Neutral Citation Number: [2024] EWHC 3298 (KB)

Case No: KB-2024-001363

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2024

Before :

MR CHRISTOPHER KENNEDY KC
(sitting as a Deputy Judge of the High Court)

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Between :

MR SAMI ZOUARI **Claimant**

- and -

MS ANA MARIA MATOS SOARES BILREIRO PAIXO

Defendant

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- -

Mr Tim Jenns (instructed by **Messrs Bracewell (UK) LLP**) for the **Claimant**
Mr Crispin Hayhoe (instructed by **Messrs Starck Uberoi**) for the **Defendant**

Hearing date: 20 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Christopher Kennedy KC
(Sitting as a Deputy Judge of the High Court)

Christopher Kennedy KC:

Introduction

1. The Claimant in this case is a British and French national who lives in Portugal. He has brought this action ('the English claim') against the Defendant, ('Ms Ana Maria Paixão') in connection with the breach of a promissory agreement for the sale of a property in Portugal ('the agreement'). Ms Ana Maria Paixão is a Portuguese national, who lives in London and is the sole Defendant in the English claim. However, the Claimant has additionally brought proceedings for breach of the agreement in Portugal ('the Portuguese claim'). Ms Ana Maria Paixão is also a Defendant in the Portuguese claim, along with her mother and two sisters. I have referred to them collectively as 'the Portuguese Defendants'.

2. By an application dated 18 June 2024, Ms Ana Maria Paixão seeks a declaration that this court has no jurisdiction to try the English claim, alternatively that it should not exercise any jurisdiction it has. I am further invited by her to use the court's power under CPR Part 11.1(6) to set the claim form aside. Her secondary application is that I strike out the claim as an abuse of process, pursuant to CPR 3.4(2)(b). In the further alternative she invites me to use my case management powers to order a stay.

Background

3. The events which gave rise to the dispute between the parties started in May 2022 when the Claimant entered into the agreement with the Portuguese Defendants. It concerned the sale and construction of a villa on a property ('Caminho de Alba Longa, Sintra no.6 and 6-A'). By a notice dated 17 July 2023, the Portuguese Defendants gave the Claimant notice that they wished to cancel the agreement. The Claimant did not accept and, on 7 August 2023, issued the Portuguese claim seeking what, in this jurisdiction, we would describe as specific performance. In the alternative he claimed compensation under Portuguese law for culpable breach of contract - a payment of twice his deposit, the refund of what he had already paid and a penalty of €9,500 per month.

4. Ms Ana Maria Paixão apart, the Claimant did not encounter particular difficulty in serving the Portuguese Defendants. One of her sisters also lived outside Portugal, in Germany, but she accepted service. This was not the case with Ms Ana Maria Paixão. Letters were sent to her in October and December 2023. She acknowledged receipt but no more. In early 2024 the Claimant, through his lawyers, sought the assistance of the Portuguese consulate. The consulate wrote to Ms Ana Maria Paixão and asked her to attend there to accept service. She did not contact the consulate in response.

5. Around the same time as he, through his lawyers, was seeking to serve the Portuguese proceedings, the Claimant also decided to take a different route. On 14 February 2024 his English solicitors, Messrs Bracewell, sent a letter of claim to Ms Ana Maria Paixão, intimating an intention to bring proceedings in England, arising out of the same facts, for conspiracy and unjust enrichment. She replied on 16 February 2024 acknowledging receipt of the letter. She stated that she had no specific knowledge of the matter as it was being dealt with by her mother. The response from Messrs Bracewell, dated 20 February 2024, pointed out that Ms Ana Maria Paixão was a party to the contract and thus involved and asserted that she had chosen not to be a party to the Portuguese claim. Messrs Bracewell stated their view that the Portuguese claim was irrelevant to the

English claim. On 6 March 2024 Ms Ana Maria Paixão reverted, engaging with the dispute relating to the agreement, asserting that the case should be tried in Portugal and also asserting that she had no valuable assets in the United Kingdom. This was something she expanded on in a second letter dated 8 March 2024. Neither letter influenced the Claimant's solicitors.

