Neutral Citation Number: [2018] EWHC 3259 (Comm)

Case No: CL-2017-000107

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/11/2018

Before :

MR JUSTICE MALES

- -

Between :

GRIFFIN UNDERWRITING LIMITED	**Claimant**
- and -	
ION G. VAROUXAKIS	**Defendant**

"FREE GODDESS"

- -
- -

Richard Sarll (instructed by **Thomas Cooper International**) for the **Defendant**
Philippa Hopkins QC (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Claimant**

Hearing date: 20th November 2018

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Approved Judgment

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MR JUSTICE MALES

Mr Justice Males :

Introduction

1. The defendant, Mr Ion Varouxakis, who is domiciled in Greece, is sued for inducing breaches of contract by companies under his control and of which he is or was the sole director. Jurisdiction over him is sought to be established pursuant to Article 7(2) of the Recast Brussels Regulation, which provides that:

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

2. Article 7(2) enables a claimant to sue in the courts for the place where it has suffered damage even if the event which gave rise to the damage occurred elsewhere. The claimant insurance company ("Griffin") contends that as a result of the defendant's conduct it has lost the right to claim general average contributions which were payable and would have been paid in London, so that the damage it has suffered was suffered in this jurisdiction.

3. The defendant disputes this analysis, contending that the damage in question was suffered either in the place where the underlying contract was broken or alternatively in Guernsey where Griffin is domiciled and where it would ultimately have received any general average payments. Alternatively he contends that Griffin's claim is a "matter relating to insurance" within the meaning of Section 3 of Chapter II of the Regulation so that, in accordance with Article 14, he can only be sued in the courts of Greece where he is domiciled. On one or both of these grounds he seeks an order that court has no jurisdiction to try the claim against him.

4. Griffin contends that this application is out of time, with the consequence that the defendant must be treated as having accepted that the court has jurisdiction (see CPR 11(5)). The defendant disputes this, but if necessary seeks relief from sanctions and an extension of time.

5. Accordingly there are three issues to be determined:

   (1) Is the defendant's application in time?

   (2) Should there be relief from sanctions?

   (3) Does the court have jurisdiction?

6. In my view this is the logical order in which to address the issues. Before doing so, however, I must describe the circumstances in which the claim comes to be made and the chronology of the proceedings.

The facts

7. For the purpose of this application there was no dispute as to the essential facts, which can be summarised as follows.

8. Griffin, a Guernsey company, insured Adventure Five S.A. ("the shipowner"), then the owner of the m.v. "FREE GODDESS", under a policy of kidnap and ransom insurance for a 30-day round trip voyage which involved passing through the Gulf of Aden.

9. In February 2012, while carrying a cargo of rolled steel coils from Egypt to Thailand pursuant to bills of lading issued on 20 and 26 January 2012, the vessel was seized by pirates in the Arabian Sea and taken to Somalia. As a result Griffin paid out just under US $6.5 million under the policy, including sums by way of ransom payments, and the vessel was eventually released and made her way to Salalah, Oman, arriving there in October 2012. General average was declared. In the ordinary course, the shipowner would have had claims for general average contributions against the holders of the bills of lading and average guarantees would have been issued by the insurers of the cargo prior to its delivery to the bill of lading holders at the discharge port. Griffin would have been subrogated to those claims.

10. In February 2013, while the vessel was at Salalah, a Settlement Agreement was concluded between Griffin, the shipowner and the manager of the vessel, a Marshall Islands company. The Settlement Agreement was subject to English law and jurisdiction. Its express terms included the following:

> "1. The Insurers are now subrogated to all and any rights and remedies of the Owners in respect of the entitlement of the Owners (individually or collectively) to pursue, recover and secure all or any part of the Settlement and other monies previously paid by the Insurers on Owners' behalf ("Final Settlement") from third parties whether in general average, at common law or pursuant to contract or otherwise, and including the rights and entitlement of the Owners (individually or collectively) to an indemnity under any policy of insurance other than the Policy in respect of their inability to recover the Final Settlement, or any part thereof, by reason of a breach of the contract of carriage ("Third Party Recoveries"). …
>
> 4. Owners and Managers hereby undertake to account to Insurers for any and all amounts that Owners may recover pursuant to Third Party Recoveries and hereby authorise the appointed Average Adjuster to hold any such funds received from third parties to the order of Insurers in respect of the Final Settlement. …
>
> 6. The Owners and Managers undertake to furnish Insurers with any and all assistance that Insurers may reasonably require of them when exercising rights and remedies in relation to Third Party Recoveries including but not limited to: … (iii) ensuring that full and adequate general average security is obtained from all interests before/upon arrival at the port of discharge. Owners shall where necessary exercise at Owners' expense a possessory lien over the cargo and/or take such steps as may reasonably be necessary to obtain adequate general average security to the satisfaction of Insurers. Owners reserve the right to claim any expenses reasonably incurred in doing this from Insurers under the relevant policy and/or in general average …"

11. Griffin contends that there were also implied terms of the Settlement Agreement to the effect that the shipowner and the manager (1) would not take any steps that would render performance of the bill of lading contracts impossible and (2) would ensure

that the bill of lading contracts were performed or would at least use their best endeavours to ensure that they were performed.

12. It is Griffin's case that the shipowner committed breaches of the Settlement Agreement and that it was induced to do so by the defendant. The defendant, Mr Ion Varouxakis, is a Greek national and is or was the sole director of the shipowner. He is, according to Griffin, the individual who directs and controls the activities of both the shipowner and the manager, and the Freeseas Group of which they form part. For the purpose of this application that can be taken as correct. He signed the Settlement Agreement on behalf of both the shipowner and the manager.

