed by that regulation, an application to join a further defendant to those proceedings is governed by that regulation.

44. Article 4 of the regulation is the general provision about persons being sued in the member state in which they are domiciled. If Article 4 was the relevant and conclusive article in this case, then it would not be open to the claimant to sue Mr Dikautschitsch in England and Wales because he is not domiciled in England and Wales. It is not necessary to decide whether he is domiciled in Spain or in Germany. The parties seem to favour the suggestion that his domicile was in Spain, but it is not England and Wales.

45. So something more is needed to give the court jurisdiction over him. Mr Colton says that jurisdiction is conferred on the English court in relation to Mr Dikautschitsch in the context of this case pursuant to Article 8.1. I will read Article 8.1 which provides:

"A person domiciled in a Member State may also be sued:

(1) Where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

46. In this case, Mr Dikautschitsch is to be one of a number of defendants. One of the existing defendants, East-West UK, is domiciled in England and Wales. The claim against East-West UK and the proposed claim against Mr Dikautschitsch are closely connected. So the question becomes: are those claims so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings?

47. In the course of the argument, Mr Colton asserted that Article 8.1 applied in this case, and Mr Riley asserted the opposite. Initially, I was not given any real assistance by reference to earlier decisions as to how Article 8.1 was to be applied. However, in due course, I was given greater assistance on that subject. It emerges that there is, as perhaps one would expect, considerable case law as to the way in which Article 8.1 falls to be applied.

48. I was referred to a note in Civil Procedure volume 1 at paragraph 6JR.21 on page 411. The note reads:

"In numerous cases, the English courts have been concerned with the 'irreconcilable judgments' proviso in cases where it has been submitted that the risk of irreconcilability arises from potentially conflicting findings of fact or potentially conflicting decisions on questions of law. The courts have applied a broad, common sense approach avoiding an oversophisticated analysis."

49. The note refers to an earlier decision at first instance of ET Plus SA v Welter [2006] 1 Lloyd's Rep 251, at paragraphs 57 to 59. I was provided with a copy of that decision, a judgment of Mr Justice Gross. His decision referred to an earlier decision of the Court of Appeal in Casio Computer Company Limited v Sayo [2001] IL Pr 43. I have considered the judgment in that case of Lord Justice Tuckey with whom the other members of the court agreed.

50. Casio dealt with what was then Article 6 of the Brussels regulation which was in the same terms as the current Article 8.

51. Casio also referred to an earlier authority on what had been Article 22 of the former regulation, and that is now Article 30.3.

52. Lord Justice Tuckey explained that Article 22 of the former regulation had been considered by the House of Lords in Sarrio SA v Kuwait Investment Authority [1999] 1 AC 32. It was in that case at paragraph 20 that Lord Saville said of the former Article 22:

"For these reasons, I am of the view that there should be a broad common-sense approach to the question whether the actions in question are related, bearing in mind the objective of the article, applying the simple wide test set out in article 22 and refraining from an over-sophisticated analysis of the matter."

53. It can be seen that it was that statement in that case which is the origin of the approach described as a common sense approach refraining from an oversophisticated analysis.

54. Sarrio concerned Article 22, but in Casio, the Court of Appeal held that what went for Article 22 also went for Article 6, or now the current Article 8. In Casio at paragraph 36, Lord Justice Tuckey said, referring to Sarrio:

"This judgment makes it clear that the court is not merely concerned with the risks of conflicting decisions giving rise to mutually exclusive legal consequences. It also makes it clear that the court will be concerned with the risks of conflicting decisions on questions of fact as well as law. This Court so held in Gascoigne where Hirst LJ at paragraph 45 said:

"Conflicting findings of fact, on the one hand, are virtually impossible to reconcile if different judges in different jurisdictions within the EEC, hearing and seeing different witnesses, reach different conclusions which have hinged on an assessment of the reliability of individual witnesses; and of course the problem may be compounded in cases where there are different

procedures in the different national courts in the way in which they hear the evidence and assess it. Moreover, different findings of fact also frequently lead to different conclusions of law.""

55. It seems to me that these statements of principle are the statements of principle I should endeavour to apply in this case.

56. I consider that what I have to do is to assess the risk of irreconcilable judgments in relation to matters of fact and/or matters of law in a situation where I do not join Mr Dikautschitsch and instead the claim which the claimant wishes to bring against Mr Dikautschitsch is not dealt with by the English court but is dealt with by a court in Spain or possibly in Germany.

