Neutral Citation Number: [2018] EWCA Civ 2590

Case No: 2017/3203 2017/3193 2017/3525

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL DIVISION
The Hon. Mr Justice Teare
[2017] EWHC 3040 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2018

Before :

LORD JUSTICE GROSS
LORD JUSTICE MOYLAN
and
LORD JUSTICE COULSON

- -

Between :

Aspen Underwriting Limited and Ors	**Appellant**
- and -	
Credit Europe Bank NV	**Respondent**

- -
- -

Steven Berry QC and **Adam Board** (instructed by **Campbell Johnston Clark Ltd**) for the **Appellant**
Peter MacDonald Eggers QC and **Sandra Healy** (instructed by **Norton Rose Fulbright LLP**) for the **Respondent**

Hearing dates: 1-2 May 2018

- -

Judgment Approved

LORD JUSTICE GROSS:

INTRODUCTION

1. This is a dispute as to jurisdiction between the Claimants ("Underwriters") and the Third Defendant ("the Bank"), in connection with Underwriters' claim to recover from the Bank insurance proceeds previously paid out to ship owners ("Owners") and the Bank.

2. The essence of the matter was succinctly summarised in the judgment of Teare J, dated 27 July 2017: [2017] EWHC 1904 (Comm.); [2017] 2 Lloyd's Rep. 295 ("the judgment"):

> "1. On 3 April 2013 the vessel ATLANTIK CONFIDENCE ('the Vessel') sank in the Gulf of Aden. It has been held by this court in a Limitation Action commenced by her Owners, the First Defendant, that the Vessel was deliberately sunk by the master and chief engineer at the request of Mr Agaoglu, the alter ego of the Owners; see *The Atlantik Confidence* [2016] 2 Lloyd's Reports 525. In this action the Hull Underwriters of the Vessel, who paid out on the hull and machinery policy ('the Policy') in August 2013 but who now consider, on further investigation, that the Vessel was deliberately cast away by her Owners, claim recovery of the insurance proceeds which were paid to Owners and the Vessel's mortgagees, Credit Europe Bank NV, the Third Defendant ('the Bank').
>
> 2. The Bank is domiciled in the Netherlands. These proceedings were served on the Bank there. The Bank maintains that under the Brussels Regulation this court has no jurisdiction to hear and determine the claim against the Bank. It must be sued in the courts of the Netherlands where it is domiciled. The Hull Underwriters maintain that this court has such jurisdiction….."

3. As appears from the judgment and a further (short) judgment of Teare J dated 1 December 2017 ("the second judgment"), both Underwriters and the Bank had some success before the Judge, with Underwriters, however, ultimately enjoying partial success in establishing jurisdiction for their misrepresentation claims here. As, however, Underwriters failed to establish jurisdiction for their claim in restitution, the upshot is that (absent sensible agreement) different aspects of these proceedings must be pursued in different jurisdictions. This is an unfortunate consequence of the jurisdiction rules contained in Brussels Recast (as defined below). Further, on the facts of the present case, this matter cannot be remedied by Underwriters pursuing the entirety of their claim against the Bank in the Netherlands, given that their claims against Owners and Managers are brought in this jurisdiction. In these circumstances, before this Court, the Bank is thus an Appellant and a Cross-Respondent, whereas Underwriters are a Respondent and Cross-Appellant.

4. The principal Issues before this Court fall conveniently under the following headings:

i) What is the evidential standard to be adopted by the Court as to whether it has jurisdiction under the *Brussels Regulation Recast (Regulation (EU) 1215/2012)* ("Brussels Recast")? ("Issue I: The evidential standard")

ii) Whether the Court has jurisdiction pursuant to the exclusive English jurisdiction clause contained in the Settlement Agreement dated 6 August 2013 ("the Settlement Agreement")? ("Issue II: The Settlement Agreement")

iii) Whether the Court has jurisdiction pursuant to the exclusive English jurisdiction clause contained in the Hull and Machinery Insurance Policy for the period of 12 months from 15 October 2012 to 15 October 2013 ("the Policy")? ("Issue III: The Policy")

iv) Whether Underwriters' claims are matters relating to insurance within Chapter II, Section 3 ("the Insurance Section") of Brussels Recast? ("Issue IV: Matters Relating to Insurance")

v) If the answer to Issue IV is "yes", whether the Bank is entitled to rely on the Insurance Section if it is not the economically weaker party within the meaning in Recital (18) of Brussels Recast? ("Issue V: Economic Imbalance")

vi) Whether Underwriters' claims for damages for misrepresentation are matters relating to tort, delict or quasi-delict under Art. 7(2) of Brussels Recast, or, alternatively are matters relating to contract within the meaning of Art. 7(1) thereof ("Issue VI: Damages for Misrepresentation")

vii) Whether Underwriters' claims for restitution are matters relating to tort, delict or quasi-delict under Art. 7(2) of Brussels Recast? ("Issue VII: Restitution").

5. In outline terms, Underwriters challenge the approach adopted by the Judge under Issue I. On Issues II, III and IV, the Bank succeeded before the Judge. However, on Issue V, the Judge found in favour of Underwriters, as he did on Issue VI. Before the Judge, the Bank succeeded on Issue VII.

6. I shall deal with the Issues in turn but, before doing so, it is necessary to say something as to the facts, essentially (and gratefully) adopting the Judge's summary.

THE FACTS

7. *Financing:* In the judgment, the Judge recounted the history of the financing arrangements entered into by Owners and the Bank in respect of the Vessel, together with the financing arrangements for a vessel, *The Atlantik Glory*, in associated ownership. Thus:

> "4. By a loan agreement dated 9 March 2010 (but subsequently amended) the Bank lent $38.2m to the Owners and to Capella Shipping Limited, the owners of the ATLANTIK GLORY, to re-finance the purchase of the Vessel and the ATLANTIK GLORY. The loan was secured by a first mortgage on both vessels and by a deed of assignment which included an assignment of the insurances on the vessels….

> 5. By a further loan agreement (entitled Framework Credit Agreement) dated 14 March 2011 the Bank lent $3.5m to the Owners for working capital and enabling overdraft. This loan was secured by a second mortgage and a second deed of assignment.
>
> 6. At the beginning of April 2013 the debt against the Vessel under the first loan was just under $10m, namely $9,990,158, and under the second loan just under $3.9m, namely $3,899,704.86. The debt against the ATLANTIK GLORY under the first loan was just under $25m, namely $24,906,136.39. Those sums included missed repayment of principal in the sum of $723,280 and missed repayment of interest in the sum of $685,068."

8. *The Policy:* Reference has already been made to the Policy. It contained a choice of law and jurisdiction clause in these terms:

> "This insurance shall be governed by and construed in accordance with the law of England and Wales and each party agrees to submit to the exclusive jurisdiction of the courts of England and Wales."

9. The Policy includes a schedule of the respective owners and mortgagees. The value of the Vessel was given as US$22 million. A Contract Endorsement in respect of the Vessel, dated 8 February 2013, recorded a change in the managers and that the Vessel was mortgaged in favour of the Bank "…as per Notices of Assignment and Loss Payable Clauses attached".

10. The Notice of Assignment, dated 11 February 2013 ("the Notice of Assignment"), provided that Owners:

> "….GIVE NOTICE that, by an assignment in writing dated 11 February, 2013, we assigned to ….[the Bank]…, a company incorporated under the laws of the Netherlands acting through its Malta branch…..all our right, title and interest in and to all insurances effected or to be effected in respect of the Vessel, including the insurances constituted by the policy on which this notice is endorsed, and including all money payable and to become payable thereunder or in connection therewith…."

11. The Loss Payable Clause of the same date ("the Loss Payable Clause"), noted the assignment and went on to provide (so far as here relevant) as follows:

> "Claims payable under this policy in respect of a total or constructive total or an arranged or agreed or compromised total loss or unrepaired damage and all claims which (in the opinion of the Mortgagee) are analogous thereto shall be payable to the Mortgagee up to the Mortgagee's mortgage interest."

12. *Events after the loss of the Vessel:* The Vessel sank on 3 April 2013. As set out in the judgment, various discussions between Owners and the Bank followed in short order, as to payment of Owners' operational costs and other matters. The Bank was informed, apparently to the surprise of a Mr Tayfun, the Division Director since 2006 of the Bank's Corporate Credits Department, that the amount which would be paid under the Policy was the insured value (namely US$22 million), rather than the Vessel's market value. There was some debate as to how the insurance proceeds would be applied.

13. On 4 April 2013, Owners asked the Bank to provide a letter formally authorising Underwriters to pay the proceeds of the insurance claim to the brokers, Willis. Such a letter was forthcoming from the Bank, on 5 April 2013 ("the Letter of Authority"). It was addressed to "Underwriters concerned", headed "Re: 'Atlantik Confidence'/ 30th March 2013 Fire, explosion and subsequently sank" and was in these terms:

> " We hereby authorise you to pay to Willis Ltd all claims of whatsoever nature arising from the above mentioned casualty provided that (i) there are no amounts due under the policy and (ii) …[the Bank] is the sole loss payee of the policy.
>
> We agree that settlement of such amounts in account or otherwise with Willis Ltd, shall be your absolute discharge in respect of such amounts paid.
>
> ……"

14. As Teare J noted, on 18 April 2013, the Bank asked Owners for the current status of the claim and received the answer that Owners would ask their lawyer for a weekly report but that correspondence could not be shared because it was "private and confidential".

15. Settlement discussions followed between Owners and Underwriters. In an email, dated 29 July 2013, Willis indicated its understanding that Clyde & Co. LLP ("Clydes") would sign the Settlement Agreement on "Owners'/Bank's behalf". As Teare J observed, this appears to have been a misunderstanding because when the Settlement Agreement was entered into (on 6 August 2013), it was signed:

> "….by Clyde & Co. LLP as agent only on behalf of 'the Assureds' (defined as being the Owners and the Managers) and by Norton Rose Fulbright LLP as agents only on behalf of the Underwriters."

16. The Settlement Agreement provided, insofar as material, as follows:

> " This agreement is made the 6th day of August 2013
>
> BETWEEN
>
> (1) The UNDERWRITERS more particularly described in schedule 1 hereto ('Underwriters') for their respective several proportions;

(2) KAIROS SHIPPING LIMITED of…..Malta, as owners of the Vessel (as defined below), ZIGANA GEMI ISLEMTMELERI AS of Itri Sokak….of Turkey, as managers of the Vessel and their associated, affiliated and subsidiary companies for their respective rights and interests (hereinafter together the 'Assureds').

WHEREAS:

(A) The Assureds purchased hull and machinery insurance from the Underwriters for 12 months at 15 October 2012 in respect of the 'ATLANTIK CONFIDENCE' (the 'Vessel') in the sum of US$ 22,000,000 on the terms and conditions appearing in policy no. B080193898M12 and the endorsements thereto (the 'Insurance').

(B) The Insurance was placed on behalf of the Assureds by Willis Limited ('Willis'). ….[The Bank]….was mortgagee of the Vessel and loss payee under the Insurance. The Bank have consented to Underwriters making payment to Willis in accordance with a letter dated 5 April 2013…..

(C) The Vessel suffered a fire and sank off the coast of Oman in March/April 2013 (the 'Casualty'). The Assureds advanced claims under the insurance, inter alia, in respect of damage to and/or loss of the Vessel (the 'Claims').

(D) The parties hereto wish to resolve all claims of whatsoever nature in relation to the Vessel and the Casualty upon the terms and conditions set out below.

