Neutral Citation Number: [2022] EWHC 741 (Comm)

IN THE HIGH COURT OF JUSTICE Claim No CL-L-2020-000797
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice. Rolls Building
Fetter Lane, London, EC4A 1NL
Friday 1 April 2022

BEFORE:

MR RICHARD SALTER QC
Sitting as a Deputy Judge of the High Court

BETWEEN:

CHEP EQUIPMENT POOLING BV

Claimant

– and –

(1) ITS LIMITED
(2) ITS ESTONIA OU
(3) BART DE LAENDER
(4) KLAUS MITTELBERGER
(5) MARCELO DI BENEDETTO

Defendants

- -

Ms Victoria Windle
(instructed by *Taylor Wessing LLP*)
appeared for the Claimant

The Defendants did not appear and were not represented

Hearing date: 16 March 2022

- -

……

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30am on 1 April 2022

MR SALTER QC:

Introduction

1. On Wednesday 16th March 2022, applications by the First Defendant ("**ITS**") and the Second Defendant ("**ITS Estonia**") (together, "**the Relevant Defendants**") were listed for hearing before me. Those applications, issued on 22 June 2021, each sought declarations that the Court has no jurisdiction to try the claims made in this action (alternatively, that the Court should not exercise any jurisdiction that it has) and orders that the Claim Form and Particulars of Claim and the service of those documents should be set aside. The application by ITS also sought an order setting aside the order dated 21 April 2021 of Bryan J giving permission for ITS to be served in the Isle of Man. The application by ITS Estonia sought an order setting aside the order dated 10 March 2021 of Bryan J giving permission for service upon ITS Estonia by alternative methods.

The non-appearance of the applicants

2. At the hearing, Ms Victoria Windle (since 21 March 2022 one of Her Majesty's counsel) appeared for the Claimant but neither of the Relevant Defendants appeared or was represented. It was therefore necessary for me to satisfy myself at the outset that the Relevant Defendants had each had proper notice of the hearing of these applications and, if so, to decide how to deal with these applications. At the hearing, I announced my decision that I was so satisfied, and that I would hear and determine the applications in the absence of the Relevant Defendants. This section of this judgment contains my reasons for those decisions.

3. As to notice of the hearing, Ms Windle drew my attention to the following matters, which appeared from the documents in the application bundle:

    3.1 The Acknowledgements of Service indicating an intention to contest the jurisdiction on behalf of the Relevant Defendants were filed on their behalf by Keystone Law, whose address was given as their address for service.

    3.2 Keystone Law also issued the applications on behalf of the Relevant Defendants and were still the solicitors on record for the Relevant Defendants when the applications were fixed for a two-day hearing on 15-16 March 2022.

    3.3 On 9 February 2022 Keystone Law filed and served a Notice of Change of Solicitor on behalf of ITS Estonia, stating that Keystone Law had ceased to act and that ITS Estonia would now be acting in person. On 15 February 2022, Keystone Law filed a similar Notice of Change of Solicitor on behalf of ITS.

    3.4 Taylor Wessing LLP, the solicitors for the Claimant, sent letters dated 22 February 2022 by courier to each of the Relevant Defendants, which referred

to "the hearing listed for 15-16 March 2022", and which invited the Relevant Defendants to confirm (in the light of the fact that they no longer had solicitors acting for them) that they agreed to withdraw their applications. No response was received to either of those letters.

3.5 Taylor Wessing LLP sent letters dated 1 March 2022 to each of the Relevant Defendants. In the case of ITS, the letter was sent by special delivery; in the case of ITS Estonia it was sent by courier. Those letters again expressly referred to the hearing "listed for 15-16 March". They drew the requirements set out in paragraph F6.4 of the Commercial Court Guide to the attention of the Relevant Defendants but stated that, as the Relevant Defendants were no longer represented, Taylor Wessing LLP would prepare the application bundle on their behalf. A draft index for the application bundle was enclosed with each of those letters, which again repeated the invitation to withdraw the applications. Again, no response was received to either of those letters.

3.6 In fact, the applications were not listed for hearing on 15-16 March 2022, but on 16-17 March 2022.

3.7 At no relevant point had either of the Relevant Defendants attempted to make contact with Taylor Wessing LLP. Nor was there any record on the Court File of any attempt to make contact with the Court.

4. I was satisfied from these matters that the Relevant Defendants had received sufficient notice that their applications were to be heard by the Court on 16 March 2022.

5. With regard to how I should deal with the applications, Ms Windle submitted that, in view of the non-attendance by the Relevant Defendants, it was open to me simply to dismiss their applications, without considering the merits. She drew my attention to the recent decision of the Court of Appeal in *Leave.EU Group Limited v The Information Commissioner* [2022] EWCA Civ 109, in which that course was taken. Sir Geoffrey Vos MR (with whom Lewison and Asplin LJJ agreed) stated (at [18]) that:

> **.. I am satisfied that the Court of Appeal has an inherent jurisdiction either to hear an appeal in the absence of one party or to dismiss an appeal when the appellant fails to appear for a substantive hearing. It would make the operation of the Court of Appeal impossible if no such jurisdiction existed, and the Court must be in control of its own procedures in order to give effect to the overriding objective of enabling the court to deal with cases justly and at proportionate cost (CPR Part 1.1) ..**

Ms Windle submitted that the High Court at first instance must also have such an inherent jurisdiction, either to hear an application in the absence of a party or to dismiss an application without consideration of the merits when the applicant fails to appear for the hearing.