57. If I do not join Mr Dikautschitch to these proceedings, what findings of fact will I be required to make in relation to him, so far as relevant for the present inquiry. I will need to deal with the issues pleaded in relation to East-West UK and Ms Helbet. I will have to make findings as to the alleged connection between East-West UK, East-West Germany and Ms Helbet on the one hand and Mr Fishman on the other hand. It is already clear that if there were such a connection, Mr Dikautschitsch was involved in it. Mr Dikautschitsch acted for Ms Helbet and through her as his nominee he acted for East-West UK and East-West Germany. I will therefore have to make findings of fact as to Mr Dikautschitsch's relationship or alleged relationship, directly or indirectly, with Mr Fishman.

58. If the claim which the claimant wishes to bring against Mr Dikautschitsch is not litigated in this court but is instead litigated in Spain or Germany, then that claim will require the foreign court to make findings as to the relationship or alleged relationship, directly or indirectly, between Mr Dikautschitsch and Mr Fishman.

59. This will produce the result that both the English court and the foreign court will be making findings of fact as to the same alleged relationship. I consider that it is obvious that in such a case there would be a risk of irreconcilable findings of fact. That would seem to bring the case squarely within Article 8.1.

60. Nonetheless, Mr Riley does not accept that Article 8.1 applies here. I do not consider that his submissions formed any basis for challenging the previous conclusions I have expressed as to the risk of irreconcilable findings, so I will proceed on the basis that my reasoning so far is correct.

61. However, Mr Riley did submit that something needed to be added to that reasoning. He pointed out that the English proceedings do not involve a claim in relation to Mr Dikautschitsch's involvement in JURAG. Mr Riley suggested that if Mr Benkel succeeds in the present proceedings, there would come a time when he might wish to bring further proceedings relating to Mr Dikautschitsch's involvement in JURAG. It was suggested that those proceedings would not be in the English court, but even if they were not in the English court, there would be further proceedings.

62. In these putative new proceedings, there would again be issues as to the relationship between Mr Dikautschitsch and Mr Fishman. So, as I understood it, the argument was even if Mr Dikautschitsch was joined as a party to the present proceedings, and I made detailed findings in relation to his relationship with Mr Fishman, there would be a risk that some other court dealing with the JURAG claim would make findings of fact which were irreconcilable with my findings.

63. I can see that Mr Riley might be right that if Mr Benkel succeeds in the present proceedings there might be further proceedings in relation to JURAG. Again, there might be overlap between the issues of fact investigated in the present proceedings and the issues of fact required to be investigated in the future proceedings. It might have been better after all if the issues in relation to JURAG had been litigated in this action, but that is not going to happen.

64. However, I am simply not persuaded that the possibility of further proceedings in relation to JURAG means that it ceases to be expedient within the meaning of Article 8.1 to add Mr Dikautschitsch to the present proceedings in relation to East-West UK and East-West Germany. As I have explained, there is a clear and present risk of irreconcilable findings in relation to East-West UK and East-West Germany which I can remove by adding Mr Dikautschitsch to the present proceedings. The fact that I cannot in addition remove a further possible risk of inconsistency

between my findings in the present case and possible further findings in a possible future case concerning JURAG does not mean that I should allow the former risk to continue to exist or that I should fail to deal with it.

65. I conclude, therefore, that I have jurisdiction pursuant to Article 8.1 in relation to the proposed claim against Mr Dikautschitsch in these proceedings.

66. I next need to consider, having jurisdiction, whether to join Mr Dikautschitsch as a party.

67. The relevant rule is CPR Rule 19.2. So far as relevant, Rule 19.2 provides:

"(1) This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 … .

(2) The court may order a person to be added as a new party if:

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

68. Mr Riley rightly accepts that the claimant is able to establish that the case comes within Rule 19.2(2)(b). It is therefore not necessary for me to consider whether the case is in addition within Rule 19.2(2)(a), although it seems to me highly arguable that it is.

69. As the case is within Rule 19.2, the question is: should the court add Mr Dikautschitsch as a party?

70. To answer that question, it is helpful to consider what will happen if I do add Mr Dikautschitsch and what will happen if I do not. When those matters have been considered, I can then proceed to decide what should be done. I wish to stress at this point that even though I have heard all of the evidence given in this case, I am not intending to indicate anything about my expectations as to how the case will actually be decided. There are real issues as to that which remain to be grappled with and I have not yet heard closing submissions from counsel.

71. If I do not join Mr Dikautschitsch, I will determine whether the claimant has established his right to the relief claimed. One possibility is I will hold that East-West UK and Ms Helbet do not hold their interests on trust for Mr Fishman but instead they hold them on trust for Mr Dikautschitsch.

