Neutral Citation Number: [2022] EWHC 3259 (Ch)

Appeal Ref: CH-2022-000060
Claim No.: BL-2019-001341

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

BEFORE Mr Recorder Richard Smith
(Sitting as a Judge of the Chancery Division)

BETWEEN:-

CORNWALL RENEWABLE DEVELOPMENTS LTD

Claimant/ Respondent

-and-

WRIGHT, JOHNSTON & MACKENZIE LLP

Defendant/ Appellant

APPROVED JUDGMENT

Charles Phipps (instructed by Clyde & Co LLP) for the Defendant/ Appellant
Christopher Burdin (instructed by Stephens Scown LLP) for the Claimant/ Respondent

Hearing date: 8 December 2022
Draft judgment circulated: 19 December 2022

This judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 21 December 2022 at 10.30 am.

Introduction

1. This judgment concerns an appeal (**Appeal**) against the Order of Chief Master Shuman dated 14 January 2022 (**Order**) by which she dismissed the Defendant's application challenging the Court's jurisdiction to try this claim for the reasons set out in her judgment of the same date (**Judgment**). On 7 June 2022, Leech J granted permission to appeal against the Order. The Claimant subsequently filed a Respondent's Notice, seeking to uphold the Judgment on additional grounds (**Cross-Appeal**). I heard the Appeal and Cross-Appeal on 8 December 2022.

2. The Claimant is an English registered company engaged in the business of developing and operating sites for the production and sale of electricity from renewable sources. The Defendant is a firm of solicitors, registered in Scotland. In 2013, the Claimant instructed the Defendant to act in relation to the proposed development of two wind farms on two sites in Cornwall. The Claimant alleges that the Defendant was negligent in the performance of its retainer, as explained below, including by reference to the Particulars of Claim (**PoC**).

3. The jurisdictional challenge concerned the allocation of jurisdiction within the UK, the Defendant asserting that the Claimant should have sued the Defendant (if at all) in Scotland, not England. In the Judgment, the Chief Master held that:-

    (a) the Claimant could avail itself of the jurisdictional gateway under rule 3(a) of Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 (**CJJA**) for "*matters relating to a contract*" (**Rule 3(a)**). The Defendant appeals that finding;

    (b) the Claimant could not avail itself of the jurisdictional gateway under rule 3(c) of Schedule 4 to the CJJA for "*matters relating to tort, delict or quasi-delict*" (**Rule 3(c)**). The Claimant cross-appeals that finding; and

    (c) England was the natural and appropriate forum for the Claimant's claim. That finding is not challenged on the Appeal.

4. The Defendant advances one overarching ground on the Appeal, namely that the Chief Master was wrong to hold that England was the place of performance of the Defendant's relevant contractual obligation for the purpose of Rule 3(a) and therefore wrong to conclude that the Court had jurisdiction over the Claimant's claim. That overarching ground was broken down into four sub-issues, namely that the Chief Master was wrong to:-

    (a) hold that England was the relevant place of performance despite the fact that the Defendant was in Scotland when it either performed or failed to perform its obligation to exercise reasonable care and skill (**Duty Argument**);

    (b) hold that England was the relevant place of performance despite the fact that the Defendant was in Scotland when it performed the work constituting its services, including its research, the formulation of the advice it provided to the Claimant and/ or the drafting of the documents it provided to the Claimant (**Services Argument**);

    (c) decline to apply the dicta of Gloster LJ and the Court of Appeal in *Deutsche Bank AG* v *Petromena ASA* [2013] EWHC 3065 (Comm) and

[2015] 1 WLR 4225 and to distinguish that case on grounds which were invalid and/ or inadequate; and

(d) take into account matters irrelevant to identifying the place of performance of the Defendant's relevant contractual obligation.

5. Leech J gave permission to appeal on the basis that:-

> " …. *the Appellant has a real prospect of satisfying the Appeal Court that the Chief Master ought to have followed Petromena ASA even though it was a case under the Lugano Convention and characterised the obligation in question either by reference to the content of the Appellant's legal duty to exercise reasonable skill and care or by reference to the services which the Appellant provided. If she had done so, it is likely that she would have found that the place for performance of the obligation in question was Scotland.*
>
> ……. *I respectfully consider that the appeal gives rise to an issue of law on which the Appellant has a real prospect of success*."

6. On the Cross-Appeal, the Claimant's principal additional ground for seeking to uphold the Judgment was that the Chief Master was wrong to rely on *Source Ltd v T U V Rheinland AG Holding* [1998] QB 54 to hold that the Claimant could not avail itself of the Rule 3(c) jurisdictional gateway in respect of its claim based on the Defendant's alleged concurrent tortious liability, the holding in *Source* on that issue having been superseded by the effect of later EU jurisprudence.

Factual background

7. As the Chief Master identified (Judgment at [5]-[20]), certain facts were agreed for the purposes of the jurisdiction challenge, as now summarised again below.

8. The Defendant has no place of business outside Scotland. It employs 72 solicitors, of which half are member partners. There are 6 dual qualified solicitors able to practise law in both Scotland and in England and Wales.

9. Mr Brian Henderson (**Mr Henderson**), a director of NMS Financial Renewables Ltd, acted as an intermediary between the Claimant and the Defendant, introducing them through his connection with Mr Kenneth Long, one of the Defendant's members. Mr Long, in turn, introduced Ms Donna Kelly–Gilmour (**Ms Kelly-Gilmour**) to Mr Henderson. Ms Kelly-Gilmour was a partner at the Defendant firm between April 2002 and March 2014. She practised in property law and was dual qualified in Scotland and in England and Wales.

10. On or around 14 June 2012, the Claimant entered heads of terms with the owners of two sites in Cornwall, known as Tremaine Farm (**Tremaine**) and Tresawson Farm (**Tresawson**), for which it proposed to obtain planning permission for the construction and operation of wind farms to generate and sell electricity.

11. On 18 March 2013, a planning application was made to the local planning authority, Cornwall Council, relating to developing wind farms on Tremaine.

12. On 5 June 2013, Mr Henderson contacted the Defendant on behalf of the Claimant for fee estimates in connection with work in respect of Tremaine and two other sites.

13. On 6 June 2013, Ms Kelly-Gilmour emailed Mr Henderson setting out the scope of the work and providing fee estimates. The Defendant's standard terms of business contain a Scottish governing law clause and are subject to the exclusive jurisdiction of the Scottish courts. However, for the purposes of the jurisdiction challenge, it was accepted that there is no evidence that a retainer letter was sent by the Defendant to the Claimant or that the Claimant was aware of the exclusive jurisdiction clause.