6. CPR Pt 23.11(1) gives the court an express power to proceed in the absence of a party who fails to attend the hearing of an application. If the Court does so and makes an order, Pt 23.11(2) gives the court an unfettered discretion, either on application or of its own initiative, to re-list the application for hearing: see *Yeganeh v Freese* [2015] EWHC 2032 (Ch).

7. I was prepared to accept Ms Windle's submission that, in addition to that express power under the CPR, the Court also has an inherent jurisdiction in appropriate circumstances simply to dismiss an application without considering the merits where the applicant fails to attend.

8. Different considerations, however, apply to substantive appeals to the Court of Appeal from those which a first-instance judge should take into account in considering an interim application: and different considerations may apply depending upon the particular interim application under consideration.

9. The *Leave.EU* case was an appeal from the Upper Tribunal (Administrative Appeals Chamber): and Sir Geoffrey Vos MR also relied as a ground of decision upon Rule 8(3)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (applied to the Court of Appeal by CPR Pt 52.20(1)), which enables the Upper Tribunal to strike out proceedings if an appellant has failed to cooperate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly and justly. Moreover, one of the reasons why the Court of Appeal simply dismissed the appeal in that case, rather than hearing it in the absence of the appellant, was that:

> **.. [I]t would have been undesirable in the circumstances of this case to try to decide such important questions at the level of the Court of Appeal without full oral argument ..**

Those considerations do not apply to a routine jurisdiction application at first instance, such as that before me.

10. I carefully considered the three options available to me for dealing with this application: to adjourn it; to dismiss it summarily; or to exercise the power given by CPR 23.11(1) to proceed in the absence of the Relevant Defendants.

11. I did not consider that it would be appropriate to adjourn these applications. No application for an adjournment had been made. Moreover, the failure of either of the Relevant Defendants to respond to either of the letters from Taylor Wessing LLP, and the failure of both of the Relevant Defendants to take any steps to prosecute these applications, did not suggest that any useful purpose would be served by such an adjournment. In accordance with paragraph (e) of CPR Pt 1.1(2), I had to consider the pressures upon the time of the Commercial Court and to consider the interests of other court users. I also had to consider the inevitable open-ended delay to the progress of

this litigation (and consequent prejudice to the Claimants and to the interests of justice) that would be caused if these jurisdiction applications were simply postponed.

12. It nevertheless did not seem to me to be the right course in all the circumstances simply to dismiss these applications without considering their merits. These applications involved challenges to the jurisdiction of the Court: and for many reasons (not least justice to the parties in relation to the enforcement of Court orders) it is important for the Court always to satisfy itself that any jurisdiction which it exercises over parties is one that is soundly based in law.

13. I had all the relevant materials before me, including the Witness Statements served on behalf of the Relevant Defendants in support of their applications. Although I did not have the benefit of any written or oral argument on behalf of the Relevant Defendants, Miss Windle properly discharged her duty to draw to my attention the relevant authorities and arguments.

14. Accordingly, as I indicated at the hearing, I decided to deal with the applications on their merits.

15. With that preamble, I now turn to the substance of the applications that were before me.

The background

16. The jurisdiction regimes governing ITS and ITS Estonia are different. I shall therefore consider them separately. Before doing so, however, it is necessary to set out a little of the background which is common to both applications.

17. As appears from the Particulars of Claim, the Claimant's claims against ITS and ITS Estonia are for (i) dishonestly assisting the Third to Fifth Defendants' breaches of fiduciary duties owed to the Claimant, and (ii) unlawful means conspiracy. The Claimant says that the Defendants conspired together to make a secret profit from the Third, Fourth and Fifth Defendants' positions as senior employees of the Claimant or companies in its group.

18. The following outline summary of the claim is largely drawn from paragraphs 6, 7 and 13 to 20 of the judgment given on 10 September 2021 by Jacobs J on the Third Defendant's jurisdiction application (see paragraph 19.1 below):

    18.1 The Claimant is a company incorporated in Belgium as part of the Brambles Group of companies. The Brambles Group is, among other things, a supplier of wooden pallets. It obtains these pallets from various manufacturers who in turn procure materials from raw material suppliers.

18.2 ITS is a company incorporated in the Isle of Man. ITS Estonia is a subsidiary of ITS incorporated in Estonia. At all material times, ITS and ITS Estonia were beneficially owned and/or controlled by the Third, Fourth and Fifth Defendants, although that fact was kept secret from the Claimant and its group. The Third, Fourth and Fifth Defendants are each former employees of companies within the Brambles Group ("**the Former Employees**"). The Third and Fourth Defendants were both former employees of the Claimant itself, but the Fifth Defendant was not.