13. At the time of the conclusion of the Settlement Agreement, all parties were operating on the basis that the bill of lading contracts were still in existence and capable of being performed and that they would be performed. It was envisaged that the vessel would be repaired and would proceed to Thailand to discharge the cargo, in accordance with the shipowner's obligations under those contracts (cf. *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1 at 16). However, that is not what happened.

14. Instead the vessel remained in Salalah, with the cargo insurers on board and the crew unpaid and in increasing distress. Monies were advanced by Griffin and by the vessel's hull insurers for repairs to be to be carried out, but they seem not to have been used for that purpose.

15. Unknown to Griffin, the bill of lading holders commenced arbitrations in London against the shipowner under the bills of lading on 28 March 2014, seeking orders for delivery up of the cargo in Thailand.

16. On 11 April 2014 Mr. Varouxakis wrote to the cargo interests in the following terms:

> "We have taken the decision to cut our loses [*sic*] and close the book on Free Goddess. I regret that this may become a total loss for your cargo, but it is impossible for us to keep throwing good money after bad money…"

17. On 18 August 2014 the arbitral tribunal issued awards ordering the shipowner "forthwith [to] cause the [vessel] to proceed to Bangkok, Thailand and there deliver the contractual cargo in accordance with the bill[s] of lading".

18. However, the vessel remained where she was in Salalah, with the cargo and crew still on board.

19. On 7 April 2015 the bill of lading holders applied in the arbitrations for an order for delivery up of the cargo at Salalah. The shipowner resisted that application, stating that the vessel was or would shortly be ready to sail for Thailand.

20. In May 2015 the vessel was sold by the owner, with Mr Varouxakis signing the bill of sale, to a new entity. It was renamed "FIGARO" and bareboat chartered back to another company in the Freeseas group. This had the effect of destroying the shipowner's possessory lien over the cargo for general average.

21. On 5 October 2015 the arbitral tribunal issued further awards, this time ordering the shipowner to deliver the cargo to the bill of lading holders in Oman. The shipowner did not comply with these awards either. The crew, by now in such distress that they were reliant on humanitarian aid from the port authorities, remained on the vessel, as did the cargo.

22. The crew was eventually repatriated in February 2017. On 28 March 2017, the arbitral tribunal issued yet further awards, requiring the shipowner to deliver up the cargo within 42 days. The bill of lading holders applied for these awards to be converted into judgments of this court, and those judgments were duly issued on 12 April 2017. They required the cargo to be delivered to the bill of lading holders in Oman by 9 May 2017. Once again, that did not occur.

23. In June 2017 the Salalah port authorities caused the now abandoned vessel to be moved within the port for safety reasons. It seems that the cargo was eventually discharged and sold in late 2017, though to whom and at what price is not in evidence. The vessel was also sold, for scrap.

24. Although London general average adjusters, Rogers Wilkin Ahearne LLP, were appointed by solicitors acting for the shipowner in June 2012 and produced a draft schedule for an adjustment in March 2013, no general average adjustment has ever been finalised. Nor has any general average security been obtained.

25. Griffin's case is that the events described above had the effect of wiping out the owner's claim for a general average contribution from the cargo interests. Any such claim would be substantially eroded, and probably extinguished, by the cargo interests' counterclaim for breach of the contracts of carriage, which they would assert as a defence by way of set-off.

26. On 1 August 2016 Griffin commenced proceedings for damages for breach of the Settlement Agreement against the shipowner and manager in this court. That claim was initially defended, but on 2 March 2017 the shipowner and the manager withdrew instructions from their solicitors and ceased to participate in the action. They are in breach of an unless order made by Andrew Baker J on 10 April 2017, with the result that their Defence is to be treated as struck out. Griffin could have proceeded to enter judgment against them but did not do so. They appear no longer to have any assets, or at any rate no identifiable assets against which a judgment could be enforced.

Griffin's claims in this action

27. On 17 February 2017 Griffin commenced this action against Mr. Varouxakis personally. The claim against him is for inducing or procuring breaches by the shipowner and manager of the Settlement Agreement. As appears from the Particulars of Claim, there are two principal aspects to the claim.

28. First, Griffin contends that it has lost the right to recover general average on a subrogated basis against the cargo interests (or the value of that claim has been substantially reduced) by reason of the failure of the shipowner to complete the voyage to be performed under the bill of lading contracts. This has been referred to as "the Lost GA Claim". Griffin contends that the owner and the manager were in breach of the express and implied terms of the Settlement Agreement referred to above and

that those breaches were procured or induced by Mr. Varouxakis. It says that, as a result of those breaches of the Settlement Agreement the shipowner was in breach of the bill of lading contracts so as to provide the cargo interests with a defence to any claim for general average contributions or alternatively with a monetary counterclaim which extinguishes or substantially reduces any such claim. Griffin's loss is said to be the amount of the general average contributions which it ought to have been able to recover, but cannot now recover, from the cargo interests.

29. Second, Griffin claims that the shipowner received a payment of US $800,000 from the cargo interests on account of general average together with a further payment of US $800,000 from the vessel's P&I club, for which it was obliged to account pursuant to clause 4 of the Settlement Agreement, but that Mr Varouxakis ensured that it failed to do so. This has been referred to as "the Accounting Claim".

The merits of the claim against Mr Varouxakis

30. It is common ground that I am not concerned on these applications with the merits of Griffin's claims against Mr Varouxakis. Although at one time it appeared that the defendant intended to argue that there was a "merit threshold" test to be satisfied, Mr Richard Sarll for the defendant disclaimed any such argument.

