Neutral citation no. [2017] EWHC 739 (Admlty)

Claim No. AD-2016-000026

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMIRALTY COURT

Before Admiralty Registrar Kay QC

B E T W E E N:

LAURENT GARCIA

Claimant

-and-

(1) BIH (UK) LIMITED

(2) TOTAL GABON S.A.

(3) SIGMA OFFSHORE SARL

Defendants

Appearances:

For the Claimant: Mr. Grahame Aldous QC instructed by Hugh James

For the Second Defendant: Sarah Venn and Emma Hynes instructed by Clyde & Co.

There was no appearance by any other interested person

Hearing date: 3rd January 2017

JUDGMENT

The Application

1. By its application notice dated 19th August 2016 the Second Defendant has applied to set aside service on it of these proceedings and for a declaration that 'the English court has no jurisdiction

to try the claim against the Second Defendant'. The Second Defendant's application is supported by a witness statement of David Leckie dated 19th August 2016.

2. The response to the application on behalf of the Claimant is set out in the witness statement of Mark Harvey dated 8th December 2016. That witness statement was made in addition to the first witness statement of Mr Harvey, dated 11th March 2016 which dealt with the background to this claim in support of the without notice application for permission to serve out of the jurisdiction.

The Background

3. *Case Summary.* The Claimant ("Mr Garcia")is a French national who worked as a professional diver on a coastal construction project located offshore of Gabon in West Africa ("the Project"). He claims for catastrophic injuries from an accident on or around 14th June 2013 and seeks damages from each of the defendants. In the pleadings, Mr Garcia joined the defendants on the basis that each was an employer of Mr Garcia. The witness statement of Mr Harvey dated 8th December 2016, states that Mr Garcia also alleges that each defendant owed a tortious duty to Mr Garcia.

4. The Claimant suffered a very severe brain injury when he was working as a diver off a barge in the waters of Gabon. The Particulars of Claim allege, inter alia, that the Claimant's injuries resulted from poor working practices on the Second Defendant's site where he was working. His injuries mean that he will require constant care and attention for the rest of his life.

5. The Claimant was working as a diver under a contract of employment dated 28th November 2012 and issued in the name of the First Defendant BIH, (UK) Limited, a UK company ("BIH"). It was written in English and both the contract and the letter of appointment expressly provided that it was governed by the law of England and Wales and that the courts of England and Wales had exclusive jurisdiction to settle any disputes or claim arising out of or in connection with the agreement or its subject matter or formation, including non-contractual disputes or claims. The letter of appointment which was dated 28th November 2012 was issued to the Claimant by BIH and shows its Head Office as being in Dorset, England. BIH was clearly domiciled in the UK. According to the POC the diving site was operated by the Second Defendant ("Total Gabon ") and they had contracted the Third Defendant ("Sigma") to provide diving services at the site. The Claimant's case is that he was deployed by BIH at the time of the accident to work under the control of Sigma on a site where the operations were, or should have been, supervised by Total Gabon.

6. A letter of claim was addressed to BIH, the First Defendant, on 13th November 2014. BIH sought an extension of time to the six months period for replying under the pre action protocol. However, no substantive response was received to the letter of claim. According to the witness statement of Mr Leckie BIH is a small entity. Its most recent annual return was dated the 24th December 2015. Apparently its sole director, Jean-Francois Maechel, signed an application to have the company struck from the company register on or about the 12th August 2016. The witness statement does not recount whether the company has actually been struck off.

7. The Second Defendant ("Total Gabon") is a company registered in Gabon. It is licensed by the Gabonese Republic to operate the Project. Apparently Total Gabon contracted with Sigma, and Sigma subcontracted to a French-registered entity, Naurex Resources SA. A letter of claim was addressed to Total Gabon on 27th January 2015. Total Gabon responded on 10th November 2015 stating that it denied liability and contended that contractual relationships between Total Gabon and Sigma precluded legal action against Total Gabon in this case.

8. Third Defendant ("Sigma") is a company registered in Gabon. Mr Garcia claims that his employment with BIH was to be undertaken for Sigma. A letter of claim was addressed to Sigma on 27th January 2015. Sigma responded on 31st August 2015 stating that contractual relationships between Sigma and Naurex Resources precluded legal action against Sigma in this case. It is to be noted that a company called Naurex Limited appears on the letter of appointment from BIH. Apparently Sigma were employed by the Second Defendant to provide personnel and it may be that they further obtained personnel through another company named Naurex Resources. There is no evidence as to the relationship between Naurex Resources and Naurex Limited.

9. According to the witness statement of Mr. Leckie Sigma is a contractor to Total Gabon pursuant to a contract between them dated 25th June 2013. It is said that the following provisions are relevant: (i) Sigma shall act as an independent entrepreneur to conduct, execute and control the services contracted by Total Gabon (Art.1), (ii) no employee of Sigma is to be considered an employee of Total Gabon (Art. 1), (iii) Sigma shall not sub-contract part of its obligations without prior written authorisation of Total Gabon (Art. 24), the applicable law of the contract is that of Gabon (Art. 31). Whether there is a contractual connection between the Claimant and the Second Defendant is presently uncertain.

