Neutral Citation Number: [2019] EWHC 2193 (Ch)

Claim no: BL 2018 001653
Appeal no: CH 2019-00078

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST (ChD)
On appeal from Deputy Master Linwood

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 8th October 2019

Before :

HIS HONOUR JUDGE EYRE QC

- -

Between:

BELLMARE HOLDINGS LIMITED	**Claimant**
- and -	
DAVID WELLS	**Defendant**

- -
- -

William Paynter Bryant as a director of the Claimant for the **Claimant**
Thomas Robinson (instructed by **DLA PIPER UK LLP**) for the **Defendant**

Hearing dates: 24th July 2019

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JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HH Judge Eyre QC:

Introduction.

1. Bellmare Holdings Ltd has commenced proceedings against David Wells claiming damages for deceit alternatively for negligent misstatement. The Claimant says that the Defendant fraudulently made false representations in loan agreements which the Claimant then entered with Dorry Holdings Ltd ("Dorry") in reliance on those false statements.

2. The Defendant appeals with the permission of Deputy Master Linwood against the Deputy Master's dismissal of his application for an order pursuant to CPR Pt 11 setting aside the claim form on the ground that the court had no jurisdiction.

The Factual Background.

3. The underlying history is substantially uncontentious although there is considerable dispute as to the consequences of that history and the inferences which can be drawn from the conduct of the relevant actors. The following summary is largely derived from the Deputy Master's analysis of the evidence before him.

4. The Claimant is registered in the British Virgin Islands as is Dorry. William Paynter Bryant is the sole director of and shareholder in the Claimant. He is resident in Switzerland. The Defendant is resident and domiciled in Switzerland.

5. The dealings between the parties relate to loans made to Dorry which were said to be in connexion with the development of a property known as Grosvenor Gardens House ("GGH"). That property was not in fact owned by Dorry at any stage.

6. The dealings in relation to GGH have already generated litigation. In particular the judgment of Nugee J in *Holyoake & another v Candy & others* [2017] EWHC 3397 (Ch) related to proceedings which had been brought by Mark Holyoake who is said to be the ultimate owner of Dorry. The Claimant placed considerable weight on Nugee J's findings in relation to the conduct of the Defendant and of William Pym and their relations with Mr. Holyoake and in relation to the GGH project. Although the Defendant gave evidence in those proceedings he was not a party to them nor was he represented. In those circumstances Nugee J's judgment is an indication of the conclusion reached by an experienced judge in respect of conduct and rôle of the Defendant in particular circumstances on particular evidence but it is not evidence against the Defendant in the current proceedings.

7. Before October 2011 various loan agreements providing for loans to Dorry were drawn up under the auspices of The Private Office ("TPO") a Swiss company. The standard format which was adapted to particular cases was first drawn up by Mr. Pym.

8. Before September 2011 the preamble to the loan notes stated:

> "The Borrower, Dorry Holdings Limited wholly owns Greenlander (a company incorporated in the BVI) which wholly owns Hotblack Holdings Limited (a company incorporated in Jersey) which latter company will acquire the Property known as Grosvenor Gardens House in London."

9. On 14th September 2011 a new loan note format was drawn up by Mr. Pym in London. The new format first appeared in a loan agreement which was to have been made between Dorry and ARH Ltd but which was apparently never concluded. In this format the preamble to the loan agreement stated:

> "The Borrower, Dorry Holdings Limited, Vanterpool Plaza 2nd Floor, Wickams Cay, Road Town Tortola) (a Company incorporated in the British Virgin Islands) has acquired and will develop the Property known as Grosvenor Gardens House in Victoria, London Grosvenor Gardens House, 35-37 Grosvenor Gardens London SW1W 0BS."

10. It is accepted that Dorry never in fact acquired GGH and this ("the Ownership Representation") is the first of two statements contained in the standard loan note format which are said by the Claimant to have been false. The second ("the Proceedings Representation") is the assertion also contained in Mr. Pym's standard form that:

> "There are no claims proceeding, pending, or threatened against the borrower nor is the borrower party to any proceedings which may adversely affect the borrower from fulfilling his obligations hereunder."

11. William Lovering was the joint managing partner of TPO. His witness statement was before the Deputy Master and he said, at [7(c)], that the draft prepared by Mr. Pym for the ARH agreement became "the format for future Dorry loan notes and was used as the basis of the loans to Muir and [the Claimant]".

12. The Deputy Master summarised parts of Mr. Lovering's and the Defendant's evidence thus at [20]:

> " Mr Lovering says Mr Wells took over from Mr Pym the preparation of the Dorry loan notes after October 2011. Mr Wells, in his second witness statement, says:
>
> > "5. At paragraph 19 of this witness statement, Mr Paynter-Bryant comments on my involvement in the preparation of various loan notes. In fact, I did not draft the initial proforma loan notes. As and when I was requested to by Mr Lovering or someone else at TPO, following TPO receiving instructions for this from their clients, I would sometimes fill in some missing information or add a clause where I had been asked to do."
>
> He contends that TPO and Mr Lovering were driving the content - see also paragraph 9 of his statement. The fact remains that on his account, he finalised and sent out loan notes to those from whom Dorry was obtaining funding. I

> would emphasise that the funding was not just being obtained from one entity, Bellmare Holdings."

13. At the times when the Defendant finalised and sent out the draft loan notes he did so in Switzerland.

14. For the Defendant Mr. Robinson says it is of significance that although the Defendant drew up loan notes at the instigation of TPO it is not alleged by the Claimant that he was an employee or agent of TPO. The Particulars of Claim assert and the Defendant accepts that the Defendant was acting as a director of Dorry in his dealings with the Claimant.

