Neutral Citation Number: [2019] EWCA Civ 10

Case No: A4/2017/3042

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR PETER MACDONALD EGGERS QC
SITTING AS A DEPUTY OF THE HIGH COURT
Case No: CL-2016-000414

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2019

Before :

LORD JUSTICE DAVIS
LADY JUSTICE ASPLIN
and
LORD JUSTICE GREEN

- -

Between :

KAEFER AISLAMIENTOS SA de CV	**Claimant/ Appellant**
- and -	
(1) AMS DRILLING MEXICO SA de CV **(2) ATLANTIC MARITIME SERVICES BV**	**Defendants**
(3) ATLANTIC TIBURON 1 PTE LIMITED **(4) EZION HOLDINGS LIMITED**	**Defendants/ Respondents**

- -
- -

Michael Nolan QC (instructed by **Clyde & Co**) for the **Appellant**
Nigel Cooper QC (instructed by **Stephenson Harwood**) for the **Respondent**

Hearing date: Wednesday 21st November

- -

Approved Judgment

LORD JUSTICE GREEN :

A Introduction

1. This is an appeal with leave of Flaux LJ given on 15th February 2018 against an Order of Mr Peter Macdonald Eggers QC, sitting as a deputy Judge of the High Court. By that Order the Judge declared that the court had no jurisdiction to try the claim of the appellant against the Third and Fourth Defendants. The pleadings and the service of them out of the jurisdiction were set aside.

2. The appeal raises a point of law as to the test to be applied on an application to set aside jurisdiction and, in particular, whether the test has two discrete parts or one part with composite ingredients. The appeal focuses also upon the substantive meaning of the phrases "*good arguable case*" and "*much the better argument*" which are or have been part of the test for establishing jurisdiction and as to the approach that courts should adopt when applying those tests. In addition, the appeal considers the approach that courts should adopt when, as will usually be the case at the interim stage when a jurisdiction challenge is launched, the evidence before the Court is incomplete. Two judgments of the Supreme Court were intended to put to rest the many arguments that have surrounded the application of the test for jurisdiction: *Brownlie v Four Seasons Holdings International* [2017] UKSC 80 ("*Brownlie"*), and, *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 ("*Goldman Sachs*"). However, as the arguments advanced during this appeal demonstrated, the attempts at clarification have served to raise a series of new arguments.

3. Over and above issues as to the applicable test the appellant argues that, irrespective of the test to be applied, the Judge erred in his analysis of the evidence and that he should have found that the case for jurisdiction was made out.

A. The facts

4. The facts are complex. They are set out fully in the Judgment. It is necessary to summarise the evidence in some detail to identify those features of the evidence which played a part in the argument.

The dispute

5. The appellant (the "appellant" or "Claimant" in the proceedings) commenced proceedings for sums alleged to be due under a contract for works performed by the appellant to the accommodation areas of a cantilever jack-up rig, the *Atlantic Tiburon 1,* ("the Rig"). The works included the removal and disposal of various items, the abatement of asbestos, the supply and installation of insulation, and refurbishment. The claim was for US$2,353,794.42.

6. The Claimant initially sued four defendants: (i) AMS Drilling Mexico SA de CV ("AMS Mexico"); (ii) Atlantic Marine Services BV ("AMS"); (iii) Atlantic Tiburon 1 Pte Limited ("AT1"): and (iv) and Ezion Holdings Limited ("Ezion"). The Claim

Form and the Particulars of Claim were served on AT1 and Ezion in Singapore under CPR rules 6.33(2)(b)(v) and 6.33(2A).

7. The appellant contends that the Court has jurisdiction to determine the claim against AT1 and Ezion under Article 25 of the Brussels I Regulation (Recast) (Regulation (EU) 1215/2012) ("*the Recast Brussels Regulation*"). It is said that the relevant contract contains an English exclusive jurisdiction clause and the relevant contract was concluded by AMS Mexico and/or AMS *on behalf of* AT1 and/or Ezion as undisclosed principals and, it follows, the contract, including its jurisdiction agreement, bound AT1 and Ezion.

8. AT1 and Ezion challenged jurisdiction arguing that they did not act as undisclosed principals, and neither were therefore party to the contract under which the claim was made. AMS and AMS Mexico do not challenge jurisdiction. It appears however that they are in financial difficulties.

9. Before the Judge below it was common ground that the gravamen of the issue was whether AT1 and Ezion were party to the jurisdiction agreement contained in the contract in question. The facts relevant to this appeal are those by which AT1 and Ezion were involved in the works performed on or in connection with the Rig and whether they suffice to establish, according to the proper test, whether they acted as undisclosed principals.

The Purchase Order

10. The relevant contract was evidenced by a Purchase Order dated 16th August 2013 ("the Purchase Order") which identified the Claimant as the "*Vendor*" and was signed by Mr Jody Baker of AMS (the Second Defendant). The Purchase Order stipulated that invoices were to be addressed to AMS Mexico (the First Defendant) marked for the attention of the Rig ("*Atlantic Tiburon 1*"). Delivery of the services was to be at the Rig's Project Office located at Terminal J Ray McDermott de Mexico, in Puerto Industrial de Altamira, Altamira Tamaulipas, Mexico. The reference to "*Atlantic Tiburon 1*" in the Purchase Order is to the Rig (not AT1). There is no dispute about this.

11. Under the Purchase Order 30% of the price would be paid upfront and the residue (ie 70%) invoiced against bi-weekly documented progress. This was to be signed by "*the AMS project manager*". Indeed, all documents supporting an invoice had to be signed by "*the AMS project manager*". Terms and conditions of business printed on the Purchase Order (described as "*Terms & Conditions of Business AMS BV*") applied. These included an entire agreement clause in clause 1:

> "1. Agreement
>
> These Terms and Conditions of Business together with this Purchase Order constitute the entire agreement between Atlantic Marine Services BV and its various affiliates and subsidiaries (hereinafter collectively referred to as "the company"[)] and supplier stated in the Purchase Order, (the

> Seller), for the execution of the work/supply of the goods described in the Purchase Order. Each order by the Company for goods from the Seller shall be deemed to be an offer by the Company to purchase goods/services subject to these Terms & Conditions. Variations or changes to the Purchase Order or these Terms & Conditions shall only be effective if made in writing specifically for such purpose and signed by a duly authorised representative of both parties …"

12. Clauses 10 and 11 concerned default and termination, and suspension:

> "10. Default and Termination …
>
> 10.2 In the event that, in the Company's sole opinion, the Seller[']s default shall be deemed not capable of remedy to the Company's satisfaction, the Company shall have the right to terminate the Purchase order in part or whole by notice in writing to the Seller …
>
> 11. Suspension
>
> The Company may at any time at its sole option suspend the performance of all or part of the Purchase order by giving written notice to the Seller … The Company will grant no compensation or extension of time for any suspension that might result from an act or default caused by the Seller …"

13. Clause 13 concerned ownership:

> "13. Ownership
>
> 13.1 Title to the goods shall pass from the Seller to the Company upon the earlier of: (a) delivery by the Seller and receipt of the goods accepted by the Company; (b) payment, either partial or in full; (c) for designs, drawings, technical information and data when prepared by the Seller …"

14. Clause 17 concerned assignment and subcontracting:

> "17. Assignment and Subcontracting …
>
> 17.4 The Purchase Order/Contract shall enure to the benefit of and be binding upon the successors of the Company and the Seller …"

15. Clause 21 specified English law as the governing law and the exclusive jurisdiction of the High Court in London:

> "21. Governing Law
>
> These Terms & Conditions and any Purchase Order shall be governed by and construed and interpreted in accordance

with the laws of England and Wales and the parties hereto irrevocably submit to the exclusive jurisdiction of the High Court in London for the resolution of any disputes arising in connection with the supply of goods under these Terms & Conditions and the relevant Purchase Order/Contract"

16. The Claimant argues that ATI and Ezion, as undisclosed principals, are bound by clause 21.

The services to be provided under the Purchase Order

17. The background to the services provided by the Claimant to the Rig were set out in witness statements prepared by Mr Luis Fernando Pereira Cozzoli ("Mr Pereira"), the Deputy Director of the Claimant, and Mr Cheah Boon Pin ("Mr Cheah"), Group Financial Officer at Ezion and a director of AT1.

18. The registered owner of the Rig was AT1, a wholly owned subsidiary of Ezion. In early 2012 representatives of Treatmil Holdings Ltd, (the parent company of AMS Mexico and AMS) ("Treatmil") and Traxiar Ventures Ltd (an associated company) ("Traxiar") agreed with Ezion that it would assist in providing rigs for projects with oil majors. It was to arrange financing and would acquire a rig through a special purpose vehicle ("SPV") which would then demise charter the rig to AMS or a nominee company. Financing costs were to be reimbursed through the payment of charter hire income paid to the SPV from the earnings made by Treatmil and Traxiar, with the income being paid into an escrow account.

19. An opportunity arising related to a contract with Pemex Exploracion y Production ("PEP") to operate the Rig as a drilling platform in the Gulf of Mexico. According to Mr Cheah, AMS entered a contract with PEP under which AMS would deliver the Rig to PEP between 30th May 2012 and 31st January 2015.

20. On 29th March 2012, AT1 contracted for the acquisition of the Rig and a Bill of Sale was executed on 17th April 2012. A Provisional Certificate of Registry was issued by the Republic of the Marshall Islands naming AT1 as sole owner of the Rig on 24th April 2012.

The Bareboat Charterparty

21. On 16th March 2012, a bareboat charterparty ("the Bareboat Charterparty") was concluded in respect of the Rig between AT1 as owner and AMS as charterer on an amended Barecon 2001 form. It was signed by Mr Cheah on behalf of AT1 and by Mr Alfred Schwegler on behalf of AMS.

