Neutral Citation Number: [2025] EWHC 400 (Comm)

Claim No: CL-2022-000048

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2025

Before :

MR JUSTICE FOXTON

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Between :

(1) COMMERCIAL BANK OF DUBAI PSC
(2) HORTIN HOLDINGS LIMITED
(3) WESTDENE INVESTMENTS LIMITED
(4) LODGE HILL LIMITED
(5) VS 1897 (CAYMAN) LIMITED **Claimants**

- and -

(1) MR ABDALLA JUMA MAJID AL SARI
(2) MR MAJID ABDALLA JUMA AL SARI
(3) MR MOHAMED ABDALLA JUMA AL SARI
(4) FAL OIL CO INC
(5) INVESTMENT GROUP PRIVATE LIMITED
(6) IPGL GENERAL TRADING LLC
(7) GLOBE INVESTMENT HOLDINGS LIMITED
(8) MENA INVESTMENT HOLDINGS LIMITED
(9) MAS CAPITAL HOLDINGS LIMITED
(10) MR HAMAD SAIF HAMAD ABDALLA ALMHEIRI **Defendants**

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Anthony Peto KC, **Andrew Trotter** and (for the written submissions) **Madelaine Clifford** (instructed by **Jones Day**) for **the Claimants**
Jonathan Cohen KC and **Nicola Allsop** (instructed by **PCB Byrne LLP**) for **the Seventh, Ninth and Tenth Defendants** for the hearing of 12-15 and 18 November 2024.

Hearing dates: 12, 13, 14, 15 and 18 November 2024
Further Written Submissions: 28 January 2025
Draft judgment circulated: 19 February 2025
Further written submission: 19 February 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 27 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Foxton :

1. This judgment addresses an outstanding issue following my judgment reported at [2024] EWHC 3304 (Comm) ("**the Judgment**"). The background to the issue is set out in the Judgment, and I adopt the defined terms there used. The issue concerns the applicable law of the Claimants' claim that certain of the Defendants maliciously prosecuted two sets of DIFC Proceedings.

2. I reached the view that further submissions were required, in addition to those made at the November 2024 hearing, to resolve this issue. Shortly after the handing down of the Judgment, the PCB Defendants' solicitors came off the record, and counsel ceased to be instructed. In these circumstances, I made provision for both parties to serve additional written submissions. In the event, submissions were filed by the Claimants but not the PCB Defendants. Inevitably those submissions introduced new arguments not raised at the hearing, as well as further development of those that were.

3. This judgment was circulated in draft at the start of the working day on 19 February 2025. It became apparent in response that a letter had been filed with the court on CE file at 9.30am on 18 February 2025, accepted onto the system at 3.54pm that day but not yet alerted to me, raising a new matter which fundamentally changed the legal context in which this issue had arisen. That matter had first been raised within the Claimants' legal team around opening hours UK time on Wednesday 12 February 2025. I return to the impact of this matter below.

THE RELEVANT CLAIMS IN SUMMARY

4. By way of brief summary, claims that court proceedings were brought maliciously in the DIFC are made in respect of two sets of proceedings:

    i) the DIFC Tenancy Proceedings brought by IGPL GT against the BVI Companies; and

    ii) the Globe DIFC Proceedings brought by Globe against the BVI Companies and the Bank.

5. The malicious prosecution claims are brought:

    i) by the BVI Companies in relation to both sets of proceedings, against IGPL GT, and Globe, and against the Al Saris and Mr Almheiri as joint tortfeasors and/or on the basis that they caused the proceedings to be brought; and

    ii) by the Bank in relation to the Globe DIFC Proceedings against Globe, and (on the same basis) against the Al Saris and Mr Almheiri.

6. In addition, both malicious prosecution claims are relied upon by both the BVI Companies and the Bank as unlawful means for the purposes of unlawful means conspiracy claims. There was no argument as to whether the unlawful means relied upon have to be actionable at the suit of each unlawful means conspiracy claimant, and that issue does not arise for decision at this point.

7. So far as the Globe DIFC Proceedings are concerned, the losses claimed are:

i) legal fees paid by the Bank from an account in "onshore" UAE pursuant to retainers signed by the Bank in the UAE (although it is not clear whether, in each case, the retainer was signed before or after the Globe DIFC Proceedings were commenced) for work done by lawyers in the DIFC, England and Australia caused by the bringing of the Globe DIFC Proceedings;

ii) losses resulting from the delay to the BVI Companies in recovering the Bridge Properties in England and Wales (user damages for lost enjoyment of the Bridge Properties or a reduction in market value together with lost use of proceeds and expenses during the period sale is said to have been prevented).legal fees for work done by lawyers in the DIFC, England and Australia caused by the bringing of the Globe DIFC Proceedings.

8. So far as the DIFC Tenancy Proceedings are concerned, the losses claimed are:

i) legal fees paid by the Bank from an account in "onshore" UAE pursuant to retainers signed by the Bank in the UAE (the same issue arising as to the date the retainer was signed); and

ii) losses resulting from the delay to the BVI Companies in recovering the Bridge Properties in England and Wales (user damages for lost enjoyment of the Bridge Properties or a reduction in market value together with lost use of proceeds and expenses during the period sale is said to have been prevented).

