



Neutral Citation Number: [2021] EWCA Civ 326

Case No: B3/2020/1263

IN THE COURT OF APPEAL OF ENGLAND AND WALES
(CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(THE HONOURABLE MR JUSTICE JAY)

Strand, London, WC2A 2LL

Date: 10/03/2021

Before:

LORD JUSTICE BEAN
LORD JUSTICE COULSON
and
LORD JUSTICE MALES

Between:

**HAMIDA BEGUM (on behalf of MD KHALIL
MOLLAH)**

**Claimant/
Respondent**

- and -

MARAN (UK) LIMITED

**Appellant/
Defendent**

**Robert Bright QC and James Goudkamp (instructed by Ince Gordon Dadds LLP) for the
Appellant**

Richard Hermer QC and Rachael Toney (instructed by Leigh Day) for the Respondent

Hearing dates: 9 and 10 February 2021

Approved Judgment

LORD JUSTICE COULSON:

1 INTRODUCTION

1. By a judgment dated 13 July 2020 ([2020] EWHC 1846 (QB)), Jay J (“the judge”) refused the Appellant’s application for reverse summary judgment under CPR Part 24.2, and the related application to strike out the claim under CPR Part 3.4. He found that it could not be said that the duty of care alleged on behalf of the Respondent would certainly fail, and that it should be allowed to proceed to trial. In addition, although he found that, on the face of it, the law of Bangladesh applied to the claim, and that this imposed a strict limitation period of one year which had not been complied with, the judge considered that there were arguments available to the Respondent under Articles 7 and 26 of Rome II which he could not resolve by way of interim application, which meant that he could not say that the claim was definitely statute barred.
2. The judge himself granted permission to appeal on the issue as to the existence of a duty of care. This court granted the Appellant permission to appeal on the two time bar issues arising out of Articles 7 and 26. Notwithstanding what ought to have been the relatively narrow scope for debate on the appeal, the joint authorities filled 5 full lever arch files and ran to 64 separate cases, statutes or commentaries. As is so often the way, only a handful of those were of direct application to the issues on appeal. Leading Counsels’ oral submissions, on the other hand, were focused and illuminating.
3. I set out the factual background in Section 2. I identify some of the relevant passages in the judge’s judgment in Section 3. I identify the relevant tests under CPR Part 24.2 and Part 3.4 in Section 4. Then at Section 5 I identify the assumptions relevant to the claim which, on these interim applications, were made by the judge in favour of the Respondent/claimant.
4. The Respondent puts her case as to the existence of a duty of care in two different ways. I deal with each separately in Sections 6 and 7. Thereafter I deal with the time bar issues, setting out in Section 8 the relevant background to those issues before analysing, in Sections 9 and 10 respectively, the arguments under Article 7 and Article 26 of Rome II. There is a short summary of my conclusions at Section 11.

2 THE FACTUAL BACKGROUND

5. The Respondent is the widow of Mohammed Khalil Mollah (“the deceased”) who had worked in the shipyards in Chattogram in Bangladesh for about 9 years. On 30 March 2018, he was working on the demolition of an oil tanker (“the vessel”) at the Zuma Enterprise Yard (“the Zuma Yard”) when he fell to his death.
6. The vessel had been registered to Centaurus Special Maritime Enterprise (“CSME”), a Liberian company that is part of the Angelicoussis shipping group. All the shares in CSME are directly owned by another company within the same group, Maran Tankers Shipholdings Limited (“MTS”), incorporated in the Cayman Islands. Another related company, Maran Tankers Management (“MTM”), also incorporated in Liberia, operated and managed the vessel.
7. By an agreement made between MTM and the Appellant (another related company, an English company and therefore amenable to the jurisdiction of the English court) on 1

August 2013, the Appellant agreed to provide agency and shipbroking services to MTM in respect of the vessel and 28 other ships. It was common ground that one of these services was the negotiation and agreement of contracts of sale as and when the ships reached the end of their working lives. It is the Respondent's case, on the disputed but currently uncontroverted evidence, that the Appellant had complete control over the sale of any of the vessels, including who it was sold to and for what price. The question of price was particularly important because, on the Respondent's case, a high price meant that the Appellant would have known that the vessel in question would be broken up in Bangladesh at a yard with negligible safety standards.

8. By the summer of 2017 the vessel had come to the end of its useful life. In accordance with standard practice, CSME, as the ship owners, acted through the Appellant as their brokers to arrange its sale and demolition. Also in accordance with standard practice, the proposed sale was not directly to the shipbreakers themselves, but to a demolition cash buyer who then assumed the credit risk. In this way, in August 2017, the Appellant made enquiries, obtained quotations, conducted negotiations and agreed the sale of the vessel to Hsejar Maritime Inc ("Hsejar").
9. The agreement to sell was the subject of a Memorandum of Agreement ("MoA") dated 24 August 2017. The purchase price was over \$16 million, which was the equivalent of \$404 per net long ton. The evidence was that this was at the high end of the likely range. In addition, the vessel, which was being sold "as is" in Singapore, only had a modest amount of fuel oil left in its tanks.
10. On the Respondent's evidence, the high price for the vessel and the small amount of oil left meant that the Appellant would have known that the vessel would be broken up in Bangladesh rather than anywhere else. The judge accepted that inference ([14]) and Mr Bright QC also accepted that the applications should be determined on the assumption that the Appellant was aware of the ultimate destination of the vessel.
11. Why does that matter? The answer can be found in the expert evidence before the judge. For a tanker of this size, the only realistic place for it to be broken up in safe working conditions was China (the Respondent's expert evidence being that the only other safe option, Turkey, could not have taken a vessel so large). But, for reasons of cost, hardly any oil tankers are demolished in China. As the judge noted at [15], out of the 11 million tonnes of oil tankers demolished in 2018, only 80,000 tons were broken up in Chinese and Turkish yards.
12. The vast majority of oil tankers are instead broken up in Bangladesh (with some in India and Pakistan). The evidence is that the vessels are beached there, that is to say driven onto tidal mud flats, where they are subsequently demolished by hand by workers, such as the deceased, working from the top of the vessel downwards. There are no heavy cranes or dock infrastructure of any kind: no cranes, scaffolding, cradles or harnesses. There is nothing to allow for rapid emergency response, and few occupational health and safety controls or inspections. The evidence is that, despite international concern registered in many ways over many years, the dangerous working practices in the Bangladesh shipbreaking yards inevitably cause shockingly high rates of death and serious injury.
13. Following the MoA, Hsejar took delivery of the vessel on 5 September 2017. It was sailed from Singapore on 22 September and beached at Chattogram on 30 September

at the Zuma Yard. From the photographs, the Zuma Yard simply consisted of an area of the shoreline where numerous tankers were beached. Six months later, on 30 March 2018, the deceased was working at the top of the vessel when he fell from a considerable height and died of his injuries.

14. The proceedings were commenced on 11 April 2019. The Respondent's claim against the Appellant is based on the existence of a duty of care arising out of the Appellant's autonomous control of the sale of the vessel and the Appellant's knowledge that, as a result of that sale, the vessel would be broken up in Bangladesh in highly dangerous working conditions. That is, in my view, an unusual basis of claim. Moreover, it is the only basis available to the Respondent: although there was a separate claim for unjust enrichment, the judge rejected that out of hand and there is no appeal from his decision on that aspect of the case.

3 THE RELEVANT PARTS OF THE JUDGMENT

15. At [4] the judge explained why it was appropriate to consider the Appellant's applications by reference to the summary judgment test at Part 24.2, and he reminded himself of the relevant approach at [5]. He set out the facts between [6] and [19]. He addressed the alleged duty of care by reference to the pleadings ([23] – [26]), the skeleton argument ([27] – [28]); and the oral submissions ([29] – [32]). He summarised the Appellant's case at [33] – [35].
16. The judge's analysis of the duty of care starts at [36]. At [37] the judge considered the Respondent's first way of putting their case as to the existence of a duty, based on ordinary *Donoghue v Stevenson* principles. The judge was plainly unimpressed with that way of putting the duty of care but, at [64] he indicated that he was not prepared to strike out the claim on that basis at this stage.
17. Between [38] and [63], the judge addressed the alternative basis for the alleged duty, by reference to the Appellant's responsibility for creating a danger which then put workers such as the deceased at risk from the conduct of third parties, such as the Zuma Yard. With respect to him, the judge's analysis in these paragraphs is not always easy to follow, in part because he concluded that this case did not easily fit within a particular category of liability recognised in the authorities. At [53] the judge referred to "the creation of danger principle", examined it by reference to the authorities and the factual assumptions he was being asked to make, and concluded that it could not be said that a claim based on such a duty was bound to fail.
18. Having rejected the unjust enrichment claim between [66] and [74], the judge then turned to the limitation issues. On an application of Article 4 of Rome II, the judge concluded that the law of Bangladesh applied ([77]). However, that finding was subject to the Respondent's contention that this was a case of "environmental damage" and that Article 7 of Rome II applied. If that was right, it provided the Respondent with at least an argument that it was English law which applied. The judge considered that argument at [82] – [84] and concluded that the Respondent had a real prospect of success on that issue.
19. The judge decided at [86]-[97] that the relevant limitation period under Bangladeshi law was a period of one year from the date of the accident and that that was not extendable in any circumstances. On that basis, the limitation period expired on 29

March 2019 and, because this claim was not commenced until 11 April 2019, the present claim, if governed by Bangladeshi law, was statute-barred ([97]). However, this was not only subject to the Article 7 (environmental damage) argument noted above, but was also subject to a separate argument under Article 26 as to whether or not the one-year limitation period could be disapplied. The judge dealt with that very briefly at [85], given that this appears to have been a point which, through no fault of the judge, had been dealt with summarily in the draft judgment and had then arisen in the parties' comments on that draft. The judge's conclusion at [85] was that, in view of the detailed claim letter, the Respondent had no argument that the period should be disapplied because she had not had access to justice, but that, as to the more general point as to whether it would be offensive in English law to countenance so short a limitation period, it would not be right to determine that issue at this stage. That is therefore the second time bar point which arises on this appeal.