15. On 22nd November 2012 the Defendant sent a draft to Mr. Holyoake and Mr. Lovering saying there were "quite a few changes so please read carefully". That draft included the following statement.

> "In the Borrower's capital structure all existing 'mezzanine' debt and this new and other 'mezzanine' debt up to £7,500,000 shall rank pari passu and is subordinate only to secured principle (sic) bank debt up £22,500,000 and ranks ahead of £20,000,000 of free equity in the Borrower's assets".

16. The source of that statement is unclear and was not addressed in the evidence. The draft of 22nd November 2012 is the first document in the evidence in which that statement appears but it may have originated earlier.

17. On 1st July 2013 the Defendant provided Loan Agreement 1 to the Claimant and signed the same as a director of Dorry. That agreement was for a loan of £325,000 from the Claimant to Dorry. It superseded a loan agreement in the same amount between Dorry and Alexander Muir dated 25th June 2012 ("the Muir Agreement") and was in turn replaced by Loan Agreement 2 of 5th November 2015 between the Claimant and Dorry. Loan Agreement 1 and the Muir Agreement both contained the Ownership Representation and the Proceedings Representation together with the following ("the Mezzanine Debt Representation"):

> "In the company's capital structure, this mezzanine debt is subordinated to senior obligations an(sic) secured principle bank debt, but ranks ahead of any equity or unsecured lenders at the company."

18. Loan Agreement 2 contained the Ownership Representation and the Mezzanine Debt representation but not the Proceedings Representation.

19. The Claimant's case in short is that the three representations contained in Loan Agreement 1 were false; that it entered the agreement in reliance on them; and that the Defendant is liable having made the false representations knowingly.

20. For present purposes it is of note that Mr. Pym was in England when he prepared the first version of the Ownership and Proceedings Representations and that the Defendant was in Switzerland when he signed Loan Agreements 1 and 2.

21. The Deputy Master set out thus at [24] those matters which were common ground or at least not disputed before him.

    (1) "The two loan notes in the original form before September 2011 were first prepared in Switzerland by Mr Pym without the misrepresentation regarding the ownership of the Property or the intent to acquire it;

    (2) Mr Pym moved to London from Switzerland to work in TPO's London office in August 2011;

    (3) In September 2011, Mr Pym produced in and circulated from London a draft loan note for ARH which included for the first time two of the misrepresentations namely as to ownership of the Property and the absence of proceedings;

    (4) On 1 July 2013, Mr Wells, then in Switzerland, signed the first Dorry/Bellmare loan note and then on 5 November 2015, also in Switzerland, he signed the second loan note;

    (5) There appears on the evidence an unbroken chain of loan note versions from Mr Pym to Mr Wells;

    (6) Dorry had never owned the Property;

    (7) The Private Office was a family office, a fundraiser;

    (8) Mr Wells worked on the raising of funds always utilising the false wording referring to Dorry owning the Property;

    (9) Mr Wells signed the loan notes as a director of Dorry; and

    (10) As to damage to Bellmare, i.e. financial loss, this could only be suffered by it in Switzerland as payments were due according to the loan notes to its Swiss bank account or possibly the British Virgin Islands, but not in England."

The Claimant's Pleaded Case.

22. It is important to note at the outset the nature of the case which the Claimant asserts against the Defendant. Although reference is made to the Defendant's position as a director of Dorry his liability is not said to derive from that position. Similarly there is no allegation of conspiracy nor of some form of vicarious or concurrent liability for the acts of others. Rather the case is put directly on the footing that the Defendant himself made statements which were false and which caused the Claimant to enter a loan agreement with Dorry. Those statements are said to have been made by the Defendant knowingly and fraudulently or alternatively recklessly.

23. Thus the claim form describes the claim as being one "for damages for deceit resulting from false statements made by the Defendant in his capacity as a director of a company to whom the Claimant lent monies."

24. At [5] the Particulars of Claim assert that

> "… in the period between 2010 and 2014 the Defendant (alongside [Mr. Holyoake] was involved in the raising of finance for GCH, including `*producing loan notes for individual investors'* and in his capacity as a director of Dorry continued email correspondence with [Mr. Paynter Bryant] in the capacity of the latter as agent for the Claimant which, inter alia, included providing [Mr. Paynter Bryant] with copies of the loan notes and the making of the various representations set out below."

25. The pleading next proceeds to set out the loan agreement between Dorry and Mr. Muir (which Loan Agreement 1 with the Claimant replaced). It then pleads the Claimant's entry into Loan Agreement 1. At [12.1 – 12.3] it sets out the three statements which are said to have been false having commenced that paragraph thus:

> "Loan Agreement 1 … contained a number of representations, in documents sent by the Defendant to [Mr. Paynter Bryant] authorised by the Defendant and … produced by the Defendant with the representations made by the Defendant including the following…."

26. At [13] and [14] the Claimant says

> "13. The Claimant will rely on the fact that the Defendant produced loan agreement 1 and relies upon admissions made by the Defendant in the case who, when asked … whether he had produced loan notes for individual investors answered in the affirmative.
>
> "14. In the alternative the Claimant will say that, if the court were to find that the Muir loan document and loan agreement 1 were not in fact produced by the Defendant the self-same representations were nonetheless made or repeated by the Defendant …"

27. The pleading then sets out the respects in which it is alleged that the statements were false and avers that they caused the Claimant to enter the loan agreement.