72. As to the claim in paragraph 17 of the current version of the re-amended particulars of claim, I might hold that Mr Dikautschitsch, whatever his relationship with Mr Fishman, was not his agent. That result would leave a major question unresolved. If the relevant interests are held on trust for Mr Dikautschitsch, for whom does he hold them?

73. If I held that Mr Dikautschitsch was the beneficial owner of those interests, then that question would be resolved. However, Mr Dikautschitsch has a case to answer that he is not the beneficial owner of the interests. On the present pleading, I might have to leave unresolved the question for whom Mr Dikautschitsch holds the relevant interests. If I did go on to decide for whom he held the relevant interests, it may be that that finding would not be binding on Mr Benkel or Mr Dikautschitsch. If I went on to hold that Mr Dikautschitsch held the relevant interests for Mr Fishman, even though that is not a pleaded case, I might be unable to give the claimant any relief in relation to that finding because on this hypothesis Mr Dikautschitsch is not a party to the proceedings and so I am unable to make effective orders against him.

74. As I have indicated, if I do not join Mr Dikautschitsch there will be an issue as to whether he could rely on findings in his favour in other proceedings which Mr Benkel might bring against him. Mr Riley appeared to me to accept that if Mr Dikautschitsch is not a party to these proceedings he will not have the benefit of findings in his favour for the purpose of other proceedings. Mr Dikautschitsch did not seem to mind that that would be the position. If I make findings against Mr Dikautschitsch in these proceedings, then in any further proceedings in Spain or Germany against him in relation to East-West UK and East-West Germany Mr Benkel may have to litigate those matters a second time. It may be necessary to make East-West UK and Ms Helbet parties to the second time around litigation.

75. Mr Colton did refer to a possible argument that Mr Dikautschitsch might be considered to be the privy of Ms Helbet and so that may affect the question whether he has the benefit of findings and/or is bound by findings, but neither counsel suggested to me that the position would be clear in this respect.

76. If I do join Mr Dikautschitsch, the case becomes relatively straightforward. I will have to decide one way or the other whether he holds the relevant interests on trust for Mr Fishman or whether he holds them beneficially or some other possibility applies. If I decide that he does hold the interests for Mr Fishman, I can make orders against him to give effect to that finding. My findings will be binding on Mr Benkel and Mr Dikautschitsch.

77. Having compared the result of not joining Mr Dikautschitsch with the result of joining him, there appear to me to be powerful reasons in favour of his joinder.

78. Mr Riley then submitted that, whatever the wisdom of Mr Dikautschitsch being a party to these proceedings from the outset, it was simply too late to attempt to join him at the current stage in the trial. I readily acknowledge that it would have been better to have had Mr Dikautschitsch as a party from the outset. It would also have been better if he had been joined following his witness statement in September 2020. However, neither of those reflections means that I should erect a complete barrier to joining him if everything else points in favour of that being the appropriate order. On the most unusual facts of this case to which I will refer, I do not consider that it would be unfair in any way to Mr Dikautschitsch to make him a party at this stage, late though it is.

79. This is not a case where the litigation has been going on for some time between persons unconnected with Mr Dikautschitsch and of which Mr Dikautschitsch was unaware. If that had been the case then an attempt to join him at this stage would have to deal with the very real difficulty that he would have to be given time to take advice, to decide whether to acknowledge service, whether to defend, how to defend, how to search for documents and whether to seek witnesses to support his case.

80. Mr Riley went so far as to submit that Mr Dikautschitsch would have to do all those things if he was joined at this stage. Mr Riley submitted to me very forcefully that if I joined Mr Dikautschitsch and did not adjourn matters for a considerable period of time to allow him to do all of those things or some of those things, then I would be acting in a most unfair and unjudicial manner.

81. I find Mr Riley's submission as to potential unfairness to Mr Dikautschitsch to be wholly lacking in reality. Mr Dikautschitsch has been involved in this litigation from its inception. East-West UK and Ms Helbet did not act in any sense independently of him. They acted under his express direction. The way the case has been conducted by the defendants as to pleadings, disclosure, witness statements, calling witnesses, has been entirely under the control of Mr Dikautschitsch. The decisions made in the course of the litigation in those respects have been his decisions. The defendants have had legal advice throughout from solicitors and from leading and junior counsel. There is no suggestion that Mr Dikautschitsch has not had the full benefit of that advice.