31. I make clear, therefore, that I express no view about the merits of the claim, one way or the other. If the case proceeds, these will have to be investigated, including the basis on which it is said that Mr Varouxakis has a personal liability (cf. *Moran Yacht & Ship Inc v Pisarev* [2014] EWHC 1098 (Comm) at [115]). I have heard no argument about this.

Chronology of the action

32. The claim form was served on Mr. Varouxakis personally in Greece on 8 March 2017. On 29 March he filed an acknowledgment of service indicating an intention to contest jurisdiction.

33. On 25 April 2017, before any further step had been taken in the action, the parties agreed a moratorium in relation to all litigation, terminable on 48 hours' notice.

34. Discussions then took place between Griffin's solicitors and Mr. Varouxakis to explore other possible avenues of recovery and whether any agreement could be reached. These discussions proved unsuccessful.

35. On 24 October 2017 Griffin's solicitors sent an email to Mr. Varouxakis in the following terms:

> "Several months ago, we agreed to stay the above legal action against you for recovery of value lost on account of the decision to transfer the Free Goddess from Adventure Five to another company. We agreed that we would not lift the stay without providing you with at least 48 hours' notice. …
>
> In these circumstances, Griffin has no option but to withdraw its agreement to an ongoing stay of the English action against you personally and move forward with proceedings.

> Could we please hear from you by Monday 6 November with any proposals to pay the loss suffered by Griffin failing which the action will proceed in England."

36. No such proposals were forthcoming. Instead, Mr Varouxakis responded on 6 November 2017 by describing Griffin's "purported claim" as "completely unmeritorious" and suggesting further discussion to find what he described as a constructive way forward.

37. There was then a telephone conversation between Griffin's solicitors and Mr. Varouxakis on 5 December 2017. No agreement was reached. Although some aspects of this conversation are disputed, a contemporary attendance note records Mr Varouxakis as having said that he had forgotten about the claim and that, as far as he was concerned, it "does not exist". That comment only makes sense if the context was that he was being told that it was going to be pursued.

38. Despite this, nothing happened in the action for some time. Mr. Varouxakis did not issue an application to challenge jurisdiction, nor did he serve a Defence. For its part Griffin did not take any steps, for example to obtain a default judgment.

39. In the event nothing further happened until 1 May 2018 when Griffin applied to enter judgment in default of defence against Mr. Varouxakis. That led to the issue on 25 May 2018 of the present application to challenge the jurisdiction of the court.

40. On 12 July 2018 there was a directions hearing before Teare J who ordered that the defendant's jurisdiction challenge should be heard together with its application for an extension of time and relief from sanctions (in the event that that was necessary), that Griffin's application for a default judgment should be heard following determination of the jurisdiction challenge, and that so far as necessary any stay which was in place pursuant to CPR 15.11(1) was lifted.

Is the defendant's application in time?

41. Miss Philippa Hopkins QC for Griffin submits that Mr Varouxakis' challenge to the jurisdiction comes too late. She says that he had 28 days to challenge the jurisdiction after acknowledging service, expiring on 26 April 2017; that time ceased to run against him as a result of the agreed moratorium concluded on 25 April, at which time there was one day left; but that the moratorium was terminated by Griffin's solicitors' email dated 24 October 2017 as a result of which time ran again from (at latest) 7 November 2017. As he failed to issue any application to challenge jurisdiction, he must be taken to have submitted.

42. Mr Richard Sarll for Mr Varouxakis agrees that the deadline for issue of an application to challenge jurisdiction was 26 April 2017 and that deadline was extended by the parties' agreed moratorium. He submits, however, that while that moratorium was still in force so that Mr Varouxakis was not required to do anything, an automatic stay of the proceedings came into effect pursuant to CPR 15.11(1), which could only be lifted by an application to the court; and that the jurisdiction challenge was issued on 25 May 2018 before the stay was lifted and was therefore in time.

43. In my judgment the correct analysis is as follows.

44. Upon filing his acknowledgement of service, Mr Varouxakis had 28 days to make his application to challenge the jurisdiction of the court, expiring on 26 April 2017: CPR 11(4) as varied for Commercial Court proceedings by CPR 58.7. In the event that he failed to do so, he would be treated as having accepted that the court has jurisdiction: CPR 11(5). The making of an application to challenge jurisdiction would mean that no Defence need be served: CPR 15.4(2).

45. CPR 2.11 provides that the time specified by a rule for a person to do any act may be varied by the written agreement of the parties. In the Commercial Court, however, any such agreement must be notified to the court in writing, with reasons, and the court may make an order overriding the agreement: CPR 58 PD para 7. It would no doubt be unusual for the court to wish to override a sensible agreement made by the parties, but this at least enables the court to retain control of the proceedings. CPR 2.11 contains no express limit on the length of any agreed variation of time but does include a cross reference to CPR 3.8. CPR 3.8 also enables the parties to agree an extension of time for doing an act required by the rules where the rules also specify the consequences of failure to comply, but provides that unless the court orders otherwise the maximum extension which can be agreed is 28 days and, even then, that the extension must not put at risk any hearing date. Paragraph C3.3 of the Commercial Court Guide explains that the general power to agree variations to time limits contained in CPR 2.11 enables the parties to agree extensions longer than 28 days, but that even if this is agreed, the court should be invited to make a consent order.