THE ARGUMENT THAT THE DEFAULT RULE HAS NOT BEEN DISPLACED

9. The first argument raised by the Bank and the BVI Companies is that they have pleaded their claim by reference to English law, in reliance on the "default rule" (cf *Brownlie v FS Cairo (Nile Plaza) LLC* [2022] AC 995, [108]-[126]), and that D7 and D9, who served a defence, did not plead that some other system of law applied to this claim.

10. I dealt with this issue in the Judgment at [101]:

i) So far as Mr Almheiri is concerned, no defence has been served and the issue is whether there is a serious issue to be tried. At the main hearing, Mr Almheiri advanced the argument that the applicable law was DIFC law. This judgment determines the argument which Mr Almheiri advanced, but which it was not possible to resolve on the basis of the oral arguments alone. The terms in which other defendants have responded to the Claimants' case provide no answer to Mr Almheiri's entitlement to have the argument he raised determined.

ii) So far as D7 and D9 are concerned, they did raise the argument at the hearing that these claims were doomed to fail because they were governed by DIFC law and, by their application for summary judgment and strike out, clearly signalled their challenge to the application of the default rule. I am satisfied that I should resolve that issue, on which I heard full argument, and which raises essentially the same issues for D7 and D9 as for Mr Almheiri.

THE ARGUMENT BY REFERENCE TO ARTICLE 4(1)

Introduction

11. Article 4 of Rome II provides as follows:

> "(1) Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
>
> (2) However, where the person claimed to be liable and the person sustaining the damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
>
> (3) Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

12. The Claimants contend that the effect of Article 4(1) is that the claims for malicious prosecution of the Globe DIFC Proceedings are governed by UAE law, or alternatively involve a series of claims, governed, inter alia, by UAE and English law, and that the claims for malicious prosecution of the DIFC Tenancy Proceedings are likewise governed by English law and/or UAE law. In the alternative, by way of a new argument, they contend that UAE law applies as between some parties by virtue of Article 4(2).

13. It is common ground that the law of the DIFC does not recognise a tort of malicious prosecution of civil claims.

The cases relied upon

14. The issue of what constitutes damage arises not simply in relation to Article 4(1) of Rome II but also in relation to Article 5(3) of the Lugano Convention and Article 7(2) of the Brussels Recast Regulation (via Case 21/76 *Handelskwekerij GJ Bier BV v Mines de Potasse d'Alsace SA* [1978] QB 708). A consistent approach is to be adopted to the application of the concept of damage in both contexts: *Anton Durbeck GmbH v Den Norske Bank ASA* [2003] QB 1160, although the cases disclose consideration in the former context of issues which do not seem to be directly germane to the latter. In both contexts, an autonomous interpretation of the concept is required (*CA Indosuez (Switzerland) SA v Afriquia Gaz SA* [2023] EWCA Civ 1072 and Recital (11) of Rome II).

15. The Claimants relied upon a number of authorities which had considered where pure economic loss had been suffered for both jurisdictional and applicable law purposes. Many of these are cases in which the claimant contended it had made what proved to be a worthless, or at least insufficiently valuable, investment in reliance on negligent advice or inaccurate statements. The obvious tension in these cases is whether the place of damage is where the "defective" transaction is irreversibly entered into, the place from which funds are advanced to make it, or where the flaws in the investment subsequently manifest themselves or crystallise (for example through on-sale of the investment at a reduced value).

16. In *Kwok Ho Wan v UBS AG* [2022] EWHC 245 (Comm), Cockerill J had to determine the place in which damage in the form of pure economic loss resulting from an underperforming investment had been suffered for Lugano Convention purposes. Cockerill J reviewed the CJEU and domestic authority in this context. These included a number of CJEU cases which offered support for some or all of the competing approaches in the preceding paragraph:

    i) Case C-168/02 *Kronhofer v Maier* [2004] IL Pr 27 held that damage resulting from the making of speculative investments was suffered in the place where the investment account was opened (Germany), from which funds were applied to acquire the investments, and not in Austria where the claimant lived and from where he had transferred the funds into the investment account.

    ii) Case C-375/13 *Kolassa v Barclays Bank* [2015] IL Pr 14, in which the CJEU held that the place of damage was Austria (where the claimant was domiciled) because "the damage alleged occurred directly in the applicant's bank account" (it is not clear whether this is a reference to the account from which payment for the investment had been made, or the investment account where the investment were held, although both accounts were in Austria).

    iii) Case C-12/15 *Universal Music International v Schilling* [2016] QB 967, in which negligent legal advice led the claimant to sign a contract on unfavourable terms, but in which the CJEU appears to have concluded that the place of damage was where an arbitration award was issued and the settlement of a dispute arising out of the defective feature of the contract was later reached.

    iv) Case C-304/17 *Löber v Barclays Bank Plc* [2019] 4 WLR 5, in which the CJEU reached a decision that the place of damage was where the investment was made.

    v) *Vereniging van Effectenbezitters v BP Plc* [2021] IL Pr 23, in which damage resulting from an investment made in listed shares in reliance on negligent statements was held to have been suffered at the place where the listed value of the shares fell.

