Neutral Citation Number: [2023] EWCA Civ 1072

Case No: CA-2023-000016

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
MR JUSTICE ROBIN KNOWLES CBE
[2022] EWHC 2871 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 September 2023

Before:
SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE PHILLIPS
and
LADY JUSTICE CARR

- -

Between:

CA INDOSUEZ (SWITZERLAND) SA **Claimant**
- and -
(1) AFRIQUIA GAZ SA
(2) MAGHREB GAZ SA
Defendants/Part 20 Claimants/Respondents
- and -
(1) GULF PETROCHEM FZC
First Part 20 Defendant
(2) UBS SWITZERLAND AG
Second Part 20 Defendant/Appellant

- -

Laura John KC and Daniel Schwennicke
(instructed by **Holman Fenwick Willan LLP**) for the **Appellant**
James M. Turner KC (instructed by **Bird & Bird LLP**) for the **Respondents**

Hearing date: 15 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 28 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Phillips:

Introduction

1. This appeal concerned a Part 20 claim form issued by the respondents ("the Buyers") on 30 December 2020, the day before the EU Exit Implementation Period ended ("IP completion day"), endorsed with the assertion that the Buyers were permitted to serve the Part 20 claim form on the appellant ("UBS") in Switzerland pursuant to Article 6(2) of the Lugano Convention.[1] Article 6(2) provides that a person may be sued in third party proceedings in the court seized of the original proceedings unless these were instituted solely with the object of removing him from the jurisdiction of the court which would otherwise be competent in his case.

2. The first issue on the appeal was whether, notwithstanding that the Lugano Convention continues to apply to proceedings commenced before the United Kingdom ceased to be a party on IP completion day ("Transitional Claims"),[2] changes in the Civil Procedure Rules which came into effect at the end of the implementation period introduced a requirement that permission of the court be obtained to serve Transitional Claims out of the jurisdiction. The Buyers did not obtain such permission before serving or purporting to serve UBS in Switzerland on 8 March 2021.

3. The second issue was whether the Buyers can continue to rely on Article 6(2) as founding jurisdiction in England and Wales (assuming they were entitled to do so at the date of issue of the Part 20 claim form) notwithstanding that, by the time UBS's challenge to that jurisdiction was heard in February 2022, the original proceedings against the Buyers in this jurisdiction had been settled. UBS contended that substantive jurisdiction under Article 6(2) had been lost or, alternatively, that the English court should exercise a discretion to decline to exercise it. The issue may have relevance in this jurisdiction beyond Transitional Claims as the United Kingdom has applied for individual membership of the Lugano Convention.

4. On 11 November 2022 Knowles J ("the Judge"), in a careful and well-reasoned judgment, held (in relation to the issues subject to appeal) that (i) the changes to the CPR did not introduce a requirement that permission be obtained to serve Transitional Claims out of the jurisdiction; and (ii) the courts of England and Wales had had jurisdiction under Article 6(2) at the date of issue of the Part 20 claim form and that jurisdiction was not lost (and should not be declined as a matter of discretion) by reason of the intervening settlement of the main proceedings. Accordingly, by order dated 15 December 2022, the Judge dismissed UBS's jurisdiction challenge.

5. UBS appealed the Judge's decision on each of the issues identified above with permission granted by the Judge. The Buyers opposed the appeal and further contended, by way of Respondent's Notice, that if (contrary to the Judge's decision) they should have obtained permission to serve the Part 20 claim form out of the jurisdiction, service

[1] The Part 20 claim form mistakenly referred to Article 6(3) rather than Article 6(2), but the intent was clear.
[2] Regulations 92 and 93A of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479).

should retrospectively be validated pursuant to CPR 3.10(a), and/or any procedural error should be remedied by order of the court pursuant to CPR 3.10(b).

The essential facts

6. By a sale contract dated 9 June 2020, the first Part 20 defendant ("the Seller") agreed to sell 22,000 mt of commercial butane to one or both of the Buyers. The sale contract provided that any dispute would be subject to the exclusive jurisdiction of the High Court in London.

7. On 23 July 2020, following deliveries to each of the Buyers, the Seller invoiced US$1,020,219 to the first-named Buyer and US$2,958,523.14 to the second-named Buyer, demanding payment to itself at its account with the claimant bank ("CAIS"), giving notice that the debts had been assigned as security to CAIS and directing payment exclusively to the Seller's CAIS account. On 27 and 28 July CAIS gave notice of assignment of the debts to the Buyers.

8. On about 19 August 2020 the Buyers paid the invoiced sums by SWIFT transfer, but paid them to an account held by the Seller at UBS rather than to its account with CAIS. The sums were then transferred in to a different account where they reduced but did not extinguish a negative balance. UBS has thereafter refused to unwind the credit to the account by returning the funds to the Buyers (for re-transfer to CAIS).

9. On 12 November 2020 CAIS issued proceedings against the Buyers in the Commercial Court ("the Main Proceedings"), claiming payment of the sums due under the invoices as assignee. The Buyers denied the claim, making no admission as to the alleged assignment and denying that any assignment was valid or effective.

10. As stated above, the Buyers issued the Part 20 claim against UBS on 30 December 2020, asserting that, if the Buyers were liable to CAIS in the Main Proceedings, then the payments to the Seller's account with UBS were made by mistake, there was no consideration for those payments and UBS was unjustly enriched. The Buyers claimed that, in those circumstances, the sums were held by UBS on constructive trust for the Buyers, alternatively the Buyers were entitled to restitution of those sums. It is common ground that Swiss law applies to these claims and the Buyers have now accepted, in the light of expert evidence as to that law, that their claim in constructive trust must fail.

11. UBS declined to nominate solicitors to accept service in the jurisdiction. After an extension of time for service, the Buyers procured that the Part 20 claim form was delivered to UBS in Switzerland (by way of purported service) on 8 March 2021.

12. UBS filed an Acknowledgment of Service indicating an intention to contest the jurisdiction and, on 21 April 2021, applied to set aside service of the Part 20 claim form on the ground that permission to serve out of the jurisdiction had not been obtained. On 7 May 2021 the Buyers cross-applied for an order under CPR 3.10.

13. By further application dated 5 July 2021 UBS sought a declaration that the English court has no jurisdiction to determine the claim by virtue of Article 6(2) of the Lugano Convention or otherwise and/or that the court should decline to exercise any jurisdiction it might have.

14. By order dated 8 July 2021, following a Case Management Conference, the Judge directed that the Part 20 claim proceed separately from the Main Proceedings,

15. On 17 December 2021 Butcher J ordered (by consent) that the Main Proceedings be stayed on confidential settlement terms and that the Part 20 claim continue.

16. As prefaced above, the Judge dismissed UBS's applications on 15 December 2022. He made no order on the Buyers' cross application under CPR 3.10, it being unnecessary for him to determine that application.

Is permission required to serve Transitional Claims out of the jurisdiction?

The position up to IP completion day

17. The United Kingdom was a State bound by the Lugano Convention by reason of its membership of the European Union. The stated purpose of the 1988 Lugano Convention was to extend the principles of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters between EU Member States to certain members of the European Free Trade Association (including Switzerland). In 2007 the European Union and certain members of EFTA (again including Switzerland) signed the current version of the Lugano Convention, the preamble to which recognised that it was designed to extend the principles laid down in Council Regulation (EC) No 44/2001 ("the Judgments Convention"), which had replaced the Brussels Convention, to the contracting parties to the Lugano Convention. Regulation 44/2001 was recast by Regulation (EU) No. 1215/2012 ("the Judgments Regulation").