18.3 On 1 June 2010, Brambles Enterprises Limited ("**Brambles Limited**"), a Brambles Group company incorporated in England, entered into a Supply Agreement with ITS ("**Supply Agreement**"). The Supply Agreement was entered into by Brambles Limited "for and on behalf of itself as well as any other legal entity belonging to the Brambles Group, in existence or not at the time of this agreement, responsible for the purchasing of CHEP wooden pallets". The Claimant had not yet been incorporated as at the date of the Supply Agreement but in due course it was a company which became responsible for purchasing CHEP wooden pallets, and thus came to be bound by the Supply Agreement.

18.4 The Supply Agreement provided that ITS would be responsible for procuring raw materials from suppliers and the onward sale of those materials to wooden pallet manufacturers. The Brambles Group would then purchase the completed wooden pallets from the manufacturers. In effect, the Supply Agreement inserted ITS into the supply chain for wooden pallets. ITS obtained remuneration by charging an additional fee to pallet manufacturers for the wood supplied to them. That fee was passed on to the Brambles Group companies purchasing wooden pallets, including the Claimant, in the form of higher prices for those finished pallets.

18.5 The Claimant's case is that the Former Employees were responsible for negotiating the Supply Agreement on behalf of the Brambles Group, and that the Third Defendant was responsible for deciding whether to renew the Supply Agreement beyond the initial term.

18.6 Accordingly, the Claimant's case is that the Former Employees owed fiduciary duties to the Claimant in relation to the negotiation and extension of the Supply Agreement. The Former Employees breached those fiduciary duties by failing to disclose their interest in ITS. ITS dishonestly assisted in that breach of duty, and the Former Employees and ITS conspired together to use unlawful means (being the breach of duty by the Former Employees) to injure the Claimant, by causing it to make higher payments for pallets than it would otherwise have made, to its disadvantage, and the advantage of ITS.

18.7 On 1 October 2013, the Claimant entered into a quality control audit agreement with ITS Estonia ("**the Audit Agreement**"). In October 2017, the Claimant and ITS Estonia agreed an addendum to the Audit Agreement ("**the Audit Agreement Addendum**"). Under the Audit Agreement (as added to or amended from time to time) ITS Estonia charged the Claimant for audit services.

18.8 The Claimant's case is that the Third Defendant and/or the Fourth Defendant negotiated the Audit Agreement on behalf of the Claimant, and/or caused the Claimant to enter into the Audit Agreement, and that the Third Defendant negotiated the Audit Agreement Addendum and/or was responsible for deciding whether to renew the Audit Agreement beyond the initial term.

18.9 Accordingly, the Third and/or Fourth Defendants owed fiduciary duties to the Claimant in relation to the negotiation of the Audit Agreement and Audit Agreement Addendum, and their renewal. The Third and/or Fourth Defendants breached those fiduciary duties by failing to disclose their interest in ITS Estonia. ITS Estonia dishonestly assisted in that breach of duty, and conspired with the Former Employees to use unlawful means (being the breach of duty by the Third and/or Fourth Defendant) to injure the Claimant, by causing it to make payments for Audit services to ITS Estonia.

18.10 The Claimant's case is that if the Former Employees had disclosed their interest in ITS and/or ITS Estonia, Brambles Limited would not have entered into the Supply Agreement on behalf of the Brambles Group, and the Claimant would not have entered into the Audit Agreement.

18.11 The Claimant seeks from ITS and ITS Estonia an account of profits and/or equitable compensation for dishonest assistance, and/or damages for conspiracy.

19. The Claim Form was issued on 8 December 2020 and in due course, was served on each of the Defendants. Each of the Defendants acknowledged service and issued an application contesting the jurisdiction of the Court. The jurisdiction applications of the First and Second Defendants, ITS and ITS Estonia, are the subject of this judgment. As to the others:

19.1 The Third Defendant's jurisdiction application was successful, Jacobs J holding on 10 September 2021 that the Court had no jurisdiction over the Third Defendant under Regulation (EU) No 1215/2012 of the European Parliament and of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("**the**

Brussels Recast Regulation"), on the basis that the claim was one which related to the Third Defendant's contract of employment, and (under Articles 20(1) and 22(1)) had to be brought in his country of domicile.

19.2 In the light of Jacobs J's judgment in relation to the Third Defendant, the Claimant and the Fourth Defendant agreed confidential terms pursuant to which the action against the Fourth Defendant was dismissed by Order dated 10 March 2022.

19.3 In his judgment of 10 September 2021, Jacobs J had also held that "the place where the harmful event occurred" in relation to the claims in this action for the purposes of Article 7(2) of the Brussels Recast Regulation was England. In the light of that finding, the Fifth Defendant (who was not in a position to rely upon Articles 20(1) and 22(1)) agreed to withdraw his application disputing the jurisdiction of this Court and consented to an Order dated 23 February 2022 which gave him a period of 28 days from the determination of the other jurisdiction applications to file and serve his defence.