6. It is a feature of the exchange of correspondence rehearsed at paragraph 5 above, that the Claimant's solicitors did not ask Ms Ana Maria Paixão to accept service of the Portuguese claim and she did not volunteer that she would do so.

7. The English claim was issued on 30 April 2024. The Particulars of Claim were dated 16 May 2024 and served on Ms Ana Maria Paixão on 22 May 2024. None of the other Portuguese Defendants were named as Defendants in the English claim and, as far as I am aware, there has been no attempt to involve them in it.

8. On 4 June 2024 Ms Ana Maria Paixão acknowledged service of proceedings in the English claim but stated, through her solicitors, that she would dispute the jurisdiction on the basis that the subject matter of the dispute was 'firmly located in Portugal and that the Portuguese courts have the inherent jurisdiction to resolve it'.

9. On 14 June 2024 Ms Ana Maria Paixão was served with the Portuguese proceedings whilst she was on a visit to Portugal.

10. On 17 June 2024 Mr Nuno Paixão, the Portuguese Defendants' (including Ms Ana Maria Paixão's) lawyer, sent a communication to Messrs Starck Uberoi, Ms Paixão's English solicitors. Having set out their case on the merits, he asserted that the appropriate jurisdiction to determine the dispute was Portugal. Mr Nuno Paixão pointed out that the property was located and registered there and that that was where the Claimant had issued his first claim. He also relied on a jurisdiction clause in the agreement. He maintained that, whilst the causes of action might be different in Portugal and England, the remedies and orders sought were substantially the same. He raised the risk of double recovery. He described the issuing of the English claim as 'merely tactical'.

11. Messrs Starck Uberoi, made this application the day after Mr Nuno Paixão had sent his letter to them. The application was supported by a statement from Ms Ana Maria Paixão herself and from her solicitor, Mr James Incledon. They make similar points to Mr Nuno Paixão. Mr Incledon draws attention to the absence of any nexus between the dispute and this jurisdiction and maintains that the Claimant is in a position to obtain justice in Portugal.

12. There are three events of importance which post-date the application. First, by a letter dated 19 June 2024, Messrs Strarck Uberoi repeated an earlier invitation that the Claimant withdraw the English claim and pay costs. Messrs Bracewell responded to that letter on 15 July 2024 maintaining that the cause of action pursued in the English court was different. Their letter also suggested that the claims advanced in England were not reliant on there being a breach of the agreement. They further asserted that Ms Ana Maria Paixão had not voluntarily accepted service between October 2023 and June 2024, the implication being that she had sought to avoid service. The letter from Bracewell concluded with the following proposal,

> "Now that the Defendant has accepted service of the Portuguese proceedings and they can advance, the Claimant accepts that the most efficient course would be for the English proceedings to be stayed pending judgment in the Portuguese proceedings or the application of either party. This would avoid the need for further evidence to be exchanged and for a hearing to take place in relation to the Application. In addition, at the end of the stay, these proceedings could be advanced with the benefit of a decision having been made in the Portuguese proceedings."

Messrs Bracewell made no proposal in relation to costs in their letter.

13. On 22 July 2024 Messrs Starck Uberoi replied, maintaining their position that the claim should be discontinued. They did not admit that Ms Ana Maria Paixão had attempted to avoid service of the Portuguese claim. They did however invite the Claimant to discontinue the English claim and suggested that they would not seek their costs if he did so.

14. The final event of importance was the filing by the Portuguese Defendants of a defence in the Portuguese claim. This happened on 30 August 2024. Contrary to the position advanced on her behalf by Mr Nuno Paixão in the letter of 17 June 2024, the Defence seeks dismissal of the Portuguese claim against Ms Ana Maria Paixão on the basis that she is the subject of the English claim. It relies, amongst other things, on the fact that Ms Ana Maria Paixão was served with the English claim before she was served with the Portuguese claim.