4 STRIKING OUT/SUMMARY JUDGMENT

20. The Appellant's application before the judge sought an order pursuant to r.3.4(2)(a) that the particulars of claim disclosed "no reasonable grounds" for bringing the claim and should be struck out and, in the alternative, a claim for summary judgment pursuant to r.24.2(a)(i) that the Respondent had no real prospect of succeeding on the claim. There can sometimes be procedural consequences if applications are made under the 'wrong' rule (which do not arise here) but, in a case like this (where the striking-out is based on the nature of the pleading, not a failure to comply with an order), there is no difference between the tests to be applied by the court under the two rules.
21. Accordingly, I do not agree with the judge's observation at [4] that somehow the test under r.24.2 is "less onerous from a defendant's perspective". In a case of this kind, the rules should be taken together, and a common test applied. If a defendant is entitled to summary judgment because the claimant has no realistic prospect of success, then the statement of claim discloses no reasonable grounds for bringing the claim and should be struck out: see *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37; [2017] 4 WLR 16 at [27].
22. As to the applicable test itself:
 - (a) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91. A realistic claim is one that carries some degree of conviction: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472. But that should not be carried too far: in essence, the court is determining whether or not the claim is "bound to fail": *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1WLR 1804 at [80] and [82].
 - (b) The court must not conduct a mini-trial: *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, in particular paragraph 95. Although the court should not automatically accept what the claimant says at face value, it will ordinarily do so unless its factual assertions are demonstrably unsupported: *ED & F Man Liquid Products v Patel*; *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, at paragraph 110. The court should also allow for the possibility that further facts may emerge on discovery or at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

Sutradhar v Natural Environmental Research Council [2006] 4 All ER 490 at [6]; and *Okpabi* at paragraphs 127-128.

23. The other principle relevant to the present appeal is that it is not generally appropriate to strike out a claim on assumed facts in an area of developing jurisprudence. Decisions as to novel points of law should be based on actual findings of fact: see *Farah v British Airways* (The Times 26 January 2000, CA). In that case, the Court of Appeal referred back to the decision of the House of Lords in *Barrett v Enfield DC* [2001] 2 AC 550 where Lord Browne-Wilkinson said at 557e-g:

“In my speech in the *Bedfordshire* case [1995] 2 AC 633, 740 – 741 with which the other members of House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff’s claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such developments should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purposes of the strike out”.

I note that the judge cited this passage and relied on it at [64].

24. The same point arose more recently in *Vedanta Resources PLC & Another v Lungowe & Others* [2019] UKSC 20. That was a case where the underlying duty of care was alleged against a parent company, rather than the company involved in the day-to-day running of the mine said to have caused the pollution. Lord Briggs said:

“48. It might be thought that an assertion that the claim against Vedanta raised a novel and controversial issue in the common law of negligence made it inherently unsuitable for summary determination. It is well settled that difficult issues of law of that kind are best resolved once all the facts have been ascertained at a trial, rather than upon the necessarily abbreviated and hypothetical basis of pleadings or assumed facts.”

5 THE RELEVANT FACTUAL ASSUMPTIONS

25. Before turning to consider whether the Respondent’s assertion of a duty of care in the present case is more than fanciful, it is useful to set out the factual assumptions which the judge made when considering that issue, and in respect of which there is properly no appeal. Although they can be found in different parts of the judgment, it is instructive to gather them together in one place. They are the background against which that crucial question has to be asked and answered.
26. The relevant passages in the judgment are as follows:

“13. For the purposes of this application only, the defendant accepts that the "beaching" method of demolition carried out in India, Pakistan and Bangladesh since 1960 or thereabouts is an inherently dangerous

working practice. The evidence of Ms Ingvild Jenssen and the claimant's expert, Mr Nicholas Willis, demonstrates that this method has been the subject of international concern for years, and they say that the yards in Chattogram are particularly egregious. Para 17 of Ms Jenssen's witness statement, although not specifically directed to working practices at this deceased's workplace, encapsulates these concerns:

"According to the International Labour Organisation (ILO), shipbreaking is one of the most dangerous jobs in the world. When conducted on tidal beaches, without proper infrastructure to allow for rapid emergency response and safe use of heavy lifting cranes, the danger workers are exposed to, of course, increases. Carried out in large part by the informal sector, shipbreaking in South Asia is rarely subject to occupational health and safety controls or inspections. Unskilled migrant workers are deployed by the thousands to break down the vessels manually. Without protective gear, they cut wires, pipes and blast through ship hulls with blowtorches. The muddy sand and shifting grounds of tidal flats cannot support heavy lifting equipment or emergency access, and accidents kill or injure numerous workers each year."

14. The claimant's key evidence, including the evidence of her solicitor, Mr Martyn Day, invites the court to draw the inference that the defendant knew that the vessel would be broken up in Bangladesh rather than anywhere else from two factors: namely, the level of the price paid by Hsejar in August 2017 (a lower price would have signified onward sale to a reputable yard) and the quantity of fuel oil left on the vessel when it was delivered. For the purposes of this application and in the absence of evidence to the contrary, I was minded to draw this inference. In the event, Mr Bright accepted in terms that I should determine this application on the premise that his client was aware of the ultimate destination of the vessel. His realistic approach – without prejudice to his submission that the issue would be challenged at trial – has served to abbreviate the process...

19. For the purposes of this application only, Mr Bright's principal argument proceeded on the basis that I could take "control" at its highest and assume that the defendant had autonomy over the sale. By making this concession he was accepting that it was at least arguable that the commercial realities went further than the four corners of the Operating Agreement and the Agency Agreement. As I put to Mr Bright in oral argument, his concession meant that the position of the defendant is legally indistinguishable for these purposes from that of MTM (on further reflection, I think that it is probably legally indistinguishable from that of the owner). Mr Bright submitted in the alternative that the defendant's obligations and functions went no further than the black letter of the contracts, and that if necessary (in

the event that his primary case should fail) its alleged duty of care should be analysed on that premise. Given Mr Willis' expert evidence, the paucity of evidence emanating from the defendant in support of its application and that disclosure has not taken place, I would reject this alternative submission. There is a real prospect that an examination of the complete evidential picture at any trial would support the high watermark of the claimant's case on control...

30. Mr Hermer highlighted six core evidential features of his client's case. First, the vessel had reached the end of its operating life and a decision was taken (perforce) to dispose of it. Secondly, end-of-life vessels are difficult to dispose of safely. Aside from the evident difficulties inherent in dismantling a large metal structure, a process replete with potential danger, an oil tanker such as this contains numerous hazardous substances such as asbestos, mercury and radioactive components. Although these were listed for Basel Convention purposes and for the attention of the buyer, and the deceased was not injured as a result of exposure to any hazardous substance, the only reasonable inference is that waste such as asbestos is not disposed of safely in Chattogram. Thirdly, the defendant had a choice as to whether to entrust the vessel to a buyer who would convey it to a yard which was either safe or unsafe. Fourthly, the defendant had control and full autonomy over the sale. Fifthly, the defendant knew in all the circumstances that the vessel would end up on Chattogram beach. Sixthly, the defendant knew that the *modus operandi* at that location entailed scant regard for human life.

31. Mr Bright did not place any of these matters in issue although he cannot be taken to have accepted all of the rhetoric.”

As the judgment records, these passages were the subject of concessions by the Appellant made for the purpose of the applications although they (or some of them) will be disputed at trial. From them, I distil the following eight factual assumptions of particular significance.

27. First, the vessel needed to be scrapped. Large oil tankers like this are difficult to dispose of safely: see the first two of the six core evidential features referred to in [30].
28. Secondly, the Appellant had a choice as to whether to sell the vessel to a buyer who would convey it to a shipbreaking yard which was either safe or unsafe: see the third evidential feature in [30].
29. Thirdly, the Appellant had complete autonomy over that sale (see [19] and the fourth evidential feature in [30]). The assumption is that the Appellant should be treated for these purposes as if it was in no different position to the owner.
30. Fourthly, the Appellant knew that, because it had chosen to sell for \$16 million to Hsejar, the vessel was going to end up in Bangladesh, on Chattogram beach [sic]. That can be discerned from [14] and the fifth evidential feature in [31].