NOW IN CONSIDERATION OF THE MUTUAL OBLIGATIONS AND PROMISES HEREINAFTER CONTAINED, IT IS HEREBY AGREED AS FOLLOWS:

1. Payment

1.1 Underwriters shall pay to the Assureds their due proportions….of US$22,000,000 (the 'Settlement Sum').

1.2 Each Underwriter shall pay its due proportion of the Settlement Sum to Willis on behalf of the Assureds…..Such payment….shall completely discharge and release each such paying Underwriter for its respective proportion of the Settlement Sum…

1.3 The Assureds accept the Settlement Sum in full and final settlement….

2. Release

> Upon payment of each Underwriter's due proportion of the Settlement Sum to Willis, the Assureds completely discharge and release each such Underwriter……
>
> 3, Warranties
>
> 3.1 The Assureds warrant that, subject to the interests of the Bank:
>
> (a) they are the only parties entitled to the Settlement Sum and that no other party has any legal or equitable interest in any claims of whatsoever nature against Underwriters….
>
> …..
>
> 4. Rights of Third Parties
>
> The parties to this Agreement do not intend that any provision of this agreement confers or purports to confer any benefit which may be enforceable by third parties pursuant to the Contracts (Rights of Third Parties) Act 1999, save that Underwriters' directors, officers, servants, employees, adjusters, agents, contractors, solicitors, counsel and experts shall have the benefit of and may enforce clauses 2 and 3 above.
>
> 5. Law and Jurisdiction
>
> 5.1 This agreement and any dispute or claim arising out of or in connection with it (including any non-contractual disputes or claims) shall be governed by and construed in accordance with the laws England.
>
> 5.2 The parties irrevocably submit to the exclusive jurisdiction of the High Court of Justice in England in respect of any disputes or claims that may arise out of or in connection with this agreement (including any non-contractual disputes or claims)."

17. The evidence before the Judge, including from Mr Tayfun, was that the Bank was not involved in the negotiations or in the settlement of the insurance claim.

18. In the event, on or around 16 August 2013, the insurance proceeds were paid by Underwriters to Willis, to an account located in London and, thereafter, the Bank received US$21,970,272.74 in Malta from Willis. US$1,676,129.18 was transferred into the Capella account as part repayment of the debt against *Atlantic Glory*. US$20,294,143.56 was transferred into a Kairos account and used to discharge various debts.

19. *Underwriters' claims:* It is next convenient to summarise the nature of the claims sought to be advanced by Underwriters, in proceedings commenced in December 2016.

20. Underwriters submit that, in presenting the claim under the Policy, Owners (acting, it is alleged, on their own behalf and on behalf of the Bank) made the following express or implied representations ("the Representations"):

> " …that (1) the Vessel was lost by reason of a peril insured against under the Policy; (2) the Vessel's loss was accidental; (3) the Owners were unable to explain the cause of the loss of the Vessel; (4) the Owners and the Bank were entitled to an indemnity under the Policy in respect of the loss of or damage to the Vessel; (5) the Owners were not guilty of wilful misconduct and did not procure the loss of the Vessel by their own wilful misconduct."

21. Underwriters further contend that the Bank "independently" made the Representations, or adopted, or is vicariously liable for, the Representations made by Owners, so as to achieve payment of the insurance proceeds to Willis.

22. Underwriters go on to aver that, in reliance on each of the Representations, made by or on behalf of Owners and/or the Bank, Underwriters entered into the Settlement Agreement with Owners on behalf of themselves and on behalf of the Bank – and paid the settlement sum to Willis.

23. Underwriters contend that the Representations were untrue and material and that they amounted to material misrepresentations and/or gave rise to a mistaken belief by the Underwriters to the effect that the Representations were true.

24. As expressed in Underwriters' skeleton argument, these misrepresentations and/or mistaken beliefs form the basis of Underwriters' claim against Owners and the Bank for:

> " (1) the avoidance and/or rescission of the Settlement Agreement on grounds of misrepresentation and mistake; (2) restitution of the sums paid pursuant to the Settlement Agreement by reason of the avoidance and/or rescission of the Settlement Agreement; (3) damages in deceit, for negligent misrepresentation and/or pursuant to sections 2(1) and/or 2(2) of the Misrepresentation Act 1967; and (4) restitution of the sums paid by mistake…."

25. As is already apparent, the Bank challenged jurisdiction.

26. ISSUE I: THE EVIDENTIAL STANDARD

27. *(1) Introduction:* This Issue goes to whether observations in the Supreme Court in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80; [2018] 1 WLR 192, post-dating the judgment, have changed the relevant test, so that the Judge's approach to various of the Issues in the case must now be regarded as erroneous.

28. Before the Judge it was common ground that the standard of proof to be applied in disputes as to whether the English Court has jurisdiction under Brussels Recast is that of a good arguable case, in the sense that the party contending for the jurisdiction should

have "the better of the argument". It is apparent from the judgment, at [21], that the Judge applied this test – as illustrated in the judgment, *passim*, with examples at [33], [38] and [54].

29. *(2) The observations in Brownlie:* In *Brownlie*, Lord Sumption JSC, with whom Lord Hughes JSC agreed, began his consideration of the evidential standard for establishing the application of one of the jurisdictional gateways at [5]. There (*inter alia*), he drew attention to the view of Lord Simonds in *Vitkovice Horni v Korner* [1951] AC 869, at p.880, adopting the expression of a "good arguable case", importing "more than a *prima facie* case but less than a balance of probabilities". That test had commanded acceptance in subsequent authority and, though originating in the old Rules of the Supreme Court ("RSC") applied to the current Civil Procedure Rules ("CPR").

30. Lord Sumption went on to say this:

> "7. An attempt to clarify the practical implications of these principles was made by the Court of Appeal in *Canada Trust v Stolzenberg (No. 2)* [1998] 1 WLR 547. Waller LJ, delivering the leading judgment observed, at p. 555:
>
> ' 'Good arguable case' reflects…..that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e., of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that facts exist which allow the court to take jurisdiction.'
>
> …..In my opinion it is a serviceable test, provided that it is correctly understood. The reference to 'a much better argument on the material available' is not a reversion to the civil burden of proof which the House of Lords had rejected in *Vitkovice*. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word 'much', which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

31. At [33], Baroness Hale of Richmond PSC (with whom Lord Wilson JSC and Lord Clarke of Stone-Cum-Ebony agreed), underlined that everything said about jurisdiction in *Brownlie* was *obiter*. She added, however:

> "…For what it is worth, I agree (1) that the correct test is 'a good arguable case' and glosses should be avoided; I do not read Lord Sumption JSC's explication in para. 7 as glossing the test…."

32. *(3) The rival cases:* For Underwriters, Mr MacDonald Eggers QC submitted that, in the light of the observations in *Brownlie*, "the better of the argument gloss" had not been retained and/or differed from the Supreme Court guidance providing for an approach materially different to the approach adopted by the Judge. The test was that of "a good arguable case" and it sufficed here to establish a gateway if there was a plausible, albeit contested, evidential basis for it. This Court was not constrained by the decision of the Judge; we had the same material available as did the Judge – with the advantage of the *Brownlie* decision, not available to the Judge.

33. For the Bank, Mr Berry QC submitted that the Judge's approach had not been invalidated by anything said in *Brownlie*. If need be, the "better of the argument" test equated to Lord Sumption's formulation that the Court must "take a view". In any event, this Court should be slow to interfere with a lower Court's evaluation of a jurisdictional challenge.

34. *(4) Discussion and conclusion:* In my judgment, nothing said in *Brownlie* invalidated the approach adopted by the Judge to the applicable standard of proof to be satisfied by Underwriters – on whom the burden of proof rested – to come within the relevant Brussels Recast jurisdictional gateways. As is clear from *Brownlie*, the test remains that of "a good arguable case". A majority of the Supreme Court deprecated any "glossing" of that test but said, in terms, that Lord Sumption's "explication", at [7], did not constitute any such impermissible gloss. Accordingly, a good arguable case remains something more than a *prima facie* case and something less than a case satisfying a balance of probabilities test. Where there is a dispute as to the applicability of a gateway, unless prevented by reason of some consideration relating to the interlocutory stage of the proceedings, the Court "must take a view on the material available if it can reliably do so". With regard to the disputed Issues on this appeal, there does not seem to me to be any reason why the Court cannot make a reliable assessment. For my part, I think that is what the Judge did: on the material available, he took a view and made an assessment. I would be content to say that in asking himself who had the better of the argument on the material available, the Judge may be seen to give effect to the test as subsequently formulated in *Brownlie*; but it suffices to conclude, as I do, that if any distinction can be drawn between the Judge's approach and the *Brownlie* formulation, it is a distinction without any meaningful difference. Accordingly, I cannot accept Mr MacDonald Eggers' challenge to the judgment under this Issue.

ISSUE II: THE SETTLEMENT AGREEMENT

35. *(1) Introduction:* As already observed, cl. 5.2 of the Settlement Agreement provides for the exclusive jurisdiction of this Court in respect of any disputes or claims arising out of or in connection with that Agreement. Art. 25 of Brussels Recast accordingly provides that this Court shall have jurisdiction to determine the present dispute – *provided* that the Bank is a party to the Settlement Agreement. There is much good sense in the proposition that the Bank *ought* to have been a party to the Settlement Agreement; but the question remains as to whether the Bank *was* a party.

36. *(2) The judgment:* Following a very careful consideration (judgment (at [17] – [46]), Teare J held that the Bank was not a party to the Settlement Agreement.

37. Teare J asked himself whether Underwriters had the better of the argument that the Bank was a party to the Settlement Agreement. He approached this question by applying ordinary principles of English Law (rather than autonomous principles of European Law); on any view, that approach was not unfavourable to Underwriters.

38. Teare J observed that the Letter of Authority did not purport to be a grant of authority by the Bank to Owners to settle the claim under the Policy. He then addressed the argument that Owners were unable to settle the claim without the Bank's consent. Teare J was content to proceed on the basis that the Assignment was equitable not legal; on that footing, he concluded that Owners could settle the claim without the Bank's consent:

> "….though that would be a breach of the mortgage and they would need the Bank to agree that payment by the Hull Underwriters to Willis would be a good discharge of their payment obligations. That agreement was given by the Bank in the letter dated 5 April 2013 and….probably also amounted to consent for the purposes of the mortgage. But it does not follow that the claim must have been made on behalf of the Bank. "

The Judge accepted that the Loss Payable Clause meant that claims for a total loss were payable to the Bank (provided the amount of the claim was at least equal to Owners' indebtedness) and that only the Bank could give a good discharge but did not consider that these points materially advanced the debate. They did not mean, for the reasons already given by the Judge, that Owners could not make a claim on the Policy in their own name.

39. Turning to the discussions between the Bank and Owners, Teare J concluded that the parties contemplated that a claim would be made on the Policy and reached agreement as to how the proceeds would be treated. As the Judge observed:

> "The Bank, if it had wished to do so, could have instructed the Owners to make a claim on the Policy on its behalf. It was an equitable assignee of the Policy and loss payee….."

There was, however, no direct evidence that it had done so. To the contrary, Mr Tayfun's evidence was that Owners would deal directly with Underwriters on their own behalf. The Bank's "only concern" was that the sums received by Owners (from Underwriters) would be used to discharge their debts and those of other group companies. Subsequently, as already noted, when the Bank asked Owners for information as to the progress of the insurance claim, Owners declined to share all their correspondence, on the basis that it was "private and confidential". Understandably, this prompted Teare J's observation:

> "That remark sits unhappily with the suggestion that the Owners were making a claim under the Policy on behalf of the Bank."