28. At [18.1] the Claimant says that the representations "reflected a course of conduct by the Defendant in misleading a number of lenders" and, at [18.22], pleads that the first representation "was made knowingly by the Defendant". At [20] the Claimant invokes the Defendant's signature of Loan Agreement 1 as "evidence of the representations made by the Defendant". At [21] the Claimant contends that the Defendant "was fully aware he was engaging in deceit". Then at [22.1] it again pleads the Defendant's knowledge that the first representation was false and, at [22.2], says that "the Defendant fully intended that the Claimant should rely on false statement 1". At [26] and [31] the Claimant repeats in relation to the second and third statements respectively the assertions made at [22] in relation to the first statement.

29. Then the Claimant puts an alternative case. At [36] it says that if the court were to find the statements were not made knowingly they were made recklessly. It invokes a passage in respect of the Defendant from Nugee J's *Holyoake v Candy* judgment as evidence of that alleged recklessness.

30. At [39] the Claimant says that it "avers that the Defendant is personally liable for the loss and damage suffered not because he is a director but because he committed a fraud."

31. It follows that the Claimant's case was put with commendable clarity and directness in the Particulars of Claim. It was a case that the Claimant had suffered loss because it had entered the loan agreement in reliance on identified false representations; that those representations had been made by the Defendant; and that he had made them knowingly and fraudulently or alternatively recklessly.

32. Particular regard is to be had to the nature of the case being asserted against the Defendant because the assessment which is to be made in determining whether the courts of England and Wales have jurisdiction is an assessment in respect of the cause of action being alleged in the particular case.

The Jurisdiction Application.

33. On 25th November 2018 the Defendant applied for a declaration that the court had no jurisdiction or that it would not exercise its jurisdiction. It was that application which the Deputy Master determined on 13th March 2019.

The Starting Point: The Provisions of the Lugano Convention.

34. The Defendant is resident in and domiciled in Switzerland. Accordingly, the question of whether the court has jurisdiction is governed by the provisions of the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2007.

35. Article 2 of the Convention provides that a person domiciled in a state bound by the Convention shall be sued in the courts of the state where that person is domiciled. That provision is subject to Article 5 which provides for circumstances in which a person may be sued in the courts of a state in which he or she is not domiciled. The exception which is potentially applicable in this case is that at Article 5 (3) which provides that in cases of tort, delict, or quasi-delict a person may be sued "in the courts for the place where the harmful event occurred or may occur".

36. I will have to consider the operation of Article 5 (3) in detail below. It suffices at this stage to say that the parties were agreed before the Deputy Master that the application was to be determined by reference to Article 5 (3) and that if the exception contained in that Article was not applicable then the court had no jurisdiction. The Defendant said that the relevant allegedly harmful event was the provision by him of Loan Agreement 1 to the Claimant and that this had happened in Switzerland. The Claimant said that the drafting by Mr. Pym of the loan note format containing the Ownership and Proceedings Representations was a relevant harmful event and that this had taken place in England.

The Deputy Master's Decision.

37. The Deputy Master set out the procedural and factual background and summarised the parties' key contentions. He then set out his understanding of

the law and of the authorities to which he had been referred. In that regard the Deputy Master set out the effect of *Handelskwekerij G.J. Bier B.V. & Another v Mines De Potasse D'Alsace S.A.* [1978] QB 708. He then referred to *Shevill & Others v Presse Alliance S.A.* [1995] 2 AC 18. It appears from his comments at [35] and [36] that the Deputy Master attached particular weight to paragraphs [24] and [32] of the *Shevill* judgment as indicating that although proceedings could be brought in the courts of the place of distribution of the libel in that case those courts did not have "exclusive" jurisdiction and that proceedings could also be brought where the libel "was put into circulation".

38. At [40] – [42] the Deputy Master considered the decision of Rix J in *Domicrest Ltd v Swiss Bank Corporation* [1999] QB 548. He quoted the first part of Rix J's analysis at 567H – 568C of the place of the harmful event in the tort of negligent misstatement. It is apparent from [41] that the Deputy Master regarded the approach in *Domicrest* as in accord with that in *Shevill* in identifying "the place where the event giving rise to the damage occurred in terms of origin" and in having regard to "the originating act of putting the statement into circulation".

39. Then the Deputy Master turned to the decision in *Kolassa v Barclays Bank plc* [2016] 1 All E R (Comm) 733. It became clear later in his judgment that the Deputy Master regarded the production of the prospectus in that case as closely analogous to Mr. Pym's creation of the original format for the loan notes subsequently used by the Defendant.

40. Finally, Deputy Master Linwood made reference to the decision of the Supreme Court in *JSC BTA Bank v Ablyazov & another* [2018] UKSC 19, [2018] 2 WLR 1125.

41. It is to be noted that the Deputy Master was referred to neither *McGraw-Hill v Deutsche Apotheker* [2014] EWHC 2436 (Comm) nor *Melzer v MF Global UK Ltd* [2013] 3 WLR 883.

42. At [56] the Deputy Master explained why he was not considering the Claimant's alternative case that the Defendant had been in London at the time of the Muir Agreement.

43. The Deputy Master then made clear his understanding that the burden was on the Claimant to establish a good arguable case that the matter came within the relevant gateway and that this would not be done if the arguments were finely balanced. He then set out his analysis and conclusion. At [59] and [60] he summarised the Claimant's case that the creation and deployment of the falsehood were both relevant parts of the claim indicating his agreement with that approach. He noted the emphasis placed by the Claimant on the decision made in London "to put the falsity into circulation" contrasting that with the Defendant's position that the tort alleged was the making of false representations by the Defendant to the Claimant and that that had happened in Switzerland.