Other relevant evidence

15. In support of its application Ms Ana Maria Paixão relies on the statements from herself and Mr Incledon referred to in paragraph 11 above, both dated 18 June 2024 and on a further statement from Mr Incledon dated 25 October 2024. The matters addressed in Mr Incledon's statements have already been sufficiently summarised, save for the list he provided in paragraph 17 of his second statement of eight potential trial witnesses, the majority of whom are Portuguese, all of whom live in Portugal and all of whom are not native English speakers.

16. Ms Ana Maria Paixão's statement does not address her lack of response to the attempts to serve her. Her expressed understanding is that the Portuguese court will now progress the matter towards a trial and she expects to travel to Portugal for that. Whilst this development post-dated her statement, there is no evidence before me addressing the application in her defence in the Portuguese claim to dismiss the claim against her on the basis that she is the subject of the English claim. As things stand therefore, she has extant applications to dismiss both sets of proceedings.

17. The Claimant relies on his own statement dated 4 October 2024 and a statement from his solicitor, Mr John Gilbert, dated 5 November 2024. Paragraph 15 of the Claimant's statement contains his evidence as to his principal motivation for the institution of the English claim,

> As Ms Paixao's refusal to accept service of the Portuguese proceedings was preventing any progress being made to reach a resolution of the situation and my family and I had been left without the home we expected and without the money

> paid to the Sellers and spent on the property, I decided to consider what steps could be taken in England as I knew that Ms Paixao was resident in England and acting from England.

The statement also offers a subsidiary reason for issuing the English claim namely that he considered that Ms Ana Maria Paixão had assets in England that may have been acquired with monies owed to him. He has located £15,000 in shares owned by her. I do not attach a great deal of weight to that reason. It is unconvincing in the context of a dispute where the sums at stake are many times that figure and the primary remedy he seeks is specific performance.

18. The Claimant also set out in his statement (paragraphs 22-23) his understanding that the Portuguese court will make a decision on the request to dismiss his claim in the summer of 2025. He makes the point that, if Ms Ana Maria Paixão's applications here and in Portugal were to be successful, he would be left without a jurisdiction in which to pursue her. For reasons which are relevant to a later part of this judgment, the Claimant does not use the conditional in relation to that scenario; rather he uses the indicative, 'will not be able to pursue any claims'. Finally, the Claimant has repeated in his evidence, that he agrees to a stay of the English Claim but only on the basis that it is the most efficient and proportionate approach, not therefore because Ms Ana Maria Paixão is entitled to it as of right.

19. Mr Gilbert's statement dated 5 November 2024 addresses a proposition contained Mr Incledon's second statement as to the effects upon the Portuguese proceedings of a stay and or a withdrawal of the English claim. He disagrees with Mr Incledon's evidence on this point. It was however common ground between the parties that neither had permission for expert evidence on foreign law and what was behind the statements of both was the advice of their respective Portuguese lawyers not independent expert opinion. In the circumstances I cannot come to a judgment as to the legal effect on the Portuguese claim of any decision I make in the English claim. Ms Ana Maria Paixão has offered undertakings (i) to inform the Portuguese court that the English claim is struck out, were the court to order it and (ii) to withdraw any application disputing jurisdiction/seeking dismissal of the Portuguese proceedings again were the English claim to be struck out. On the face of it, that suggests that she has some control over whether the application for dismissal proceeds in the Portuguese court. However in the absence of expert evidence, I cannot come to a judgment as to the legal effect of that either.

20. After the proceedings the Claimant provided his own unsolicited undertaking that he would credit certain sums recovered in the Portuguese claim against the English claim. The wording follows the wording offered to the court in *Sethia London Ltd v Sethi* [2021] EWHC 367. It is the Claimant's position that it meets the risk of double recovery.

21. Stepping back, it can be seen from the above that both parties agree that, as a minimum, the English claim should be stayed. They disagree about whether it should be struck out and they disagree about who should pay costs.

