

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 9.30am on Friday 29 May 2020



Neutral Citation Number: [2020] EWHC 1348 (Comm)

**Claim No. CL-2017-000525**

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS & PROPERTY COURTS OF**  
**ENGLAND & WALES**  
**COMMERCIAL COURT (QBD)**

Before:  
**MR JUSTICE WAKSMAN**

**BETWEEN:**

- (1) **SENIOR TAXI AEREO EXECUTIVO LTDA**  
(2) **SYNERGY HELICOPTERS II LLC**  
(a limited liability company incorporated under the laws of Delaware)  
(3) **SYNERGY AEROSPACE CORP.**  
(a company incorporated under the laws of Panama)

Claimants

**and**

- (1) **AGUSTA WESTLAND S.p.A.**  
(A company incorporated under the laws of Italy)  
(2) **AGUSTA WESTLAND LIMITED**  
(3) **LEONARDO S.p.A**  
(A company incorporated under the laws of Italy)  
(4) **AGUSTA WESTLAND NV**  
(A company incorporated under the laws of The Netherlands)  
(5) **AGUSTA S.p.A.**  
(A company incorporated under the laws of Italy)

Defendants

Matthew Reeve (instructed by asb law LLP, Solicitors) for the Claimants  
Tim Marland (instructed by Holman Fenwick Willan LLP, Solicitors) for the Defendants

**APPROVED JUDGMENT**

**Hearing dates: 27 and 28 April 2020**

## **INTRODUCTION**

1. The proceedings before me arise out of the fatal crash of an Agusta Westland AW 139 twin turbine helicopter (“the Helicopter”) on 19 August 2011, during a flight from the Petrobras P-65 offshore oil platform in the Atlantic, west of Rio de Janeiro, to Macae Aerodrome in Brazil. The Helicopter crashed into the sea in the Campos Basin, killing both pilots and both passengers. CENIPA, which is the Brazilian equivalent of the UK Air Accidents Investigation Branch, produced an interim report following its initial investigation of the accident, on 25 August 2011. Its final report was not published until 22 June 2017, almost 6 years after the accident.
2. The Third Claimant, a Panama company, was the original purchaser of the Helicopter from the First Defendant, AgustaWestland S.p.A. (“AW S.p.A.”), an Italian company, pursuant to a contract dated 1 September 2006. By an assignment made between AW S.p.A., the Third Claimant and the Second Claimant, A Delaware company, the purchase contract was assigned to the Second Claimant which then leased the Helicopter to the First Claimant, a Brazilian company, pursuant to a lease agreement made on 4 June 2007. The First Claimant was the operator of the Helicopter at all material times, as well as being the lessee. It makes the primary claims in this action and such claims are also made further, or in the alternative, by the Second and Third Claimants. For present purposes, I can treat all Claimants together and so refer to them collectively as “Senior”.
3. The Second Defendant, presently known as AgustaWestland Limited (“AW Limited”) is an English company. The Third Defendant, Leonardo S.p.A. (“Leonardo”) is another Italian company. The First to Third Defendants are all part of the Leonardo group of companies. The Fifth Defendant is the same corporate entity as AW S.p.A., simply being its former name and can thus be disregarded. The Fourth Defendant was a Dutch company, part of the same group but which now no longer exists, so it can equally be disregarded.
4. On 21 November 2012, Clyde & Co., then acting for Senior, wrote to AW S.p.A. and also Agusta Westland do Brasil Ltda, a Brazilian company, intimating a claim against either or both of them. They made a further claim letter on 9 July 2013. No proceedings were issued anywhere at that time. On 21 July 2016 Senior’s Italian lawyers wrote to AW S.p.A. and Leonardo in order formally to interrupt the running of time for the purposes of any Italian proceedings. Following publication of the CENIPA final report, those lawyers wrote again to interrupt time on 24 July 2017, 2 July 2018 and 24 June 2019. No proceedings have yet been commenced in Italy.