40. Considering all Underwriters' points together, rather than in isolation, Teare J held (at [32]) that it was arguable that:

> "….by signing the letter dated 5 April 2013 and by providing it to the Owners in circumstances where the Bank was the total loss payee and knew that a claim was to be made on the Policy and in due course settled, to which settlement the Bank consented, it is to be inferred that the Bank authorised the Owners to make and settle the claim on its behalf. But I do not regard that as an inevitable inference and it is contrary to Mr Tayfun's understanding of the position as expressed in his evidence."

In the event and applying the good arguable case test, the Judge (at [33]) rejected Underwriters' arguments on these points, even considered as a whole:

> "My conclusion as to the letter dated 5 April 2013 is that the Hull Underwriters do not have the better of the argument on their submission that the Bank, by signing the letter dated 5 April 2013, authorised the Owners to settle the insurance claim on their behalf. On the contrary, on the evidence before the Court, including in particular the evidence of Mr Tayfun, the Bank has the better of the argument that it did not, by its letter dated 5 April 2013, confer authority upon the Owners to settle the claim on its behalf."

Neither the terms nor the context of the Letter of Authority required the Court to infer nor "compelled the conclusion" (the wording of Underwriters' counsel) that the Bank must have given Owners authority to settle the claim under the Policy on its behalf. Instead (at [34]) the terms of the Letter of Authority and its context were consistent with the Bank's understanding that:

> "…Owners would deal with the Hull Underwriters on their own behalf but being concerned to ensure that the sums received by the Owners from the Policy would be used to discharge the Owners' debts to the Bank."

41. Coming next to the terms of the Settlement Agreement, the Recitals and the definitions of the parties strongly suggested that the Bank was not a party to the agreement; the Judge's conclusion (at [43]) was in these terms:

> "The first question which…arises….is whether the terms of the Agreement unequivocally and exhaustively define the parties to it. I consider that they do, or that the Bank has at any rate the better of the argument that they do. The Agreement purports to define the parties to it, namely the Hull Underwriters and the Owners and Managers. Such clear definition of the parties is a cogent indication that they and no-one else were the parties to the Settlement Agreement. Further, the recitals expressly noted the role of the Bank as mortgagee and loss payee and referred to the Bank as having consented to the Hull Underwriters making payment to Willis by their letter dated 5 April 2013. Had it been

> intended that the Bank was also party to the Settlement Agreement the parties would surely have made that clear. In those circumstances the natural construction of the terms of the Agreement…..which referred to 'the Assured' is that they did not include the Bank."

42. If wrong (so that the terms of the Settlement Agreement did not unequivocally and exhaustively define the parties to it) then the second question arose: namely, whether there was evidence (on which Underwriters had the better of the argument) that Owners entered the Agreement as agents on behalf of the Bank. For the reasons already summarised, the Judge was unable to accept that Underwriters had the better of that argument. Accordingly, Underwriters' argument, namely, that this Court had jurisdiction by reference to the exclusive jurisdiction clause in the Settlement Agreement, failed.

43. *(3) The rival cases:* Before this court Mr MacDonald Eggers submitted that the Judge had fallen into error. The Bank was a disclosed principal and, whether identified or unidentified, could be sued on the Settlement Agreement, entered into by Owners on its behalf. The identity and contractual capacity of parties to a contract were questions of fact to be determined on the evidence. Having regard to the crucial significance of the Bank's position as both assignee and loss payee – the only entity entitled to be paid by Underwriters and to give a good discharge – the sensible construction and inference was that the Bank was a party to the Settlement Agreement; at the least, there was a good arguable case that Owners entered into the Settlement Agreement on behalf of the Bank. The Judge went wrong in placing too much weight on the terms of the Settlement Agreement and did not give sufficient weight to factors extrinsic to the terms of the Agreement. With regard to the evidence, he had placed too much weight on the assertions in Mr Tayfun's evidence, which were outweighed by the matters relied upon as part of Underwriters' case and the inferences to which they gave rise. In any event, he erred as to the construction of the terms of the Settlement Agreement, especially when read together with the Letter of Authority. Furthermore, the Judge was wrong in finding that Owners could settle with Underwriters without the Bank's consent.

44. Mr Berry submitted that the Judge was right, essentially for the reasons he gave. The question was one of actual authority and the short point was that Owners did not have actual authority to enter into the Settlement Agreement on behalf of the Bank; alternatively, if they did, any such authority was not exercised. Regardless of what might have happened, Owners had not entered into that Agreement on behalf of the Bank. On its natural and ordinary meaning, the Settlement Agreement (and the jurisdiction agreement within it) was not and did not purport to be an agreement made on behalf of the Bank. The identification of the Bank's interest in a capacity other than that of a party contradicted Underwriters' case or was, at best, neutral. Parol evidence could not be relied upon to contradict the named parties to a written agreement. While the Bank was an assignee of the Policy, it did not hold all rights and title to the proceeds and was only an equitable assignee. Equally and though a loss payee, the Bank was not entitled to the full proceeds of the insurance. The Letter of Authority had not authorised Owners to enter into the Settlement Agreement on behalf of the Bank; indeed, it had not envisaged "a settlement agreement intervening". Further, the Bank had not become aware of the terms of the Settlement Agreement until the litigation, a period of years

following the conclusion of that Agreement. There was no basis for disturbing the Judge's conclusion on this Issue.

45. *(4) Discussion and conclusions:* For my part, I can see no basis for departing from the Judge's decision on this Issue. In reaching this conclusion, I confess to a measure of regret, in that there would have been much good sense in the Bank being a party to the Settlement Agreement. But, however the matter is put, Underwriters' case that the Bank was a party to the Settlement Agreement (as distinct from ought to have been a party) falls tantalisingly short of disclosing a good arguable case. Moreover, I would not lightly depart from the Judge's decision on an evaluative Issue such as this and would only do so if I was persuaded he was wrong – which I do not think he was. My reasons follow.

46. *(A) The law:* As to the law, like the Judge, I approach the question as one of English law, adopting the assumption most favourable to Underwriters.

47. It is not in dispute that English Law permits an undisclosed principal to sue or be sued on a contract, subject (for present purposes): (1) to the terms of the written contract expressly or impliedly confining it to the named parties; (2) to the willingness of the "other" contracting party to contract with the undisclosed principal; (3) to the agent having actual authority to contract on behalf of the undisclosed principal and exercising such authority. There can be no real doubt here that Underwriters were willing to treat the Bank as a contractual party to the Settlement Agreement; thus (2) is not in dispute. However, (1) and (3) are.

48. In this regard, authoritative guidance is furnished by *Teheran-Europe v Belton* [1968] 2 QB 545. As Lord Denning MR expressed the matter, at p. 552:

> "It is a well-established rule of English law that an undisclosed principal can sue and be sued upon a contract, even though his name and even his existence is undisclosed, save in those cases when the terms of contract expressly or impliedly confine it to the parties to it."

Diplock LJ (as he then was) said this (at p.555):

> "….In determining who is entitled to sue or liable to be sued on a contract, a useful starting point, where the contract is in writing, is to look at the contract……
>
> Where an agent has such actual authority and enters into a contract with another party, intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, if the other party is willing….to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract...
>
> Whether the agent was actually authorised to enter into a particular contract on behalf of a particular principal depends on what passed between the agent and the principal…. "

Thus, both the terms of the Settlement Agreement and the need for Underwriters to establish (to the standard of a good arguable case) that Owners had actual authority from the Bank to contract on its behalf, remain to be considered.

49. There was some debate before us as to whether and, if so, to what extent, in seeking to ascertain the identity of parties to the (written) Settlement Agreement, it was permissible to have recourse to parol evidence. We were referred to passages from authorities emanating from very different contexts, namely: *Shogun Finance v Hudson* [2003] UKHL 62; [2004] 1 AC 919, esp., at [49], [153], [154] and [161]; *Homburg Houtimport BV v Agrosin Ltd (The Starsin)* [2003] UKHL 12; [2004] 1 AC 715, at [175] – [176]; *The Jascon 5* [2006] EWCA Civ 889; [2006] 2 Lloyd's Rep 195, esp., at [27]. For present purposes, it is unnecessary to be drawn into a discussion of conflicts between these passages (if indeed conflicts there are). The reason is that, as it seems to me, the materials to which the Judge had regard – outside of the terms of the Settlement Agreement – were plainly matters of contractual matrix (or context), which, on any view, he was entitled to consider when ascertaining the identity of the parties to that Agreement.

50. *(B) The terms of the Settlement Agreement:* The terms of the Settlement Agreement tell, at the least very strongly, against the Bank being a party thereto. To begin with, the definition of the parties plainly does not include the Bank; the definition of "Assureds" goes no further than Owners and Managers and cannot be extended to include the Bank. Furthermore, the Settlement Agreement is not silent as to the Bank; to the contrary, the Recitals record the role of the Bank as mortgagee and loss payee, together with the Bank's consent to the payment of the insurance proceeds pursuant to the Letter of Authority. As Teare J observed (at [43]), had "…it been intended that the Bank was also party to the Settlement Agreement the parties would surely have made that clear". I accordingly agree with the Judge (*ibid*) that on a "natural construction" of its terms, the Bank was not a party to the Settlement Agreement. It may be that this conclusion is sufficient to dispose of the appeal on this Issue but I shall proceed to consider the contextual materials (as the Judge did) on the working assumption that the terms of the Settlement Agreement do not necessarily confine the parties thereto to the named parties.

51. *(C) The Settlement Agreement in context:* Here too, I am unable to conclude that Underwriters have a good arguable case that the Bank was a party thereto. I am not at all persuaded that the Judge fell into error as contended by Mr MacDonald Eggers.

    i) At [32], the Judge helpfully summarised what might be regarded as the "high point" of Underwriters' case. He took very much into account the features that the Bank was the mortgagee and loss payee, that it had signed the Letter of Authority and that it (at some point) consented to the settlement. These were the strongest inferences supporting the Bank conferring authority on Owners to enter into the Settlement Agreement on its behalf. The Judge's reference to these features not giving rise to an "inevitable inference" did not import some excessively demanding test; here, the Judge was doing no more than saying that it did not necessarily follow from the features relied on by Underwriters that the Bank had indeed conferred actual authority on Owners to make and settle the claim on its behalf. That must be right and was no more than an introduction to the next paragraph ([33]), where the Judge applied the "good arguable case" test.

ii) Turning to [33], the Judge reached a conclusion that was open to him, taking fully into account the contextual evidential materials and not, in my judgment, giving undue weight to Mr Tayfun's evidence. Thus, first, the Judge had well in mind that the Bank was an equitable assignee and, though the loss payee, was not entitled to the entirety of the insurance proceeds. In this regard, the Judge's analysis that Owners *could* have settled the claim without the Bank's consent, albeit conduct which would have been most unattractive and in breach of the mortgage, is difficult to fault. Secondly, the Judge had already underlined Owners' unwillingness to share all their correspondence as to the progress of the insurance claim with the Bank; for my part, this factor alone poses the gravest difficulties for Underwriters' case that Owners entered the Settlement Agreement on behalf of the Bank. Thirdly and earlier in the judgment, the Judge had correctly posed the question of whether the Bank had in fact authorised Owners to enter the Settlement Agreement on its behalf. The Judge's conclusion, that there was not a good arguable case that it had done so, was consistent with the terms of the Letter of Authority and the evidence as a whole, namely, that Owners would deal with Underwriters on their own behalf, the Bank's concern being confined to the use made of the proceeds once received: judgment, at [34]. Fourthly, the Judge's conclusion is reinforced by Mr Berry's submission, not contradicted by Underwriters, that the Bank was not aware of the terms of the Settlement Agreement until years later. While not by itself conclusive – the Bank's concern being the receipt and use of the proceeds by Owners rather than the terms of the Agreement – it does tell against Owners having contracted on the Bank's behalf. Had that been the case, it might have been expected that, on conclusion of the Settlement Agreement and without more ado, Owners would have sent the Bank a copy or that the Bank might (as a matter of good order) have asked for one.

iii) Accordingly, in my view, the Judge was entitled to conclude that, in context, the Bank did not confer actual authority on Owners to enter into the Settlement Agreement on its behalf and that, in any event, Owners had not exercised any such authority in entering into that Agreement.