14. On 18 July 2013, Mr Henderson sent the Defendant heads of terms for the sites, prepared by the Claimant.

15. On 19 July 2013, Ms Kelly-Gilmour provided initial advice on the documentation required and raised certain queries. Mr Dart, sole director of the Claimant, provided responses to those queries within the email, including setting out an extract on "*financial involvement*". Mr Henderson forwarded this to Ms Kelly-Gilmour on 25 July 2013, indicating that the matter was becoming time critical.

16. On 26 July 2013, Ms Kelly-Gilmour forwarded separately to Mr Dart and Mr Henderson a draft agreement between the Claimant and the owner of Tresawson. On the same day, the Defendant issued its invoice addressed to Phenix Renewable Energy.

17. On 30 July 2013, Mr Dart e-mailed Ms Kelly-Gilmour, raising a query about the confidentiality clause in the draft agreement and saying that the reference to the Scottish Institution had been corrected to the Office for National statistics. Ms Kelly-Gilmour replied the same day. On 31 July 2013, the Defendant re-issued its invoice, now addressed to the Claimant at Mr Dart's Cornwall address.

18. On 2 August 2013, the Claimant executed the agreement in four parts. On 8 August 2013, these were submitted to Cornwall Council in support of the planning application.

19. On 23 October 2013, Cornwall Council refused planning permission. On 29 October 2013, Mr Henderson emailed Ms Kelly-Gilmour stating that "*the council have rejected the documentation saying that it did not fit their criteria*" and that Mr Dart was keen to understand this and whether it could be challenged. Mr Henderson sent a further email that day with a 'bullet point' made by Mr James Patrick of Cornwall Council about the financial arrangements not falling within the scope of "*financial involvement*."

20. On 17 April 2014, grounds of appeal were filed against Cornwall Council's refusal of planning permission. These were later withdrawn.

21. On 22 July 2019, the Claimant issued the Claim Form. The PoC are dated 9 November 2019. The postmark on the envelope serving the proceedings is dated 21 November. These were received at the Defendant's offices the next day.

The Claimant's pleaded case

22. At the hearing, the Claimant highlighted its needs and objectives in the arrangements to be concluded with the Defendant's legal assistance, both parties referring to the related correspondence in which these were communicated (see PoC [6]-[13]). These included the need for those arrangements to deal with the

'noise issue' created by the proposed wind farms for which purpose the relevant land had to meet the local planning criteria for "*Financially Involved Properties*".

23. The Claimant says the Defendant was instructed on this basis and that it assumed the following duties in tort and/ or in contract and/ or under the Supply of Goods and Services Act 1982 (PoC at [14]), namely:-

    (a) to carry out its instructions received from the Claimant;

    (b) to exercise the care and skill reasonably expected of competent solicitors practising in the field of planning and environmental law, particularly wind farm planning;

    (c) to act in the Claimant's best interests, taking into account its needs and circumstances, including in particular by ascertaining its objectives and taking all reasonable steps to ensure their achievement;

    (d) to ensure the Defendant had the necessary resources, skills and procedures properly to carry out its instructions and/ or meet the Claimant's objectives, including by identifying and researching the relevant law and planning guidance; and/ or

    (e) to provide advice upon request and/ or as reasonably incidental to carrying out its instructions including, in particular, advice as to whether the Claimant's objectives would be achieved as a result of the Defendant's work.

24. The Claimant pleads that the above duties were breached by the Defendant's non-fulfilment of the Claimant's instructions or objectives by the agreement it drafted failing to satisfy the "*financially involved*" requirement and, therefore, to deal with the noise requirements such that any planning application was bound to fail (PoC at [18]).

25. The Claimant also pleads that the Defendant breached its duties by failing to (i) conduct proper research into the relevant planning law and guidance despite the "*financially involved*" requirement being expressly brought to the Defendant's attention and the Defendant knowing that its satisfaction was the primary objective of the instructions (ii) advise that the agreement drafted by the Defendant failed to fulfil that objective and those instructions through the non-satisfaction of the "*financially involved*" requirement (iii) advise that a bespoke agreement was required to meet the Claimant's objective rather than the adaption of a generic precedent and/ or (iv) advise that the Defendant could not fulfil the Claimant's instructions or objective and that the Defendant lacked sufficient expertise such that external advice was required (PoC at [19]).

26. Finally, the principal head of loss and damage claimed is the loss of the chance to obtain planning permission and, therefore, to undertake the proposed wind farm development in Cornwall.

Legal framework

27. The Claimant purported to serve the Claim Form pursuant to CPR, Part 6.32, which provides in relevant part that:-

    "*(1) The claimant may serve the claim form on a defendant in Scotland or*

Northern Ireland where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the 1982 Act and—

(a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom; and

(b)… (i) the defendant is domiciled in the United Kingdom…"

28. There is no dispute that there were no pending proceedings in the Courts of any other part of the UK or that the Defendant is domiciled in the UK, here Scotland. As to whether the claim is one which the Court has the power to determine under the CJJA, the starting point of the analysis is section 16 of the CJJA which provides in relevant part that:-

"*(1) The provisions set out in Schedule 4 (which contains a modified version of Chapter II of the Regulation) shall have effect for determining, for each part of the United Kingdom, whether the courts of law of that part, or any particular court of law in that part, have or has jurisdiction in proceedings where—*

(a) the subject-matter of the proceedings is within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation would have had effect before IP completion day in relation to the proceedings); and

(b) the defendant or defender is domiciled in the United Kingdom …"

29. There is no dispute that section 16(1) of the CJJA is satisfied in this case. Section 16(3) of the CJJA provides in relevant part that:-

"*(3) In determining any question as to the meaning or effect of any provision contained in Schedule 4—*

(a) regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention or Chapter II of the Regulation and to any relevant decision of that court as to the meaning or effect of any provision of that Title or that Chapter; and

(b) without prejudice to the generality of paragraph (a), the expert reports relating to the 1968 Convention may be considered and shall, so far as relevant, be given such weight as is appropriate in the circumstances.

(3A) The requirement in subsection (3)(a) applies only in relation to principles laid down, or decisions made, by the European Court before IP completion day."

30. This interpretative provision therefore requires the Court to have regard to relevant principles laid down by the European Court of Justice (**ECJ**) in connection with (i) the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (**Brussels Convention**) and (ii) Council Regulation (1215/2012) of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**Brussels Re-cast**). In this regard, although Schedule 4 to the CJJA is, strictly, part of the domestic law, the Defendant relies on the dictum of Lord Goff in *Kleinwort Benson Ltd*. v *Glasgow City Council* [1999] 1 AC 153 (at [163D-G]) for the proposition that it will be a rare case in which a provision of Schedule 4 bears a materially different meaning from the corresponding provision of the Brussels Convention (see also to the same end, Lord Clyde at [179A-B] and Lord Hutton at [187C-F]). Moreover, although the section 16(3) requirement is limited to principles laid down before the "*IP completion day*" of 31 December 2020, the Defendant says the Court is not required to ignore the later position.