ITS's jurisdiction application

20. ITS is a company incorporated in the Isle of Man. The jurisdiction of this Court over ITS therefore depends upon service out of the jurisdiction under CPR Pt 6.36 and one of the "gateways" provided in Practice Direction 6B para 3.1, and upon the common-law rules, rather than upon the jurisdiction regime under the Brussels Recast Regulation.

21. On an application under CPR Pt 6.36, the claimant must satisfy the Court (in summary) that:

21.1 There is a good arguable case that the claim made in the action against the relevant defendant falls within one or more of the gateways in paragraph 3.1 of PD 6B.

21.1.1 The relevant test is that laid down by the Supreme Court in *Goldman Sachs International v Novo Banco* [2018] UKSC 34, [2018] 1 WLR 3683 at [9] as explained and elaborated by the Court of Appeal in *Kaefer Aislamientos SA de CV v AM Drilling Mexico SA de CV* [2019] EWCA Civ 10, [2019] 1 WLR 3514: see the summary by Carr J in *Tugushev v Orlov* [2019] EWHC 645 (Comm) at [56] to [61];

21.2 There is a serious issue to be tried on the merits of that claim; and that

21.3 In all the circumstances:

21.3.1 England and Wales is the proper place in which to bring the claim (CPR 6.37(3)); and

21.3.2 The court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

See *Altimo Holdings and Investment Ltd v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [71], [81] and [88] per Lord Collins; and *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808, [2012] 2 Lloyd's Rep 313 at [99] to [101] per Lloyd-Jones LJ (affirmed [2013] UKSC 5, [2013] 2 AC 337).

22. The Claimant's application under CPR Pt 6.36 was supported by the Third Witness Statement of Mr David de Ferrars, who is a partner at Taylor Wessing LLP. The Claimant relied upon three of the "gateways" provided for in Practice Direction 6B paragraph 3.1:

22.1 (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 or proper party to that claim.

22.2 (6) A claim is made in respect of a contract where the contract (a) was made within the jurisdiction; (b) was made by or through an agent trading or residing within the jurisdiction; or (c) is governed by English law.

22.3 (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.

23. In her argument before me, Ms Windle relied only on the first and third of these "gateways", and in relation to the third of them, only upon paragraph 3.1(9)(b) of Practice Direction 6B.

24. ITS's application was supported by two witness statements: that of Mr Javier Perez, a director of ITS, made on 21 June 2021; and that of Mr Robert Harvey, a consultant at Keystone Law, made on 22 June 2021. Mr Perez's witness statement set out his understanding of the background. Mr Harvey's witness statement supplemented that of Mr Perez, and in paragraph 6 made clear the basis of ITS's application:

> **[ITS] contends that none of the "gateways" in Practice Direction 6B on which the Claimant sought to rely in its application .. are applicable. I**

> **understand that these are matters for legal submissions, but the points [ITS] will be relying on are that:**
>
> **6.1 None of the alleged knowledge of the Third to Fifth Defendants is properly attributable to [ITS].**
>
> **6.2 [ITS] is not a necessary or proper party under Practice Direction 6B, paragraph 3.1(3) in light of the challenges to jurisdiction which have, or which I understand are being made in parallel to this application, by the Second to Fifth Defendants.**
>
> **..**
>
> **6.5 No relevant act from which damage has been sustained was committed in the jurisdiction of the purposes of PD6B paragraph 3.1(9)(b).**
>
> **6.6 England is not the proper place to bring the claim against [ITS], and this Court should in any case stay these proceedings on *forum non conveniens* grounds in favour of the Belgian courts, being the courts to which the Second Defendant has submitted ..**

25. Mr Perez, in his witness statement, referred to the witness statement of the Third Defendant, Mr Bart De Laender, made on 4 May 2021, the witness statement of the Fourth Defendant, Mr Klaus Mittelburger, made on 28 May 2021, and the witness statement of the Fifth Defendant, Mr Marcelo di Benedetto, made on 28 May 2021, each of which was made in support of that party's own jurisdiction application. According to Mr Perez, he has "checked the records available to me of [ITS] and ITS Estonia and .. can find no evidence to contradict those statements". However, since the Supply Agreement was made in June 2010 and the Audit Agreement in October 2013, Mr Perez (who states in paragraph 8 was he did not become involved with ITS until 2015) can give no direct evidence of those matters. Nevertheless, by the time the Audit Agreement Addendum was agreed in October 2017, a company owned by Mr Perez and a company owned by his business partner had (according to Mr Perez) already (in April 2017) become the owners of the shares in ITS.

26. Mr Harvey, in his witness statement, also referred to the witness statement of Maario Laas made on 22 June 2021 in support of ITS Estonia's jurisdiction application.