31. Fifthly, the Appellant knew that beaching was an inherently dangerous working practice and that the safety standards in the yards in Chattogram were particularly egregious, and that as a result fatalities and serious injuries occurred there regularly: that is at [13] and the sixth evidential feature in [32].
32. Sixthly, the logical consequence of the previous assumptions is that the Appellant exercised its choice by choosing a buyer for the vessel who it knew would *not* demolish it safely, and would instead expose workers like the deceased to a real risk of death or personal injury during the demolition of the vessel. At [56], on a different but related point concerned with the Basel Convention, the judge confirmed that the Appellant must have known that the hazardous substances in or on the vessel “would not be disposed of safely in Bangladesh”.
33. Seventhly, as to the degree of risk to which the deceased was exposed, the judge said at [42] that, whilst it was “inevitable” that the deceased would be exposed to the risk of personal injury, it was “only foreseeable” that he would sustain a serious accident. But at [43] the judge considered that this meant that the deceased’s accident at the Zuma Yard was “probable” in the sense explained by Lord Mackay in *Smith v Littlewoods Organisation Limited* [1997] 1 AC 241.
34. Finally, as to the extent that any assumptions needed to be made about the role of Hsejar, the judge said at [37] that “the intervention of Hsejar in conveying the vessel to Bangladesh is of little or no significance. The buyer did not alter the vessel in any way. If, say, the vessel had sailed to a point just outside Chattogram under the auspices of CSME, and title was then transferred directly to the yard, Mr Bright would be raising exactly the same objections.”
35. Those then are the factual assumptions against which these applications were decided and which must govern this appeal. For the purposes of these applications, any investigation of the actual facts, let alone a mini-trial on any contested areas of the evidence, is not only inappropriate, it is also unnecessary.
36. Two consequences of these assumptions should be immediately apparent. The first is that, whilst there is nothing in the evidence at the moment which expressly contradicts any of those assumptions, because they all stem from the Respondent’s case and the evidence to support it, it is likely that some of them, perhaps many, will be disputed at trial. The assumptions therefore would appear to represent the Respondent’s case at its highest. It is not easy to see how it could be materially improved at trial. Unlike *Okpabi*, therefore, the crucial questions here fall to be answered against the background of the assumptions that the Respondent herself wants the court to make.
37. The second consequence is that the making of so many critical assumptions, in a case where the duty alleged could fairly be described as an unusual extension of an existing principle, may take us into the doubtful area of deciding important questions of law on assumed facts, as identified by Lord Browne-Wilkinson in *Barrett* and Lord Briggs in *Vedanta*.

6 DUTY OF CARE: ROUTE 1

38. The duty of care in this case is pleaded at paragraph 88 of the particulars of claim as follows:

“At all material times, the Defendant owed the Deceased a common law duty of care. The duty of care required the Defendant to take all reasonable steps to ensure that its negotiated and agreed end of life sale and the consequent disposal of the Vessel for demolition would not and did not endanger human health, damage the environment and/or breach international regulations for the protection of human health and the environment.”

Paragraph 89 avers that this duty fell within well-recognised categories of the tort of negligence and paragraph 90 provides particulars as to foreseeability, proximity and held why it is fair, just and reasonable to impose such a duty.

39. Mr Hermer’s first submission in support of the existence of this duty of care was by reference to what he said were straightforward *Donoghue v Stevenson* principles. The judge was unimpressed with that way of putting the duty, dealing with the argument in one paragraph:

“37. In my judgment, the present case does not fit comfortably within elementary *Donoghue v Stevenson* principles. In that case there was a chain of contractual relationships, all part of Mr Hermer's so-called "continuum", but there was no intervening action of any sort by a third party. This was because the ginger beer was concealed in an opaque bottle and no one along this contractual chain (aside from the manufacturer) was in any way responsible either for putting it there or failing to detect its presence. The present case is different owing to the interventions of the owner of the yard and/or the deceased's employer in causing him to work on the vessel without taking proper precautions...”

The judge apparently only spared this alleged basis for the duty of care from strike out on the application of the principle in *Barrett*.

40. On this primary way of putting the duty, the Respondent would need to establish that the Appellant had a duty to take reasonable care to avoid acts or omissions which it could reasonably foresee would be likely to injure the deceased, and that the deceased was his ‘neighbour’ because he was “so closely and directly affected by [the Appellant’s] act that [the Appellant] ought reasonably to have him in contemplation as being so affected when [the Appellant] was directing its mind to the acts or omissions which are called in question”: *Donoghue v Stevenson* [1932] AC 562.
41. In my view, the Respondent’s first way of putting the duty hangs its metaphorical hat very firmly on foreseeability. But foreseeability alone cannot create a duty of care: see Lord Goff in *Smith v Littlewoods* at 272-279; Lord Hope in *Mitchell v Glasgow City Council* [2009] 1 AC 874 at paragraph 15; and Lady Hale in the same case at paragraph 76. Hence the need for Mr Hermer to show sufficient proximity between the deceased and the Appellant; that the Appellant ought to have had the deceased reasonably in contemplation at the time of choosing to sell to Hsejar. That is rather more difficult. Is there really such a close connection between a shipbroker in London and a worker in the Chattogram shipyards, that the former should have regarded the latter as its ‘neighbour’?

42. Perhaps alive to that potentially difficult issue, on appeal Mr Hermer put his argument based on *Donoghue v Stevenson* principles – what he called route 1 - in a slightly different way. He said that there were two questions for the court to answer. The first was: if the Appellant had sold a dangerous product direct to the yard with full knowledge of its unsafe practices, was the Appellant’s relationship with the deceased sufficiently proximate to establish a duty of care? He said the answer to that first question was Yes. He said the second question was whether that duty could then be negated as a result of the involvement of third parties. He said the answer to that second question was No.
43. The potential difficulty inherent in Mr Hermer’s first question is that it assumes that the vessel was a dangerous product. That seems to me to be far from certain. If its danger lay in its size, that was hardly something that was hidden, in contrast to the snail in the ginger beer bottle. Moreover, it is arguable that if, say, the vessel was in a dry dock in China, surrounded by cranes and safety infrastructure, it would not itself be inherently dangerous. When I put that to Mr Hermer during the course of argument, he said that the vessel was dangerous because its demolition was an inherently dangerous activity. That answer potentially moves this case outside the scope of ordinary *Donoghue v Stevenson* principles, not least because the dangerous activity – namely the demolition - was not being arranged, supervised or performed by the Appellant.
44. As to Mr Hermer’s second question, namely the effect, if any, of the involvement of third parties, he said the judge had been wrong to say that such involvement could even arguably negate the duty. He said that this was because neither Hsejar nor the Zuma Yard had acted in any way other than anticipated. He said that they acted in the way determined by the Appellant’s original decision to sell to Hsejar.
45. I certainly accept that, on the assumption noted at paragraph 34 above, the involvement of Hsejar would not negate the duty. The issue turns on the involvement of the Zuma Yard.
46. In reliance on the proposition that the existence of a duty could not be extinguished by the involvement of third parties, if those third parties acted in the way that was or could be anticipated, Mr Hermer relied on the well-known decision of the House of Lords in *Home Office v Dorset Yacht Co Limited* [1970] AC 1004, and the following passage from Lord Reid’s speech:

“These cases show that, where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as *novus actus interveniens* breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think it can matter whether that action was innocent or tortious or criminal. Unfortunately tortious or criminal action by a third party is often the " very kind of thing" which is likely to happen as a result of the wrongful or careless act of the defendant. And in the present case, on the facts which we must assume at this stage, I think that the taking

of a boat by the escaping trainees and their unskilful navigation leading to damage to another vessel were the very kind of thing that these Borstal officers ought to have seen to be likely.”

47. It seems to me that this passage is more concerned with foreseeability than proximity. Mr Hermer used other words to try to colour the degree of foreseeability in this case, such as “anticipated” and even “preordained”, but in legal terms, as the judge pointed out at [48], they still only mean “foreseen”.
48. As to proximity, I am not persuaded that *Dorset Yacht* is of very much assistance in the present case. There, as Mr Bright rightly pointed out, the basis for the finding of liability against the Home Office was that the Borstal trainees who caused the damage were “under the supervision and control of three Borstal officers”. It was that significant element of supervision and control of the third parties which gave rise to the finding of liability on the part of the Home Office.
49. For these reasons, notwithstanding the factual assumptions set out in Section 5 above, I am doubtful whether, at trial, a court would follow Mr Hermer down route 1 to reach his intended destination, namely the finding of a duty of care in the present case on *Donoghue v Stevenson* principles. I am inclined to agree with the judge’s conclusion at [37] that this case “does not fit comfortably” within such principles.
50. But this is not the trial: it is an interim application for summary judgment by the Appellant. And although neither of them is straightforward, can it properly be said that Mr Hermer’s answers to his two questions are so fanciful, so unconnected to the recent developments in the law of negligence, that the claim should not be permitted to proceed to trial? I do not think that it can. This way of putting the case may not be straightforward, may even be unlikely to succeed at trial. But, like the judge, I cannot conclude that it is so fanciful that it should be struck out. Moreover, again like the judge, my conclusion to that effect is strengthened by a consideration of Mr Hermer’s route 2.

7 DUTY OF CARE: ROUTE 2

51. Mr Hermer’s route 2 accepts the proposition that the involvement of the Zuma Yard may defeat the existence of a standard *Donoghue v Stevenson* duty. His argument is that this case falls into one of the recognised exceptions to the usual rule that A will not be liable for harm done to C caused by a third party B (the rule that there is generally no liability in tort for the harm caused by the intervention of third parties). The exception arises where A is responsible for or has created the danger which B has then exploited and that has caused harm to C.
52. I should say at the outset that I do not accept Mr Bright’s submission that, in some way, the judge invented his own exception to the general rule that there is no liability in tort for the harm caused by the intervention of third parties. One only has to look at *Clerk and Lindsell on Torts*, 23rd edition, at para 7-60 to see that one exception to the general rule is said to occur “where the defendant is responsible for a state of danger which may be exploited by a third party”. It was that exception, which the judge called the ‘creation of danger’ exception, which he found to be arguable. It is certainly right that the judge considered that some of the ingredients which, in other cases, have led to the finding of that exception, did not exist in the present case. But that is a different point, concerned

with the applicability of an existing exception to an individual case, rather than the invention of an entirely new category or exception.

53. The ‘creation of danger’ exception can be traced back to *Smith v Littlewoods* where Lord Goff described the exception in these terms:

“But there is a more general circumstance in which a defender may be held liable in negligence to the pursuer, although the immediate cause of the damage suffered by the pursuer is the deliberate wrongdoing of another. This may occur where the defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the pursuer.”