10. *The Proceedings***.** The Claimant commenced proceedings in England against all three Defendants on 14th March 2016. According to the Claimant the Second and Third Defendants did not engage with the Claimant's solicitors in the pre-claim correspondence stage and therefore the Claimant

joined Total Gabon and Sigma in the proceedings and sought and obtained permission to serve them out of the jurisdiction under CPR Part 6 PD6B para. 3.1 (3). They did so on the basis that the Second and Third Defendants were 'necessary or proper' parties to the claim issued against the UK company, BIH, in England. In making the application the Claimant's solicitor stated that the Claimant had a belief in the likely success of the claim.

11. Leave to serve out of the jurisdiction on Total Gabon was granted on 17th March 2016. On 8th July 2016, Total Gabon acknowledged service and indicated that it would contest jurisdiction. Default judgment was entered against BIH in this matter on 13th April 2016. Default judgment was entered against Sigma on 16th August 2016. Total Gabon applied under CPR Part 11 on 19th August 2016.Total Gabon has not entered a Defence to these proceedings because it challenges jurisdiction.

The case for the Applicant/ Second Defendant

12. The Second Defendant has challenged jurisdiction under CPR Part 11 and sought an Order: (a) setting aside the permission granted to the Claimant to serve out of jurisdiction; and/ or (b) that the claim is stayed against the Second Defendant pursuant to the Court's discretion on the basis that England and Wales is not the appropriate forum for the claim made against the Second Defendant.

13. Ms Venn, for the Second Defendant, has contended that permission to serve out of the jurisdiction should not have been granted because: (a) The 'gateway' requirements for service out of jurisdiction were not satisfied and (b) England and Wales is not, in any event, the appropriate forum. In support of her case Ms Venn has made the submissions set out below.

    a. There is no pleaded issue against the Second Defendant which the Claimant can reasonably have believed will be successful (per CPR Part 6.31(a)), and accordingly no good arguable case that Total Gabon is a necessary and proper party to the claim and no serious issue to be tried on the merits. Therefore the basis of the Claimant's application is wholly misconceived.

    b. Even if there was a proper cause of action disclosed, permission to serve out should not have been granted because the Claimant has not and cannot show that England is clearly or distinctly the appropriate forum to bring a claim against Total Gabon.

    c. From the witness statement of Mr David Leckie, the solicitor for the Second Defendant, it appears that (i) the Second Defendant ("Total Gabon") is a Gabonese company; (ii) it has no operations in or connection to England and Wales; (iii) Total Gabon was and is

licenced by the Gabon state to operate a terminal in Gabon, le Terminal du Cap Lopez, at Quai des Chalands ("the Project"). The Third Defendant, Sigma, is a Gabonese company.The First Defendant, BIH, is a small company, ostensibly a shell, registered in England and Wales under company number 07478231. The Claimant worked as a Diver at the Project. He is a French national.

d. The contractual chain on the Defendants' side only involves Total Gabon, Sigma Offshore and Naurex Resources. It does not extend to the Claimant or to anyone with whom the Claimant contracted.

e. Total Gabon contracted with Sigma Offshore. Sigma Offshore managed all operational aspects of the Project, as far as is relevant to the matters of this claim. This relationship was governed by a contract of the same form as that dated 25th June 2013 exhibited to Mr Leckie's statement. By the exclusive jurisdiction clause at Article 31, the law applicable to this relationship is Gabonese law. By the same article, the parties have agreed to arbitrate in Gabon. Thus, as between the Second and Third Defendants, the applicable law is Gabonese and a dispute must be arbitrated in Gabon.

f. Apparently Sigma Offshore contracted to a French entity ("Naurex Resouces") for the supply of human resources at the Project. From Mr Leckie's witness statement it appears that Naurex Resources is the only contractor to Sigma Offshore, as far as is relevant to the matters of this claim. That relationship is governed by a contract dated 8th July 2009 (as amended).

g. The precise involvement of BIH is not understood by Total Gabon and has never been properly explained. The Claimant relies on two documents: (i) a contract dated 28th November 2012 between the Claimant and BIH (UK) which states that BIH (UK) is the Claimant's employer; (ii) A letter of appointment signed by an entity stated to be "Naurex Limited", which is an entity incorporated in England and Wales.

h. As appears from paragraph 17 of Mr Leckie's statement the contract with BIH and the letter of appointment are not signed by the same parties. Notwithstanding that anomaly, the Claimant alleges that taken together these form an agreement for employment ("the Employment Contract"). However Total Gabon does not know how or why BIH or Naurex Limited came to be part of the contractual chain or involved with the Claimant. Total Gabon is not party to any agreements save for the one it has with Sigma Offshore.

i. The Claimant has alleged a personal injury sustained on 14th June 2013 while performing his duties at the Project. Total Gabon has not entered a Defence and, by definition, takes no position in relation to those assertions.

j. A claimant seeking service out must make an application under CPR Part 6.36, meeting the provisions of CPR Part 6.37.

k. The correct approach to service of a foreign defendant out of the jurisdiction is set out in *AK Investment v Kyrgyz Mobil Tel Ltd* [2011] 1 CLC 205; [2011] UKPC 7. (recently approved in *Este Group Bank v VMZ 'Red October' & Ors* [2015] EWCA Civ 379 at paragraph 25 by Gloster LJ). That approach requires that:

    i. the claimant must satisfy the court in relation to the foreign defendant there is a serious issue to be tried on the merits;

    ii. the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given; and

    iii. the claimant must satisfy the court that in all the circumstances, England and Wales is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings outside the jurisdiction.