46. It seems to me that there is some tension between CPR 2.11 and CPR 3.8 but, in the Commercial Court at any rate, the parties must notify the court of any agreed extension, as required by the rules and the guide. In the present case the parties did not notify the court of the moratorium agreed on 25 April 2017. In those circumstances a question arises as to the effect of the moratorium. Did it take effect to extend the time for challenging the jurisdiction indefinitely despite the parties' failure to notify the court? Was it effective to extend the time but only for 28 days (e.g. if CPR 3.8 was the applicable rule)? Or did the failure to notify the court render the moratorium wholly ineffective?

47. I would hold that the failure to notify the court meant that the moratorium was not effective to extend the time for the defendant to challenge jurisdiction. It is important that the court retains control of the proceedings and has at least the opportunity to consider whether to override any agreement reached between the parties, in accordance with CPR 58 PD para 7. It is not open to the parties to agree an indefinite extension of time without notifying the court. To hold that the moratorium was effective despite the failure to comply with the notification requirement would deprive the court of control and would mean that there was no effective sanction for non-compliance. Or as Hobhouse J used to say in the days long before the CPR, in this court it takes three to make an agreement.

48. Accordingly Mr Varouxakis must be treated as having accepted that the court has jurisdiction in accordance with CPR 11(5). The same result would follow slightly later if the agreed moratorium was effective to extend the time but only for 28 days.

49. It is only if the moratorium was effective to suspend the running of time indefinitely, subject to 48 hours' notice, that there is any scope for a different conclusion. Even then, however, the result is the same. In that event Mr Sarll advances two

submissions. The first, as already noted, is that the agreed moratorium (in effect an agreed stay) was overtaken by an automatic stay pursuant to CPR 15.11 which could only be lifted on application to the court. However, CPR 15.11 only operates when six months have expired since the end of the period for filing a defence. If the period for filing a defence has been indefinitely extended by an effective agreement between the parties, there is no scope for an automatic stay.

50. The second submission is that no effective notice was given to terminate the agreed moratorium. Citing *Mannai Investment Co Ltd v Eagle Star Life Insurance Co Ltd* [1997] AC 749 at 768, Mr Sarll submits that the email dated 24 October 2017 was insufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when it was intended to operate. I do not accept this. In my judgment the email would have left the reasonable recipient in no reasonable doubt that, in the absence of a proposal to pay the claim (and not merely to discuss it) by 6 November 2017, the agreed moratorium would thereupon come to an end. At that point time would begin to run again. This was more than the 48 hours' notice required by the terms of the moratorium, but that is no objection.

51. Accordingly, even if the moratorium was effective in accordance with its terms, it came to an end after 6 November 2017 and, because Mr Varouxakis did not file an application to challenge the jurisdiction of the court, he must on this analysis also be treated as having accepted jurisdiction in accordance with CPR 11(5).

Should there be relief from sanctions?

52. It is common ground that the court has power to allow the defendant to make his application out of time, and that the principles governing relief from sanctions established by *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 should be applied.

53. Accordingly the first step is to identify the nature and seriousness of the defendant's failure. I have held that, strictly speaking, the defendant's time for making an application to challenge jurisdiction expired on 26 April 2017. On that basis, his application made on 25 May 2018 was 13 months late. However, in a case where the parties had agreed a moratorium, even one which I have held was ineffective, it was understandable that the defendant did not take any step to challenge jurisdiction between 25 April and 6 November 2017. After termination of the moratorium on 6 November 2017, however, there was in my judgment no valid reason to refrain from making the application to challenge jurisdiction if that was what the defendant intended to do. Realistically, therefore, the failure in question was a delay of six months in making a jurisdiction challenge. This was a serious failure.

54. The second step is to consider the reason for the failure. Mr Varouxakis' evidence is to the effect that he did not understand the email dated 24 October 2017 to amount to notice to terminate the agreed moratorium and that his understanding was that "the ball was therefore very clearly in [Griffin's] court when we ended the conversation on 5 December 2017". I find this difficult to accept. In my judgment the email dated 24 October 2017 is clear and the evidence of Griffin's solicitors that it was explained that Griffin had no option but to continue the action in the absence of any settlement proposal is inherently plausible. It is more likely that Mr Varouxakis was simply

hoping that, if he did nothing, the action would go away. I consider that there was no good reason for the failure to make the jurisdiction challenge.

55. Finally, it is necessary to consider what justice requires in all the circumstances of the case. Here Mr Sarll submits that an important and even overwhelming consideration is the fact that refusal of relief would involve a case being heard in England which would not otherwise have been heard here for lack of jurisdiction – although that submission can only be assessed if the challenge to the jurisdiction is first determined on its merits. Mr Sarll relies on what was said by Ms Sara Cockerill QC, sitting as a deputy judge of this court, in *Newland Shipping & Forwarding Ltd v Toba Trading FZC* [2017] EWHC 1416 (Comm) at [94]:

> "In this case there is an unusually disproportionate sanction, in that for the reasons which I have already given, this is a case where the Fifth Defendant would quite plainly be entitled to have the service of the claim form and the claim form itself set aside as this court clearly has no jurisdiction on the basis relied upon against the Fifth Defendant in relation to the claim sought to be brought against him. To deprive the Defendant of the opportunity to challenge a baseless assertion of jurisdiction when there is no prejudice would in my view be disproportionate. Further weight is given to this element by the fact that, moving beyond jurisdiction, a refusal of relief now would, as Mr Edey QC submitted, make an application to set aside the default judgment at the very least extremely difficult because that too would be advanced under the principles applicable to this application. Consequently the Fifth Defendant might find himself unable to set aside a judgment which this court had on a proper application of the rules no jurisdiction to pronounce and to which it appears likely there is a powerful defence."

