Neutral Citation Number: [2020] EWHC 1846 (QB)

Case No: QB-2019-1331

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2020

Before:

MR JUSTICE JAY

- -

Between:

HAMIDA BEGUM (on behalf of MD KHALIL MOLLAH)	**Claimant**
- and –	
MARAN (UK) LTD	**Defendant**

- -
- -

Richard Hermer QC and Rachel Toney (instructed by **Leigh Day**) for the **Claimant**
Robert Bright QC and James Goudkamp (instructed by **Ince Gordon Dadds LLP**) for the **Defendant**

Hearing dates: 29th and 30th June 2020

- -

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.

.....

MR JUSTICE JAY

MR JUSTICE JAY:

Overview

1. On 30th March 2018 Mr Mohammed Khalil Mollah ("the deceased") fell to his death whilst working on the demolition of a defunct oil tanker ("the vessel") in the Zuma Enterprise Shipyard ("the yard") in Chittagong (now Chattogram), Bangladesh. On 11th April 2019 the deceased's widow issued proceedings claiming damages for negligence under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976; alternatively, under Bangladeshi law. The scope of the proceedings has subsequently been broadened inasmuch as draft Amended Particulars of Claim advance a cause of action in restitution: more precisely, unjust enrichment.

2. These proceedings have not been brought against the owner of the yard and/or the deceased's employer. Both are Bangladeshi entities. Maran (UK) Ltd ("the defendant") is a company registered in the UK and, by way of highly compressed summary of the claimant's pleadings, it is alleged was both factually and legally responsible for the vessel ending up in Bangladesh where working conditions were known to be highly dangerous.

3. On 28th February 2020 the defendant filed an Application Notice to strike out the claim and/or for summary judgment under CPR Part 24.2. The parties are agreed that in determining this application my scrutiny should be directed to the version of the draft Amended Particulars of Claim served on 18th May.

4. The defendant's application raises a number of issues but the principal focus of the oral argument has been whether the draft Amended Particulars of Claim disclose viable claims in English law on the two bases pleaded, namely in the tort of negligence and in unjust enrichment. Furthermore, given that the requirements of CPR Part 24.2 are less onerous from a defendant's perspective than those of Part 3.4(2)(a) (but, as the claimant would emphasise, are stringent enough), it seems sensible to consider the former rather than the latter. In any case, both parties rely on evidence which would not be admissible on a strike-out application.

Summary Judgment: the Test

5. Summary judgment may be ordered under CPR Part 24.2(a) only if the court considers that the claimant has no real prospect of succeeding on the claim. This has been explained in various authorities using slightly different language but ultimately the issue is whether the court is able to conclude, without conducting a mini-trial or anticipating what the processes of disclosure and receiving oral evidence may provide by way of further enlightenment, that the claim is "bound to fail": see Lord Collins in *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804, at paras 80 and 82, and Lord Sumption in *Brownlie v Four Seasons* [2018] 1 WLR 192, at para 5. In *Sutradhar v Natural Environmental Research Council* [2006] 4 All ER 490 Lord Hoffmann pithily encapsulated the matter in these terms:

> "6. I therefore approach this appeal on the basis that the claimant's allegations of primary fact must (unless plainly fanciful, which is not the case here) be accepted as true and allowance must be made for the possibility that further facts

> may emerge on discovery or at trial. The question is whether, on these assumptions, he has a real prospect of success. For this purpose, I shall first set out the facts as alleged in the statement of claim together with some incontrovertible background material which is either contained in the evidence or common general knowledge. I shall then consider whether as a matter of law there is any prospect of the claimant being able to establish a cause of action."

The Facts

6. What follows is not a narration of the facts that would necessarily be found at any trial but my assessment of the claimant's case taking the available evidence at its reasonable pinnacle and giving her the latitude referred to by Lord Hoffmann. This account also reflects the very pragmatic approach adopted by Mr Robert Bright QC in his oral argument.

7. The vessel, known as the "MARAN CENTAURUS" for the last 13 years of her working life, was from 2004 to August 2017 registered to Centaurus Special Maritime Enterprise ("CSME"), a company incorporated in Liberia and part of the Angelicoussis shipping group. All the shares in CSME are directly owned by another company within the same group, Maran Tankers Shipholdings Ltd ("MTS"), incorporated in the Cayman Islands. Pursuant to an Operating Agreement made on 9th February 2009 between CSME and Maran Tankers Management ("MTM"), a company incorporated in Liberia but with a place of business in Greece, MTM agreed as independent contractor and not as agent to operate and manage the vessel.

8. By an Agency Agreement made between MTM and the defendant on 1st August 2013, the latter agreed to provide agency and shipbroking services to MTM in respect of 29 vessels. By clause 2 of that agreement, the defendant agreed to carry out a number of functions on behalf of MTM including "to act as chartering broker", "to collect … all proceeds realised from the employment of the Ships" and "to attend and deal with the insurance of the Ships". It has been pointed out that the sale of vessels for the purposes of demolition or otherwise may not form part of the defendant's express agency responsibilities under the agreement, but in my view clause 2(k) is probably wide enough to encompass these. What is clear from the Agency Agreement read as a whole is that, as one might expect, the defendant acts under the direction and instruction of MTM.

9. By the summer of 2017 the vessel had come to the end of its useful life and had to be sold for demolition. Rather than deal directly with shipbreakers in India, Pakistan, Bangladesh, Turkey and China, it has been standard practice for decades for shipowners, acting through managers and/or agents, to contract with demolition cash buyers who assume the credit risk. The owners act through brokers or intermediaries - in this case, Clarksons. So it came about that in August 2017 the defendant made enquiries, obtained quotations for the vessel's sale, and conducted the negotiations for the sale. The highest bidder was Hsejar Maritime Inc ("Hsejar"), a company incorporated in Nevis. The sale was to be "as is" in Singapore.

10. On 24th August 2017 CSME agreed to sell the vessel to Hsejar pursuant to a Memorandum of Agreement ("the MoA"). The purchase price was over $16M with

Hsejar's obligations under the MoA being guaranteed by Wirana Shipping Corp Pte Ltd, a company incorporated in Singapore and which the claimant contends was the "real" buyer. The defendant was not a party to this agreement. In my view, there is no evidence that the MoA was other than an arms' length transaction made for proper value or that there was any overt collusion between the parties. By clause 22 Hsejar agreed that the sale was to be for demolition purposes only and that it would only sell the vessel to a "ship breaker's yard that is competent and will perform the demolition and recycling of the vessel in an environmentally sound manner and in accordance with good health and safety working practices".

11. Title to the vessel was in due course transferred to Hsejar and the sums due under the MoA were paid by Wirana in a number of tranches. On 5th September 2017 Hsejar took delivery of the vessel which was reflagged from Greece to Palau, its name was changed to EKTA, and a new crew was installed: from that moment no entity within the Angelicoussis shipping group had any direct involvement with it. The vessel left Singapore on 22nd September 2017 and was beached at Chattogram on 30th September. The vessel must have come under the ownership of the yard at about that time but the deceased's employer is not known.

12. The evidence is that the deceased had been working in shipbreaking continuously since 2009. He worked for at least 70 hours a week for low pay in highly dangerous conditions. His fatal accident happened when he fell from a height and sustained multiple injuries.