## **RELEVANT CORPORATE HISTORY**

5. This is essentially not in dispute. AW Ltd was known as Westland Helicopters Ltd from 1966 until 1996. It was then known as GKN Westland Helicopters Ltd until 12 February 2001. This reflected the fact that it had become part of the GKN group of companies. It then reverted to the earlier name of Westland Helicopters Ltd until 1 June 2011 after which it took its present name. Since 1 January 2017 it has been non-trading.
6. In July 2000, the Italian conglomerate known as Finmeccanica S.p.A., which at that time was the owner of the Agusta helicopter business, announced the merger of that business with GKN’s helicopter business which included AW Ltd. The merger was completed by February 2001 which is why AW Ltd at that point dropped the “GKN” part of its name.
7. It is not entirely clear if there was a new corporate entity resulting, which consisted of the merged businesses of AW S.p.A. and AW Ltd, while those two companies still operated, but at any rate, GKN and Finmeccanica each owned 50% of the overall merged helicopter business. In around 2004 GKN disposed of its 50% share to Finmeccanica and AW Ltd itself is now a wholly-owned subsidiary of Leonardo. The latter company had previously been known as Finmeccanica S.p.A. But it and the group subsequently changed its name to Leonardo. AW S.p.A. was originally incorporated as Agusta S.p.A. in May 1999 and this was its name at the time of the merger. It adopted its present name thereafter. Pursuant to an agreement made in January 2016 all the assets

and liabilities of AW S.p.A. Were transferred to Leonardo. Since then, Leonardo has been the sole owner of the relevant helicopter business.

8. Accordingly, whatever else may be said about the involvement (or otherwise) of AW Ltd in the work or projects of AW S.p.A., there was no formal corporate connection until completion of the merger in 2001.

## **THE ACCIDENT**

9. CENIPA's final report concluded essentially as follows:
  - (1) one of the tail rotor blades of the Helicopter ("the TRB") was compromised by manufacturing defects including porosity, voids, torsion box damage and delamination, giving rise to cracks and breakage;
  - (2) the TRB broke off during the flight causing an immediate yaw to the right;
  - (3) within a second or less, the vibration of the remaining tail rotor blades ripped off the tail rotor assembly, severing the pipework of the No. 1 and No. 2 hydraulic systems which power the aircraft controls;
  - (4) the fluid in the No. 1 hydraulic system drained away immediately rendering it useless;
  - (5) for about 7.5 seconds, the tail rotor shut-off valve (TRSOV) involved in the No. 2 hydraulic system operated to retain fluid power in the system, probably allowing the pilots to regain control of the aircraft;
  - (6) the TRSOV then failed, because of a (further) manufacturing or design defect emptying out the remainder of the hydraulic fluid in No. 2, and depriving the pilots of any means of controlling the aircraft;
  - (7) as a result, the aircraft fell, uncontrolled, into the sea;
  - (8) there have been at least two prior similar instances of defective rotor blades on AW 139 aircraft breaking off, each resulting in the immediate detachment of the tail rotor assembly:
    - (a) B-MHJ (East Asia Airlines) which ditched in Hong Kong Victoria Harbour on 3 July 2010 with 2 pilots and 11 passengers; and
    - (b) A7-GHA in Qatar on 2 May 2011.
10. The TRB which broke off here, numbered Q1018, was a replacement. It had originally been fitted to a different helicopter in September 2008 and then to a further helicopter in August 2010. It was later repaired and put back into circulation as a warranty replacement part on a yet further helicopter. Finally, it was fitted to the Helicopter on 22 April 2011 and remained on it until the flight in question.

## **THE CLAIM**

11. Paragraph 10 of the Particulars of Claim alleges that at the material time, AW Ltd's business included the design and manufacture of its own helicopters and the provision of helicopter research and design services to others and made reference to its December 2003 accounts. Paragraph 21 alleges that "the Defendants" were designers, manufacturers re-manufacturers, sellers, suppliers repairers, maintainers of the AW 139 helicopter type, its parts and components and were suppliers of connected services. Paragraph 22 alleges that the AW139 was at the material times marketed by "the group" as the Agusta Westland AW139 and parts were marketed as Agusta Westland parts. Paragraph 34 alleges that the AW139 tail rotor blades, as "designed, manufactured (etc) by [the] Defendant[s] appeared frequently to contain defects". Paragraph 35 alleges that "the Defendants" should have recognised the existence of such defects prior to the accident.