l. Permission for service out of the jurisdiction should never have been granted because it was obtained on a wholly wrong premise. The Claimant's pleading that Total Gabon was a party to the Employment Contract was wrong, not sustainable and should not have been advanced. The Claimant has disclosed no viable case against Total Gabon, let alone one which the Claimant could believe has a real prospect of success. It follows that the Claimant did not meet the requirement of showing that he had a good arguable case. The Claimant's case does not satisfy the gateway test and his claim was not one which engaged a serious issue to be tried on the merits. In this respect:
    i. The Claim Form, dated 14th March 2016 and sealed on 6th April 2016 which pleads that by reason of the Employment Contract, the Claimant was employed by Total Gabon.
    ii. The witness statement of Mark Andrew Harvey dated 11th March 2016 states that Total Gabon was the employer of the Claimant.

iii. The assertion that Total Gabon was the Claimant's employer is repeated in the Claimant's pleadings as being the basis for the claim against all three Defendants (at paragraph 7, pleadings of Leading Counsel dated 18th March 2016).

iv. However the Claimant and Total Gabon have no contractual relationship. The Claimant has not set out any other basis for bringing a claim against Total Gabon.

m. Further even if the court considered that there is an action against Total Gabon the court in England and Wales is not the appropriate forum for trial:

i. The leading case is *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] AC 460, in which the House of Lords held that a stay will be granted "*where the court is satisfied that there is some other available forum, having competent jurisdiction which is the appropriate forum for the trial of the action*".

ii. In cases where the Claimant seeks permission to serve out, the burden is on the Claimant to establish that England and Wales is the appropriate forum: *AK Investment v Kyrgyz Mobil Tel Ltd, op.cit*

iii. The European Court of Justice case of *Owusu v Jackson* (Case C-281/02) established that the court of a member state has no power to decline jurisdiction conferred on it by (what is now) Article 4 of Regulation EU 1215/2012 (The Recast Directive). Therefore a court cannot decline jurisdiction in a claim that is brought against a defendant domiciled in a member state in favour of jurisdiction in a non-contracting state. However, the court retains the power to consider claims against defendants domiciled in non-contracting states on the basis of *forum conveniens*. This approach is of particular significance when the court is considering actions which the Claimant seeks permission for under the gateway at 3.1(3) of PD6B: *Erste Group Bank v VMZ Red October* [2015] 1 CLC 706; [2015] EWCA Civ 379 at paragraph 78.

n. Even if there is an exclusive jurisdiction clause, which is the basis for a claim to be brought against BIH, it is not the case that a court should necessarily allow service out on foreign defendants; in other words, it is not simply enough to show that there is an anchor defendant by virtue of EU 1215/2012 as the Court of Appeal has made it clear that the court should stand back and "*ask the practical question where the fundamental focus of the litigation was to be found*": *Erste Group Bank v VMZ Red October, op.cit* at paragraph 149.

o. The courts have warned against bringing foreign defendants to the English jurisdiction, even if a denial to take jurisdiction has the effect that a prospective claimant would have to bring more than one action: *AK Investment v Kyrgyz Mobile Tel Ltd, op.cit*, citing *Golden Ocean Assurance Ltd v Martin ("The Golden Mariner")* [1990] 2 Lloyds Rep 215.

p. In *Erste Group Bank v VMZ Red October*, the court held that there was no real issue that was reasonable for the English court to try against the anchor defendants. Nonetheless, the Court of Appeal went on to consider whether it would have been right to refuse permission, even had there been a real issue. Although the court expressly acknowledged the effect of the exclusive jurisdiction clause on the anchor defendants, the court held that the matters of the claim were overwhelmingly connected with the foreign jurisdiction which in that case was Russia. The Claimant had not and could not discharge its burden of showing that England was the appropriate forum. That case is strikingly similar to the present case.

q. The law applicable to any claim against Total Gabon cannot be English law. It appears that the only possible claim against Total Gabon must be in tort although such a claim is not pleaded. Under article 4 of Regulation (EC) 864/2007 (Rome II), the applicable law to such a claim is the law where the damage occurred. It follows that as the damage is alleged to have occurred in Gabonese territorial waters, the governing laws must be Gabonese.

r. In *VTB Capital plc v Nutritek International Corp* [2013] 2 AC 337 the Supreme Court gave guidance on how to approach issues of *forum conveniens*. Lord Mance held that "*other things being equal, a case should be tried in the country whose law applies*" (at paragraph 46). His Lordship further held that this principle was of "*particular force if issues of law are likely to be important and if there is evidence of relevant difference in the legal principles or rules applicable to such issues in the two jurisdictions*" and "*the place of commission is a relevant starting point when considering the appropriate forum for a tort claim" (at paragraph 51).* Gabonese law is derived from the French Civil Code. It has no connection with English common law. It is a fundamentally different legal regime. This fortifies Total Gabon's contention that a Gabonese court is the right forum to apply Gabonese law; not the English court.

s. As a matter of practicality, any issues that remain undecided are not connected with the UK:

   i. The Claimant did not have default judgment at the time permission was sought. However, now, the Claimant has judgment in default against both BIH on 13th April 2016 and Sigma Offshore on 16th August 2016.