Argument

22. The submissions of Mr Hayhoe on behalf of Ms Ana Maria Paixão concentrated on the strong connections between the claim and Portugal. It was a Portuguese contract involving a Portuguese property. All the witnesses were either Portuguese or lived in Portugal. That is where the Claimant had commenced proceedings. He relied on these connections in support of his overarching submission that the tests set out by Lord Goff in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] A.C. 460 ('*The Spiliada*'), were met and that Portugal was the appropriate forum. He reminded me of the observations of Lord Templeman in *The Spiliada* to the effect that disputes as to jurisdiction should be dealt with by the court in a proportionate and straightforward manner.

23. Whilst accepting that it was a little strained in its wording, certainly in translation and also accepting that such clauses are not absolute barriers to the English court accepting jurisdiction, Mr Hayhoe separately relied on a jurisdiction clause in the agreement,

> 'Both parties agree that any emerging disputes regarding interpretation, integration and fulfilment of this promissory agreement, the parts (*sic*) agree that the competent Court shall be one of the locations of the property object of the present agreement with express waiver of any other.'

I note that the clause in the agreement following the jurisdiction clause provides that the Portuguese version of the agreement prevails in cases of doubt or discrepancy. I would be surprised if what is in the agreement is the best possible translation from the original. It is however the only translation before me.

24. Mr Hayhoe invited me to find that, whilst the English claim was put as one of unjust enrichment and conspiracy, it was in reality a claim for breach of contract and it was difficult to see how the English claim could succeed unless there had been such a breach. In oral submissions he drew attention to the absence of any other Defendant in the English claim, the lack of detail as to the alleged conspiracy and the similarity of the factual matrix behind each claim. He raised the concern that there might be double recovery.

25. It is common ground between the parties that English courts cannot determine title to or possession of foreign land. Mr Hayhoe submitted that that would be the practical effect of a judgment for the Claimant in the English claim and that that was a further reason not to permit it to proceed.

26. The abuse of process identified by Mr Hayhoe on behalf of Ms Ana Maria Paixão was that the Claimant was pursuing her in two jurisdictions over the same dispute. There was, he argued, no nexus to England and that is the claim which should be struck out. In oral submissions Mr Hayhoe expanded on this point and described the Claimant's behaviour in starting the English claim as 'gamesmanship'.

27. Mr Hayhoe relied on the judgment of Sir Nicholas Browne-Wilkinson VC *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank* [1989] 3 All ER 65. In that case the Claimant had brought proceedings against the Defendant in both England and Queensland. The proceedings arose out of the same subject matter, an agreement for the placement of shares. At p.69g-j Sir Nicholas Browne-Wilkinson

rejected the argument of counsel for the Claimant that this situation only engaged the issue of which forum was the most appropriate,

> "Counsel for the plaintiff sought to approach this case as though it was simply one in which one applied the rules of forum conveniens as now stated in *Spiliada Maritime Corp* v *Cansulex Ltd, The Spiliada* [1986] 3 All ER 843, [1987] AC 460. In my judgment it is not as straightforward as that. What we have in this case, and so far as I know it has not previously arisen, is a case in which the same party has initiated proceedings in two separate jurisdictions, those proceedings raising either at the present time or inevitably in the future exactly the same issues. The plaintiff, having itself invoked the two jurisdictions, now applies for a stay of the counterclaim (which naturally arises out of the claim) on the terms that it merely stays its own existing action in this country. In my judgment, where a plaintiff seeks to pursue the same defendant in two jurisdictions in relation to the same subject matter, the proceedings verge on the vexatious. I am not suggesting in any sense that the plaintiff in this case was being deliberately vexatious, but the outcome is vexatious."

It was Mr Hayhoe's submission that the same was true in this case.

28. Although Mr Hayhoe suggested orally that it was proper for Ms Ana Maria Paixão, to make her best defence in both jurisdictions and thus to apply to dismiss the Portuguese claim on the basis that she was also the Defendant in the English claim and to make a like application in Portugal, the subsequent provision of an undertaking indicates at least a measure of change in that position.