17. At [111], Cockerill J suggested that the overall thrust of the CJEU jurisprudence favoured the place of the manifestation of damage, rather than the place of the transaction which led to the damage, as the relevant place for jurisdiction purposes:

> "I conclude that certain points are established and provide critical guidance:
>
> (i) The leading CJEU cases demonstrate that in the context of the damage head it is the manifestation of damage that is relevant, not the transaction that ultimately led to such loss.
>
> (ii) Manifestation is more likely to be associated with crystallisation of the damage than the origins of the transaction in cases where there is a difference. As I will consider further below, while the references in *UMI* to 'became certain' and 'irreversible burden' are not posited as the key test, they indicate what the CJEU is looking for when manifestation is not self-evident.

(iii) Caution may be required to be exercised when looking at damage that may or may not occur depending on what happens in the future. In this context careful thought may be needed to distinguish between the last thing that happened to bring the loss home to the claimant and the point where the loss itself becomes clear. In *Kronhofer*, Mr Kronhofer was exposed to risk from the moment he invested his money with the defendant (that was the very essence of his claim), but it is nowhere suggested that the damage occurred at this time. Similarly, in *UMI*, UMI was bound to pay more than anticipated as soon as it signed the original contract, but its losses did not actually manifest and become certain until it settled the dispute about exactly how much.

(iv) While it is obviously right that foreseeability and a consideration of factors relating to the sound administration of justice cannot provide an independent basis for a conclusion that jurisdiction resides in a particular location, the CJEU has clearly used such factors in some cases. At times the relation of these factors to the reasoning is unclear. However, their existence and the rationale for the rule seems to justify their use by way of cross-check where the analysis simply by reference to manifestation remains troublesome. This is because the existence of the special jurisdiction is justified by the principle of proximity and is effectively designed to ensure that the jurisdiction is both foreseeable and likely to facilitate the administration of justice, the efficacious conduct of proceedings, and the taking of evidence. Or as *Briggs* puts it (p. 274):

> '… the conclusion to which the law comes must be derived from what appears to be the underlying reason for the rule.'"

18. In *Kwok*, the investment had been in synthetic form in H-Shares, which were held in a Secured Account with a bank in London. The fall in value of those shares triggered an obligation on the claimant's part to repay a loan facility granted by the bank, and when the payment could not be made, the Secured Account was debited and the shares sold. Cockerill J held that loss was not suffered when the claimants relied on the misrepresentation to enter into the transaction, but when the shares were liquidated and the Secured Account debited.

19. That decision was upheld by the Court of Appeal ([2023] EWCA Civ 222). At [33], Sir Geoffrey Vos MR emphasised that the CJEU authorities which the Judge had said were "not entirely clear" reflected their particular facts, and should not be construed as a statute ([33]). The Court of Appeal doubted that there was "a rule that is universally applicable to financial loss cases" ([45]). At [47]-[48], the Master of the Rolls stated:

> "The judge seems to me to have founded her decision on the indication that she found in *UMI* to the effect that damage manifested itself where it crystallised. In *UMI*, that was where the arbitration award identified what loss UMI had actually sustained, even though UMI had obviously sustained loss when it entered into the option agreement pursuant to the negligent drafting of the Czech lawyers.
>
> I am not sure, however, that jurisdiction founded on damage under article 5(3) will always be where the loss actually crystallises and is made certain. In *VEB*, for example, the CJEU seems to have laid down a rule that applies to cases brought in respect of listed companies breaching reporting requirements. This is not such a

> case. Nor is this a case like *Kolassa* and *Lober*, where there were significant connecting factors with the claimant's domicile in that the investments were made in Austria and the losses manifested themselves there."

20. *Kwok* suggests that even for defective investments, there may not be a universal rule that the place where the damage occurs is where loss first manifests itself or is crystallised, and that the principle may be a flexible one, reflecting other factors such as the strength of the connecting factors with the relevant place.

21. I was also referred to two cases which were not defective investment cases, but cases in which a legal wrong had caused the defendant to incur various heads of costs. Those might be said to be closer to the fact pattern here.

22. In *MX1 Limited v Farahzad* [2018] EWHC 1041 (Ch), 57 tweets were published making various allegations of bribery and corruption against the claimant and disclosing various documents. The claimants suggested that the tweets had the potential to cause damage to their business (the claimants were "one of the world's largest communications and satellite owners and operators", doing business in a number of jurisdictions). An issue arose as to the applicable law of the claimants' claim (for lawful and unlawful means conspiracy), the claimants contending that it was English law because legal and forensic expert costs were incurred in England). At [39(7)], Mr Justice Marcus Smith stated:

> "Whereas in the case of personal injury and physical damage to property it may be more straightforward to discern the country in which the damage occurs, and hence the applicable law, the fact that financial and non-material loss (such as the £100,000 loss) lacks an immediate physical manifestation presents real problems in discerning the applicable law."

23. The Judge suggested that "the touchstone, in cases of financial and non-material loss, for identifying the applicable law, appears to be *reversibility* of detriment" (citing Professor Andrew Dickinson, *The Rome II Convention* (2008), [4.67] and *Hillside (New Media) Ltd v Baasland* [2010] EWHC 3336 (Comm)). At [40], the Judge held in respect of legal fees that "it would appear that irreversible or concrete loss – in the form of entering into an agreement with Kroll and with the Claimants' lawyers – occurred in England and Wales."

24. The Judge noted that other losses were alleged to have been suffered in other jurisdictions. At [44], he concluded:

> "In my judgment, the applicable law pursuant to Article 4(1) is *not* the place where the damage predominantly occurs. That is not what the Article says. Article 4(1) refers to 'the law of the country in which the damage occurs'. The natural reading is that where damage occurs across several jurisdictions, there will be several applicable laws. This is, of course, also consistent with the Explanatory Memorandum."