   ii. BIH appears to be a shell and it has applied to be struck off the register for insolvency. No insurer has been found. In the circumstances, it is highly unlikely that it will participate further in this claim.

   iii. The only remaining claims are either against Sigma Offshore, a Gabonese entity which has not yet participated in this matter, and, if a cause of action is identified, Total Gabon.

iv. As between Sigma Offshore and Total Gabon, the English court may not apportion liability because their relationship is governed by an arbitration agreement. Total Gabon insists on the effect of that agreement.

t. Additional features relevant to the issue of the most appropriate forum:

i. In light of the matters set out above, language is a very significant factor in the Claimants' claim. Both the Claimant and Total Gabon are French-speaking. The Project language was French. The applicable law to any live issues against Total Gabon is in French. The evidence will be in French. Most of the contracts, and certainly all of those giving rise to any live issues, are in French. The likely witnesses speak French. Any case will need to be conducted in French.

ii. The Claimant pleads that technical failures gave rise to his injuries. To establish these, the Claimant will have to rely on evidence of fact, such evidence being located in Gabon. Total Gabon will want those technical facts to be tested. The facts will be established only by a proper investigation of the site in Gabon. As sympathetic as Total Gabon may be with regards to the Claimant's challenges, an inspection of the systems is necessitated by his own pleadings. Clearly, the court in Gabon is the best placed court to make such inspections.

u. If it is established that Gabon is the most appropriate forum, it is open to the Claimant to establish that it is not in the interests of justice for the Claim to be heard there. The Claimant's representative remarks that Gabon is not able to accommodate this claim as well as the English courts. Even if this amounted to a reason to hold a trial in England, which it does not, such remarks are wholly without evidence or basis, and should be rejected as offensive to international comity.

v. In the premises, Total Gabon contends that the Claimant has not and cannot show that the England is the appropriate forum. When the court, as it must, stands back and considers where the focus of any extant litigation is, it should conclude that it is in Gabon. It follows that permission should not have been granted and the claim against Total Gabon should be stayed.

w. Whilst the Claimant was obliged to sue BIH in England and Wales, that does not make England and Wales the appropriate forum as regards the claim brought against Total Gabon by default. There is no presumption that claims against various parties connected to an accident must all be dealt with together; Mr Harvey has misunderstood the authorities on this issue. Mr Harvey has also misunderstood *Owusu v Jackson* [2005] QB 801 and *Lungowe v Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975; neither holds that parties connected to a dispute involving an anchor defendant must proceed in England and Wales.

x. It is irrelevant that Total Gabon did not set out its position in respect of jurisdiction pre-action; had the Claimant properly considered the Employment Contract and the gateway test, it would have been obvious to the Claimant that service out of jurisdiction should not have been sought.

y. Mr Harvey cannot expand on the Claimant's pleaded cause of action by witness statement; the Court must determine the application with reference to the Claimant's pleaded cases, which does not positively assert a claim in tort.

z. The applicable law is plainly the law of the territory in which the accident occurred: Gabon. Further Mr Harvey is wrong to assert that any contribution proceedings by Total Gabon against Sigma Offshore (or vice versa) should be brought in England and Wales; there is an exclusive jurisdiction and arbitration clause in the contract between these parties.

The case for the Claimant/Respondent

14. Mr. Grahame Aldous QC has argued that the English court is clearly the most obvious forum for the dispute to be heard and that, in his witness statement, Mr Harvey has touched upon some of the reasons why this is so and why the application of the Second Defendant dated 19th August 2016 should be dismissed. In particular Mr Aldous QC has submitted

    a. There is no application for a stay of the proceedings.

    b. If proceedings are to be brought in another state then there would be the real risk of duplication and conflicting judgments.

    c. It is not unusual for different parties, who might all be responsible for construction site accidents, to try and pass responsibility around among themselves. Indeed it is not unusual for Defendants to try and introduce confusion about who the actual employer was. For that reason it is important that proceedings bring in altogether those who share in the responsibility for the accident

    d. Total Gabon may wish to blame others for this accident, but it was their site and they had ultimate control over the dangerous operations being carried out there. They are a proper party to these proceedings, where they can be held to account for their failures.

    e. The Claimant is obliged to sue BIH in England and Wales under the terms of the contract of employment and he was obliged to do so on the basis that they were domiciled here and Article 4 of the Recast Brussels Regulation (reflected in the terms of CPR Part 6) requires that they be sued here. If the claims against the various parties are to be dealt with together, then they have to be dealt with here.

f. Following the decision in *Owusu v Jackson* [2005] QB 801, not only did BIH have to be sued in England but there is no jurisdiction in the English court to decline that jurisdiction or stay the proceedings on any grounds of *forum non conveniens*.

g. Not only can this court not stay the proceedings against BIH of grounds of *forum non conveniens*, it cannot stay the proceedings against the other defendants, see *Owusu* since been confirmed by a decision of Mr Justice Coulson in *Lungowe v Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975.