44. The Deputy Master said that he had concluded that the case was within the Article 5 (3) gateway stating his reasons thus at [62]:

(1) "The falsity was originated in London by Mr Pym. That was the originating event, the start of what became a common intent to deceive investors (see *JSC Bank* at [37]);

(2) There was a complete symmetry to the flow of the falsity from when it was created by Mr Pym in London in September 2011 to being taken over by Mr Wells in October 2011 which led to the Muir loan note in June 2012 and then the Bellmare loan note of 1 July 2013;

(3) Whilst the separation of the individuals in these particular circumstances has caused me quite some considerable concern as it is, in effect, or it can be argued as in effect forcing jurisdiction upon a party who did not personally set up the originating event, on reflection here, I think that there is such a substantial participation it means that the actions of the individuals here are indivisible and, accordingly, Mr Pym's originating action must bind Mr Wells for the purposes of Article 5(3) and the authorities;

(4) That common cause, for, by, or through, or at the behest of The Private Office of both Mr Pym and Mr Wells was to raise funds by issuing loan notes by one borrower, their principal, Dorry, to multiple investors. In my judgment, that common intent is akin to the responsibility of Barclays staff for the prospectus in *Kolassa*;

(5) There was no issue with the founding of jurisdiction occurring some considerable time before the claimant entered into the transaction concerned. So the time difference is of no account (*Kolassa* again); and

(6) There are further common factors for these loans. They were to fund the development of a property in London. That also accords with for the public policy point on jurisdiction being near to the cause of the damage which affords all possible claimants the option to sue in the courts of the place of the event which gives rise to and is at the origin of the damage (*Bier* at [21] and [25]) so as to increase the prospects of consistent judgments as opposed to various claimants, namely loan note creditors possibly having to commence proceedings in different jurisdictions."

45. For the Defendant Mr. Robinson said that the Deputy Master had made separate and distinct errors in regarding the acts of Mr. Pym in London as the originating event and in concluding that there was a common cause involving both the Defendant and Mr. Pym. In my judgement it is rather artificial to read the decision in that way. The Deputy Master's reasoning needs to be seen as a whole and the elements leading to his conclusion are to be read together. When that is done it is clear that the Deputy Master was heavily influenced by the analogy to the prospectus in the *Kolassa* case. He saw the deception as a continuing and combined process with different elements all of which were to be seen as part of the same operation. He placed considerable emphasis on the general nature of the operation rather than on the Defendant's particular dealings with the Claimant. He regarded the latter as having to be assessed as a part of the general operation rather than as a separate exercise. That regard to the general nature of the operation in turn fed into the conclusions that there was a common cause between the Defendant and Mr. Pym; that the latter's actions in London started the process and were the originating event for the

purposes of Article 5 (3); and that those actions were to be attributed to the Defendant.

The Grant of Permission to Appeal.

46. The Deputy Master granted permission to appeal. Mr. Robinson characterised that as being because the Deputy Master was concerned about the effect of his decision. It seems to me that in saying that Mr. Robinson is reading rather too much into the Deputy Master's comments at [62(3)]. The Deputy Master was there indicating that aspects of the case had given him cause for concern in the sense of causing a need to reflect carefully before reaching his conclusion but I do not read the judgment as expressing concern at the outcome which was ultimately reached.

47. The Deputy Master stated his reason for granting permission to appeal and said that it was because there was "no authority on [the] point that if A creates or originates the harm in say London by a false representation if B from Switzerland repeats it do A's actions found jurisdiction over B?" As I have already noted the Deputy Master was not referred to either *McGraw-Hill v Deutsche Apotheker* or *Melzer v MF Global UK Ltd* both of which were put before me and which are at least arguably in point.

The Parties' Contentions.

48. The first ground of appeal was that the Deputy Master erred in failing to follow the approach set out in *Domicrest Ltd v Swiss Bank Corporation.* The Defendant says that Deputy Master Linwood should have held that the event giving rise to the damage was the making of the misstatement in Switzerland rather than the place where the wording used was produced. There was, it is said, a failure properly to identify the relevant harmful event. This resulted from a failure to appreciate the nature of the tort of fraudulent misstatement. That was not, as the Deputy Master had said, a two stage process involving both the formulation and the communication of the false statement but instead a single matter in which the actual communication of the misstatement was the starting point. If the Deputy Master had properly appreciated the nature of the Claimant's cause of action he would have followed *Domicrest* and *McGraw-Hill v Deutsche Apotheker* the latter of which, the Defendant says, is indistinguishable from the current circumstances and in doing so he would have held that the relevant event occurred in Switzerland.

49. The Claimant says that the Deputy Master was correct to find that the misstatement had originated in England. In that regard it places emphasis on the drafting having been done by Mr. Pym in England and draws attention to the Defendant's first statement where, at [35], he distanced himself from the drafting saying that he "never changed the substance" of the loan agreements but only "occasionally" made "minor changes". It says that the relevant wording is to be regarded as having originated in England with such changes as the Defendant made being seen as immaterial. The Claimant says that the format drawn up by Mr. Pym was to be seen as akin to the defamatory newspaper article in *Shevill* and in particular to the prospectus in *Kolassa*, a case which the Claimant says was "on all fours" with the current claim. Conversely, it contends that the facts of *McGraw-Hill v Deutsche Apotheker*

were distinguishable from those of the current case because the Defendant made no changes of substance to the representations which had been drafted by Mr. Pym. Finally, in this regard the Claimant places weight on a number of factors which, it says, show a close connexion between the dispute and England.