22. The Bareboat Charterparty provided for delivery of the Rig on 30th May 2012 or some other agreed date. The charter period was for 977 calendar days with an extension of 483 days at AMS's option. AMS agreed to pay a mobilisation fee of US$1,450,000 and charter hire at the rate of US$59,400 PDPR for the first 850 days and thereafter at the rate of US$48,400 PDPR. Clauses 3 and 10 of the Bareboat Charterparty stated:

"3. Delivery

(a) The Owners shall before and at the time of delivery exercise due diligence to make the Vessel seaworthy And in every respect ready in hull, machinery and equipment for service under this Charter. The Vessel shall be delivered by the Owners and taken Over by the Charterers [in the Gulf of Mexico] …

(c) The delivery of the Vessel by the Owners and the taking over of the Vessel by the Charterers shall constitute a full performance by the Owners of all the Owners' obligations under this Clause 3, and thereafter the Charterers shall not be entitled to make or assert any claim against the Owners on account of any conditions, representations or warranties expressed or implied with respect to the Vessel but the Owners shall be liable for the cost of but not the time for repairs or renewals occasioned by latent defects in the Vessel, her machinery or appurtenances, existing at the time of delivery under this Charter, provided such defects have manifested themselves within twelve (12) months after delivery …

10. Maintenance and Operation

(a) (i) Maintenance and Repairs - During the Charter Period the Vessel shall be in the full possession and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect. The Charterers shall maintain the Vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and … at their own expense they shall at all times keep the Vessel's Class fully up to date with the Classification Society [American Bureau of Shipping] and maintain other necessary certificates in force at all times

(c) The Charterers shall keep the Owners and the mortgagee(s) advised of the intended employment, planned dry-docking and major repairs of the Vessel, as reasonably required …

(e) Changes to the Vessel - Subject to Clause 10(a)(ii), the Charterers shall make no structural changes in the Vessel or changes in the machinery, boilers, appurtenances or spare parts thereof without in each instance first securing the Owners' approval thereof …"

Addenda to the Bareboat Charterparty

23. On 12th November 2012, AT1 and AMS agreed Addendum No. 1 varying the Bareboat Charterparty in relation to the date of delivery and sums to be paid by AMS as charterer. The time for delivery agreed was "*On or about 1st March 2013 or such other date as may be agreed*". It was also agreed that AMS would pay forthwith to AT1 (a) a non-refundable deposit of US$9,350,000 which could be set-off against charter hire payable for the first 850 days at the rate of US$11,000 per day and (b) a non-refundable down payment of US$650,000 as partial payment of the agreed mobilisation fee of US$1,450,000.

24. On 13th March 2013, Addendum No. 2 was agreed which varied the charter hire payable by AMS.

Delivery of the Rig

25. There was a lack of certainty as to the date of delivery of the Rig. Mr Cheah stated that the Rig was delivered under the Bareboat Charterparty to AMS on or about 22nd October 2012 but was never delivered into service under the PEP contract. PEP was dissatisfied with the condition of the Rig and was not prepared to accept it as being in accordance with the specifications required by the PEP contract.

26. Before the Judge the Claimant questioned the 22nd October 2012 delivery date because Addendum No. 1 (concluded three weeks later) varied the date of delivery to "*On or about 1st March 2013 or such other date as may be agreed*". If the Rig had already been delivered, it was said, there would have been no need to include the variation. However, by the date of Addendum No. 2 (13th March 2013), no further reference was made to the delivery date of the Rig under the Bareboat Charterparty. Mr Cheah said that hire due under the Bareboat Charterparty was suspended pending delivery of the Rig into service under the contract with PEP. However, the Claimant pointed out that there was no written record of such suspension.

27. Mr Cheah explained "*As far as I am aware, the Purchase Order with the underlying contract between [AMS] and the Claimant was made because [AMS Mexico and AMS] were endeavouring to put the Rig into a condition where it was acceptable to PEP and they could comply with their obligations as disponent owners of the Rig under the PEP Contract*". Further that "*…certain works were necessary to make the rig sea-worthy and operational and should be funded by the financing provided by [Ezion]*", and that "*Pursuant to the arrangements between [Ezion] on the one hand and Treatmil and Traxiar on the other the project costs financed by [Ezion] were to be used in part for any necessary reactivation and upgrade works*". The Judge observed that whilst the date of delivery was uncertain it seemed at least that the Rig had been delivered to AMS under the Bareboat Charterparty before the date of the Purchase Order of 16th August 2013.

The provision of work on the Rig relating to abatement of asbestos

28. In relation to asbestos the appellant contends that the work undertaken by it to the Rig was necessitated by the International Convention for the Safety of Life at Sea (SOLAS), Ch. II-1 Reg. 3.5 and MSC. 1/Circ 1379, and by the Leasing Requirements of PEP which required compliance with SOLAS 2009 and the MODU Code 2010.

29. The respondents dispute this. They say that the codes did not apply to the abatement of asbestos of the Rig, which was built in 1982. SOLAS II-1 Reg. 3-5 provides that "*From 1 January 2011, for all ships, new installation of materials which contain asbestos shall be prohibited*" and MISC. 1/Circ. 1379 provided that "*new installation of materials*" means "*any new physical installation on board*". Therefore, Mr Cooper QC argued, there was no requirement to remove asbestos if the materials had not been installed after 1st January 2011. A similar argument was made in respect of the MODU Code, which provided (at least in its 2009 version) that it applied to "*mobile offshore drilling units as defined in section 1.3, the keels of which are laid or which are at a similar stage of construction on or after 1 January 2012*" (section 1.2.1).

30. To render the Rig seaworthy and fit for service, according to Mr Cheah, AT1 entered into two contracts. First, a Master Vessel Repair and Modification Agreement dated 28th September 2012 ("the Modification Agreement") with J Ray McDermott de Mexico SA de CV ("McDermott"). The Rig was then located at McDermott's yard. The Modification Agreement was subsequently re-signed on 13th May 2013. A copy of the re-signed, but not the original, agreement was before the Court. Second, a Jack-Up Rig Project Management & Services Agreement dated 31st October 2012 ("the Project Management Agreement") with AMS Singapore was concluded. AMS Singapore was a sister company to AMS and AMS Mexico.

31. By the Modification Agreement, signed by Mr Cheah on behalf of AT1, it was provided that:

> "WHEREAS, [AT1] may desire to engage [McDermott] from time to time to perform services and/or provide materials, goods, equipment or other products in connection with such services as more specifically set forth in an Order, as herein defined (the "Work") …
>
> ARTICLE I
>
> SCOPE OF WORK
>
> …
>
> 1.2 Control. This Agreement shall control and govern all Work performed and/or goods or equipment provided by [McDermott] or [AT1] under subsequent written Work Orders or Change Orders. No Work will be performed without a Work Order or Change Order … For the purposes of this Agreement "Work Order" shall mean any written order or written instruction from Company and accepted by Contractor giving Contractor an order to perform any Work referenced in Appendix 1 …

> ARTICLE XI
>
> WORK BY COMPANY
>
> 11.1 Performance of Work Outside of Scope of Work. [AT1], with [McDermott's] prior written consent, shall have the right from time to time to perform, either directly or through one or more specialist contractors work on various tasks on the Vessel that are not a business of [McDermott] … [AT1] shall be responsible for the costs and expenses of all services provided by these specialist contractors.
>
> 11.2 Access and Cooperation. Any work performed by [AT1] or its contractors in accordance with Article XI shall be scheduled in such a manner as to not unduly interfere with [McDermott's] performance of the Work …"

32. On 30th November 2012, Intertek issued an analytical report in respect of an asbestos survey carried out on the Rig. It was addressed to McDermott. On 7th August 2013, by a letter addressed to AMS, the Claimant tendered for the removal of various items from the Rig, the abatement of asbestos and the supply of thermal insulation. In the covering letter, the Claimant referred to the scope of work as including "*Use OSHA Level 2 asbestos abatement procedures as modified by applicable Mexican asbestos regulations to remove materials identified as asbestos-containing in the Intertek asbestos survey*". This phrase is repeated in the Purchase Order.

33. On 16th August 2013, AMS issued the Purchase Order referred to above.

Suspension of works pending payment / payments / settlement discussions

34. On 11th October 2013 McDermott stated that it would not perform the Modification Agreement. On 16th October 2013 AMS replied and stated:

> "AMS, as the appointed representative of the Asset Owners pursuant to the two Master Vessel Repair and Modification Agreements … relating to the vessels Atlantic Tiburon I and Atlantic Tiburon 3 (the "Vessels"), we acknowledge your letter … Derived from reading your letter, we understand that [McDermott] refuse to reverse their fixed position to abandon, renounce and refuse to perform the [Modification Agreement] and substantially interfered with AMS's right of position [sic: possession] of the Vessels … AMS informs by this means to [McDermott] of the actions which will be taken by AMS in order to minimize the impact of the damages that potentially will be caused to AMS for [McDermott's] position …"

35. On 17th October 2013, McDermott responded in a letter to AT1 for the attention of Mr Cheah (copied to AMS), confirming that McDermott had suspended work until all

amounts due and payable under the Modification Agreement had been received. McDermott referred to the AMS letter of 16th October 2013 and stated:

> "… In the letter, AMS outlines the work on the Projects that they wish to continue to perform. As you are well aware, at this time McDermott has suspended the work on the Projects pursuant to the terms of the current Vessel Repair and Modification Agreements for Atlantic Tiburon I … and McDermott is not willing to allow any work to be performed on the vessels until all amounts due and payable have been received … Please note that McDermott is taking these actions due to [AT1] … (the "Owners") failure to continuously pay amount that are due and payable pursuant to the [Modification Agreement], despite our repeated requests that the Owners do so … The suspension of the work for the Projects is an appropriate and legitimate exercise of McDermott's contractual rights based upon the continued failure by Owners to pay long outstanding invoices approved by AMS on behalf of Owners …"

36. In October and November 2014, two separate payments of US$100,000 were made to the appellant in respect of invoice no. A1598 by subsidiaries of Ezion (other than AT1). The payments were described as being made "*on behalf of Atlantic Marine Services BV*". Mr Cheah stated that the sums represented sums due to AMS and/or AMS Singapore and were made at AMS's request and that AT1 and Ezion were willing to assist AMS to deliver the Rig to PEP to generate cash flow from the PEP contract, which was required to pay charter hire under the Bareboat Charterparty.

