Neutral citation no. [2019] EWHC 2867 (Admlty)
Claim No 2014 Folio 1336

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (QB)
ADMIRALTY COURT
BEFORE: Mr Registrar Kay QC Admiralty Registrar

B E T W E E N

ALLAN PEACOCK

Claimant

-and-

(1) DEL SEATEK INDIA PRIVATE LIMITED,
a Company incorporated in the Republic of India
(2) HYUNDAI HEAVY INDUSTRIES COMPANY LIMITED,
a Company incorporated in the Republic of South Korea

Defendants

Appearances

For the Claimant – Matthew Chapman QC instructed by Irwin Mitchell

For the Second Defendant –Ms Marie Louise Kinsler QC instructed by Kennedys Law

Hearing dates: 22nd March 2016, adjourned to 3rd July 2019

APPROVED JUDGMENT

(Handed down 29.10.2019)

Introduction

1. This matter concerns an application by the Second Defendant to contest jurisdiction of the court to hear the present claim pursuant to CPR Part 11. The Application Notice was dated 23rd November 2015.

2. The factual background is that the Claimant is a United Kingdom national domiciled in England whose date of birth was the 5th January 1970. He was a commercial diver. On the 10th November 2011 he was employed on board a vessel located off-shore in the Paradip area of India. The First Defendant is a company incorporated/registered in India and the employer of the Claimant. Judgment in default has been entered in the English Court. Jurisdiction is not in issue. The Second Defendant is a company incorporated/registered

in South Korea. It is the owner/occupier of the vessel, "HD 1000" ("the Barge"), and the beneficiary of the works undertaken by the Claimant. A CPR Part 11 application to contest jurisdiction has been filed and served.

3. The circumstances of the accident as pleaded are:
    a. On or about 10th November 2011, in the course of his said duties as a saturation diver, the Claimant was working at or about the Barge and was instructed to dive to a depth of around 20 – 30 metres. His task was to disconnect two chains holding two vertical piles together (one pile rested on top of the other pile). It is believed that there had been at least one (aborted) earlier attempt at the task allocated to the Claimant; the earlier attempt had been aborted as a result of poor visibility and a strong tide. The supervisor of the dive was a man known to the Claimant as Tuli and it is believed that he was employed by the First Defendant.
    b. The top pile was used to drive down the second pile into the seabed (acting like a hammer on a nail). The second, bottom, pile – when embedded in the seabed – was then deployed like an anchor for a single buoy mooring used for tanker vessels while loading or unloading at the Barge. The chains connecting the piles were at a height of approximately 1.5 – 2 metres from the seabed.
    c. The Claimant left the surface in the dive basket. He exited the basket just below the keel of the Barge and then followed a swim line until he reached the seabed (eventually walking along the seabed holding the swim line). Visibility was poor (around one metre). As the Claimant approached the piles he began to leave the seabed (the swim line was higher at this location than it ought to have been). On reaching the piles the Claimant was swimming in mid-water while still holding the swim line in the strong tide. The swim line was attached to the top of the chain and not to the bottom shackle which the Claimant would have to remove.
    d. The Claimant tried to secure his umbilical to give him more room to work (the strong tide was pulling him away from his task and was causing the umbilical to move around). While the Claimant was securing his umbilical the top pile parted from the bottom pile. They parted because they were insecurely attached; there was too much "*slack*" in the chains holding them together. In addition, the swell and movement of the water caused the Barge to roll which also affected the movement of the piles. The Claimant's right foot was sucked in between the parted piles before the top pile fell back on top of the bottom pile and, in doing so, crushed the Claimant's

foot. The Claimant's foot was stuck for a few seconds before the piles moved again and the Claimant was able to remove his foot. The Claimant detached his umbilical and hopped/dragged himself back to the dive basket after informing the dive supervisor of the accident/injury (the basket had been removed to the surface and so the Claimant had to await its return). Following the Claimant's accident, he learned that additional weight had been added to the tidal gauge in order to make the tide appear calmer than, in fact, it was at the material time.

e. By reason of the accident the Claimant (born on 5 January 1970), sustained a severe crush injury to his right foot resulting in a below-knee amputation.

4. Liability, causation and quantum are all in issue in this matter. The procedural history of this matter is:

   a. The Claimant issued a Claim Form in the Admiralty Court on the 4th November 2014.

   b. On the 8th January 2015 the Claimant made an application for permission to serve proceedings outside the jurisdiction on (1) Seatek India Private Limited and (2) Hyundai Heavy Industries Company Limited.

   c. On the 3rd March 2015 an Order, without notice, was made by the Admiralty Registrar granting permission to serve outside the jurisdiction.

   d. 14th April 2015 an Order was made by Burton J extending time for service on both Defendants to 30th August 2015.

   e. On the 12th August 2015 Proceedings were served on Seatek India Private Limited.

   f. On the 12th August 2015 an Order was made by Andrew Smith J extending time for service on both Defendants to 30th November 2015.

   g. On the 28th August 2015 a Defence was pleaded by Seatek India Private Limited which stated, among other things, that no entity with the name Seatek India Private Limited exists.

   h. On the 30th September 2015 Claimant made an application to amend the Claim Form and Particulars of Claim to correct the name of First Defendant from Seatek India Private Limited to Del Seatek India Private Limited.

   i. On the 6th October 2015 an Order, without notice, was made by the Admiralty Registrar granting permission to amend the name of First Defendant pursuant to

CPR 17.4. Directions for service and acknowledgement of service and/or a Defence were made.

j. On the 10th November 2015 the Second Defendant (Hyundai) acknowledged service indicating an intention to contest jurisdiction.

k. On the 23rd November 2015 the Second Defendant applied for an Order setting aside service pursuant to CPR Part 11.

l. On the 29th February 2016 an Amended Claim Form and Particulars of Claim (corrected as to name of First Defendant were served on the First Defendant in India.)

m. On the 22nd March 2016 there was a hearing of the Second Defendant's jurisdictional challenge before the Admiralty Registrar which the First Defendant did not attend. The following Order was made:

> UPON permission to appeal having been granted by the Supreme Court in *Brownlie v Four Seasons Holdings Incorporated* (Reference: UKSC 2015/0175) IT IS ORDERED THAT:
>
> 1. The hearing of this Application shall be adjourned generally to a date to be fixed on application by the Claimant and/or Second Defendant (estimated length of hearing: 1 day, plus reading time of ½ a day);
> 2. Permission to the Claimant and/or Second Defendant to apply.

n. On the 24th March 2016 the Claimant made a Request for judgment in default.

o. On the 26th April 2016 the Admiralty Registrar made an Order for judgment in default.

p. On the 10th May 2016 the Claimant, pursuant to the Admiralty Registrar's Order, applied for the Court to list a CMC.

q. On the 12th May 2016 the First Defendant made an Application to set aside judgment in default.

r. On the 20th May 2016 the First Defendant filed and served an Amended Defence.

s. On the 24th May 2016 the Admiralty Registrar made a Directions Order.

t. On the 16th June 2016 the Admiralty Registrar amended the Directions Order.

u. On the 1st November 2016 the First Defendant's Application to set aside Judgment and CMC was heard.

v. On the 20th December 2016 the First Defendant's application to set aside Judgment was dismissed.

w. On the 19th December 2017 Supreme Court gave judgment in *Brownlie* [2018] 1 WLR 192 (UKSC).

x. On the 3rd July 2019 there was the resumed hearing of Second Defendant's Application to contest jurisdiction under CPR Part 11.

5. At the present hearing Mr Chapman QC, for the Claimant, seeks orders:
    a. Dismissing the Second Defendant's Application under CPR Part 11;
    b. For a trial of the liability and quantum issues which will include orders for expert evidence in respect of:
        i. Indian law as to liability, causation and quantum. (Apparently it is common ground that Indian law will apply to the liability issues in this matter pursuant to Article 4(1) of the Rome II Regulation);
        ii. Diving as this case involves technical commercial diving issues and the safety or otherwise of what the Claimant was required to do;
        iii. A variety of medical and ancillary disciplines.
    c. As to costs budgeting, the Claimant will file and serve a Budget.
    d. That the claim is listed for trial before the Admiralty Registrar with a suggested time estimate of 7 days together with 1 day of reading time.