29. I asked Mr Hayhoe about the fact that it proved difficult to serve Ms Ana Maria Paixão with the Portuguese claim. He told me that, having had nothing to do with the transaction, she wanted nothing to do with the litigation and invited me to find that that was an understandable, if ultimately incorrect, position to adopt.

30. On behalf of the Claimant, Mr Jenns relies on the fact that Ms Ana Maria Paixão was served as of right with the proceedings in the English claim at a time when she was not a party to the Portuguese claim because it had not been possible successfully to serve her. He records the Claimant's expectation that Portugal would become an available forum for the trial of the dispute about the agreement. His submission is not only that that expectation has been confounded by the contents of the Defence and the application to dismiss the Portuguese claim but that what he describes as the 'real risk' that the court might agree with her, means that I should find that Portugal is not an available forum. If that is so, then I do not need to consider the strength of the relative factors for and against England and Portugal.

31. The way Mr Jenns puts the question of 'availability' is that I have to be satisfied on the evidence at today's date that the Portuguese court will be available in the sense that it will have jurisdiction. He submitted that the burden was on Ms Ana Maria Paixão to establish that and she had failed.

32. In his skeleton Mr Jenns has drawn my attention to the observations of the authors of Dicey Morris & Collins 16th edition para 12-031, that an undertaking to submit to the jurisdiction of a foreign court can make it 'available' but, if that undertaking is given after proceedings have started, that may have implications for costs.

33. The Claimant did not advance a case that there were factors that made England and Wales a more appropriate forum than Portugal or that the Claimant would face substantial injustice if his claim were tried there. He did not however accept that the jurisdictional clause was applicable as it only related to disputes arising out of the interpretation, integration and fulfilment of the agreement and the English claim did not fall within the scope of that provision. He cited the absence of any expert evidence from Ms Ana Maria Paixão as to the scope of the clause.

34. Mr Jenns submissions in answer to the point that the dispute concerned a title to foreign land were similar to those in relation to the jurisdictional clause - the English claim was not principally concerned with references to title. However he also relied on the decision of the Court of Appeal in *Hamed v Stevens* [2013] EWCA Civ 911 where the Court dismissed an application to apply the exclusionary rule to a dispute arising out of a contract of sale relating to a property in Egypt. There it was held that the issue must relate directly to title and an action based on a contract could proceed.

35. Mr Jenns implicitly accepts that commencing concurrent proceedings might be an abuse of process but invites me to find that that is a matter which is dependent on the facts of each particular case. He relied on the judgment of the Court of Appeal in *Municipio de Mariana v BHP Group plc [2022] EWCA Civ 951*. That case concerned the collapse of a dam in Brazil. The Claimants brought proceedings in the High Court against an English and an Australian company. Those Defendants applied to strike the English proceedings out on the basis that other proceedings in Brazil would make the English proceedings unmanageable.

36. At paragraphs 170-178 of the judgment, the Court of Appeal took the opportunity provided by the complex facts of the case to re-state the general principles which apply to an application for abuse of process. Mr Jenns relies in particular on the final paragraph of that section, in support of his submission that these cases require an examination of all the circumstances and that the remedy of strike out should only be applied in clear and obvious cases,

> "178. Finally, but importantly for present purposes, litigants should not be deprived of their claims without scrupulous examination of all the circumstances and unless the abuse has been sufficiently clearly established: "the court cannot be affronted if the case has not been satisfactorily proved" (see *Alpha Rocks Solicitors v Alade [2015] EWCA Civ 685, [2015] 1 WLR 4535 at para. [24]* ; *Hunter* at p. 22D; *Summers v Fairclough Homes Ltd [2012] UKSC 26, [2012] 1 WLR 2004 at para. [48]*). Thus it has been stated repeatedly that it is only in "clear and obvious" cases that it will be appropriate to strike out proceedings as an abuse of process so as to prevent a claimant from bringing an apparently proper cause of action to trial (see for example *Wallis v Valentine [2002] EWCA Civ 1034 at para. [31]* , approving the dicta of Simon Brown LJ in *Broxton v McCelland [1995] EMLR 485 at pp. 497-498*); *JSC BTA Bank v Ablyazov [2011] EWHC 1136 at para. [10]* ; *Optaglio Ltd v Thomas Tethal [2015] EWCA Civ 1002 at para. [63]*)."