ISSUE III: THE POLICY

52. *(1) Introduction:* As has been seen, the Policy contains an English choice of law and (exclusive) jurisdiction clause. Underwriters' case before the Judge and before this Court was that the Bank was bound by this clause. In his skeleton argument, Mr MacDonald Eggers put the matter this way:

> "….the Bank is in any event bound by the jurisdiction agreement in the Policy by virtue of its assertion of its right, under the Policy, to payment of the insurance proceeds. In circumstances where the Bank, as assignee of and loss payee under the Policy, asserted a right to payment under the Policy, manifested by the letter of authority dated 5th April, 2013, it must have done so subject to the jurisdiction agreement in the Policy."

53. *(2) The judgment:* Teare J succinctly rejected this way of advancing Underwriters' case. At [51], having referred to the terms of the Letter of Authority, he said this:

> "…The Bank does not …thereby [i.e., by virtue of the Letter of Authority] assert its right to payment under the Policy in the sense of demanding that the proceeds of the Policy be paid to it or to its order. Rather, the Bank recognises that in certain circumstances (where it is the sole loss payee of the Policy) the Bank is entitled to the proceeds of the Policy and informs the Hull Underwriters that in those circumstances they may pay the proceeds to Willis and that such payment will be regarded as a good discharge of the Hull Underwriters' obligation to pay the proceeds to the Bank under the loss payable clause. The Bank had the right to assert a claim in the sense of demanding that the proceeds be paid to it or its order but the terms of the letter do not suggest that it did so. In any event, the Bank would only have been bound by the jurisdiction clause in the event that it chose to sue the Hull Underwriters on the Policy and it never did so. In those circumstances the Hull Underwriters do not have the better of the argument that the Bank is bound by the jurisdiction clause in the Policy."

54. *(3) The rival cases:* Reduced to its essentials, Mr MacDonald Eggers' submission was that the Judge erred in two respects. First, in confining the circumstances in which the Bank is bound by the jurisdiction clause in the Policy to the situation where the Bank seeks to enforce its right to payment by suing the Underwriters. In his words, there was "no reason why the Bank should be better off because it has not been put to the trouble of suing". By virtue of the assignment and the Loss Payable clause, the Policy was directly enforceable by the Bank against Underwriters; there was no reason why it should not be enforceable by Underwriters against the Bank. What, asked Mr MacDonald Eggers, would be the position if Underwriters had refused to pay the Bank's claim and had commenced proceedings for a negative declaration? In such a case, the jurisdiction clause in the Policy would bind both Underwriters and the Bank. By way of "conditional benefit analysis", the Bank's continued assertion of its right to the insurance proceeds must be subject to the obligation to submit to the jurisdiction of the English Court. Secondly, the Judge was wrong in finding that the Letter of Authority did not assert the Bank's right to payment under the Policy.

55. Mr Berry accepted that if an assignee elected to sue on the basis of assigned rights, then he was bound to do so in accordance with the terms of the assigned contract. This was so because the assignee had acquired the rights subject to a condition or equity to enforce them only in the way contemplated by the instrument which created them. The "conditional benefit analysis" meant that an assignee could not sue inconsistently with the terms of the contract under which he was claiming. However, if no proceedings were brought, an assignee was not subject to the equity of the jurisdiction clause. The same position prevailed under the *Contracts (Rights of Third Parties) Act 1999*. Accordingly, the Judge was right to hold that the Bank would only have been bound by the jurisdiction clause in the Policy if it had chosen to sue. An "assertion of rights short of suing" would not suffice for the Bank to be bound by the jurisdiction clause. There was nothing "odd" about this; a jurisdiction clause was only concerned with proceedings. The position of negative declaratory relief was not analogous. Moreover, the Judge's conclusion, that the Letter of Authority did not involve the Bank asserting its rights to payment under the Policy, was "impeccable".

56. *(4) Discussion and conclusions:* I respect the skill with which Mr MacDonald Eggers has constructed his submission, but I cannot agree with it. Instead, I agree entirely with both the Judge's conclusion and his reasoning, set out at [51] in the judgment.

57. I add only the following brief observations, expressed in my own words. First, the principle underlying "conditional benefit" is straightforward. If a party, X, acquires rights arising under a contract between A and B, X can only enforce those rights consistently with the terms of that contract. The principle was crisply explained by Hobhouse LJ (as he then was) in *The Jay Bola* [1997] 2 Lloyd's Rep. 279, at p.286, with regard to rights acquired by insurers from voyage charterers:

> "…the rights which the insurance company has acquired are rights which are subject to the arbitration clause. The insurance company has the right to refer the claim to arbitration, obtain if it can an award in its favour from the arbitrators, and enforce the obligation of the time charterers to pay that award. Likewise, the insurance company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of a dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognising the obligation to arbitrate."

See too, *The Tilly Russ*, Case C-71/83 [1984] ECR 2417, at [24] – [26]. These authorities lend no support to Underwriters' case. Nor, for that matter, does *Youell v Kara Mara Shipping* [2001] Lloyd's Rep. IR 553, at [56] and following.

58. Secondly, a jurisdiction clause is, by its nature, concerned with proceedings. Had the Bank commenced proceedings against Underwriters to enforce its insurance claim it would, doubtless, have been required to do so in accordance with the English jurisdiction clause contained in the Policy. But it did not do so and that, by itself, is an end of the matter. A mere assertion of its rights, short of commencing proceedings, would not, without more, result in the Bank being bound by the jurisdiction clause in the Policy.

59. Thirdly and in any event, like Teare J, I do not read the Letter of Authority as entailing an assertion of the Bank's rights. I have nothing to add to Teare J's observations (at [51]) on this point.

60. Fourthly, in the circumstances, it is unnecessary to lengthen this judgment by embarking on a consideration of the position which would or might have prevailed had negative declaratory relief been sought. Suffice to say, it was not.

61. It follows that I would dismiss Underwriters' appeal on this Issue.

ISSUE IV: MATTERS RELATING TO INSURANCE

62. *(1) Introduction:* Before coming on to consider whether this Court has jurisdiction in relation to Underwriters' claims pursuant to Arts. 7(2) or 7(1) of Brussels Recast, it is first necessary to consider whether Underwriters' claim is a "matter relating to insurance", within Section 3 of Brussels Recast. If it is, then *subject to* Issue V below,

Underwriters may only bring proceedings in the courts of the Member State where the Bank is domiciled, namely those of the Netherlands – and this Court would lack jurisdiction. Teare J held that the subject-matter of Underwriters' claim was a matter relating to insurance. Underwriters submit that he was wrong; the Bank contends that he was right.

63. *(2) Brussels Recast – the relevant provisions:* This Issue gives rise to a question of autonomous European Union law, with the relevant provisions to be found in Brussels Recast.

64. For present purposes, the underlying scheme of Brussels Recast appears from Recitals 15, 18 and 19; in short, jurisdiction is generally based on the defendant's domicile and the autonomy of parties to a contract with regard to jurisdiction should be respected, subject to its limitation in certain classes of contract, of which insurance is one, so as to protect the weaker party.

> "(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously…..
>
> (18) In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.
>
> (19) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation."

65. Art. 4 of Brussels Recast contains the general rule, namely, that "…persons domiciled in a Member State shall…..be sued in the courts of that Member State".

66. Chapter II, Section 3 of Brussels Recast deals with jurisdiction in matters relating to insurance. Our attention was drawn to the fact that the heading of Section 3 refers to "matters relating to insurance" – rather than to "matters relating to *contracts of* insurance" – by contrast with Sections 4 and 5, which refer to "Jurisdiction over consumer contracts" and "Jurisdiction over individual contracts of employment", respectively.

67. Art. 14 is pivotal for this Issue:

> "1. ….an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

> 2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending."

There was no dispute before us that the Bank was a "beneficiary", within Art. 14.1, as assignee and loss payee.

68. *(3) The judgment:* Having summarised the nature of Underwriters' claims and remedies sought, together with various domestic authorities, Teare J observed (at [66]) that the present case was:

> "….not merely one where there is a factual connection between the claim and the Policy but is one where the outcome of the claim very much depends upon whether the Hull Underwriters were in fact liable under the Policy."

The Judge accepted that the Settlement Agreement had been interposed but cautioned against a "strict legal analysis of the position in English law", giving rise to the risk that the Court would not give effect to the autonomous meaning of the phrase "matters relating to insurance".

69. The Judge's conclusions appear from the following passage in the judgment:

> "69. I accept that the mere fact that an insurance policy features in the history or pathology of the claim may not be enough to cause the subject-matter of the dispute to relate to insurance. But in my judgment the Policy on the Vessel is much more than a feature of the history or pathology of the claim brought by Hull Underwriters against the Bank. The representations which form the basis of the claim expressly concern the question whether the Vessel was lost by reason of a peril insured against under the Policy. The Hull Underwriters expressly allege that the Vessel did not become a total loss by reason of a peril insured against under the Policy. That is the reason why the representations were misrepresentations and why the Hull Underwriters claim to be entitled to avoid or rescind the Settlement Agreement. The Hull Underwriters, when explaining their claim for damages, expressly allege that they are not liable for loss caused by the wilful misconduct of the Owners pursuant to …section 55(2)(a) of the Marine Insurance Act 1906……
>
> 70. It is wise in these matters to stand back from the detail of the claim and its precise legal analysis in terms of English law. In my judgment the nature of the claim made by the Hull Underwriters against the Bank is so closely connected with the question of the Hull Underwriters' liability to indemnify in respect of the loss of the Vessel pursuant to the Policy that it can fairly and sensibly be said that the subject-matter of the claim relates to insurance and so is governed by Article 14.

> 71. Indeed, Mr MacDonald Eggers accepted that where consideration of the insurance contract is indispensable to the determination of the claim the matter is one which relates to insurance. Perusal of the Hull Underwriters' claim shows that consideration of the Hull Underwriters' liability under the Policy is indispensable to the determination of the claim against the Bank."

70. *(4) The rival cases:* The essence of the rival cases can be very shortly summarised. The question was whether the Settlement was a "firewall" or "broke the chain" between the Policy and Underwriters' claim. Mr MacDonald Eggers submitted that there was a real separation between the Policy and the claims. Mr Berry contended that what mattered here was non-liability under the Policy.