54. Although, as I have said, this exception is recognised at paragraph 7-60 of *Clerk and Lindsell on Torts*, I note that many of the most important post-*Smith* authorities are not referred to in that or subsequent paragraphs. These cases reflect a growing trend of claims in negligence where there has been an intervention of some kind by a third party, such as claims against public bodies and local authorities based on the acts of others. They include *AG of the BVI v Hartwell* [2004] UKPC 12, *Mitchell and Another v Glasgow City Council* [2009] UKHL 11; *Michael and Another v Chief Constable of South Wales Police* [2015] UKSC 2; and *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736. This line of authority currently terminates in the Supreme Court judgment in *Poole Borough Council v G N and Another* [2019] UKSC 25.

55. *Hartwell* was a case about a police officer who fired four shots at his partner with a police service revolver and caused serious injury to the claimant, who was a tourist who happened to be in the bar at the time of the shooting. The evidence was that the police officer was not a fit and proper person to be given access to firearms. The Privy Council held that the police authority owed to the public at large a duty to take reasonable care to see that the officer was a suitable person to be entrusted with such a dangerous weapon and that there was a breach of that duty. Lord Nicholls said:

“38...The risk in the present case was that a police officer, entrusted with access to a firearm for police purposes, might take and use the weapon for his own purposes, namely, with the object of maliciously injuring someone else, this risk inevitably carrying with it the further risk that in the course of such criminal activity a member of the public might be injured. Were these two risks, and particularly the first of them, reasonably foreseeable? It is always *possible* that anyone may behave in such an irresponsible and criminal fashion. Strange and unexpected things are always happening. But were these risks so remote that a reasonable police officer would ignore them as fanciful?

39. In agreement with the Court of Appeal, their Lordships consider this last question must be answered "no". In the view of their Lordships the appropriate analysis is that when entrusting a police officer with a gun the police authorities owe to the public at large a duty to take reasonable care to see the officer is a suitable person to be entrusted

with such a dangerous weapon lest by any misuse of it he inflicts personal injury, whether accidentally or intentionally, on other persons. For this purpose no distinction is to be drawn between personal injuries inflicted in the course of police duties and personal injuries inflicted by a police officer using a police gun for his own ends. If this duty seems far-reaching in its scope it must be remembered that guns are dangerous weapons. The wide reach of the duty is proportionate to the gravity of the risks. Moreover, the duty imposes no more than an obligation to exercise the appropriately high standard of care to be expected of a reasonable person in the circumstances.”

56. In *Mitchell*, D and M were both local authority tenants. D had mental health issues and had threatened to kill M on a regular basis. Without informing M, the local authority summoned D to a meeting at which he was warned that continued anti-social behaviour could result in his eviction. About an hour after the meeting, D attacked M, who subsequently died. The claim against the local authority was based on the events surrounding the meeting, not the pre-history, so it could be said that a state of danger already existed. The claim was rejected, the House of Lords concluding that there was nothing to show that the local authority had made itself responsible for protecting M from the criminal acts of D. Lord Hope said:

“15. Three points must be made at the outset to put the submission into its proper context. The first is that foreseeability of harm is not of itself enough for the imposition of a duty of care: see, for example, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1037 - 1038, per Lord Morris of Borth-y-Gest; *Smith v Littlewoods Organisation Ltd* (reported in the Session Cases as *Maloco v Littlewoods Organisation Ltd*) 1987 SC (HL) 37, 59, per Lord Griffiths; *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 60, per Lord Keith of Kinkel. Otherwise, to adopt Lord Keith of Kinkel's dramatic illustration in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175,192, there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning. The second, which flows from the first, is that the law does not normally impose a positive duty on a person to protect others. As Lord Goff of Chieveley explained in *Smith v Littlewoods Organisation Ltd*, 76, the common law does not impose liability for what, without more, may be called pure omissions. The third, which is a development of the second, is that the law does not impose a duty to prevent a person from being harmed by the criminal act of a third party based simply upon foreseeability: *Smith v Littlewoods Organisation Ltd*, 77- 83, per Lord Goff.”

Later in his judgment at [19] Lord Hope referred to *Hartwell*, and said: “It is not so easy to reconcile an approach that relies generally on the likelihood of harm with the general rule that a person is under no legal duty to protect another from harm”. Put another way, Lord Hope might be thought to be querying whether foreseeability was enough to found such a broad duty.

57. In *Michael*, the victim made a 999 call and told the call handler, amongst other things, that her former partner had threatened to kill her. The call handler did not pass on that part of the message, with the result that the call was given a lower priority level. By the time the police responded to the call, the former partner had killed the victim. By a majority, the Supreme Court rejected the claim in tort against the police. Lord Toulson said:

“97. English law does not as a general rule impose liability on a defendant (D) for injury or damage to the person or property of a claimant (C) caused by the conduct of a third party (T): *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 270 (a Scottish appeal in which a large number of English and Scottish cases were reviewed). The fundamental reason, as Lord Goff explained, is that the common law does not generally impose liability for pure omissions. It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else.

98. The rule is not absolute. Apart from statutory exceptions, there are two well recognised types of situation in which the common law may impose liability for a careless omission.

99. The first is where D was in a position of control over T and should have foreseen the likelihood of T causing damage to somebody in close proximity if D failed to take reasonable care in the exercise of that control. *Dorset Yacht* is the classic example, and in that case Lord Diplock set close limits to the scope of the liability...

100. The second general exception applies where D assumes a positive responsibility to safeguard C under the *Hedley Byrne* principle...”

Thereafter, for the reasons set out at length in his judgment, primarily concerned with the liability of public bodies in such circumstances, Lord Toulson rejected the proposition that there was a duty of care in that case under either of the exceptions.

58. By contrast, in *Robinson*, police officers caused foreseeable injury to an elderly passer-by while attempting to arrest a suspect on the street in the town centre. The Supreme Court found that there was a reasonably foreseeable risk of injury and the police officers had owed a duty of care towards pedestrians, including the claimant, in the immediate vicinity when the arrest had been attempted. In that case, Lord Reed adopted Lord Hope’s analysis in *Mitchell* in arriving at his conclusions. He said at [37]:

“A further point, closely related to the last, is that public authorities, like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party: see, for example, *Smith v Littlewoods Organisation Ltd* and *Mitchell v Glasgow City Council*. In *Michael*, Lord Toulson explained the point in this way:

“It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else.” (para 97)

There are however circumstances where such a duty may be owed, as Tofaris and Steele indicated in the passage quoted above. They include circumstances where the public authority has created a danger of harm which would not otherwise have existed, or has assumed a responsibility for an individual’s safety on which the individual has relied. The first type of situation is illustrated by *Dorset Yacht*, and in relation to the police by the case of *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273, discussed below. The second type of situation is illustrated, in relation to the police, by the case of *An Informer v A Chief Constable* [2013] QB 579, as explained in *Michael* at para 69.”

59. Two general points should be made about these authorities. First, they show that it may be unnecessary and potentially distracting to insist that claims in tort arising from the intervention of third parties must be corralled into a pen marked “pure omissions”. That may have been how Lord Goff treated such claims in *Smith*, but that language is not always helpful and can appear outdated. It can be unhelpful because it can lead to interminable debates (including in the present case) about whether the facts of a particular case could be said to amount to “pure omissions”, or whether there was an act or acts which might somehow make all the difference to the application of the exception. Such debates have always had an air of artificiality and they detract from the underlying principles to be applied in third party cases, a point I tentatively made in *Kalma v African Minerals Limited and Others* [2020] EWCA Civ 144 at [121] and [128], and which, more importantly, was made expressly by Lord Reed in *Poole* at [28].
60. That same paragraph in Lord Reed’s judgment also explains why the language of “pure omissions” might now be regarded as somewhat outdated. He instead drew the distinction between causing harm (making things worse), on the one hand, and failing to confer a benefit (not making things better), on the other. He noted that the law often imposes a duty of care not to make things worse, but rarely imposed a duty to make things better. That is a much clearer description of where the dividing line might be drawn in any particular case.
61. The second general point to be made about these authorities is that they demonstrate that one of the most fast-developing areas of the law of negligence at present concerns the scope and extent of this and other exceptions to the general rule that there is no liability in tort for harm caused by the intervention of third parties. That is a point also emphasised in Lord Reed’s judgment in *Poole*.
62. Mr Hermer’s route 2 is based on the proposition that this is not a case where the Appellant failed to make things better; he submitted that the Appellant here made things worse. He argued that the Appellant created the danger by deciding that the vessel was to be broken up in Chattogram, where the working practices were so notoriously unsafe. He said that the Appellant brought about the deceased’s death because, in the circumstances, that death was not a mere possibility but a probability.