15. With respect to the Second Defendant's submissions (as set out in the witness statement of Mr. Leckie of Clyde & Co) Mr Aldous has submitted:

a. *Employment.* The only response from Total Gabon before the issue of proceedings clearly suggested that BIH were not the real employers of the Claimant. Whether that was due to de facto control of the Claimant's activities, undisclosed principal or otherwise was not explained by Total Gabon, and remains unexplained in the statement of Mr Leckie.

b. *Failure to Supervise.* Mr Leckie appears to suggest that any tortious duty depends on Total being a party to the contract of employment. That is not so but arises out of the fact that it was Total Gabon's site and they should have been supervising the dangerous work that was being undertaken there, as pleaded in the Particulars of Claim. There is clearly an issue to be determined whether Total Gabon are liable to the Claimant for his injuries sustained as a result of their failure to supervise the works on their site properly.

c. *Gabonese Law.* Although Mr Leckie has asserted that Gabonese law must apply to a claim by the Claimant against Total Gabon however in a case where an international team is assembled in waters off the coast of a state it is far from clear that the applicable law will necessarily be that of the state in whose waters the work happens to be undertaken. Total has not made any assertions as to the provisions of Gabonese law.

d. *Foreign law.* The burden of proving foreign law lies on the party who bases his claim or defence on it. If that party adduces no, or insufficient, evidence of foreign law, the court applies English law, See Dicey, Morris and Collins, 15th Edn. Vol. 1 , para. 9-025. However Mr Leckie has made no assertions as to what Gabonese law is, nor that it would afford no relief to the Claimant in the circumstances pleaded. There is no basis on the evidence for the court to make any finding as to Gabonese law or to conclude that Gabonese law would not provide relief against negligent conduct by the occupier of a site on which dangerous construction work was being undertaken in breach of minimum industry standards as pleaded. Indeed Mr Leckie does not contend that there is.

Consideration

16. The starting point is CPR Part 6.36 and CPR Part 6.37. CPR Part 6.37 provides:

> *6.37(1) An application for permission under rule 6.36 must set out—*
>
> *(a) which ground in paragraph 3.1 of Practice Direction 6B is relied on;*
>
> *(b) that the claimant believes that the claim has a reasonable prospect of success; and*
>
> *(c) the defendant's address or, if not known, in what place the defendant is, or is likely, to be found.*
>
> *(2) Where the application is made in respect of a claim referred to in paragraph 3.1(3) of Practice Direction 6B, the application must also state the grounds on which the claimant believes that there is between the claimant and the defendant a real issue which it is reasonable for the court to try.*
>
> *(3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.*

17. Paragraph 3.1(3) of Practice Direction 6B sets out the general grounds which permit a claimant to serve a claim form out of the jurisdiction with the permission of the court. It provides:

> *3.1(3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and*
>
> *(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and*
>
> *(b) the claimant wishes to serve the claim form on another person who is a necessary and proper party to that claim.*

18. The essence of Ms Venn's argument is that there is no pleaded issue against the Second Defendant which the Claimant can reasonably have believed would be successful, and accordingly no good arguable case that Total Gabon is a necessary and proper party to the claim and no serious issue to be tried on the merits. She has relied upon a number of authorities to support her argument that her approach is correct. However it appears to me that her argument is based upon a misunderstanding of the relevant rule. The tests are: (i) whether there is a real issue between the claimant and the defendant "*who will be served otherwise than in reliance on this paragraph*" (see paragraph 3.1(3)(a) of the Practice Direction) and (ii) whether the claimant

wishes to serve the claim form on another person who is a necessary and proper party to that claim (see paragraph 3.1(3)(b) of the Practice Direction). In the context of the present claim it appears that question is whether there is a real issue for consideration as between the Claimant and the First Defendant. The second part of the test is whether the other person to be served is one upon whom "*the claimant wishes to serve the claim form on another person who is a necessary and proper party to that claim*". That appears to be the part of the test which refers to the Second Defendant. A further consideration of importance is the effect of CPR Part 6.37(3) (i.e. the need for the court to give consideration to whether England and Wales is the proper place in which to bring the claim).

19. Consideration has been given to the effect of the decisions in *AK Investment v Kyrgyz Mobil Tel Ltd* [2011] 1 CLC 205; [2011] UKPC 7 and the more recent decision of the Court of Appeal in *Este Group Bank v VMZ 'Red October' & Ors* [2015] EWCA Civ 379. This has led to further consideration of the legal background to, and the effect of, the leading decisions on *forum non conveniens* including of the views of Lord Goff in *Spiliada Maritime Corpn v Casulex (Spiliada)* [1987] AC 460, Evans LJ in *Golden Ocean Assurance Ltd and World Mariner Shipping SA v Martin (The Goldean Mariner)* [1990] 2 Lloyd's Rep 215 (CA) and Lord Mance in *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5; 2AC 337. Furthermore a central aspect of the dispute before me is the effect, if any, of the decision of the European Court of Justice in *Owusu v Jackson* [2005] QB 801 upon applications for permission to serve proceedings outside the jurisdiction where the defendant is resident within the EEC.

20. Whilst these matters have led to an interesting debate the authorities make it clear that the decision to be taken under CPR Part 36 is discretionary and one which should based upon its own facts. With that in mind I have come to the conclusion that the decision which has the closest factual connection with the present case and which provides the most assistance is the clear and helpful guidance given by Coulson J. in *Lungowe v Vedanta Resources and KCM* (*supra*).