6. Mr Chapman informed the court that the First Defendant has been informed of the date of this hearing, but has, at least to the 25th June 2019, failed to respond.

The Second Defendant's Application

7. Ms Kinsler QC sought to rely upon a witness statement of one David McKie served on the Claimant on Thursday 20th June 2019 the admissibility of which has been objected to by Mr Chapman.

8. Ms Kinsler, by way of background informed the Court:
    a. that the purpose of the application is to challenge the jurisdiction of the Court and obtain an order setting aside service of the Claim Form and Particulars of Claim. She also informed the Court;
    b. that, for the avoidance of doubt, and if necessary, the Second Defendant, "HHI", confirms that it submits to the jurisdiction of the Indian court;

c. that the Claimant is a commercial diver who, at the material time, was employed by the First Defendant ("Seatek"), a company incorporated in India. HHI is a company incorporated in South Korea which contracted with Seatek for the performance of diving works;
d. that the claim arises out of an injury sustained by the Claimant on 10th November 2011 when performing diving works off the coast of Paradip, India.

It therefore appears that there is no essential dispute as to the factual background underlying the present application.

9. With respect to the application itself Ms Kinsler has submitted:
    a. That permission to serve the Claim Form on it out of the jurisdiction, in Korea, should not have been granted as the Claimant has failed to discharge the burden of establishing the three necessary elements namely that:
        i. one of the jurisdictional gateways applies; and
        ii. he has reasonable prospects of success; and
        iii. England is the *forum conveniens.*
    b. Further that the permission to extend time for service of the Claim Form on it should not have been granted. The Second Defendant requests the Court to set aside the Orders of Burton J (14.04.15), Andrew Smith J (12.08.15) and Admiralty Registrar Kay Q.C. (06.10.15) granted without notice and without a hearing, on the grounds that:
        i. The applications were not supported by sufficient evidence to justify the orders;
        ii. The Claimant breached his duty of full and frank disclosure.

Discussion

10. The starting point is CPR Part 6.36 and CPR Part 6.37 which provide:

> *6.36 In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply.*
>
> *6.37(1) An application for permission under rule 6.36 must set out—*
>
> *(a) which ground in paragraph 3.1 of Practice Direction 6B is relied on;*

(b) that the claimant believes that the claim has a reasonable prospect of success; and

(c) the defendant's address or, if not known, in what place the defendant is, or is likely, to be found.

(2) Where the application is made in respect of a claim referred to in paragraph 3.1(3) of Practice Direction 6B, the application must also state the grounds on which the claimant believes that there is between the claimant and the defendant a real issue which it is reasonable for the court to try.

(3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.

11. Paragraph 3.1 of Practice Direction 6B sets out the general grounds which permit a claimant to serve a claim form out of the jurisdiction with the permission of the court. It provides:

3.1(3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and

(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary and proper party to that claim.

3.1(9) A claim is made in tort where – (a) damage was sustained [or will be sustained] within the jurisdiction; or (b) damage [which has been or will be] sustained results from an act committed [or likely to be committed] within the jurisdiction.[1]

12. Ms Kinsler made the following submissions with respect to the proper approach to be taken in considering whether jurisdiction is established in the English Court, citing the authorities set out:

[1] The sections in square brackets were added by amendment with effect from 1 October 2015.

a. At common law, jurisdiction is based on service. The court has no inherent jurisdiction to permit service of a Claim Form or other document out of the jurisdiction. Legislation has, at various times, provided a statutory basis for the court to permit service out in certain defined circumstances. The current rules are provided by CPR Part 6 and its Practice Direction 6B ("CPR 6BPD").

b. In order for the Court to grant permission to serve out, the Claimant has to establish in respect of each claim that:

    i. one of the jurisdictional gateways in paragraph 3.1 of CPR 6BPD applies; and

    ii. the claim has reasonable prospects of success; and

    iii. England is the proper place in which to bring the claim[2].

c. The burden of establishing each of these elements rests upon the Claimant and they each of the three elements have to be separately satisfied: a strong case on one element cannot compensate for the weakness of the case on another element.[3] The Claimant can only succeed on jurisdiction if he succeeds on all three elements.

d. The application to set aside permission to serve out of the jurisdiction falls to be determined by reference to the position at the time permission is granted although subsequent events may throw light upon considerations which were relevant at the time: see *Erste Group Bank AG v JSC 'VMZ Red October'* [2015] EWCA Civ 379 [44-45].

e. The jurisdictional gateways circumscribe the legal limits of the court's jurisdiction. They provide a statutory basis for jurisdiction in cases where there is a link or "a sufficient or appropriate nexus" of the foreign defendant to the English court".[4] In the absence of submission by such a defendant to the jurisdiction (whether by contract or otherwise), a real and substantial connection with England, as defined by the gateways, is necessary before the court can assume jurisdiction.

f. The proper construction of the gateways, and what is required to satisfy them, are questions of law for the tribunal to decide. There is no justification for adopting a

[2] *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80 [A/20]. *Altimo Holdings v Kyrgyz Mobil* [2012] 1 WLR 1804 [A/4]

[3] *Seaconsar Far East v Bank Markazi* [1994] 1 AC 439 [A/41]

[4] *Metall & Rohstoff v Donaldson Inc.* [1990] 1 QB 391 (C.A.) [A/35] at p. 436G-H; *Conductive Inkjet Technology v Uni-Pixel* [2013] EWHC 2968 (Ch) [A/15] at § [52], Roth J.

strained or expansive construction of the gateways given the imposition on a defendant who is served out of the jurisdiction. A conservative approach to the construction is appropriate and is consistent with well-established authority.[5]

g. In respect of gateways which require proof of evidential facts, a claimant must establish that he has a 'good arguable case' that the gateway applies. This phrase, addressing the standard of proof imposed on a claimant, has been considered recently in a number of cases at appellate level: see *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80, *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 [A/25], *Aspen Underwriting Ltd v Kairos Shipping Limited* [2018] EWCA Civ 2590 [A/5] at [34], *Kaefer Aislamientos SA v AMS Drilling Mexico SA* [2019] EWCA Civ 10 [A/30].

h. The effect of these judgments in this case is that, to the extent that a gateway requires proof of evidential facts, the Claimant has to establish a better argument that the gateway applies and must supply a "plausible evidential basis" for the application of the relevant jurisdictional gateway.

i. The high standard which continues to be imposed on a Claimant seeking to rely on a gateway is not surprising. The court only has the power to assume jurisdiction against foreign defendants outside the territorial jurisdiction of the court if it is satisfied that the relevant gateway applies - thus ensuring that there is a sufficient factual connection between the foreign defendant and the English court.[6]

13. In the present case the Claimant relies on two gateways: the 'tort' gateway in CPR 6BPD, para. 3.1(9)(a) and the 'necessary or proper party' gateway in CPR 6BPD, para 3.1(3). Miss Kinsler has submitted that neither are satisfied in this case.

The Tort gateway.

14. The question before the Court is whether the claim against the Second Defendant falls within PD6B para 3.1(9).

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[5] *The Hagen* [1908] P 189 [A/27]*; The Siskina* [1979] AC 210 [A/43]*; Metall & Rohstoff (supra); Mercedes Benz AG v Leiduck* [1996] AC 284 [A/34] at p. 299D-E*; Dicey, Morris & Collins* "The Conflict of Laws" 15th Ed (2012), 11-142 [A/48]. HHI also submits that it is relevant to consider whether a claim falls within the spirit as well as the letter of the gateway: see: *GAF Corp v Amchem Products* [1975] 1 Lloyd's Rep 601 [A/22], *Rosler v Hilbery* [1925] Ch 250 [A/39], 259-260; *Sharab v Al-Saud* [2009] EWCA Civ 353 [A/42], *Conductive Inkjet Technology (supra).*

[6] *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547 [A/12]; *Bols Distilleries BV v Superior Yacht Services Ltd* [2007] 1 WLR 12 [A/9].