63. This second way of putting the duty of care is again not straightforward. The quartet of decisions in *Hartwell*, *Mitchell*, *Michael* and *Robinson* demonstrate the restricted circumstances in which a defendant will be liable in tort for damage caused by the intervention of a third party, and that it will only be in a relatively extreme case that the ‘creation of danger’ exception will operate. Much will turn on the precise nature and extent of the danger said to have been created. Fundamental questions therefore arise: can it really be said that a large oil tanker was the equivalent of the loaded gun in *Hartwell*? Did the Appellant “create a danger of harm which would not otherwise have existed” as per *Robinson*, simply by sending the vessel to Chattogram?
64. However, whilst I do not underestimate the hurdles that Mr Hermer’s route 2 will face at trial, I consider that this way of putting the claim is arguable, and not fanciful. The ‘creation of danger’ is a recognised exception to the usual rule as to the intervention of third parties which may give rise to a duty of care. I consider that the assumptions in Section 5 above are capable of triggering that exception: the Appellant arguably played an active role by sending the vessel to Bangladesh, knowingly exposing workers (such as the deceased) to the significant dangers which working on this large vessel in Chattogram entailed. That might render the vessel and its demolition dangerous in a way that the large empty cinema in *Smith* was not. The Zuma Yard’s failure to provide any safety harnesses or any other proper equipment, and the tragic consequences of their not doing so, were entirely predictable, perhaps even more than the likelihood of mischief by the Borstal boys in *Dorset Yacht* or the risk of misuse of the gun in *Hartwell*.
65. This may properly be described as an unusual extension of an existing category of cases where a duty has been found, but it would not be an entirely new basis of tortious liability. Moreover, the Respondent’s case, when reduced to its basic ingredients, is that, not only is there the necessary foreseeability, but there is also a relationship of proximity between the Appellant and those who might foreseeably be injured by the danger created by (or inherent in) the Appellant’s decision to sell to Hsejar. In my view, by reference to the authorities noted above, such a case is at least arguable.
66. I have some sympathy with Mr Bright’s twin submissions on the practicalities of all this (that the Appellant cannot be held to be the shipbreaking world’s policeman and that, if there was a duty of the kind alleged here, the ramifications might be extremely far-reaching), but it seems to me that they go to a consideration of whether, if the alleged duty is found to fall outside any established category, it would still be fair, just and reasonable to find the existence of the duty in this case. The authorities make plain that such an issue is not to be decided at an interim stage like this.
67. For completeness, I should deal with one of the aspects of the appeal to which some time and effort was devoted on both sides. It was submitted on behalf of the Respondent that the danger of harm would not otherwise have existed (as per *Robinson*) if the Appellant had sold the vessel elsewhere. For the reasons I have already given, I consider that to be arguable, but it is a proposition which also highlights one of Mr Bright’s least persuasive submissions. His repeated complaint was that it was wholly unclear what else the Appellant could have done, or should have done, to avoid the risks to the deceased. The answer to that lay in the Respondent’s expert evidence, namely that the Appellant could, and should, have insisted on the sale to a so-called ‘green’ yard, where proper working practices were in place. The evidence was that there were a number of

such yards round the world where this vessel could have been safely demolished (see in particular paragraph 28 of the report of Nicholas Willis, the Respondent's expert).

68. How might that have been achieved, Mr Bright asked rhetorically? In my view, it could have been achieved by the use of provisions within the MoA which, whilst recognising that there are three parties (the yard, the demolition contractor and the shipowner/seller), could have endeavoured to link the inter-party payments to the delivery of the vessel to an approved yard. Such an arrangement appears not only feasible, it also finds a clear echo in the MoA itself. Clause 22 imposed an obligation on the buyer (in this case Hsejar) to confirm that they would only sell to a yard that would perform the demolition "in accordance with good health and safety working practices..." In other words, the inclusion of provisions requiring safe demolition in the contract of sale was well within the reasonable control of the Appellant. The evidence was that clauses like clause 22 were standard, so ensuring that they had real force might perhaps become standard too.
69. The problem is that, on the evidence, both Hsejar, the buyer, and the Appellant, the seller of the vessel, knew that clauses like clause 22 would be entirely ignored. That appears to be part of the unhappy reality of the shipbreaking business: everyone turns a blind eye to what they know will actually happen. A seller in the position of the Appellant would have no interest in ensuring the performance of clause 22 as it stands, and a buyer in the position of Hsejar could therefore be in breach of that provision without any sanction. Even if it was in breach of clause 22, it would argue that the seller had suffered no loss as a result. However, if the payment arrangements had been different, then both buyer and seller would have had a very real interest in ensuring that provisions like clause 22 were more than words on a piece of paper.
70. In this way, it is at least arguable that the Appellant could have acted differently and that, if they had done, it might have made a real difference to the outcome.
71. There is one final point which favours the dismissal of the appeal on Ground 1. As I have endeavoured to show, claims based on a duty of care, in circumstances where the damage has been caused by a third party, are currently at the forefront of the development of the law of negligence. The alleged duty in this case could certainly be regarded as being on the edge of that development. But in such circumstances, I agree with the judge that, following the principle in *Barrett and Vedanta*, it would be inappropriate to strike out the claim based on the alleged duty of care on assumptions, in the absence of any findings of fact.
72. Accordingly, for the reasons that I have given, I would uphold the judge's conclusion that the alleged duty of care in the present case was not susceptible to being struck out, or was so fanciful that it should lead to summary judgment in favour of the Appellant. To the extent that it matters, I consider that route 2 has more chance of success than route 1, because it at least addresses head-on the potentially critical involvement of the Zuma Yard in the death of the deceased.
73. However, that is not the end of the appeal. In order to avoid the striking out of the claim, the Respondent also has to show that it is not statute-barred. On the judge's findings, this means that she has to persuade the court that she has an arguable case to disapply the one-year limitation period under Article 7 of the Rome II Regulation and/or to disapply the one-year limitation period under Article 26, or that one or both of those

issues should not be decided now, but instead be resolved by way of some form of preliminary issue.

8 THE BACKGROUND TO THE LIMITATION ISSUES

74. The judge found that, pursuant to Article 4 of Rome II, the law of Bangladesh applied to this case: see [76]-[79]. He also found that, if Bangladeshi law applied, the claim was statute-barred because it was brought outside the non-extendible one-year limitation period prescribed by Bangladeshi law. On the face of it, therefore, the claim was statute-barred and was susceptible of being struck out.
75. However, the judge declined to strike out the claim on this basis for two separate reasons. First he found that the Respondent had an arguable case that Article 7 of Rome II applied, because this was a claim arising out of environmental damage: see [76]-[84] which could have the effect of replacing the one-year period with the three-year period applicable in England. The judge rightly dealt with this entirely as a matter of construction of Article 7.
76. In addition, he concluded at [85] that the Respondent's second argument, that pursuant to Article 26 of Rome II the one-year limitation period should be disapplied, was not capable of being resolved at the hearing and should instead be determined by way of a preliminary issue. As noted above, the Appellant has permission to appeal against both of those findings. If the Appellant is successful on both it would mean that, notwithstanding my views about the duty of care, if my Lords agreed, this claim would be struck out.
77. Mr Hermer said that the arguments on these two points had been limited before the judge, and that in consequence this court should not intervene in what were essentially case management decisions. In my view, there is nothing in that argument. It is immaterial to Article 7, where the issue is entirely a matter of construction of the Article itself. The judge's construction was either right or wrong and the Appellant has leave to argue that he was wrong. And although the proper management of the issues has some relevance to the debate about Article 26, the position there has, as we shall see, moved on quite considerably since the matter was before the judge, and on one view, it is now the Respondent who requires the indulgence of the court.

9 ARTICLE 7

78. Article 7 provides as follows:

““Environmental damage

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.”

Recitals 24 and 25 are also relevant:

"(24) 'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.

(25) Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised."

79. The Respondent's first argument is that the deceased's death arose out of environmental damage, or was damage sustained as a result of environmental damage. On that basis, it is said that the Respondent is entitled to choose to base her claim on the law of the country in which "the event giving rise to the damage occurred". The second argument is that the event giving rise to the damage was the contract for the sale of the vessel to Hsejar, which contract was made in London.
80. If a court concludes that an application for summary judgment under Part 24 gives rise to a short point of construction or law, then it should proceed to decide it: see *ICI Chemicals and Polymers Limited v TTE Training Limited* [2007] EWCA Civ 725 and *Global Asset*. The Article 7 issue here is a good example of a point that is capable of such summary determination. I am in no doubt that the Respondent's submissions are based on an incorrect and insupportable construction of Article 7.
81. Expanding his first argument, Mr Hermer submitted that the beaching of the vessel at a Chattogram beach was an adverse change in a natural resource, as per the definition of 'environmental damage' in the Recitals. He said that the term "arising out of" was deliberately wider and looser than "caused by", such that it could be argued that the death of the deceased arose out of that environmental damage. He said that, since the accident resulted from the chain of events which began with the beaching, with all the environmental risks that that posed, the deceased's death was caught by Article 7.
82. I profoundly disagree. Article 7 is concerned with the law applicable to a non-contractual obligation: in other words, the duty of care. It is that duty which has to 'arise out of' environmental damage for Article 7 to apply at all. I have set out the pleaded duty in this case at paragraph 38 above. In essence, it is the duty to take all reasonable steps to ensure that the sale of the vessel for demolition purposes did not endanger human life or health. That duty did not arise out of environmental damage; it had nothing to do with environmental damage at all. It arose out of the complete absence of workplace safety.
83. The same point can be put in another way. If the relevant duty in this case arose out of environmental damage or the adverse change in a natural resource (the damage caused by beaching the vessel at Chattogram, thereby allowing oil and other pollutants to leak

into the sea and onto the land, and perhaps exposing the workers to toxic material like asbestos), then the Respondent would not be able to avail herself of such a duty in order to bring this claim. Such a duty would not be engaged as a result of the deceased's fall from the top of the vessel. There would be no actionable breach of a duty in respect of environmental damage on which to found the fatal accident claim.