37. Mr Pereira, Deputy Director of the Claimant, referred in his statement to settlement discussions between the Claimant and AT1 and/or Ezion. Mr Cheah also refers to these discussions. They took place from about October 2014 until early 2015. According to Mr Pereira the Claimant was looking to Ezion for payment of the sums due under the Purchase Order. The Claimant contended that this indicated that Ezion or AT1 acknowledged that they <u>were</u> contracting parties to the contract evidenced by the Purchase Order. Mr Cheah disputed this referring to a draft novation agreement which was being negotiated and which contemplated the transfer of AMS's rights and obligations under the Purchase Order contract to AT1.

B. The arguments below in relation to jurisdiction

38. In support of its case that AT1 and Ezion were undisclosed principals to a contract the Claimant identified various evidential matters. Details are set out in the Judgment at paragraphs [68] – [78] and can be summarised as follows.

39. First, the Rig was owned by ATI, a wholly owned subsidiary of Ezion. Mr Cheah in evidence refers to AT1 and Ezion as "*asset owners*". In a letter dated 16th October 2013 AMS referred to itself "*as the appointed representative of the Asset Owners*". The work carried out by the Claimant was, it is said, for the long-term benefit of AT1 and Ezion as the Rig owner. The Judge commented that, AMS as the bareboat

charterer was also interested in the long-term condition of the Rig and its suitability for the PEP contract, as to which AMS (or an associated company) was the principal. The appellant countered that the performance of the PEP contract was dependent on the Bareboat Charterparty and its performance would have benefited AT1 and Ezion; income earned from the PEP contract would be used to pay hire under the Bareboat Charterparty. The Judge noted that this same benefit could have been achieved if AMS entered into the contract with the Claimant on its own behalf and not on behalf of AT1 or Ezion.

40. Second, the work under the Purchase Order was carried out at the same time and in the same place as work that was commissioned by AT1 which was necessary to make the vessel fit for the PEP contract. Mr Pereira stated in evidence that such works "*constituted around 50% of the total works taking place on the Rig at that time*". Mr Cheah explained that "*certain works were necessary to make the rig sea-worthy and operational and should be funded by the financing provided by [Ezion]*", and that: "*Pursuant to the arrangements between [Ezion] on the one hand and Treatmil and Traxiar on the other the project costs financed by [Ezion] were to be used in part for any necessary reactivation and upgrade works*". To this end, AT1 entered into the Modification Agreement with McDermott and the Project Management Agreement with AMS Singapore apparently before the asbestos was discovered. The appellant argued that the Project Management Agreement with AMS Singapore related to all reactivation works. The purpose of the Purchase Order works and the Modification Agreement works was the same, namely to render the Rig fit for service under the PEP contract. AT1 and Ezion responded by pointing out that since AT1 was prepared to contract as principal under the Modification Agreement and the Project Management Agreement, it would have done so under the Purchase Order had it so intended; but it did not. The Project Management Agreement was not concluded with AMS but AMS Singapore, a different company (albeit related to AMS).

41. Third, the work carried out by the Claimant was to deal, in part, with the abatement of asbestos which had been discovered by a survey commissioned by McDermott and performed by Intertek.

42. Fourth, it was consistent with the scheme of the Modification Agreement with McDermott that the work performed by the Claimant should be carried out by an independent contractor engaged by AT1. Article XI.1 of the Modification Agreement provided that "*[AT1], with [McDermott's] prior written consent, shall have the right from time to time to perform, either directly or through one or more specialist contractors work on various tasks on the Vessel that are not a business of [McDermott] ...*".

43. Fifth, the work performed by the Claimant was work which AT1 (but not AMS) was obliged to perform under the Bareboat Charterparty.

44. Sixth, by its letter dated 16th October 2013, (shortly after the date of the Purchase Order), AMS described itself "*as the appointed representative of the Asset Owners*". This letter also stated that AMS was the appointed representative "*pursuant to the two Master Vessel Repair and Modification Agreements ... relating to the vessels Atlantic Tiburon I and Atlantic Tiburon 3 ("the Vessels")*". The appellant referred to the fact that two or three websites refer to AMS as "*the Rig's manager*".

45. Seventh, the Claimant pointed out that the work undertaken under the Purchase Order benefitted AT1 and Ezion in that they both stood to receive payments made by PEP.

46. Eighth, the settlement discussions referred to above were undertaken as between the appellant and representatives of AT1.

47. Ninth, the two payments of US$100,000 made to the Claimant in October and November 2014 were made by subsidiaries of Ezion. Mr Cheah stated that the payments were at the request of AMS and represented sums owed by those subsidiaries to AMS or AMS Singapore. The appellant queried this evidence as entirely hearsay.

C. The Judgment below

48. The Judge held that the Claimant had not established that the Court had jurisdiction against AT1 and Ezion. In relation to the relationship between AMS and AT1 there was a "good arguable case" that AT1 was an undisclosed principal to the contract evidenced by the Purchase Order but "*AT1 has the better of the argument that it was not an undisclosed principal*" and accordingly the claim for jurisdiction against AT1 failed.

49. The reasons why there was a good arguable case were set out in the Judgment at paragraph [82]. It is not necessary to go into them in any detail. At paragraph [83] the Judge said that the test of arguability that he applied would have sufficed to overcome a summary judgment application:

> "83. I therefore consider that the Claimant has a good arguable case (or a sufficiently arguable case) that it contracted on behalf of ATI. By this I mean that such a case is consistent with the evidence and may be inferred from that evidence. Indeed, such an inference may prove to be justified at trial. The Claimant's case in this respect has substance and is more than fanciful. Indeed, if this had been an application for summary judgment dismissing the Claimant's claim against AT1, I would have dismissed that application because the Claimant would have a real prospect of succeeding in this allegation."

50. In paragraph [84] the Judge explained why nonetheless AT1 had "…*the better of the argument*" and why its arguments were "*more plausible*":

> "84. However, notwithstanding the arguability of the case that AT1 was an undisclosed principal, I think, on the evidence available, that AT1 has the better of the argument that it was not, i.e. AT1's case that it was not an undisclosed principal is more plausible than the Claimant's case that AT1 was an undisclosed principal, for the following reasons:
>
> (1) Even though the Rig was owned by AT1, by reason of the Bareboat Charterparty, AMS was the bareboat charterer and

concluded the Bareboat Charterparty in order to advance its own interests in connection with the PEP project. Whether or not AMS was responsible, under the Bareboat Charterparty, to undertake the Purchase Order works, the works were required to enable the Rig to satisfy the PEP requirements. This would have been for the benefit of AMS.

(2) Although AT1 was a party to the Modification Agreement and the Project Management Agreement, there is no evidence that the Purchase Order works were carried out under those Agreements. Indeed, if AT1 was prepared to be identified as a party to those agreements, it is striking that it was not identified as a party to the Purchase Order contract. Furthermore, the relevant authority for the undertaking of the Purchase Order works may have been derived from the Project Management Agreement, but AMS (nor AMS Mexico for that matter) was not the Project Manager appointed under that agreement: instead, AMS Singapore was the Project Manager. In addition, as Mr Cooper QC pointed out, the Project Management Agreement makes no reference to the removal of asbestos (being one of the items of work required under the Purchase Order).

(3) The letter dated 16th October 2013 from AMS to McDermott, in which it describes itself as AT1's "appointed representative", is consistent with AMS having contracted with the Claimant on behalf of AT1. However, there are two matters which lead to the conclusion that AT1 has the better of the argument that this does not relate to the Purchase Order. First, there is no obvious or explicit connection between this letter and the Purchase Order. Second, AMS refers in the letter to McDermott's actions damaging AMS's interests, not AT1's interests ("AMS informs by this means to [McDermott] of the actions which will be taken by AMS in order to minimize the impact of the damages that potentially will be caused to AMS …"). In addition, it is not clear to me how AMS became the "appointed representative", given that the Project Management Agreement was concluded between AT1 and AMS Singapore, not AMS.

(4) It is equally plausible, based on the limited materials available, that AMS or AT1 would be responsible for such works under the Bareboat Charterparty. In many respects, I regarded this as the high point of the Claimant's case in that if AT1 was obliged by the Bareboat Charterparty to ensure that asbestos was removed in order to render the Rig seaworthy and fit for service, there might be said to be a compelling reason for concluding that the contract with the Claimant - which was in part concerned with the abatement of asbestos - was concluded on behalf of AT1 (though not Ezion). There is a lack of

> evidence that the Purchase Order works were required to discharge AT1's obligations under the Bareboat Charterparty. Accordingly, I am not in a position to determine whether AT1 is responsible under the Bareboat Charterparty and I am not able to say whether or not AMS or AT1 has the better of the argument in this respect. However, even assuming that AT1 - not AMS - was responsible under the Bareboat Charterparty to ensure that the Rig was asbestos-free, I do not consider that this means that the Claimant has the better of the argument that AMS was authorised by AT1 and intended to contract with the Claimant on behalf of AT1. First, it does not follow that the Purchase Order was agreed on behalf of AT1. It is possible that AMS, as the bareboat charterer, undertook the work on its own behalf and would claim recompense from AT1 as the owner. There is no direct evidence that the Purchase Order contract was made on behalf of AT1. Second, it is not obvious that the works other than the removal of asbestos performed under the Purchase Order contract were required to render the Rig seaworthy and fit for service and therefore to have been within AT1's responsibility under the Bareboat Charterparty.
>
> (5) As there is no direct evidence of the authority and intention required to establish a party as an undisclosed principal, and in particular no direct evidence relating to the authority granted by AT1 to AMS or relating to AMS's intention at the time of the Purchase Order contract, taken together with the other matters referred to above, AT1 must have the better of the argument in this respect.
>
> (6) The settlement discussions with Ezion and the payments at the behest of Ezion in 2014-2015 add little to the questions I am asked to consider. However, to the extent that they are relevant, the fact that the settlement discussions contemplated a draft novation agreement whereby the rights and obligations under the Purchase Order contract were to be transferred to AT1 is a factor in favour of AT1 not having been a party to the Purchase Order contract in the first instance."