15. The Claimant sustained his physical injury in India. The question for the Court is whether the phrase "*damage sustained*" in the jurisdictional gateway extends to suffering *indirect* damage, namely the consequential effects of the physical injury in the form of continuing pain and the resulting pecuniary expenditure or loss. Ms Kinsler has submitted that this "has long been a controversial matter." I agree that there have been differing views expressed over recent times. There are a number of first instance authorities where it has been held, in the personal injury context, that indirect damage is sufficient to engage the gateway. Ms Kinsler has provided a number of these set out in the footnote.[7] To those may be added the decision of MacDuff J in the case of *Anthony Harty v Sabre International Security Ltd* [2011] EWHC 852 (QB) to which I have been referred by Mr Chapman. In that case the Claimant, a British national domiciled in England, worked as a security consultant in Iraq. He was employed by one or other of two corporate Defendants. One of the Defendant companies was incorporated in the British Virgin Islands. The other Defendant was incorporated in Iraq. The Claimant was injured in a road traffic accident in Iraq. He brought proceedings against both Defendants (expressing his claim in the alternative against each of them). He obtained permission to serve outside the jurisdiction by means of a without notice application to the Queen's Bench Master. There was no appeal against that decision. In many respects the factual background was similar to the present case. As a general point the majority of first instance judges have been prepared to accept that even though the initial injury was suffered outside the jurisdiction the gateway condition is satisfied if the damage has continued within it.

16. Ms Kinsler has observed that the approach referred to above has been questioned, for example the *obiter dicta* of the Court of Appeal in *Erste Group Bank AG v JSC 'VMZ Red October'* [2015] EWCA Civ 379 at [104-105]. However, it is to be noted that the other cases cited by Ms Kinsler on this aspect in the footnote predated the first instance decisions referred to above[8] and I do not consider that they are helpful for present purposes. She has also drawn attention to *Four Seasons Holdings Inc v Brownlie* [2015]

[7] See *Booth v Phillips* [2004] 1 WLR 3292 [A/10]; *Cooley v Ramsey* [2008] ILPr 27 [A/16]; *Saldanha v Fulton* [2011] EWHC 1118 (Admlty) [A/40]; *Wink v Croatia Osiguranje DD* [2013] EWHC 2188 (QB) [A/47]; *Pike v Indian Hotels Co Ltd* [2013] EWHC 4096 (QB) [A/38].

[8] And see *Metall und Rohstoff* at 424*; Societe Commerciale de Reassurance v Eras International (The Eras Eil actions)* [1992] 1 Lloyd's Rep 570 [A/44] at 591; *ABCI v Banque Franco-Tunisienne* [2003] 2 Lloyd's Rep 146 [A/1] at 41-43. In all these cases, the CA held that the gateway was to be construed in the light of the CJEU jurisprudence on Article 5(3)/7(2) of the Brussels Regulation.

EWCA Civ 665, in which the Court of Appeal unanimously held that consequential or indirect damage suffered in England by a person injured abroad did not satisfy the gateway, thus effectively overruling the first instance decisions. That decision was reversed by the Supreme Court in *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80 on other grounds and the Court of Appeal decision was therefore rendered *obiter, Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876.

17. It is therefore clear that with respect to PD6B paragraph 3.1(9) there is some divergence of judicial opinion as to whether and what type of damage sustained within the jurisdiction can confer jurisdiction on the English court, see for example *Booth v Phillips* [2004] EWHC 1437 Mr Nigel Teare QC (as he then was), *Cooley v Ramsey* [2008] 1 LPr 27 (Tugendhat J) and MacDuff J in *Anthony Harty v Sabre International Security Ltd* [2011] EWHC 852 (QB) which accepted claims for consequential damages and economic loss arising within the jurisdiction and the decision of the Court of Appeal in *Erste Group Bank AG (London) v JSC (VMZ Red October)* [2015] EWCA Civ 379 where it was doubted whether it was correct to extend 'damage' referred to in the rule as including consequential losses. Although that doubt was supported by the Court of Appeal in *Brownlie v Four Season Holdings Inc* [2015] EWCA Civ 379 which followed the approach in *Erste* nonetheless the matter has been before the Supreme Court which reversed the Court of Appeal on a different ground, namely that the claim had been brought against the wrong Defendant, and re-considered the reasoning of the Court of Appeal with respect to the meaning of damage sustained within the jurisdiction set out in PD6B para. 3.1(9)(a). By a majority of 3 (Baroness Hale, Lords Clarke and Wilson) to 2 (Lords Sumption and Hughes) the Court expressed the view that the wider interpretation of PD6B para, 3.1(9)(a) should apply at least insofar as the rule refers to personal injuries although the majority did not deal specifically with consequential loss outside of the personal injury context. Lady Hale, at para 54, accepted the danger of a Claimant being able to 'pick and choose' her jurisdiction but considered that issue could be dealt with by a "*robust*" application of the *forum conveniens* discretion at the third stage of the test. However it is fair to note that the views of the Supreme Court were expressly said to be *obiter* in which respect Lord Wilson said: "*had [the Court's conclusion on the scope of the 'tort gateway'] been part of the decision, it would have been far-reaching; and the need for the court at the hearing of this appeal to address other issues … may have led to less full argument about the meaning of para 3.1(9)(a) than its importance requires*".

18. Ms Kinsler has argued, in the present case, that the Court is faced with the option of following two Supreme Court judges and three Court of Appeal judges on the one hand, or three Supreme Court judges on the other. She has submitted that the Court should choose the first option, namely to follow the outcome in the Court of Appeal for the reasons set out by Lord Sumption and Lord Hughes in the Supreme Court.

19. As the decision of the Supreme Court reversed the Court of Appeal so that the views of that court are also *obiter* there is, therefore, no definitive decision of the Court of Appeal or the Supreme Court on this topic which leaves a situation where there are a significant number of first instance decisions which have not been overruled and which, until they are, may be regarded as persuasive. Whilst some doubt has arisen because of the decision of the Court of Appeal nonetheless the approach taken in the earlier cases has been supported by the majority in the Supreme Court, at least with respect to claims for damages for personal injury. In the circumstances I consider that the fact that the Claimant has continued to suffer damage within the jurisdiction satisfies one of the limbs of the jurisdictional gateways in paragraph 3.1 of CPR 6BPD.

20. The next question is whether the claim against the Second Defendant has a reasonable prospect of success. Mr Chapman has drawn attention to the principles to be considered with respect to the evidence put before the court when making a decision as to jurisdiction. He has submitted, in my view, correctly:
    a. A CPR Part 11 Application hearing is not a trial and ought usually to proceed, as here, on the basis of written evidence and the parties' submissions. In the light of the limitations inherent in this interlocutory process, the Court should not express a concluded view as to the merits (particularly where the issues relevant to jurisdiction are issues that may also arise at trial: see, *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555E – G *per* Waller LJ (CA) and Dicey, Morris & Collins on *The Conflict of Laws* (15th ed, 2012), paras 11-146 – 11-147).
    b. The requirement that there be a "*good arguable case*" as to jurisdiction provides, as standard of proof, the kind of flexibility appropriate to an interlocutory application of this kind (the Court is not applying the civil standard of proof to any "*gateway*" condition for jurisdiction) (see, *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555H *per* Waller LJ (CA).