82. Although at the end of this judgment I might make provision for some other course, my assessment of what Mr Dikautschitsch needs to do to be a formal party defending this claim is to do precisely what he would do if he were not a formal party but he was defending the claim through his nominee Ms Helbet, no more and no less.

83. Mr Riley then submitted that the present application was an abuse of process and amounted to a collateral attack on the decision of the deputy judge in June 2020. I have already referred to what transpired before the deputy judge. It is necessary to distinguish between what the deputy judge decided when he declined to permit joinder of Mr Dikautschitsch in connection with the claim in relation to JURAG and what was not done and what was not said in relation to a claim in respect of East-West UK and East-West Germany.

84. The deputy judge decided the claimant should not be allowed to expand these proceedings to include a claim in relation to Mr Dikautschitsch and JURAG. The present application does not involve any challenge to that ruling.

85. It is right that in paragraph 17 of the draft pleading which was before the deputy judge there was the allegation which the claimant now wishes to plead as paragraph 16 of the draft pleading before me and to join Mr Dikautschitsch to deal with that claim. It is also right that the deputy judge referred to the relevant part of the pleading in his judgment. However, what is striking, as I have summarised earlier, is that the deputy judge did not consider that there was a freestanding claim to join Mr Dikautschitsch to answer paragraph 17 of the draft pleading.

86. I proceed on the basis that the claimant did not make a freestanding claim to join Mr Dikautschitsch on that basis because otherwise the deputy judge ought to have dealt with it, and I infer he would have dealt with it. Accordingly, the present application does not involve a challenge to what the deputy judge did but rather raises again a point which the deputy judge did not deal with and possibly, I think probably, was not asked to deal with.

87. Of course, in some circumstances, it may be an abuse of process to make a claim which could have been and should have been dealt with earlier. That subject is considered in Johnson v Gore Wood [2002] 2 AC 1, in particular in the judgments of Lord Bingham and Lord Millett. That case shows that whether a particular set of facts gives rise to an abuse of process in that way is an issue which is very fact-sensitive, is merits-based and should take account of both the public and the private interests involved.

88. In this case, given the history of the litigation and the close involvement of Mr Dikautschitsch with the litigation from the inception and at all times thereafter, I do not consider it to be an abuse of process to join Mr Dikautschitsch on the present application. Formally, Mr Dikautschitsch is moving from not being a defendant to being a defendant, but, as I have indicated, everything that has been done on the defendants' side has been done by him and no further steps need to be taken in reality by him for him to continue with the trial in the capacity of a formal defendant.

89. As to the fact that this application is made at the time it is made, I have already expressed the view that it could have been made earlier, and it would have been better if it had been made earlier, but as against that there are mitigating considerations.

90. In June 2020, the claimant did not know so much as to the position of Ms Helbet and Mr Dikautschitsch as is known today. The claimant had the pleaded defence of Ms Helbet but did not have the benefit of the witness statements of Ms Helbet and Mr Dikautschitsch. The claimant did not know in June 2020 that which is now admitted which is that Ms Helbet is a mere nominee for Mr Dikautschitsch. At the trial, it is even more apparent that that is the position.

91. It also emerges from what happened at the trial, and what has happened in response to this application, that Mr Dikautschitsch's stance is that he is the beneficial owner of the interests which are under attack in these proceedings but for some reason he refuses to be made a party to these proceedings. One has to wonder why he adopts that stance. It is clear to me that the reason for his stance is a tactical one. He wishes to place obstacles on the claimant's path rather than defend the proceedings with a view to having a determination in his favour that he is the beneficial owner of the relevant interests, which determination would be binding on Mr Benkel.

92. In addition to these considerations, even if the deputy judge had dismissed a freestanding application similar to the present application, I would have to consider whether to make a different order exercising my power under CPR Rule 3.1(7). The scope of that power was considered in Tibbles v SIG plc [2012] 1 WLR 2591, as summarised in Civil Procedure at paragraph 3.1.17.1.

93. I consider that the matters which have emerged since June 2020 are such that it would be open to me to look at this application afresh. I am dealing with a matter which essentially involves case management. I am asked to make Mr Dikautschitsch formally a party when in every sense, apart from formality, he is already conducting the defence.