50. The second ground of appeal is that there was no evidence to support the Deputy Master's finding that there was a common cause with the effect that Mr. Pym's actions were binding on the Defendant. The Defendant says that this was a "simple misreading" of the evidence where there was no reference in the evidence to a common cause and where there was neither evidence nor any pleaded allegation to the effect that Mr. Pym's actions bound the Defendant. The Defendant says that the Deputy Master's conclusion went beyond the evidence of Mr. Lovering that Mr. Pym's draft became the format for future loan notes and was used as the basis for the Muir Agreement and for Loan Agreements 1 and 2. The Defendant says that this is the high point of the evidence which even potentially points to a common cause and does not justify Deputy Master Linwood's conclusion.

51. In this regard the Defendant says that the Deputy Master was influenced by the purported analogy to the *Kolassa* case an analogy which the Defendant says is not apt. First, the Defendant says that there is no true analogy because the court in *Kolassa* was not concerned with a misstatement but with statutory liability for the contents of a prospectus. The analogy is also inappropriate, the Defendant says, because in *Kolassa* those involved were all employees of the defendant. Here Mr. Pym worked for TPO but the Defendant was neither an employee nor an agent of TPO or of Mr. Pym and the Claimant's case against him is put on the basis that he was acting as a director of Dorry.

52. The Claimant says that the conclusion was one which was open to the Deputy Master on the evidence. In addition to the history already rehearsed it points to the exhibits to Mr. Lovering's statement which contain email exchanges between the Defendant and Mr. Pym relating to the drafting of loan agreements.

53. Finally, the Defendant says that even if the Deputy Master was entitled to find such a common cause then the approach laid down in *Melzer v MF Global UK Ltd* comes into play. He says that the effect of that decision is that as his acts were all outside England and Wales the English courts cannot exercise jurisdiction over him by reason of Article 5 (3) even if Mr. Pym's acts within the jurisdiction were part of the same wrongdoing.

54. The Claimant counters by saying that the court in *Melzer v MF Global UK Ltd* was addressing the problem of forum-shopping and that its approach is not applicable in the circumstances of this case. The Claimant says that consideration of [40] of the Advocate General's opinion in that case indicates that the approach there is confined to cases where three elements are all present. Namely, first, that the places of the events giving rise to the damage occurred in different member states; second, that there are several persons who are joint participants or accomplices in the wrongdoing; and, third, that the claimant has brought proceedings against one purported participant in the state

where another participant acted. The Defendant contends that those circumstances are not present here because there was only one act which set the tort in motion and that was the drafting by Mr. Pym in England of the false representations. The Defendant does not accept that the *Melzer* approach is confined to those circumstances but says it was instead setting out an approach of general application. In any event the Defendant says that on the Claimant's case the three elements were present.

The Applicable Law.

55. The general rule is that proceedings are to be brought in the courts of the place of the defendant's domicile. The exercise of the special jurisdiction under Article 5 (3) is a derogation from that general rule and as a consequence the terms of Article 5 (3) are to be strictly interpreted (see *JSC BTA Bank v Ablyazov & another* at [31]).

56. The burden is on a claimant to establish that a claim falls within a relevant gateway. In order to do so he must show a good arguable case which is "something more than a *prima facie* case and something less than a balance of probabilities test". A judge must make an assessment of the material before him or her and ask who had the better of the argument on that material (see *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192 at [7] and *Aspen Underwriting Ltd v Credit Europe Bank NV* [2018] EWCA Civ 2590 at [34]).

57. For the purposes of Article 5 (3) "the place where the harmful event occurred" covers both the place where the damage occurred and the place of the event giving rise to it. The latter is the "place of the event which gives rise to and is at the origin of [the] damage" (*Bier* at [24 – 25]). In *JSC BTA Bank v Ablyazov & another* the Supreme Court explained that in applying the second limb of the *Bier* test the Court of Justice has emphasised "the notion of the originating event" [34] and "the relevant harmful event which sets the tort in motion" [38].

58. The question of what is the place of the harmful event is fact specific and will depend on the nature of the cause of action and the legal elements of the tort or delict being alleged. Thus in *JSC BTA Bank v Ablyazov & another* at [32] and [33] Lord Sumption and Lord Lloyd-Jones said:

> " 32 The expression "place where the harmful event occurred" in article 5(3) requires an autonomous interpretation in order to ensure its effectiveness and uniform application… However, the requirement of an autonomous interpretation does not mean that the component elements of the cause of action in domestic law are irrelevant. On the contrary they have a vital role in defining the legally relevant conduct and thus identifying the acts which fall to be located for the purposes of article 5(3). In particular, whether an event is harmful is determined by national law. To take an example raised during the hearing of the appeal, if a firearm is manufactured in state A and fired in state B the place of the event giving rise to the damage within article 5(3) is likely to differ depending on whether the basis of the complaint in national law is negligent manufacture of the firearm, or its negligent handling by the gunman. In the same way, the place

> of the event giving rise to the damage may vary depending on whether the cause of action is an unlawful means conspiracy or a free-standing tortious act.
>
> 33 Thus in *Shevill v Presse Alliance SA* (Case C-68/93) [1995] 2 AC 18 the Court of Justice emphasised (at paras 34—41) that the sole object of article 5(3) of the Brussels Convention is to allocate jurisdiction by reference to the place or places where an event considered harmful occurred. It does not specify the circumstances in which the event giving rise to the harm may be considered harmful to the victim or the evidence which the claimant must adduce to enable the court seised to rule on the merits of the case. This is because these are matters for the national court applying the substantive law determined by its own rules of private international law, national conflict of laws rules, provided that the effectiveness of the Convention is not thereby impaired…"

59. The operation of Article 5 (3) in the context of claims based on negligent misstatement was considered by Rix J in *Domicrest*. In that case the question was whether the place of the originating event was where the statement was made (Switzerland) or where it was received (England). Rix J made reference to the analogy with defamation and the approach taken in the *Shevill* case. He concluded, at 568C, that "it is the representor's speech rather than the hearer's receipt of it which best identifies the harmful event which sets the tort in motion."