25. This was a reference to the following statement in the Explanatory Memorandum which accompanied Rome II:

> "The rule entails, where damage is sustained in several countries, that the laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as 'Mosaikbetrachtung' in German law."

26. *MX1* was a case in which an essentially delocalised act (the publication of tweets) directly damaged the claimant in a series of countries where the contents of the tweet achieved notoriety, with the loss in one country not being dependent or a consequence of loss in another. To that extent it bears some similarities with cases in which libellous statements are published, and directly damage the claimant's reputation, in a number of countries (*Shevill v Presse Alliance SA* (C-68/93) [1995] ECR 1-415).

27. This can be contrasted with a case in which a wrongful event causes a claimant damage in one country (e.g. by damaging a manufacturing plant) as a result of which it suffers further damage in other countries where it operates (e.g. through lost sales). In this context, it is clear that the place where the indirect or consequential damage is suffered will not determine which court has jurisdiction or the applicable law. I referred to the distinction between these types of case in *Kingdom of Sweden v Serwin* [2022] EWHC 2706 (Comm), [84]:

> "In this regard, it may be appropriate (at least as a matter of emphasis) to distinguish between torts which have horizontal multi-jurisdictional effects, and those which have vertical multi-jurisdictional effects. The publication of a libellous tweet which is read and causes loss in a number of jurisdictions, or the use of confidential information to sell infringing products in a variety of countries, may present a rather stronger case for a 'Mosaikbetrachtung' of applicable laws than a case such as the present, in which the defendants began causing loss to the claimant in one country, but adjusted their modus operandi so as to continue causing loss of essentially the same kind to the same claimant in another country."

28. *W Nagel v Pluczenik* [2022] EWHC 1714 (Comm) was concerned with a fact pattern falling somewhere between these two types, in that the immediate consequence of the defendant's actions was that the claimant found itself an unwilling party to proceedings in a particular court, with the fact of those proceedings causing the claimant financial loss in other countries. Of the authorities cited to me, it comes closest to the facts of this case. The court had to consider issues of applicable law in relation to a claim for the tort of abuse of process in respect of proceedings in Belgium. The claimant alleged that it had suffered loss, inter alia, in the form of damage to its reputation and wasted management time, which it had suffered in England. There does not appear to have been any argument that the applicable law should be determined otherwise by reference to where the defendant in the foreign proceedings had suffered financial loss and it was accepted that those two heads of loss were suffered in England and Wales.

29. It was also said that loss had been suffered in the form of wasted legal costs incurred in the Belgian proceedings. Following her own earlier judgment in *Kwok Ho*, [91], Cockerill J held that "damage would manifest in the bank account from which the money was lost to the account holder".

30. In the previous jurisdiction challenge in this case ([2023] EWHC 1797 (Comm)), Bright J made the following observations:

    i) At [132], that it is necessary not to confuse this "damage claimed" with matters that are being asserted not as "damage claimed" but its precursors – i.e., the events claimed to have caused the "damage claimed" and that it important to distinguish "between (a) identifying original damage, directly caused and (b) indirect, remote or consequential damage".

ii) At [139], that the authorities "suggest that, in any given case, the Court should perhaps be slow to arrive at the conclusion that there is more than one place of damage; and/or that such a conclusion may make it appropriate to take a particularly careful look at Article 4(3) of Rome II."

iii) At [152], that all direct damage from the Globe DIFC Proceedings was suffered in the UAE, with the consequence in London regarding the Bridge Properties being "a very clear case of consequential, indirect damage." As I understand Bright J, his reference was on the basis that the DIFC formed part of the sovereign territory of the UAE (given the statement at [154] that "it cannot be said that any of these claims is manifestly more connected with a country other than the country where the relevant proceedings have taken place"). For the reasons given in the Judgment, [176], I am satisfied that the DIFC is to be treated as a separate country for Rome II purposes.

Analysis and conclusion

31. It has been noted that one of the difficulties with cases dealing with the identification of the place of damage for the purposes of the Brussels Regulation Recast and Rome II is how fact-dependent the answer is (*Kwok Ho,* [33] and Bright J at [124]).

32. This is a case in which the commencement of malicious proceedings against the Claimants in a particular jurisdiction is said to have caused loss to the Claimants in the form of legal costs incurred in various jurisdictions by way of a response to those proceedings, and delayed the realisation of property in England with alleged consequential financial losses. The Claimants say that:

    i) the loss constituted by the legal costs were suffered in the place of the bank account from which those costs were paid;

    ii) alternatively the loss constituted by those legal costs was suffered in the place where the Claimants signed the contract of retainer under which the fees would become payable;

    iii) in the yet further alternative, loss in the form of legal costs was suffered in the place where the work was done and/or payment for the work had to be paid; and

    iv) the loss resulting from the delayed sale or use of the Bridge Properties was suffered where those properties were located.