13. For the purposes of this application only, the defendant accepts that the "beaching" method of demolition carried out in India, Pakistan and Bangladesh since 1960 or thereabouts is an inherently dangerous working practice. The evidence of Ms Ingvild Jenssen and the claimant's expert, Mr Nicholas Willis, demonstrates that this method has been the subject of international concern for years, and they say that the yards in Chattogram are particularly egregious. Para 17 of Ms Jenssen's witness statement, although not specifically directed to working practices at this deceased's workplace, encapsulates these concerns:

> "According to the International Labour Organisation (ILO), shipbreaking is one of the most dangerous jobs in the world. When conducted on tidal beaches, without proper infrastructure to allow for rapid emergency response and safe use of heavy lifting cranes, the danger workers are exposed to, of course, increases. Carried out in large part by the informal sector, shipbreaking in South Asia is rarely subject to occupational health and safety controls or inspections. Unskilled migrant workers are deployed by the thousands to break down the vessels manually. Without protective gear, they cut wires, pipes and blast through ship hulls with blowtorches. The muddy sand and shifting grounds of tidal flats cannot support heavy lifting equipment or emergency access, and accidents kill or injure numerous workers each year."

14. The claimant's key evidence, including the evidence of her solicitor, Mr Martyn Day, invites the court to draw the inference that the defendant knew that the vessel would be broken up in Bangladesh rather than anywhere else from two factors: namely, the

level of the price paid by Hsejar in August 2017 (a lower price would have signified onward sale to a reputable yard) and the quantity of fuel oil left on the vessel when it was delivered. For the purposes of this application and in the absence of evidence to the contrary, I was minded to draw this inference. In the event, Mr Bright accepted in terms that I should determine this application on the premise that his client was aware of the ultimate destination of the vessel. His realistic approach – without prejudice to his submission that the issue would be challenged at trial – has served to abbreviate the process.

15. Within a feasible range of Singapore, outside South Asia the only reputable yards capable of breaking up oil tankers were in China. According to Mr Willis, the MARAN CENTAURUS was too large to be broken up in Turkey, where Mr Bright submitted safe working practices are deployed. According to para 13 of Ms Jenssen's statement, over the past ten years more than 70% of the approximately 800 vessels that reach the end of their operating lives annually – representing 80-90% of the tonnage – are broken up using the "beaching" method. An analysis of table 2.5 in the UNCTAD Review published in 2019 and containing data for the previous year shows that, out of the nearly 11 million tonnes of oil tankers demolished in 2018, only 80,000 tonnes were broken up in Chinese and Turkish yards. This evidence serves to fortify the claimant's case on the issue of duty although Mr Bright used it in support of a submission on breach: given that nearly all vessels ended up in South Asia, it could not be said that his client was deviating from standard practice. I reject that submission on the straightforward basis that if standard practice was inherently dangerous, it cannot be condoned as sound and rational even though almost everybody does the same. I also reject any suggestion that South Asia was the only option as a matter of practical reality.

16. Had the vessel been broken up in China, the sale price would not have been calculated at $404 per net long ton but somewhere in the region of $255 per net long ton.

17. There is also an issue between the parties as to the degree of control, if any, that the defendant had over the sale of the vessel. Mr Willis' report asserts that those in the Sale and Purchase business would have regarded the defendant as acting as "principals" in relation to this transaction. Commercial people rather than lawyers no doubt use terminology of this sort, but I agree with Mr Bright that if what the contracts provide are an end of the matter the defendant acted as sub-agent for the registered owner. Mr Willis agrees that the defendant must have received an instruction from the owner to sell the vessel at this particular time. However, in his opinion:

> "From the evidence that I have seen, it appears they had a high degree of autonomy in those negotiations. It certainly appears that they made a decisive choice, or a series of choices, which led to the ship being sold for guaranteed demolition to Wirana at a price which meant that Chittagong was the only possible destination for the Vessel."

18. A further written submission by Mr Richard Hermer QC develops the issue in these terms:

> "'Control' in this context can take a number of legally relevant forms, each of which may be sufficient to establish a duty of care, all of which are dependent on what the facts reveal. At its highest, it may be revealed (as Mr Willis suspects) that the Defendant enjoyed literal control over the negotiations – setting the price, effectively selecting Chittagong, determining the terms of the agreement, giving approval etc. At the other end of the scale it may be that disclosure will reveal that the 'control' exercised in an 'instrumental' role was in 'advising' Mr Angelicousis [sic] on the negotiation (certainly sufficient to establish liability if reliance was placed on that advice). If the Defendant took the steps that resulted in the sale going ahead in the terms agreed then it matters not that they were acting as agents for others – 'agency' is not a defence in English law, it is equally irrelevant that others may also be jointly liable for their role in the negotiations."

19. For the purposes of this application only, Mr Bright's principal argument proceeded on the basis that I could take "control" at its highest and assume that the defendant had autonomy over the sale. By making this concession he was accepting that it was at least arguable that the commercial realities went further than the four corners of the Operating Agreement and the Agency Agreement. As I put to Mr Bright in oral argument, his concession meant that the position of the defendant is legally indistinguishable for these purposes from that of MTM (on further reflection, I think that it is probably legally indistinguishable from that of the owner). Mr Bright submitted in the alternative that the defendant's obligations and functions went no further than the black letter of the contracts, and that if necessary (in the event that his primary case should fail) its alleged duty of care should be analysed on that premise. Given Mr Willis' expert evidence, the paucity of evidence emanating from the defendant in support of its application and that disclosure has not taken place, I would reject this alternative submission. There is a real prospect that an examination of the complete evidential picture at any trial would support the high watermark of the claimant's case on control.

Synopsis of the Issues

20. The following issues arise for my determination:

    (1) Did the defendant owe a duty of care to the deceased (or, at the very least, does the claimant have a real prospect of establishing the existence of such a duty on the facts I have outlined)?

    (2) Was the defendant unjustly enriched by the deceased (ditto)?

    (3) Is the claim statute barred (or, at the very least, has the claimant a real prospect of establishing that it is not)?

21. A number of sub-issues arise under (2) and (3) above which will be identified and addressed below.

Duty of Care

22. For the purposes of this application, the defendant is content to proceed on the basis of English law principles.

The Claimant's Pleaded Case

23. I set out the relevant portions of paras 88-90 of the Amended Particulars of Claim:

> "88. At all material times, the Defendant owed the Deceased a common law duty of care. The duty of care required the Defendant to take all reasonable steps to ensure that its negotiated and agreed end of life sale and the consequent disposal of the Vessel for demolition would not and did not endanger human health, damage the environment and/or breach international regulations for the protection of human health and the environment.
>
> 89. The Claimant contends that the duty of care falls within well recognised categories of the tort of negligence. In particular, it concerns the duty owed by a party who was fully aware, by virtue of their position within the international shipping industry that their act/omissions would directly expose highly vulnerable third parties to the risk of death and very serious injury. Alternatively the Claimant avers that it would be just and reasonable to impose a duty of care.
>
> 90. In support of the existence of such a duty, the Claimant relies on the following facts in particular:
>
> 90.1. The Deceased is connected to the Defendant in that he was a worker tasked with dismantling the Vessel, a ship previously managed and operated by the Defendant/s, using the beaching method effectively selected and condoned, by the Defendant (see above: the Defendant knew or ought to have known that the Vessel could only have been destined for breaking on the beaches of Bangladesh);
>
> 90.2. The risks of serious and/or fatal injury to workers such as the Deceased were foreseeable by the Defendant for the reasons set out above. …
>
> 90.3. It is fair just and reasonable to impose a duty of care in the present circumstances not least
>
> because:
>
> 90.3.1. The problems associated with shipbreaking in countries with weak regulatory systems, low labour costs and limited environment enforcement have been widely recognised. It is frequently associated with fatalities and injuries due to the unsafe conditions in which this work is carried out. It is the source of environmental damage due to the poor management

of substances such as asbestos, PCBs and heavy metals which are frequently found on ships;

90.3.2. Various international institutions, NGOs and civil society organisations have sought to curb this exploitative practice due to these adverse effects on humans and the environment, but the practice has continued largely unabated;

90.3.3. Ship owners and ship managers, such as the Defendant, make a profit from selling end-of-life vessels to shipbreaking yards in South Asia, instead of paying for their disposal at installations with high standards of health and safety, and environmental protection. If the shipping industry chose to dispose of the ships in a responsible manner, shipbreaking yards would be forced to improve their methods and conditions, thereby protecting workers such as the Deceased;

90.3.4. Instruments of international law and European law have sought to regulate the disposal of ships in a manner which is not damaging to human health and the environment because of lax regulation or poor enforcement of regulation in countries such as Bangladesh. However, the impact on beaching has been limited due to the inherent difficulty in regulating an international industry such as shipping; and

90.3.5. The EU Ship Recycling Regulation came into force on 30 December 2013 to create a list of approved installations for the recycling of ships. The regulations started applying on 31 December 2018, but only ships flying a flag of a member state come within their scope. The Ship Recycling Regulation recognises the difficulty of regulating the practice of shipbreaking on beaches. In the preamble, the Regulation specifies:

"(2) The mechanisms for monitoring the application of, and enforcing the current Union and international law are not adapted to the specificities of ships and international shipping."