60. The Deputy Master was not referred to *McGraw-Hill v Deutsche Apotheker* where Cooke J had to consider the application of Article 5 (3) to a claim of negligent misstatement. The relevant claim was made in respect of marketing material which had originated in England but which had been provided to investors in their home states. The Claimant relied on *Domicrest* and contended that the courts of England and Wales had jurisdiction because the marketing material had been created in London and this meant that London was where "the misstatements originated". In addressing that argument Cooke J had already, at [51], explained that in applying Article 5 (3) the court was "not looking to see where the substance of the tort or delict is committed … [but] is looking to ascertain where the substance of the event took place which gives rise to the damage." He then proceeded to address the argument based on *Domicrest* thus at [54 – 55]:

> "54 The fact that the written marketing material originated in England in the sense that it was created there cannot however assist [the claimant] in relation to Article 5.3 because SRR pleads that there were meetings or contacts with the investors in their countries of domicile where the marketing material was delivered to them and discussed. The debate in *Domicrest* was whether the harmful event occurred in the place from which the communication was made or the place in which it was received. When speaking of written documents, Rix J had in mind the place from which it was sent, as opposed to the place in which it was received. The place in which it was composed fell outside the ambit of the discussion.
>
> 55. In my judgment, the place where the harmful event occurred here is therefore only susceptible of one answer. It is the place where the meetings and contacts took place at which the written materials were both delivered and received. On the material available to this court, the negligent communications all took place

> in Germany, Austria and Switzerland both in terms of making and receipt of them. In the case of negligent misrepresentation, that must be where the harmful event occurred."

61. It follows that the decision is clear authority to the effect that in negligent misstatement the place of event giving rise to the damage is not the place where the misstatement was composed but the place where it was communicated to the claimant albeit if the despatch or making of the communication and its receipt were in different places then it is the former of those two which is the place of the originating event.

62. A further potentially relevant authority which was not before the Deputy Master was the decision of Nigel Teare QC, as he then was, in *Anton Durbeck GMBH v Den Norske Bank ASA* [2003] Q 1160. The issue in that case concerned a claim for the wrongful arrest of a ship in Panama in circumstances where the instructions to effect the arrest had come from London. It was held that the originating event was the arrest in Panama and not the instruction from London. The then Deputy Judge referred, at [15], to the requirement to take a restrictive approach to the application of Article 5(3) and said that "to conclude that the place where the decision is taken to commit a tort is the place where the event which gives rise to the damage occurs rather than the place where the first component of the tort occurs [would be] to adopt a broad approach to Article 5 (3) rather than a restrictive approach."

63. The Claimant in the *Durbeck* case had contended that the decision made in London to effect the arrest was analogous to the making of the negligent misstatement in *Domicrest* and to the publication of the libel in *Shevill*. The Deputy Judge rejected those analogies. It is of note that in doing so he explained, at [17], that the tort of negligent misstatement requires a negligent misstatement, reliance, and damage and that "a negligent misstatement is not only an essential component of the tort but is also the first in time."

64. In *Shevill & Others v Presse Alliance S.A* the Court of Justice was considering the case of a defamatory newspaper article which was created and first published in Paris and then distributed in other countries. The court held that proceedings could be brought in the countries where there had been distribution because that was where damage had been suffered but that the place of the originating event was the place where the newspaper was first published. Thus, at [24], it said:

> "In the case of a libel by a newspaper article distributed in several contracting states, the place of the event giving rise to the damage, within the meaning of those judgments, can only be the place where the publisher of the newspaper in question is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation."

65. The Claimant placed heavy reliance on the Court of Justice's decision in *Kolassa v Barclays Bank plc* and it is apparent that the decision had a considerable impact on the approach taken by Deputy Master Linwood. It was a claim against the defendant bank arising out of a prospectus which had been issued in Austria and which was said to have been in breach of the requirements of Austrian law in relation to the contents of such prospectuses.

The court concluded that Austria was not the place of the event giving rise to the loss because the decision as to the contents of the prospectus had not been taken there. Thus, at [53]:

> "As regards the events giving rise to the loss claimed, namely, the alleged breach by Barclays Bank of the legal obligations relating to the prospectus and information for investors, it should be pointed out that the acts and omissions that might constitute such a breach cannot be considered to have taken place where the investor who claims to have suffered loss is domiciled, given that there is no information in the case-file to show that the decisions regarding the arrangements for the investments proposed by Barclays Bank and the contents of the relevant prospectuses were taken in the Member State in which the investor is domiciled or that those prospectuses were originally drafted and distributed anywhere other than the Member State in which Barclays Bank has its seat."

66. The Claimant said that this was authority that the place of the originating event in a claim based on a misleading document was the place where the document was first created. It is, however, important to keep in mind that the court was there concerned with a single document (albeit one of which there were multiple copies) and that the cause of action depended on the compliance or otherwise of the contents of that document with the requirements of Austrian law. It is also of note that the Austrian courts had jurisdiction in any event because Austria was the place where loss was suffered.