84. That proposition can also be tested by looking at the pleaded duty itself (paragraph 38 above). I note that it refers to 'damaging the environment', as well as endangering or protecting human health. But if the references to 'damaging the environment' were taken out, that would not affect the validity of the pleaded claim, with its necessary link between the duty owed and the damage suffered. If, however, the references to endangering or protecting human health were taken out of the pleaded duty, so that all that was left was the duty to take reasonable steps not to damage the environment, the pleaded duty would have no connection with the damage suffered and the pleaded claim would fail.
85. Accordingly, for these reasons, I am confident that, as a matter of construction of Article 7, this was not a duty which arose out of environmental damage.
86. Even if Mr Hermer was right and, as a matter of construction of Article 7, the court had to consider whether the death (rather than the duty) arose out of environmental damage, the result would be the same, and for the same reasons. Even assuming for this purpose that the beaching of the vessel itself constituted environmental damage, the deceased's death did not arise out of that environmental damage or result from such damage. Instead, the death arose out of the absence of safe working practices and, in particular, the absence of a safety harness. The deceased could have been working in the most environmentally-friendly shipbreakers in the world, but sadly the absence of a safety harness would still have killed him.
87. To the extent that it is relevant, I note that these conclusions appear to be in accordance with the three commentaries to which we were referred by Mr Bright: *Dicey, Morris & Collins on the Conflict of Laws* (15th edition, 2018) at paragraph 35-067 (which suggests that, for Article 7 to apply, personal injury damage must be 'direct' and must be caused by the environmental damage); *The European Private International Law of Obligations* by Plender and Wilderspin, 4th edition, at pages 657-664; and Huber's *Rome II Regulation Pocket Commentary* on Article 7, at 212 (which states, in a chapter written by Angelika Fuchs, that personal injuries are included in Article 7 "if, and only if, they result from damages to the environment"). Mr Hermer did not refer to, much less challenge, these passages.
88. Just stepping back and looking at Article 7 in the round, it seems reasonably clear what it is designed to do. Some countries will have more lax standards as to environmental risks than others. If, say, a state or a person suffers environmental damage in country A, because of a petrol-chemical plant in a less environmentally-aware country B, five miles over the border, Article 7 is designed to give country A or its citizens the choice to use its courts to bring the claim against the plant in country B: see *Dicey, Morris & Collins* at 35-070. All of that is a million miles away from the facts of this case.
89. Moreover, if Mr Hermer's submission was correct, Article 7 would apply to every claim for damage to persons and property, provided that there was some sort of a link (as he put it) to some other environmental damage, even if that environmental damage was

incidental, in that it was not the subject of the claim. He suggested that Article 7 would not apply if the vessel had been in a dry dock, but if his broad interpretation is right, it would be inevitable that some (albeit limited) environmental damage would be caused by, say, the cutting up of the steel hull, even if the workplace was generally safe. So Article 7 would still apply. That would be an astonishing interpretation, giving Article 7 a scope and an impact which cannot be discerned from its words, or the commentaries upon it. The absence of any caselaw to that effect is also an indication that it cannot have such a broad application.

90. Although my views as to environmental damage make it unnecessary to reach a concluded view as to whether or not “the event giving rise to the [environmental] damage” could be said in this case to be England, I think there is a fundamental difficulty with the Respondent’s argument on that aspect of the construction too. The Respondent has to say that the event which gave rise to the damage was the sale of the vessel, an event which, of itself, was a mere paper transaction with no direct effect on the environment at all. The same paragraph in *Dicey, Morris & Collins* noted in the previous paragraph suggests that the event giving rise to the damage should be identified with “the human activity which is the principal or substantial cause of the environmental damage”. In this case, that must be the demolition of the vessel in Chattogram.
91. Contrary to Mr Hermer’s submissions, I consider that this is the common sense interpretation of the words “events giving rise to the damage...”. Furthermore, I consider that the Swedish authority to which he referred (*Arica Victims KB v Boliden Minerals* (2019) Ovre Norrland Court of Appeal), was also against him. There the damage caused by the wet sludge took place in Chile, but the Swedish court accepted jurisdiction. That was not (as Mr Hermer suggested) because the first event in the chain happened to be in Sweden, but because the defendant was a Swedish company, and numerous relevant and significant events happened in Sweden, including meetings with the Swedish Environmental Protection Agency and other key decisions about who would take over responsibility for the wet sludge.
92. In this way, the *Arica* case is simply an example of the equivalent English law as to jurisdiction in tort claims, where the claiming party who wishes to litigate in England needs to show that “the damage has resulted from substantial and efficacious acts committed within the jurisdiction”: *Metall und Rohstoff v Donaldson* [1990] 1 QB 391 at 437 E-G. *Arica* is not authority for any proposition or principle, much less the suggestion that you simply take the first event in a chain of events as being “the event giving rise to the damage”.
93. For these reasons, I consider that the judge was wrong to find that it was arguable that Article 7 was engaged in this case. As a matter of construction, it plainly was not. Thus the first potential way round the one-year limitation period is not therefore open to the Respondent.

10 ARTICLE 26

94. Article 26 of Rome II provides:

“The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum”

95. Recital 32 provides:

“Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum”.

96. The parties were agreed that this provision was echoed in Section 2 of the Foreign Limitation Periods Act 1984 which provides:

“(1) In any case in which the application of Section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.

(2) The application of Section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings”

97. The argument put forward by the Respondent is that the one-year time limit imposed by Bangladeshi law should be disapplied by operation of Article 26. The prime reason for that was an argument concerned with undue hardship. On appeal, Mr Hermer also relied, rather more faintly, on general public policy.

98. The judge dealt with the point briskly:

“85. Mr Hermer's Reply and skeleton argument raised the application of the public policy exception under Article 26 of Rome II to the one-year non-extendable Bangladeshi limitation period, assuming that it was applicable. At the hearing, the submissions in support of this contention, made both orally and in writing, were exiguous on both sides. According to the Reply, the claimant had had no previous access to justice against the defendant, but pre-action correspondence written before 30th March 2019 demonstrates that averment to be incorrect. The Reply also asserts that the egregious nature of the defendant's breach of duty is relevant. In my view the focus must be principally on whether it would be offensive in English law to countenance the application of so short a limitation period, and the submissions on this aspect were light indeed. Aside from taking a pleading point, Mr Bright did not advance a substantive rebuttal. Thus, I am asked to resolve this issue on a basis that is far from satisfactory. My conclusion is that it would

not be right to determine the issue at this stage, and certainly not in the defendant's favour. If the overriding objective and reasons of proportionality support the definitive resolution of the Article 26 issue in advance of the trial, the Court may come back to it.”

In other words, the judge rejected the argument as to undue hardship because of the pre-action correspondence, but concluded that any wider arguments as to whether or not the one-year limitation period would be offensive in English law should be resolved by way of a preliminary issue.

99. Mr Hermer sought to support that conclusion in front of us. He submitted that the Article 26 point could not be decided without evidence, in particular evidence relating to whether or not the Respondent would suffer undue hardship and whether or not there would be a denial of access to justice. That rather overlooked the point that the judge had already decided that issue against the Respondent because the pre-action correspondence showed that she had had access to Leigh Day well before the expiry of the limitation period.

Undue Hardship

100. Accordingly, the first question is to decide whether undue hardship is in play in this appeal at all. There is no cross-appeal, which would normally make it difficult for a Respondent to be able to reopen this point. That said, I am conscious that this case is rather unusual. The Article 26 issue only arose after the hearing itself, and the judge dealt with the point very much in passing, and at the stage of corrections to his draft judgment. Through no fault of the judge, it cannot be said to have been fully ventilated.
101. In my view, the just course is this. The Respondent should be allowed to reopen the judge's conclusion on undue hardship, but only to the limited extent identified in the recent exchanges between the parties and outlined below.
102. The best-known authority dealing with undue hardship is the decision of Wilkie J in *KXL v Murphy* [2016] EWHC 3102 (QB) where he identified a number of propositions from the earlier cases. These included that:
- a) ‘Undue’ in this context means ‘excessive’ (*Jones v Trollope Colls Cementation Overseas Limited*, The Times January 26 1990 (CA));
 - b) The focus is on the undue hardship caused to the claimant by the application of a foreign limitation period over and above that inevitably caused by the application of the foreign limitation period in question (*Jones*);
 - c) If, within the foreign limitation period, the claimant acquires all the material required for bring the action, it is not contrary to public policy to apply the foreign rule, even if he is only a few days late in commencing the proceedings (*Arab Monetary Fund v Hashim and Others* [1993] 1 Lloyd's Rep. 543);
 - d) The fact that a claimant did not issue in time on account of inaccurate legal advice as to the limitation period does not suffice, as a hardship would not have been caused by the foreign limitation period (*Harley v Smith* [2010] EWCA Civ 78).

103. This approach has been followed in a number of subsequent cases including *Kazakhstan v Zhunus* [2017] EWHC 3374 (Comm) and *Roberts v Ministry of Defence* [2020] EWHC 994 (QB).
104. I accept Mr Hermer's submission that, in an ordinary case, evidence as to what legal resources the Respondent had available to her, the nature of her communications with her solicitors, and how and when those were facilitated, might well be directly relevant to any consideration of undue hardship and access to justice. But I am confident that none of that is relevant in the present case, because we know – and as the judge found - that, on 22 January 2019, Leigh Day sent a 13-page letter of claim to the Appellant. Amongst other things, that letter expressly recognised, as part of the alternative case, that the law of Bangladesh would apply to the claim. Accordingly, whatever the difficulties may have been before January 2019 in terms of access to justice, it was quite apparent that all the material required for bringing the claim had been obtained on behalf of the Respondent two months before the expiry of the limitation period.
105. On the face of it, therefore, the case was entirely within the category of case identified in the *Arab Monetary Fund* case, cited by Wilkie J in *KXL*. That was clearly the judge's view, because he found that the pre-action correspondence (namely the detailed letter of claim) demonstrated that the complaint about access to justice was inapplicable.
106. On appeal, an argument was raised for the first time that the Leigh Day letter of claim wrongly identified the accident date as 24 April rather than 30 March 2018 and that this error was also reflected in the claim form. The claim form was issued within a year of that (incorrect) date. The suggestion was, therefore, that there had been an error in the identification of the date of death and the Respondent should not be liable for the consequences.
107. At the end of the hearing, this court required Martyn Day, the Respondent's solicitor, to provide a witness statement saying when and in what circumstances his firm became aware of the actual date of the deceased's death. Mr Day's statement says that the incorrect date of 24 April 2018 came from a source at the Zuma Yard and had been confirmed by the Respondent. He said that the error was not spotted by his team until 1 August 2019. However, Ince Gordon Dadds (the Appellant's solicitors) pointed out in their response of 18 February 2021 that - amongst other things - the material provided by Mr Day showed that the death certificate, which referred to the correct date of the accident ("30/3/18"), had been provided to Leigh Day on 18 March 2019, 12 days *before* the expiry of the one-year limitation period. Mr Day did not suggest that his firm was unaware of the one-year limit under Bangladeshi law. The only reason the claim form was not issued in time was because of the error about the date of death.
108. On the basis of this material, none of which was available to the judge, it seems to me that there is a short, sharp issue between the parties as to the undue hardship exception, and whether it can be invoked in this case. It is a very limited issue, relating only to the documents and other information that was available to Leigh Day about the date of the accident between 22 January 2019 (the date of the letter of claim) and the expiry of the limitation period. The period prior to the letter of claim on 22 January 2019 is irrelevant for this purpose, for the reasons given by the judge, and which I have endorsed above. This limited issue ought to be capable of swift resolution at a preliminary issue hearing.