21. In *Lungowe* the Claimants were a number of Zambian citizens who commenced proceedings in England alleging personal injury and damage to property arising out of alleged pollution caused by a copper mine from 2005 onwards. The mine was owned by and operated by the second defendant, "KCM", a company incorporated in Zambia. KCM was owned by the first defendant, "Vedanta", a company incorporated in England. The claim against the first defendant was in negligence that it had a duty to ensure that KCM's mining operations did not cause harm to the environment or local communities based upon the factors derived from the decision in *Chandler v Cape Plc* [2012] EWCA Civ 525. Both Vedanta and KCM applied for declarations that the court did not have jurisdiction or should not exercise jurisdiction to try the claims. Vedanta also sought

a stay of proceedings and KCM sought an order setting aside the claim form, the service of the claim form and the order giving the claimants permission to serve the claim form out of the jurisdiction and, alternatively a stay of the proceedings. The applications were dismissed.

22. Coulson J considered the legal background to the applications and the effect of the leading decisions on *forum non conveniens* referred to above. However he held that the effect of the decision of the European Court of Justice in *Owusu v Jackson* [2005] QB 801 is that art. 4 of the Recast Brussels Regulation 1215/2012 was to be applied so that that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State and further that questions of *forum non conveniens* do not amount to an exception to the general rule. The learned judge referred to a number authorities on the applicability of *Owusu v. Jackson,* stating "*It has been repeatedly held in subsequent decisions in the United Kingdom that the decision in Owusu v Jackson prevents any consideration of the forum conveniens principle when the defendant or one of the defendants is domiciled in the UK. It is unnecessary to set them all out. A representative sample of those authorities, each of which is binding on me, is as follows: . . . Global Multimedia International Ltd v. ARA Media Services [2006] EWHC 3612 (Ch) per Sir Andrew Morritt C; . . . . Attorney General of Zambia v Meer Care & Desai (A firm) [2006] EWCA Civ 390, per Sir Anthony Clarke MR, a he then was, who said: "The effect of the decision of the European Court of Justice in Owusu v Jackson is that the English court could not grant a stay of proceedings against those defendants in favour of a court or state which is not a party to the relevant convention . . ."; UBS AG v HSH Nordbank AG [2009] EWCA Civ 585 in which Collins LJ, as he then was, who said: "The prevailing view is that there is no scope for the application of forum conveniens to remove a case from a court which has jurisdiction under the regulation, even as regards a defendant who is not domiciled in a Member State"; . . . A v A (Children: Habitual Residence) [2013] UKSC 60; [2014] AC 1, in which Baroness Hale said that the rule in article 2 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 which required that 'persons domiciled in a contracting state shall, whatever their nationality be sued in the courts of that state' meant that the courts of that state had to assume jurisdiction, even though there was a third country which also had jurisdiction and even though that country was, on the face of it, the more appropriate forum in which to bring the action. Thus the English court was not only empowered but obliged to assert and exercise jurisdiction rather than leave the parties to the jurisdiction of a state which is not a party to the Convention."*

23. However the learned judge recognised that there may be an argument for avoiding the effect of art.4 by reason of art. 6(1) if the proceedings being brought against the defendant, sued in England, is an abuse of EU Law. That might arise if the sole purpose of bringing proceedings

within one jurisdiction is to oust the jurisdiction of the courts of a different Member State where one of the defendants is domiciled. However Coulson J has recognised that there is a very high threshold in this respect and, on the facts of that case he refused to accept that the claim had been brought for that purpose. It was not suggested before me that the claim against BIH was started as a ploy to oust the jurisdiction imposed by Art.4 but even if it had been such a suggestion could not be accepted. The claim against BIH arises under a contract which specifically provides for the jurisdiction of the English Court. It cannot be sensibly suggested that the Claimant was not entitled to bring that claim in England and it has been pursued to judgment albeit a default judgment. This demonstrates that the claim was not brought in England solely to oust another jurisdiction or even to establish jurisdiction in the English court. Furthermore it is to be noted that the argument may only arise where there is a question of ousting the jurisdiction of the Court of another Member State as opposed to the jurisdiction of a state which is not a party to the Convention.

24. Furthermore Coulson J, whilst recognising that the decision in *Owusu* might be open to criticism on the basis that the reasoning of the European Court of Justice might be suspect, see paragraph 70, nonetheless clearly concluded that this had no effect upon the fact that it was clearly binding upon him, see paragraph 71. If it was binding upon him it is obviously binding upon me. It follows that the Court may not decline jurisdiction in the claim against BIH.

25. For the reasons set out it appears to me that there is no basis for the English Court to refuse jurisdiction in the claim, against the First Defendant. Although Ms Venn argues that the test is whether there is a claim with a real prospect of success against Total Gabon it does not appear to me that is what Paragraph 3.1(3) of Practice Direction 6B provides. It is true that it requires that there "*is between the claimant and the defendant a real issue which it is reasonable for the court to try*" but the defendant is defined as being the person "*on whom the claim form has been or will be served (otherwise than in reliance on this paragraph)*". In other words that is BIH, the First Defendant. Once that is established the rule only requires that "*the claimant wishes to serve the claim form on another person who is a necessary and proper party to that claim*". The question therefore is whether Total Gabon could be considered a necessary and proper party to the claim at the time when the application was made, that being accepted as the relevant time for these purposes.