67. Finally, regard is to be had to the decision of the Court of Justice in *Melzer v MF Global UK Ltd*. The claimant, in Berlin, had been solicited as a client by WHH based in Dusseldorf which had then opened a futures trading account for the claimant with the defendant in London. The claimant's case was that he had not been sufficiently informed of the risks involved in futures trading nor of the arrangements between WHH and the defendant. He sought to bring proceedings against the defendant alone for assisting WHH. He brought the proceedings in Dusseldorf contending that the relevant originating event was the conduct of WHH there. The court identified, at [19], the issue to be addressed as:

> "Whether article 5(3) of Regulation No 44/2001 must be interpreted as meaning that jurisdiction may be established on the ground of a harmful event, imputed to one of the presumed perpetrators of damage who is not a party to the dispute, over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised."

68. Similarly at [29] the court made it clear that the issue was whether a person could be sued in the courts of a place where he had taken no action (and where no damage had occurred) on the footing that the actions of another person in that place were an originating event. The court concluded that it would be contrary to the Convention to allow such proceedings. In the following words at [40 – 41] it explained that the acts of one perpetrator in a particular place are not to be regarded as an originating event for the purpose of giving jurisdiction to the courts of that place over a separate alleged perpetrator who has himself taken no action in that place:

> " 40 It follows from the foregoing that, in circumstances such as those in the main proceedings, in which only one among several presumed perpetrators of the alleged harmful act is sued before a court within whose jurisdiction he has not acted, an autonomous interpretation of article 5(3) of Regulation No 44/2001, in accordance with the objectives and general scheme thereof, precludes the event giving rise to the damage from being regarding as taking place within the jurisdiction of that court.
>
> 41 Accordingly, the answer to the question referred is that article 5(3) of Regulation No 44/2001 must be interpreted as meaning that it does not allow jurisdiction to be established on the ground of a harmful event imputed to one of the presumed perpetrators of damage, who is not a party to the dispute, over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised."

69. The Defendant says that the decision is relevant in the present case where proceedings are being brought against him in England based not on anything he is said to have done in England but on the actions of Mr. Pym. I have already set out at [54] the Claimant's contention that the approach in *Melzer* is confined to cases where the relevant events occurred in different member states with several persons said to have been joint participants in the wrongdoing and where the proceedings are brought against one purported participant in the state where another participant acted. It is true that at [40] of his opinion the Advocate General said that those elements were present in the particular case. However, I do not read the court's decision as being confined to those circumstances. Rather it was setting out more generally applicable principles as to the absence of jurisdiction under Article 5 (3) in cases where proceedings are brought against one alleged co-tortfeasor in the courts of a place where he has not acted but where a different co-tortfeasor (who is not a party to the proceedings) is said to have acted. In any event in my judgement the three elements to which the Advocate General referred are present in this case.

70. It follows that *Melzer* is authority that Article 5 (3) does not operate to give jurisdiction in circumstances such as those here.

Analysis.

71. The Deputy Master was entitled to conclude that the Defendant and Mr. Pym were engaged in a "common cause" to raise funds for Dorry as set out at [62(4)] of his judgment. A draft loan agreement was created by Mr. Pym which was then used as a model by the Defendant who drafted loan agreements which replicated the structure of Mr. Pym's model and used at least parts of the wording which had been first formulated by Mr. Pym. The documents were used by Mr. Pym and the Defendant for the same purpose namely obtaining funds for Dorry in relation to the GGH project. Moreover, the evidence contains email exchanges between Mr. Pym and the Defendant about the need for agreements to be drawn up.

72. It is much more questionable whether the evidence before him was such as to entitle Deputy Master Linwood to conclude that there was a "common intent to deceive investors" as he says at [62(1)]. The conclusion that there was such

a common intent depends on a finding that there was deliberately planned deception and that both the Defendant and Mr. Pym were knowing parties to that arrangement. It can be said that such a finding can be derived from the elements in the documents which were untrue and from the continued use of the same models and the same wording. It is a permissible and legitimate finding albeit one which did not follow inevitably or automatically from the material. However, even if, as I conclude it was, such a finding was open to the Deputy Master it still remained necessary for him to make an assessment of the nature and effects of the common cause and common intent in particular with regard to the nature of the claim being alleged against the Defendant and the originating event in respect of that claim. It was in those regards that the Deputy Master fell into error.

73. The conclusions at [62(1)] and at [62(4)] that there were respectively a "common intent" and a "common cause" were the basis for the key conclusion at [62(3)] that "the actions of the individuals here are indivisible and accordingly Mr. Pym's originating event must bind [the Defendant] for the purposes of Article 5(3)". It is apparent that the Deputy Master was also very greatly influenced by the purported analogy to the actions of the Barclay's staff in drawing up the prospectus in *Kolassa*.

74. In reaching that conclusion the Deputy Master failed to take proper account of the evidence of the Defendant's actions and in particular of the differences between the actions of Mr. Pym and the Defendant. More significantly he failed to take sufficient account of the nature of the cause of action being alleged against the Defendant and was misled by the supposed analogy with *Kolassa* which was not apt.