109. As I have indicated, although this is something of an indulgence to the Respondent (because it is a new point on which they need to succeed in order to keep this claim from being struck out), I am confident that it is a just course. The issue that has now arisen was never even mentioned to the judge. I am entirely satisfied that, if the judge had had the material which is now available to this court, he would have concluded that a preliminary issue on the issue of undue hardship was appropriate.

Public Policy

110. Mr Hermer suggested that considerations of public policy also militated against the imposition of the one-year limitation period. That argument found favour with the judge, at least to the extent of being hived off to be dealt with at a preliminary issue. However, for the reasons set out below, I disagree with that conclusion. I am in no doubt that, if the matter had been properly argued before him, the judge would have dismissed the argument based on public policy.
111. Mr Hermer's first submission was that there may be further evidence on disclosure relevant to the issue of public policy. In particular, he said that disclosure might be material if the documents showed that one of the reasons why the sale of the vessel happened at all was because the Appellant was aware that the short limitation period in Bangladesh made it most unlikely that it would have to pay any ultimate legal price for the decision to sell to Hsejar.
112. That is both fanciful and irrelevant. It is fanciful because, as I have already explained, the Appellant always knew that there would be no ultimate legal price to pay, because of the toothlessness of clause 22. And it is irrelevant because such documents, even if they existed, would be of no relevance to the Section 2(1) / public policy test. Section 2(1) is concerned with wider principles, not the particular facts of any given case. It is impossible to see how in principle, even if the short limitation period in Bangladesh had been a factor in the sale, that could give rise to any sort of public policy argument.
113. As Wilkie J noted in *KXL*, public policy should be invoked for the purposes of disapplying a foreign limitation period only in exceptional circumstances. That could only be where the foreign limitation period was contrary to a fundamental principle of justice. That is, deliberately, set as a very high bar. Mr Bright rightly drew attention to the words of Article 26, which said it "only" applied if the foreign limitation period was "manifestly incompatible" with public policy.
114. Nothing here suggests that the Respondent has come anywhere close to meeting this high hurdle. The argument that it is manifestly less generous than the English limitation period is nothing to the point: as Sir Thomas Bingham MR noted in *Durham v T & N PLC* (1 May 1996, CA, unreported), it would be wrong to treat a foreign limitation period as contrary to English public policy simply because it was less generous than the comparable English provision. And, on analysis, that is the only point that the Respondent can make on public policy.
115. Accordingly, whilst I consider that the new evidence about the incorrect date of the accident justifies a short preliminary issue hearing on the "undue hardship" test, I do not consider that the same is necessary or appropriate in respect of the policy issue. On the contrary, in the present case, there is no basis, other than possibly undue hardship, for the one-year limitation period to be disappplied.

11 CONCLUSIONS

116. For the reasons set out in Sections 6 and 7 above, I consider that the duty of care alleged in this case, although faced with formidable hurdles, cannot be dismissed as fanciful. It survives the CPR r.3.4/r.24.2 test. And to the extent that it is close to the borderline, I consider that, because it is an unusual argument in a rapidly-developing area of law, it would also be wrong in principle to strike it out at this stage.
117. Subject to the undue hardship argument, I consider that, for the reasons set out in Sections 9 and 10, the claim is statute barred. I do not consider that there is any relevant material concerning the application of either Article 7 or Article 26 which is not available to the court. For the reasons set out in Section 9 above, I conclude that Article 7 does not apply to this case. For the reasons set out in Section 10, I conclude that Article 26 does not apply either, unless the Respondent is able to establish, within the confines of the particular issue noted above, the undue hardship argument.
118. If my Lords agree, I would make an order to that effect.

LORD JUSTICE MALES:

119. With one minor reservation (see [135] to [137] below), I agree with the judgment of Coulson LJ. In view of the interesting arguments addressed to us, I add some observations on two aspects of the case. I do so bearing in mind the guidance, most recently reiterated by the Supreme Court in *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3 at [107], that “the factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupported”. The factual averments made by the Claimant in the present case are not demonstrably untrue. On the contrary they are clearly pleaded and supported by evidence which appears to be plausible. Nevertheless, it is important to say that in many respects they are disputed. It follows that what we have to decide at this stage is very different from the judge’s task at any trial. At this stage all we have to decide is whether the Claimant has an arguable case on the facts assumed to be true. The issue at any trial will be whether she has a good case on the facts which are actually proved, which may cast the matter in a rather different light. When I refer to the facts in what follows, I am referring to the facts which have to be assumed for the purpose of the present appeal.

Duty of care

120. A tanker which has come to the end of its working life cannot just be abandoned or scuttled by its owner. That would create a physical and environmental danger. Instead, its thousands of tonnes of steel must be dismantled and recycled, and the toxic and polluting substances which it contains must be removed. Such shipbreaking is only carried out in a limited number of countries.
121. When the “MARAN CENTAURUS” reached the end of its working life in the summer of 2017, its owner (by which term I include the Defendant who must be treated for the purpose of this appeal as standing in the shoes of the owner) had to decide what to do with it. The choice was straightforward. Either the ship could be sent for dismantling in the relative safety of a dry dock in China or it could be run aground on a beach in the Indian subcontinent to be broken up by hand by workers who were not even provided with rudimentary safety equipment and where fatalities and serious injuries were both

common and notorious. It might be thought that any responsible owner faced with that choice would opt for safety. But not so. Chinese shipyards would have been prepared to pay US \$10 million for the ship but a buyer in the subcontinent, which did not have to bear the expense or go to the trouble of providing safe conditions for its workers, would pay more. A shipbreaker in Chattogram (formerly known as Chittagong) in Bangladesh, where conditions were worst of all, would pay the most, US \$16 million. The owner of the “MARAN CENTAURUS” decided to take the money, leaving the workers in Chattogram to take the risk. So it was to Chattogram that the ship went. That, at any rate, is the Claimant’s case, reduced to its essentials.

122. In due course the entirely foreseeable happened when the Claimant’s husband joined the ranks of Chattogram fatalities, falling to his death when working on the vessel at height without having been provided with a safety harness.
123. The first issue on this appeal is whether it is arguable with a real prospect of success that the Defendant owed a duty of care to the Claimant’s husband. This issue has been argued by reference to English law. There is a further issue whether the applicable law is English law or the law of Bangladesh, but for the purpose of deciding whether a duty of care exists it has not been suggested that there is any material difference between the two systems of law.
124. As Coulson LJ has explained, there is a well-established exception to the principle that a Defendant is not liable for harm caused by the acts of a third party which applies when the Defendant is responsible for creating a state of danger which results in the third party causing injury to the Claimant. In my judgment it is at least arguable that this exception applies here, or at any rate that its application would represent only a minor incremental step from the existing authorities to which Coulson LJ has referred. The Defendant was responsible for sending the ship to Chattogram, knowing that this would expose workers such as the Claimant’s husband to the risk of death or serious injury as a result of the negligence of the shipbreaker which employed him. It was not a case where there was merely a risk that the shipbreaker would fail to take reasonable care for the safety of its workers. On the contrary, this was a certainty, as the Defendant knew.
125. As I understood his submissions, Mr Robert Bright QC for the Defendant advanced three main reasons why it is not arguable that the exception applies.
126. The first is that, on the facts, it was not the shipowner which sent the ship to Chattogram or which controlled the ship’s ultimate destination. The shipowner merely sold the ship to an intermediate buyer, Hsejar, which was free to decide where the ship should be broken up and, moreover, it did so on terms that Hsejar would sell it on to “a ship breaker’s yard that is competent and will perform the demolition and recycling of the Vessel in an environmentally sound manner and in accordance with good health and safety working practices” (see clause 22 of the sale contract dated 24th August 2017).
127. However, it is the Claimant’s case, supported by evidence, that the interposition of such an intermediate cash buyer was essentially a device for shipowners to seek to distance themselves from an unsavoury sector of the shipping industry, and that clause 22 was no more than a fig leaf which neither party intended to be taken seriously. There is support for that view in the sale contract. The sale price was only consistent with sale to an ultimate buyer in Bangladesh. The contract provided for the existing name of the

ship and the manager's emblem to be painted over, and for the name to be changed and the ship to be registered under the flag of the Republic of Palau. The quantity of bunkers to be left on board was what was required for a voyage from Singapore to Bangladesh, but would not have sufficed if the ship was going to China. In those circumstances there is at least an arguable case that the shipowner knew and intended that the ship would go to Bangladesh to be broken up, and that it exercised the same control over the ship's destination as if it had been sold directly to the shipbreaker in Chattogram.