"(7) The purpose of this Regulations is also to reduce disparities between operators in the Union, in the OECD countries and in relevant third countries in terms of health and safety at the workplace and environmental standards and to direct ships flying the flag of a Member State to ship recycling facilities that practice safe and environmentally recycling sound methods of dismantling ships instead of directing them to substandard sites as is currently the practice."

"(22) Since the objective of this Regulations, namely to prevent, reduce or eliminate adverse effects on human health

> and the environment caused by the recycling, operation and maintenance of ships flying the flag of a member State, cannot be sufficiently achieved by the Member States due to the international character of shipping and ship recycling, but can rather by reason of its scale and effects, be better achieved at a Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union."
>
> 90.3.6. For the avoidance of doubt, it is not averred that the Ship Recycling Regulation applies to the Defendant since (i) its provisions had not yet come into effect at the time of the material events (ii) to the best of the Claimant's knowledge it is believed that the Vessel did not fly a flag of a Member State in that at the time of the sale and the time of demolition the Vessel was re-flagged by Palau precisely to avoid the burden of regulation such as the Shipment of Waste Regulation or the Ship Recycling Regulation (see also above in relation to the MoU backlisting of Palau). Nevertheless, the factors listed above strongly support the averment that a common law duty of care owed by the Defendant towards the Claimant has now crystallised and is fair, just and reasonable."

24. I have two observations at this stage. The first is that the claimant's pleaded case does not seem to be Mr Hermer's last word on the law. Paras 88-90 do not mention the term "control", yet this was the centrepiece of his oral argument. These paragraphs appear to suggest that foreseeability is sufficient to found a duty of care (that part of the pleading directed to the issue of whether it would be fair, just and reasonable to impose a duty do little more than reformulate the defendant's foresight), but the authorities are clear that even if it exists to a high degree it is not. Furthermore, I cannot see the relevance of EU Regulations which were not in force at the material time and would not have applied to the defendant even if they had been.

25. Para 91 of the Amended Particulars of Claim sets out the claimant's case on breach of duty in five respects:

> "91. The Defendant breached its duty of care towards the Deceased in that it:
>
> 91.1. Negotiated and agreed and/or was instrumental in agreeing and approving an end of life sale for demolition of the Vessel with particulars of sale such that the Defendant knew or ought to have known that the Vessel could only have been destined for demolition on the beaches of Bangladesh where working methods are known to be environmentally unsound and unsafe for workers;
>
> 91.2. recommended the terms of the end of life sale for demolition to the owners of the Vessel and/or supervised the performance of the sale agreement, in circumstances where they knew or ought to have known that the Vessel was to be

> beached and demolished as a method of disposal in Bangladesh, in circumstances where this is known to be environmentally unsound and unsafe for workers;
>
> 91.3. failed to take into account, or give sufficient importance, to the risk to workers such as the Deceased in the dismantlement of the Vessel using the beaching method;
>
> 91.4. failed to take steps, or recommend steps to the owner, to avoid endangering human health through the end of life disposal of the Vessel; and
>
> 91.5. failed to take steps to ensure that the end of life sale of the Vessel and performance of the end of life sale and consequent disposal of the Vessel for demolition, met or was likely to meet reasonable standards of health and safety and environmental protection."

26. Thus, the claimant's case is based on a mixture of acts and omissions.

The Claimant's Skeleton Argument

27. The heart of Mr Hermer's argument on the law is to be found in paras 37-38 of his skeleton argument:

> "37. Yet, once it is accepted that the Claimant's case on the facts is that the Defendant had a decisive role in the decision that led to the Deceased's death, it is obvious that this cannot possibly be categorised as a case of 'pure omissions' nor is it remotely akin to the category of cases concerning the liability of the emergency services for the criminal acts of third parties. Equally, it is plain that the Claimant does not premise her case on existence of foreseeability of injury alone.
>
> 38. In this case the existence of a duty can be readily established on orthodox principles established in the House of Lords since at least the *Dorset Yacht* case and the subsequent line of authorities regarding damage caused by third parties. These include a line of cases, establishing what is now considered trite law, that liability in tort may extend to third parties suffering damage as a result of a party's negligence, in particular, when that party ought reasonably to foresee that in providing a service for another he may place other persons at risk of direct physical harm. In such cases, that party will generally owe those third parties a duty of care: *Clay v A J Crump & Sons Ltd* [1964] 1 Q.B. 533; *Rimmer v Liverpool City Council* [1985] Q.B 1; *Pearson Education Ltd v Charter Partnership Ltd* [2007] EWCA Civ 130; [2007] B.L.R 324. Architects and engineers, for example, whose negligent design of a building endangers the client, his visitors and casual

> bystanders may similarly be liable to ensuing injuries, whoever happens to be the victim."

28. The concept of "decisive role" is equivalent to "control", and in my view its application to cases such as *Dorset Yacht Co. Ltd. v Home Office* [1970] AC 1004 is clearly understood. That was a case of "damage caused by third parties", the borstal boys, over whom the prison officers exercised control. The duty was owed to those who moored vessels in the nearby harbour, and the liability arose not because the Home Office was in some way vicariously responsible for the escapees but because their officers were negligent in failing to supervise the boys, the consequences of which were likely. On the other hand, I do not understand the relevance of the Dorset Yacht case to "a line of cases … that liability in tort may extent to third parties suffering damage as a result of a party's negligence" since the cases referenced have nothing to do with damage caused by third parties

Mr Hermer's Oral Argument

29. In an impressive and forceful oral presentation, delivered in difficult circumstances over a Skype link which was sub-optimal, Mr Hermer refined and developed his client's case. Although a transcript is available, it is worthwhile distilling its essential elements.

30. Mr Hermer highlighted six core evidential features of his client's case. First, the vessel had reached the end of its operating life and a decision was taken (perforce) to dispose of it. Secondly, end-of-life vessels are difficult to dispose of safely. Aside from the evident difficulties inherent in dismantling a large metal structure, a process replete with potential danger, an oil tanker such as this contains numerous hazardous substances such as asbestos, mercury and radio-active components. Although these were listed for Basel Convention purposes and for the attention of the buyer, and the deceased was not injured as a result of exposure to any hazardous substance, the only reasonable inference is that waste such as asbestos is not disposed of safely in Chattogram. Thirdly, the defendant had a choice as to whether to entrust the vessel to a buyer who would convey it to a yard which was either safe or unsafe. Fourthly, the defendant had control and full autonomy over the sale. Fifthly, the defendant knew in all the circumstances that the vessel would end up on Chattogram beach. Sixthly, the defendant knew that the *modus operandi* at that location entailed scant regard for human life.

31. Mr Bright did not place any of these matters in issue although he cannot be taken to have accepted all of the rhetoric.