56. It is apparent from this citation that *Newland Shipping* was a case where there was no proper basis for an assertion of jurisdiction over the defendant in question and where that defendant appeared to have a powerful defence on the merits. In such circumstances refusal of relief against sanctions would have meant, not only that the defendant was unable to pursue his jurisdiction challenge, but also that he was unlikely to be able to set aside the default judgment. It is not surprising that this was regarded as a disproportionate sanction.

57. However, I do not accept that *Newland Shipping* stands for any broader principle that a more liberal approach to relief from sanctions should apply to cases where a defendant has failed to challenge jurisdiction within the time provided by the rules. Nor is it necessary, in order to deal with the question of relief from sanctions, to determine how the defendant's jurisdiction application would be decided if the defendant were permitted to make it. On the contrary, the question of relief from sanctions will only arise in circumstances where the defendant has or may have a valid challenge to jurisdiction. Save in an obvious case such as *Newland Shipping* was held to be, that can be assumed. However, the rules provide a defendant with a fair opportunity to take steps to challenge jurisdiction. They spell out clearly in CPR 11(5) that the consequence of failing to take timely steps to do so is that he will be treated as having submitted. There is no need in these circumstances, at least in general, to regard the fact that the court will have jurisdiction where otherwise it might not have done as a reason, let alone a powerful one, to grant relief from the sanction provided by CPR 11(5).

58. Looking at the matter overall, I consider that it is not in the interests of justice to grant relief from sanctions in this case. To do so would not promote the efficient conduct of litigation. There has been a serious failure to comply with the rules for which there is no good reason. It is not a case where it is obvious that there is no proper basis for the court to take jurisdiction. There is no default judgment to complicate the position. The sanction (i.e. that the defendant is taken to accept the jurisdiction of this court) is not disproportionate. On the contrary, in his capacity as a director and the controlling mind of the shipowner Mr Varouxakis has been content to enter into agreements providing for English law and jurisdiction, including the Settlement Agreement itself. Although questions of *forum conveniens* are irrelevant when considering whether the court has jurisdiction under Article 7(2) of the Recast Brussels Regulation, I see no reason why the court should be required to shut its eyes to the fact that it is clearly the natural forum for this claim when considering a different question, whether the loss of the right to challenge jurisdiction is a disproportionate sanction.

59. There is, moreover, another feature of this claim which tells powerfully against an exercise of discretion in Mr Varouxakis's favour. That feature is the shipowner's repeated determination, at Mr Varouxakis's instigation, to flout the awards made by the arbitral tribunal, as well as the judgment of this court enforcing the most recent of those awards. There is no evidence at present that this was other than a deliberate choice made by Mr Varouxakis personally, such as to render him in contempt of court. Mr Sarll submitted that this was an irrelevant consideration, relating to other proceedings. I do not agree. It is necessary to have regard to all the circumstances of the case. Those circumstances include the history which I have set out.

Conclusion on timing

60. For these reasons I conclude that the application to challenge jurisdiction comes too late. The defendant must be treated as having accepted the jurisdiction of this court. It is not an appropriate case for relief against that sanction.

61. This conclusion is sufficient to determine this application and, in a way, it would be appropriate as well as tempting to conclude this judgment here. However, the merits of the jurisdiction challenge have been fully argued and I consider that I should deal with them, not least out of respect for the interesting and able arguments presented on each side.

Does the court have jurisdiction?

Article 7(2) – the law

62. I deal first with the arguments relating to Article 7(2) of the Recast Regulation. It is common ground that the burden is on Griffin as the claimant to demonstrate that the court has jurisdiction under Article 7(2) and that the standard to be applied is that of "good arguable case". This means that the claimant should have "the better of the argument". Where there is a dispute as to the applicability of a gateway, the court must take a view on the material available if it can reliably do so. As the Court of Appeal has explained in *The Atlantik Confidence* [2018] EWCA CW 2590 at [27] to [34], Lord Sumption's observations in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192 at [7] have not varied the evidential standard which the court should apply.

63. The principles applicable to Article 7(2) (and its predecessors, Article 5(3) of the Brussels Regulation and, before that, the Brussels Convention) have been established by a series of decisions by the CJEU in Luxembourg and by the courts in this country. They have recently been considered on two occasions by the Supreme Court: *AMT Futures Ltd v Marzillier* [2017] UKSC 13, [2018] AC 439 and *JSC BTA Bank v Khrapunov* [2018] UKSC 19, [2018] 2 WLR 1125. I can therefore summarise them briefly:

    (1) As a derogation from the general rule conferring jurisdiction on the defendant's domicile Article 7(2) must be interpreted restrictively.

    (2) The rationale for the derogation is that, when Article 7(2) applies, that provides a close connection between the dispute and the court in question. However, a claimant need only show that Article 7(2) applies. If it does, there is no additional requirement to establish any further degree of such connection.

    (3) Article 7(2) encompasses two concepts, (i) the place where the harmful event occurred which gave rise to the damage, and (ii) the place where the damage occurred. Where these occur in different jurisdictions, the claimant has an option to sue in either.

    (4) Where a claimant suffers initial harm in one jurisdiction and consequential financial loss in another jurisdiction, typically his own domicile, the place where the damage occurred for the purpose of Article 7(2) is where the initial direct and immediate damage (sometimes called the "actual" damage) occurred. Once such damage has occurred, the fact that its consequences can also be felt elsewhere makes no difference.