51. This was the position as between the Claimant and AT1. As between the Claimant and Ezion the Judge did not conclude that an even arguable case arose. He stated:

> "85. As far as Ezion is concerned, I consider that there is no good arguable case that Ezion was an undisclosed principal to the Purchase Order contract and, it follows, Ezion has the better of the argument in this respect, for the following reasons:

> (1) The Rig was not owned by Ezion. Although Ezion was the parent of AT1, the fact that Ezion was not prepared to own the Rig directly or to enter into the Bareboat Charterparty with AMS, renders it implausible that Ezion authorised AMS to contract with the Claimant. Although Ezion may have benefited from the Purchase Order, it does not mean that AMS was necessarily authorised or intended to contract on Ezion's behalf.
>
> (2) Ezion was not a party to the Modification Agreement and/or the Project Management Agreement.
>
> (3) Even if the Purchase Order works were necessary to discharge the obligations of AT1, as owner, under the Bareboat Charterparty, no similar consideration applies to the position of Ezion, who was not a party to the Bareboat Charterparty.
>
> (4) There is no direct evidence that AMS was authorised by Ezion and intended to contract on behalf of Ezion."

D. The Grounds of appeal / Respondent's Notice

52. The Claimant set out 6 grounds in its skeleton. These can be grouped together and summarised as follows. First, the Judge, having found that the appellant had a good arguable case that AT1 was an undisclosed principal, erred in proceeding to apply a second test based upon plausibility and/or who had the "*better argument*". This "*gloss*" on the good arguable case test is neither justified in law or policy. Second, even if the "*better argument*" test was applicable in principle it should not have been applied in the present case where the evidence was incomplete and contradictory and where crucial evidence was in the hands of the Defendants who had chosen not to reveal the "*full picture*" and failed to provide disclosure notwithstanding requests for documents. Third, in any event on the evidence before the Court the Judge erred in finding that AT1 had the better of the argument. Fourth, the Judge erred in failing to find that there was a good arguable case that Ezion was an undisclosed principal. Finally, there is a Respondent's Notice which, *inter alia*, raises a point about the significance of the entire agreement clause in the terms and conditions and whether the Judge was correct to essentially treat this as neutral in the weighing of the scales of good arguability.

E. The law relating to undisclosed principals

53. In *Teheran-Europe v Belton* [1968] 2 QB 545 ("*Teheran-Europe")* at page [552] Lord Denning MR observed: "*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) stated (at page [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…."

54. In *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199, 207 (PC) ("*Siu Yin Kwan"*), Lord Lloyd summarised the law:

> "For present purposes the law can be summarised shortly. (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal."

55. There is no material dispute between the parties as to the governing principles. For a party to be an undisclosed principal it must hence be established that: (1) the agent contracted with and within the scope of the actual authority of the undisclosed principal; (2) at the time of the relevant contract, the agent intended to contract on the principal's behalf; and (3), there is nothing in the contract or surrounding circumstances showing that the agent is the true principal and which excludes the making of a contract with an undisclosed principal.

56. Various points were taken in argument about the application of the doctrine to the facts of the present case (cf Judgment paragraphs [38] – [44]). In these paragraphs the Judge addressed an argument advanced by AT1 and Ezion that the terms and conditions, and in particular the entire agreement clause, strongly indicated that there

was no room for a finding of an undisclosed principal. The Judge disagreed and held that the terms and conditions were essentially neutral in the analysis. AT1 and Ezion have questioned this conclusion in a Respondent's Notice. I address this at paragraphs [109] – [115] below.

F. The test to be applied: The Supreme Court in Brownlie (2017) and in Goldman Sachs (2018)

57. The Judge applied a two-part test. First, he asked whether the Claimant had demonstrated a good arguable case. In this he seemed to equate the test with that for summary judgment. Second, he went on to ask whether the Claimant had "*the better and more plausible*" argument. In the light of case law as it has evolved it was common ground between the parties before us that this two-part approach was incorrect and that in this respect the Judge erred.

58. Over many years the Courts have expressed the view that the determination of disputes about jurisdiction should be determined with despatch. They are a (frequently costly and time consuming) distraction from the main event, which is the determination of the substance of the dispute and not where its adjudication takes place. The Courts have however struggled to find a formulation which encapsulates in readily workable language what the test is and how it should be applied.

59. A test intended to be straightforward has become befuddled by "*glosses*", glosses upon glosses, "*explications*" and "*reformulations*". In relation to the standard of proof, that which the Claimant must establish to found jurisdiction, the Courts have referred to a test of "*good arguable case*", who has the "*better argument*" or "*much*" the better argument, the need for "*reliable*" evidence, the need for "*clear and precise*" evidence, "*credible*" evidence, evidence of real "*substance*", "*plausible*" evidence, and "*sufficient*" evidence. Disputes abound over whether the test is a single test or comprised of two parts and, in any event, as to whether the test is absolutist and /or relative.

60. For the purpose of analysis, I take as the starting point the two recent judgments of the Supreme Court in *Brownlie* and *Goldman Sachs*. I proceed upon the footing that the test laid down in those two judgments is intended to guide the way and, taking into account the arguments advanced during the hearing about those judgments, I seek to apply them to the facts eschewing glosses, reformulations and explications.

61. Before addressing those authorities, it is sensible to provide a word of explanation about the key conceptual dispute between the parties. This concerned the asserted difference between an absolute test and a relative test. It is argued that an absolute test is one where the Claimant, to found jurisdiction, need only surmount a specified evidential threshold which does not involve the Court otherwise assessing the relative merits of the competing arguments. In contrast it is argued that a relative test does involve the court in looking to the merits in a relative sense to see whose arguments are stronger. In this context a test which is set by reference to a fixed standard (eg arguability) is an absolute test, because provided the Claimant surmounts this hurdle, it is irrelevant that the Claimant's arguments, even at the interim stage, may be (relatively) weaker than the Defendants arguments: an argument might be arguable

but still wrong. It follows that an absolute test is easier to establish and therefore one which claimants will prefer; and a relative test is harder to meet, and one which defendants will prefer.

62. I turn now to *Brownlie*. There Lord Sumption (with whom Lord Hughes agreed) explained that the starting point was the judgment of Waller LJ in *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547 ("*Canada Trust*") who had construed the "*good arguable case*" test as including within it the relative concept of who had "*much*" the "*better argument*". Lord Sumption stated:

> "7. An attempt to clarify the practical implications of these principles was made by the Court of Appeal in *Canada Trust Co 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, ie of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."
>
> When the case reached the House of Lords, Waller LJ's analysis was approved in general terms by Lord Steyn, with whom Lord Cooke and Lord Hope agreed, but without full argument: [2002] AC 1, 13. The passage quoted has, however, been specifically approved twice by the Judicial Committee of the Privy Council: *Bols Distilleries (trading as Bols Royal Distilleries) v Superior Yacht Services Ltd* [2007] 1 WLR 12, para 28, and *Altimo Holdings*, *loc cit*. 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."

63. Lady Hale stated that the observations of the Supreme Court about jurisdiction were *obiter* and that she did not read the "*explication*" of Lord Sumption (*supra*) as "*glossing*" the test. She observed:

> "33. As we agree that this action cannot continue against the current defendant, everything which we say about jurisdiction is *obiter dicta* and should be treated with appropriate caution. 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's explication in para 7 as glossing the test; and (2) that the action in tort is governed by Egyptian law and so the Fatal Accidents Act 1976 cannot apply to it, although Egyptian law may in fact allow for a similar claim, should permission ever be given to plead it."

64. Lord Wilson agreed with Lady Hale and those parts of the judgment of Lord Sumption with which she agreed (in other words he disagreed with Lord Sumption where Lady Hale did). Lord Clarke agreed with Lady Hale and Lord Wilson including where there were differences between them and Lord Sumption and Lord Hughes.

65. Pulling strands together the following limited points seem to have been common ground: (i) observations about the test for jurisdiction were *obiter;* (ii) the pre-existing test was the test laid down in *Canada Trust;* (iii) any court determining jurisdiction must take into account the limitations inherent in the fact that a jurisdiction dispute is an interim hearing often in the absence of full evidence.

66. Before us Mr Cooper QC and Mr Nolan QC, both with considerable persuasive skill, argued that the reformulation of Lord Sumption (assuming that it was reflective of the majority) led to diametrically opposed end-results.

67. Mr Nolan QC, for the appellant, argued that Lord Sumption was in effect being polite and tactful since his endorsement of the *Canada Trust* test as "*serviceable*" and his reformulation of the test articulated therein was, in substance, a wholesale revision which lowered the threshold for jurisdiction to a single and absolute level of plausibility and removed any hint of a relative test based upon who had the better (or "*much*" better) argument. He pointed out that there was no express reference to relativity in the three-part reformulation of Lord Sumption which focused only upon the absolute (non-relative) test of plausibility (in limb (i)) and plausibility and good arguable case in limb (iii) both of which he said were absolutist and not relative tests. And it was also pointed out that Lady Hale had herself cast the test in terms of good arguable case only. None of this indicated a relative test.