71. *(5) Discussion and conclusions:* I go some of the way with Mr MacDonald Eggers and agree with his submissions that:

i) Section 3 of Brussels Recast should, in principle, be narrowly construed, as a derogation from the general rule of jurisdiction based on the defendant's domicile, albeit that in the particular case of claims against policyholders, insureds or beneficiaries, the same result is achieved. See, *UGIC v Group Josi Reinsurance* (Case C-412/98) [2001] QB 68, at [49] and [70] – [72]. I would add, first, that I do not think anything turns in the present case on whether Section 3 and Art. 14 in particular are to be narrowly or otherwise construed. Secondly, I do not think the Judge was suggesting otherwise in his concluding observations at [68], where he said that in determining whether a matter "relates to insurance", the Court must "in a broad and common sense manner consider whether the subject-matter of the dispute relates to insurance". The target of the Judge's remarks was the analysis, based on domestic law, advanced by Mr MacDonald Eggers as to the interposition of the Settlement Agreement; I do not read the Judge's observations here as going to the approach to be adopted to the construction of Section 3. That the inquiry was broad did not mean that the provisions in question were to be given a broad meaning.

ii) Nothing turns on the absence of the word "contracts" in the heading of Section 3, by contrast to the wording in the headings of Sections 4 and 5. Aside from any other considerations, the word "contracts" or "contract" is applied in Recitals (18) and (19) in an undifferentiated manner to insurance as well as consumer and employment matters.

iii) A "but for" test, without more, may well not suffice for a matter to relate to insurance. I am not dissuaded from this view by the analogy Mr Berry sought to draw from the observations of the Court of Justice of the European Union ("CJEU") in *Profit Investment Sim SpA v Ossi* (Case C-366/13) [2016] 1 WLR 3832, at [55], in the context of contract and a restitution claim – and, for that matter, I do not think that a simple "but for" test was applied in the CJEU decision in *Brogsitter* (see below).

iv) The three English authorities to which the Judge referred (at [61] – [65]) do not furnish any significant assistance. Both *The Ikarian Reefer (No. 2)* [2000] 1 Lloyd's Rep. 129 and *Keefe v Mapfre Mutualidad Cia SA* [2015] EWCA Civ

> 598; [2016] 1 WLR 905 concern factual situations very far removed from the present case. *Jordan Grand Prix Ltd v Baltic Insurance Group* [1999] 2 AC 127 was much closer; the decision was that the avoidance of an insurance contract on the ground of fraud was held to be a matter relating to insurance – *but* no settlement agreement had been interposed, so no issue arose in that regard, rendering that authority instantly distinguishable from this case.

Thereafter, however, I part company with Mr MacDonald Eggers.

72. What remains is the CJEU decision in *Brogsitter v Fabrication de Montres Normandes EURL* (Case C-548/12) [2014] QB 753, together with the consideration of that decision by this Court (to which I was a party) in *Arcadia Petroleum Ltd v Bosworth* [2016] EWCA Civ 818. There is a need for caution, not only because (like the Judge) I am hesitant to base my decision on cases which do not concern the meaning of the phrase "matters relating to insurance" (and neither of these cases does) but also because the Supreme Court has referred questions arising from *Arcadia* to the CJEU for a Preliminary Ruling (see, *Official Journal of the European Union*, 18.12.2017).

73. Nonetheless, the guidance afforded by those decisions accords with the common sense manner in which I would in any event approach the meaning of the phrase "matters relating to insurance" and, to such extent, I do derive assistance from them. Some brief references suffice.

74. *Brogsitter* concerned the question of special jurisdiction (now covered by Arts. 7 and following of Brussels Recast) and, in particular, whether the matter related to contract or tort. As set out in *Arcadia* (at [49]), this Court held that the CJEU's central reasoning in *Brogsitter* was to be found in the following paragraphs of that judgment:

> "23. ….the mere fact that one contracting party brings a civil liability claim against the other is not sufficient to consider that the claim concerns 'matters relating to a contract'….
>
> 24. That is the case only where the conduct complained of may be considered a breach of contract, which may be established by taking into account the purpose of the contract.
>
> 25. That will *a priori* be the case where the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter.
>
> 26. It is therefore for the referring court to determine whether the purpose of the claims brought by the applicant in the case in the main proceedings is to seek damages, the legal basis for which can reasonably be regarded as a breach of the rights and obligations set out in the contract which binds the parties in the main proceedings, which would make its taking into account indispensable in deciding the action.

> 27. If that is the case, those claims concern 'matters relating to a contract'….Otherwise, they must be considered as falling under 'matters relating to tort, delict or quasi-delict'…..
>
> …..
>
> 29. Therefore, the answer to the question referred is that civil liability claims such as those at issue in the main proceedings, which are made in tort under national law, must none the less be considered as concerning 'matters relating to a contract' within the meaning of article 5(1)(a)….where the conduct complained of may be considered a breach of the terms of the contract, which may be established by taking into account the purpose of the contract."

75. In *Arcadia*, the relevant issue (for present purposes) was whether conspiracy claims comprised matters relating to "individual contracts of employment" (within what would now be Section 5 of Brussels Recast). This Court (at [64] and following) rejected the application of a "mechanistic test", turning on whether the conspiracy claims *could* have been pleaded as a breach of the contracts of employment in question. Having regard to English law, we favoured (at [65]) staying with the actual words of the Article in question, without any gloss. A broad test and a broad inquiry were involved – focusing on the substance of the matter. We held that:

> "….the correct approach as a matter of English law is to consider the question whether the reality and substance of the conduct relates to the individual contract of employment, having regard to the social purpose of Section 5…."

76. Turning to *Brogsitter*, we viewed the *ratio* as contained at [24] – [27] of that judgment (set out above). The upshot (at [66] of *Arcadia*) was that:

> "…it does not suffice to pose the – literal – question as to whether the conduct complained of 'may be considered a breach of contract'. Instead the requirement that the legal basis of the claim 'can reasonably be regarded' as a breach of contract, assists in directing the focus of the inquiry to the substance of the matter, with the result that it is 'indispensable' to consider the contract in order to resolve the matter in dispute. This is a test and an approach indistinguishable….from that adopted in *Alfa Laval* [i.e., *Alfa Laval Tumba v Separator Spares International* [2012] EWCA Civ 1569 (Ch); [2012] IL Pr 40], so that (in Davis LJ's words) there will be a material nexus between the conduct complained of and the individual contracts of employment. "

77. With these considerations in mind, I find myself in full agreement with the Judge. It is correct that the Settlement Agreement was here interposed and, as the Judge observed (at [67]) its aim was to resolve all claims under the Policy. Moreover, as moneys had been paid by Underwriters to Owners (via Willis) pursuant to the Settlement Agreement, it is inevitable that Underwriters' claims needed to "tackle" the Settlement

Agreement – and, as seen from the summary set out above, they do so, seeking its avoidance and/or rescission, restitution of sums paid thereunder and damages for misrepresentation.

78. However, as a matter of reality and substance, the foundation of Underwriters' claims lies in the Policy. Central to Underwriters' claims, as the Judge explained (at [69] – [70], set out above), was the question of Underwriters' liability or non-liability to indemnify Owners under the Policy. The crucial (if not the only) question is whether the Vessel was lost by reason of a peril insured against under the Policy or whether the loss arose by reason of wilful misconduct on the part of Owners. On this footing, there is the most material nexus between Underwriters' claims and the Policy. Further still, a consideration of the Policy is indispensable to the determination of the claim. As a matter of common sense, having regard to the autonomous meaning to be given to Section 3 and fortified by *Brogsitter* and *Arcadia*, notwithstanding the interposition of the Settlement Agreement, Underwriters' claims come squarely within the heading "matters relating to insurance".

79. For completeness, Mr MacDonald Eggers submitted that the Judge's recording (at [71]) of his "acceptance" that consideration of the Policy was indispensable to the determination of Underwriters' claims, misinterpreted the more limited nature of the "concession" he had made. I am happy to accept that explanation from Mr MacDonald Eggers and do not in any way base my conclusion on a suggested concession. I am, however, firmly of the view, for the reasons given, that (as the Judge there said) "consideration of the Hull Underwriters' liability under the Policy is indispensable to the determination of the claim against the Bank" and is, therefore, a matter relating to insurance.

80. In the circumstances, I would dismiss Underwriters' appeal on this Issue.

ISSUE V: ECONOMIC IMBALANCE

81. *(1) The judgment:* Having held that the subject-matter of Underwriters' claim was a matter relating to insurance, Teare J nonetheless concluded that the Bank could not take the benefit of Art. 14, Brussels Recast. The reason was that the Bank was not "the weaker party" within the meaning of Recital (18).

82. The Judge dealt with this matter shortly, as follows:

> "72. …..Another recital to the Regulation, number 18, provides that in relation to insurance the weaker party should be protected by rules of jurisdiction more favourable to his interest than the general rules. In the present case, it is not possible to describe either party to the Policy or the Bank as 'the weaker party'. That being so the case law of the European Court of Justice appears to establish that the special rules for matters relating to insurance do not apply; see *Vorarlberger v WGV-Schwabishe* [2010] Lloyd's Rep IR 77 at paragraphs 40-45. The ECJ stated at paragraph 41 that the protective role fulfilled by these provisions implies that they should not be extended to persons for whom that protection is not justified. Further, at paragraph 42 it said that no special protection is justified where the parties concerned

> are professionals in the insurance sector. It followed, on the facts of that case, that a social security institution, acting as assignee of an injured person, could not, when suing an insurer, take the benefit of the special jurisdictional provisions in article 11 (now article 13) of the Brussels Regulation; see paragraph 43."

83. The Judge went on (at [73]) to describe this approach as "a particularly robust application of recital 18" but held that he could not ignore it.

84. From this decision, the Bank appeals. If the Bank is right on this Issue, the outcome is fatal to Underwriters' argument that this Court has jurisdiction.

85. *(2) The rival cases:* Mr Berry submitted that, as assignee and loss payee, the Bank was a "beneficiary" and thus came within the defined class set out in Art. 14, namely "policyholder….insured or …beneficiary". Members of this class were deemed to be "the weaker party", in Recital (18) and were entitled to the benefit of the rules of jurisdiction contained in Art. 14. Binding domestic authority supported that proposition. The authorities relied on by Underwriters, where the view had been taken that a party was not "the weaker party" did not involve members of the defined Art. 14 class. As made clear in Recital (15), rules of jurisdiction should be "highly predictable"; there was no room for individual analysis of the Bank's economic position to ascertain whether there was or was not (on the individual facts) an economic imbalance. Hence, the rejection of the United Kingdom's ("UK's") preferred position at the time of Accession and the limited derogation for certain classes of insurance only, now reflected in Arts. 15 and 16 of Brussels Recast. Art. 14 was to be applied "unless the contrary is expressly envisaged, and expressly stated, in the Regulation"; it could not be derogated from "by inference, implication or purposive interpretation". The Judge had therefore erred in embarking on a factual assessment of who was the weaker party. In any event, compared with Underwriters, the Bank was the economically weaker party and there was no evidence to suggest otherwise. Moreover, the Bank was not an insurance professional.

86. Mr MacDonald Eggers submitted that Section 3 was inapplicable; its purpose was to provide jurisdictional protection for the weaker party – i.e., economically weaker and a weaker party in terms of legal experience. Where there is no social need for such protection, Section 3 would not apply. The matter was not concluded by the Bank being a "beneficiary" within Art. 14; that was an altogether too formalistic approach. The existence of certain types of insurance within Arts. 15 and 16, where party autonomy prevailed, supported his argument. Mr MacDonald Eggers disclaimed any case-by-case assessment of a person's economic strength. Here, however, the Bank came within a class of professionals to whom the Section 3 protection did not apply or extend. In the light of its shipping finance business, the Bank's professional activity included taking assignments of insurance rights. The Bank was not an economically weaker party than Underwriters and no authority bound the Court to hold otherwise. It was a feature of this case that the Settlement Agreement was not a contract whose terms were predetermined. The Judge's conclusion was justified and should be upheld.