75. In respect of the Defendant's actions he did, indeed, use a format originally created by Mr. Pym replicating parts of the wording first formulated by Mr. Pym and did so to obtain lenders for Dorry. However, the format contained representations which could be true or untrue depending on the circumstances at any given time. In this regard the Proceedings Representation is of note. Its truthfulness would depend on whether there were or were not any relevant claim or proceedings at a given point in time and although included in the Muir Agreement and Loan Agreement 1 it was not contained in Loan Agreement 2. Moreover, the format created by Mr. Pym was not repeated in its entirety or without alteration. Thus in November 2012 the Defendant produced a draft which he said contained "quite a few changes". Similarly the Mezzanine Debt Representation was not contained in Mr. Pym's draft of the ARH agreement and the wording of that representation evolved over time. Of greatest significance in this regard is the fact that it was the Claimant's case that the Defendant had played an active part in the drafting of the loan notes. In his first statement the Defendant had said that he had not changed the substance of the loan agreements but had merely made "minor changes such as inserting party names". In his statement for the Claimant Mr. Paynter Bryant countered the Defendant's assertion by exhibiting material which he said showed that the Defendant "did indeed change the substance of these loan agreements by drafting and inserting new material clauses in respect of the assignment of the loan and a new and comprehensive unilateral confidentiality

obligation." It follows that on the Claimant's case the Defendant was not just passing on documents originally drafted by Mr. Pym but had involvement in and control over the language used.

76. The position was that the Defendant provided a draft loan agreement to the Claimant. That draft derived from a model created by Mr. Pym in London and was used to bring in lenders. The document used by the Defendant was not, however, identical even in respect of all the alleged representations to that which had been produced by Mr. Pym. In those circumstances the analogy to the prospectus in *Kolassa* and to the defamatory newspaper article in *Shevill* is of very limited value. In those cases the court was concerned with identical documents which had been given to different people in different countries. Moreover, in *Kolassa* the court was saying that Austria was not the place of the originating event rather than definitively identifying the country which was the place of that event. The most significant difference is that the courts in those cases were not dealing with a claim alleging fraudulent or negligent misstatement and as was made clear in *JSC BTA Bank v Ablyazov & another* the assessment of whether a claim falls within Article 5 (3) is to be made by reference to the particular tort alleged and to the elements in the relevant cause of action.

77. The unfortunate attraction of the misleading analogy to the cases of *Kolassa* and *Shevill* meant that the Deputy Master failed properly to consider the particular cause of action being alleged against the Defendant. In my judgement that was his crucial error.

78. The claim against the Defendant was that particular misstatements had been made by the Defendant to the Claimant; that they had been made in particular documents; and that they had been made with a particular state of mind (fraudulent knowledge alternatively recklessness). As I have already said there was no allegation of conspiracy or of vicarious liability nor even of joint participation in a tort with another. At [62(1)] in the context of his reference to a "common intent to deceive investors" the Deputy Master referred to *JSC BTA Bank v Ablyazov & another* at [37]. The point which the Deputy Master is seeking to make by the reference is not entirely clear and it may be that he intended to refer to [38] of the Supreme Court decision. In any event the crucial factor is that the Supreme Court was addressing a case of conspiracy and the Deputy Master does not appear to have appreciated the significance of the distinction between that and the claim being made against the Defendant in the current case.

79. Cooke J's judgment in *McGraw-Hill v Deutsche Apotheker* gives clear guidance that in cases of misstatement the originating event is the making of the statement which is said to constitute the misstatement. The claim here was in respect of the Defendant's alleged fraud in the making of a particular statement to the Claimant. That was the originating event and the use by the Defendant of elements of a model drafted by Mr. Pym in England did not alter the position. The Deputy Master accepted the Claimant's assertion that there was a two stage process involving both the drafting of the loan note and then its "deployment" both of which were necessary for the claim. He was in error in doing so. As was said in the *Durbeck* case the making of the statement is

the first element in time of the tort of negligent misstatement. The drafting of the model by Mr. Pym and his original formulation of the allegedly false wording were not part of the Claimant's cause of action against the Defendant. If they had been then the Claimant would have had to have pleaded and ultimately proved the original creation of the deception in the model. The Claimant did not seek to plead such an allegation (it is noteworthy that the Particulars of Claim make no reference at all to the actions of Mr. Pym or to the creation of the model loan agreement in London) and did not need to do so because the claim properly sets out an allegation against the Defendant of the making by him of a false statement.

80. The case of *McGraw-Hill v Deutsche Apotheker* is indistinguishable from the circumstances of this case and the approach set out by Cooke J is manifestly correct. It has regard to the nature of a claim in misstatement and accords with the need for certainty as emphasised by the Supreme Court in *JSC BTA Bank v Ablyazov & another* at [38].

81. It follows that the relevant originating event was the making of the statement by the Defendant in Switzerland and that it was not open to the Deputy Master to conclude that it was the drafting by Mr. Pym of the model loan agreement in London. In those circumstances jurisdiction under Article 5(3) was not established.

82. Even if the drafting of the model can be seen as the originating event the bringing of the claim against the Defendant in England runs counter to the approach laid down in *Melzer*. If the originating event were to be seen as the drafting of the model in London and the Defendant were to be regarded as a liable as being a co-tortfeasor (despite the absence of such an allegation currently) then the proceedings could still not be brought against the Defendant in England. This would be the consequence of the approach in *Melzer* and the need for the exceptions to the Article 2 principle that persons are sued in the courts of their place of domicile to be interpreted restrictively.

83. It follows that the conclusion that the claim was even potentially within Article 5(3) was not open to the Deputy Master. Had he been referred as he should have been to *McGraw-Hill v Deutsche Apotheker* and *Melzer v MF Global UK Ltd* he may well have seen the case in a different light. As it was he reached a conclusion which was not open to him as a matter of law and his decision cannot stand.

84. The appeal will, accordingly, be allowed and the Defendant granted the relief sought of a declaration that the court has no jurisdiction and an order setting aside the claim form.