68. Mr Cooper QC, for the respondents, argued to the contrary that in *Brownlie* the Supreme Court clearly endorsed the relative (better argument or "*much*" the better argument) test since, as Lord Sumption acknowledged, the relative formulation of Lord Justice Waller in *Canada Trust* in the Court of Appeal had been approved on appeal in general terms by Lord Steyn, with whom Lord Cooke and Lord Hope agreed ([2002] AC 1 at paragraph [13]) and that it had been specifically approved twice by the Judicial Committee of the Privy Council in *Bols Distilleries (trading as Bols Royal Distilleries) v Superior Yacht Services Ltd* [2006] UKPC 45 ("*Bols*") paragraph [28], and *Altimo Holdings*, *loc cit*. Further, Lord Sumption (whether begrudgingly or not) himself had described it as "*a serviceable test*". Mr Cooper pointed out that, properly read, Lord Justice Waller's judgment in *Canada Trust* had treated the relative (better argument) evaluation as an integral part of the good arguable case test. He argued that Lady Hale, when endorsing the good arguable case test, was approving

a test which incorporated a relative element. Hence, it followed that any reference to good arguable case, or indeed a proxy of "*plausibility*", also included a relative element. Moreover, when Lord Sumption had come to criticise the test he had cavilled only at the addition of "*much*" to the "*better argument test*". He had not queried the essential and (importantly) relative test of which party had the "*better argument*". Mr Cooper also pointed out that in a significant number of earlier cases the Courts had consistently construed the *Canada Trust* test as being relative in nature (see eg *Erdenet Mining Corp v Government of Kazakhstan* [2016] EWHC 299 (Comm) at paragraph [13] and per Lady Justice Arden in *Brownlie* in the Court of Appeal at [2015] EWHC Civ 665 paragraph [23]). In short Mr Cooper argued that if the Supreme Court had intended to reverse and change the relative "*better argument*" test in *Canada Trust* then it would have said so expressly and not through opaque politeness; but it manifestly did not. For reasons I set out below I agree with this analysis.

69. Argument also surrounded how the three-part reformulation of Lord Sumption applied *in practice* given that it was difficult to see how limbs (i) and (iii) differed or could be reconciled. In particular limb (i) of the test specified an evidential test of plausibility. But if that test could not be met (because for instance of unresolvable evidential uncertainties) so that the Court was unable to decide whether the Claimant's case was plausible then the Court (under limb (iii)) was nonetheless required to apply a test of whether the Claimants had a good arguable case that there was a plausible evidential basis. On one view the test is self-defeating. If the Court (under limb (i)) cannot meet a plausibility test how can it then proceed to apply a good arguable case of plausibility (under limb (iii)) nonetheless?

70. An opportunity to clarify the test arose in *Goldman Sachs*. Lord Sumption (giving a judgment with which Lord Hodge, Lady Black, Lord Lloyd-Jones and Lord Mance agreed), essentially repeated his formulation in *Brownlie.* To the extent that there was disagreement in *Brownlie* about the reformulation of the *Canada Trust* test the Supreme Court has now spoken with a single voice and the route forward lies with that reformulation. In paragraph [9] Lord Sumption stated:

> "9. This is, accordingly, a case in which the fact on which jurisdiction depends is also likely to be decisive of the action itself if it proceeds. For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had "the better of the argument" on the facts going to jurisdiction. In *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192, para 7, this court reformulated the effect of that test as follows:
>
> "… (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."

> It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced."

71. Any dispute about whether the three-limbed test is *obiter* has accordingly now vanished. The test has been endorsed by a unanimous Supreme Court. But the Court has not gone further than in *Brownlie* and has not expressly explained how the test works in practice nor as to what is meant by "*plausible*" nor how it relates to "*good arguable case*" nor how the various limbs interact with the relative test in *Canada Trust*.

G. How to apply the three-limbed test in Goldman Sachs

72. Notwithstanding, when one stands back in order to determine what was sought to be achieved and when one takes into account pre-existing case law which was not in question in *Brownlie* and in *Goldman Sachs*, it is in my view possible to make sense of the new, reformulated, test.

Limb (i)

73. It is in my view clear that, at least in part, the Supreme Court confirmed the relative test in *Canada Trust*. This is plain from the express endorsement of that test in *Brownlie* and nothing in *Goldman Sachs* detracts from that analysis but on the contrary operates upon the basis that *Brownlie* was correct. The reference to "*a plausible evidential basis*" in limb (i) is hence a reference to an evidential basis showing that the Claimant has the better argument. It is perhaps relevant that in the Court of Appeal in *Brownlie* Arden LJ expressly linked the formulation of Lord Justice Waller in *Canada Trust* with a concept of relative plausibility (ibid paragraph [23]). The use of "*plausibility*" as a guiding relative principle in *Brownlie* and in *Goldman Sachs* was not therefore a novelty plucked from a jurisprudential void.

74. What is the correct name for the test? In *Aspen Underwriting Ltd v. Kairos Shipping Limited* [2017] EWHC 1904 (Comm), on appeal [2018] EWCA Civ 2590 ("*Aspen*"), the Court of Appeal construed *Brownlie* as endorsing the "*good arguable case*" test which boiled down to who had (relatively) the better of the argument (ibid paragraph [34]). *Aspen* was however heard before the judgment in *Goldman Sachs* was handed down, and, even though it was handed down afterwards, it does not take account of that judgment. It is notable that in *Goldman Sachs* the Court does not use the terminology of "*good arguable case*" save in respect of limb (iii) where it is combined with plausibility. In limb (i) – which is the basic test – the test is plausibility alone. Yet it is true (as the Court of Appeal accepted in *Aspen*) that in the Supreme Court judgments the Court was seeking to restructure the good arguable case test. In my view, provided it is acknowledged that labels do not matter, and form is not allowed to prevail over substance, it is not significant whether one wraps up the three-limbed test under the heading "*good arguable case*" and since this was the understanding in *Aspen* there remains currency in this rubric.

75. Various points surrounding the test were not in issue in *Brownlie* or in *Goldman Sachs*. The burden of proof remains upon the Claimant: see eg *VTB Capital plc v Nutritek International Corpn* [2013] UKSC 5 at paragraphs [90] - [91]. For the avoidance of doubt the test under limb (i) is not balance of probabilities: See eg *Cherney v Deripaska* (No2) [2008] EWHC 1530 (Comm) at paragraph [44]; and *Brownlie* in the Court Appeal per Arden LJ [2015] EWCA Civ 665 at paragraphs [22] and [23]. The expression "*balance of probabilities*" is apt for use at trial when the court can weigh the evidence in its totality but is not therefore an appropriate expression for use at the interim stage. The test is context specific and "*flexible*": See eg *Canada Trust* at page 555H per Waller LJ; and *Brownlie* per Arden LJ in the Court of Appeal at paragraph [21].

76. In expressing a view on jurisdiction, the Court must be astute not to express any view on the ultimate merits of the case, even if there is a close overlap between the issues going to jurisdiction and the ultimate substantive merits: see eg per Waller LJ in *Canada Trust* (ibid) page 555F, Teare J in *Antonio Gramsci Antonio Gramsci Shipping Corp v Recoletos Ltd* [2012] EWHC 1887 (Comm) ("*Antonio Gramsci*") paragraph [39]; and Aikens LJ in *JSC Aeroflot Russian Airlines v Berezvsky* [2013] EWCA Civ 784 ("*JSC Aeroflot")* at paragraph [14].

77. Next, the adjunct "*much*" in the *Canada Trust* formulation must be laid to rest. This was the view expressed by a variety of judges prior to *Brownlie* (see for instance per Aikens LJ in *JSC Aeroflot* at paragraph [14]) and the word was, rightly in my view, deemed superfluous in *Brownlie* by Lord Sumption. There is no discernible logic for saying that jurisdiction arises if the claimant, having established that it has the better case (relatively), then has to proceed upwards and onwards <u>and</u> show that it has "*much*" the better case. A plausible case is not one where the claimant has to show it has "*much*" the better argument.

Limb (ii)

78. Limb (ii) is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "*reliably"* can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The Court is not compelled to perform the impossible but, as any Judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with "*due despatch and without hearing oral evidence"* (see per Lord Steyn in the House of Lords in *Canada Trust* ([2002] AC1 at page [13]; and per Lord Rodgers in *Bols* at paragraphs [27] and [28]). It should be borne in mind that it is routine for claimants to seek extensive disclosure (as was done on the facts of the present case) from the defendant in the expectation (and hope) that the defendant will resist, thereby opening upon the argument that the defendant has been uncooperative and is hiding relevant material for unacceptable forensic reasons and that this should be held against the defendant. Where there is a genuine dispute judges are well versed in working around the problem. For instance, it might be possible to decide an evidential dispute in favour of a defendant on an assumed basis and ask whether jurisdiction is nonetheless established. Equally, where there is a dispute between witnesses it might be possible to focus upon the documentary evidence alone and see

if that provides a sufficient answer which then obviates the need to grapple with what might otherwise be intractable disputes between witnesses.

Limb (iii)

79. The relative test has been endorsed "*in part*" because limb (iii) is intended to address an issue which has arisen in a series of earlier cases and which has to be grappled with but which as a matter of logic cannot satisfactorily be addressed by reference to a relative test: see eg *Antonio Gramsci (ibid)* at paragraphs [39] and [44] – [48] per Teare J citing *WPP Holdings Italy Sarl v Benatti* [EWCA Civ 263 ("*WPP*") at paragraph [44] per Toulson LJ. This arises where the Court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument.

80. What does the Judge then do? Given that the burden of persuasion lies with the claimant it could be argued that the claim to jurisdiction should fail since the test has not been met. But this would seem to be unfair because, on fuller analysis, it might turn out that the claimant did have the better of the argument and that the court should have asserted jurisdiction. And, moreover, it would not be right to adjourn the jurisdiction dispute to the full trial on the merits since this would defeat the purpose of jurisdiction being determined early and definitively to create legal certainty and to avoid the risk that the parties devote time and cost to preparing and fighting the merits only to be told that the Court lacked jurisdiction. In *Antonio Gramsci* and in *WPP* the Court recognised that a solution had to be found. In *WPP* Lord Justice Toulson stated that the Court could still assume jurisdiction if there were "*factors which exist which would allow the court to take jurisdiction*" (ibid *WPP* paragraph [44]) and in *Antonio Gramsci* Teare J asked whether the claimant's case had "*sufficient strength*" to allow the court to take jurisdiction (ibid paragraph [48]). The solution encapsulated in limb (iii) addresses this situation. To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits.