31. Schedule 4 to the CJJA sets out the rules for allocation of jurisdiction within the UK on the basis of a modified Chapter II of the Brussels Re-cast. Rules 1 and 2 of Schedule 4 to the CJJA provide that:-

> "*1. Subject to the rules of this Schedule, persons domiciled in a part of the United Kingdom shall be sued in the courts of that part.*
>
> *2. Persons domiciled in a part of the United Kingdom may be sued in the courts of another part of the United Kingdom only by virtue of rules 3 to 13 of this Schedule.*"

32. Rule 3 of Schedule 4 to the CJJA contains potential derogations from the default position under rule 1:-

> "*A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued-*
>
> *(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question…*
>
> *(c) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.*"

33. These mirror in terms two of the special jurisdictions afforded by Articles 5(1) and 5(3) of both the Brussels Convention and the 1988 Lugano Convention.[1] It is notable in the context of this jurisdictional dispute that Rule 3(a) is <u>not</u> expressed in the more expansive terms of the corresponding special jurisdiction stated in Article 7(1) of the Brussels Re-cast.[2]

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[1] Lugano Convention of 16 September 1988 (88/592/EEC) on jurisdiction and the enforcement of judgments in civil and commercial matters.

[2] That more expansive formulation also features in Article 5(1) of both the predecessor to the Brussels Re-cast, namely Council Regulation (44/2001) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**Brussels Regulation**) and the Lugano Convention of 21 December 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**2007 Lugano Convention**).

Relevant authorities

34. At the hearing, I was referred to various authorities which the parties said supported their respective positions as to the "*obligation in question*" and/ or its "*place of performance*". Given that these issues are closely related, I consider the authorities together (and chronologically) as they were argued on the Appeal, albeit addressing *Petromena* in more detail under the Services Argument.

35. The Defendant relied on *Source*, not only in the context of the Cross-Appeal, but also for its finding as to the "*place of performance of the obligation in question*". That case concerned the purchase of goods by the English claimant from suppliers in Hong Kong and Taiwan, payment being made by letter of credit upon presentation of certificates of quality prepared by the German defendants engaged by the claimant. The defendants inspected the goods, prepared a report and sent this to England, on the strength of which, the English buyer instructed them to issue certificates of quality to the suppliers, enabling them to obtain payment. After receiving complaints about the goods, the English claimant sued the German defendants for breach of contract and breach of duty of care in failing to exercise reasonable care and skill in the preparation and supply of the reports. The German defendants applied to set aside service of the proceedings on the basis the English Court had no special jurisdiction under Articles 5(1) and (3) of the Brussels Convention. The candidates for the principal "*obligation in question*" included the obligation to inspect the goods, to refer defects to the suppliers' factories, to prepare a report and send this to England, and to transmit a quality certificate to the suppliers. Staughton LJ found (at [61G]) that the principal obligation was the inspection of goods, being the principal task for which the claimant engaged the defendants.

36. The Claimant relied on *Viskase Ltd* v *Paul Kiefel GmbH* [1999] 1 WLR 1305 in which the English claimants contracted to purchase machines from the German defendant. The claimant sued the defendant in England claiming the machines were not fit for purpose. The defendant applied to set aside service. The question arose whether the English Court had jurisdiction under Article 5(1) of the Brussels Convention. The Court of Appeal held that the principal "*obligation in question*" was to supply machines that were fit for purpose, an obligation to be performed, once and for all, at the time of delivery (at [1323B]). Although a case concerning the sale of *goods* rather than, as in this and the other cases cited, *services*, Article 5(1) of the Brussels Convention (and Rule 3(a)) do not make this distinction (unlike the Brussels Re-cast at Article 7(1)(b)).

37. In *Barry* v *Bradshaw* [2000] ILPr 706, the claimants sold their English business and emigrated to Ireland, appointing an accountant domiciled in Ireland to assist in the settlement of their related Capital Gains Tax liability with the Inland Revenue. Once that liability had been established, they sued the accountant in England for the negligent handling of the case, including failing to ensure that certain available reliefs were properly taken into account by the Inland Revenue. The defendant challenged jurisdiction, the County Court finding it lacked jurisdiction under Article 5(1) of the Brussels Convention because the overwhelming bulk of the accountant's duties were performed in Ireland. The pleadings stated that it was a term of the retainer that the defendant was under a duty to exercise all reasonable care and skill as tax agents to represent, conduct and settle the claimants' tax affairs. On appeal, the claimants argued that the

defendant's principal "*obligation in question*" was the failure to ensure attendance and/ or representation at a crucial hearing in England. Having regard to the pleaded retainer, breaches and the loss and damage caused by the defendant's alleged failure to ensure representation at the hearing (comprising a tax assessment without regard to reliefs), the Court of Appeal accepted the claimants' argument. Retirement relief could only ultimately have been obtained by making representations at the hearing before the Commissioners. That obligation could only be performed in England.

38. In *Rayner* v *Davies* [2002] CLC 952, the claimant wished to purchase a yacht in Italy and was introduced to a marine surveyor domiciled in Italy who agreed to survey the vessel. The claimant paid the fee to the surveyor's bank account in the UK. The surveyor then undertook the survey and prepared a report in Italy which he sent to the claimant in the UK. The claimant alleged that the survey was undertaken negligently and sued the surveyor in England. The surveyor applied for a stay under the Brussels Convention on the basis he was domiciled in Italy. The claimant argued that he was a consumer under Articles 13 and 14. The district judge did not consider the claimant's alternative argument that the English Court had jurisdiction under Article 5(1). However, on appeal, Morison J found (at [16]) that the performance of the defendant's obligation to carry out the survey with care and skill gave rise to the dispute and the breach thereof founded the cause of action relied upon. Since the survey was conducted in Italy, Italy was the place of performance of the obligation in question. The fact that the decision to buy the yacht was taken in England on reliance on the survey did not alter the analysis. The claim did not hinge on the decision to buy.

39. *Bateman* v *Birchall Blackburn LLP* [2014] NIQB 112 concerned the instruction by the Northern Ireland domiciled claimants of English solicitors in respect of the attempted purchase of properties in the Philippines. The question arose whether the claim should proceed in Northern Ireland or be stayed on jurisdictional grounds by reasons of the operation of Rule 3(a). The principal "*obligation in question*" was found to be the provision of legal services, to advise on the transaction and to provide good title to the property (at [22]). The work was undertaken in England and delivered in Northern Ireland. Although the immediate beneficiaries were in Northern Ireland, they in turn provided the services for the benefit of relatives based in Scotland, England, Canada and Northern Ireland. The service related to property in the Philippines. The place of performance of the principal "*obligation in question*" was held *obiter* to be where the defendant carried out the activities in performance of the contract, namely England, where the services were undertaken and work done (at [22]).