c. The standard of proof was recently considered by the Supreme Court in *Four Season Holdings Incorporated v Brownlie* at 199 *per* Lord Sumption JSC, who said: "*An attempt to clarify the practical implications of these principles was made by the Court of Appeal in Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547 Waller LJ, delivering the leading judgment observed, at p 555: 'Good arguable case' reflects … that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction.' When the case reached the House of Lords, Waller LJ's analysis was approved in general terms by Lord Steyn, with whom Lord Cooke of Thorndon and Lord Hope of Craighead agreed, but without full argument [2002] 1 AC 1, 13. The passage quoted has, however, been specifically approved twice by the Judicial Committee of the Privy Council: Bols Distilleries BV (trading as Bols Royal Distilleries) v Superior Yacht Services Ltd [2007] 1 WLR 12, para 28, and Altimo Holdings, loc cit. In my opinion it is a serviceable test, provided that it is correctly understood. The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof which the House of Lords had rejected in Vitkovice. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context.*" The approach taken in *Brownlie* as to the standard of proof has been applied in more recent case law decided at an authoritative level (see, for example, *Aspen Underwriting Ltd v Credit Europe Bank* [2018] EWCA Civ 2590).

d. The nature of the interlocutory process and the desirability of avoiding unnecessary appeals (from interlocutory decisions) means that it will usually be

appropriate for a Trial Judge to hear the application (see, *VTB Capital Plc v Nutritek International Corporation* [2013] 2 AC 337, 377H – 378B (SC(E)).[9] In *VTB Capital Plc* Lord Neuberger PSC provided the following additional guidance as to CPR Part 11 Applications of the present kind (at pp 375 – 376): "*When a court is called upon to decide whether an action should proceed in this, as opposed to another, jurisdiction, it is being asked to decide a procedural issue at a very early stage. Where, as is now the position in this case, it is common ground that the parties would have a fair trial in the competing jurisdiction, the exercise will normally involve the court weighing up a number of different factors, and deciding where the balance lies. Whilst the same considerations will not always apply to applications for permission to serve out and applications for stays of proceedings, the argument on this appeal has highlighted three general points in relation to each type of exercise. The first point is that hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument. It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost. There is also a real danger that, if the hearing is an expensive and time-consuming exercise, it will be used by a richer party to wear down a poorer party, or by a party with a weak case to prevent, or at least to discourage, a party with a strong case from enforcing its rights. Quite apart from this, it is simply disproportionate for parties to incur costs, often running to hundreds of thousands of pounds each, and to spend many days in court, on such a hearing. The essentially relevant factors should, in the main at any rate, be capable of being identified relatively simply and, in many respects, uncontroversially. There is little point in going into much detail: when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial*." Mr Chapman submitted that such considerations have additional force in a case like the present where there is recent authority (pursued through appeal to the highest level) which, if applied, would be conclusive on the tort gateway issue. I agree with him.

[9] The Claimant's draft Order anticipates that this matter will be listed for Trial before the Admiralty Registrar.

e. As to the evidence on which the Defendant might rely in a CPR Part 11 Application of this kind, the Court is referred to the following commentary by Lord Neuberger PSC in *VTB Capital Plc v Nutritek International Corporation* [2013] 2 AC 337, 377D – E (SC(E)): "*... if the defendant chooses to say nothing, then it would be quite appropriate for the court to proceed on the basis that there is no more (and no less) to the proceedings than will be involved in the claimant making, or trying to make out, its case. Of course, in many instances, the defendant will be able to say that, although he has not submitted a draft statement of case, its nature is clear from correspondence, common sense, or even submissions. ... I would not want to encourage a defendant to go into great detail as to his case in a long document with many exhibits, but if he is wholly reticent about his case, he can have no complaint if the court does not take into account what points he may make, or evidence he may call, at any trial.*"

21. In this case the claim against the Second Defendant arises out of the same accident that is the focus of the Claimant's claim against the First Defendant. The Claimant's evidence, set out in the witness statement of Mr. Philip Banks, solicitor, dated 12th February 2016, demonstrates there is a factual basis for bringing a claim against the Second Defendant in negligence arising out of a breach or breaches of duty by the Second Defendant's servants or agents. On the one hand there are, on the face of the documents before the court, clearly issues of fact which, if made good at trial, would result in a successful outcome. On the other hand the Second Defendant has not, as it might have done, put before the court a statement denying the evidence provided by Mr Banks. Mr Chapman has submitted the Second Defendant has "*chosen not to enlighten the Court as to the stance it takes on liability and has chosen not to disclose documentation or other information as to (for example) its relationship with the First Defendant (the Second Defendant could have disclosed such material in a witness statement, provided for CPR Part 11 purposes, without any submission to the jurisdiction of the English Court. Instead, the Second Defendant has chosen to remain silent; it therefore runs the corresponding risk identified in VTB Capital Plc v Nutritek International Corporation*").

22. With respect to the fact that the case will need to be considered applying Indian Law, which I understand is common ground between the parties, I do not see that this can assist the Second Defendant in the present context. The Court is entitled to assume that the

position as to the Second Defendant's liability is the same in Indian law as it is in English law absent any evidence from the Second Defendant to the contrary. In my view Indian law will only be applied to the claim in tort or contract to the extent that the Defendant pleads and proves the material differences between English and Indian law. There is no evidence of any such differences and until there is the English Court may proceed on the basis that there are none, see, *Bumper Development Corporation v Commissioner of Police for the Metropolis* [1991] 1 WLR 1362 (CA); *James Rhodes v OPO & Anor.* [2014] EWCA Civ 1277; [2015] UKSC 32; [2016] AC 219); and, *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665; [2016] 1 WLR 1814 (CA), at 1835F – 1836E *per* Arden LJ (CA). It may be noted that her view on this was not the subject of adverse comment in the Supreme Court.

23. On the evidence before the court it is, in my judgment, entitled to conclude that the Claimant has a reasonable prospect of success and there is nothing which suggests that he does not.

Forum conveniens

24. That leaves for consideration the discretionary element with respect to *forum conveniens.* Lady Hale considered that a "robust" approach to the application of the *forum conveniens* principles is a useful way of ensuring that a proper result is achieved in each case and CPR Part 6.37(3) provides: "*The court will not give permission* [to serve the claim form out of the jurisdiction] *unless satisfied that England and Wales is the proper place in which to bring the claim.*".

25. The relevant principles applying to forum non conveniens are set out in:
    a. *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 in which, at p. 476, it was stated: "*The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice*", and;
    b. The *Conflict of Laws* at 12-030 which states: "*First, in general the legal burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay, although the evidential burden will rest on a party who seeks to*

establish the existence of matters which will assist him in persuading the court to exercise its discretion in his favour. Secondly, if the court is satisfied by the defendant that there is another available forum which is clearly a more appropriate forum for the trial of the action, the burden will shift to the claimant to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in England. Thirdly, the burden on the defendant is not just to show that England is not the natural or appropriate forum, but to establish that there is another forum which is clearly or distinctly more appropriate than the English forum; accordingly, where (as in some commercial disputes) there is no particular forum which can be described as the natural forum, there will be no reason to grant a stay. Fourthly, the court will look to see what factors there are which point in the direction of another forum as being the "natural forum", i.e. that with which the action has the most real and substantial connection. These will include factors affecting convenience or expense (such as availability of witnesses) and such other factors as the law governing the transaction and the places where the parties reside or carry on business, and also whether the claim is part of a larger overall dispute which would be damaged by being fragmented. Fifthly, if the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, the court will ordinarily refuse a stay. Sixthly, if, however, the court concludes that there is some other available forum which prima facie is clearly more appropriate, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted. In that enquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. Seventhly, a stay will not be refused simply because the claimant will thereby be deprived of "a legitimate personal or juridical advantage", provided that the court is satisfied that substantial justice will be done in the available appropriate forum.