33. In the context of the particular and distinct form of tortious conduct in issue, I am not persuaded that what matters are the places where the adverse financial consequences of the maliciously prosecuted litigation manifest themselves. In determining what approach to adopt in this singular context, I have found the passage in *Dicey, Morris & Collis: The Conflict of Laws* 16th (2022), [35-026], in a chapter written by Professor Andrew Dickinson, particularly instructive (emphasis added):

> "The definition of 'damage' in Art.2(1) of the Regulation, as well as the stated need for foreseeability of court decisions and the need to strike a reasonable balance between the interests of the parties, suggest that the court should seek to identify and locate the outward consequences of the defendant's conduct—or of an event

> for which the defendant is claimed to be legally responsible—and then to treat as the relevant 'damage' *those consequences which are closely and foreseeably linked to that conduct etc., which are in some sense irreversible and which do not simply reflect or follow from other consequences occurring in another country.* In undertaking that analysis, *the court should assess the essential factual and legal characteristics of the 'harmful event' underlying the claim or claims presented in order to identify the underlying interest or interests which the putative ligation(s) would seek to protect, and then to find an appropriate method of locating the harmful consequences resulting from interference with those interests.* For example, if the defendant's allegedly false misrepresentations have led the claimant or its representative to release goods or documents held as security for a third party's obligations, the damage can be located in the country where the security was held at the time of its release, rather than in the country where the claimant received the representations or took any decision to release. Similarly, if the defendant by a representation specifically addressed to the claimant induces the claimant to enter into an unfavourable transaction (such as a contract) with a third party, it is strongly arguable that the claimant should be taken to have suffered damage at the point, and in the place, where the claimant or his or her representative concludes the transaction, with that place being determined according to factual rather than legal criteria."

34. In that passage, Professor Dickinson refers to the opinion of Advocate-General Bobek in Case C-27/17 *AB 2 flyLAL-Lithuanian Airlines v Starptautiska Lidosta 'Riga' VAS* [2019] 1 WLR 669 where he noted:

    i) at [32], that "torts, delicts and quasi-delicts can protect against adverse effects on both the public interest (general damage) and the private interests of individuals (specific damage)"; and

    ii) at [50], that identification of the "place where the harmful event occurred'… must take into account the *scope of protection offered by the substantive provision of law* at issue" (emphasis in original).

35. Professor Dickinson expands on those arguments in "Damage", a contribution to Justin Borg- Barthet, Katarina Trimmings, Burcu Yüksel Ripley and Patricia Zivkovic, *From Theory to Practice in International Law: Gedächtnisschrift for Professor Jonathan Fitchen* (2024), a collection of essays to celebrate the achievements of a very talented private international lawyer who tragically passed away in 2021. At p.86, Professor Dickinson states:

> "The central submission of this chapter is that the concept of 'damage' within EU private international law is an active one which fixes upon the way in which the relevant event brings about its (claimed) effects upon the victim by adversely affecting a legally protected interest of that person to which the claim relates. This opens up the possibility of classifying different kinds of legally protected interests with a view to developing autonomous approaches for locating interference with them".

36. The assistance to be derived from the nature of the legally protected right as a relevant factor when identifying what constitutes direct and immediate damage and where it is

suffered, coheres with wider right-based tort scholarship (e.g. Robert Stevens, *Torts and Rights* (2007)).

37. Approached from this perspective, the tort of malicious prosecution addresses the very specific interest of not being harassed by bad faith litigation before the sovereign court of a particular state. Further:

i) The essential ingredients of malicious prosecution do not identify quantifiable financial loss as a requirement in addition to prosecution by the defendant, a successful outcome for the claimant, the absence of reasonable and probable cause and malice (*Clerk and Lindsell on Torts* 24th ed (2023) [15-13]). This appears to be because the act of commencement of proceedings, with the allegations becoming publicly known, is itself a sufficient actionable interference with the claimant's legally protected interests, and inherently harmful, because of the adverse reputational impact this will have: *Mosley v Associated Newspapers Ltd* [2020] EWHC 3545 (QB), [55]-[60].

ii) The legal costs incurred to defeat the claim are, in essence, a form of mitigation, rather than the direct and primary loss. It is not attractive to suggest that the defendant who defends itself in maliciously prosecuted litigation without incurring fees, or whose fees are paid by a third party, has not suffered any loss by being maliciously dragged into litigation against its will.

iii) The combined effect of i) and ii) supports the conclusion that the primary invasion of the claimant's legal interests occurs at the place the proceedings are instituted, and that being made a defendant to such proceedings is inherently harmful, with the financial costs of defending the suit being secondary or consequential in nature.

iv) The suggestion that being wrongfully made the subject of litigation in a particular place involves a direct and immediate harm in that place is supported by the decision in *AMT Futures Ltd v Marzillier* [2018] AC 439, in which the defendant had procured breaches of exclusive jurisdiction clause in favour of England and Wales between the claimant and its clients. In [2014] EWCA Civ 143, Christopher Clarke LJ stated at [53]:

> "If one looks at the matter more broadly and asks: what was the harm which, in this case, occurred in England, it seems to me impossible to say that it was the failure to issue proceedings here; and, if the harm was that proceedings were issued in Germany, then it was in Germany that the harm was suffered."

v) In the Supreme Court, Lord Hodge at [27] referred to "the direct harm caused by the raising of the German proceedings" and "the expenditure occasioned by the German proceedings". True it is that the relevant expenditure was, presumably, paid to German lawyers, albeit not from German funds. However, the case cannot have turned on whether payment was made to the English branch of an international law firm whose German office conducted the case. The reality is that improperly commencing litigation against someone locks the defendant against their will into an adverse process which will inevitably consume time, money and attention.

vi) This conclusion derives qualified support from the following passage in *Clerk & Lindsell on Torts* 24th (2023):

> "It would seem that malicious prosecutions in a foreign court may be actionable, though the point may often be academic, since the law governing liability is likely to be that of the place where the damage occurred, which in turn will normally be where the foreign court is situated."

vii) This conclusion is consistent with that of Bright J, once it is recognised that the DIFC is to be treated as a separate country from onshore UAE for Rome II purposes.

viii) Finally, it derives at least a measure of support from the Master of the Rolls' observation in *Kwok* quoted at [19] above, because there are very strong links between the claimants' complaint and the place where the malicious proceedings are brought.