128. Mr Bright's second submission was that there was no relationship of "proximity" between the shipowner and the Claimant's husband, that being a requirement for any duty of care. I accept that mere foreseeability of the risk of injury or even death is not enough to give rise to a duty of care and that proximity is required. What that means in the present context was explained by Lord Hoffmann in *Sutradhar v Natural Environmental Research Council* [2006] UKHL 33, [2006] 4All ER 490, a case which, as it happens, also concerned Bangladesh. The Defendant carried out research into water samples taken from wells which were used for the supply of drinking water and negligently issued a report stating that the water was safe to drink, when in fact it was contaminated with arsenic. The House of Lords held that the Defendant owed no duty of care because, although injury from arsenic poisoning was foreseeable, there was no relationship of proximity between the parties. Lord Hoffmann equated proximity with a measure of control over and responsibility for the potentially dangerous situation:

"38. ... It may or may not be possible now to subsume liability for negligent statements together with other conduct causing physical injury under a single principle. But that principle is not that a duty of care is owed in all cases in which it is foreseeable that in the absence of care someone may suffer physical injury. There must be proximity in the sense of a measure of control over and responsibility for the potentially dangerous situation. Such a principle does not help the claimant. In *Perrett v Collins* [1988] 2 Lloyd's Rep 255 the inspector had complete control over whether the aircraft flew or not. If he refused a certificate it could not fly. The purpose of the system of certification established by the Air Navigation Order 1989 was equally clearly the protection of persons who might be injured by unairworthy aircraft and therefore placed responsibility for affording such protection upon the inspector. For my part, therefore, I have no difficulty with the proposition that the inspector owed a duty to potential passengers to exercise due care and this may be why *Perrett v Collins* has not been reported in the official series of law reports. (Compare also *Clay v AJ Crump & Sons Ltd* [1964] 1 QB 533 in which an architect had complete control over whether a dangerous wall was left standing and *Watson v British Boxing Board of Control Ltd* [2001] QB 1134 in which the Board had control over the medical services provided at boxing matches.) But the claimant does not come even remotely within the principle stated by *Hobhouse LJ*. The BGS had no control whatever, whether in law or in practice, over the supply of drinking water in Bangladesh, nor was there any statute, contract or other arrangement which

imposed upon it responsibility for ensuring that it was safe to drink. Lord Brennan said that while it was true that the BGS had no control over or responsibility for the water supply, they had control over and responsibility for their report. But this emendation of Hobhouse LJ's principle would turn it into complete nonsense. Everyone has control over and responsibility for their own actions. The duty of care depends upon a proximate relationship with the source of danger, namely the supply of drinking water in Bangladesh.”

129. Lord Brown, who gave the only other reasoned speech, spoke to the same effect:

“48. Here the essential touchstones of proximity are missing. BGS had no ‘control over or ‘responsibility for’ (see p 262 of Hobhouse LJ's judgment in *Perrett v Collins* quoted by Lord Hoffmann at paragraph 38 above) the provision of safe drinking water to the citizens of Bangladesh in the same way as the architect, the air safety inspector and the British Boxing Board of Control had control over and responsibility for ensuring respectively a safe wall, a safe aircraft and a safe system for treating injured boxers.”

130. In the present case the Defendant did not have control over working conditions in Chattogram, but it did have control over whether the Claimant’s husband would be exposed to the risk of death or serious injury from working on its ship. That was a foreseeable risk which the Defendant created by its decision to send the vessel to be broken up in Bangladesh and is arguably sufficient, in my judgment, to create the necessary relationship of proximity.
131. Mr Bright’s third submission was that, if the Claimant’s husband had not been killed while working on the Defendant’s ship, he might just as easily have been killed or injured when working on some other ship. He was, said Mr Bright, already at risk every day of his working life. That is a submission which, in my view, does the Defendant no credit. In any event, however, the fact that the Claimant’s husband was exposed to other risks which did not materialise provides no answer to the Claimant’s claim resulting from the fatality which did occur on the Defendant’s ship as a result of a foreseeable and foreseen risk.
132. Accordingly the Claimant’s alternative case has, in my judgment, a sufficient prospect of success that it should not be struck out. The Claimant’s primary case, based on conventional *Donoghue v Stevenson* [1932] AC 562 principles, is more difficult. As Coulson LJ has explained at [41] above, in order to show a relationship of proximity between the Claimant’s husband and the Defendant, the Claimant will need to prove that the Defendant ought to have had her husband, or at any rate the shipbreaking workers in Chattogram, reasonably in contemplation at the time of choosing to sell to Hsejar. In this connection I regard the averment that the sale to an intermediate buyer such as Hsejar was a device to distance the shipowner from an unsavoury sector of the

shipping industry as particularly significant. If true, it is a reasonable inference that the Defendant had well in contemplation the danger to which those workers would be exposed and was attempting to break the relationship which it perceived -- or was concerned that others would perceive -- to exist. Accordingly, I consider that the Claimant's primary case, even if weaker than its alternative case, should not be struck out. In any event, if (as I consider) the alternative case has a real prospect of success and must go to trial, there is nothing to be gained and potentially something to be lost by striking out the primary case.

133. As I have said, it may turn out that the Claimant is unable to prove the factual averments which she makes. But if she is able to do so, it might be thought that it would be a poor system of justice which gave her no remedy against the Defendant. In my judgment, it is at any rate arguable that English law does give her such a remedy and, subject to the issue of limitation, she should have the opportunity to seek to make good her case at trial.

Article 7 of Rome II

134. There is, however, no point in having a trial if the claim is bound to fail because it is time-barred. The judge held that if Article 4 of the Rome II Regulation applies, the applicable law is the law of Bangladesh and that a non-extendable one-year limitation period applies. Permission to appeal from these conclusions was sought by the Claimant, but refused by Orders of Lady Justice Carr on 17 November 2020. The Claimant seeks to escape from the resulting time bar by two routes. The first of those routes, Article 7, would mean that the claim as a whole is governed by English law. The second route, Article 26, would mean that the substantive merits of the claim continue to be governed by the law of Bangladesh, but that its one-year limitation period would be disapplied on the ground that its application in the present case is manifestly incompatible with English public policy.
135. In my view Article 7 gives rise to some issues of interpretation, both as a matter of language and policy, which are not entirely straightforward. One such issue is concerned with the nature and strength of the causative link required in order for the environmental damage to "arise out of" a non-contractual obligation and for personal injury to be regarded as the "result" of such environmental damage. We were referred to no case law which addresses these questions and very little in textbooks or other academic writings. *Dicey, Morris & Collins on the Conflict of Laws*, 15th Ed (2018), para 35-070 suggests, without further explanation, that the personal injury must be the "direct" result of the environmental damage. *The European Private International Law of Obligations*, 4th Ed (2015), para 21-020 by Sir Richard Plender (whose early retirement from the bench due to illness was a sad loss to European law) and Michael Wilderspin refers to (but does not identify) commentators who have argued for a loose connection between the environmental damage and the personal injury and suggests that there are good arguments on both sides.
136. Another issue is what is meant by "the event giving rise to the damage", in particular whether it refers to the event on which the claimant bases his or her claim or to what is objectively to be regarded as the proximate or effective cause of that damage. *Dicey*, para 35-070 says that "the event giving rise to the damage" should be identified with "the human activity which is the principal or substantial cause of the environmental damage". That suggests that a comparison of causative potency is required. *JSC BTA*

Bank v Ablyazov [2018] UKSC 19, [2020] AC 727, on the other hand, holds that identification of “the event giving rise to the damage” when that concept is used in the context of Article 5 of the Lugano Convention or Article 5 of the Brussels Convention and its successors “does not require a comparative consideration of the causative impact of different events” but refers to “the relevant harmful event which sets the tort in motion” or (in other words) which “gives rise to and is at the origin of the damage” (see in particular at [38] and [41]).

137. These are questions of European law to which it is to be expected that an autonomous answer should be given. While I find Coulson LJ’s reasoning compelling, in my judgment it is unnecessary to reach a final view about them in the present case and I would prefer not to do so. On any view, and even requiring only a “weak” or “loose” causative link between the environmental damage and the personal injury sustained, it is not reasonably arguable that the Claimant’s husband fell to his death as a result of environmental damage. His death had nothing to do with environmental damage in any causative sense, but was caused by the absence of a safety harness. That is enough to conclude that the Claimant has no real prospect of being able to rely on Article 7.

Article 26

138. On Article 26 I have nothing to add to the judgment of Coulson LJ.

Conclusion

139. For these reasons, in addition to those given by Coulson LJ, I would make the order which he proposes.

LORD JUSTICE BEAN:

140. I agree with Coulson and Males LJ that, for the reasons they both give, this claim raises triable issues of breach of a duty of care by the Appellant which, subject to the question of limitation, should be allowed to proceed to a trial.
141. Like Males LJ, I am not attracted by the argument “if Mr Mollah had not been killed working on our ship, he could just as easily have been killed or injured working on someone else’s”. On the Claimant’s case, the Defendant obtained the highest possible price for the Vessel and sought to wash their hands of responsibility for anything, however foreseeable, which happened after that. I endorse the observation of Males LJ at [133] that, if the Claimant is indeed able to prove the factual averments which she makes, it would be a poor system of justice that gave her no remedy against this Defendant.
142. On the limitation issues, I agree that, for the reasons given by Coulson LJ, the case under Article 7 of Rome II has no reasonable prospect of success; and that the question of undue hardship under Article 26 should be remitted to the Queen’s Bench Division for trial as a preliminary issue.