18. The Judgments Regulation and the Lugano Convention establish independent schemes for allocating jurisdiction and providing for recognition of judgments and are to be interpreted autonomously: see for example *C-45/13 Kainz v Pantherwerke AG* EU:C:2014:7, [2015] QB 34 at [18]-[19]. Each provides that persons domiciled in one state bound by the relevant instrument "may be sued" in the courts of another such state in specified circumstances and that states have exclusive jurisdiction, regardless of domicile, in other specified circumstances. On the face of matters, such provisions entitled claimants, as a matter of the United Kingdom's treaty obligations, to invoke the jurisdiction of the English courts when permitted by the relevant instrument without the need to pass through any of the gateways set out in CPR PD6B.3.1 and without demonstrating that the claim had a reasonable prospect of success (CPR 6.37(1)(b)) and that England and Wales is the proper place to bring the claim (CPR 6.37(3)).

19. The above position was reflected in the version of the Civil Procedure Rules in force up to IP completion day, permitting service out of the jurisdiction in cases falling within the Judgments Regulation or the Lugano Convention without permission of the court:

    i) CPR 6.33(1) provided that:

> "The claimant may serve the claim form on the defendant out of the United Kingdom where each claim against the defendant to be served and included in the claim form is a claim which the court has power to determine under… the Lugano Convention and-

> a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Convention territory; and
>
> b) (i) the defendant is domiciled in the United Kingdom or in any Convention territory; or
>
> (ii) the proceedings are within…article 22 of the Lugano Convention; or
>
> (iii) the defendant is a party of an agreement conferring jurisdiction, within…article 23 of the Lugano Convention".

ii) CPR 6.33(2) contained similar provisions in relation to claims which the court had power to determine under the Judgments Regulation.

iii) CPR 6.33(2B) provided for service out of the jurisdiction without permission where the court had power to determine the claims under the 2005 Hague Convention.

iv) CPR 6.33(3) provided for service out of the jurisdiction without permission where jurisdiction was provided by other legislation, excluding the Judgments Regulation and the Lugano Convention, as to which separate provision had been made as set out above:

> "The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine other than under the 1982 Act, the Lugano Convention, the 2005 Hague Convention or the Judgments Regulation, notwithstanding -
>
> (a) the person against whom the claim is made is not within the jurisdiction; or
>
> (b) the facts giving rise to the claim did not occur within the jurisdiction."

The rules after IP completion day

20. Regulation 4(16)(a) of the Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 (SI 2019/521) deleted CPR 6.33(1) (relating to the Lugano Convention) with effect from IP completion day. Regulation 4(16)(b) amended CPR 6.33(2) by removing the reference to the Judgments Regulation, save in relation to consumer and employment matters.

21. Regulation 4(16)(d) of SI 2019/521 also deleted the following words from CPR 6.33(3): "the 1982 Act, the Lugano Convention," and "the Judgments Regulation". The result was that CPR 6.33(3) now reads (also deleting the word "or" between the Lugano Convention and the Judgments Regulation, which was plainly the intention of the amendment):

> "The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine other than under the 2005 Hague Convention, notwithstanding that -
>
> (a) the person against whom the claim is made is not within the jurisdiction;
>
> or (b) the facts giving rise to the claim did not occur within the jurisdiction."

22. Regulations SI 2019/521 were later amended by paragraph 9 of the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020 (SI 2020/1493), to insert regulation 18(3A) in the following terms:

> "Where a claim to which rule 6.33(2) applies is issued before IP completion day but the claim form has not been served by IP completion day, rules 6.33 and 6.35 apply on and after IP completion day in relation to service of the claim form and to the period for responding to the claim form as if the changes, made by these Regulations had not been made."

The issue

23. The Buyers contended that the straightforward effect of deleting the exclusion of the Lugano Convention from CPR 6.33(3) is to permit service of Transitional Claims out of the jurisdiction under that provision. Applying the literal wording of the rule (as so amended), the Buyer argued, the court has the power to determine those claims (by reason of the continuing application of the Lugano Convention) and there is no longer anything in the rule to prevent its use in such circumstances.

24. UBS accepted that, read in isolation, the words of the amended CPR 6.33(3) are capable of bearing the meaning proposed by the Buyers. But UBS argued that such reading of amended CPR 6.33(3) cannot be the intended meaning given the subsequent preservation of the pre-existing provisions in relation to transitional claims governed by the Judgments Regulation (that is, CPR6.33(2)) by regulation 18(3A) of SI 2019/521. They pointed out that such preservation would not have been necessary if the Buyers' contention were correct, as the reference to the Judgments Regulation was also deleted from CPR 6.33(3). The express preservation of the service provisions in relation to transitional claims under the Judgments Regulation demonstrates, UBS submitted, that it was not intended to preserve the effect of the parallel provisions in relation to Transitional Claims under the Lugano Convention. UBS pointed out that in *Naftiran Intertrade Company (NICO) Limited v G.L. Greenland Limited* [2022] EWHC 896 (Comm) Julia Dias QC, sitting as a Deputy High Court Judge, recognised that there was no obvious reason to introduce a requirement of obtaining permission in respect of Transitional Claims and that CPR 6.33(3) as amended was wide enough to permit service of such claims, but observed (without needing to make any decision on the

point) that that did not explain why an express saving provision was felt necessary for claims falling within the Judgments Regulation.

25. UBS therefore contended that permission is required to serve Transitional Claims out of the jurisdiction under CPR 6.36, suggesting that CPR PD6B 3.1(20)(a) provides a relevant gateway, dealing with a claim made "under an enactment which allows proceedings to be brought…". UBS asserted that there is nothing onerous or surprising about introducing an element of court supervision over Transitional Claims.

26. In rejecting UBS's argument, the Judge first addressed the concern expressed in *Naftiran* by Ms Dias QC as to why a saving provision was introduced in relation to transitional claims under the Judgments Regulation but not Transitional Claims under the Lugano Convention, stating as follows.

> "24…The concern is to my mind sufficiently met by Mr Turner KC's point that regulation 18(3A) was introduced to ensure that the UK met its obligations under Article 67 of the Treaty. Article 67.1(a) of the Treaty requires material provisions of (among other things) the Judgments Regulation to continue to apply in respect of proceedings instituted before the end of the implementation period. Article 67 did not, at least explicitly, address the Lugano Convention which (as noted above) has a different membership structure."

27. The Judge proceeded to determine the issue in favour of the Buyers, giving the following reasons:

> "25. The question is whether the language of CPR 6.33(3) includes the circumstances of the Part 20 Claim Form. In my view it plainly does. The important point is that at the same time CPR 6.33(1) was removed, CPR 6.33(3) was widened. True, the words "Lugano Convention" were deleted from CPR 6.33(3), but that was to delete the exclusion of the Lugano Convention. The technique allowed CPR 6.33 to embrace claims which engaged jurisdiction under the Lugano Convention at implementation date without providing enduring reference to the Lugano Convention or the Judgments Regulation as a basis of jurisdiction after the United Kingdom's membership of the European Union ceased.
>
> 26. I appreciate that this would mean that regulation 18(3A) may not strictly have been necessary, because the language of CPR 6.33(3) was also wide enough to embrace claims which engaged jurisdiction under the Lugano Convention. But there is little to favour an argument that the addition of regulation 18(3A) by a later Statutory Instrument and without disturbing the language of CPR 6.33(3) should alter the meaning CPR 6.33 had borne in the period before the addition was made.
>
> 27. There is also no reason of policy why the Court's permission should start to be required for the service abroad of Claim Forms issued on the basis of jurisdiction under the Lugano Convention and awaiting service. As Mr Turner KC asked rhetorically in his oral argument, why

> should a requirement for judicial oversight be introduced here for the first time after many years without it? Ms John KC's answer that oversight has a purpose or value does not quite meet Mr Turner KC's point which is, why now, at this point in history?
>
> 28. The regulations under SI 2019/521 were concerned with the cessation of the United Kingdom's membership of the European Union. Requiring the Court's permission to serve out of the jurisdiction would have no bearing on that subject. It is one thing to unwind the Lugano Convention from the Court's procedures; it is another to introduce a different and more elaborate procedure for a limited number of Lugano Convention claims remaining as the Convention was unwound."