38. By contrast, the matters relied upon by the Claimants as constituting damage for Article 4(1) purposes seem at best indirect or consequential damage flowing from the invasion of the legal right not to be wrongfully sued, and to offer a wholly unsatisfactory basis for determining the applicable law:

i) The bank account(s) from which the Claimants paid legal fees is, essentially, a matter of the Claimants' choice, and the case law is hostile to attempts to rely on claimant-selected factors of this kind to determine the place of damage for jurisdictional or applicable law purposes: Case C-12/15 *Universal Music International v Schilling* [2016] QB 967, [34]-[38].

ii) The retainer letter with a law firm may precede the event giving rise to damage (as where a law firm has a continuing retainer under which individual instructions are given over time). For many types of lawyer-client relationship, the client is only obliged to pay for work as, when and to the extent it is done, such that it is the doing of work which, together with the terms of the retainer, create the liability to pay. Further, the signing the retainer may well occur after (and in response to) the commencement of proceedings, giving the claimant the opportunity to influence the law governing the issue of whether it has a claim for malicious prosecution of civil proceedings by determining where the retainer is signed.

iii) The place where the lawyers' work is done involves a haphazard element – as in this case where I am told most of the work was done in London and Australia.

iv) The alleged delays in enjoying the fruits of the Bridge Properties which were said to arise as a factual consequence of the bringing of proceedings and the making of court orders in the DIFC is a classically consequential loss, both conceptually and chronologically, as Bright J has already found in this case.

v) Further, the legal restrictions arising from orders of the DIFC were imposed there, and their "bite" stemmed from the legal jeopardy which non-compliance with that court's orders would have involved before that court, and the enforcement measures open to it.

vi) I would also note that if the Claimants are right, then where a court grants an interim order, but provides a modified regime for compensating loss caused by the order if it later determines it should not have been made (as English law does), a party who has successfully set the order aside but was denied full or any recompense might be

> able to bring a tortious claim for some species of malicious prosecution or abuse of process under some other law to recover what it was unable to obtain under the law of the court which made the order. That is not a determinative factor, but at least gives further pause for thought as to the correctness of the Claimants' argument.

39. Further, the Claimants' construction leaves a very real possibility of the act of commencing proceedings maliciously spawning several torts governed by different laws, dependent on where the lawyers are instructed or the bank accounts from which legal bills were paid. While there may be tort claims where this approach is appropriate (cf. [26] above), that seems a particularly unattractive outcome:

    i) for a claim concerning a wrongful act which is as geographically focussed as the malicious commencement of legal proceedings (in contrast, for example, to the misuse of confidential information to manufacture and sell products in a variety of markets, or where defamatory statements affect the claimant's reputation in a number of jurisdictions); and

    ii) where the decisions which trigger the application of multiple laws are all claimant-sided.

40. Applying Article 4(1) to this singular tort, I am satisfied that the place of the invasion of the protected legal interest (and, in this case, of the primary or direct loss) is the DIFC.

Article 4(2)

41. By way of a fall-back, the Claimants argue that Article 4(2) applies, such that claims between the Bank, the Al Saris, Mr Almheiri, Globe and IGPL GT are governed by on-shore UAE law.

42. This argument was raised in writing by the PCB Defendants in response to the Claimants' unlawful means conspiracy claim, and challenged orally in a brief passage of the transcript by the Claimants on the basis that the Bank is registered in Dubai, and the Al Saris, Mr Almheiri, Globe and MAS are all habitually resident in Sharjah, which are not "the same country" for Article 4(2) purposes.

43. I had not recollected this argument when the Judgment was prepared (it does not feature in the skeleton argument, and the transcript was not available at that time). In the Judgment, I said this at [209(i)]:

> "Mr Justice Bright held that the applicable law was English law: [2023] EWHC 1797 (Comm), [167]. I accept that that is arguably the case. I also accept that it is arguable that Article 4(2) of Rome II displaces the ascertainment of applicable law by reference to where loss was suffered to UAE law so far as the Bank and D10 are concerned (an issue which did not arise before Bright J). I am also satisfied that it is arguable that the applicable law of the unlawful means conspiracy claim is UAE law under Article 4(3) of Rome II. It may be there is an arguable case that BVI law governs the claims (it is not clear to me if anyone is contending for this as a fall-back)."

44. Article 25(1) of Rome II provides:

> "Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation."

45. Elsewhere in the Judgment, however, I accepted the distinction which Mr Trotter had sought to make for this purpose (by reference to Article 25 of Rome II), albeit for the purposes of distinguishing between the law of onshore UAE and the law of the DIFC: see [76].