40. The Defendant also relies on *Petromena* and, in particular, Longmore LJ's dictum (at [96]) that:-

> "*An expert who is in the business of giving advice (whether he or she is a barrister, solicitor, financial or other adviser) essentially performs the service in the place where information is collated, relevant meetings are held and the advice is formulated rather than in the place in which it happens to be received*."

41. Although that case concerned potential jurisdiction under the 2007 Lugano Convention, the Defendant says this was not based on a narrow understanding of

EU jurisprudence rather than a more general observation that the place where the relevant advice was formulated, as opposed to delivered, was critical. This (and the first instance judgment) are considered later in this judgment (at [65]-[71]) in the context of the Services Argument.

42. In *Holgate* v *Addleshaw Goddard (Scotland) LLP* [2020] 1 All ER (Comm) 447 (a case with some factual similarities to this), the claimant sought damages for breach of contract, negligence and breach of fiduciary duty arising out of the instruction of the defendant to act as solicitor and advise the claimant in relation to a dispute with its bankers (also a client of the defendant) concerning the alleged mis-selling of an interest rate swap product. The defendant, a Scottish firm, applied for a declaration that the English Court had no jurisdiction under the CJJA. As for the principal "*obligation in question*", it was common ground that this was determined by analysis of the pleaded case (at [132]). In the Master's view, the primary complaint was that the defendant breached its fiduciary duty by continuing to advise and act for the claimant and failing to advise it that it could not properly do so, thereby putting the bank's interest before the claimant's (at [135]-[136]). As to the "*place of performance*" of the advisory obligation, the Master considered it necessary to identify to whom the obligations were owed to ascertain where they were fulfilled (at [138]). Although the natural persons receiving the advice were predominantly in Scotland, they did so as agents for the company based in England such that the obligation was performed there (at [139]). Moreover, as to the claimant's complaint that the defendant did not progress the swaps claims against the bank, those claims arose out of English causes of action which should have been pursued there (at [140]). Since the conditions in Rule 3(a) were met, the English Court had jurisdiction over the claim (at [141]). The Defendant argued that, since the Master had already found jurisdiction on the alternative basis of an 'anchor claim', her observations concerning Rule 3(a) were *obiter*, there are, in any event, points of distinction with the present case (including the defendant's failure in *Holgate* to pursue English proceedings on behalf of its client), the recipients of the advice were in fact in Scotland and a number of relevant authorities, including *Petromena*, were apparently not cited to the Master. The Claimant says that *Holgate* represents good authority, reflecting a proper evaluative approach to the matters in issue on the pleadings in that case.

43. Since these authorities turn on their own unique facts, they are of limited assistance in this case. However, certain broad points pertinent to this case can be discerned from those authorities concerned with Rule 3(a) (or its EU law equivalent) including (non-exhaustively):-

    (a) where the claim is expressed in terms of a breach of duty of reasonable care and skill, the particular respect in which the defendant is alleged to have fallen short of that duty still falls to be identified;

    (b) how the case has been framed in the pleading is a key element in the identification of the "*obligation in question*";

    (c) even where the bulk of services are performed outside the jurisdiction, the principal obligation may yet be performed within it;

    (d) the delivery or receipt of the relevant work product to the claimant may not be decisive of the "*place of performance*"; and

(e) returning to where this synopsis started, each case will turn on its own facts and pleadings, and the Court's careful evaluation thereof.

The Appeal – preliminary considerations

44. The Defendant says the Chief Master erred in finding that the "*place of performance of the obligation in question*" within the meaning of Rule 3(a) was England rather than Scotland. Some preliminary observations are warranted.

45. First, it was common ground that the Chief Master's finding was an evaluative decision, as to which, "*the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion"* (*Re Sprintroom Ltd* [2019] BCC 1031 (at [76]); see also *Public Institution for Social Security v Banque Pictet & CIE SA* [2022] EWCA Civ 29, citing *Sprintroom* (at [14])).

46. The Defendant says that, although the Appeal proceeds by way of review rather than rehearing, the significance of the distinction drawn by the Court of Appeal in *Sprintroom* is reduced, and the underlying decision more amenable to challenge on appeal, where, as here, the facts are both uncomplicated and uncontroversial and the question to be decided is straightforwardly one of (exorbitant) jurisdiction rather than, for example, the balancing exercise involved in deciding appropriate forum. This straightforward case contrasts with cases such as *Banque Pictet* in which the respondents' jurisdictional costs alone were claimed at £13.5 million.

47. The Claimant responds that, on the Defendant's exposition, it might be thought that the Court in *Banque Pictet* would have taken a more interventionist approach given the short points of law that arose for determination on the appeal. However, it did not do so, finding at every step of the analysis that it was open to the judge to reach the decision he did. Even the process of construing contracts (as to the meaning of which there is only one answer) is an evaluative one (*Trust Risk Group SpA* v *Am Trust Europe Ltd* [2015] 2 Lloyd's Rep 154 (at [34]-[37])). By its nature, the application of Rule 3(a) to the facts at hand is inherently evaluative and there is no complaint of error in the legal sense in this case. Appropriate respect should therefore be afforded to the Chief Master's decision.

48. Second, it was also common ground that it was incumbent on the Claimant in resisting the jurisdiction challenge to show a 'good arguable case' or, put another way, that it had the 'better of the argument' (see *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] 1 WLR 3514, at [74]), albeit the Defendant correctly emphasised that this test should not be confused with that for summary judgment under CPR, Part 24 (see to that end, *Kaefer* (at [88-89]).

49. Third, like the Chief Master on the jurisdictional challenge, I am not concerned on the Appeal with, and I express no view on, the merits of the claim.

50. Fourth, the Defendant highlighted the default provision provided by Rules 1 and 2 of Schedule 4 to the CJJA, namely that defendants shall be sued in the courts of their domicile save only as otherwise expressly provided therein, reflecting the policy underpinning the EU jurisdictional regime that the starting point is the defendant's mandatory right to be sued in its domicile, requiring any departure

therefrom (including under Rule 3(a) and (c) which is only expressed permissively) to be construed restrictively (see *Kleinwort* at [164A], [173B], [179G] and [188E]). As to this, the Claimant says the whole point of Rule 3(a) is to afford a different basis of jurisdiction from domicile, it is not unjust or unfair to apply an exception which has been expressly provided for, and the Court should not feel any diffidence in that regard.