UBS's arguments on the appeal

28. On this appeal Ms John KC, for UBS, repeated the arguments made before the Judge as referred to above, but also advanced two new points in oral argument, not prefaced in her written submissions.

29. The first submission was that CPR 6.33(1), prior to its deletion, contained at sub-paragraph (a) an important requirement before service could be effected under the Lugano Convention, namely, that no proceedings between the parties concerning the same claim were pending in the courts of any other part of the United Kingdom or any other Convention territory (the "No Lis Alibi Pendens Condition"). Ms John submitted that the absence of an equivalent requirement in CPR 6.33(3) after its amendment indicated that that provision was not intended to be a substitute route for service without permission; the better interpretation, she argued, is that after IP Completion Day, compliance with the No Lis Alibi Pendens Condition would be monitored and enforced by the court when considering whether to give permission to service out of the jurisdiction on an application under CPR 6.36. More broadly, Ms John submitted, the service regime provided in CPR 6.33(1) and (2) for Lugano Convention and Judgments Regulation claims, which both contained an express No Lis Alibi Pendens Condition, had always been distinct from the regime in CPR 6.33(3). Indeed, the references in the latter to service being permitted notwithstanding the defendant or the facts giving rise to the claim were out of the jurisdiction was inapposite for claims under the Lugano Convention or the Judgments Regulation. The mere deletion of reference to the Lugano Convention from CPR 6.33(3) could not, Ms John submitted, be interpreted as effecting a complete inversion of the regime under that provision so as to apply it, inappropriately, to Transitional Claims.

30. The second related submission pointed to the fact that, in addition to deleting references to the Lugano Convention and the Judgments Regulation, the amendment to CPR 6.33(3) also deleted reference to "the 1982 Act". Ms John suggested that such a deletion must have been in error, or at any event cannot have been intended to create a separate route of service of claims under the 1982 Act, given that CPR 6.33(2) was simultaneously amended expressly to permit claims under sections 15A to 15E of the 1982 Act. Ms John argued that the apparent drafting error in deleting reference to the 1982 Act (or its failure to create an alternative route for service) undermines the Buyer's reliance on the deletion of the Lugano Convention from CPR 6.33(3) as creating an alternative route for service without permission of Transitional Claims.

Discussion

31. The natural starting point in determining the scope of the amended CPR 6.33(3) is its literal meaning. As UBS effectively conceded, that literal meaning would permit service of Transitional Claims because the court has power to determine those claims under the Lugano Convention and such claims are no longer excluded from the scope of the provision. Indeed, the amendment to CPR 6.33(3) expressly removed the exclusion of claims under the Lugano Convention.

32. The effect of UBS's case is that amended CPR 6.33(3) should be read as though the words "the Lugano Convention" (and, indeed the words "the 1982 Act" and the Judgments Regulation") were still in place, at least in relation to Transitional Claims and transitional claims under the Judgments Regulation. In other words, UBS contended that the amendment to the wording of CPR6.33(3) should simply be ignored to that extent. That is an inherently unlikely result of an interpretation exercise and would require powerful justification: a court will not readily conclude that an amendment was intended to have no effect, still less that it was a complete mistake. In the present case, I see no justification for arriving at such a conclusion.

33. First, in amending CPR 6.33, Parliament must be taken to have been aware that the Lugano Convention continued to apply in relation to Transitional Claims, having so provided in SI 2019/479. In that context, the parallel removal of the exclusion of claims under the Lugano Convention in CPR 6.33(3) by SI 2019/521 must be read as permitting service of those claims which continued to be governed by that instrument pursuant to its terms. As the Judge put it, this appears to be a technique intentionally adopted to allow CPR 6.33 to embrace claims which engage jurisdiction under the Lugano Convention at IP Completion Day, without providing enduring reference to the Lugano Convention.

34. Second, and as again explained by the Judge, there is no reason of policy why permission of the court should start to be required for the service abroad of claims under the Lugano Convention. Indeed, there was no "mischief" that needed to be addressed in that regard. I would go further and suggest that the introduction of such a requirement in relation to a relatively small number of Transitional Claims, after decades where permission was not required to effect service of Lugano Convention claims out of the jurisdiction, would be surprising. It would also appear to be inconsistent with the UK's obligations under the Lugano Convention (which by definition still arise in relation to Transitional Claims). Further, given that the purpose of the Lugano Convention is to extend the application of the Judgments Regulation to certain further states, it would make no sense to impose a permission requirement in relation to the former when (following the re-instatement of CPR 6.33(2) in relation to the transitional claims under the Judgments Regulation) no such requirement is imposed in relation to claims under the latter.

35. Third, and as again explained by the Judge, the subsequent express introduction of a saving provision in relation to CPR6.33(2) in relation to transitional claims under the Judgments Regulation cannot have the effect of completely reversing the consequence of deleting "the Lugano Convention" from CPR 6.33(3), as analysed above, which had already been implemented. Such a drastic reversal would require something clearer than a provision relating to another instrument which does not even mention the Lugano Convention. I agree with the Judge that the subsequent saving of CPR 6.33(2) is readily

explicable by the need for the UK expressly to comply (and be seen to comply) with its obligations under Article 67 of the Withdrawal Agreement (a purpose confirmed by the Explanatory Note to SI 202/1493), which requires (among other things) that material provisions of the Judgments Regulation should continue to apply to proceedings instituted before the end of IP Completion Day. There is no such obligation in relation to the Lugano Convention (at least in express terms) and hence no requirement to preserve CPR 6.33(1) in relation to Transitional Claims. But that does not mean that CPR 6.33(3) is not to be interpreted as having the same effect.

36. Fourth, it is relatively clear that the enactments referred to in Gateway 20(a) in CPR PD6B Para 3.1 are domestic statutes: in its original form the gateway listed eight such statutes to which it applied: see the historical review by Lewison LJ in *Orexim Trading Ltd. v Mahavir Port and Terminal Pte Ltd* [2018] EWCA Civ 1660, [2018] 1 WLR 4847 at [41]. The distinction is that CPR 6.33(3) is designed to deal with statutes giving effect to international treaties and instruments. It is therefore highly unlikely that, following the amendment to CPR 6.33(3), it was intended that service of Transitional Claims would have to pass through gateway 20(a) rather than be effected under the now available CPR 6.33(3).

37. Fifth, I see no real force in any of the points made by Ms John as to the detailed wording of CPR 6.33, before or after amendment.

    i) Whilst it is true that the amended version of CPR 6.33(3) does not include the No Lis Alibi Pendens Condition which was contained in CPR 6.33(1), the difference is illusory. A Transitional Claim, would, by definition, have been issued under CPR 6.33(1) and the claimant would have had to self-certify that there was no *lis alibi pendens*. Further and in any event, the No Lis Alibi Pendens Condition mirrored the wording of Article 27 of the Lugano Convention, which requires a court to stay any proceedings where it is not the court first seized. The creation of a permission requirement to enable the court to monitor compliance with the No Lis Alibi Pendens Condition would be remarkably heavy-handed given (a) that compliance with that condition was self-certified under CPR 6.33(1) and enforcement would be by way of application to the court to challenge jurisdiction and/or set aside service and (b) a claimant who serves proceedings under amended CPR 6.33(3) where there <u>was</u> a lis alibi pendens would be met by exactly the same type of application under Article 27. I do not consider that the difference in the above two situations justifies regarding CPR 6.33(3) as forming part of an entirely different service regime, incapable of being adapted to cater for Transitional Claims.

    ii) Again, whilst the wording at the end of CPR 6.33(3) (providing that the rule applies "notwithstanding" that the defendant is out of the jurisdiction or the facts giving rise to the claim occurred out of the jurisdiction) adds nothing in relation to claims under the Lugano Convention, it is not inconsistent with such claims and the wording continues to be relevant to other claims which continue to fall within the provision after its amendment. Further, CPR 6.33(3) must be capable of applying to Lugano Convention claims or else it would not have been necessary (prior to the amendment) to exclude such claims from its scope.

    iii) Neither, in my judgment, does the exclusion of "the 1982 Act" from the amended version of CPR 6.33(3) undermine the literal meaning in relation to

> the Lugano Convention and Transitional Claims. The fact that there may be an infelicity in permitting claims to be brought under both CPR 6.33(2) and CPR 6.33(3) after the amendment appears to have no relevance to the clear-cut effect of removing "the Lugano Convention" from CPR 6.33(3).