27. I have carefully considered all of these witness statements, together with the responsive evidence filed and served on behalf of the Claimant, which comprised: the second witness statement of Mr de Ferrars, made on 31 March 2021; the first witness statement of Carmelo Alonso-Bernaola Ruiz, Senior Vice President, Global Supply Chain at CHEP Espagna SA, made on 31 March 2021, which confirmed the matters set out in Mr de Ferrars' second witness statement; Mr Alonso-Bernaola Ruiz's second witness statement made on 5 July 2021 in response to Mr di Benedetto's witness statement; and Mr de Ferrars' fourth witness statement.

28. Of this evidence, only the Third Defendant's own witness statement and the second witness statement of Mr de Ferrars were before Jacobs J at the hearing on 28 July 2021 of the Third Defendant's jurisdiction application. That application was also supported by a witness statement from Ms Sophie Eyre, the Third Defendant's solicitor. According to paragraph 32 of Jacobs J's judgment, Ms Eyre's witness statement (which I have not read) "described [the Third Defendant)'s employment history and role within the Claimant .. [and] .. set out the reasons why the English court had no jurisdiction".

29. Neither ITS nor ITS Estonia took any part in the hearing of the Third Defendant's application before Jacobs J. As I have just explained, the evidence before Jacobs J did not include many of the witness statements which have been placed before me. It is therefore necessary for to me to reach my own, independent conclusions, on the basis of that more extensive body of evidence, reminding myself (in the words of Lord Sumption in *Goldman Sachs* (*supra* at [9])):

> **(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.**

30. In my judgment, the Claimant has shown a good arguable case (applying this test, as elaborated in *Kaefer*) in relation to each of the two "gateways" (under para 3.1(3) and (9)(b)) relied on by Ms Windle in her argument before me.

31. As to the para 3.1(3) "gateway", it is now clear that the claim will continue in this jurisdiction against the Fifth Defendant. As noted in paragraph 19.3 above, the Fifth Defendant has withdrawn his jurisdiction application and has consented to an order requiring him to serve his Defence within 28 days of the disposal of the other jurisdiction applications. I am satisfied that there is a real issue between the Claimant and the Fifth Defendant that it is reasonable for the court to try. I am also satisfied that ITS is a proper party, as an alleged co-conspirator, to the claim against the Fifth Defendant.

32. As to the para 3.1(9)(b) "gateway":

32.1 This "gateway" (relevantly) requires damage to have been sustained which results from an act committed within the jurisdiction.

32.1.1 In *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, the Court of Appeal held that this requirement obliges the court to look at the tort alleged in a common sense way, and to ask whether damage has resulted from substantial and efficacious acts committed within the jurisdiction, regardless of whether or not such acts have been committed elsewhere. The question is where in substance the cause of action arises. If the court finds that the tort has in substance been committed in this country, the fact that some of the relevant events have happened abroad is irrelevant for these purposes.

32.1.2 *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19, [2020] AC 727, like the present case, involved an allegation of a conspiracy to injure by unlawful means. The Supreme Court held that, for the purposes of Article 5(3)(b) of the Lugano Convention 2007 (which provides that "A person domiciled in a state bound by this Convention may, in another state bound by this Convention, be sued: . . . (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur"), the making of the conspiratorial agreement in England should be regarded as the harmful event which set the tort in motion, so that the courts of England and Wales have jurisdiction.

32.1.3 This reasoning was applied by Carr J in *Tugushev v Orlov* (*supra*) to the para 3.1(9)(b) gateway. Carr J held (at [211] to [215]) that "the making of a conspiratorial agreement is sufficient to amount to a substantial and efficacious act justifying the defendant being brought here to answer the claim, and may constitute an act committed within the jurisdiction from which damage has been or will be sustained for the purposes of the tort gateway".

32.1.4 Taking these authorities into account, I respectfully share the view of Jacobs J, who held (in paragraphs [119] and [120] of his judgment) that it is appropriate, when considering this "gateway", to focus on the formation of the conspiracy rather than upon the steps taken subsequently to implement it.

32.2 The evidence before me (particularly in the second and fourth witness Statements of Mr de Ferrars and the first and second witness statements of Mr Alonso-Bernaola Ruiz) in my judgment establishes (as the evidence did before Jacobs J) a plausible evidential basis for the proposition that the conspiratorial

agreement said to give rise to this claim was wholly or principally made in England:

32.2.1 ITS was incorporated "during the 6-12 month window when the Supply Agreement was under negotiation" and "meetings involving [the Former Employees] were occurring in England at around the time that ITS was incorporated and the negotiations, which eventually led to the Supply Agreement, were in their initial stages" (Judgment of Jacobs J at [124]);

32.2.2 The fact that the Fifth Defendant was at all material times working in England, combined with "evidence of meetings in England between the Fifth Defendant and both of the other (alleged) conspirators at the material times described above, and a contrasting lack of evidence from [the Third Defendant] which identifies any other location where the conspiracy was hatched" (at [128]); and

32.2.3 For the purposes of identifying the formation of the conspiracy, a distinction should not be drawn between the Supply Agreement and the Audit Agreement because it was "appropriate to take a broad view of the conspiracy when considering the originating event". The conclusion of the Supply Agreement and the Audit Agreement were "simply one part of the chain of events originating with the hatching of the conspiracy" (at [132]).