26. However in *Lungowe* Coulson J accepted that in assessing whether the case passed the "necessary or proper party" gateway "*the claimant must satisfy the court that, in relation to the foreign defendant there is a serious issue to be tried on the merits*" (per Lord Collins in *AK Investment CJSC v Krygyz Mobil Tel Ltd* [2011] UKPC 7 "*Altimo*") and held that the test has a relatively low threshold. The issue therefore is whether the Claimant has a real prospect of success in its claim

against Total Gabon. In the judgment of Coulson J he reminds us that the test is that applicable to summary judgment under CPR Part 24. In applying that test it is necessary to keep in mind the assumption that the facts asserted by, in this case, the Claimant are true unless they are on the documents provided, demonstrably false. There are two basis of claim against the Total Gabon one is pursuant to contract and the other is based upon tort.

27. The leading authorities which provide guidance on how CPR Pt 24 is to be applied are set out in the White Book. The essential principles are: (a) Although the Court should not conduct a mini trial or adopt the standard of proof, ie a balance of probabilities which would be used at a trial, the court should consider the evidence which can reasonably be expected to be available at the trial. It has been said that the rule "is designed to deal with cases which are not fit for trial at all"; (b) the test of "no real prospect of succeeding" requires the judge to take an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment; (c) it is a discretionary power; (d) the court must carry out the necessary exercise of assessment but not by conducting a trial or a fact finding exercise; (e) it is the assessment of the case as a whole which must be looked at; (f) accordingly, "the criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is the absence of reality".

28. In *Easyair Ltd t/a Openair v Opal Telecom Ltd* [2009] EWHC 339 Lewison J., as he then was, provided a helpful summary:

    a. The court must consider whether the Claimant has a "real" as opposed to a "fanciful" prospect of success*: Swain v Hillman* [2001] 2 All ER 91;

    b. A "realistic" case is one that carries some degree of conviction. This means a case that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

    c. In reaching its conclusion the court must not conduct a "mini−trial": *Swain v Hillman*;

    d. This does not mean that the court must take at face value and without analysis everything that a party says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel at [10]*;

    e. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

f. Where a summary judgment application gives rise to a short point of law or construction the court should decide that point of law if it has before it all the evidence necessary for a proper determination and provided the parties have (as here) had sufficient time to address the point in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim.

29. At the time the claim was pleaded and permission to serve out was given the Claimant was asserting a contract with Total Gabon. If that assertion can be made good then it is obvious that the Claimant has a case with a real prospect of success. As recorded above Mr. Aldous QC has made the point that it is not unusual for Defendants who are responsible for work sites to all try to avoid liability. In those circumstances it is reasonable to commence proceedings even though the true contractual situation may not be ascertainable before disclosure has taken place. On the other hand one must bear in mind the evidence contained in the witness statement of Mr. Leckie. If he is correct in all the assertions as to the contractual nexus between the Claimant and Total Gabon it seems unlikely that the Claimant will make good a case in contract against Total Gabon. However it seems to me that I cannot accept the statements made by Mr. Leckie at face value without conducting a trial at a time when disclosure has not taken place. It is trite law that it is not permissible to conduct a mini trial when considering a summary appraisal of whether there is a real prospect of success. In the circumstances I think that I must find that on the basis that the Claimant manages to establish a contractual nexus there is a real prospect of success.

30. Turning to the question of tortious liability Ms Venn has submitted that tort has not been alleged on the statement of case and that the court can only consider whether there is a real prospect of success upon the basis of the pleaded case. In my view that contention is incorrect because the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial, see *Royal Brompton Hospital NHS Trust v Hammond (No 5)* (above). The court is therefore not bound to consider only the case actually pleaded before it but is entitled to take account of the pleadings as they will probably be finalised before the hearing. In any event it appears to me that the Paticulars of Claim are so pleaded as to include a claim that Total Gabon owed the Claimant a duty of care to exercise reasonable skill and care with respect to the diving operations, see paragraph 15, and that there was a breach of that duty, see paragraph 39.

31. In *Lungowe* Coulson J held that the claim against KCM had a real prospect of success because: (a) KCM were responsible for the operation of the mine; (b) there had been discharges of toxic waste from the mine into waterways; (c) under statutory provisions KCM were strictly liable for the consequences of those discharges; and (d) there is no attempt in the evidence to challenge the

underlying basis of the claimants' claim against KCM. Similarly in the present case I have no doubt that, in tort, there is a real prospect of success against Total Gabon because (a) it was responsible for the operations at the diving site; (b) it had a duty to consider risk assessment and manage a safe diving plan; (c) paragraph 39 of the Particulars of Claim set out a number of respects in which Total Gabon may be found to have failed in exercising due care of the Claimant; (d) although commercial diving is by its nature a hazardous way of life it is unusual for a diver to be so badly injured unless there has been negligence. It follows that the fact, nature and extent of the injury all lend weight to the conclusion that the Claimant has a real prospect of successfully claiming against the operator of the dive site.

32. In the circumstances I consider that it is proper for the claim against BIH to be commenced in the English court and that there was, at least before the default judgment was obtained a real claim to be made against BIH. In my view it is also established that the gateway test is satisfied and that Total Gabon is a necessary and proper party to the proceedings in that the claimant has a claim with a real prospect of success against Total Gabon, either in contract if disclosure provides documents which establish that there was a contractual nexus and, in any event, in tort.