51. Fifth, the "*place of performance of the obligation in question*" is usually the place with the closest connection between the dispute and the court having jurisdiction over it (*Shenavai* v *Kreischer* (Case 266/85) [1987] E.C.R. 239 (at [18])). The Claimant points to the Chief Master's findings in the context of appropriate forum that the centre of gravity of this dispute is in England (Judgment at [62-63] and [84]). That finding of a close factual connection is a useful 'cross-check' as to the correct application of Rule 3(a) and the consistency of the Chief Master's decision with the legislative purpose. A contrary finding, as the Defendant urges, might suggest something has gone wrong.

52. Sixth, both parties agreed that "*matters relating to a contract*" within the meaning of Rule 3(a) is an autonomous EU concept (see *Kleinwort* [at [164H]), albeit nothing turns upon it on the Appeal (as distinct from the Cross-Appeal).

53. Seventh, the term "*obligation in question*" is also an autonomous EU concept. It was common ground before the Chief Master that the word "*obligation*" connotes "*the contractual obligation forming the basis of the legal proceedings*" (see *Kleinwort* (at [164E-F])). It was also common ground that, where more than one obligation is in issue, the *principal* obligation will determine jurisdiction (*Kleinwort* (at [166D-E]), citing *Shenavai*). It was also common ground (as it was in *Holgate* at [132]) that the Court must analyse the Claimant's pleaded case to identify the principal "*obligation in question*".

54. Eighth, it was also common ground that the question of the "*place of performance*" was to be determined in accordance with the law governing the obligation in question as established by the conflict of laws rules of the forum. The Defendant asserted that this was English or Scots law but did not suggest any difference between them. The Claimant maintained that English law applied. The Appeal therefore proceeded on the basis of English law on this aspect.

55. Ninth, in reaching my decision, I have carefully considered the written and oral submissions on both sides for which I am grateful. However, in relation to the Appeal, I have focused in this judgment on the Defendant's arguments since the Claimant's position was essentially that the Chief Master was right, that she properly characterised the "*obligation in question*" and its "*place of performance*", and that this was a classic exercise of judicial evaluation that should not be 'second guessed' on appeal absent some error of law, as to which, there was none.

Duty Argument (1)

56. The Defendant says the Chief Master fell into error by wrongly identifying the principal "*obligation in question*" under the Defendant's retainer as the provision of "*advice and agreements to the claimant for negotiation and execution by parties in England, with the intention that they would satisfy Cornwall Council's planning rules so that planning permission would be granted, and the*

development could proceed" (Judgment at [49], [58] and [63]), rather than as the duty "*to exercise reasonable care and skill*", a duty performed (or not) wherever the Defendant was when it provided its services, i.e. Scotland.

57. As to the duties pleaded by the Claimant in the PoC, the Defendant says that:-

    (a) the first - to carry out the Claimant's instructions (PoC at [14.1]) - is irrelevant. The Claimant's case is not one of non-feasance - a refusal or failure by the Defendant to carry out its instructions - but that those instructions were carried out incompetently.

    (b) the second - to exercise reasonable care and skill (PoC at [14.2]) - is relevant, the only pleaded duty that matters and the duty on which professional negligence claims such as this are invariably founded.

    (c) the third – to act in the Claimant's best interests and ensure its objective were met (PoC at [14.3]) - is a hybrid of a fiduciary duty, coupled with the duty to exercise reasonable care and skill.

    (d) the fourth - ensuring the adequacy of the Defendant's resources, skills and procedures (PoC at [14.4]) - is a second order duty.

    (e) the fifth - to recommend alternative advice be taken (PoC [14.5]) - also appears to be a second order duty.

58. As for the breaches alleged by the Claimant in the PoC, the Defendant says that:-

    (a) the first - the failure of the agreement drafted by the Defendant to fulfil the Claimant's instructions or meet its objective to satisfy the "*financially involved*" requirement (PoC at [18]) - even if made good, was a breach of the duty of reasonable care and skill. There was no implied term that the agreements would be 'fit for purpose' nor was there an unqualified strict liability duty to fulfil the Claimant's objectives.

    (b) the second and third - the failure to conduct proper research and to advise the Claimant appropriately (PoC at [19.1]-[19.3]) - were also alleged breaches of the duty to exercise reasonable care and skill.

    (c) the fourth - the failure to recommend alternative advice (PoC at [19.4]) - adds nothing to the existing alleged breaches based on the provision of allegedly incompetent services.

    (d) the fifth - the failure subsequently to advise appropriately (PoC at [19.5]) - was also an alleged breach of the duty to exercise reasonable care and skill.

59. The Defendant says that, on any reasonable analysis of the Claimant's pleaded case, the principal "*obligation in question*" was therefore the Defendant's alleged failure to exercise its duty of reasonable care and skill.

Duty Argument (1) - discussion

60. The gravamen of the Claimant's claim is that it instructed the Defendant to produce an agreement for submission to the Cornish planning authority to ensure compliance with that authority's "*financially involved*" requirement and to enable the Claimant's objectives of higher noise limits for the land and obtaining planning permission to be achieved. The Defendant's alleged failure to comply

with that instruction and to enable that objective to be achieved permeates the Claimant's pleaded case. The fact that this alleged duty can, as it is (at PoC [14.2]), also be pleaded as a duty to take reasonable care and skill does not alter the analysis. Rather, framing the matter in those more general terms begs the question as to how the Defendant is said to have fallen short in that regard. So, for example, in *Barry*, the alleged duty of care was framed in terms of taking all reasonable care and skill as tax agents to represent, conduct and settle the claimants' tax affairs. The principal "*obligation in question*" was found to be to ensure attendance and/ or representation at a crucial hearing in England. At the hearing, I asked the Defendant what, on the pleading, it was required to do with reasonable care and skill in this case. The answer was advising and/ or drafting (which included implied advice). However, that characterisation belies the close focus of the particulars of breach on the failure of the agreements provided by the Defendant to comply with the Claimant's instructions with respect to the "*financially involved*" requirement and to allow the Claimant to achieve its related planning objectives (PoC at [18]-[19]).

61. In this regard, I also found unpersuasive the assertion that there was no implied term that the agreement provided by the Defendant would be 'fit for purpose'. The reference in the Judgment to that phrase (at [49]) was to the requirement for the agreement to comply with the instructions given by the Claimant, not an inapposite reference to the sale of goods. Nor, without descending into the merits, did I find persuasive the Defendant's reliance (for these jurisdictional purposes) on authorities such as *Nationwide Building Society v Davisons Solicitors* [2013] PNLR 188 (at [37] and [51]-[58]) to the suggested effect that the Defendant was under no unqualified duty to fulfil the Claimant's objective. The precise nature, scope and extent of the Defendant's alleged duty, and whether it falls to be qualified in the manner suggested by the Defendant, will be a matter for argument if the case proceeds in England but, for present purposes, the pleaded "*obligation in question*" is squarely the Defendant's provision of an agreement in accordance with the Claimant's instructions, compliant (or not) with the "*financially involved*" requirement and capable (or not) of meeting the relevant criteria for planning permission.