Relationship with Article 25 of the Recast Brussels Regulation

81. This case concerns whether AT1 and Ezion were party to an exclusive jurisdiction clause set out in terms and conditions attached to the Purchase Order. It is common ground that Article 25 of the Recast Brussels Regulation, on prorogation of jurisdiction, applies.[1] This provision, in its earlier incarnations,[2] did not apply unless

---

[1] Article 25, "Prorogation of jurisdiction":

> "1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either: (a)

at least one of the parties was domiciled in the EU. But it now applies *regardless* of the domicile of the parties. In *Bols* (ibid) the Privy Council cited earlier case law of the Court of Justice[3] which held that the relevant provisions (now Article 25) imposed on the court the duty of examining "*whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties*" and this had to be "*clearly and precisely demonstrated*". The purpose of the provisions was to ensure that the "*consensus*" between the parties was "*in fact*" established. The Court of Justice has however recognised that the manner of this proof is essentially an issue for the national laws of the Member States, subject to an overriding duty to ensure that those laws are consistent with the aims and objectives of the Regulation.

82. The Privy Council in *Bols* held that the domestic good arguable case test had to be read in the light of the "*clear and precise*" evidence requirement and in this manner it was consistent with the purpose behind the EU Regulation. Mr Cooper QC relied upon this to support his argument that, howsoever one cast the test, it nonetheless was not the minimal test advanced by the appellant. He pointed out that in *Brownlie* the judgment in *Bols* had been cited with apparent approval (see paragraph [62] above). An obligation to adduce clear and precise evidence to show jurisdiction was a test importing weight and substance. It was not for instance a test to be equated with that for summary judgment (as the Judge seemed to conclude in paragraph [83] of his Judgment). Mr Nolan QC for the appellant in an attempt to side-line the clear and

---

> in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
>
> 2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.
>
> 3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.
>
> 4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.
>
> 5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.
>
> The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid."

[2] In Article 17 of the Brussels Convention of 27th September 1968 on jurisdiction and enforcement of judgments in Civil and Commercial matters and then in Article 23(1) of Council Regulation (EC) 44/2001 which replaced the Convention.

[3] Case 24/76 *Estasis Salotti di Colzani Aimo et Gianmario Colzani v RÜWA Polstereimaschinen GmbH* [1976] ECR 1831, 1841 at paragraph [7] and Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-9337, 9371 at paragraph [13].

precise standard argued that it did not apply because the rationale behind it (as explained in the case law of the Court of Justice) was that exclusive jurisdiction agreements amounted to a derogation from the normal rules determining jurisdiction, such as a defendant's domicile, and as a derogation from a basic norm it had to be strictly construed. This was why the arguably high hurdle of clear and precise had been introduced. But that logic was, he said, no longer apposite since the Recast Brussels Regulation now applied irrespective of a defendant's domicile. Now that the rules had changed the logic behind the "*clear and precise*" rule no longer arose. Mr Cooper QC retorted that this was a distinction without a difference. Article 25 did not (could not) apply two rules: one where the defendant was an EU company and one where it was not. There had to be a single test.

83. The Supreme Court in *Brownlie* and in *Goldman Sachs* seemingly approved *Bols* but did not address how the new three-limbed formulation took into account the provisions of the Recast Brussels Regulation, no doubt because it did not specifically arise on the facts of those cases. I agree with the analysis of Mr Cooper QC on this. I consider that in a case such as the present where the background legal context is Article 25 some regard must be paid to the fact that, as was held in *Bols*, the "*clear and precise*" test must be taken into account as a component of the domestic test and the melding of the two is necessary to ensure that domestic law remains consistent with the Regulation. As with so much of the language used in this context, that which is "*clear and precise*" is not easy to define with precision. But I would rely upon it as providing at least an indication of the quality of the evidence required. It supports the conclusion that the *prima facie* test (in limbs (i) and (ii)) is a *relative* one; and in so far as the court cannot resolve outstanding material disputes (limb (iii)) it affords an indication as to the sort of evidence that a Court will seek. I would not go much beyond this though.

Exorbitant jurisdiction as a justification?

84. Before moving on it is necessary to add a word about the underlying policy justification for the test since this played a part in the arguments of both parties in the light of the Supreme Court judgments but it led, once again, to different end results.

85. The object of the present dispute is to establish, at an interim stage, jurisdiction. Once established, jurisdiction is proven definitively and not re-ventilated at the trial. In this regard it fits uneasily with the definitive nature of the decision that jurisdiction should be established upon the basis of a low and uncertain threshold of good arguability when, had there been a full-blown investigation, the result might have been different. This is a justification for the test being relative. Historically, it has been said that the Courts should apply a high threshold before asserting jurisdiction because permitting parties from third countries to be made subject to the domestic courts through service of proceedings abroad was an "*exorbitant*" jurisdiction entitling the assertion of sovereign power over a defendant and a commensurate interference with the sovereignty of the state in which service is affected: see eg *Deripaska v Cherney* [2008] EWHC 1530 (Comm) at paragraph [41] and *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWH Civ 437 at paragraph [41]. This logic was however doubted in *Abela v Baardani* [2013] UKSC 44 ("*Abela*") at paragraphs [44] and [53] per Lord Clarke and Lord Sumption, with whom the remainder of the Supreme Court agreed, as unrealistic in the modern era: routinely where service out is authorised the defendant will have submitted contractually to the jurisdiction of the domestic courts

(or there would be an argument to that effect) and in any event litigation between residents of different states is a normal incident of modern global business. As such the decision to permit service out is, today, more generally viewed as a pragmatic decision predicated upon the efficiency of the conduct of litigation.

86. Mr Cooper QC, who was seeking to establish a high threshold for jurisdiction on behalf of his clients, argued that *Abela* did not represent a withdrawal from the classification of cases such as the present as entailing an exorbitant jurisdiction warranting a rigorous and demanding test. He argued that the case was distinguishable upon the basis that it concerned the method of service out and was not a case where "*the very existence of a contract between the relevant parties is in dispute and there is otherwise no substantial connection between the dispute and this country*". For my part I consider that the stance of the Supreme Court in *Abela* applies and that the distinction drawn by Mr Cooper QC is a distinction without a real difference when set against a policy rationale premised upon the realities of the modern business world. I do not consider that the case law on exorbitance, in and of itself, provides justification for raising the bar for the establishment of jurisdiction. It played no part in the analysis of the Supreme Court in either *Brownlie* or *Goldman Sachs*. The key issue is whether the test retains a relative element. If it does then it is that relative ingredient which provides the rigour to the analysis; but even then, it would not go as far as to justify the reintroduction of the "*much*" into "*better case*" in the relative test.

H. Application of the law to the approach applied by the Judge

87. I turn now to set out my conclusions on the approach adopted by the Judge.

88. The Judge did not have the benefit of the judgments of the Supreme Court in either *Brownlie* or *Goldman Sachs*. As already observed, he applied a two-part test starting with good arguable case, which he seemed to equate with the summary judgment test, and then moved on decide who had "*much the better argument*". It is common ground before us that strictly the Judge erred since, even prior to *Brownlie* and *Goldman Sachs,* the "*much the better argument test*" was viewed by Lord Justice Waller in *Canada Trust* as simply an ingredient of the broader "*good arguable case*" test, and not separate to it. As such the Judge was wrong to separate out the tests.

89. Indeed, even based on pre-existing case law the good arguable case test for jurisdiction was not to be equated with the test for summary judgment. In the case of the latter the grant of summary judgment is a determination on the merits upon the evidence before the court and a court should not (on Article 6 grounds) readily be prevented from fully assessing the merits. But a finding about jurisdiction is not a finding on the substantive merits. A rejection of jurisdiction does not prevent a Claimant from the pursuing the merits in a different court, for instance that of the defendant's domicile. The two situations are thus not comparable in terms of underlying policy.

90. But be that as it all may, when in practice the Judge came to apply those tests the Judge did apply a relative test and he did abjure the word "*much*" and asked only who had the better argument (see eg Judgment paragraphs [55] and [56]). Indeed, in

relation to AT1 he asked who had the "*more plausible*" argument (paragraph [84]) and in relation to Ezion he applied a test of "*relative plausibility*" (paragraph [88]). As such, somewhat presciently, the Judge ultimately used a test which was very close to that now reflected in the reformulation in *Brownlie* and in *Goldman Sachs*.

91. In my view the Judge did err in parts of his thinking but, ultimately, he applied a test which can be said to be consistent with that expressed in the Supreme Court judgments.

I. The application of the test to the evidence

92. This brings me to the conclusions of the Judge on the evidence. The appellant refers, in particular, to the findings and observations of the Judge: (i) that Mr Cheah's evidence was hearsay in that he did not disclose precise sources (Judgment paragraph [91]); (ii) that some of Mr Cheah's evidence was implausible (paragraph [92]); (iii) questioning whether the date for delivery of the Rig was as early as indicated by the Respondents (paragraph [94]); and (iv), that AT1 and Ezion had chosen not to reveal the "full picture" concerning the relationship between them and AMS or AMS Mexico.

The approach to be adopted on appeal

93. I start with a point about the approach that this Court should adopt on appeal.

94. In this case the Judge was faced with a complex factual tableau and a series of disputes and uncertainties about the evidence. The Judge quite plainly addressed these disputes and he applied himself to resolving them. I give two illustrations. First, there was a dispute about whether AT1 was responsible under the Bareboat Charterparty to ensure that the Rig was asbestos free. If AT1 was responsible for ensuring the removal of asbestos, then it was said that this was a reason for concluding that the relevant contract was *with* AT1. The Judge found that there was a lack of evidence on this matter which he could not resolve at the interim stage, but he nonetheless analysed the situation upon the assumed basis (favourable therefore to the Claimant) that AT1 *was* responsible in order to test the Claimant's argument. In other words, he adopted a pragmatic judicial device in order to circumvent an evidential uncertainty. Second, in relation to the complaint that the evidence of Mr Cheah was unattributed hearsay in important respects and should attract minimal probative value the Judge asked whether, upon the basis of the documents before him (and therefore ignoring witness statement evidence), he could determine the issue. In the light of his conclusion on the documents he then asked whether the evidence of Mr Cheah was needed to inform the decision or was merely confirmatory. In the event the Judge decided that he could decide the issue on the documents alone and that the witness statement evidence of Mr Cheah was merely confirmatory. This was also a sensible judicial approach to deal with an evidential dispute.