26. In the context of a case in which similar issues arose, *Harty v Sabre International Security Ltd & Another* (*supra*), MacDuff J was concerned with an application by two corporate Defendants (one incorporated in the British Virgin Islands and the other incorporated in Iraq) in respect of proceedings arising out of a road traffic accident in Iraq

in which the Claimant (an Irish national domiciled in England) was injured. With respect to the application of *forum conveniens* MacDuff J said [11]:

> "*The court should stay the action, if it considers that the English court is not the proper forum for the claim. The principles which the court must apply, in exercising this power, are to be found in Spiliada ... . These may be briefly summarised. The legal burden rests on the Defendant to persuade the court to grant a stay. If the Defendant is able to satisfy the court that another jurisdiction is, prima facie, more appropriate, the burden moves to the Claimant to show why justice requires that the case should, nevertheless, be tried in England and Wales. Furthermore, the Defendant must not only demonstrate that England is not the appropriate (or convenient) forum, but also establish that another identified jurisdiction is clearly and distinctly more appropriate. The court must consider what factors point to the alternative forum being the natural forum and must determine the forum with which the action has the most substantial and real connection. Only if there is a forum which is more clearly more appropriate will a stay be granted. Even if a more convenient forum is identified, a stay should be refused if the court considers that, in all the circumstances, justice requires that the action should be heard in England. However, a stay will not be refused simply because a Claimant would thereby be deprived of a legitimate 'personal or juridical' advantage provided that the court can be satisfied that substantial justice will be done in the alternative forum. It should be regarded as immaterial that the alternative jurisdiction may reach a different result or that damages may be lower; the English court should be slow to assume that other judicial systems, different though they may be, are inferior, or cannot achieve substantial justice*."

27. For the Second Defendant, Ms Kinsler has contended that India is the appropriate forum for trial in this matter. She has submitted: (a) The place of commission of the alleged tort is India. India is prima facie the appropriate forum for trial in this matter; (b) The essential damage (the crushing injury) that gives rise to the cause of action was sustained in India; (c) The Claimant was injured in the course of his employment by Seatek, his Indian employer; (d) The Claimant received initial treatment in India; on the vessel, at a local hospital and at a hospital in Mumbai; (e) The claim against the Second Defendant is governed by Indian law. It is preferable that an Indian court apply Indian law; (f) Witnesses with local knowledge of the site, weather and sea conditions are in India; (g)

The piles on which the Claimant worked are still in place off the coast of India; (h) The factors connecting the claim to India are overwhelming. The only connection to the jurisdiction is that the Claimant returned to England after the accident and has suffered some of the consequences of his injury here; (i) The fact that, if the claim proceeds in the English court, the medico-legal and quantum experts instructed will be located in England is not relevant; it pre-supposes that the trial will proceed in England; (j) Unsurprisingly, the assessment of quantum is conducted differently in India and if necessary, evidence in the Indian court can be given by video link. On this aspect she relies upon the disputed witness statement of David McKie; (j) There is no risk of irreconcilable judgments, default judgment having been entered against Seatek, effectively drawing those proceedings to a close. In any event, India is an available forum for the trial of a claim against both Defendants; (k) In the circumstances, the Claimant has failed to demonstrate that England is clearly the more appropriate forum for the trial of this action. India is clearly the appropriate forum. Accordingly, for this separate reason, permission to serve out of the jurisdiction should be set aside. In the alternative, even if permission was rightly granted, the action against the Second Defendant, HHI, is more appropriately heard in India and by reason of default judgment being entered against Seatek no risk of parallel proceedings arises. Accordingly, and following the approach of Admiralty Registrar Kay QC in *Laurent Garcia, Garcia v (1) BIH (UK) Ltd (2) Total Gabon SA (3) Sigma Offshore Sarl* [2017] EWHC 739 (Admlty) the claim against HHI in England should be stayed.

28. Mr. Chapman has submitted that England is the suitable and convenient forum for this litigation (in contrast to India); liability witnesses (the Claimant and his brother) were and remain here in England; the relevant barge is no longer in India (she now sails in the waters of the United Arab Emirates); the only liability witness specifically identified by the Second Defendant's former solicitor, Thomas Kelly, in his third witness statement is no longer in India, but is now in South Korea; nearly all of the Claimant's medical treatment has been in England and the vast majority of his losses have been sustained here; the quantum witnesses are in England; the case as to quantum against the First Defendant will proceed in England in any event and there may be factual evidence as to liability which has a bearing on the quantum issues. It is submitted that this matter should sensibly be tried in England.

29. This is an appropriate point at which to consider whether the witness statement of Mr McKie be admitted in evidence? Mr Chapman has objected to its admission because it is late and seeks to provide hearsay evidence as to the Indian Law. It refers to information apparently provided by one Mr Amitava Majundar perhaps assisted by a Mr Ruchir Goenka. The qualifications of these persons to provide this information has not been provided. Although decisions of the Indian courts on the meaning and operation of section 14 of the Limitation Act 1963 have been referred to in sub-paragraph 27.e. of Mr McKie's witness statement he has not exhibited/annexed the case law and his explanation as to the point being made by Mr Majundar is not easy to follow. There has been no permission to adduce expert evidence which is contrary to CPR Part 35. There has been a failure to comply with the notice formalities of CPR 33.7 (which is derived from section 4(2) of the Civil Evidence Act 1972). The Second Defendant ought to have provided such notice to the Claimant "*not less than 21 days before the hearing.*" His statement appeared by email without any warning at midday on 20th June 2019. The Indian decisions to which Mr Majundar, through Mr McKie, has referred have not been provided.

30. Whilst it may be acceptable for a party to put forward expert evidence upon which it relies this should be done by providing a report from an accredited person. Evidence of foreign law is a matter of expert opinion and it is not acceptable to put forward unsubstantiated statements with respect to it. Moreover it is important that proper notice is given that such evidence is to be adduced. In my view the nature and timing of this evidence is not acceptable. It has not been provided in the form of a report made by a person who can be identified as being an expert in Indian Law. It was provided too late. It could and should have been provided much earlier and the delay is wholly unexplained. There has been a failure to provide notice of it as required by the rules of court, in particular CPR 33.7. For these reasons I consider that the evidence as to Indian Law contained in Mr. McKie's witness statement should not be admitted in evidence.

31. Applying the principles referred to above it is necessary to balance the various aspects of this case to assess which of the two proposed fori for consideration in the present case, namely England or India, is the more appropriate forum for the trial of this matter. Whilst it is true, as Ms Kinsler submits, that the place where the injury took place was India, commission of the alleged tort was in India, that the Claimant was employed at the time by an Indian Company and that Indian Law is to be applied with respect to the claim

against the Second Defendant there are other factors which, in my view, indicate that England, rather than India, is the more appropriate forum to try this case.

32. Two of the liability witnesses, with respect to the claim against the Second Defendant, namely the Claimant and his brother, are in England, On the other hand the only known witness for the Second Defendant on the issue of liability, namely Mr Kelly, is no longer in India and is, on the evidence, understood to be in Korea. The vessel in use at the time of the incident is no longer in India but in the Middle East. The incident took place off the coast of India and there is nothing to suggest that there are any relevant factual witnesses who are resident in India. On the contrary the injury was caused during a diving operation and at the centre of the liability trial there is certainly going to be expert evidence as to diving practice. Mr Chapman has submitted, and I accept, that such expertise is more likely to be available in England. I do not consider that the fact that the piles upon which the Claimant was working at the time of his injury are still in India is likely to be material nor do I consider that the local weather or tidal conditions, which may be relevant to the expert evidence, militate towards holding the trial in India. Such information should be readily available to a diving expert wherever he is. Such evidence will be ascertained from weather reports and from the tidal data available. Aside from official reports or predictions on those matters such evidence may also be available from those onboard the relevant vessel but she is no longer in India. Insofar as witnesses need to be called as to the practice onboard the relevant vessel, if they do, it is apparent that they are likely to be connected to the vessel itself rather than India. The reality is that the incident occurred in an offshore operation which appears to have little direct connection with India except that the Claimant's immediate employers were Indian. The injury arises out of the sort of extra territorial marine incident which the Admiralty Court is frequently used to considering.