    (5) On the other hand, where the harm suffered is the non-payment of money in breach of an obligation to make a payment, the place where the damage occurred is the place where the money should have been paid. That will often but not always be the country of the claimant's domicile.

64. In the even more recent case of *Loeber v Barclays Bank Plc* [2018] I.L.Pr 39 at [27] the CJEU described the place where the damage occurred as being "where the damage actually manifests itself". The decision of the court recognises that this place may in an appropriate case be the place where the claimant has a bank account into which money ought to have been paid, but this will only be the case "when the damage alleged occurred directly in the applicant's bank account" (see [28] of the judgment). Manifestation of the damage is not a new test departing from the court's established case law. It is merely another way of expressing the same concepts.

65. The application of these principles is illustrated by numerous decisions of which the most important for present purposes are those discussed in the following paragraphs.

66. In *Dumez France SA v Hessische Landesbank* [1990] ECR I-49, French companies claimed to have suffered financial loss due to their interest in certain subsidiaries that were involved in a property development project in Germany. The subsidiaries became insolvent after the defendant bank cancelled loans to the main contractor. The question was whether the expression "place where the damage occurred" could be interpreted as referring to the place where the indirect victims of the damage

ascertained the repercussions on their own assets. The ECJ held that it could not. Instead, it held at [20] that "the latter concept can be understood only as indicating the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event".

67. In *Marinari v Lloyd's Bank Plc* [1996] QB 217, promissory notes were lodged by the claimant with a bank in Manchester. The notes were sequestrated by the bank and the claimant was arrested in England. He brought proceedings in Italy against an Italian branch of the bank, seeking payment of the promissory notes and compensation for the damage suffered as a result of his arrest. The ECJ held that the Italian court did not have jurisdiction. It explained at [14] that the special jurisdiction could not be construed "so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere".

68. *Domicrest Ltd v Swiss Bank Corpn* [1999] QB 548 concerned an exporter of electronic consumer goods whose practice was to ship goods but not release them until payment. It was negligently told by the defendant bank that a payment order constituted sufficient assurance that payment would be made, and so it released the goods in Italy and Switzerland. The question was whether the damage occurred in England (where it received and acted upon the assurance) or in Italy and Switzerland. It was held that the damage occurred in Italy and Switzerland, where the goods were released without prior payment. As Rix J explained at 568, "the essence of the complaint is in any event that the goods were released prior to payment on the strength of Swiss Bank Corporation's representations and contrary to Domicrest's trading policy".

69. In *Réunion Européenne SA v Spliethoff's Bevrachtingskantoor BV* [2000] QB 690 goods were carried aboard a vessel from Melbourne to Rotterdam, and then by road from Rotterdam to Rurgis (France) where damage was discovered. The freight forwarder was sued in France under its house bill of lading. The question was whether the master and the ocean carrier could be sued there too under the special jurisdiction in Article 5(3). The ECJ held at [35] that the place where the damage arose in the case of an international transport operation could only be the place where the actual maritime carrier was to deliver the goods.

70. In *Kronhofer v Maier* [2004] All ER (EC) 939, the claimant sued a German financial services provider for negligent advice in Austria, that being the place where his assets were concentrated and the loss suffered. It was held at [21] that "the expression 'place where the harmful event occurred' does not refer to the place where the claimant is domiciled or where 'his assets are concentrated' by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State".

71. In *Dolphin Maritime v Aviation Services Ltd v Sveriges Angfartygs Assurans Forening* [2009] EWHC 716 (Comm), [2010] 1 All ER (Comm) 473 a claims recovery agent (Dolphin) was appointed on behalf of cargo insurers after a vessel was involved in a collision which caused damage to the cargo. The vessel's interests were represented by the Swedish Club. Upon learning that the Club had approached the cargo insurers directly, Dolphin wrote to the Club, referring to its terms of appointment and demanding that payment be made to it. Instead, payment was made

to the Turkish insurers directly, whereupon Dolphin lost the ability to deduct its commission. Christopher Clarke J held that the relevant damage occurred in England. Under the contract, the underwriters were bound to procure that the sums recovered directly from the Club were paid in the first instance to Dolphin. When asking where the damage occurred, the answer was in England "where Dolphin did not receive the money which, if the contract had been performed, it should have received" (see [58]).

72. In *AMT Futures v Marzillier* [2015] EWCA Civ 143, [2015] QB 699, a financial services provider claimed damages from a German law firm for inducing clients to breach exclusive English jurisdiction clauses by bringing proceedings in Germany. It was held that the damage was suffered in Germany. In the Court of Appeal Christopher Clarke, LJ explained at [50] that:

> "There is a material distinction between the facts in the *Dolphin Maritime* case and the facts of the present case. In the *Dolphin Maritime* case the failure to pay in England, which the defendants were said to have induced, was the sole, direct and immediate cause of the loss which the claimant had suffered, namely the non-receipt of the money. In the present case the failure to start proceedings in England against AMTF did not of itself cause AMTF any loss at all. What did cause the loss was the proceedings which were started in Germany."

73. The decision of the Court of Appeal was upheld by the Supreme Court [2017] UKSC 13, [2018] AC 439. Lord Hodge commented at [15] that the focus is on where the direct and immediate damage occurred.