32.3 There is nothing, either in the evidence which was before Jacobs J or in the further evidence to which I have referred, which significantly undermines those conclusions. Mr Mittelberger's witness statement deals with his place of residence and domicile and his employment. He denies having negotiated either the Supply Agreement or the Audit Agreement, and seeks to justify on a commercial basis the terms of the Supply Agreement. Mr Di Benedetto's witness statement deals with similar topics, denies involvement in the negotiation of the Supply Agreement or the Audit Agreement, and says that he was "routinely away from England". Mr Perez's witness statement, although it confirms what is said by the Former Employees, provides no first-hand evidence of the events at the relevant time.

32.4 In my judgment, the Claimant has accordingly established a good arguable case that the damage of which it complains resulted from an act - the making of the alleged conspiracy - committed within the jurisdiction.

33. I am also satisfied that there is a serious issue to be tried on the merits of the Claimant's claim against ITS. Mr Harvey's witness statement challenges that proposition, on the

basis that (according to him) none of the alleged knowledge of the Third to Fifth Defendants is properly attributable to ITS. However, the evidence on behalf of the Claimant to which I have just referred establishes a *prima facie* case that (as pleaded in paragraph 11 of the Particulars of Claim) the Former Employees were the directing minds of and/or controlled and/or exercised significant influence over ITS at the material time: and it is noteworthy that the evidence which has so far been filed and served on behalf of the Defendants does not present any coherent rebuttal of that case.

34. Finally, I am satisfied (applying, inter alia, the guidance given by the Supreme Court in *VTB Capital plc v Nutritek International Corpn* [2013] UKSC 5, [2013] 2 AC 337) that England and Wales is the proper place in which to bring the claim and that the Court ought to exercise its discretion in favour of the Claimant.

34.1 Mr Harvey argues, in his witness statement, that the Claimant's claim against ITS should be brought in the Belgian courts, as the court to which (as I note in paragraph 42 below) the Audit Agreement between the Claimant and ITS Estonia gives exclusive jurisdiction. In the course of the hearing, I was told that there were no relevant proceedings against any of the Defendants in Belgium. However, by letter dated 31 March 2022, the Claimant's solicitors have informed the Court that the Claimant in fact intends to issue proceedings in Belgium against the Third Defendant on 1 April 20202, in order to stop time running in his favour for the purposes of any limitation defence.

34.2 Those connections are significant factors in favour of Belgium as the proper place for the claims against all of the Defendants to be litigated. As noted in paragraph 19.3 above, however, the Fifth Defendant has submitted to the jurisdiction of the English courts, and the proceedings against him will (I am informed) continue here. That means that it is not possible for the proceedings against all of the Defendants to be heard before a single court.

34.3 The factors in favour of England, rather than Belgium, being the proper place for the claim against ITS include the following: First, ITS was a party to the Supply Agreement, but was not a party to the Audit Agreement. It is the Supply Agreement (rather than the Audit Agreement) which is at the heart of this claim, and there are a number of significant factors which link the Supply Agreement to England, not least the fact that it is in the English language and contains clauses providing for English law and jurisdiction.

34.4 It appears at this stage that the making and much of the carrying out of the alleged unlawful means conspiracy took place in England and that the applicable law in respect of that conspiracy, some of the fiduciary duty claims, and of the dishonest assistance claim will therefore probably be English law.

34.5 The fact that the remaining Defendants are located in numerous jurisdictions means that there is no other jurisdiction which is the "centre of gravity" of the claims, with regard to the location of Defendants or witnesses or documentary evidence. The evidence given on behalf of the Claimant, the First Defendant, the Second Defendant and the Fifth Defendant in connection with the various jurisdiction applications has been given by English solicitors, or by persons giving addresses in the Isle of Man, Spain or Estonia.

34.6 The only common language between the Claimant and the remaining Defendants is likely to be English. There is no suggestion that the parties all share any of the official languages of Belgium.

35. It follows that ITS's challenge to the jurisdiction of the courts of England and Wales fails and falls to be dismissed.

ITS Estonia's jurisdiction application

36. ITS Estonia is a company incorporated in Estonia. The jurisdiction of this Court over ITS Estonia is therefore governed by the Brussels Recast Regulation.