62. Finally, the Defendant took issue with four observations of the Chief Master in the Judgment (**emboldened below**) in relation to the Duty Argument, namely that:-

    (a) **the consequence of the Duty Argument would be that a professional negligence claim for negligently drafted documents drawn up by a solicitor practising from Scotland for a client based in England would always have to be litigated in Scotland** (Judgment at [38]). The Defendant's suggestion that it is open to parties to agree a jurisdiction clause is no basis for denying special jurisdiction under Rule 3(a) where available. The Duty Argument would have that denying effect if, as the Chief Master found here, it misidentifies the "*obligation in question*";

    (b) **an identical conclusion would be reached in relation to both written and oral advice** (Judgment at [38]). The Defendant suggests that written advice should be treated in the same way as oral advice. I did not understand the Chief Master to suggest otherwise, rather than to point out that the same consequence as above would follow for advice as well as drafting;

(c) **a solicitor owes a number of duties to the client, which should not always be subordinated to the obligation to exercise reasonable care and skill** (Judgment at [49]). The Defendant says that, although a solicitor may owe a number of duties, Rule 3(a) requires the identification of the "*obligation in question*", in this case the duty to exercise reasonable care and skill, such that any resulting subordination of the Defendant's other obligations is mandated by the legislative scheme. However, this assumes the Defendant's case as to the "*obligation in question*". The Chief Master rejected that as she was entitled to do; and

(d) **the Court must look to the wider picture and the nature of the obligation between solicitor and client, and also at the product received by the client** (Judgment at [55(1)]). The Defendant says that the Court should not consider the contract on a broad basis, rather than focus on the specific contractual obligation on which the claimant's claim depends. However, the Defendant fails to identify the proper context for this observation, namely consideration of that part of the judgment from *Holgate* (at [138]) discussing the "*place of performance*" (Master Clark having earlier identified the "*obligation in question*"). The Chief Master's reference to the "*wider picture*" was not, as the Defendant suggests, an impermissible search for "*the obligation which characterises the contract*" (in the manner indicated in *Kleinwort* at [165E]), rather than saying that, in 'advice cases', looking only at the place where the solicitor performed the work would be too narrow a focus.

Duty argument (1) - conclusion

63. The Chief Master was entitled to conclude that the Claimant had a good arguable case that the principal "*obligation in question*" was to provide advice and agreements to the Claimant for negotiation and execution by parties in England, with the intention that they would satisfy Cornwall Council's planning rules so that planning permission would be granted, and the development could proceed. She did so after a careful evaluation of the facts and the Claimant's pleaded case. She did not fall into any legal error. As such, there is no basis for me to disturb her findings. I reject the first ground of appeal.

Services Argument (2)

64. As an alternative to, albeit drawing on the analysis in the context of, the Duty Argument, the Defendant also relies on its Services Argument: if and to the extent the Court's search for the place of performance of the specific contractual obligation on which the Claimant's claim is based requires the Court to identify the place where the Defendant performed its services, then that place was also not in England, but in Scotland. In this context, I consider the second and third grounds of appeal together, being closely related.

65. The Defendant says the Services Argument receives strong support from the judgments of Gloster LJ at first instance and of the Court of Appeal in *Petromena*. In that case, the Norwegian defendant, Petromena, applied to dismiss on jurisdictional grounds an English claim in which Deutsche Bank sought a declaration of non-liability in relation to Petromena's claims advanced against the bank in Norway. Petromena's substantive complaint was that the bank had provided funding advice and breached a number of duties, including of loyalty, reasonable care and skill and confidentiality. Petromena advanced three

arguments as to why the English court had no jurisdiction under the 2007 Lugano Convention, namely that:-

(a) the claim was a matter relating to a contract and the relevant "*place of performance*" was Norway. Although the bank's employees had been based in London, its advice had been delivered to Petromena in Norway;

(b) if the claim was not a matter relating to a contract but was tortious or delictual, then Petromena suffered its damage in Norway; and

(c) the claim was covered by a jurisdiction clause in Petromena's loan agreement with a lender and which provided for Norwegian jurisdiction.

66. At first instance, Gloster LJ held that (i) the claim was not a matter relating to contract (ii) for the purpose of the tort gateway, the events giving rise to the damage took place in England, not Norway (iii) the jurisdiction agreement in the loan agreement was irrelevant and (iv) the English Court therefore had jurisdiction. However, if she was wrong that the claim was not a matter relating to a contract, she considered the "*place of performance*" of the bank's relevant obligations under any such contract, holding *obiter* (at [58]) that:-

> "*Since there is no evidence of any contract having been concluded in the present case, nor of any term prescribing where performance is to take place, the provisions of the contract provide no assistance in this respect. What the evidence before this Court does clearly show, however, is that the place where DB for the most part carried out its activities in relation to the matters in issue in the proceedings was London. The relevant DB employees spent the overwhelming majority of their time in London, and carried out nearly all of their activities there. I accept Mr Handyside's submission that it is immaterial that Petromena may have received DB's alleged "advice" in Norway. The focus… is where the relevant work was done by the provider of the service. The location of the recipient of the service is insignificant.*"

67. The Court of Appeal dismissed Petromena's appeal on the principal ground it had submitted to English jurisdiction by filing a further acknowledgement of service. However, Longmore LJ also considered *obiter* the question of the "*place of performance*" if the claim had been a matter relating to contract, stating (at [93] and [95]-[96]):-

> "*93. … on any view, if there was a contractual obligation, the place of performance of that obligation was, as the judge held, England…*
>
> *…95. If one has regard to the factual aspects of the present case and, in particular, the time spent in England and the importance of the activities carried out in England it is evident, as the judge held, that the place where DB for the most part carried out its advisory activities (if, indeed, that was what it was doing) was London. The relevant employees engaged in putting together such advice spent the overwhelming majority of their time in London and carried out nearly all their activities there... The most relevant meeting between the parties took place in London. Moreover, the judge held (in a conclusion not now challenged) for the purpose of article 5(3) that the events*

which caused damage to Petromena occurred in England; that in itself is a strong pointer to the place where the services were to be provided.

96 … An expert who is in the business of giving advice (whether he or she is a barrister, solicitor, financial or other adviser) essentially performs the service in the place where information is collated, relevant meetings are held and the advice is formulated rather than in the place in which it happens to be received."

68. Ryder and Floyd LJJ agreed with Longmore LJ on this aspect (at [102] and [103] respectively).

69. The Defendant pointed out the initial criticism in Briggs *Civil Jurisdiction and Judgments* (6th ed., at [2.179]) that Gloster LJ's focus was incorrectly on the 'performance of services' rather than their 'provision', Article 5(1)(b) of the 2007 Lugano Convention being concerned with the latter. However, in light of the ECJ's decision in *Wood Floor Solutions Andreas Damberger GmbH v Silva Trade SA* (concerning the same language in Article 5(1)(b) of the Brussels Regulation), *Briggs* no longer pursued that criticism, instead identifying as the potentially material question the place where the service provider does the bulk of the work constituting the service as distinct from the place of provision of the final work product (7th ed., at [14.21]).