74. In *JSC BTA Bank v Khrapunov* [2017] EWCA Civ 40, [2017] QB 853 the claimant bank was granted worldwide freezing orders in support of proceedings which it had brought to recover large sums of misappropriated money. The first defendant breached that order by dealing with frozen assets. The bank, alleging that the second defendant had assisted the first in his wrongful dealings in assets, brought an action against both defendants for conspiracy to injure by unlawful means. Teare J held that the bank's damage did not occur in England. Although England was the place where its chose in action, its freezing order and its judgment were to be found, all of which been reduced in value, the place where the bank suffered "harmful effects" was the place where the asset was wrongly dealt with in breach of the freezing order. As a result of wrongful dealings with those assets the bank's opportunity to seize the assets in execution of the judgment was either lost or impeded. This was the element of damage which was closest in causal proximity to the harmful event. The decision of Teare J on this point was upheld by the Court of Appeal. This aspect of the decision was not challenged in the Supreme Court.

75. Finally, I should mention *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm). This case was concerned with the expression "the country in which the damage occurs" in Article 4 of the Rome II Convention on choice of law, but Cockerill J described the authorities on Article 7(2) of the Recast Brussels Regulation as likely to be useful in interpreting Article 4. She expressed the view at [490] to [497] that the principle in *Dolphin Maritime* (i.e. that when the relevant damage is the non-receipt of money, the place where the damage occurs is the place where the money should have been paid) does not depend on the existence of an obligation to pay in a particular place.

76. It is apparent that the determination of the place where the damage occurred may call for a finely balanced exercise of judgment, particularly in a case of economic or financial as distinct from physical damage. Indeed, as Sales LJ observed in the Court of Appeal in *JSC BTA Bank v Khrapunov* [2017] EWCA Civ 40, [2017] QB 853 at [71], there may be cases where there is a rational basis for more than one view and no single right answer.

Article 7(2) – application

77. It is necessary to consider separately the two claims brought by Griffin. While it would be untidy, in a case where there are two related claims, to conclude that the English court had jurisdiction under Article 7(2) to deal with one claim but not the other, the remedy for such untidiness lies in the claimant's hands as the defendant can always be sued in the courts of the country where he is domiciled.

78. I deal first with the Lost GA Claim.

79. The bills of lading provided that:

> "General Average shall be adjusted, stated and settled according to the York Antwerp Rules 1994 … in London."

80. Although it may be strictly correct to say that there is no binding decision to this effect as a matter of *ratio*, there is no real doubt that this imports an obligation on the bill of lading holders to pay any net general average contributions due from them to the average adjuster in London: see *The Evje* [1975] AC 797 at 815B and 817B-C and *Mora Shipping Inc v Axa Corporate Solutions Assurance SA* [2005] EWCA Civ 1069, [2005] 2 Lloyd's Rep 769 at [5].

81. Rights in general average arise at the time of the relevant sacrifice or expenditure (*Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65), but Rule G of the York Antwerp Rules 1994 provides for general average to be adjusted "upon the basis of values when and where the adventure ends". That occurs when the cargo is discharged from the vessel: *The Trade Green* [2000] 2 Lloyd's Rep 451.

82. If the shipowner had performed its obligation under the bill of lading contracts to repair the vessel and complete the voyage to Thailand, average guarantees would in the usual way have been obtained from the cargo insurers prior to discharge. The standard form of average guarantee which would have been obtained in this case provides for English law and jurisdiction and includes an undertaking by the cargo insurers to pay to the shipowner or the average adjusters any contribution to general average due from the cargo interests. An average guarantee in that form enables the cargo insurers to choose whether to pay the shipowner directly or to pay the adjusters who will then account to the shipowner: *Mora Shipping Inc v Axa Corporate Solutions Assurance SA* [2005] EWCA Civ 1069, [2005] 2 Lloyd's Rep 769. In practice, no doubt, such payments would be made to the average adjusters who would account in this case to Griffin by virtue of its rights of subrogation and the express terms of the Settlement Agreement.

83. As it was, the voyage was never completed and no average guarantees were obtained. Further, the liability of the cargo interests to pay general average was extinguished or

very substantially eroded by the shipowner's breach of the contracts of carriage in failing to complete the voyage.

84. It is necessary in these circumstances to identify the damage in question. Was the damage suffered by Griffin the non-payment of a general average contribution by the cargo interests which ought to have been paid or the loss of or damage to contractual rights to receive such payments? Mr Sarll submits that the jurisdictionally relevant damage occurred in Oman where the voyage was wrongfully abandoned, thereby diminishing the value of any claim for general average contributions, alternatively in Thailand where the cargo ought to have been delivered but was not. Miss Hopkins submits that this conflates the event causing damage with the damage itself: Griffin's complaint is not that the cargo was not delivered but that as a result of that failure to deliver it is unable to recover general average which (it says) would have been paid in London.

85. Although there is something to be said on both sides, in my judgment the better view is that the initial direct and immediate damage was suffered in Oman where the shipowner was induced by Mr Varouxakis to abandon the voyage. Griffin's claim is that it suffered an inability to enforce a right (i.e. its subrogated right to general average contributions), the value of which would have been realised in London. However, that damage was suffered as soon as and, in my judgment, in the place where the value of the right was adversely affected. If the value of the right had not been damaged by the shipowner's breach of the bill of lading contracts, there would in due course have been an adjustment after delivery of the cargo in Thailand, which would in practice have resulted in a payment by the cargo insurers to the average adjusters in London. It can therefore be said that damage occurred also in London, but that was in reality the consequence of damage which had already occurred by reason of the abandonment of the voyage. Indeed the abandonment of the voyage meant that there was no point in requiring the average adjusters to carry out the adjustment which would have triggered the payment of the amount found to be due. Either it was obvious that any such liability would be extinguished by the bill of lading holders' counterclaim or alternatively any remaining claim for cargo's contributions would be effectively unenforceable without the security of an average guarantee from the cargo insurers, the ability to obtain which was lost with the loss of the shipowner's possessory lien when the vessel was sold in Oman. On either basis, the damage occurred in Oman.