87. *(3) Authority, terms of Accession and Arts. 15 and 16:* I start with the domestic authority, which, Mr Berry contended, bound us to decide this Issue in his favour: *New Hampshire Ins Co v Strabag Bau AG* [1992] 1 Re LR 325. Proceedings were commenced by London market insurers against a German insured; insurers and insured

had comparable bargaining power. This Court held that the proceedings between the parties related to insurance and that, by reason of Art. 11 of the *Brussels Convention 1968* (now Art. 14 of Brussels Recast), they were required to be brought against the German insured in Germany.

88. The plaintiffs (New Hampshire) contended that the defendants (Strabag and others) did not require protection, being substantial civil engineering and construction companies.

89. Lloyd LJ (as he then was) observed (at p.330) that Section 3 was "essentially protective in nature". It was intended to protect the small policyholder against a more powerful insurer. He continued as follows (at pp. 330-331):

> "When negotiations for the accession of the United Kingdom commenced, the United Kingdom proposed a major amendment to section 3, so as to exclude large risks altogether from the scope of Articles 7-12. According to Professor Schlosser, this proposal was regarded as 'too far reaching in view of the general objectives of the 1968 Convention'. In paragraph 140 Professor Schlosser says:
>
> 'The United Kingdom's request for special rules for the insurance of large risks was probably the most difficult problem for the Working Party. The request was based on the realisation that the concept of social protection underlying a restriction on the admissibility of provisions conferring jurisdiction in insurance matters is no longer justified where the policyholders are powerful undertakings. The problem was one of finding a suitable demarcation line. Discussions on the second Directive on insurance had already revealed the impossibility of taking as criteria abstract, general factors like company capital or turnover. The only solution was to examine which types of insurance contracts were in general concluded only by policyholders who did not require social protection. On this basis, special treatment could not be conceded to industrial insurance as a whole.'
>
> Thus the solution eventually adopted was to exclude from Articles 7-12 the insurance of ships, aircraft, and goods in transit (other than passengers' luggage), and liabilities arising out of the use or operation of ships and aircraft: see Article 12A. This came some way towards meeting the needs of the London insurance market; but not the whole way."

90. Against this background, the Court considered the opposing contentions. The plaintiffs advanced two main arguments. First, that this was not a matter relating to insurance at all. Building on the position prevailing as to credit sale agreements, counsel submitted that jurisdiction in matters relating to insurance should be read as jurisdiction "in *certain* matters relating to insurance". This submission, however, involved a re-run of the UK's failed Accession negotiations and did not find favour with the Court.

91. The plaintiffs' second main argument was that, if reinsurance was excluded from Arts. 7-12 that could only be on the basis that insurers and reinsurers were normally of equal bargaining power; if so, then the same reasoning should apply as between other parties of equal bargaining power. For various reasons (at p.332), Lloyd LJ rejected this argument, holding that the argument based on reinsurance was only of limited assistance to the plaintiffs. Interestingly for present purposes, Lloyd LJ observed that if reinsurance was indeed excluded from Arts. 7-12, such exclusion might be justified on a narrower basis than equal bargaining power: namely, "…that both insurers and reinsurers are in the same business of taking risks for a premium".

92. The "exclusions" from Arts. 7-12 of the Brussels Convention (to which Lloyd LJ referred) are now to be found in Arts. 15 and 16 of Brussels Recast. So far as here relevant, Art. 15 provides that the provisions of Section 3 may only be departed from by an agreement:

> "(5) which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 16."

Art. 16 catalogues the risks referred to in Art. 15 (5), including the following:

> "(1) any loss of or damage to:
>
> (a) seagoing ships….arising from perils which relate to their use for commercial purposes.
>
> …..
>
> (3) any financial loss connected with the use or operation of ships…as referred to in point (1)(a), in particular loss of freight or charter-hire;
>
> ……
>
> (5) notwithstanding points (1) to (4), all 'large risks' as defined in Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance…."

93. The effect of these provisions of Arts. 15(5) and 16 is that parties to a contract of insurance covering the enumerated risks enjoy autonomy to enter into a jurisdiction agreement departing from the Section 3 scheme. An example readily to hand is the exclusive English jurisdiction clause contained in the Policy.

94. In *Societe Peloux v Axa Belgium* (Case C-112/03); [2006] QB 251, the CJEU held that a jurisdiction clause complying with one of the exceptions to the Section 3 scheme could not be relied upon against a beneficiary under the insurance contract who had not expressly subscribed to the clause.

95. The Court, at [30], said this as to the social purpose underlying Section 3:

> "…..in affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a

> clause conferring jurisdiction for the benefit of the insurer, they reflect an underlying concern to protect the insured, who in most cases is faced with a predetermined contract the clauses of which are no longer negotiable and is the weaker party economically…."

96. However, in fairly considering *Peloux* for present purposes, two further passages should be noted. The first, from the Advocate General's Opinion (at [86]) is a reminder of the consequences of the compromise achieved in the UK's Accession negotiations:

> " It was therefore decided in the end to insert an article 12a into the Convention, allowing jurisdiction clauses in relation to 'major risk' insurance only, that is to say, in insurance policies covering certain kinds of transport (in particular air and sea transport). From that it may be inferred, *a contrario*, that the size and international stature of the policyholder or insured enterprise do not of themselves have the effect of precluding the operation of the special rules laid down by the Convention in insurance matters, since that effect is confined to the cases specified in article 12a."

The second, concerns the observation by the Court ([37]) that:

> "…it must be borne in mind that the beneficiary, like the policyholder, is protected by the Brussels Convention as the economically weakest party….."

97. *GIE v Zurich* (Case C-77/04) [2006] Lloyd's Rep IR 215, concerned third party proceedings between insurers. Here, no special protection under Section 3 was justified, insofar as the case concerned relations between professionals in the insurance sector. The Court observed (at [18]) that the protective purpose underlying Section 3 – in favour of the party "…deemed to be economically weaker and less experienced in legal matters" - implied that it should not be extended to persons for whom such protection was not justified. The Court went on to say this (at [22]):

> " The authors of the Convention took as their premise that the provisions of s.3 of Title II were applicable only to relations characterised by an imbalance between the parties and established for that reason a body of rules on special jurisdiction which favours the party regarded as the party which is economically weaker and less experienced in legal matters. Moreover, Art. 12(5) of the Convention excludes from that protective body of rules insurance contracts in which the insured enjoys considerable economic power."

98. *Vorarlberger v WGV-Schwabische* (Case C-347/08) [2010] Lloyd's Rep IR 77 (the authority cited by the Judge), concerned the position of a State social insurance fund, which had indemnified the victim of a road traffic accident and, pursuant to its statutory rights of assignment, sought to bring proceedings against the liability insurers in the country of its domicile, pursuant to Section 3. The CJEU held that it could not do so, when the insurers were established in another Member State.

99. The CJEU underlined (at [36]) that the predecessor Regulation to Brussels Recast provided for the rules of jurisdiction to be highly predictable – and founded on the principle that jurisdiction was generally based on the defendant's domicile "…save in a few well-defined situations in which the subject matter of the litigation or the autonomy of the parties" warranted a different linking factor. Consequently (at [39]), the rules on jurisdiction derogating from the general principle could not "…result in an interpretation which goes beyond the situations expressly envisaged" in the Regulation.

100. Turning (at [40]) to Section 3, it established an "autonomous system for the conferral of jurisdiction in matters of insurance". The purpose was to protect the weaker party by rules of jurisdiction "more favourable to his interests than the general rules…". The decision in *Peloux* was cited in support. The CJEU continued as follows:

> "41. The protective role fulfilled by those provisions implies that the application of the rules of special jurisdiction ….should not be extended to persons for whom the protection is not justified.
>
> 42. It has not been argued that a social security institution….is an economically weaker party and less experienced legally than a civil liability insurer…. In general, the court has already held that no special protection is justified where the parties concerned are professionals in the insurance sector, none of whom may be presumed to be in a weaker position than the others (*GIE v Zurich…*)."

Consequently (at [43]), the social security institution could not rely on the Section 3 rules of jurisdiction, against the liability insurer established in another Member State. The CJEU then added this:

> "44. In contrast, where the statutory assignee of the rights of the directly injured party may himself be considered to be a weaker party, such an assignee should be able to benefit from special rules on the jurisdiction of courts laid down in those provisions. This is particularly the situation….of the heirs of the person injured in an accident."

This conclusion enjoyed support from the case law concerning consumer contracts (now Section 4). There, it had been held:

> "45. ….that where, in the exercise of its professional activity, a statutory assignee of rights brings proceedings in order to pursue the assignor's claim under a contract concluded by a consumer, it may not enjoy the benefit of the rules of special jurisdiction concerning consumer contracts, since the purpose of those rules is to protect the economically weaker and legally less experienced party…."

101. *Kabeg v Mutuelles Du Mans Assurances* (Case C-340/16) [2017] I.L. Pr. 31, post-dated the judgment of Teare J in this case. The matter concerned a road traffic accident; during the period of incapacity which followed, the injured party's employer, a public-law institution, continued to pay his salary. The employer, proceeding by way of statutory

assignment, then sought to avail itself of the Section 3 rules of jurisdiction in a claim for reimbursement of the salary paid against the insurer of the vehicle involved. The CJEU held that, in the interests of certainty, the employer (suing as assignee of the rights of the employee) could benefit from those special rules of jurisdiction.

102. Advocate General Bobek plainly had reservations as to the approach adopted by the CJEU in *Vorarlberger*, in particular with regard to the predictability of the applicable rules of jurisdiction (at [AG60]); he observed that the *Vorarlberger* approach had not met "with universal acclaim".

103. Earlier, the Advocate General (at [AG47]) noted, in a passage specifically approved by the Court (at [32]), that the "weaker party" in insurance-related matter was defined rather broadly, by contrast with matters relating to employees and consumers:

> "…It includes four categories of persons: the policyholder, the insured, the beneficiary and the injured party. As a matter of fact, these parties may be economically and legally rather strong entities…. "

104. In the interests of predictability, in the Advocate General's view (at [AG67]):

> "….the subrogation to the rights of the directly injured party triggers the passing on of the *forum actoris* to any subrogee, including both physical and legal persons, unless: (i) that subrogee is herself a professional in the insurance sector, to whom the claim passed on the basis of an insurance relationship she formed with the directly injured party (brought about either by operation of the law or on the basis of an insurance contract); or (ii) the subrogee is an entity regularly involved in the commercial or otherwise professional settlement of insurance-related claims who voluntarily assumed the realisation of the claim as party of its commercial or otherwise professional activity. "

105. In this case, the CJEU expressed concern (at [34]) that:

> "34. …a case-by-case assessment of the question whether an employer which continues to pay the salary may be regarded as the economically weaker party in order to be covered by the definition of 'injured party' within the meaning of art. 11(2) of Regulation 44/2001, would give rise to the risk of legal uncertainty and would be contrary to the objective of that Regulation…according to which the rules of jurisdiction must be highly predictable.
>
> 35. Therefore, it must be held that….employers to which the rights of their employees to compensation have passed may, as persons which have suffered damage and whatever their size and legal form, rely on the rules of special jurisdiction laid down in arts 8-10 of that Regulation. "

106. *Hofsoe v LVM* (Case C-106/17) 31 January 2018 also post-dated the judgment of Teare J. In this case, a vehicle belonging to an individual domiciled in Poland was damaged in a traffic accident in Germany, caused by a German national insured with LVM. Facing a shortfall in compensation, the vehicle owner assigned his claim to Mr Hofsoe, who, as assignee, sought compensation from LVM. The question for the Court was whether a natural person (Mr Hofsoe), whose professional activity consisted (*inter alia*) in recovering claims for damages from insurers, could rely on the special jurisdiction rules of Section 3.