70. The Defendant also says that the approach in *Petromena* is consistent with the decision in *Bateman* noted above (at [39]) in which Weatherup J held *obiter* (at [22]) that the place of performance of the principal "*obligation in question*" in the claim for professional negligence concerning the proposed purchase of properties in the Philippines was "*where the defendant carried out the activities in the performance of the contract*", namely England, "*where the services were undertaken and work done*". To the same end in this case, the Defendant submits that it received its instructions in Scotland, undertook its drafting there, did its research there and formulated its advice there. Since all or the bulk of the work required to be undertaken was carried out there, the delivery of the ultimate work product in England does not alter the fundamental analysis (supported by *Petromena*) that the Defendant performed its services in Scotland.

71. The Chief Master was not persuaded by the Defendant's analysis, observing (Judgment at [43]) that the dicta of Gloster LJ and the Court of Appeal in *Petromena* were *obiter* and distinguishing the case on the basis the events causing the damage occurred in England, with the "*critical point*" found to be a meeting in London. By contrast, this claim concerns the delivery of a defective draft agreement to the Claimant in England, for use in England. More importantly, *Petromena* concerned the 2007 Lugano Convention which defines the "*place of performance of the obligation in question*" using words absent from Rule 3(a).

Services Argument (2) - discussion

72. In my judgment, this final point is the critical and decisive one. The Defendant says that Longmore LJ's views in his judgment in *Petromena* were expressed in general terms and were not based on any perceived potential distinction in the service provider's favour between English and EU jurisprudence or between the place where the service provider performs its contractual obligations and where it

provides its services. However, there was no need for such distinctions to be drawn in *Petromena* because the Courts in that case were undertaking a different task from the Chief Master here. In *Petromena*, the issue of jurisdiction was governed by Article 5(1) of the 2007 Lugano Convention which provides[3] that:-

> "*A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued:*
>
> *1(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;*
>
> *(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:*
>
> - *in the case of the sale of goods, the place in a State bound by this Convention where, under the contract, the goods were delivered or should have been delivered;*
>
> - *in the case of the provision of services, the place in a State bound by this Convention where, under the contract, the services were provided or should have been provided.*
>
> *(c) if (b) does not apply then subparagraph (a) applies*;"

73. *Petromena* submitted at first instance that, being a case of "*the provision of services in the form of advice*", Article 5(1)(b) applied such that the courts in the place where the services were provided had Article 5(1) jurisdiction, ie: Norway, where the advice was *received* (at [33(ii)]). Deutsche Bank agreed that, if Article 5(1) was engaged, Article 5(1)(b) applied, albeit submitting that Petromena's approach was erroneous given that *Wood Floor Solutions* had found the relevant task to be identifying "*the place of the main provision of services*" by the service provider (at [38(iii)]). Although Gloster LJ did not expressly mention Article 5(1)(b) in the relevant section of her judgment (at [56]-[59]) except in the last line (at [59]), she did not need to do so, that issue and the parties' respective arguments having been set up earlier and there being no dispute that, if Article 5(1) was engaged, the relevant part was Article 5(1)(b). In the Court of Appeal judgment, there was some limited discussion of Article 5(1)(b), principally as to whether the position in a sale of goods case informs the position in a services case (at [96]) but, again, there was no doubt as to the applicable jurisdictional regime.

74. The Chief Master addressed the different jurisdictional regimes operating in *Petromena* and in this case in the following terms (Judgment at [43]-[44]):-

> "*43. Whilst these are very powerful judgments, I must not lose sight of the fact that they are obiter and more significantly that they apply the Lugano Convention, and article 5(1)(b) which was critical to the analysis. This involves a separation of goods and services and therefore interpretation of language which is entirely absent from rule 3(a).*

[3] In the same terms as the Brussels Regulation and Brussels Re-cast.

44. No matter the eloquence of the reasoning by Gloster J her case involved a Hedley Byrne v Heller duty with the critical point being a meeting held in London. It does not seem to me that I can or should adopt the obiter reasoning in contract, particularly when the analysis rests on the decision of the ECJ in Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA [2010] ECR 1-2121 where the court considered that the task for the purpose of article 5(1)(b) was to identify "the place of the main provision of services" by the service-provider."

75. As the Chief Master also observed, *IHP Limited* v *Fleming* [2009] 7 WLUK 279 held (at [24]) that Schedule 4 to the CJJA was a modified version, not a replica of, the Brussels Regulation and that the omission of Article 5(1)(b) from Schedule 4 to the CJJA must have been deliberate (Judgment at [45]).

76. Although there may be a specious attraction to looking at the conclusions of Gloster LJ and the Court of Appeal in *Petromena* on "*place of performance*" as supportive of a proposition in contractual services cases generally that the relevant enquiry is where those services were "*for the most part*" carried out, such an approach would be erroneous in the present (Rule 3(a)) context. The language of the 2007 Lugano Convention (applicable in *Petromena*) and the CJJA (applicable here) mandate different approaches. Article 5(1)(b) is a deeming provision such that, in a contractual services case, an enquiry as to the "*obligation in question*" and its "*place of performance*" under Article 5(1)(a) is supplanted by an enquiry as to the place of service provision by the party who performs the characteristic obligation of the contract (*Wood Floor Solutions* at [34]), regardless of what may actually be in issue in the proceedings. However, where (as here) Rule 3(a) is engaged, the "*obligation in question*" does fall to be identified. In a contractual services case under Rule 3(a), that obligation may or may not relate to the performance of the services themselves, depending on the bringer and basis of the claim but, even if it does, its "*place of performance*" may well differ from the place where those services are "*for the most part*" carried out, the relevant performance being that of the "*obligation in question*", not of the obligation that characterises the contract.

77. Nor does *Bateman* - a CJJA case - support the Defendant's analysis in this regard. In *Bateman* (unlike *Petromena*), the Northern Ireland High Court had to identify the principal "*obligation in question*", concluding that this was "*to advise on the proposed transaction and to provide good title to the property*". It then went on to undertake the further evaluative assessment of the "*place of performance*", concluding that this was "*where the defendant carried out the activities in the performance of the contract which is England where the services were undertaken and the work was done*" (at [22]). By contrast, *Petromena* required a different evaluative assessment of "*the place of the main provision of services*", bypassing altogether consideration of the actual "*obligation in question*". The fact that the outcome in *Bateman* as to the actual "*place of performance*" was similar to that in *Petromena* as to the deemed "*place of performance*" is of no consequence. Moreover, even though *Bateman* and this case do engage the same jurisdictional regime under Rule 3(a), and both concern the provision of legal services, their facts and pleaded cases were different such that, unsurprisingly, the "*obligation in question*" and "*place of performance*" were found to be different as well. That is not the result of any error by the Chief Master but of the requirements of Rule

3(a), and the related evaluative assessments to be performed in each case on different facts and pleaded cases.