95. In my judgment in a case involving a close evaluative exercise performed by the Judge on the evidence, this Court must exercise reticence in second-guessing that exercise. Although Mr Nolan QC did not advance his argument in this way, it is worth saying that it is not open to an appellant to invite the Court to re-perform the

analysis of the evidence to see whether it agrees with the Judge simply because the Court of Appeal is said to be in the same position as the High Court. It might be different if the issue arising is essentially one of law. But that is not the case here where the Judge addressed complex facts in close detail.

96. In *Todd v Adams (trading as Trelawney Fishing Co)* [2002] EWCA Civ 509 ("Todd") at paragraph [129] the question was whether a contract of service existed, Mance LJ drew a distinction between challenges to conclusions of primary fact or inferences from those facts and an evaluation of those facts:

> "With regard to an appeal to this court (which would never have involved a complete rehearing in that sense), the language of "review" may be said to fit most easily into the context of an appeal against the exercise of a discretion, or an appeal where the court of appeal is essentially concerned with the correctness of an exercise of evaluation or judgment - such as a decision by a lower court whether, weighing all relevant factors, a contract of service existed. However, the references in rule 52. 11 (3) (4) to the power of an appellant court to allow an appeal where the decision below was "wrong" and to "draw any inference of fact which it considers justified on the evidence" indicate that there are other contexts in which the court of appeal must, as previously, make up its own mind as to the correctness or otherwise of a decision, even on matters of fact, by a lower court. Where the correctness of a finding of primary fact or of inference is in issue, it cannot be a matter of simple discretion how an appellant court approaches the matter. Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence. In the present case, therefore, I consider that (a) it is for us if necessary to make up our own mind about the correctness or otherwise of any findings of primary fact or inferences from primary fact that the judge made or drew and the claimants challenge, while (b) reminding ourselves that, so far as the appeal raises issues of judgment on unchallenged primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible. In relation to (a) we must, as stated, bear in mind the important and well-recognised reluctance of this court to interfere with a trial judge on any finding of primary fact based on the credibility or reliability of oral evidence. In the present case, however, while there was oral evidence, its content was largely uncontentious."

97. *In Assicurazioni Generali SpA v. Arab Insurance Group* [2003] 1 WLR 577, Clarke LJ approved of the judgment in *Todd.* He summarised at paragraphs [14] – [17] the

approach that an appellate court should take to findings and inferences of fact made by a first instance after hearing evidence at trial. He observed that the circumstances confronting a first instance judge might differ. Findings might be made upon the basis of oral evidence only, or upon the basis of documentary evidence, or upon a combination of the two. At paragraphs [15] and [16]] he stated:

> "15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a 'rehearing' under the Rules of the Supreme Court and should be its approach on a 'review' under the Civil Procedure Rules. 16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

98. These observations, including the dictum from *Todd*, were cited with approval by the House of Lords in *Datec Electronics Holdings Limited) v. United Parcels Services Limited* [2007] UKHL 23 at paragraph [46] per Lord Mance, as giving proper guidance as to the role of the Court of Appeal when faced with an appeal on fact.

99. In this case the facts are, on any view, complex. The task of the Judge was to weave through a complex body of evidence some of which was incomplete and/or inconsistent. The Claimant's arguments were based upon inferences drawn from circumstantial evidence; there was no piece of evidence that the appellant could point to which unequivocally showed that AT1 or Ezion were undisclosed principals. The Judge has with care set out his findings on the evidence. He addressed the strengths and weaknesses of each piece of evidence and set out the inferences and conclusions that he drew. He demonstrated an exercise of judgment in addressing evidential disputes which was pragmatic and sensible and which this Court should be slow to interfere with. I can see no basis for interfering with his conclusions on the facts which were well within the margin of that which was proper. The Judge applied what, following *Goldman Sachs*, would be described as a limb (ii) test.

100. It is also relevant that before this Court the Claimant did not replicate the detailed factual arguments that were put before the Judge. I deal now with particular criticisms briefly. I start with the position of AT1.

The position of AT1

101. *Hearsay*: In relation to the complaint that much of the respondents' evidence tendered via Mr Cheah was hearsay in that sources were not identified the Judge agreed that in

parts the criticism was fair. But importantly this did not go to admissibility but to probative weight, as the Judge observed: Judgment paragraph [95]. The Judge considered that the criticism was form over substance. His overall view was that this omission did not affect the "*credit*" of Mr Cheah. He had adduced three detailed witness statements and attached various documents thereto. Mr Cheah is: a director of the Third Defendant; Group Financial Officer of the Fourth Defendant; a signatory of the Bareboat Charterparty, the Modification Agreement and the Project Management Agreement; and, a correspondent with McDermott. He was well qualified to give evidence about the issues. All of these matters were germane to the probative weight to be attached to his evidence even if, technically, sources should have been identified. Moreover, there was no allegation before the Judge (nor before us) that Mr Cheah was lying in his statements. Ultimately the Judge explained that he had considered the Claimant's case on the basis of the documents and he therefore had asked whether Mr Cheah's evidence was "*reinforcing*" or "*informing*" (Judgment paragraph [95]). He decided that it was reinforcing and that he would therefore have arrived at the same result regardless of the evidence. As such the criticisms made, even if well founded, were not material to the judgment. I reject this ground of challenge.

102. *Non-disclosure by Defendant*: In relation to the criticism that the respondents failed to disclose key documents (eg the PEP contract, an agreement between the Fourth Defendant and Treatmil, work orders and other documents relating to the Rig) the Claimant does not in the Grounds or skeleton explain *why* these were so critical to the analysis. The Judge did not consider that their omission was vital. The respondents argue that the PEP contract and any agreement between the Fourth Defendant and Treatmil are peripheral; and work Orders between McDermott and the Third Defendant are also peripheral in circumstances where McDermott did not contract with the appellant for the work and did not conduct the tender exercise. Given that jurisdiction disputes are determined on the basis of the available evidence, not as trials or mini-trials, the mere fact (assuming it to be the case) that the respondents dug their heels in and did not disclose all that was demanded of them is not, in itself, a reason to conclude that the non-disclosure was material and culpable. In my view the Judge was entitled to conclude that the absence of these documents was not material. I reject this ground.

103. *Lack of clarity of the date of delivery of the Rig*: In relation to the Judge's uncertainty as to the exact date of delivery of the Rig the Judge operated upon the assumption that the Rig was delivered in early 2013. The Claimant does not suggest that the Judge erred in drawing that inference. In my view he adopted a sensible and proper approach to the evidence and as to the interferences to be drawn therefrom.

104. *Inability to determine who was responsible under the terms of the Bareboat Charterparty for carrying out the works t be performed under the Purchase Order*: The Claimant argues that the Judge erred in that having concluded that he was unable to determine who was responsible under the terms of the Bareboat Charterparty for carrying out the works performed under the Purchase Order (cf Judgment paragraph [84(4)]) he should not have concluded that conclusion on jurisdiction. The Claimant says that this was a key point and if it was incapable of being determined it was a factor weighing heavily against the respondents, especially if the gap in the evidence was the fault of the respondents. I agree with the analysis of the Judge. He observed

that there was a "*lack of evidence that the Purchase Order works were required to discharge AT1's obligations under the Bareboat Charterparty*" but even if (taking the Claimant case at it very highest) it was AT1 (though not Ezion) that assumed responsibly for carrying out the repairs this did not result in the appellant having the better of the argument:

> "I do not consider that this means that the Claimant has the better of the argument that AMS was authorised by AT1 and intended to contract with the Claimant on behalf of AT1. First, it does not follow that the Purchase Order was agreed on behalf of AT1. It is possible that AMS, as the bareboat charterer, undertook the work on its own behalf and would claim recompense from AT1 as the owner. There is no direct evidence that the Purchase Order contract was made on behalf of AT1. Second, it is not obvious that the works other than the removal of asbestos performed under the Purchase Order contract were required to render the Rig seaworthy and fit for service and therefore to have been within AT1's responsibility under the Bareboat Charterparty."

The position of Ezion

105. I turn now to the position of Ezion. The Judge found that there was no arguable case against Ezion and it followed that Ezion had the "*better of the argument*" (Judgment paragraph [85]). The appellant challenges this conclusion and (in summary) argues as follows:

(i) Although the Rig was not owned by Ezion it was acquired by an SPV wholly owned by Ezion pursuant to an agreement between Ezion and the parent company of the First and Second Defendants and an associate, by which Ezion agreed to arrange financing and to purchase the rig through its SPV (AT1). Ezion chose not to disclose that agreement so it is not known what responsibilities, other than the provision of finance, it undertook. In view of that failing it was wrong in principle to make any assumption against the appellant (ie in favour of Ezion). It is correct that the Rig was in fact directly owned by Ezion's subsidiary and that AT1 was party to the Charterparty but there was no evidence, and the judge was accordingly wrong to find, that Ezion was "*not prepared*" to own the Rig directly or to enter into the Bareboat Charter.

(ii) Other points relied upon by the Judge were neutral in light of the reticence of the respondents to provide disclosure.

(iii) The Judge failed to take account of the important evidence of the payment by subsidiaries of Ezion of 2 sums of US$100,000 owed to the appellant under the Purchase Order. The explanatory evidence of Mr Cheah that those sums were owed by those subsidiaries to either the Second Defendant or AMS Singapore was pure hearsay.

(iv) Given that the evidence was incomplete and unsatisfactory the judge should have asked (per Lord Sumption in ***Brownlie*** at paragraph [7])

whether there was a plausible (albeit contested) evidential basis for the appellant's case that Ezion was an undisclosed principal. Applying that test the Judge should have found that Ezion provided the financing for the purchase of the Rig, agreed to fund the work needed to make the Rig operational but chose not to disclose the agreement by which it did so. It profited from the deployment of the Rig and (through subsidiaries) paid some of the sums due to the appellant. This was plausible evidence that Ezion was an undisclosed principal.