32. These overarching considerations drew Mr Hermer into advancing two propositions of law which were made in the alternative. His first submission, which was not prefigured in his skeleton argument, was that this was a classic *Donoghue v Stevenson* type case of liability arising from a known source of danger. His second submission was that, if this case should be envisaged as a case of damage caused by third parties (*per* the first formulation in para 38 of his skeleton argument), then all of the exceptions set out in para 8-55 of *Clerk & Lindsell on Tort*, 22nd Ed., apply. Mr Hermer took me to various authorities and advanced a number of subsidiary submissions which will be reflected in the analysis which follows.

The Defendant's Case

33. Mr Bright submitted that foreseeability alone is insufficient to found a duty of care, that English law does not in general impose liability for omissions, and that this is a classic case of damage caused by the conduct of a third party rather than liability arising under *Donoghue v Stevenson simpliciter*. There are exceptions to the general rule of there being no liability for the conduct of a third party (see para 8-55 of *Clerk & Lindsell*) but none applies here. In particular, the defendant had no control over the yard in Bangladesh (c.f. the *Dorset Yacht* case) and there was no assumption of responsibility towards the deceased.

34. In oral argument Mr Bright recognised that the exception which was likely to be the most fruitful from the claimant's perspective was "(c) where the defendant is responsible for a state of danger which may be exploited by a third party". But he submitted that this could not apply to the present case, not least because the vessel was not inherently unsafe and the danger inhered in the unsafe working practices of the yard which pre-existed any involvement of the defendant and over which his clients had no control.

35. Mr Bright conducted an impressive in-depth analysis of the key jurisprudence which will be reflected below.

Analysis

36. It is right that I should approach this application on the basis of the claimant's "best" case on the law as advanced in oral argument. The defendant is not prejudiced by this course, not least because Mr Hermer and I part company about what that best case is. Ultimately, I find the claimant's alternative case to be more compelling than her primary case.

37. In my judgment, the present case does not fit comfortably within elementary *Donoghue v Stevenson* principles. In that case there was a chain of contractual relationships, all part of Mr Hermer's so-called "continuum", but there was no intervening action of any sort by a third party. This was because the ginger beer was concealed in an opaque bottle and no one along this contractual chain (aside from the manufacturer) was in any way responsible either for putting it there or failing to detect its presence. The present case is different owing to the interventions of the owner of the yard and/or the deceased's employer in causing him to work on the vessel without taking proper precautions. In my opinion, the intervention of Hsejar in conveying the vessel to Bangladesh is of little or no significance. The buyer did not alter the vessel in any way. If, say, the vessel had sailed to a point just outside Chattogram under the auspices of CSME, and title was then transferred directly to the yard, Mr Bright would be raising exactly the same objections. He did not submit, correctly in my view, that the defendant's sale to Hsejar was, without more, determinative of his client's liability.

38. In the present case it is wrong in my view to characterise the events in the causal chain as omissions rather than as acts. The distinction between these notions is often rather fluid, as an examination of this factual structure demonstrates, and the principal endeavour is to ascertain the substance of the matter rather than the parties' formulations. The principal breach relied on by the claimant as against the defendant

is that it arranged for the sale of the vessel to a cash buyer who was certain to convey it to Bangladesh, in the equally certain knowledge of the defendant and, I would add, in flagrant breach of the buyer's express contractual obligation not to do precisely that (again, in the certain knowledge of the defendant, the latter keeping a blind eye to it). I would characterise this breach as being in the nature of an act rather than an omission, although para 91 of the Amended Particulars of Claim list a number of ancillary failings. As Lord Reed expressed the issue in *Robinson v Chief Constable of West Yorkshire* [2018] AC 736, at para 72, the defendant played an active part in the critical events. That factor was important in *Robinson* in establishing liability, that being a case in which well-established principles of tort liability were applicable.

39. I think that the same analysis applies to the intervening events insofar as these relate to the yard/employer (and, if relevant, to Hsejar). The yard/employer took active steps to bring about the deceased's working on the vessel but – perhaps more importantly – it failed to implement a safe place of working and safe system of work. If it is necessary to consider this, Hsejar played an active role in the critical events because it conveyed the vessel from Singapore to Bangladesh; it also failed to take the vessel to a safe location. Whereas the defendant's active part is a factor militating in favour of liability, the yard's active role points the other way.

40. Because the claim in the present case is not limited to omissions, in the sense of the defendant failing to prevent third parties from causing damage to the deceased, the principles expounded in para 8-55 of *Clerk & Lindsell* cannot apply without reservation or modification. At this juncture I set out the relevant passage:

> "**(e) - Omissions**
>
> **(iii) - Specific responsibility for protection from third parties**
>
> **Basis of liability**
>
> 8-55 In *Smith v Littlewoods Organisation Ltd* Lords Mackay and Goff, who gave the leading judgments, agreed that there was no general duty to prevent a third party from causing damage to another but disagreed as to the reason and the basis of exceptions to the general rule. Lord Mackay argued that the reason lay in the difficulty of predicting whether a third party would cause damage as a result of the defendant's neglect. For this reason the general principle of reasonable foreseeability would not be easy to satisfy. It would only be reasonable to foresee such third party intervention where it was probable. Lord Goff disagreed, considering that the reason for the limited duty was not the unpredictability of human conduct but the more fundamental reluctance of the common law to "impose liability for what are called pure omissions", taken along with "the general perception that we ought not to be held responsible in law for the deliberate wrongdoing of others". Exceptions to this general position had to be based not on "generalised principle" but on special circumstances giving rise to "narrower

> but still identifiable principles". Lord Goff identified four such circumstances:
>
> (a) where there is a special relationship between defendant and claimant based on an assumption of responsibility by the defendant;
>
> (b) where there is a special relationship between the defendant and the third party based on control by the defendant;
>
> (c) where the defendant is responsible for a state of danger which may be exploited by a third party;
>
> and
>
> (d) where the defendant is responsible for property which may be used by third party to cause damage.
>
> It is suggested that the approach of Lord Goff is to be preferred for two reasons …"

(I note in passing that the editors of *Charlesworth on Negligence*, 13th Ed., consider that (c) is a sub-set of (d)).

41. A number of points arise.

42. First, the present case is some distance away from the type of situations where the highest courts have considered the question of third party intervention. In *Dorset Yacht*, the borstal boys caused the damage to the boat. In *Smith v Littlewoods Organisation Ltd* [1987] 1 AC 241, trespassers entered an empty cinema, set fire to it, and damage was caused by them to adjoining properties. In *Attorney-General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273, a police officer gained access to a firearm and seriously injured a customer of a crowded bar. In *Mitchell v Glasgow City Council* [2009] 1 AC 874, a local authority allegedly failed to take steps to protect the deceased from the criminal acts of one its secure tenants. Finally, in *Michael v Chief Constable of South Wales Police* [2015] AC 1732, the police allegedly failed to respond in a timeous fashion to an emergency call and the victim was killed. In all these cases the third party in question caused the relevant damage or personal injury by deliberate action which in some of these cases was criminal. There was also a more obvious connection between the tortfeasors (in the event that liability existed) and the third parties. In the present case the yard/employer exposed the deceased to the risk of personal injury but did not deliberately cause it. From the defendant's (and Hsejar's) perspective, it was inevitable that the deceased would be exposed to that risk, but it was only foreseeable that he would sustain a serious accident.

43. Secondly, and despite the reservation that I have just expressed, I consider that the deceased's accident was "probable" in the sense explained by Lord Mackay in *Smith v Littlewoods*. His analysis reflected that of Lord Reid in the *Dorset Yacht* case where, in a famous passage at 1026B-E, Lord Reid said that it was a likely consequence of the officers' neglect of duty that the respondent's yacht would suffer damage. On re-

reading that passage, it is I think clear that Lord Reid was not saying that foresight alone was sufficient to establish liability.