94. If I take that step I increase the prospects that these proceedings will result in an outcome which will have more effect than otherwise. It is relevant to consider the use of the court's time. It is in the

public interest that the court's time is used so as to be effective rather than to fail to be effective in resolving real disputes between real litigants. Further, if I join Mr Dikautschitsch as a party, I may be able to produce a result that will be binding on the claimant and on him and avoid a result where the same essential question may have to be litigated again. I take the view that I will not cause any prejudice to Mr Dikautschitsch save that I will take from him tactical advantages which he perceives he would enjoy if I reject his case about his being a beneficial owner of the relevant interests. I consider that the right case management decision is to join Mr Dikautschitsch and to prevent him enjoying what he perceives to be tactical advantages.

95. I add, in connection with Rule 3.1(7), that it is sometimes the case that the trial judge is able to form a significantly better view of what is required by way of case management as compared with the view formed at a much earlier stage of the litigation. I would interpret Rule 3.1(7) as allowing a trial judge to give effect to his or her views as to sound case management and to avoid continuing with an earlier view which has turned out to be unhelpful.

96. The next question is what should happen now. The proceedings will need to be formally served on Mr Dikautschitsch. In the interests of proper speed and without prejudice to anyone, I will make an order under CPR Rule 6.15 permitting service of the proceedings on Mr Dikautschitsch at the London office of the defendants' solicitors. I will also direct that copies of the proceedings are sent by email to Mr Dikautschitsch. In terms of timing, service may be effected today but in any event it will be effected without any delay.

97. For my part, I see the sense of continuing the trial without any significant change to the former programme. That would involve the parties making closing submissions some time next week with a time estimate of two days. If the parties were to agree to that, my view is that there would be no inappropriate prejudice to anyone.

98. Mr Colton for the claimant suggested that I would need to give Mr Dikautschitsch 14 days to file an acknowledgement of service. For different reasons which I will explain in a moment, I will adjourn

the case if I am asked to do so, so that closing submissions will be on the first available date 14 days from today, but my provisional view for what it is worth is that I can abridge time for an acknowledgement of service and for a defence, or possibly I could dispense with those steps.

99. I now need to refer to another matter raised by Mr Riley. He indicated that Mr Dikautschitsch might wish to appeal my decision. I can see that the appeal might include a challenge to my conclusion as to jurisdiction. That has led me to ask myself: if there is to be an appeal in relation to jurisdiction, what role can Mr Dikautschitsch take in the meantime?

100. Of course, he could make it clear in the meantime, while the case goes on, that he simply does not submit to the jurisdiction of the court. He could continue as he did before. He was previously content to allow his nominees to defend the proceedings and for Mr Riley to make all proper points in favour of Mr Dikautschitsch's underlying case that he is the beneficial owner of the relevant interests. So, on the face of it, there would be no barrier to him continuing to take that position to make it clear he does not submit to the jurisdiction and my ruling on jurisdiction is being challenged on an intended appeal.

101. If he did not file an acknowledgement of service or a defence, I could make it clear to the claimant that I would not permit an application to be made for judgment against him in default of acknowledgement of service or a defence. That would seem to be only fair in the circumstances.

102. I also consider, based on a number of decisions in the Patents Court, that I could continue with the trial and I could permit Mr Dikautschitsch to serve an acknowledgement of service and a defence and to participate as a defendant on the express understanding that he is not thereby submitting to jurisdiction but instead he is responding to the fact that the court has, against his wishes, asserted jurisdiction against him.

103. I could also extend his time for appealing against the order I will make until 21 days after handing down judgment in the action. If it transpires that Mr Dikautschitsch succeeds in this action and has

the benefit of my order, he may reflect that it was not such a bad idea after all for him to have been joined and he will not need to challenge my ruling on an appeal.

104. If, despite these many safeguards and attempts to take full account of any conceivable difficulty he may be under, he does nonetheless wish to move the Court of Appeal to reverse my order before anything else happens at the trial, then I could adjourn the case for two weeks to enable him to seek redress from the Court of Appeal.

105. It may be that there would not be a full hearing of an appeal in that time, but my own experience is that in the case of an appeal in the course of a continuing trial the Court of Appeal is prepared to take some steps to assist the intended appellant, if it considers those steps are appropriate. Of course the Court of Appeal may consider that there is no need to do anything to protect Mr Dikautschitsch.

106. My final comment is that if I am asked to adjourn the trial for two weeks to enable Mr Dikautschitsch to go to the Court of Appeal, I will hear further argument on that. If I am not asked to take that course, then so far as the court is concerned, I am prepared to revert to my earlier timetable for closing submissions.

107. I have dealt with the matters of substance which were argued. The application notice seeks further procedural orders. I did not understand that there was any real contention about the further procedural orders if I decided the matters of substance in the way in which I have, but I will hear counsel on what order I should make to give effect to my decision.