Conclusion

38. For the above reasons, which largely reflect those given by the Judge, I would dismiss UBS's appeal on the service issue. On that basis, it is unnecessary to address the Buyer's contentions based on CPR 3.10.

Is the Part 20 claim within Article 6(2)?

The provision

39. Article 6 of the Lugano Convention provides that:

> "A person domiciled in a State bound by the Convention may also be sued:
>
> "1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
>
> 2. as a third party in an action on a warranty or guarantee, or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;
>
> …."

40. The words "*provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*" were added into Article 6(1) following the decision in *Kalfelis v Bankhaus Schroder, Munchmeyer Hengst & Co (Case 189/87)* [1988] ECR 5565. In *PIFSS v Bank Pictet & Cie SA* [2022] EWCA Civ 29, [2022] 1 WLR 4193 Carr LJ referred to that change and stated at [50] that:

> "It appears therefore to have been intended from the outset that a connection between the claims made against each of the defendants was required in order for article 6 to be engaged, even though (the original) article 6 did not say so in terms..."

41. UBS relied upon that observation as supporting a contention that the "so closely connected" test must also be read into Article 6(2). However, the context (and target) of Carr LJ's remarks was Article 6(1), and not Article 6(2).

42. As for the expression "third party proceedings", the Jenard Report (OJ 1979 No C59), which informed the contents of the Brussels Convention and remains authoritative as

to the interpretation of the Judgments Regulation and the Lugano Convention, recognised at p. 28 that it was preferable to make separate provision (in Article 6(2)) for third parties and adopted the simple definition of third party proceedings to be found in the Belgian Judicial Code:

> "Third party proceedings are those in which a third party is joined as a party to the action.
>
> They are intended either to safeguard the interests of the third party or of one of the parties to the action, or to enable judgment to be entered against a party, or to allow an order to be made for the purpose of giving effect to a guarantee or warranty (Article 15)…"

The issues on the appeal

43. Before the Judge UBS argued that, even at the point of issue, there was "insufficient connection" between the Main Proceedings and the Part 20 claim to engage Article 6(2), pointing to the fact that there was no overlap in factual or legal issues, that the law governing the two claims was different and that the Judge himself had previously directed that they should be tried separately.

44. The Judge rejected that contention in the following terms:

> "44. In my view there was sufficiency of connection at the point of issue of the Part 20 Claim Form. This is for the reasons explained by Mr Turner KC in these terms:
>
> > "… on the facts, the relevant connection between the main and the Part 20 claims in the present case is that the latter were contingent upon the success of the main claim. If that claim succeeded, so that the Part 20 claims then had to go ahead, there would be nothing to prevent UBS and GP taking all the same points that we had taken, unless of course they were party to the proceedings in which judgment in CAIS's favour had been given. And this jurisdiction is the only one in which these disputes could be heard in order to prevent the risk of irreconcilable judgments.
> >
> > …The fact that the juridical nature of the main proceedings differed from that of the Part 20 proceedings is irrelevant, as is the fact that different laws govern the claims against GP and UBS. At the very least, each of those last two claims would have to take account of the other, in quantum terms, and the two would undoubtedly be part of the same overall factual investigation."
>
> Mr Turner KC later accepted there was no "trump card", but added:
>
> > "But in a case where there is not only a common investigation but also an inevitable interrelationship between the main and the Part 20 claims and between the quantum of each Part 20 claim [the Court] should accept that it carries the day." "[England & Wales] was the only forum which could house all the claims,

> CAIS's claims against AG and MG, and AG and MG's claims against GP and UBS."

> 45. Strictly, there was no evidence either way on the question whether the Swiss Court would take jurisdiction over the main claim ("in the teeth of an exclusive jurisdiction clause in favour of [the English Court]" as Mr Turner KC put it). However, the evidential burden resting in the particular context with UBS, it was for UBS to show that the Swiss Court would."

45. UBS's further contention was that, even if there was sufficient connection at the date of issue of the Part 20 claim, the matter fell to be re-assessed as at the date the Judge decided UBS's jurisdiction challenge, and that it was only in exceptional circumstances that claims could be pursued by way of third party proceedings under Article 6(2) after the main proceedings have settled, no such circumstances being present in this case.

46. The Judge also rejected that further argument. As to reassessment at the date of determination of the jurisdiction challenge, the Judge held that:

> "46. If there is sufficiency of connection at the point of issue of the Part 20 claims, should the facts that GP is now not defending the claim against it, and that the claim by CAIS has now been settled, change that conclusion? In my view, no, at least in the present case. This is because of the consideration of certainty, as described above."

47. The Judge's reference to his earlier consideration of certainty was to the following paragraph:

> "42. A truly important consideration in the exercise of discretion is the desirability of certainty. As Lord Steyn described the Lugano Convention, it is a "Convention which aims at legal certainty" (Canada Trust v Stolzenberg (No 2) [2002] 1 AC 1 at 12D). A change in conclusion on jurisdiction or admissibility as and when and if developments occur in the course of the particular litigation may lead to uncertainty. I am ready to accept that in some cases it may not. But it is in principle desirable that the parties, and the Court, should have appropriate certainty. In the context under consideration, predictability and continuity are aspects of certainty".

48. As for the contention that it was only in exceptional circumstances that Part 20 proceedings could be pursued under Article 6(2) after the main proceedings, the Judge stated:

> "39. The reference to "exceptional circumstances" is taken from Waterford Wedgwood plc v David Nagli Ltd [1999] I.L.Pr. 9, a decision of Charles Aldous QC, dealing with the Judgments Regulation. More categoric was the approach of HHJ Seymour QC in British Sugar v Fratelli Babbini di Lionallo Babbini & CO SAS [2004] EWHC 2560 who concluded:

> "… as the main action is no longer live there is no discretion to be exercised. If the Part 20 claim were to continue in England, it would be as a separate claim, simply because there is no main action to be carried forward. Thus the requirements of Article 6(2) of the regulation are simply not met as matters have turned out."
>
> 40. With respect, the conclusion that the requirements of Article 6(2) are not met is one that I cannot accept. But further, even the reference to "exceptional circumstances" is one for which I cannot find support, on earlier authority or by reference to principle."

49. On this appeal, UBS's skeleton argument pursued only the second issue, contending that the Judge's "principal error" was to assume, contrary to principle and previous authority, that the relevant time for assessing the applicability of Article 6(2) was the time the Part 20 claim was issued and not the time when the question of jurisdiction is determined. If the Judge had assessed the position at the correct date, UBS argued, Article 6(2) would not have been applicable because the Main Proceedings had settled.