44. Thirdly, and notwithstanding my second point, I accept Mr Bright's submission that foresight of the level of risk is not the touchstone of liability in a pure omissions case. Lord Goff's analysis has prevailed over Lord Mackay's in three decisions of the Supreme Court: see *Mitchell*, per Lord Hope (at para 15), Lord Scott (at para 40) and Lord Rodger (at paras 55-58); *Michael*, per Lord Toulson (at paras 97-106) and *Robinson v Chief Constable of West Yorkshire*, per Lord Reed (at paras 34-37). Whether the degree of foresight has any relevance in a case where the defendant has played an active part in the critical events will be considered below

45. As I have said, Lord Goff was dealing with a case involving pure omissions; hence *Clerk & Lindsell*'s use of the sub-heading. Mr Hermer submitted that the defendant's active involvement renders para 8-55 of *Clerk & Lindsell* inapplicable. Mr Bright sought to assimilate these two species of case. My conclusion is that the present case is somewhat of a hybrid and that *elements* only of para 8-55 apply: in particular, the immediate and proximate cause of the damage was the active involvement of a third party. Yet what distinguishes the present case from the damage caused by third party cases thus far considered is the striking absence of any proximity between the defendant and the yard/employer. That lacuna – not so much one of thousands of miles but the lack of any presence in and control over the activities of the yard – means that, unless some special feature is present, the claim should fail on a straightforward *Caparo* analysis. This point was made by Lord Toulson in *Michael* (at para 106) and was the ratio of the decision of the House of Lords in *Sutradhar*, per Lord Hoffmann (para 38).

46. At para 38 of his judgment in *Sutradhar*, Lord Hoffmann stated:

> "But that principle is not that a duty of care is owed in all cases in which it is foreseeable that in the absence of care someone may suffer physical injury. ***There must be proximity in the sense of a measure of control over and responsibility for the potentially dangerous situation***. Such a principle does not help the claimant. In *Perrett v Collins* the inspector had complete control over whether the aircraft flew or not. If he refused a certificate it could not fly. The purpose of the system of certification established by the 1989 order was equally clearly the protection of persons who might be injured by unairworthy aircraft and therefore placed responsibility for affording such protection upon the inspector. For my part, therefore, I have no difficulty with the proposition that the inspector owed a duty to potential passengers to exercise due care and this may be why *Perrett v Collins* has not been reported in the official series of law reports. (Compare also *Clay v AJ Crump & Sons Ltd* [1963] 3 All ER 687, [1964] 1 QB 533 in which an architect had complete control over whether a dangerous wall was left standing and *Watson v British Boxing Board of Control Ltd* [2001] QB 1134, [2001] 1 WLR 1256 in which the Board had control over the medical services provided at boxing matches.)

> But the claimant does not come even remotely within the principle stated by Hobhouse LJ." [emphasis supplied]

I read "measure of control over" and "responsibility for" as being a composite requirement. Given the examples Lord Hoffmann cites, I do not read "potentially dangerous situation" as a reference to the type of case discussed in *Clerk & Lindsell* at 8-60 (see §51 below), although it comes quite close.

47. Fourthly, this brings me to the four categories of special features identified by *Clerk & Lindsell*. In my judgment, three of these quite obviously do not apply. As for (a), there was no special relationship between the parties based on an assumption of responsibility by the defendant. What Lord Goff and later judges had in mind was the sort of assumption of responsibility discussed by *Clerk & Lindsell* at para 8-54, a section of which I cite:

> "Thus, in *Welsh v Chief Constable of the Merseyside Police* and *Swinney v Chief Constable of the Northumbria Police* it was held that where the prosecution or police service had given an undertaking to take some action, it could owe an affirmative duty to take reasonable care to honour the undertaking. Again, a gratuitous insurance agent who had undertaken to act for a car owner was held liable for failing to warn him that his policy had been cancelled. In *Calvert v William Hill Credit Ltd* the Court of Appeal held that the defendants had assumed a responsibility to the claimant to exclude the claimant from telephone gambling with them for six months, although the scope of the defendants' duty of care did not extend to preventing him from gambling with them in other ways or with other bookmakers. The undertaking may be implied from the defendant's conduct. Thus, in *Barrett v Ministry of Defence* the Court of Appeal, having held that there was no duty to prevent the victim (an off-duty airman) drinking excessive alcohol, accepted the defendant's concession that once the victim had collapsed and his colleagues had taken him to his room, it had assumed a responsibility for him and because medical assistance was not summoned, it had fallen short of the standard reasonably to be expected."

I cannot accept Mr Hermer's submission that this is too restrictive an approach. If voluntary assumption (or "attachment") of responsibility were as flexible a concept as he suggests, it ceases to depend on what must be an *additional* factor in play, namely an antecedent relationship between the parties.

48. As for (b), there was no special relationship between the defendant and the third party based on control by the defendant. Here, the paradigm case is *Dorset Yacht v Home Office*. Given the emphasis placed by Mr Hermer on the concept of "control", some further explanation is required. The borstal boys were autonomous agents in the sense that they had freedom of choice (tempered to reflect their youth and immaturity), but they were under the direct control of the prison officers who had a duty to supervise them. Despite Mr Hermer's ingenious argument, I simply cannot accept that the defendant had any control over what happened in Bangladesh. To say that there was a

seamless contractual concatenation linking the defendant to the yard, and thereby to the deceased, is to say no more than the defendant foresaw the risk. There was no physical connection between the defendant and Bangladesh. This problem cannot be surmounted by deploying the notion of some sort of "system", or that the vessel's arrival at Chattogram beach was in some way "pre-ordained". The "system" of which the defendant was a part was the matrix of companies within the envelope of the Angelicoussis shipping group. Hsejar was outside that envelope, and tacit understandings between seller and buyer are not enough to place the latter within it. The position of the yard/employer is, of course, *a fortiori*. Beyond the realm of theology, "pre-ordained" means "foreseen". Nor in my opinion is it possible to extrapolate the requisite degree of control from the bare fact that the defendant knew that the vessel had to be disposed of safely. This knowledge did not create, without more, any duty of care to the deceased.

49. As for (d), this is reserved for cases of Occupier's Liability and kindred situations. In any case, the defendant was not responsible for the vessel (assuming that it was "property") once ownership passed to Hsejar.

50. Item (c) remains the most problematic. Was the defendant responsible for a state of danger which may be exploited by a third party? Para 8-60 of *Clerk & Lindsell* offers the following assistance:

> "The third situation identified by Lord Goff in *Smith v Littlewoods Organisation Ltd* as giving rise to a duty is where the defendant "negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the [claimant]". He cited as an example of such a case, *Haynes v Harwood* where the defendant's employee was responsible for creating a source of danger by leaving a horse-drawn van unattended in a busy street, the danger was sparked off by a mischievous child throwing a stone at the horses causing them to bolt and the defendant was held liable for the resulting injuries. Lord Goff held that the principle had no application to the facts of *Smith*, as "the empty cinema could (not) be properly described as an unusual danger in the nature of a fire hazard". Indeed, Lord Goff stressed that liability under this principle would be very rare for otherwise the ordinary householders could "be held liable for acting in a socially acceptable manner". This restrictive approach was confirmed in *Topp v London Country Bus Ltd*. The defendant had carelessly left a minibus unlocked, with keys in the ignition, outside a pub for some nine hours until it was stolen by a third party who, minutes later, negligently drove the bus into the claimant. May J held that although it was foreseeable that the bus might be stolen and the thief might injure other road users, there could be no liability under the danger principle as a "parked minibus is no more a source of danger than every other vehicle on the road"."