33. Furthermore jurisdiction over and liability against the First Defendant has already been established in the English Court. That of itself supports the proposition that there is already a strong connection with the English jurisdiction as there will be an assessment of damages conducted before the English Court in respect of that Defendant. With respect to that assessment, aside from his initial hospitalisation, the relevant expert medical witnesses who are or will be able to assess the Claimant's condition and prognosis are all in England. In my view it would be absurd to suggest that there should be two separate hearings on quantum.

34. The Second Defendant has sought to stress that Indian Law applies to liability and the assessment of damages in the present case, but English courts are well used to dealing with matters relating to foreign law and it is open to either side to place evidence of such law before an English court. It is to be observed that the Second Defendant itself is Korean. It has no connection with India other than that it was operating in India at the relevant time. Although I was told by Ms Kinsler that it would submit to the Indian jurisdiction it was not stated that the Second Defendant would not seek to rely upon the Indian law relating to limitation if proceedings were now commenced in India. No explanation was provided as to why the Second Defendant was prepared to submit to the jurisdiction of the Indian court rather than the English court and there is, in those circumstances, an inference that the Second Defendant is seeking to gain a juridical advantage by opposing jurisdiction in the present proceedings.

35. Finally, in my view Ms Kinsler's reliance upon the decision in *Laurent Garcia* is misplaced. The decision to be made in each case is fact sensitive and the facts in that case are to be distinguished from the present not the least because the Claimant did not suffer any damage within this jurisdiction.

36. Taking all these matters into account I consider that England is by far the better and therefore the proper forum for hearing the claim against the Second Defendant.

Necessary and proper party

37. Having come to that conclusion it is not necessary to consider whether the jurisdictional 'necessary or proper party' gateway is a relevant aspect of this case and it follows that Ms Kinsler's submissions with respect to the claim against the First Defendant, and therefore whether or not the Second Defendant is to be regarded as a necessary and proper party, are not relevant. In my view it also follows that the decision in *Gunn v Diaz* [2017] EWHC 157 has no relevance to this aspect.

The Application to strike out the orders extending time for service

38. The Claimant applied for and obtained three extensions of time for the service of the Claim Form, which were granted by Burton J on the 14th April 2015, Andrew Smith J on the 12th August 2015 and Registrar Kay QC on the 6th October 2015. Ms Kinsler has

submitted that all three orders should be set aside as they were not supported by sufficient evidence or, in the alternative, on the ground that the Claimant breached their duty of full and frank disclosure to the Court.

39. *Principles.* Ms Kinsler has submitted that the rules and applicable principles are as follows:

    a. An application for an extension of time for service of the Claim Form is made under CPR 7.6. CPR 7.6(4) provides that an application for an order extending time must be supported by evidence.

    b. CPR PD 7A paragraph 8.2 provides that the evidence should state the following: all the circumstances relied upon, the date of issue of the claim, the expiry date of any rule 7.6 extension and, a full explanation of why the Claim Form has not been served.

    c. The Claimant must provide a reason which justifies the extension sought; this is considered, in light of the overriding objective, in the context of the extension sought. In *Hashtroodi v Hancock* [2004] EWCA Civ 652, the Court of Appeal considered the principles by which the Court should determine whether to extend time for service of the Claim Form. Dyson LJ held that whilst the advent of the Civil Procedural Rules had signalled a departure from the previous requirement to show a "good reason" as a threshold requirement, it would always be relevant for the court to determine and evaluate the reason why the claim form was not served within the specific period. In line with the overriding objective, the court should adopt a calibrated approach that assessed the quality of the reason advanced. Accordingly, where a very good reason was supplied then an extension of time would usually be granted, where a weaker reason is provided then a Court will be more likely to refuse to grant an extension.

    d. The Court will scrutinise the evidence relating to the relevant delay. In *Foran v Secret Surgery Ltd and others* [2016] EWHC 1029 (QB), Cox J, on the defendant's application, held that Master Roberts had been wrong to extend time for service of the Claim Form and Particulars of Claim at a hearing attended by both parties. On appeal, the defendant contended no good reason was supplied for the delay and that the Master had erred in his consideration of the relevance of the expiry of the limitation period. Cox J agreed that the Master had erred in failing to appreciate the significance of the expiry of the limitation period. The Judge was also critical of the evidence provided in explanation of the relevant delay, noting

that the Foreign Process Section of the RCJ was not contacted until 4 months after issue and that the evidence was insufficiently detailed as to the enquires undertaken of the service process. At paragraph 48 the judge said:

> "*There is no evidence, for example, as to what enquiries were made, if any, with the Claimant's Polish lawyer as to the process for service in Poland. The first time that enquiries were made with the Foreign Process Section appears to be on 21 September, more than four months after the protective proceedings were issued. There is no evidence as to what, if any, discussions were held with the Foreign Process Section or the Polish agents as to whether or how matters could be expedited because of the need urgently to serve the claim form. There is no account of what, if anything, was done to speed up the translation process or indeed the process for service.*"

e. Cox J considered that the Claimant had issued perilously close to the limitation period, and could have anticipated the problems encountered in serving out of jurisdiction, much earlier than they in fact did. At paragraph 42 the judge said:

> "*In this case the Claimant's solicitors were already perilously close to the expiry of the limitation period when they sent the detailed Letter before Claim, in English, to all the Polish Defendants, one of whom (the insurance company) was incorrectly identified. They knew from 6 May, when protective proceedings were issued, that there was a need to serve the claim form out of the jurisdiction by 6 November at the latest. Problems of the kind that arose could have been anticipated at a much earlier stage. The brief account provided by Ms Wolfe indicates a somewhat leisurely approach to the likely problems and, if more was done than is there set out, it should have been deposed to.*"

f. The granting of an extension is not a mere formality and should not be treated as such. Claimants should not expect extensions to be granted as a matter of course. It is the Claimant's responsibility, not the Courts, to ensure the correct procedure has been followed and relevant material clearly drawn to the Court's attention: see *Duckworth v Coates* [2009] EWHC 1936 (Ch) [A/17], Blackburne J.

g. A defendant is under no obligation to provide positive assistance to a claimant to serve the claim form, per Blackburne J in *Duckworth*:

"*Provided he has done nothing to put obstacles in the claimant's way, a potential defendant is under no obligation to give any positive assistance to the claimant to serve the claim form, so that the fact that the potential defendant has simply sat back and awaited developments (if any) is an entirely neutral factor in the exercise of the discretion.*"

h. *Limitation is important.* The issue of whether or not to grant an extension is thrown into sharper focus by the expiry of the limitation period: the Court must be alive to the entitlement of a defendant to be free from the possibility of any claim. In *Duckworth* Blackburne J reviewed the authorities [50], stating:

"*…(6) Whether the limitation period applicable to the claim has expired is of importance to the exercise of the discretion since an extension has the effect of extending the period of limitation and disturbing the entitlement of the potential defendant to be free of the possibility of any claim.*"

i. Where an extension of time for service of the Claim Form is granted without notice, and would deny the defendant a limitation defence, then the extension should be set aside. The fact that extensions had been granted after the expiry of the limitation period was critical in *Bayat v Cecil* [2011] EWCA Civ 135, where Stanley Burnton LJ (at [53]) stated:

"*This approach was followed in City & General (Holborn) Ltd v Royal and Sun Alliance Plc [2010] EWCA Civ 911. Longmore LJ said, in a judgment with which the other members of the Court agreed:*

7. … It is well-settled that when debatable issues of limitation arise, it is inappropriate to attempt to decide them on an interlocutory application for an extension of time for service of a claim form. If the claimants' argument that the claims are not time-barred is correct, they can always begin a fresh action in which, if a time-bar is asserted, it can be adjudicated upon. It is enough for a defendant to show that he might be deprived of a defence of limitation if time for service of a claim form is extended; if he can show that, an extension should not be granted or, if granted without notice, such extension should be set aside, see Hashtroodi v Hancock [2004] 1 WLR 3206 (paragraph 18) and Hoddinott v Persimmon Homes (Wessex) Ltd [2008] 1 WLR 806 (paragraph 52)."