107. The CJEU answered this question adversely to Mr Hofsoe, citing *GIE, Vorarlberger* and *Kabeg* in the course of doing so. The Court's central reasoning may be seen from the following passage:

> "42. …..no special protection is justified where the parties concerned are professionals in the insurance sector, neither of whom may be presumed to be in a weaker position than the other…..
>
> 43. Therefore, a person such as Mr Hofsoe, who carries out a professional activity recovering insurance indemnity claims against reinsurance companies, in his capacity as contractual assignee of such claims, should not benefit from the special protection constituted by the *forum actoris*.
>
> …..
>
> 45. …the fact that a professional, such as Mr Hofsoe, carries out his business on a small scale, cannot lead to the conclusion that he is deemed to be a weaker party than the insurer. A case-by-case assessment of the question whether such a professional may be considered as a 'weaker party' in order to be covered by the definition of 'injured party', within the meaning of Article 13(2)…would give rise to the risk of legal uncertainty and would be contrary to the objective of that regulation….
>
> ….."

108. *(4) Discussion and conclusions: (A) Pulling the threads together:* From this survey of the relevant law and background, I venture the summary set out in the paragraphs which follow.

109. First, in the Accession negotiations, as explained in *New Hampshire*, the UK did not prevail in seeking to exclude large risks altogether from the Section 3 jurisdictional regime. No suitable demarcation line could be found. The resulting compromise confined the excluded risks to those enumerated in Arts. 15(5) and 16, set out above. Marine insurance is amongst those excluded risks, so permitting parties the autonomy to enter into jurisdiction agreements outside the Section 3 regime.

110. Secondly, with respect to Mr Berry's argument to the contrary, I am not persuaded that we are bound by *New Hampshire* to decide the present Issue in his favour. The submissions advanced and rejected in *New Hampshire* were of a very limited nature.

New Hampshire does, of course, serve as a powerfully persuasive reminder that it is not open to re-run the UK's unsuccessful Accession negotiations. Thus, as explained in *Peloux* (Advocate General, at [86]), the mere size and international stature of (for example) the policyholder would not preclude the operation of the Section 3 regime.

111. Thirdly and furthermore, I am unable to accept Mr Berry's submission that the matter is *concluded* by reason of the Bank being a *beneficiary* under the Policy. The mere fact that the Bank comes within the class of policyholder, insured or beneficiary, specifically named in Art. 14, does not give rise to an irrebuttable presumption that the party in question is the "weaker party" for the purposes of Recital (18). Given that the present case concerns a marine insurance risk, it would, at the least, be odd if Owners enjoyed the autonomy to enter a jurisdiction agreement outside of the Section 3 regime – but an assignee of Owner's claim was *irrebuttably* presumed to be the weaker party for the purposes of Recital (18). Although Mr Berry can and does argue that the express Art. 15(5) and 16 exclusions are exhaustive with regard to the derogations from the Section 3 regime and that there is no room for any implied extensions, that approach seems unduly literal in the context of an EU Regulation, the more especially when no useful social purpose would be served by it. It is quite correct that Arts. 15(5) and 16 confine the exclusions from the Section 3 regime to well-defined *subject-matter* (see, *Peloux*, Advocate General, at [86]; *Vorarlberger* at [36] and [39]); it does not, however, follow that an assignee from a marine insurance policyholder *must* be treated as the "weaker party". If the matter needs to be considered in terms of presumptions, then the definition of the class listed in Art. 14 may give rise to a rebuttable presumption that those named comprise the "weaker party" (*Kabeg*, at [AG47]) but, in my view, there is neither need nor justification for an irrebuttable presumption to that effect – and none of the CJEU authorities to which we were referred spoke in terms of an irrebuttable presumption. Reaching this conclusion does not in any way involve enlarging or blurring the subject-matter of the exclusions.

112. Fourthly, the CJEU jurisprudence is clear that Section 3 is intended to serve a protective social purpose but such protection is not to be extended beyond the ambit of those who need it: *Peloux* (at [30]); *GIE* (at [22]); *Vorarlberger* (at [41] – [42] and [45]); *Hofsoe* (at [42] – [45]).

113. Fifthly, the CJEU jurisprudence is likewise clear that a case-by-case factual assessment of whether a party is the "weaker party" is impermissible and would run counter to the important principle contained in Recital (15), namely, that the rules on jurisdiction should be "highly predictable".

114. Sixthly and accordingly, any exclusion from the protective ambit of Section 3 must be based on the membership by the party in question of a class not meriting such protection. In *Vorarlberger*, the Court spoke (at [42]) of special protection not being warranted for "professionals in the insurance sector". In *Kabeg*, the Advocate General (at [AG67]) contemplated exclusions for assignees who were professionals in the insurance sector *or* entities "regularly involved in the commercial or otherwise professional settlement of insurance-related claims who voluntarily assumed the realisation of the claim as part of its commercial or otherwise professional activity". *Hofsoe* (at [42]) again spoke of no special protection being justified for professionals in the insurance sector.

115. Seventhly, it follows that the reconciliation of the tension capable of arising between the social purpose justifying the special protection afforded by Section 3 and the principle of the high predictability of jurisdiction rules is achieved by having regard to the *class of business* conducted by the party in question and *not* by an individual factual assessment of the strength of its economic position.

116. *(B) Applying the law to the facts:* Although the Judge dealt with this Issue briefly, it has required more extensive treatment here in the light of the arguments addressed to us and the developments in the law post-dating the judgment. Having now considered the matter at some length and applying the immediately preceding summary (at [108] – [115] above), my conclusions can be stated very briefly.

117. First, this Issue is not determined in the Bank's favour by either *New Hampshire (supra)* or an irrebuttable presumption flowing from the Bank being a beneficiary under the Policy.

118. Secondly, I would, with respect, be unable to uphold the decision of the Judge insofar as it rested on the straightforward proposition (at [72]) that it was not possible to describe either party to the Policy or the Bank as "the weaker party". That view, again with respect, has a strong common sense attraction but I am not persuaded that it passes muster under the CJEU jurisprudence, having regard to the principle of predictability. At least to me, it appears to stray into the forbidden territory of fact-specific assessment of economic strength. Matters do not, however, end there.

119. Thirdly, ship finance typically involves a mortgage and it is an ordinary incident of the ship finance business that mortgagees of ships become assignees and loss payees of the owners' hull (insurance) cover. Again, as an ordinary incident of its ship finance business, the Bank must have been involved from time to time "in the commercial or…professional settlement of insurance-related claims" (*Kabeg*, at [AG67]) and it would have done so as part of its commercial or professional activity. No suggestion was advanced to us that the financing arrangements entered into between Owners and the Bank were in any way exceptional or "one-off" for the Bank. In this ship-financing capacity, the Bank's routine, commercial or professional, involvement with marine insurance claims means that it comes within the second class contemplated by the Advocate General in *Kabeg (supra)*.

120. Fourthly and in any event, even if not strictly an insurance professional, the Bank's business was at least analogous to that of an insurance professional, so that *if* any extension is required to the class contemplated (in *Vorarlberger*, by the Advocate General in *Kabeg* and in *Hofsoe*) as qualifying for exclusion from the Section 3 regime, it is an extension of the most incremental kind – and, in substance, certainly does not enlarge or blur the subject-matter of the exclusions.

121. Fifthly, if it was right to exclude Mr Hofsoe from the Section 3 regime (see, *Hofsoe, supra*), it must be right that the Bank is likewise so excluded; as Mr MacDonald Eggers submitted, the present case was "*Hofsoe* on a grander scale". I am further fortified in this view by the knowledge that at least in its dealings with the Settlement Agreement, the Bank was not confronted with a predetermined contract.

122. Sixthly, in all the circumstances, excluding the Bank from the special protection furnished by Section 3 cannot be described as in any way inconsistent with its underlying social purpose.

123. For these reasons, involving some elaboration upon those given by the Judge, I would dismiss the Bank's appeal and uphold the Judge's decision on the present Issue.

ISSUE VI: DAMAGES FOR MISREPRESENTATION

124. *(1) Introduction:* Given the view to which I have come on Issue V, the special rules of jurisdiction contained in Section 3 of Brussels Recast do not *preclude* this Court assuming jurisdiction. It remains necessary, however, to consider what, if any, basis there is for this Court *taking* jurisdiction. For these purposes, it is necessary to turn at once to Art. 7(1) and (2) of Brussels Recast.

125. Art. 7 is contained within Section 2 of Brussels Recast, which deals with "Special jurisdiction". Insofar as here relevant, Art. 7 provides as follows:

> "A person domiciled in a Member State may be sued in another Member State:
>
> (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
>
> …..
>
> (2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur."

126. The contextual justification for these heads of special jurisdiction is explained in the judgment of Lord Sumption and Lord Lloyd-Jones in *JSC BTA Bank v Khrapunov*, [2018] UKSC 19, at [31]: [2018] 2 WLR 1125 (SC).

> "…because they reflect a close connection between the dispute and the courts of a contracting State, other than that in which the defendant is domiciled, and thereby promote the efficient administration of justice and proper organisation of the action…"

127. In *Kalfelis v Bankhaus Schroder Munchmeyer Hengst & Co.* (Case 189/87) [1989] ECC 407, the CJEU held (at [16]) that the concept of "matters relating to tort, delict or quasi-delict" contained in a predecessor to Art. 7(2) of Brussels Recast, "should be regarded as an independent concept" and was to be interpreted "by reference principally to the system and objectives of the Convention in order to ensure its full effect". The CJEU went on (at [17]) to say this as to the relationship between (the now) Arts. 7(1) and 7(2):

> " In order to ensure a uniform approach in all member-States, it should be accepted that the concept of 'matters relating to tort, delict or quasi-delict' covers any action which raises an issue of a defendant's liability and does not concern 'matters relating to a contract' within the meaning of …[now] article …[7(1)]."

128. With regard to the meaning of the expression, "the place where the harmful event occurred", within Art. 7(2), the CJEU, in *Bier v SA Mines de Potasse d' Alsace* (Case 21/76) [1978] QB 708, at [19], decided that the plaintiff had "….an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it" – conveniently referred to below as "Bier I" (the place where the damage occurred) and "Bier II" (the place of the event giving rise to it).

129. *(2) The judgment:* Teare J dealt succinctly with the present Issue, at [74] – [77] and [79] of the judgment. He held that the Court was concerned with a claim between Underwriters and the Bank, to be considered on the footing that the Bank was not a party to the Settlement Agreement. The essence of Underwriters' claim was that the Bank's misrepresentations induced Underwriters to enter into the Settlement Agreement with Owners. Underwriters sought to recover damages caused by those misrepresentations. The Judge did not consider that the connection between the claim and the Settlement Agreement was sufficient to bring the matter within Art. 7(1) of Brussels Recast. It followed that the claim fell within Art. 7(2).

130. Thus characterised, the claim for damages based upon misrepresentation could be brought in this jurisdiction so long as the "harmful event" occurred in England. Underwriters submitted that it did:

> "…because either the damage occurred in England (where Norton Rose Fulbright signed the Settlement Agreement and/or where the $22 m. was paid to Willis' bank account in London) or the event giving rise to the damage occurred in London (being the place where the misrepresentations were made and/or the place where the Hull Underwriters were induced)…. "

The Judge recorded that no submissions to the contrary had been made on behalf of the Bank. He therefore accepted that the harmful event occurred in England and that this Court had jurisdiction over the claim for damages for misrepresentation.

131. *(3) The second judgment:* The question here, not dealt with in the (first) judgment, was whether the Court had jurisdiction in respect of Underwriters' claim for damages for misrepresentation pursuant to s.2(1) of the *Misrepresentation Act 1967* ("the 1967 Act").