51. At para 58 of his speech in *Mitchell*, Lord Rodger stated:

> "In all these situations the defender's act which provides the opportunity for the third party to injure the claimant is itself wrongful. As Lord Sumner pointed out in the passage from *Weld-Blundell v Stephens* quoted by Lord Goff, that is not enough to make for liability in delict for the harm which a third party subsequently chooses to inflict. But it is, at least a start. … [On the facts *of Mitchell*] It was these entirely lawful and legitimate steps by the local authority officials which provided the occasion for Drummond choosing to assault Mr Mitchell. No delictual liability can arise out of those legitimate steps as such."

The situations mentioned by Lord Rodger included a decorator who leaves the door of an empty house unlocked and is liable if a thief enters, and the circumstances of *AG of the BVI v Hartwell*. Unsurprisingly, Mr Hermer placed considerable weight on this latter case, and he likened the loaded gun to this end-of-life vessel becoming dangerous as soon as its dismantling started. I will be returning to it.

52. Mr Bright did not accept that his client had created any danger. The source of danger was the unsafe working conditions at this beach which pre-existed the advent of this particular vessel and were not created by the defendant. Mr Bright further submitted that the defendant's actions in lawfully selling the vessel to Hsejar could not generate any tortious liability: see *Mitchell* (per Lord Rodger at para 58, Lord Scott at para 44 and Lord Brown at para 83).

53. The parameters of *Clerk & Lindsell*'s third exception are not fully delineated and it is obvious that the factual situations which have been considered by the courts are far distant from the circumstances of the present case. Given that para 8-55(c) of *Clerk & Lindsell* is not wholly applicable, I would prefer to describe this as the creation of danger principle. The endeavour is not to strive to find a remedy in order to punish allegedly unscrupulous shipowners and their agents seeking to shuffle off their responsibilities for these vessels. The correct approach must be to seek to ascertain whether, recognising the general rule that liability cannot attach in the absence of a relationship of proximity between the parties, it can fairly and properly be said that the defendant created a danger to which the deceased was exposed, thereby creating the requisite legal nexus. The application of this approach will need to reflect that (a) this is not a pure omissions case and (b) the intervening causal contribution of the yard/employer was not deliberate (see §43 above).

54. In sum, the application of the creation of danger principle to the present case must balance at the very least the absence of any control by the defendant over those in Bangladesh (see §49 above) against factors (a) and (b) above. I consider that it is also relevant that the deceased's accident was a likely consequence of the defendant's postulated breach of duty (as per Lord Reid in the *Dorset Yacht* case): this element, taken in combination with factors (a) and (b) above, serves substantially to weaken Lord Goff's principled concern about the wrongdoing of third parties breaking the chain of causation.

55. Mr Bright's submission that the vessel was not inherently unsafe and only became such as a result of the yard's poor working practices needs to be examined. I do not think that there is anything in the point that these working practices pre-existed the arrival of the vessel at this yard, and in my view it was unnecessary for Mr Bright to put his case that high. Had the deceased died on a different ship, the defendant would of course have owed no liability, but the fact remains that he died on this particular vessel. Thus, it is what became of this vessel that matters, and the inquiry does not extend to what happened, or did not happen, to or on all the other vessels which the deceased dismantled. Another way of putting this is that the yard applied a time-honoured working practice to this vessel when it arrived at Chattogram, but the real issue is whether these working practices alone rendered the vessel dangerous rather than its inherent characteristics or attributes.

56. In that connection, I asked Mr Bright whether the defendants would be liable if the deceased had died from asbestos exposure. It is true that the defendant complied with its obligations to the seller under the Basel Convention by listing the hazardous substances in or on the vessel at the time of sale, but both the defendant and Hsejar must have known that these would not be disposed of safely in Bangladesh (I draw that inference from the available evidence, but if it is wrong it can be rebutted at trial). My interpretation of Mr Bright's oral submission (which now reflects what he has said about it subsequently) is that he accepted in my hypothetical example that the defendants could be liable, depending on the evidence and if the particular hazardous materials made the ship unusual. The transcript records the following:

> "In a case of, say, asbestosis or exposure to nuclear materials then the particular properties of the materials onboard the unique vessel would be critical to the exposure and then the fact that it was this ship rather than any other ship would matter.
>
> But in this case there is nothing -- so far as the circumstances of the accident are concerned there is nothing special about this ship at all. If he hadn't been working on this big ship, he would have been working on another one. There is nothing uniquely dangerous about this ship that makes it different and there is nothing about the fact that it was my client's vessel that he was working on on this day that is critical in any part of the story. That is why it is, in my submission, right that it is the unsafe working method that is important. It is not the characteristics of the ship, and it is therefore not the identity of the ship. And that will be my answer to your Lordship's question, and that is reflected by the pleadings in which the dangers to Mr Mollah and others in Bangladesh are, in this regard, entirely elaborated by reference to the absence of safe working methods. Nowhere is it suggested that the characteristics of this ship, as opposed to any other ship, had any role whatsoever."

57. Having reflected on this, I am not satisfied that there is any material difference between the danger posed by asbestos and that posed by the nature and characteristics of this vessel whilst being dismantled. Asbestos is safe unless and until it is disturbed and, given its prevalence on this particular oil tanker, I would certainly not be prepared to deduce that this was in some way atypical. All the hazardous substances on the vessel could have been removed safely in exactly the same way as it could have been dismantled safely, and the distinction between the "unique" characteristics of the ship in one context and not another seems to dance on the head of the metaphorical pinhead and is hard to discern. Further, the fact that the deceased could have been working on another ship on the very same day and met the same fate is nothing to the point.

58. I take Mr Bright's point that caution is required when addressing hypothetical examples on inchoate facts. Yet the claimant's pleading had made much of the Basel Convention and was inviting analogies to be drawn. It could be said that, without the list of hazardous substances being provided by Hsejar to the yard (and who knows whether it was provided), those responsible for the deceased's working conditions might have no idea what latent dangers existed. Of course, there is no evidence that the deceased's accident resulted from any such danger. On the other hand, it was not Mr Bright's submission that a distinction fell to be drawn between patent and latent dangers, and in any case anyone with a modicum of knowledge would know what asbestos looks like.

59. As I have said, Mr Hermer placed particular reliance on the judgment of Lord Nicholls in the *AG of the BVI* case. It is correct that to the extent that Lord Nicholls' analysis proceeds on the basis of Lord Mackay's approach in *Smith v Littlewoods*, that is to say a heightened degree of foresight, it has been superseded in subsequent authority. This oil tanker was obviously less dangerous than a loaded firearm, but Mr Hermer would say that is only a matter of degree. Para 33 of Lord Nicholls' judgment is germane:

> "The law has long recognised the special dangers associated with certain types of articles such as loaded firearms, explosives and poisons. In past days when the distinction mattered, articles such as these were classed as "inherently dangerous". Those who sent forth inherently dangerous articles were subject to a common law duty to take precautions … This was a special exception to the general rules existing in the 19th century and earlier. The greater the danger the higher was the standard of diligence required."

60. If Mr Bright were right to make the concession he did in relation to asbestos exposure, and I think that it is seriously arguable that he was, the conclusion must be that the manager and operator of an oil tanker would be regarded in such circumstances as having created the source of danger and those working in Bangladesh would be regarded as interfering with the asbestos as explained by the authors of *Clerk & Lindsell* at para 8-60. The intercession of the yard/employer, if not of Hsejar, is not destructive of this conclusion. Applying this reasoning to the present case, the source of danger, the vessel now beached at Chattogram, was interfered with or disturbed by the deceased and others. That the yard/employer's state of mind bore no parallels with the gunman in *Hartwell* or the murderer in *Mitchell* is immaterial.

61. The sale of the vessel was legitimate and lawful in the sense that there is no evidence of any collusion between the parties and full value was paid. But whether it was "wrongful", or as Lord Rodger would have said "delictual", rather begs the question. In other words, the discussion is drawn back to the issue of whether the defendant could be said to have created the relevant danger rather than merely to provide the opportunity for the yard/employer to expose the deceased to the risk. My overall conclusion is that it is artificial and overly restrictive to say that the danger was created solely by the acts and omissions of the yard/employer in Bangladesh, particularly when these third parties were not acting deliberately in the sense of intending to injure the deceased. It was a danger which inhered in this end-of-life vessel once it was broken up, unless appropriate safety measures were taken.