50. However, in oral argument Ms John did maintain, albeit in passing, that even at the date of their issue the Part 20 proceedings were insufficiently connected to the Main Proceedings. Given that that argument was not prefaced in writing, it was appropriate to permit Mr Turner KC, for the Buyers, to respond with arguments which might otherwise have required a respondent's notice.

51. Mr Turner submitted that:

    i) Article 6(2) is not subject to a sufficiency of connection requirement, the only connection being provided by the fact that the proceedings were "third party proceedings" as a matter of domestic law. The use of Article 6(2) to found jurisdiction for third party proceedings is subject only to the expressly stated condition, designed to prevent the provision being used abusively. Mr Turner pointed out that UBS does not (and could not) contend that claim is such an abuse; and

    ii) despite a number of references to the contrary in the Judge's reasoning, the decision as to whether third party proceedings fall within Article 6(2) is not a discretionary decision and there is no discretion to refuse to accept jurisdiction where it is engaged.

52. The arguments on the appeal were therefore relatively wide-ranging, broadly encompassing the following three groups of issues.

    i) The meaning of "third party proceedings" in Article 6(2) and whether that meaning imports (or there is otherwise to be implied) a "sufficiency of connection" test; if there is such a test, was it satisfied in this case.

    ii) Whether the application of Article 6(2) should be assessed as at the date of issue or whether it should be assessed (or re-assessed) as at the date of determination of a jurisdiction challenge. If the latter, whether exceptional circumstances are required before third party proceedings should be permitted to continue under

Article 6(2) if the original proceedings have settled, and if so, whether such a requirement is satisfied in this case.

iii) Whether the Court has a discretion to decline jurisdiction when it would otherwise be established under Article 6(2), and if so, whether it should have been exercised in this case.

The relevant principles

53. The parties were largely in agreement as to the broad principles relevant to interpreting the Lugano Convention and, in particular, Article 6(2).

i) The Convention must be interpreted purposively, by reference to its scheme and purpose. *Briggs on Civil Jurisdiction and Judgments* 7th ed. at 3.10 explains that:

> "For this reason, attention to the general principles underpinning the Convention is the proper first step in the interpretation of any individual provision; they must be taken as read in all cases in which a question of construction arises for decision. Where they point in different directions, an argument which is well founded by reference to the purpose of the Convention as a whole has the greatest prospect of being found to be correct."

ii) Exceptions to the principle of domiciliary jurisdiction (that is to say, that a defendant may expect to be sued in his home jurisdiction, given effect by Article 2 of the Lugano Convention) are to be interpreted restrictively. Article 6(2) is such an exception, permitting a defendant to third party proceedings to be sued in the jurisdiction in which the main claim is brought, regardless of that defendant's domicile. *Briggs,* at 3.11, explains as follows:

> "While many of the provisions of the Convention prevail over the domiciliary principle, the protection of the primacy or centrality of the domiciliary rule, by the narrowing of these other provisions, is a clear trend. On occasion, the narrowing construction of exceptions to the domiciliary principle appears to have gone too far, especially where the consequences of adopting a narrow interpretation of a particular provision increases the risk of inconsistent adjudications and irreconcilable judgment."

iii) The risk of irreconcilable decision must be minimised. *Briggs* explains the principle at 3.12 as follows:

> "The Convention seeks, as the [Judgments Regulation] had sought, to facilitate the easy, almost automatic, enforcement of its judgments. It is therefore necessary to prevent, as far as possible and from the outset, the existence of concurrent proceedings in the courts of two or more Lugano States. Forceful judgments have insisted on a broad and purpose-driven application of the provisions for dealing with *lis alibi pendens*. It also discourages a court from adopting an interpretation of an

> Article which would lead to a multiplicity of courts having jurisdiction over a claim, or over part of a claim."

iv) Legal certainty, predictability, and proximity, should be supported. *Briggs* at 3.13 explains that such principle is the basis of an objection to the use of judicial discretion in determining jurisdiction. Further:

> "…the principle will tell against a proposed construction of the Convention which would have the effect of leaving an intelligent claimant uncertain about where he will be able to sue, or a well-informed defendant unable to predict where he may be liable to be called to account…Judgments have been given in favour of interpretations of the special jurisdiction provisions, in particular, which would tend to prevent the multiplication or fragmentation of jurisdiction where claims arise within a single legal relationship."

The relevant EU authorities

54. It was common ground that EU decisions as to the interpretation of Articles of the Brussels Convention (and its successors, the Judgments Convention and the Judgments Regulation) are equally authoritative as to the interpretation of the equivalent Articles in the Lugano Convention.

55. In *Somafer v Saar-Ferngas* (Case 33/78) [1979] 1 CMLR 490 the CJEU considered the scope of the heads of special jurisdiction in Article 5 of the Brussels Convention. After recognising that the general rule conferring jurisdiction was the domiciliary rule in Article 2(1), the Court explained the justification for the exceptions to that general rule in the following terms:

> "[7]… Although Article 5 makes provision in a number of cases for a special jurisdiction, which the plaintiff may choose, this is because of the existence, in certain clearly-defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings."

56. In *Kongress Agentur Hagen GmbH v Zeehaghe BV* (C-365/88) [1990] ECR I-184 the issue was whether third party proceedings on a guarantee could be brought in the same jurisdiction as the original proceedings where the original proceedings had been founded on a head of special jurisdiction under Article 5 rather than domicile under Article 2. The CJEU held that Article 6(2) applied irrespective of the basis of jurisdiction for the main action, citing *Somafer* as authority for the following analysis:

> "[11] Article 6(2) confers a special jurisdiction the choice of which depends on the plaintiff's option by reason of the existence, in a specific situation, of a particularly close connection between an action and the court to which it may be referred with a view to the efficient handling of the proceedings. Therefore the Convention permits a single court to take cognizance of the whole dispute. Consequently, the connection between the main action and the action on a guarantee is

> sufficient to confer jurisdiction on the court dealing with the latter, irrespective of the basis for jurisdiction in the main action. In this respect the jurisdiction conferred by Article 2 and that referred to by Article 5 are equivalent.
>
> [12] Therefore…where a defendant domiciled in a Contracting State has been sued in a court of another Contracting State pursuant to Article 5(1) of the Brussels Convention, that court also has jurisdiction in the main action under Article 6(2) to entertain an action on a guarantee brought against a person domiciled in a Contracting State other than that of the court seised of the original proceedings."

57. The CJEU in *Kongress* also considered the question of whether a national court hearing the main claim was bound by Article 6(2) to permit a third party claim on a guarantee to be joined (provided it was not being used abusively), regardless of its own national procedural rules. The Court emphasised the distinction between jurisdiction (established by Article 6(2)) and admissibility of an action under national procedural rules, which the Convention did not seek to unify, holding:

> [18] So far as an action on a guarantee is concerned, therefore, Article 6(2) merely specifies the competent court and does not refer at all to the conditions of admissibility proper.
>
> ….
>
> [22] Consequently…Article 6(2) must be interpreted as meaning that it does not require the national court to accede to the request for leave to bring the action on a guarantee and that the national court may apply the procedural rules of its national law in order to determine whether that action is admissible, provided that the effectiveness of the Brussels Convention in that regard is not prejudiced."