46. The argument proceeded before me on the common ground that the UAE is a state for Article 25 purposes, which I am willing to accept (for example it is a member state of the United Nations). Mr Trotter's submission in November 2024 was that Globe, IGPL GT, MAS and Mr Almheiri on the one hand, and the Bank on the other, did not have their habitual residence "in the same country", the first three having their residence in Sharjah and the Bank in Dubai (i.e. in different Emirates). The question, however, of whether Sharjah and Dubai each have their "own rules of law in respect of non-contractual obligations" is a complex one. The Claimants' expert Mr Ramadan confirmed that Dubai does not share a judiciary with Sharjah (the former not subscribing to the Federal judicial system, to which the latter is a party). However, the evidence before me is to the effect that there is a single Federal Law of torts in the UAE, the UAE Civil Transactions Law. The result, therefore, is that Dubai and Sharjah share common legislation on tort law, but with two differing court systems allowing for the prospect of conflicting interpretations of that legislation.

47. Professor Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (2008), [3-290] states:

> "The concept of a 'territorial unit' for these purposes does not, it is submitted, require a separate court system, but it does suggest a degree of constitutional separation. Thus, the fact that certain rules concerning non-contractual liability apply only to specific regions within a State does not mean that those regions will automatically constitute one or more separate countries for the purposes of the Regulation. If, however, the requisite degree of constitutional separation exists (most obviously, if a region has its own court system or a legislature with power to prescribe rules concerning non-contractual obligations), the territorial units must be treated as separate from each other, even if they largely share a 'common law', subject to local variations. For these purposes, Scotland and Northern Ireland each constitute a separate country from England and Wales. It is, perhaps, a matter of debate whether Wales constitutes a separate country from England for these purposes."

48. Professor Dickinson was contemplating a situation in which separate territories with their own court systems which had the power to develop the common law of those territories, albeit they shared a significant degree of common legal heritage. The present position is different to that. There is no "common law" of the constituent territories of the UAE. The "rules of law in respect of non-contractual obligations" are to be found in the civil code which has direct legislative force in both Sharjah and Dubai, with court decisions from the two separate territories on the meaning of those provisions having only persuasive rather than precedential effect in their own territory. In my judgment, that is sufficient to

engage Article 4(2) so far as the parties habitually resident in Sharjah and Dubai are concerned.

49. So far as the BVI Companies are concerned, their "habitual residence is their place of central administration" (Article 23(1)):

    i) The DIFC Tenancy Proceedings were commenced in January 2021, when the BVI Companies were under the control of a liquidator appointed by the BVI court. At that point, I am satisfied that their central administration was in the BVI. They were sold to a company owned by the Bank on 6 April 2021 and it is arguable that their place of central administration changed at that point (there being no evidence on this issue). The DIFC Tenancy Proceedings continued after that date, and arguably until 23 March 2022.

    ii) The Globe DIFC Proceedings were commenced on 11 April 2023. It is arguable that the BVI Companies' place of central administration was Dubai at that point and at all material times thereafter (there being no evidence on this issue).

50. I accept for the purposes of this application that Article 4(2) is capable of operating as between some of the parties to the DIFC Malicious Prosecution claims, and not others (*Marshall v Motor Insurance Bureau* [2015] EWHC 3421 (QB), [17]-[18] and *Owen v Galgey* [2020] EWHC 3546 (QB), [40] although cf [29]). It is clear that if the application of Article 4(2) leads to claims between different parties arising from the same event being governed by different systems of law, this factor can be prayed in aid to displace the operation of Article 4(2) by resort to Article 4(3) (*Marshall*, [18]-[19]; *Owen* [40]).

Article 4(3)

51. The Claimants suggested that the PCB Defendants did not raise Article 4(3) at the hearing preceding the Judgment. However, the Claimants did advance oral submissions on Article 4(3) at that hearing, describing it (transcript 13 November 2024) as Mr Cohen KC's anticipated "next port of call". Further, the Claimants did not advance their Article 4(2) argument at the hearing preceding the Judgment, an argument which naturally leads to consideration of Article 4(3). Sensibly, the Claimants anticipated this was likely to be the case, and made further written submissions on Article 4(3).

52. As *Dicey, Morris & Collins* note at [35-028], there is a (strong) temptation to avoid the theoretical difficulty of the "multiple applicable laws" approach "by seeking to locate the 'direct' damage in a single country or by making use of the 'escape clause' in Article 4(3) of the Regulation" (and see also Bright J's observation in *Magomedov v TPG Group Holding (SBS) LP* [2025] EWHC 59 (Comm), [346], although cf *Shenzhen Senior Technology Material Co v Celgard LLC* [2020] EWCA Civ 1293, [61]).

53. I accept that the application of Article 4(3) has been described as "exceptional" and that Article 4(3) sets a "high hurdle" for the party seeking to establish an applicable law under this provision (*Dicey, Morris & Collins*, [35-032]). As Linden J noted in *Owen v Galgey* [2020] EWHC 3546 (QB), [60], Article 4(3) requires that it be "'clear' that there is a 'manifestly' or obviously closer connection with the country other than that which is indicated by arts 4(1) and (2)". Linden J continued at [61]:

> "Article 4(3) is an exception/exceptional in these senses but in my view, there is no additional test of exceptionality and it is therefore not necessary for the court to be satisfied, for example, that the facts of the case are also exceptional or unusual in nature before applying art.4(3) . What is required is the application of the words of Article 4 with an awareness of aims of Rome II. The aim of arts 4(1) and (2) in particular, is to achieve certainty. They will provide the answer in a given case unless they can be displaced. But the Regulation also aims 'to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation.' through art.4(3) , albeit this provision will only operate in a clear and obvious case."