132. Teare J held that Underwriters had the better of the argument that a claim for damages under the 1967 Act was a claim relating to tort within the meaning of Art. 7(2). Accordingly and for the reasons given in the (first) judgment, the harmful event occurred in England and this Court had jurisdiction over the claim for damages under the 1967 Act.

133. In reaching this conclusion, the Judge (at [5] of the second judgment) rejected Mr Berry's submission that, given the claim under the 1967 Act depended upon proof of a contract between Underwriters and the Bank, the Judge's own reasoning at [76] – [77] of the judgment dictated that the claim was not a matter relating to tort. Teare J did not consider that the conclusion followed from the premise:

> " Notwithstanding that the success of the claim depends upon proof of a contract between the Underwriters and the Bank the claim remains one which relates to tort….."

134. *(4) The rival contentions:* Mr MacDonald Eggers submitted that Underwriters' claims for damages for misrepresentation at common law, whether based on deceit or negligence, and under the 1967 Act, were properly characterised as claims in tort and thus fell within the scope of Art. 7(2) of Brussels Recast. Furthermore, the harmful event occurred within the jurisdiction; both Bier I and Bier II were satisfied, as held by the Judge (at [79], set out above). If wrong that Underwriters' claims fell within Art. 7(2), then these claims were necessarily claims relating to a contract. If so, this Court still had jurisdiction, in that London was "the place of performance of the obligation in question", within Art. 7(1)(a) – namely, the obligation, in accordance with the duty of good faith, not to make a misrepresentation to Underwriters.

135. Mr Berry's contention was that, properly considered, these were not claims in tort; if they were, then the harmful event had not occurred here, so that this Court could not take jurisdiction. It was fundamental that the Judge had held that Underwriters did not have a good arguable case that the Settlement Agreement had been entered into by Owners on behalf of the Bank. Moreover, so far as concerned Bier I, no reliance could properly be placed in this context on the fact that the Willis bank account was within the jurisdiction. If these claims properly related to a contract, then Art. 7(1) did not assist Owners, as the place of the characteristic obligation was not here.

136. *(5) Discussion and conclusions: (A) Characterisation:* I agree with the Judge's conclusion and reasons, at [76] – [77] of the judgment and at [3] and [5] of the second judgment (distinguishing between success of the claim and the nature of the obligation). The better analysis is that Underwriters' claims for damages for misrepresentation, both at common law and under the 1967 Act, are not matters relating to a contract and, accordingly, fall within Art. 7(2) as matters relating to "tort, delict or quasi-delict". In a nutshell, the legal basis for these claims in damages does not hinge on a breach or breaches of contract. As it seems to me, this is the correct conclusion to be drawn from *Brogsitter* and *Arcadia* – already discussed above. For completeness, the characterisation of the misrepresentation claims here poses a different question to that arising under Issue IV, when considering whether Underwriters' claim was a matter relating to insurance. Further and again for completeness, I am fortified that the view expressed here accords with the analysis of Mr Kenneth Rokison QC, sitting as a Deputy Judge of the High Court in *Dunhill v Diffusion Internationale* [2002] 1 All ER 950, esp., at pp. 963 – 965. I am, with respect, not deterred from this conclusion by the contrary "submission" (as Professor Briggs himself referred to it) contained in *Civil Jurisdiction and Judgments* (6th ed.), at para. 2.191.

137. *(B) The harmful event:* It is noteworthy that, before Teare J, the Bank did not dispute that (if these claims were characterised as tortious) the harmful event occurred within the jurisdiction: judgment, at [79]. In my judgment, the Bank's first thoughts are to be preferred to the submissions advanced before us, now seeking to contend otherwise.

138. Although much play is sought to be made by Mr Berry of the earlier conclusion in his favour that the Settlement Agreement was not entered into by Owners on behalf of the Bank, the issue here is distinct. Unless it is to be said – and the Bank, rightly, does not press its submissions that far – that Underwriters claims are to be struck out on the

merits, then, *ex hypothesi*, the relevant premise is that there were misrepresentations made independently by the Bank, or adopted by the Bank, or for which the Bank is vicariously liable, as pleaded by Underwriters. In this regard, it must be kept in mind that Underwriters would not have entered into the Settlement Agreement without the Bank's Letter of Authority and that in presenting the Letter of Authority to Underwriters, Owners *were* acting as the agent of the Bank: judgment, at [31]. On this footing, it is in my judgment unanswerable (or, at the very least, Underwriters have a good arguable case) that Bier I is satisfied: the damage occurred in this jurisdiction where the Settlement Agreement was signed on behalf of Underwriters; in short, Underwriters' suffered damage here because the Settlement Agreement was concluded here.

139. This conclusion suffices with regard to the harmful event occurring within the English jurisdiction. I would, however, add that there is force in Underwriters' further contention in relation to Bier I, namely, that they suffered damage in this jurisdiction by paying the settlement proceeds to the Willis account in London. For my part, the facts of the present case are far removed from those of *Universal Music BV v Schilling* (Case C-12/15) [2016] QB 967 (ECJ), at [36] – [40], prompting the observations in that case as to the location of a bank account not necessarily constituting a reliable connecting factor for the purpose of establishing jurisdiction under Art. 7(2). Unlike the position in *Universal Music*, there are plainly other connecting factors to London and England, going beyond the *situs* of the Willis bank account – and coming within the rationale of special jurisdiction, as explained in *Khrapunov (supra)*. Accordingly, had it been necessary to do so, I would have been prepared to conclude that Bier I was satisfied on this ground as well.

140. In these circumstances, it is unnecessary to say anything as to Bier II and I do not do so.

141. *(C) Art. 7(1):* On the view I have taken, no question of coming within Art. 7(1) arises: these claims did not relate to a contract. However, should that view be wrong, I would have little hesitation in concluding that Underwriters had at least a good arguable case that London was the place of "the performance of the obligation in question" – not to make misrepresentations - so that Underwriters could establish jurisdiction here on this alternative basis. Regardless of how the representations came to be made by the Bank, or for which the Bank is answerable, the Settlement Agreement was negotiated and concluded in London, so that it was here that the obligation in question fell to be performed.

ISSUE VII: RESTITUTION

142. *(1) The judgment:* Much as he regretted (at [80]) the outcome in case management terms – as it meant that only the tort element of Underwriters' claims could be pursued in this jurisdiction – Teare J held that this Court did not have jurisdiction to entertain the claim in restitution.

143. At [78], the Judge acceded to Mr Berry's submission that claims for unjust enrichment did not depend on wrongdoing and therefore were not matters relating to tort within Art. 7(2): *Kleinwort Benson v Glasgow* [1999] 1 AC 153, at pp. 172, 177 and 196. The Judge expressed his conclusion (*ibid*) as follows:

> " In that case [i.e., *Kleinwort Benson*] Lord Goff, with whom the other members of the court agreed on this point, said that a claim in restitution based upon unjust enrichment does not, save in exceptional circumstances, presuppose a harmful event and so is impossible to reconcile with the words of Article 7(2). He was not deterred from reaching this conclusion by the decision in *Kalfelis*. The claim for restitution in this case is based upon a mistake; it does not require a harmful event, though there might in fact be one…. I consider that I am bound to follow the decision of the House of Lords and to hold that the claim in restitution based upon mistake is not within Article 7(2)…."

144. *(2) The rival cases:* Underwriters challenge the Judge's conclusion on this Issue. Mr MacDonald Eggers submitted that *Kleinwort Benson* had been overtaken by developments in EU law, was not binding and should not be followed. Arts. 7(1) and 7(2) comprised a complete code; if a claim was not within Art. 7(1), it must fall within Art. 7(2). In any event, there was a harmful event here – for the purpose of Underwriters' misrepresentation claims – which arose out of the same facts as those relied upon for the purpose of the restitution claim.

145. In a nutshell, Mr Berry submitted that *Kleinwort Benson* was binding; in any event, it was correct. The restitution claim here was simply based on mistake; it was not based on a wrong. The Judge's decision was right and should be upheld.

146. *(3) Discussion and conclusions:* This Issue can be taken very shortly.

147. First, I am not persuaded that we should interfere with Teare J's characterisation of the *restitution* claim in this case as based simply upon mistake.

148. Secondly, the fact that *Kleinwort Benson* was an intra-UK case is irrelevant for present purposes.

149. Thirdly, the House of Lords in *Kleinwort Benson* dealt squarely with the question of whether a claim for restitution fell within (the now) Art. 7(2) – and unanimously rejected the submission that it did. In doing so, the House of Lords applied *Kalfelis*. Accordingly, *Kalfelis* was neither overlooked nor was there any inconsistency between *Kalfelis* and *Kleinwort Benson* – at least on the analysis forming part of the *ratio* of *Kleinwort Benson*.

150. Thus, Lord Goff of Chieveley observed, at p.172, that "…a claim based on unjust enrichment does not, apart from exceptional circumstances, presuppose either a harmful event or a threatened wrong" and was accordingly impossible to reconcile with the wording of Art. 7(2).

151. Lord Hutton was of the view (at p.196) that it would be inappropriate to apply the words "where the harmful event occurred" to a claim for unjust enrichment. The decision in *Kalfelis* strengthened this view, as he explained (*ibid*) by reference both to Question 2(b) referred to the CJEU for a Ruling in *Kalfelis* and Answer 2(b) given by the CJEU to that Question. Thus, Question 2 had been in these terms:

> " '….(b) Does article 5(3) of the Convention confer, in respect of an action based on claims in tort and contract *and for unjust enrichment*, accessory jurisdiction on account of factual connection even in respect of the claims not based on tort?' (Emphasis added.)"

Answer 2(b) was as follows:

> "…..(b) A court which has jurisdiction under article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based."

Lord Hutton regarded this Answer as meaning that a Court which had jurisdiction over an action insofar as it was based on tort or delict did not have jurisdiction over an action insofar as it was not so based but was based on undue enrichment.

152. The House of Lords referred in terms to the jurisdiction under (the now) Arts. 7(1) and 7(2) involving derogation from the general rule of jurisdiction based on the defendant's domicile and was to be construed restrictively. The House recognised (see, for example, Lord Goff at p.167) the disadvantages which might arise from "different aspects of the same dispute being adjudicated upon by different courts" but pointed to the claimant's entitlement to bring "his action in its entirety before the courts of the defendant's domicile" – as had been observed in *Kalfelis (supra)*, at [20].

153. Fourthly, in the circumstances, the Judge and we are bound by the decision of the House of Lords in *Kleinwort Benson.* Even if (of which I am not at all persuaded) *Kleinwort Benson* has been overtaken by developments in EU law, we would, as is well established, still be bound to follow House of Lords authority. I am, with respect, not dissuaded from this conclusion by the passages in *Briggs* to which we were referred (esp., at paras. 2.172, 2.188 and 2.197) – whatever my views might be on the desirability of restitution claims falling within *Art. 7(1)*, a question not before us.

154. For these reasons, in agreement with the Judge and sharing his regret that all aspects of Underwriters' claim cannot be brought within this jurisdiction, I would dismiss Underwriters' appeal on this Issue.

OVERALL CONCLUSION

155. The upshot is that I would dismiss the challenges to the Judge's decision on all of Issues I – VII. It follows that the tort element of Underwriters' claim against the Bank can proceed in this jurisdiction. The English Court does not, however, have jurisdiction to entertain Underwriters' claim in restitution against the Bank.

LORD JUSTICE MOYLAN:

156. I agree.

LORD JUSTICE COULSON:

157. I also agree.