58. In *GIE Réunion européenne v Zurich España* (Case C-77/04) [2006] 1 All E.R. (Comm) 488 French insurers, sued in France, sought to join a Spanish insurer alleged to have provided cover for the same event under the French Insurance Code. The CJEU held that a claim by one insurer against another did not fall within section 3 of the Brussels Convention, but regarded the claim against the French insurer as the original proceedings and the claim against the Spanish insurer as third party proceedings for the purposes of the application of Article 6(2). The Court held that jurisdiction to join the Spanish insurer therefore did arise under Article 6(2) provided that the choice of forum was not an abuse, explaining as follows:

> "30. As both the Commission of the European Communities and Advocate General Jacobs, in paras 32 and 33 of his opinion, have emphasised, the existence of a connection between the two sets of proceedings before the French courts is inherent in the very concept of third party proceedings.
>
> 31 There is an inherent relation between an action brought against an insurer seeking indemnification for the consequences of an insured event and proceedings whereby that insurer seeks

> contribution from another insurer considered to have provided cover for the same event.
>
> 32. It is for the national court seised of the original claim to verify the existence of such a connection, in the sense that it must satisfy itself that the third party proceedings do not seek to remove the defendant from the jurisdiction of the court which would be competent in the case.
>
> 33. It follows that art 6(2) of the Brussels Convention does not require the existence of any connection other than that which is sufficient to establish that the choice of forum does not amount to an abuse.
>
> …..
>
> 36. ...[A]rt 6(2) of the Brussels Convention is applicable to third party proceedings between insurers based on multiple insurance, in so far as there is a sufficient connection between the original proceedings and the third party proceedings to support the conclusion that the choice of forum does not amount to an abuse."

59. In *SOVAG v If Vahinkovakuutusyhtiö Oy* (Case C-521/14), [2016] QB 780, the CJEU considered whether a second insurer could rely upon article 6(2) to join an existing claim against the first insurer in order to claim against the first insurer. In answering in the affirmative, the Court adopted the test formulated in *GIE Réunion* as follows:

> "45 Given that article 6(2) of Regulation No 44/2001 requires a link between, on the one hand, the original proceedings and, on the other hand, the third party proceedings or the action on a warranty or guarantee to which it refers, it is for the national court seised of the original claim to ascertain whether such a connection exists, in the sense that it must satisfy itself that the third party proceedings or the action on a warranty or guarantee do not seek to remove the defendant from the jurisdiction of the court which would be competent in the case: the GIE case, paras 30 and 32."

The relevant domestic rules and authorities

60. CPR Part 20 makes provision for counterclaims and "other additional claims", including a claim by a defendant against any person "for contribution or indemnity or some other remedy" (CPR 20.2(1)(b)).

61. CPR 20.7(3) provides that a defendant may make an additional claim without permission if it is issued before or at the same time as he files his defence, and at any other time with the court's permission.

62. CPR 20.9 sets out the matters to which the court may have regard when considering whether to (a) permit a Part 20 claim to be made, (b) dismiss a Part 20 claim or (c)

require a Part 20 claim to be dealt with separately from the claim by the claimant against the defendant. Those matters are:

> "(a) the connection between the Part 20 claim and the claim made by the claimant against the defendant;
>
> (b) whether the Part 20 claimant is seeking substantially the same remedy which some other party is claiming from him; and
>
> (c) whether the Part 20 claimant wants the court to decide any question connected with the subject matter of the proceedings—
>
> (i) not only between existing parties but also between existing parties and a person not already a party; or
>
> (ii) against an existing party not only in a capacity in which he is already a party but also in some further capacity."

63. CPR Part 20 replaced, but largely reflected, Order 16 of the Rules of the Supreme Court, which made provision for "Third party and similar proceedings". Order 16 rule 1 provided:

> "(1) Where in any action a defendant who has entered an appearance—
>
> (a) claims against a person not already party to the action any contribution or indemnity; or
>
> (b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
>
> (c) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and person not already party to the action; then, subject to paragraph (2), the defendant may issue…a third party notice…
>
> (2) A defendant to an action may not issue a third party notice without the leave of the Court unless the action was begun by writ and he issues the notice before serving his defence on the plaintiff."

64. Order 16 rule 4 provided that if the third party entered an appearance, the defendant who issued the third party notice was required to apply to the Court for directions. On such application the Court was empowered to give judgment against the third party, order any claim or issue to be tried, or terminate the proceedings on the third party notice. The Court was required to make such orders and give such directions as appeared to the Court "proper for having the rights and liabilities of the parties most conveniently determined and enforced and as to the extent to which the third party is to be bound by any judgment or decision in the action".

65. The English authorities on the interpretation of Article 6(2) are all first-instance decisions. In *Kinnear v Falconfilms BV* [1996] 1 WLR 920 an actor's estate sued a film company in England in respect of injuries he suffered during filming in Spain. He later died in hospital in Madrid. The film company issued third party proceedings against the hospital and the surgeon who had treated the actor claiming an indemnity or contribution in respect of any liability to the actor's estate. Phillips J decided that the court had jurisdiction over the third party proceedings under Article 6(2) of the Brussels Convention, but in the event stayed those proceedings under Article 21 because the hospital and surgeon had already commenced proceedings against the film company in Spain, seeking a declaration of non-liability. On the question of the application of Article 6(2), Phillips J cited the comments about the meaning of "third party proceedings" in the Jenard Report (set out at [42] above) before stating at p. 926B as follows:

> "… [W]here domestic procedure permits a third party to be joined in proceedings, this is likely to be on grounds which justify overriding the basic right of the third party to be sued separately in the country of his domicile and that those grounds are almost certain to be some form of nexus between the Plaintiff's claim against the Defendant and the Defendant's claim against the third party. Absent such nexus I would agree that domestic third party proceedings cannot properly be described as "any other third party proceedings" in article 6(2)."

66. After setting out the terms of Order 16 rule 1(1) as set out above, Phillips J stated at p. 926F:

> "In my judgment the nexus between the plaintiff's claim against the defendant and the defendant's claim against the third party required to satisfy Ord. 16 r.1(1) is likely to be sufficient to justify the special jurisdiction granted by article 6(2)."

67. Phillips J further considered the question of the exercise of the discretion as to whether to allow the third party proceedings to proceed or to terminate them, stating as follows at p. 927G-H:

> "In a non-Convention case, English procedural rules permit the court to decline jurisdiction in relation to a third party claim on the ground that a foreign jurisdiction is the appropriate one to determine that claim. Quite apart from the procedure under R.S.C., Ord. 12, r. 8, I see no reason in principle why the court should not found on this consideration as a reason for terminating proceedings on the third party notice under Ord. 16, r. 4. In a Convention case it would not be proper for the court to apply domestic rules to decline jurisdiction under article 6(2) simply because the third party was domiciled abroad: see *Kongress*…. I am not, however, persuaded that the court cannot properly, when deciding whether or not to exercise jurisdiction under article 6(2) in relation to a third party claim, have regard to the implications on the litigation of adding to the proceedings a claim which should more appropriately be pursued abroad. On the facts of the present case, however, I shall exercise such discretion as I have in favour of the [film company] defendants."

68. In *Waterford Wedgwood plc v David Nagli Ltd* [1999] I.L.Pr. 9 the defendant had sold counterfeit Waterford crystals, purporting to have been manufactured by the plaintiff. The defendant issued a third party notice against the suppliers of the crystals, but a summary judgment application by the plaintiff proceeded before directions in the third party proceedings had been given. The plaintiff obtained orders for delivery up and disclosure, but was refused summary judgment on its passing-off claim and was given liberty to apply for an assessment of damages. Thereafter the plaintiff took no further steps other than to require payment of its costs. On an application by the third parties to set aside the third party notice, Charles Aldous QC (sitting as a Deputy High Court Judge) laid down a list of 'Requirements for Article 6(2)':

> "[20] The following principles apply to Article 6(2):
>
> 1. The purpose behind the special jurisdiction conferred by Article 6(2) is to secure the rational and efficient disposal of trials and in particular to avoid the risk of irreconcilable judgments, which would follow if third-party claims were tried separately.
>
> 2. Although in Kinnear Philips J. stated that the nexus between the plaintiffs claim against the defendant and the defendants claim against the third party required to satisfy RSC Ord. 16, r.1(1) is likely to be sufficient to justify the special jurisdiction granted by Article 6(2), I do not read this passage as other than illustrating where it may be expedient for the claim and third party claim to be heard together. The judge was not intending to derogate from the principle of the Convention that to override the basic right of the third party to be sued separately in the Court of his domicile it must be shown to be expedient in the interests of justice and good administration that the two actions or claims be heard by the same court.
>
> 3. Absent this ingredient, domestic third-party proceedings which merely happen to satisfy Ord. 16, r.1(1) will not be regarded as "any other third party proceedings" within Article 6(2). Article 6(2) is intended to have the same meaning and effect in each Contracting State.
>
> 4. Where therefore the main proceedings are for whatever reasons no longer active, it will in my judgment only be in exceptional circumstances that claims can be pursued by way of third-party proceedings under Article 6(2), as where it is necessary that the same tribunal which has already tried the issue in the main action should determine similar or related issues in the third-party claim.
>
> 5. Save in exceptional circumstances "other third party proceedings" refer to the joinder of third parties into active proceedings so that both be heard together.