37. Mr Jenns invited me to view the observations of Browne-Wilkinson V-C in *Australian Commercial Bank v ANZ Bank* as dependent on the facts in that case. He cited the judgment of His Honour Judge Raymond Jack Q.C., sitting as a judge of the High Court, in *Merrill Lynch, Pierce Fenner & Smith Inc v Raffa* [2001] C.P. Rep 44, to the effect

that the former case was an application of principle but did not establish a universal rule in relation to concurrent proceedings,

> "The reason why two sets of proceedings in respect of the same subject matter will normally be vexatious is that it amounts to a harassment of the defendant to make him fight the same battle twice, with the attendant multiplication of costs, time and stress. But, in my view, it will not be vexatious, nor will an election be called for, where the claimant has a sufficient justification for bringing the two sets of proceedings. The passage in Dicey & Morris provides examples of when that may be so."

That is consistent with the principles set out by the Court of Appeal in *Municipio de Mariana v BHP Group plc* in particular that all the circumstances of the case should be scrupulously examined.

38. Mr Jenns further relied on the guidance given by the Court of Appeal in *Municipio de Mariana v BHP Group plc* in respect of the way in which forum non conveniens factors are capable of being relevant to an abuse argument. The Court of Appeal acknowledged at paragraph 197 of the judgment, that those factors might provide evidential support for an argument that the proceedings had been brought for the improper collateral purpose of unfair harassment but they did not consider that the factors had any other relevance. In particular the risk of inconsistent judgments and logistical difficulties would not be matters to be raised in support of an application to strike out for abuse of process.

39. On behalf of the Claimant it was suggested that it is rare for viable claims to be struck out as an abuse of process. Striking out a valid claim as an abuse of process should thus be seen as a last resort.

40. The Claimant's position is that, whilst the factual background to the English and Portuguese claims is the same, the causes of action are different. He relied on *Sethia London Ltd v Sethi*, a decision of Mr Andrew Hochhauser QC sitting as a deputy judge of the high court, in support of the proposition that, backed up by appropriate undertakings against the risk of double recovery, the English court can entertain a claim which may overlap with a claim arising out of the same facts in a different jurisdiction, providing that judgment on one did not amount to an election. That case concerned an action on a dishonoured cheque in Dubai and an action based on a loan agreement governed by English law. The loan agreement in that case specifically envisaged that the parties might take action in different jurisdictions.

41. Having offered a stay to permit the Portuguese claim to proceed first it is the Claimant's position that this application is neither appropriate nor necessary. I asked Mr Jenns how the Claimant could win in England if he lost in Portugal. He invited me not to speculate about that.

Discussion

42. I have considered the application under CPR Part 11 first.

43. The starting point for any consideration of the issue of forum non conveniens is the well-known summary of the law provided by Lord Goff in *The Spiliada*, [1987] A.C. 460 at 476C,

> "The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."

44. There are two matters I have to determine (i) which of England and Portugal is the more appropriate forum and (ii) whether Portugal is 'available'. The burden is on Ms Ana Maria Paixão in relation to both propositions, although I do not consider this a case where the incidence of the burden is relevant to my decision. The time at which the application falls to be considered is the time of determination of the application.

45. I find that Portugal is clearly the more appropriate forum. It is where the property is located. It is where the agreement was entered into. All the relevant witnesses are either Portuguese or have a connection with Portugal. It is where the Claimant himself first commenced proceedings. I have little doubt that there will be Portuguese documentation in addition to the agreement, which will need to be considered at the trial and that there will be matters of Portuguese law to consider. There is, by comparison, little if any connection between the agreement, the dispute and this jurisdiction. Justice will be achieved in Portugal at substantially less inconvenience and expense.