62. A further consideration is the standard of diligence required by the defendant in a situation such as this and an assessment of practicability in the context of the commercial realities. A cynic, or perhaps a realist, would say that had the defendant ensured that that there was enough fuel in the vessel to reach China, and had the purchase price reflected the market factors governing such a sale, Hsejar or Wirana would simply have paid less and delivered the vessel to Chattogram in the usual fashion. However, it would not be beyond the wit of shipping lawyers to devise a contractual structure which requires the buyer to provide proof of delivery to China, or any other safe yard, failing which liquidated damages would be payable. Of course, if the market became aware that shipowners were becoming more responsible and/or that cash buyers were breaching the tacit understandings, price levels would respond accordingly.

63. There are arguments which cut both ways as to whether considerations of fairness, justice and reasonableness, the safeguarding of the environment and exploited workers in the developing world, and commercial practice, should operate in a case such as this to guide the court in placing it either within or without the creation of danger principle, in so doing possibly slightly stretching the boundaries of established norms. In my judgment, it would not be appropriate to resolve the balance of these arguments on a summary judgment application.

64. Ultimately, though, it is unnecessary to reach definitive conclusions as to whether a duty of care arises as a matter of law in these particular circumstances. I have already said that the contours of the creation of danger principle are imprecise. This brings into play the cautionary words of Lord Browne-Wilkinson in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, at 557 E/F-G:

> "In my speech in the *Bedfordshire* case [1995] 2 AC 633, 740-741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

I think that this passage is applicable both to my preferred analysis, anchored as it is in the creation of danger principle, and Mr Hermer's, based on *Donoghue v Stevenson*. It is very much Mr Hermer's fall-back case whereby he invites the court to extend the law on an incremental basis in line with what may be fair, just and reasonable, but in my view this is an area of the law which is uncertain across the board and may be developing. Further, I see no difference between a strike-out application and an application for summary judgment under CPR Part 24.2.

65. It follows that I do not accede to the defendant's application to grant summary judgment in respect of the negligence claim on the footing that no duty of care was owed to the deceased. I reiterate what I said at the outset. This conclusion predicates that the defendant's arguments on the evidence and the merits fail at trial.

Unjust Enrichment

66. I shall approach the claimant's case on unjust enrichment on the basis that English law applies to it. There is a strong argument that the law of Bangladesh applies, and also an argument that Bangladeshi law does not recognise this cause of action; but these are additional obstacles to the claim which it is unnecessary to consider.

67. In *Bank of Cyprus UK Ltd v Menelaou* [2016] AC 176, at para 18, Lord Clarke said:

> "It is now well established that the court must ask itself four questions when faced with a claim for unjust enrichment. They are these: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's [here, the deceased's] expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?"

68. For present purposes it is only necessary to consider items (1) and (2).

69. According to paras 91A-91Q of the Amended Particulars of Claim:

(1) The defendant has been enriched through its receipt of an enhanced purchase price which reflected the fact that the deceased would be working in a deplorable environment.

(2) This enrichment was at the deceased's expense because these were a set of related transactions operating in a co-ordinated way and which formed a single scheme, alternatively the instant case falls within a "genuine exception".

70. The *locus classicus* in this area is now *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275. Lord Reed makes it clear that the "structured approach" outlined by Lord Clarke should not be applied prescriptively, that a close analysis is required of individual cases, and that the overarching principle of the law of unjust enrichment is that "it is designed to correct normatively defective transfers of value" (para 42). In a situation of sham transactions, the law looks at the commercial reality rather than the apparent contractual structures (para 48). In particular:

> "There have also been cases, discussed below, in which a set of co-ordinated transactions has been treated as forming a single scheme or transaction for the purpose of "for the expense of" enquiry."

Although the claimant must have directly provided a benefit to the defendant, this "suggested rule":

> "… may nevertheless require refinement to accommodate other apparent exceptions, and it would be unwise at this stage of the law's development to exclude the possibility of genuine exceptions, or to rule out other possible approaches" (para 50)

71. In my judgment, it is not remotely arguable that the defendant has been enriched at the deceased's expense, and this issue is fit to be dealt with summarily. The contractual structures in existence in the present case are not shams, fig leaves or chimeras, and they cannot in my view be conceptualised as forming a single scheme. These submissions are effectively a reprise of Mr Hermer's case on "control" which I have not accepted. The defendant did not receive any part of the purchase consideration and I accept the hearsay evidence given in Mr Biggs' second witness statement that the defendant did not receive any commission attributable to this sale. The enhanced purchase price reflected the destination of the vessel, but it simply does not follow that any enrichment was received at the deceased's expense. The reality is that the enrichment was received by the yard and/or the deceased's employer, that the deceased's remuneration may have been even more derisory had the purchase price been lower, and that the indirect beneficiary here was Hsejar/Wirana. The intangible benefit attained by the defendant, or rather its principals, was the sure knowledge that it had washed its hands of this vessel.

72. Nor do I discern any basis for concluding that the present case might fall within a "genuine exception". All that Lord Reed was saying was that the law was in an evolutionary state. There is no special feature of this case which might lead me to conclude that Lord Clarke's structure should be substantially loosened.

73. I reject Mr Hermer's submission that his client's unjust enrichment claim should go forward to trial if the negligence claim will be before the court in any event. The merits of this claim should in my opinion be separately considered.

74. My final short observation is that I am struggling to envisage circumstances in which the unjust enrichment claim could ever have succeeded if the claimant's primary claim had failed. I suspect that it was a late afterthought to address perceived difficulties with limitation. Fortunately for the claimant, the two claims do not stand or fall in unison.

Limitation

75. This issue divides into two sub-issues: viz. (1) does English law apply? (if so, the claim is not statute-barred) and, if not (2) what is the limitation period under Bangladeshi law?

Does English Law Apply?

76. Under Article 4 of Rome II:

> "**General Rule**
>
> 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 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"."

77. Thus, the law of Bangladesh applies unless it is clear from all the circumstances that the claim is manifestly more closely connected with this jurisdiction.

78. Mr Hermer submitted that this question cannot fairly be determined in advance of disclosure. He also submitted that it is at least arguable that the manifest closer connection test is satisfied: the material breaches of duty were committed by the defendant operating in this jurisdiction and the MoA was approved by the Board of Directors situated here; "the defendant operates English standards, laws and regulations relating to health and safety"; and all the relevant contracts were governed by English law.

79. I appreciate the dangers and possible unfairness of determining an issue such as this in the context of a summary judgment application, but I have to say that there is no real prospect of the claimant meeting this stringent criterion. The accident occurred in Bangladesh; the claimant and her son live in Bangladesh as do all the witnesses; and there is no pre-existing relationship between the parties based on any contract or anything else. The defendant's activities in this jurisdiction create a modicum of a connection, but in my judgment not one of sufficient nature and extent.

80. The claimant's second contention is that this is an instance of "environmental damage" and that Article 7 of Rome II applies. It provides:

> "**Environmental damage**

> The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred."

81. Under Recitals 24 and 25:

> "(24) 'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.
>
> (25) Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised."

82. Mr Bright submitted in writing (there was insufficient time for him to develop the submission orally, but the time estimate for this application came from the defendant) that Article 7 is inapplicable because the tortious obligation on which the claimant relies did not "arise out of environmental damage or damage sustained by persons or property as a result of such damage". He said that it arose because the deceased fell from a height.