33. *The proper place for the claim to be heard.* In *Lungowe* Coulson J considered that CPR Part 6.37(3) gives the court an overriding discretion, arising from whether the courts of England and Wales are the proper place to bring the claim, and that the principles governing the exercise of that discretion are those which were set out by Lord Goff in *Spiliada* (supra) and as was said in *Altimo Holdings v. Krygyz* case (supra) by Lord Collins: " . . *the task of the court is to identify the forum in which the case can be suitably tried for the interests of all parties and for the ends of justice* . . .". In *Lungowe* Coulson J first considered whether England or Zambia was the most appropriate forum ignoring the claim against the first defendant. He concluded that the obvious forum was Zambia taking account of all the features of the case. In like manner if one considers the relevant features in the present case I think one is driven to the conclusion that s claim against Total Gabon would be most conveniently and appropriately tried in Gabon. Such matters as the common language of the parties, the proper law of the place where the alleged tortious act was committed, the need for expert evidence and inspections of the site all support that conclusion.

34. The next step is to consider whether England is the appropriate place to try the claim taking account of the claim against BIH. On this topic Coulson J. has emphasized the following aspects:

    a. The general approach has always been that, if the necessary or proper party gateway that will weigh heavily in favour of giving permission to serve out of the jurisdiction, see *Re Eras Eil Actions* [1992] 1 Lloyds Rep 570 and *Petroleo Brasileiro SA v Mellitus Shipping Inc (The Baltic Flame)* [2001] EWCA Civ 418;

b. In *Credit Agricole Indosuez v. Unicof Ltd* [2003] EWHC 2676 Cooke J said: "*Although the burden is on the claimant to show . . . that England is the appropriate forum where the case can most suitably be tried for the interests of all the parties and the ends of justice, the fact of continuing proceedings in England against other defendants on the same or closely allied issues virtually concludes the question, since all courts recognise the undesireability of duplication of proceedings and the lis alibi pendnes cases makes this clear.*"

c. An opposite approach was taken by Burton J in *BNP Parabas v Ahab Co X19* [2011] EWHC 1081 (Comm) where he held that there was "*nothing to be said in favour of England at all, except the existence of this one claim in which it is said that the third party is a necessary or proper party, but which could plainly be litigated on its own without the involvement of the third party, and whose outcome could then be followed up by an indemnity claim if appropriate*".

d. In *OJSC VTB Bank v Parline Ltd* [2013] EWHC 3538 (Comm) Leggatt J considered the proper approach where there might be two or more parallel sets of proceedings.

e. That, following the decision in *OJSC VTB* (supra) in reality the question of the appropriate forum has to be decided in the light of the claims against the UK domiciled company and whether the existence of the UK based company virtually concludes the matter unless there is an exceptional reason the other way.

f. He accepted that if the claim against the first defendant was merely a device to bring the foreign defendant into the proceedings that would be a strong reason for discounting the arguments in favour of England being the most appropriate forum. In that case he held that he could not come to that conclusion and that is the same conclusion I would reach in the present case. At the time the claim was brought it appears to me that the English Court was obliged to accept jurisdiction for the reasons already set out.

35. Although the authorities strongly support the proposition that the English Court should not impose considerations of *forum non conveniens* where there is a claim brought against an English domiciled defendant nonetheless as exception was found in the decision in *Erste Group Bank AG (London) v JSC "VMZ Red October"* [2015] EWCA Civ 379. The facts of that case were different in that the Court of Appeal held that there was no basis for bringing the action against the UK domiciled defendant because there had already been a submission to the Russian jurisdiction. Such a case is likely to be exceptional however I consider that a parallel can be seen where the UK claim, although validly commenced, has now effectively run its course. That is

what has happened in the present case because judgment in default of acknowledgment of service has now been obtained. Aside from ancillary proceedings, such as an assessment of damages, those proceedings are effectively over. In those circumstances I can see little reason why the pragmatic approach advocated by Burton J in *BNP Parabas v Ahab Co X19* (above) should not be applied.

36. In my view the evidence available strongly supports the conclusion that the most appropriate forum for trying the claim against Total Gabon is in the courts of Gabon. The reality is that there will be no further proceedings in England and therefore the spectre of there being competing decisions in two separate jurisdictions will not arise. I therefore consider that the proper order to make in this case is to stay the proceedings in England.

37. Finally having come to that conclusion it is necessary to consider the issue of access to justice in Gabon as, if there was evidence that the Claimant could not get justice in Gabon, it would be a relevant and important feature affecting the discretion of the court. In *Lungowe* Coulson J held that there was evidence that the claimant would not obtain justice in Zambia. In the present case there has been no evidence and no submissions on this aspect. Therefore I cannot come to any conclusion on that aspect however by ordering a stay the court has retained sufficient jurisdiction to reconsider the matter and, if a party considered that it would be proper to make an application based upon this aspect, the court could, if persuaded, make an order reversing the stay.

Conclusion

38. For the reasons set out above I judge that it is proper to make the order staying the claim in England but giving permission to apply. Save to that extent the Second Defendant's application is refused.

Dated this 6th day of April 2017