37. The general principle underpinning jurisdiction under the Brussels Recast Regulation is set out in Article 4(1), which provides:

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

38. However, the Regulation contains provisions for "special jurisdiction", under which a person can be sued in a jurisdiction other than that in which they are domiciled. Article 7(2) provides that a person domiciled in a Member State may be sued in another Member State:

> **.. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur ..**

39. The wording of Article 7(2) is materially identical to the wording of Article 5(3)(b) of the Lugano Convention 2007, which was considered by the Supreme Court in the *Ablyazov* case (*supra*) referred to in paragraph 32.1.2 above. I was also referred, in this connection, to the cases of *Handelskwekerij G J Bier BV v Mines de potasse d'Alsace SA*, 21/76 [1978] QB 708 at [19], and *Shevill v Press Alliance* (Case C-68/93) [1995] 2 AC 18

40. Ms Windle also drew my attention to the decision of the Supreme Court in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2021] 3 WLR 1011, in which Lord Lloyd-Jones observed (at [56]) that:

> **.. It seems clear that special jurisdiction in cases of tort under article 5(3)/7(2) is narrower, in at least one important respect, than under the tort gateway in para 3.1(9)(a) of PD 6B. It follows from *Marinari*[1] that in the Brussels system if damage is sustained in the place where the causal act took place, there will not be jurisdiction in the courts of a second state even if significant further damage was sustained there. Professor Adrian Briggs explains in 'Holiday Torts and Damage within the Jurisdiction' [2018] LMCLQ 196, 199: "The imperative to try to concentrate the jurisdictionally significant damage in one place is driven by the need to confine special jurisdiction to its properly subordinate place within the overall scheme of the Regulation. Our domestic system is not subject to any such constraint. As Lord Wilson JSC pointed out in *Brownlie I*[2] (at para 63), *Marinari* is inconsistent with the decision of the Court of Appeal in *Metall und Rohstoff* and demonstrates that our domestic rules create a gateway potentially wider than the Brussels system would permit.**

41. I am satisfied (as Jacobs J was satisfied) that, even applying that narrower test, the Claimant has established a good arguable case that England is the place where the harmful event occurred for the purposes of Article 7(2).

42. There is, however, a jurisdiction argument available to ITS Estonia that is not available to the other Defendants. As stated in paragraph 18.7 above, ITS Estonia and the Claimant were both parties to the Audit Agreement. As Mr Laas pointed out in paragraph 12 of his witness statement, the Audit Agreement contained (in clause 18) a Dispute Resolution provision, which stated:

> **The parties will attempt in good faith to resolve through negotiation any dispute, claim or controversy ("Dispute") arising out of or relating in any way to this Agreement. A party may initiate such negotiations by providing written notice to the other party setting forth the nature of the Dispute and the relief requested. The recipient of such a notice will have thirty (30) days to complete the relief requested to resolve the Dispute. If the parties cannot agree that the Dispute has been resolved within such thirty (30) day period then two (2) representatives of each party to the Dispute with full settlement authority shall be appointed to a Dispute Resolution Committee ("DRC"). If the Dispute is not resolved by the DRC within thirty (30) days from the appointment, either party may submit the Dispute to the court of Mechelen, which has exclusive jurisdiction. All disputes arising out of or in connection with this Agreement shall be finally settled under Belgian law; the competent court shall be the commercial Court at Mechelen in Belgium.**

---

1 *Marinari v Lloyds Bank plc (Zubaidi Trading Co intervening)* (Case C-364/93) EUC:1995:289; [1996] QB 217

2 *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192.

43. Article 25 of the Brussels Recast Regulation provides that:

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

44. The effect of a jurisdiction agreement within the terms of Article 25 is to exclude in relation to all matters within its scope both jurisdiction based on domicile under Article 4 and the special jurisdiction provided for (inter alia) in Article 7: see *Estasis Salotti di Colzani Aimo et Gianmario Colzani v Ruwa Polstereimaschinen GmbH* Case C-24/76 [1976] ECR 1831 at [7]; *Galeries Segoura Sprl v Societe Rahim Banakdarian* Case C-25/76 [1976] ECR 1851 at [1]; and *Hough v P&O Containers Ltd* [1999] QB 834.

45. Ms Windle submitted that the claims made in the present action did not fall within the scope of the Dispute Resolution provisions in clause 18 of the Audit Agreement. In Ms Windle's submission, that jurisdiction agreement applies only to claims arising out of or in connection with the Audit Agreement. The claims made in the present action, by contrast, are claims for dishonest assistance and conspiracy, the originating event of which was the formation of the Supply Agreement. The Supply Agreement was entered into over 3 years before the Audit Agreement. Furthermore, the Claimant's claims are for loss suffered as a result of Brambles Limited entering into the Supply Agreement.

46. I am unable to accept that submission, at least in the unqualified terms in which Ms Windle made it. In the Particulars of Claim:

    46.1 A heading "The Audit Agreement" introduces paragraphs 18 to 24, which plead the making of the Audit Agreement, that the Third and Fourth Defendants caused the Claimant to enter into the Audit Agreement, and that the Former Employees failed to disclose their connection with ITS Estonia.

    46.2 Paragraph 36.2 then asserts that the Former Employees were guilty of dishonest assistance in "authorising or causing ITS Estonia to enter into and/or continue the Audit Agreement".