j. Where an extension is sought without notice, and time limits are running out, it is desirable that the application be dealt with by way of an urgent hearing, so that full consideration can be given to the circumstances of the application per *Collier v Williams* [2006] EWCA Civ 20 at [38].

k. *The duty of full and frank disclosure.* The Claimant made each application without notice and accordingly was under a duty to make full and frank disclosure of all relevant matters whether of fact or of law (see commentary in the White Book at 25.3.5).

l. There has been recent consideration of the duty of disclosure with respect to limitation periods in the context of an application for permission to serve out of the jurisdiction: see *The Libyan Investment Authority v JP Morgan* [2019] EWHC 1452 (Comm).[10] Bryan J summarises the applicable principles derived from the authorities at [92]-[98]. It is clear that what is material depends on the nature of the application. The general test of materiality is "whether the matter might reasonably be taken into account by the judge in deciding whether to grant the application."[11]

m. In the specific context of applications for permission to extend time for service of a Claim Form out of the jurisdiction, the duty of disclosure was considered by Andrews J in *Gunn*. Andrews J considered that the failure in that case of the claimant's solicitor to draw to the Court's attention that the decision in *Brownlie* CA had materially altered the application of the "tort gateway" - so as to invalidate the Claimant's reliance on the same - was a material non-disclosure.

40. *Application of the principles in this case.* Ms Kinsler has submitted:

a. The Second Defendant, HHI, relies on the witness statement of David McKie. The procedural chronology is set out at paras 6-16 and the application is addressed at paras 22-28.

b. *Limitation.* The Second Defendant contends that all three orders extending time should be set aside as they extended the Claim Form beyond the expiry of the limitation period under both English and Indian law: see Witness Statement of David McKie paragraph 27.

[10] In the context of applications for permission to serve out it is clear that the duty arises: *Masri* [2011] EWHC 1780 (Comm) [A/33] Burton J at [58].
[11] Bryan J quoting Toulson J in *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 [A/36].

c. Limitation under both English law and Indian law expired on the 10th November 2014, 3 years from the accident date. The orders extended the time for service well over a year following the accident. The Second Defendant was served just under a year outside the limitation period.

d. It is important to note that the Claimant failed to address limitation, whether under English law or otherwise, in any of their witness statements in support of their application for extensions, and further elected to proceed without oral submissions on the point. Accordingly, the Court was denied the opportunity to consider, in line with overriding objective, the reason for the extension calibrated against HHI's right to a limitation defence.

e. *Failure to show sufficient reason.* The Second Defendant, HHI, further contends that the Claimant failed to show sufficient reason in the evidence in support of their applications such as to merit an extension of time being granted. The reason proffered in each case needs to be considered in the context that limitation had expired and must be calibrated against HHI's right to a limitation defence.

f. All three extensions of time granted, disclosed insufficient reason for the extension and should be set aside.

    i. *The order of Burton J – 14th April 2015 –*

        1. The Claimant made an application dated 30th March 2015 supported by a witness statement of Philip Banks. Burton J extended the time for service to the 30th August 2015.
        2. The stated reason for the failure to serve the Claim Form is at paras 11-12 of the witness statement of Philip Banks, namely that the Claimant was trying to encourage the Defendants to nominate UK solicitors to accept service, and as a result the Claimant was forced to serve HHI at their address in South Korea.
        3. The failure of the Defendants to nominate solicitors on encouragement of the Claimant is not a valid reason for failing to serve the Claim Form in time. HHI rely on the statement of Blackburne J that there is no duty on the potential defendant to provide any positive assistance to a claimant. No other explanation is given, nor are any details given as to what, if any, other efforts had been made to serve the Claim Form between issue on 4th November 2014 and the date of the application.

4. Further, the Claimant failed to state within the body of their witness statement the date of issue of the Claim Form as required by Practice Direction 7A 8.2.

ii. *The order of Andrew Smith J – 12th August 2015 –*

1. The Claimant made an application dated 5th August 2015 supported by evidence on the application notice. Andrew Smith J extended the time for service to the 30th November 2015.
2. The stated reason for the failure to serve the Claim Form in relation to HHI, is that the proceedings were being translated into Korean, and thereafter sent to the Foreign Process Section of the RCJ to effect service and new certificates of translation had to be obtained. It was anticipated that it could take up to three months from 3rd August 2015 for service to be effected.
3. HHI again contends that this is not a good reason for an extension, particularly in the context of the expiry of the limitation period. No details are given as to the dates on which any of the steps were taken. It would have been obvious to the Claimant's solicitors that the proceedings would require translation and it is unclear why new certificates of translation were required.

iii. *The order of Admiralty Registrar Kay QC – 6th October 2015*

1. The Claimant made an application dated 30th September 2015 supported by a witness statement of Philip Banks dated 1st October 2015. The Admiralty Registrar extended the time for service to 29th January 2016.
2. The stated reason for the failure to serve the Claim Form in relation to HHI is that the documents have been processed by the RCJ Foreign Process Section, on 9th September 2015 they were sent to South Korea and that service may take four months. No detail of the dates on which the various steps were taken is given.

g. *Duty of Full and Frank Disclosure.* On each application for an extension of time, the Claimant failed to draw the limitation period to the attention of the Court. Each extension was granted after the period of limitation had expired, and given the tenor of the authorities cited above as to the importance of the limitation period to the grant of an extension (see especially *Libyan Investment* and *Bayat v*

Cecil), it is respectfully submitted that it should not be concluded that the non-disclosure made no difference to the granting of the applications. Accordingly, all three extensions should be set aside.

h. Furthermore, HHI submits that the Claimant is in the same position as the claimant in *Gunn*, having failed to draw to the Court's attention the decision of *Brownlie* CA and accordingly made a material non-disclosure. Notwithstanding the subsequent judgment of the Supreme Court this point, however technical, remains valid.

i. Judgment in *Brownlie* CA was handed down on the 3rd July 2015. The consequence of that judgment was that it invalidated the Claimant's reliance on the tort gateway as against HHI and against Seatek. Whilst a subsequent decision does not, without a defendant's application to set aside permission, nullify automatically the original permission granted, it is a material factor as to whether the Court should extend the time limit for service of the Claim Form per Andrews J in *Gunn* at [64]. In that case the Claimant applied for an extension of time, on the 5th August 2015, granted by Andrew Smith J on 12th August 2015, but failed to draw to the Court's attention that their reliance on the tort gateway had been invalidated. Had the Claimant informed the Court of the decision in *Brownlie* and the Court been fully appraised of the true legal situation in considering the application of the 5th August 2015, the Court may well not have granted the application. It is immaterial that the Claimant additionally relies upon the contract gateway against Seatek and the necessary or proper party gateway against HHI, per Andrews J in *Gunn* at [53] it is not for the applicant or their legal advisors to determine the materiality of a particular matter, rather that is for the Court.

j. The Claimant accordingly made a material non-disclosure on the application of the 5th August 2015 and the order of Andrew Smith J should be set aside. HHI was not served until the 23rd October 2015 and was accordingly served out of time.

k. The above submissions apply equally, to the Claimant's application of 30th September 2015 and the order of Admiralty Registrar Kay QC on the 6th October 2015.