83. In my judgment, this is – at least reasonably arguably - an overly narrow reading of "adverse change in a natural resource". The proximate cause of the accident was the deceased's fall from a height, but on a broader, purposive approach the accident resulted from a chain of events which led to the vessel being grounded at Chattogram, in consequence of which damage was no doubt caused at very least to the beach and tidal waters. Assuming (as I have found) that the claimant has a sustainable argument that the defendant committed a relevant tort, it is far from obvious that the present case is not caught by the spirit of Article 7. Moreover, the event giving rise to the damage was for these purposes the tortious event which occurred in this jurisdiction.

84. The submissions I received on this issue were somewhat brief and I have little doubt that there exists a body of learning which, if drawn to my attention, might have affected the outcome. But it is not for me to start conducting legal research: I have determined this issue on the parties' submissions alone. In my judgment, the claimant has a real prospect of success on this sub-issue.

85. Mr Hermer's Reply and skeleton argument raised the application of the public policy exception under Article 26 of Rome II to the one-year non-extendable Bangladeshi limitation period, assuming that it was applicable. At the hearing, the submissions in support of this contention, made both orally and in writing, were exiguous on both sides. According to the Reply, the claimant had had no previous access to justice against the defendant, but pre-action correspondence written before 30th March 2019 demonstrates that averment to be incorrect. The Reply also asserts that the egregious nature of the defendant's breach of duty is relevant. In my view the focus must be principally on whether it would be offensive in English law to countenance the application of so short a limitation period, and the submissions on this aspect were light indeed. Aside from taking a pleading point, Mr Bright did not advance a substantive rebuttal. Thus, I am asked to resolve this issue on a basis that is far from satisfactory. My conclusion is that it would not be right to determine the issue at this stage, and certainly not in the defendant's favour. If the overriding objective and reasons of proportionality support the definitive resolution of the Article 26 issue in advance of the trial, the Court may come back to it.

What is the Limitation Period Under Bangladeshi Law?

86. I deal with this issue out of an abundance of caution, if not to cater for the possibility that this case may go further.

87. The defendant's contention is that, in the event that Bangladeshi law applies, the combined effect of the Limitation Act 1908 and the Fatal Accidents Act 1855 is that the present case is governed by a non-extendable limitation period of one year from the date of death; see, in particular, Article 21 of Schedule 1 to the 1908 Act.

88. In *Bangladesh Beverage v Rowshan Akhter* [2010] 62 DLR 483, the High Court Division (Sharifuddin Chaklader and Md Nuruzzaman JJ) in the exercise of its civil appellate jurisdiction was dealing with a claim which was brought more than one year after the deceased's death. The court expressly referred to the statutory scheme, but at para 64 of its judgment appeared to hold that a claim in tort on behalf of a deceased was not governed by any prescribed limitation period and that Article 120 of Schedule 1 therefore applied. This is in the nature of a "sweep-up" provision which specifies a six-year limitation period for cases "for which no period of limitation is provided elsewhere in this schedule".

89. Bangladesh Beverage sought the leave of the Supreme Court of Bangladesh to appeal the decision of the High Court Division. One of the grounds of appeal was that a one-year limitation period governed this claim. Syed Mahmud Hossain J giving the judgment of the Appellate Division of the Supreme Court ([2016] 69 DLR 129) in April 2016 stated:

> "As regards the question of limitation the High Court Division found that the suit was filed on 01.01.1991 and the accident took place on 03.12.1989. Admittedly, the Court was on vacation from the 1st of December to 31st December 1989. Section 4 of the Limitations Act provides that when the court is closed and the period of limitation expires within the period in which the subordinate Court is closed, the suit, application or

> appeal may be instituted, preferred or made on the day in [sic] which the court reopens. …
>
> ***In the instant case the limitation expired on 03.12.1990***, the last date of filing the suit having fallen during the vacation of the court and as such filing of the suit on 1st January of 1991 i.e. on the re-opening day was perfectly within the period of limitation. Therefore, there is no merit in the submission of the learned Advocate for the petitioner that the suit is barred by limitation." [emphasis supplied]

90. Accordingly, the decision of the High Court was upheld but on what seems to me to be a wholly different basis. Although no reference was made to the Fatal Accidents Act 1855, the Supreme Court appeared to regard it as obvious that a one-year limitation period applied but that the effect of section 4 of the Act was to extend the period over the legal vacation. This decision therefore precludes the possibility of a right of action for wrongful death subsisting outwith the statutory scheme.

91. In *Das and another v George Weston Ltd and others* [2017] ONSC 4129 Perell J in the Superior Court of Justice in Ontario was seized of a class action involving amongst other things injuries sustained in Bangladesh. It is noteworthy that the court received evidence from Mr Ajmalul Hossain QC (the claimant's expert in the present case), Ms Nihad Kabir (the defendant's expert, very late instructed) and Dr James Goudkamp, Associate Professor of Law at Oxford University, who is of course Mr Bright's learned junior.

92. Both Perell J and Ms Kabir interpreted the decision of the High Court Division in the *Bangladesh Beverage* case rather differently from me. They thought that the High Court was saying that a one-year limitation period was applicable. I cannot accept that, but it matters not. I do however agree with Perell J's observations about the quality of the High Court Division's judgment.

93. The reason why it matters not is that the judgment of the Supreme Court is crystal-clear. The one-year period under statute expired on 3rd December 1990 and could only be extended because section 4 catered for that over legal vacations. Had Article 120 been applicable, the Supreme Court would have said so.

94. The Ontario Court of Appeal ([2018] ONCA 1053) upheld Perell J's Order. At paras 115-117 of his judgment, Feldman JA held:

> "As the Appellate Division found that the original claim in *Bangladesh Beverage* was brought within the applicable one-year limitation period, the later amendment to add Bangladesh Beverage was allowed and related back to the date the action was instituted.
>
> Having specifically determined that the limitation period in the case was one year, the Appellate Division made no reference to the applicability of the six-year limitation period under Article 120 of the Limitation Act, 1908.

> In my view, the motion judge made no error of law in following the decision of the Appellate Division and the clear language of Bangladesh's Limitation Act, 1908. The appellants' position that the High Court Division had found that the six-year limitation period applied is based on a misreading of one paragraph of that court's reasons. Elsewhere, those reasons make it clear that the one-year period applied."

95. I have read Mr Hossain QC's evidence with close attention. I have paid much less regard to the evidence of Ms Kabir, only because it has come so late in the day and the claimant has not had a proper opportunity to deal with it. I have noted Mr Hossain QC's sterling attempts to persuade the court that a tortious claim can subsist outside the scope of the Fatal Accidents Act 1855, and that it is covered by the "sweep-up" provision. In similar vein, he seeks to persuade the court that the Canadians erred.

96. I make due allowance for the fact that foreign law is a matter of fact, that Bangladeshi law is not the same as English law, that this is an application for summary judgment, that the Canadian jurisprudence is no more than persuasive, and that I have not heard oral evidence from Mr Hossain QC and Ms Kabir. I also ignore the encomium that Mr Bright accorded to his own expert in oral argument. All these things having been said, I have concluded that it is obvious that the statutory regime provides for a one-year limitation period in claims under the Fatal Accidents Act 1855, that there is no room for a claim outside the statutory scheme, and that the Supreme Court of Bangladesh so decided.

97. It follows that, if the present claim is governed by Bangladeshi law it is statute-barred.

Disposal

98. I have concluded that the claimant has a real prospect of succeeding in relation to her claim in negligence; that her claim in unjust enrichment is unsustainable; that the claimant has a real prospect of establishing that her claim is governed by English law (in respect only of this being a claim for environmental damage – I have left the Article 26 issue unresolved); and that if Bangladeshi law were to apply to the claim in tort, it would be statute-barred.

99. It follows that the application for summary judgment under CPR Part 24.2 and to strike out the claim under CPR Part 3.5 must be dismissed.