    46.3 The knowledge of the Former Employees of the Audit Agreement is pleaded in paragraph 37, and paragraph 37.2 specifically pleads the involvement of the Third and Fourth Defendants in negotiating and/or continuing the Audit Agreement on behalf of the Claimant as an aspect of the dishonest assistance claim. Paragraph 40.1 then specifically asserts that ITS Estonia dishonestly

assisted the Former Employees' breaches of fiduciary duty by entering into and continuing the Audit Agreement.

46.4 Finally, paragraph 41.2 pleads that ITS Estonia was guilty of unlawful means conspiracy, inter-alia, "by causing [the Claimant] to enter into and continue the Audit Agreement".

47. In my judgment, those claims fall squarely within the scope of the Dispute Resolution provisions in clause 18 of the Audit Agreement.

48. The Audit Agreement, although in the English language, is governed by Belgian law. Rightly, neither party had tendered evidence of the principles of interpretation of jurisdiction clauses under Belgian law. At this stage of the proceedings, reliance on the presumption of similarity with English law is sufficient: see *Brownlie* (*supra*) at [157], per Lord Leggatt. In those circumstances, I must simply apply to this provision the principles of interpretation articulated in *Fiona Trust and Holding Corpn v Privalov* [2007] UKHL 40, [2007] Bus LR 1719.

49. The court should (per Lord Hoffmann at [13]):

> **.. start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal ..**

Whereas some of the previous cases had drawn fine distinctions according to whether a clause used the words "arising under" or "arising out of", Lord Hoffman declared there to be a need for a "fresh start" (at [12]) and Lord Hope deprecated such "fussy distinctions" (at [27]), thereby consigning those distinctions to the legal dustbin.

50. As Patricia Robertson QC (sitting as a Deputy High Court Judge) observed in *Eastern Pacific Chartering Inc v Pola Maritime Ltd* [2021] EWHC 1707 (Comm) [2021] 1 WLR 5475 (a charterparty case):

> **.. The language "in connection with" is naturally to be read as, if anything, wider than "arising under", or variants on that phrase. Taking a broad and common sense approach to construing the clause, as I am enjoined in *Fiona Trust* to do, a tort claim may be said to arise "in connection with" [a contract] not only where there are parallel claims in tort and contract (as, for example, for breach of a duty of care) but also where the claim arises solely in tort but is in a meaningful sense causatively connected with the relationship created by [contract] and the rights and obligations arising therefrom ..**

51. In my judgment the situation here is analogous to that considered in the *Eastern Pacific* case. The claims in the present action are not claims under the Audit Agreement. Nor do they involve parallel claims in tort and contract. However, to the extent that the claims pleaded in the Particulars of Claim involve entering into or performing the Audit Agreement, they are "in a meaningful sense causatively connected with the relationship created by [that contract] and the rights and obligations arising therefrom". Indeed the words of the Dispute Resolution clause ("arising out of or relating in any way to this Agreement") are, if anything, even wider in their scope than those considered in *Eastern Pacific*. Put simply, the claims identified in paragraph 46 above seem to me plainly to be claims "relating in any way" to the Audit Agreement, in the sense in which that phrase would have been understood by a reasonable person in the position of the parties.

52. The jurisdiction challenge by ITS Estonia therefore succeeds to the extent of all such claims relating to the Audit Agreement.

53. However, ITS Estonia's challenge to the jurisdiction fails and falls to be dismissed in relation to all of the other claims made by the Claimant in this action. Claims which are primarily based on the entry into and performance of the June 2010 Supply Agreement are not, in my judgment, properly to be regarded as claims "arising out of or relating in any way" to the October 2013 Audit Agreement.

Disposition

54. For the reasons which I have given

    54.1 I dismiss the jurisdiction application made by ITS.

    54.2 I allow the jurisdiction application made by ITS Estonia in respect of claims relating to the Audit Agreement, but dismiss it as to the balance of the claims in the action.

55. I direct under CPR 11.7 that:

    55.1 ITS and ITS Estonia shall have until 4pm on Friday 22 April to file a further acknowledgement of service.

    55.2 In the event that either ITS or ITS Estonia files a further acknowledgment of service, that party shall have a further 28 days from the date on which that acknowledgement is filed within which to file and serve its Defence.

56. The costs of the jurisdiction application by ITS, which has failed in its entirety, should be the Claimant's in any event. Subject to any further submissions from the Claimant, it seems to me that the right order in relation to the application by ITS Estonia (which

has been partly successful and partly unsuccessful) is that there should be no order as to the costs of that application.

57. If the Claimant wishes to seek a different order in relation to the costs of the application by ITS Estonia, or to seek a summary assessment of costs, written submissions (together with any relevant costs schedule) should be lodged with my clerk by email by no later than 4pm on Friday 1 April 2022. I will then either give a ruling by email or direct a short further hearing by video conference.

58. Pursuant to CPR PD 52A 4.1(a), I adjourn any application for permission to appeal together with all other consequential applications to be determined in that way and extend time under CPR 52.12(2)(a) until 21 days after that determination.

59. In accordance with the Covid-19 Protocol, this judgment will be handed down remotely by circulation to the parties' representatives by email and release to BAILII. No attendance by the parties is necessary.