78. Finally, the Defendant makes certain further criticisms (**emboldened** below) of other aspects of the Chief Master's finding that England was the "*place of performance*", namely:-

    (a) **the Chief Master's reference to the agreement being (i) *delivered* to the Defendant and (ii) not "*fit for purpose*", such concepts residing in the domain of sale of goods, not the provision of services** (Judgment at [49]). Such references were to the Defendant's alleged failure to comply with its instructions to deliver an agreement compliant with the "*financial involvement*" requirement and capable of meeting the identified planning criteria. There is no difficulty in the solicitors' retainer accommodating those instructions;

    (b) **the provision of a draft agreement represented only part of Defendant's services and that the value of such a draft agreement lies in the prior research and drafting**. As is common ground, where there are multiple obligations in play, the Court's task is to identify the principal "*obligation in question*". The Chief Master found this to be the provision of advice and the agreement to the Claimant, not the prior research and drafting. Based on her evaluation of the facts and the pleaded case, she was entitled to make that finding; and

    (c) **the fact that the draft agreements were first e-mailed to Mr Henderson in Scotland before sending them to the Claimant in England shows the location of the recipient to be insignificant** (Judgment at [61]). The Chief Master concluded that nothing turned on Mr Henderson being the initial recipient of the draft agreement. Based on her analysis of the communications between the parties (Judgment at [61]), she was again entitled to that view.

Services Argument (2) - conclusion

79. The Chief Master did not fall into error by distinguishing, and declining to apply, *Petromena* in this case or in finding that there was a good arguable case that the "*place of performance*" was England, a finding reached following further careful evaluation of the facts and the pleaded case. I reject the second and third grounds of appeal.

Irrelevant considerations

80. Finally, the Defendant submits that the Chief Master wrongly took into account the connection of certain matters with England in her conclusion as to the "*place of performance*" (Judgment at [63]):-

> "*The obligation at the heart of this claim was for Ms Kelly-Gilmour to provide advice and draft agreements as a solicitor qualified to act in England and Wales regulated by the Law Society in England and Wales, to an English client, in respect of parties in England, relating to land in England satisfying planning requirements of an English Council so that the development in*

England could proceed. The agreements and advice were provided to the claimant and its director, in England. I am satisfied that the place of performance of the contract was England. I also further observe that the centre of gravity in this case was England."

81. Although potentially relevant to the enquiry as to *appropriate forum*, the Defendant says that the following matters are not relevant to the identification of the "*place of performance*" of the relevant contractual obligation, namely:-

    (a) the qualification and regulation of Ms Kelly-Gilmour of the Defendant;

    (b) the subject-matter and purpose of the Defendant's draft agreement; and

    (c) the subsequent use of the Defendant's draft agreement.

82. The Claimant argued that the "*place of performance*" was where it received the work product (England), the Defendant where the underlying legal work was carried out (Scotland). As noted, it was common ground that the parties did not expressly agree the "*place of performance*" of the "*obligation in question*". To the extent discernible, the Chief Master was therefore required to ascertain the parties' implied intention, considering the relevant circumstances known to them in the context of the particular "*obligation in question*". That obligation was found to be the provision of advice and agreements for negotiation and execution in England to satisfy English planning requirements to allow the development to proceed there. The subject-matter, purpose and intended use of the agreement to be provided therefore formed an essential element of the performance of the "*obligation in question*". As such, these matters were relevant to the Chief Master's evaluation of the "*place of performance*". Relevant countervailing considerations included the Claimant's instruction of a firm of Scottish solicitors with no presence in England. As the Chief Master canvassed with the parties at the hearing (Judgment at [62])), this might suggest that the place where the drafting was undertaken (Scotland) held some importance, albeit diminished where the draftsperson was also qualified in England. Likewise, as noted (at [78(c)]), the Defendant relied on Mr Henderson being the initial recipient of the draft agreement to suggest its delivery in England was of no importance. Although another relevant matter considered by the Chief Master, after analysing the related correspondence, she concluded that nothing turned upon it.

83. The Defendant also argued that it should make no difference logically to the "*place of performance*" if, as it did, it sent the agreement to England and Ms Kelly-Gilmour was qualified in Scotland or the draft had been a Scottish law agreement relating to Scottish parties and properties or the Defendant had intended to use the draft in Scotland. Although that may be right as a matter of logic, it may well not be right as a matter of the intention of the parties. Indeed, on the logic of the Defendant's case, if Ms Kelly-Gilmour happened to have undertaken the relevant work while on a business trip to New York, the "*place of performance*" would be the United States even though that could not be said to be the intention of either party.

84. Finally, the Defendant also suggests that the Chief Master wrongly conflated an aspect of the analysis in *Holgate* (at [140]) concerning the relevant breach in that

case, namely the defendant solicitors' alleged failure to advance claims in England, with the *consequences* of the breach in this case, namely the Claimant's inability to obtain planning permission from Cornwall Council (Judgment at [55]). The Defendant says the former is relevant to the "*place of performance*" but the latter is not. However, I did not discern any conflation. The Chief Master referred to the non-pursuit in *Holgate* of certain claims that "*should have been pursued in England*." Self-evidently, the consequence is that they were not. Moreover, such consequence, including any related loss, may inform the evaluation of the "*place of performance*". In this case, the loss was of the opportunity to obtain planning permission in England and to develop the wind farms in England. Although the Defendant says such matters may be relevant to the appropriate forum but not the "*place of performance*", this appears to overlook the fact that the latter usually constitutes the closest connection between the dispute and the court having jurisdiction over it (*Shenavai* at [18]).

85. Accordingly, I am unable to conclude that these considerations were irrelevant or that the Chief Master fell into error by having regard to them. The Defendant's real complaint seems to be directed to the weight she attached to them. However, it is not the role of this Court on the Appeal to perform its own calibration. That was squarely a matter for the Chief Master's evaluation of the "*place of performance*" which, as noted, she undertook with appropriate care and without falling into error. I therefore reject the fourth and final ground of appeal.

Overall conclusion and disposal

86. For the reasons stated, I dismiss the Appeal. It is therefore not necessary for me to consider the Cross-Appeal and I do not do so.

87. I trust that the parties can agree for my consideration a draft minute of order reflecting these findings and any consequential matters. However, if there are any outstanding aspects requiring my input, I will hear further from them.