106. The respondents argue that the Judge was correct in his analysis including as to the manner in which he addressed evidential gaps. The documents before this court established, and Mr Cheah accepted in his written evidence, that Ezion had provided some financial assistance. But Ezion did not acquire the Rig in its own name but via an SPV. It was not party to either the Modification Agreement or the Project Management Agreement. In such circumstances it was commercially unreal to suggest that Ezion would enter contractual arrangements making it directly responsible for the works under the Purchase Order when its corporate strategy was to avoid that outcome and where being responsible would undermine the SPV structure established for ownership of the Rig. As to the payment made the appellant fails to deal with the finding of the Judge (paragraph [32]) that the two sums of US$100,000 were made expressly on behalf of the Second Defendant.

107. In my view there was no error in the analysis of the Judge. He addressed squarely the evidential points before him including their limitations and he formed a view as to the non-arguability of the case against Ezion which in my opinion was perfectly justified. He was right in my view to conclude that the case was very weak. I detect no error in the approach adopted or in the evaluation of the evidence. He applied a limb (ii) *Goldman Sachs* approach.

108. In my judgment the judged did not err in his analysis of the evidence.

J. Respondent's Notice: Implications of entire agreement clause / identification of parties

109. I turn now to a point raised in the Respondents' Notice by Mr Cooper QC. This concerns the conclusion of the Judge that the terms of the agreement, and in particular the exclusion of the respondents from the list of parties, was not relevant. Mr Cooper QC argued out that the terms and conditions contained an entire agreements clause (cf paragraph [11] above) which operated to exclude the possibility of any person other than those expressly identified, being a party to the agreements in issue and, it followed, the exclusive jurisdiction clause. The judge addressed an argument about the implications to be drawn from the terms of the agreement (Judgment paragraphs [38] – [45]) but he does not refer to the entire agreement clause and its possible preclusive effect. At paragraphs [42] and [43] he stated (citing *Teheran-Europe (ibid))*:

> "42. I should start by stating that, given the nature of the doctrine of undisclosed principal, I do not consider that because the party or parties to the contract have been identified in the contract and such

> party or parties do not include the undisclosed principal, that necessarily means the parties to the contract intended to exclude the possibility of intervention by the undisclosed principal … .
> 43. I do not consider that there is anything in the nature of the contractual services provided by the Claimant or in the description of the other party as "*the company*" which necessarily excludes the possibility that the contract was made with an undisclosed principal. There would usually have to be something more, such as an express provision prohibiting the intervention of an undisclosed principal or a contract which concerns the registered title of a named party."

110. Mr Cooper QC argued (using the Judges' terminology) that the entire agreement clause was a term which either "… *necessarily excludes the possibility that the contract was made with an undisclosed principal*" or was at least strong evidence to that effect.

111. The question for this court is whether the Judge erred in his conclusion that the contract terms were essentially neutral. It is notable that in the summary of the law on undisclosed principals (see paragraph [53] - [56] above) the House of Lords in *Siu Yin Kwan* held that if the terms of the agreement in dispute expressly or by implication excluded the alleged principal's right to sue or his liability to be sued then this could show that the agent (the signatory to the agreement in question) was the true and only principal.

112. With respect to the Judge I am of the view that the terms of the agreement were relevant and pointed <u>against</u> the conclusion that AT1 or Ezion were undisclosed principals. The contract terms are not neutral. The entire agreement clause is evidence that the named contractual parties were to treat each other, and no one else, as the parties with liabilities and rights under the agreement and hence the persons to sue or be sued thereunder.

113. Before the Judge, the respondents relied upon the judgment in *The United Kingdom Mutual Steamship Assurance Association v Nevill* (1887) 19 QBD 110 in support of their contention that the Purchase Order excluded recognition of an undisclosed principal. Before us Mr Cooper QC relied also upon the ruling in *Aspen (ibid)* in both the High Court and Court of Appeal where the court was required to consider whether a bank was a party to a settlement agreement, which contained a definition of the '*Underwriters*' and the '*Assured*' (cf High Court [2017] EWHC 1904 paragraph [14].) The agreement contained no clause otherwise preventing the intervention of a disclosed or undisclosed principal. Teare J accepted a submission (at paragraphs [42] and [43]) that the terms of the settlement agreement unequivocally and exhaustively identified the parties to the agreement and that it was impermissible to seek to contradict those terms. Mr Cooper says that the Judge should have reached a similar conclusion in the present case. On appeal in *Aspen* the Court endorsed the findings of Teare J and held that the terms of the agreement "… *tell, at the least very strongly, against the Bank being a party thereto*" (per Gross LJ ([2018] EWCA Civ 2590 paragraph [51]). In other words, the express identification of the parties in the relevant agreement was (a powerful) part of the evidential mix but was not dispositive. It is evidence going to, *inter alia*, whether a party (here the Claimant) was

willing to contract with persons other than the counterparty signatory. Where there is an entire agreement clause this is evidence which tends to negative any suggestion that a party intended to sue or be sued by a person other than the counterparty in respect of disputes under the agreement.

114. On one view *Aspen* is a stronger case than the present because the Judge found that, even absent an entire agreement clause, the specification of particular parties implied that there was no scope for an undisclosed principal. But the facts of that case were quite different to the present case and it might be putting the proposition too highly to say that the mere specification of parties in a contract serves to oust the doctrine of undisclosed principal since, if it were true, then every contract with named parties would serve to prevent a finding that there were undisclosed principals which would defeat the principle itself. It is not evident to me however that the Judge intended that conclusion. For my part I do not think that the entire agreement clause in the terms and conditions necessarily serve to exclude *altogether* the possibility that there might be undisclosed principals. The language used is not wholly unequivocal and the parties could, had they wished, have expressly stated that the parties thereto were the *only* parties that could sue and/or be sued. But they did not. On the other hand, I do consider that it is a cogent indication that the alleged agents (the First and Second Defendants) did not intend to act on behalf of an undisclosed third-party principal and that this was also the view of the Claimant. It is evidence that can go into the mix. In my view the Judge did therefore err in treating the terms of the agreement as neutral; he should have held that they were relevant and weighed against the Claimant and against a finding of jurisdiction in respect of AT1 and Ezion. Had he so found then he might not have even found an arguable case against AT1. Ultimately however, this point does not alter the outcome since the Judge did, of course, reject the case for jurisdiction.

115. For these reasons I conclude that the Judge did err in failing to attach weight to the express identification of the parties in the light of the entire agreement clause. But this is not decisive and in fact only serves to strengthen the Judge's overall conclusion that jurisdiction should be declined.

K. Conclusion

116. For the reasons set out above I would dismiss the appeal.

Lady Justice Asplin:

117. I agree with the Judgments of both Lord Justice Green and Lord Justice Davis.

Lord Justice Davis:

118. I agree with the conclusion of Green LJ, for the reasons which he gives.

119. I am in something of a fog as to the difference between an "explication" and a "gloss". But whatever the niceties of language involved, it is sufficiently clear that the ultimate test is one of good arguable case. For that purpose, however, a court may perfectly properly apply the yardstick of "having the better of the argument" (the additional word "much" can now safely be taken as consigned to the outer darkness).

That, overall, confers, in my opinion, a desirable degree of flexibility in the evaluation of the court: desirable, just because the standard is, for the purposes of the evidential analysis in each case, between proof on the balance of probabilities (which is not the test) and the mere raising of an issue (which is not the test either).

120. In the present case, the deputy judge, with all respect to him, adopted an over-schematic and incorrect approach in initially differentiating between a good arguable case on the one hand (as though it were an aspect of summary judgment) and "the better of the argument" on the other hand. But that erroneous approach did not, I agree, vitiate his ultimate conclusion. For on analysis, as Green LJ has pointed out, the judge did ultimately apply the right approach in his evaluation of the evidence.

121. It is my own view, in fact, that the appellant has rather struggled to identify any sufficiently arguable case for present purposes. It at all events scarcely assists the appellant that it had from the outset difficulties in identifying the alleged undisclosed principal: not least in that the Particulars of Claim are peppered with allusions to the undisclosed principal(s) being Ezion and/or ATI. The words "and/or" can often be revealing of uncertainty.

122. As found by the judge, for ample reasons, the case against Ezion was not arguable. As for ATI, the judge fully engaged with the evidence: he plainly considered himself in a position to undertake the exercise subsequently set out in paragraph (ii) of the three-limbed test posed by Lord Sumption in *Goldman Sachs*. That was a matter for the judge's assessment. His ultimate conclusion is also reinforced by the terms and conditions of the Purchase Order as argued in the Respondents' Notice.

123. There is no proper basis for the appellate court interfering with the judge's appraisal of the evidence on such an issue. In the ordinary way, the appellate court in cases of this kind will not interfere with a judge's decision on such an issue unless there has been a material error in the legal approach adopted, or a failure to take into account material facts, or a taking into account of immaterial facts, or a demonstrable misunderstanding, or an evaluation of the evidence which is so unreasonable as to transcend the ordinary margin of appreciation available to a first instance judge evaluating evidence. There was, ultimately, no such error here.

124. It is also, to my mind, very regrettable that applications of this kind seem, judging by the present case and other cases cited to us, to be generating so much complexity of debate. One understands the potential importance to the parties. Even so, this is by its nature an interlocutory process, not in any way concerned with a final conclusion on the facts or merits. Hearings and judgments in such cases should so far as possible be appropriately concise accordingly. I also rather deprecate the approach of claimants (as here) peremptorily in correspondence seeking the fullest and widest possible disclosure from defendants, in effect by way of fishing exercise, as though such proceedings are already some kind of ongoing trial process: and then coolly relying on non-disclosure as of itself supporting the claim of a plausible case. In the present case, the judge rightly saw through that ploy. That is not to say that defendants in an appropriate case are not required to put in detailed evidence and supporting materials in explanation, where that is called for; and failure to do so sufficiently may in some instances cause adverse conclusions to be drawn. But there are limits: that is the nature of this jurisdiction.