> 6. Even in cases falling within Article 6(2) the Court retains a discretion under the Article. If otherwise the third-party claims ought to be pursued abroad, the Court can in appropriate cases exercise its discretion and decline jurisdiction. It might do so for example where it would equally refuse leave under domestic rules."

69. In *British Sugar v Fratelli Babbini di Lionello Babbini & Co SAS* [2004] EWHC 2560, [2005] 1 All ER (Comm) 55 a claimant brought proceedings in England against an Italian defendant alleging that machinery supplied by the defendant was defective. The defendant issued a Part 20 claim against the supplier (also domiciled in Italy) of one part of the machine under Article 6(2) of the Judgments Convention. The Part 20 defendant challenged English jurisdiction under Article 23 on the basis of an Italian exclusive jurisdiction clause. By the time that challenge was heard the main proceedings had settled. HH Judge Seymour QC upheld the challenge under Article 23, but also stated (obiter) that following *Kongress* there would have been no discretion under CPR 20.9 to stop the Part 20 claim if the main action had still been alive, but as it had settled "the requirements of art 6(2) … are simply not met as matters turned out".

70. In *Barton v Golden Sun Holidays* [2007] I.L.Pr. 57 the claimant holiday makers brought proceedings against their tour operator for breach of contract in respect of their stay in a Cyprus hotel. The tour operator admitted the breach and by April 2006 all of the claims had been settled, with costs to be assessed. That month the tour operator obtained permission to issue a Part 20 claim against the operator of the Cyprus hotel and served it in October 2006. Wyn Williams J confirmed that *Kinnear* was authority for the proposition that, if domestic procedure permitted a party join proceedings, then it was likely that there would be a sufficient nexus for there to be jurisdiction under Article 6(2). He then considered the principles from *Waterford Wedgwood*, stating:

> "44. I agree with the learned Deputy Judge that the purpose behind the special jurisdiction conferred by Art.6(2) is to secure the rational and efficient disposal of trials and in particular to avoid the risk of irreconcilable judgments. That is abundantly clear from the preamble to the Regulation and from the decisions in *Kalfelis*, *Hagen*, and *GIE Reunion* (cited above). In my judgment Phillips J. says nothing in Kinnear which would or could dilute that underlying rational.
>
> "45. I also agree with the Deputy Judge that domestic third-party proceedings which merely happen to satisfy the national procedural rules will not necessarily be regarded as "any other third-party proceedings" within Art.6(2). That article is intended to have the same meaning in effect in each contracting state.
>
> 46. In my judgment it is beyond dispute that a connection must exist between the proceedings commenced by the claimant and the proceedings commenced by the defendant against a Pt 20 defendant before the Pt 20 proceedings can be considered to fall within Art.6(2). It is not possible to define the nature of that connection notwithstanding the understandable desire that Art.6(2) is understood and applied by all contracting states in the same way. It seems clear, however, that the connecting factor must be a close one—see [11] in Hagen—and there

> must be good reason to conclude that the efficacious conduct of proceedings is best promoted by both the claim between claimant and defendant and claim between defendant and Pt 20 defendant being considered by one court."

71. Wyn Williams J found that there was no close connection between the claims in the *Barton* case, stating at [47]:

> "In short, the claim between the claimant and the defendant is no longer active and is unlikely ever to be revived. There is no realistic possibility that the claim between the defendant and Pt 20 defendant will be tried with the claimants' claim. There is no risk of irreconcilable judgments. There has never been and never will be any prospect of the Pt 20 defendant being a party to the determination of the proceedings brought by the claimants against the defendant."

What are "third party proceedings" and is there a "sufficiency of connection" test?

72. UBS contended that the CJEU decision in *Kongress* is long-standing authority, at the highest level, for the proposition that proceedings against an additional party will only constitute third party proceedings for the purposes of Article 6(2) if there a "particularly close connection" between those proceedings and the main proceedings. UBS relies on the view of Wyn Williams J that "it is beyond dispute" that a connection must exist and (referring to *Kongress*) that the connection must be a close one.

73. In my judgment UBS's submission and the decision in *Barton* are based on a misreading of *Kongress*, a misreading which is clear from the express terms of subsequent CJEU decisions.

    i) The Court in *Kongress*, following the analysis in *Somafer*, was explaining the rationale for the special jurisdiction provided for in Article 6(2), namely, that the particularly close connection between main proceedings and third party proceedings justified a single court taking jurisdiction over the whole dispute: see [11]. The Court was not stating that third party proceedings are subject to a "sufficiency of connection" test, but was stating that third party proceedings (under the applicable domestic procedural rules) would necessarily have a close connection to the main proceedings.

    ii) Indeed, the Court in *Kongress* at [22] recognised that the question of which claims to admit by way of third party proceedings was a matter of domestic law. The Court's concern was not that a domestic court would permit third party claims that were insufficiently connected to the main proceedings, but that the domestic court might refuse to admit such claims, thereby undermining the effectiveness of the Convention by permitting linked disputes to be determined in different jurisdictions, giving rise to irreconcilable judgments and consequent issues as to enforcement. What is clear is that the Court regarded such third party proceedings as were admitted as falling within Article 6(2).

iii) The above reading of *Kongress* is consistent with the amended text of Article 6, into which a sufficiency of connection test had been added in Article 6(1) but not in Article 6(2). It is difficult to imply such a test into the latter provision when it is clear that a decision was taken not to include the test expressly. It would be surprising if the Court in *Kongress* had supported such implication without explaining that it was doing so, and, in my judgment, it did not do so.

iv) The CJEU in *GIE Réunion* explained at [30] that the existence of a close connection was "inherent in the very concept of third-party proceedings". The Court therefore went on to state at [33] that Article 6(2) does not require the existence of any connection other than that which is sufficient to establish that the choice of forum does not amount to an abuse. That is the clearest express repudiation of a general sufficiency of connection test, entirely consistent with the analysis of *Kongress* and the amended text of Article 6 as set out above. It was repeated in *SOVAG*. Ms John argued that *GIE Réunion* and *SOVAG* were dealing with contribution claims between insurers (in *SOVAG*, the question being whether an insurer could join as third party to bring a claim), where the connection was obvious and assumed, and should be read in that limited context. But the statements of the law by the CJEU in each of those cases was expressed in general terms, in no way limited to multiple-insurer cases. I consider they are clear and binding authority as to the proper interpretation of Article 6(2).

v) In *Barton* Wyn William J referred to the key paragraphs of the decision in *GIE Réunion*, and accepted the "abuse" connection test at [26], but appears not to have taken that into account when holding, on the basis of his reading of *Kongress*, that there must be a close connection between the main proceedings and the third party proceedings.

vi) I would add that I see little or no basis or justification for the list of "requirements" of Article 6(2) set out in *Waterford Wedgwood*.