41. Mr Chapman's submissions on this aspect are:

a. The Second Defendant had a right to apply to set aside the extensions of time granted by this Court. It ought to have made such application within 7 days: CPR

23.10. It now applies several years out of time and after two Hearings at which the Second Defendant has been legally represented by solicitors and Counsel whose expertise and competence is obvious. Moreover, the Second Defendant makes this application without providing the Court with any explanation for the delay.

b. This matter was last before the Court on 22nd March 2016 when it was adjourned pending the decision of the Supreme Court in *Brownlie*, a decision which went the Claimant's way as to the tort gateway. On 22nd March 2016 and at the subsequent Hearing before the Admiralty Registrar on 1st November 2016 the Second Defendant was represented by Mr Emmet Coldrick of Counsel and Clyde & Co solicitors. By the time of the March 2016 Hearing, the Second Defendant had filed and served no fewer than 3 witness statements in support of its CPR Part 11 Application. While a number of matters were taken on the Second Defendant's behalf (in respect of the jurisdictional challenge), it was not at any time suggested that service of proceedings on the Second Defendant was defective such that this should be set aside by reason of an alleged failure to give full and frank disclosure.

c. This matter has been raised for the first time in a witness statement from David McKie, Partner at Kennedys Law LLP, dated 20th June 2019. The service of Mr McKie's witness statement and the apparent (but undisclosed) intention to rely on Indian law expert opinion was not mentioned by the Second Defendant at any time before the witness statement was received by email by the Claimant's solicitors at about midday on 20th June. The key assertion made by Mr McKie is that the Claimant should, in the context of Applications to extend time for service overseas, have alerted the Court to some aspect of the Indian law of limitation. That is so abstruse that neither Mr McKie nor Leading Counsel (drafting the Second Defendant's Skeleton Argument) have been able fully to explain it (indeed, there is no attempt at such explanation in the Skeleton Argument). This claim was commenced by the issue of a CPR Part 7 Claim Form in time pursuant to English law and, if Mr McKie is correct, pursuant to Indian law as well. It is not clear whether Mr McKie is suggesting that a failure to serve (validly) within the limitation period will result in the operation of a time bar? Alternatively, it is not clear whether he is suggesting that defective service means that a limitation defence will be available? Mr McKie has not described the Indian limitation point that the Claimant has allegedly failed to disclose.

d. Mr McKie has had conduct and control of this matter since February 2019. Kennedys Law have evidently had conduct and control of this matter (in succession to Clyde & Co) for even longer. The failure to raise the matters of Indian law (and to take any defective service point) over the several years that this matter has been pending is unexplained by Mr McKie.

e. Furthermore, the Skeleton Argument filed on the Second Defendant's behalf on 25th June 2019 takes a further new point as to defective service: namely, that the Claimant should – in the context of without notice Applications to extend time for service – have alerted the Court to the decision of the Court of Appeal in *Brownlie* which, if the Supreme Court majority is correct, is now bad law (at least as to the proper approach to the tort gateway). This further new point clearly did not occur to Mr McKie (on 20th June) or to his predecessors. It was raised for the first time on 25th June 2019 (nearly 4 years after the Court of Appeal delivered judgment on 3rd July 2015). The delay is all the more inexplicable in circumstances where – as long ago as March 2016 – the Second Defendant prosecuted this CPR Part 11 Application at a Hearing at which *Brownlie* (in the Court of Appeal) was the sole and express reason for the adjournment.

f. The Court is asked to set aside the grant of extensions of time for service. In this regard, a discretion will be exercised: see, *DDM v Al-Zahra* [2018] EWHC 346 (QB). It is submitted that the extraordinary and wholly unexplained delay by the Second Defendant in this matter is relevant to the exercise of such discretion (in respect of both points – as to Indian limitation and as to *Brownlie* in the Court of Appeal – now raised by the Second Defendant). It is also relevant to consider in this context (and from the Claimant's perspective): (i) the delays inherent in seeking the assistance of the FPS for service overseas; and, (ii) the consistent failure of the Second Defendant in this case to provide disclosure or to respond to requests to nominate solicitors for service within the jurisdiction (see again, *DDM v Al-Zahra* [2018] EWHC 346 (QB) in which, among other matters, doubt is expressed about reliance on *Foran v Secret Surgery* [2016] EWHC 1029 (QB)). My attention was also drawn to the decision of the Court of Appeal in *DDM v Al-Zahra* [2019] EWCA Civ 1103 in which the decision of Foskett J at first instant was reversed in part although it may be noted that his observations as to *Foran v Secret Surgery* were approved, see para.77 *per* Haddon-Cave LJ.

42. It is trite that the court has to exercise its discretion in relation to applications of this nature. In this respect the overriding objective and the requirement not to come to a decision which would be disproportionate are highly relevant. In the present case the proceedings were issued within the limitation period. Nonetheless, given that the claim is for damages arising from personal injury and the date of the issue of the claim form appears on its face the fact that limitation issues would arise if it were not served in time (within 6 months in the present case, see CPR Part 7.5(2)) must always have been obvious. The applications for permission to extend time fell within 7.6(2) and were prospective rather than retrospective. In *Collier v Williams* [2006] EWCA Civ 20 the Court of Appeal held that the court could allow an application to extend time prospectively under 7.6(2) without being satisfied that all reasonable steps have been taken albeit, following *Hashtroodi v Hancock* [2004] EWCA Civ. 652, a valid reason for the application must be advanced. In the present case reasons were given, although Ms Kinsler disputes their validity, and the Court allowed an extension on three occasions. Although she submits that the reason given on the first cannot be valid it nonetheless passed muster before the judge. That is also true of the applications made on the second and third occasions. To say that endeavours to make contact with the defendant and seek to persuade them to appoint solicitors within the jurisdiction must be disregarded is putting the matter too high. Admiralty matters frequently involve defendants who are outside the jurisdiction and such processes frequently bear fruit and obviate a great deal of procedural difficulty and expense. Given also the overriding principle, which indicates that litigation and unnecessary expense should be avoided where possible, it seems to me to be unduly harsh to criticise solicitors for acting as the present solicitors did. Further with respect to foreign service the difficulties are well known to the judges who considered the applications and they would in my view be entitled to take judicial knowledge of them and require a lesser degree of evidence in line with *Collier v Williams* (supra).

43. With respect to the arguments that there has been a failure of frank disclosure in respect of the time limit in India. That submission relied upon the evidence of Mr McKie as to Indian Law which I have already ruled to be inadmissible. It follows that the criticism is not made good because, absent evidence to the contrary, the parties and the court, were entitled to assume that foreign law is the same as English law at the time when the

application was made and considered. It follows that there was no material failure of disclosure by the Claimant at the relevant time.

44. I find the argument based upon Andrews J's decision in *Gunn* difficult to follow. If Ms Kinsler is correct it would mean that the present claim should now be struck down because the Claimant failed to disclose the existence of the Court of Appeal's decision in *Brownlie,* '*which had materially altered the application of the "tort gateway"*', which decision has since been overruled. In fact the time at which the tort gateway was to be considered was the time when the permission to serve out was given which is now the subject of this application under CPR Part 11. It seems to me that it would be invidious to expect each judge considering an application for an extension for time to serve to have to reconsider in every case whether permission to serve out was properly given. Even if that decision had been brought to the attention of the Court at the time of the applications to extend it must also have been drawn to the court's attention that it was under appeal to the Supreme Court which must, almost inevitably, have led to a decision allowing the extension so that the CPR Part 11 point would be raised, as it has in the present case, at the appropriate time, namely, with the agreement of the parties, after the decision of the Supreme Court had been made. To have refused an extension of time, at the time when the applications were made, when the law with respect to the jurisdictional gateway was under specific consideration by the senior court, would in my view have been oppressive. Further, in my view, to now effectively strike out the claim on the basis that the Court's attention was not drawn to something which should have had no material effect upon the applications to extend would be equally oppressive.

45. CPR Part 23.10 provides a mechanism whereby a party subject to a 'without notice' order may challenge that order. That mechanism has not been followed. On the contrary the Second Defendant has left it an inordinate amount of time before raising this matter. No explanation has been given as to why these matters have been raised so late. It could have been raised at or before the last hearing when the parties agreed that the matter should be adjourned to await the decision in *Brownlie.* I accept Mr Chapman's criticism in respect of the manner in which these aspects have been raised and that it is an aspect which I am entitled to consider in exercising my discretion.

Conclusion

46. For the reasons given above I consider that the Second Defendant's applications should be dismissed.

Dated 29th day of October 2019