46. The English claim is acknowledged to be founded on the same facts as the Portuguese claim. I am not satisfied that the availability of different causes of action offers the Claimant any advantage in this jurisdiction, certainly nothing which would alter the balance. It appears that the Claimant himself does not attach significant separate weight to his causes of action here as he commenced proceedings against the Portuguese Defendants in Portugal and gave no thought to making a second claim in England until he encountered his difficulties with service of Ms Ana Maria Paixão. He has not sought to involve the other Portuguese Defendants in the English claim.

47. Given my findings on appropriateness generally, I do not need to determine the relevance of the jurisdiction clause or the issues of whether or not the dispute concerns title to foreign land and, if so, what the effect of that is.

48. The Claimant's position is that, by reason of Ms Ana Maria Paixão's application to dismiss the claim, I should find that Portugal is not an available forum. Her application might be successful and, if that were to happen, Portugal would not be available as a forum. I do not agree with that analysis. Portugal is an available forum which is seised of the case. If a decision were subsequently to be made in Portugal which barred the Claimant from access to the Portuguese courts there, then it might be judged unavailable. That however would be a matter to be considered at that time and in the light of the reasons for the decision which led to that outcome.

49. The availability of Portugal as a forum is demonstrated by the fact that the Claimant is offering a stay of the English claim to permit the Portuguese claim to proceed. That is an implicit acknowledgment of its availability. In his skeleton argument Mr Jenns seeks to finesse this point by suggesting that Ms Ana Maria Paixão cannot simultaneously suggest that Portugal is available whilst applying for the dismissal of his claim there. That may weaken her ability to make that argument but it does not affect the reality of the position.

50. In fact, the situation in which the Claimant finds himself was anticipated by Lord Goff in *The Spiliada* [1987 A.C.] 460. He addressed it at p.482E-F in the context of the way the court should treat a legitimate personal or juridical advantage obtained by commencing proceedings in England and Wales,

> "Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings…simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the appropriate available forum."

And then at 483C-D

> "I do not think that an English court would, in ordinary circumstances, hesitate to stay proceedings brought by one [party to a road accident] against the other in this country merely because he would be deprived of a higher award of damages here.
>
> But the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice; and these considerations may lead to different conclusions in other cases. For example, it would not, I think, normally be wrong to allow a Plaintiff to keep the benefit of security obtained by commencing proceedings here, whilst at the same time granting a stay of proceedings in this country to enable the action to proceed in the appropriate forum."

51. The Claimant has the benefit of the security of commencing proceedings here against the contingency that Ms Ana Maria Paixão's application to dismiss the Portuguese claim on the basis of the existence of the English claim succeeds. At the same time, in my judgment, the appropriate order in response to Ms Ana Maria Paixão's application under CPR Part 11 is to declare that the court will not exercise its jurisdiction and to stay these proceedings to enable the action to proceed in Portugal.

52. I turn to consider abuse of process. The chronology, in particular the account of the unsuccessful attempts between October 2023 and June 2024 to serve Ms Ana Maria Paixão with the proceedings in the Portuguese claim, coupled with the absence of any satisfactory explanation from her, have led me to find that she was indeed avoiding service. I accept that that her avoidance was the Claimant's motivation for commencing the English claim and I accept that it was a reasonable strategy to adopt in the circumstances.

53. Ms Ana Maria Paixão was not a party to the Portuguese claim at the time the proceedings in the English claim were served and she had not demonstrated that she was willing to be a party. I cannot say whether or not the service of the English claim was the cause of Ms Ana Maria Paixão accepting service of the Portuguese claim but that is now what has happened.

54. Having accepted service in the Portuguese claim and made this application to stay and strike out the English claim, Ms Ana Maria Paixão then made an application to dismiss the Portuguese claim. She is not in a position to criticise others for gamesmanship.

55. For the reasons set out in the paragraphs above this is not the sort of clear and obvious case where it would be appropriate to strike the claim out as an abuse of process and I decline to do so.

56. Can I conclude by thanking both counsel for their assistance in this matter.