74. It follows, in my judgment, that where domestic rules (such as CPR Part 20 or its predecessor RSC Order 16) permit the joinder of an additional/third party, that is in itself sufficient to engage Article 6(2), provided that the joinder is not an abuse in the terms of the Article. I consider that Phillips J in *Kinnear* came close to recognising that position, and his judgment should now be viewed in the light of the CJEU decisions in *GIE Réunion* and *SOVAG*.

75. Such an interpretation is not only mandated by the CJEU, but is necessary to give effect to the principle of certainty. A party issuing third party proceedings needs to know whether or not they fall within and can be served under the Lugano Convention (with the required self-certification). Such a claimant should not be exposed to the risk of a limitation period expiring whilst an open-textured argument takes place as to whether the third party proceedings are sufficiently connected to the main proceedings. If the proceedings are found to be an abuse, the claimant would have no cause for complaint, but a broader connection test would undermine the certainty and efficacy of the Convention.

76. The fact that Part 20 claims fall within Article 6(2) does not prevent the court from deciding, within CPR 20.9, that the third party proceedings should not be tried with the main proceedings (as in this case) or that they should be dismissed, as recognised in

[22] of *Kongress*. But that should not (and in my judgment does not) mean that they were not properly brought in this jurisdiction under Article 6(2).

77. Applying the above analysis in the present case, there is no assertion that the Part 20 claim was being used abusively. It therefore engaged Article 6(2) and that Article conferred jurisdiction over the dispute on the courts of England Wales at the date of issue and service of the claim.

78. Whilst the point does not arise given the above analysis of the law, I would in any event have regarded the Part 20 claim in these proceedings as sufficiently connected to the Main Proceedings at the date of issue, if that was a requirement. The Part 20 claim was contingent on the Buyers being held liable to CAIS, and both claim and Part 20 claim turned on the nature and effect of the payment made by the Buyers to CAIS. It was plainly appropriate and desirable that UBS should, all things being equal, be party to and bound by findings in the Main Proceedings as to the circumstances in which the payment was made and whether it discharged the debt to CAIS.

As at which date should the application of Article 6(2) be assessed?

79. There is no doubt that the question of whether Article 6(2) applies falls to be considered at the date of issue of a third party claim. A party can only issue such a claim and serve it under the Lugano Convention if it falls within one of the Articles conferring jurisdiction in the Convention (such as Article 6(2)) at the date of issue. Service on that basis can be challenged on the ground that the claimed basis for jurisdiction was not made out.

80. The question is whether, if there was jurisdiction, at the date of issue, a *further* assessment can or should be made as at a later date to determine whether the Part 20 claim continues to be within Article 6(2). In other words, is it open to the court to determine that jurisdiction which was effectively and validly founded on Article 6(2) at the date of issue has been lost as a result of subsequent events?

81. UBS contended that such a further assessment must be made because the court is under a continuing duty to ensure that the principles and purposes of the Convention are met. Thus, UBS submitted, the court must assess whether a Part 20 claim is properly maintainable under Article 6(2) when it first comes to review the jurisdiction for the proceedings. In particular, if the main proceedings have by that date settled, Article 6(2), and the rationale underlying it, no longer applies and jurisdiction should be declined at that point.

82. UBS pointed to *Waterford Wedgwood* and *British Sugar* as authorities for the proposition that the court should decline jurisdiction if the main proceedings are no longer extant: in particular, UBS relied on the dicta in *British Sugar* that the requirements of Article 6(2) "are simply not met as matters turned out". Although UBS also relied on *Barton* in this regard, it seems that the main proceedings had already settled by the time of issue of the Part 20 claim in that case.

83. In my judgment, and despite the dicta in the first instance domestic cases, there is no merit in UBS's contention. There is no support in the text of the Lugano Convention (or the Judgments Regulation), the Jenard Report or any of the EU authorities for the proposition that jurisdiction, once founded at date of issue, can be "lost". Such a

proposition would directly conflict with and undermine the principle of certainty and predictability: a Part 20 claimant who had issued and served proceedings under Article 6(2) could find their claim ousted from a properly and effectively chosen jurisdiction, outside a relevant limitation period and with no remedy, by reason of matters entirely outside their control.

84. Further, the decision of the House of Lords in *Canada Trust Co v Stolzenberg (No 2)* [2002] 1 AC 1 is highly persuasive as to, if not determinative of, the issue. The question arose as to whether the date for assessing domicile for the purposes of establishing jurisdiction under Article 2 and Article 6(1) was the date of issue or the date of service of proceedings, recognising that a defendant might have changed domicile between the two. Lord Steyn (with whom all other members of the House agreed) rejected the argument that relevant domicile could change after the issue of proceedings, stating at p.12D that that would "cast doubt on its feasibility in the framework of a Convention which aims at legal certainty". Lord Steyn concluded at p. 12E that "sued" in articles 2 and 6 should be interpreted as referring to the initiation of the proceedings". That reading of Article 6 necessarily entails that the date for assessing whether a third party may be sued in the jurisdiction where the main proceedings are on foot is the date of issue.

85. I would therefore reject UBS's primary argument on the second limb of its appeal.

Is there a discretion not to accept jurisdiction under Article 6(2)?

86. Determination of whether a claim falls within Article 6(2) undoubtedly requires an exercise of judgment by the court, not least if the question arises as to whether the abuse exception applies.

87. UBS contends, however, that there is a further question as to whether the court should accept jurisdiction under Article 6(2) as a matter of the exercise of discretion, referring to section 15.12 of *Briggs*, headed "The discretion to decline jurisdiction under article 6(2)". However, it would be remarkable if *Briggs* was suggesting that a head of jurisdiction under the Lugano Convention was a discretionary matter given that work's earlier recognition of the objection to judicial discretion in determining jurisdiction (referred to in [53(iv)] above). In fact it is plain from the ensuing discussion (primarily addressing the decision in *Kongress*) that the discretion referred to is not a discretion as to whether to accept jurisdiction under Article 6(2), but as to whether the proceedings should be permitted to proceed as a matter of domestic procedural rules: the distinct question of "admissibility" addressed by the CJEU in *Kongress* at [22]. As *Briggs* states:

> "It is one thing to enact a rule that gives jurisdiction over third-party claims, but another to say when that jurisdiction may be, and may not be, exercised. Domestic laws have criteria that specify whether the permission of the court is needed, at what point in the procedure the third party may be joined, and so on. The silence of the Convention upon these matters, which is entirely rational, means that they must be resolved by the procedural law of the court seised. It is inevitable that there will be circumstances in which the court has special jurisdiction but, under its own procedural rules, will have reason not to exercise it. All that is required of the national court is that it refrain from operating

> its procedural rules in such a way as to undermine the practical effect of the Convention."

88. It is also clear, in my judgment, that Phillips J's references to "discretion" in *Kinnear* were also to the exercise of the court's procedural power to decline to permit third party proceedings to proceed under RSC Order 16 rule 4: that is plain from Phillips J's indication that factors relevant to *forum non conveniens,* which was not relevant to jurisdiction under the Convention, were relevant to the discretion as to whether to allow third party proceedings to be joined with the main claim.

89. In my judgment it would be contrary to the purposes of the Convention and the principle of certainty and predictability if a court had discretion to decline to accept jurisdiction which would otherwise have been established by under Article 6(2). Management of those proceedings as a matter of domestic procedural law, including the application of CPR 20.9, is another matter.

Conclusion

90. I would also dismiss UBS's appeal on the issue of whether the courts of England and Wales have jurisdiction over the Part 20 claim pursuant to Article 6(2).

Lady Justice Carr

91. I agree.

Sir Geoffrey Vos, Master of the Rolls

92. I also agree.