54. I also accept that the place of damage for Article 4(1) purposes can be a factor which supports the identification of another law with a manifestly closer connection under Article 4(3), and Article 4(3) may have the effect of bringing the applicable law back to that which Article 4(1) suggested, but which Article 4(2) displaced: *Marshall*, [19]. On the basis of my findings, this points to DIFC law.

55. Further, the tort of wrongful commencement of legal process is closely related to the circumstances in which the process of court can be legitimately invoked. In *W Nagel v Pluczenik*, [97] in holding that the closely related English tort of abuse of process did not extend to foreign proceedings, Cockerill J held:

> "In the end, however, it appears to me to be out of step with the ethos of the posited tort. It has its roots in the Court's control of its own powers and resources. Thus in the 1698 malicious prosecution decision of *Savile v Roberts* (1698) 1 Ld Raym 374, Holt CJ referred to the ill of people '*mak[ing] use of law for other purposes than those for which it was ordained'*. The law and the purposes are the law and purposes of this court in this jurisdiction. It is not for this court to police or to second guess the use of courts of or law in foreign jurisdictions."

Those same considerations support a close link between a tort of wrongful invocation of legal process and the law of the place where the process is invoked.

56. Further, the scope of the tort has significant implications for the finality of legal determinations in the relevant jurisdiction. The idea that a claim brought on the basis that there had been malicious prosecution of court proceedings in this jurisdiction which was governed by some other system of law (for example a system of law which does not require a claimant in such cases to have succeeded in the original litigation) because legal fees were paid from a bank account in another jurisdiction, or a retainer signed there, or to lawyers based or who worked there, is not an appealing vista.

57. Finally, it has been noted that a malicious criminal prosecution is one in which "the defendant has abused the criminal power of the state" (*Gregory v Portsmouth City Council* [2000] 1 AC 419, 426). That provides a very strong reason why that species of the tort should be governed by the law of the place of the criminal proceedings. While the malicious prosecution of civil claims does not involve invoking the coercive powers of the state quite so directly (cf *Willers v Joyce* [2018] AC 779, [50] and compare *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366, [78(f)] and [104]), courts of civil jurisdiction have coercive powers, and in any event, the commencement of civil litigation involves invoking the machinery of justice provided by

the state. I am not aware of any suggestion that the tort of malicious prosecution applies to the commencement of arbitrations.

58. I accept that the commencement of the two DIFC sets of proceedings involved skirmishes against the background of a much wider commercial conflict which has significant links to the UAE. Those links may well have carried the day for tortious conduct which did not concern the malicious invocation of a state judicial process. However, the specific features and nature of this particular tort provide strong reasons for concluding that the applicable law of such a tort is always the law of the place of proceedings.

59. That conclusion is reached without regard to any additional Article 4(3) impetus which would derive from a differential application of Article 4(2) as between different parties to the DIFC Proceedings and/or for different periods of time. It would derive additional support to the extent that the BVI Companies' habitual residence is in the BVI, on the basis set out in *Marshall* and *Owen*.

Conclusion

60. For these reasons, I have concluded that the law applicable to the claims for malicious prosecution of the DIFC Globe and DIFC Tenancy Proceedings is DIFC law.

61. On the basis of the common ground as to DIFC law which prevailed throughout the hearing and up to the period before the draft judgment was circulated, the law of the DIFC does not recognise a tort of malicious prosecution of civil proceedings, which had the result that the claims for the malicious prosecution of the DIFC Globe and DIFC Tenancy Proceedings are not arguable, nor can those acts constitute unlawful means for the purposes of the tort of unlawful means conspiracy.

62. That brings me to the letter and attachments filed by CE file on 18 February 2025 and which I received on the morning of 19 February 2025 after circulating the draft judgment. The effect of that material is that following a consultation process initiated in May 2024, the DIFC introduced a legislative amendment to reverse (at least to some extent) the effect of the decision in *The Industrial Group Limited v Abdelazim El Shikh El Fadil Hamid* [2022] DIFCCA CA 005 and CA 006 which had held that there was no tort of abuse of civil process under DIFC law. While described by the Claimants' solicitors as a "development in DIFC law since the November hearing", the legislation relied upon ("Law on the Application of Civil and Commercial Laws in the DIFC Amendment Law") was enacted on 14 November 2024, during the hearing, albeit it came into force on 21 November 2024.

63. For present purposes, I will simply note that, without the benefit of any argument on the point, I cannot rule out the possibility that the statute would allow a DIFC court to follow the majority in *Willers v Joyce* [2018] AC 779, and to do so in respect of proceedings commenced prior to 21 November 2024. In circumstances in which this judgment arises from the need to deal with an issue raised, but which could not properly be dealt with, at the November 2024 hearing, by a round of post-judgment written submissions, it is not appropriate to contemplate a yet further round of written submissions. Accordingly, while my finding as to the applicable law will be binding, the content of DIFC law will have to be determined on a future occasion. The result may be that the time and costs devoted to this issue have been wholly unnecessary.