86. Accordingly I would have held that the court does not have jurisdiction to try the Lost GA claim as the place where the damage occurred was not in England.

87. This conclusion renders it unnecessary to consider where the damage occurred if the relevant damage was non-payment of the cargo interests' general average contribution. Miss Hopkins submits that the payment would have been made in London, while Mr Sarll submits that the relevant payment would have been to Griffin in Guernsey. As explained above, the payment in question would have been made by the cargo insurers in accordance with the terms of an average guarantee which would have given them the option either to pay Griffin directly or to pay the adjusters. It is highly likely that in practice they would have chosen to make the payment to the adjusters in London, who would then account to Griffin, but they would not have been obliged to do so. The reasoning of Cockerill J in *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) may suggest that what matters for the purpose of Article

7(2) is where the payment would in fact have been made rather than whether there was an obligation to make payment in that place. However, it is unnecessary for me to determine that question.

88. The Accounting Claim is more straightforward. Here Griffin's claim relates to two payments totalling US $1.6 million which were received by the shipowner from the cargo interests and the vessel's P&I club. The shipowner was obliged by clause 4 of the Settlement Agreement to account to Griffin for those payments but was induced by Mr Varouxakis not to do so.

89. Clause 4 provided that:

> "Owners and Managers hereby undertake to account to Insurers for any and all amounts that Owners may recover pursuant to Third Party Recoveries and hereby authorise the appointed Average Adjuster to hold any such funds received from third parties to the order of Insurers in respect of the Final Settlement."

90. Mr Sarll submits that this single sentence contains two separate provisions: (1) an obligation to account to Griffin by making a payment to Griffin's bank account in Guernsey and (2) an authorisation to the average adjusters in London to hold any funds received by them from third parties to Griffin's order. In my judgment this over complicates a straightforward provision. The way in which the shipowner is required to account to Griffin for amounts recovered from third parties is by payment of those amounts to the average adjusters. The reference to the average adjuster holding "any *such* funds received from third parties" confirms that the funds which the average adjuster is authorised to hold to Griffin's order are or include the same funds as have been recovered by the shipowner and accounted for by being paid to the average adjusters.

91. I would therefore have held that so far as the Accounting Claim is concerned, the claim is a claim that Mr Varouxakis procured the non-payment of money which ought to have been paid to the average adjusters in London, so that this claim falls within Article 7(2).

"Matters relating to insurance"

92. Mr Sarll submits that the claim is a "matter relating to insurance" within the meaning of Section 3 of Chapter II of the Recast Brussels Regulation, with the consequence that (regardless of where the damage was suffered) pursuant to Article 14 the insurer may only bring proceedings in Greece where the defendant is domiciled.

93. The Court of Appeal gave judgment in *The Atlantik Confidence* [2018] EWCA Civ 2590, dealing with the scope of Section 3 of the Regulation, on the day after the hearing of this application. Accordingly the parties have made brief written submissions as to the effect of that decision.

94. Article 10 provides:

> "In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of article 7."

95. Article 14 provides:

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

96. Not all claims brought by a claimant who happens to be an insurer comprise matters relating to insurance. In *The Atlantik Confidence* at first instance [2017] EWHC 3040 (Comm) at [70] and [71] the test applied by Teare J was whether the nature of the claim made by the insurers was so closely connected with the question of liability under the contract of insurance that it could fairly and sensibly be said that the subject matter of the claim related to insurance or, in other words, whether consideration of the insurance contract was indispensable to the determination of the claim.

97. In the Court of Appeal [2018] EWCA Civ 2590 at [77] to [80] Gross LJ agreed with this approach. It was necessary to consider the position "as a matter of reality and substance" and to determine whether consideration of the insurance policy was indispensable to determination of the claim. He referred also to the need for a "material nexus" between the policy and the claim.

98. In my judgment neither of Griffin's claims are matters relating to insurance. The fact that Griffin is an insurer forms part of the background to the claim and explains why the harm which Griffin has suffered is the loss of an ability to enforce a subrogated right (although insurers are not the only people who sometimes have the benefit of rights of subrogation), but that is all. In all other respects the nexus between the claim in tort and the policy is tenuous. Determination of the claim requires no consideration of the terms of the policy, which was scarcely looked at during the hearing.

99. In *The Atlantik Confidence* [2018] EWCA Civ 2590 it was held that even though the claim was a matter relating to insurance, the defendant bank could not rely on Article 14 because it was not "the weaker party" within the meaning of Recital (18) of the Recast Brussels Regulation. This was not because of the defendant's individual position but because of its membership of a class not meriting the special protection afforded by Section 3 of Chapter II of the Regulation. Founding on this conclusion, Miss Hopkins submitted that Mr Varouxakis could be described as a member of a class of "substantial shipowners" who likewise were not entitled to rely on Article 14. No such argument had been advanced at the hearing or addressed in the parties' evidence. If the point had mattered, I would have held that it was too late to be raised in a brief note after the hearing.

Conclusions

100. For the reasons which I have explained:

(1) The defendant must be treated as having accepted the jurisdiction of this court.

(2) Relief against sanctions is refused.

(3) Accordingly the defendant's jurisdictional challenge is dismissed.

(4) Had it been otherwise, I would have held that the court has jurisdiction under Article 7.2 to determine the Accounting Claim but not the Lost GA Claim and that the claim is not a matter relating to insurance.