12. Paragraph 43 cited the two previous accidents where tail rotor blades had broken off leading to the immediate detachment of the tail rotor assembly. Paragraph 44 alleges that by then at the latest, “the Defendants” should have been aware of this. Paragraph 56-58 alleged negligence against the Defendants with 51 separate particulars together with reliance upon *res ipsa loquitur*. Paragraphs 59-60 alleged as against all Defendants breach of European Directive 85/374, the Consumer Protection Act 1987 (“the 1987 Act”) and/or Italian law as suppliers of defective products, namely the Helicopter and/or the TRB.
13. Again as against all Defendants, Senior claims the following losses:
  - (1) An indemnity in respect of the monies paid out by way of compensation to the families of the deceased put at about Brazilian Reals R\$6.2m (“the Indemnity Claim”);
  - (2) Loss of value of the Helicopter at between US\$8-11m;
  - (3) Search and Rescue costs;
  - (4) Wreckage storage costs (to be quantified), and
  - (5) Business losses including loss of profits (to be quantified).
14. The Defendants, among other things, deny that AW Ltd had any role in relation to the design manufacture, supply or marketing of the Helicopter or the TRB. AW Ltd’s Defence states that it did not provide any relevant research or design services and also that the Particulars of Claim fails to articulate any coherent allegation against it. Paragraph 16 says that the generic expression “the Defendants” is wholly inadequate. Paragraph 17 says that AW Ltd at no time marketed the AW139 and it was never represented as a helicopter produced or supplied by it. It further denied in paragraph 26 that it assembled or delivered it. It said that it was clear that the Helicopter had been manufactured by AW S.p.A. In paragraph 27, AW Ltd denied any involvement in the design manufacture supply or fitting of the TRSOV or tail rotor blades. Paragraph 35, without prejudice to the earlier denials, alleged that the claim included a claim for damages in respect of personal injuries and so any claim in negligence was now time-barred.
15. AW Ltd then pleaded further detailed points as to the non-availability against it of any claim under the 1987 Act or other relevant provisions. Further limitation points were taken as well as alleging that the claimed losses included irrecoverable claims for pure economic loss.

### **THE ISSUES ON THE APPLICATIONS**

16. There are before me, two applications:
  - (1) AW Ltd’s application to strike-out the claims against it or have them summarily dismissed pursuant to CPR Part 24 (“the Strike-out Application” and “the Summary Judgment Application”);
  - (2) The other Defendants’ application to set aside the proceedings against them for want of jurisdiction (“the Jurisdiction Application”).
17. As refined in argument, AW Ltd’s essential contentions are these:
  - (1) On the Strike Out Application, there is no properly articulated claim against it and/or there is an abuse of process, so that the Particulars of Claim should be struck out;
  - (2) In the alternative, and pursuant to the Summary Judgment Application, there is in any event no viable or sustainable claim at all against it. It has no real prospect of success because (a) on the facts AW Ltd had nothing to do with the design or manufacture of the Helicopter, the TRB or the TRSOV and (b) all or part of the claim is now time-barred or fails for other reasons.

18. Senior denies all of this. It adds that on the Summary Judgment Application even if the claim has no real prospect of success, there are other compelling reasons for a trial. This latter contention is denied, in turn, by AW Ltd.
19. As for the Jurisdiction Application, AW S.p.A. and Leonardo, contend that:
  - (1) Article 8(1) of the Recast Brussels Regulation (“the Regulation”), was the basis for service of these proceedings out of the jurisdiction against them, as foreign-domiciled companies; but it could only be invoked if there was, at the outset, a properly pleaded and viable claim against AW Ltd as the “anchor Defendant”;
  - (2) However, there is no such claim here and accordingly Article 8 (1) does not operate.
20. For its part, Senior denies both propositions.

### **THE EVIDENCE**

21. The following evidence was adduced before me:
  - (1) Four witness statements from Ms Lorraine Wilson, the Defendants’ solicitor, dated 30 April, 21 and 28 June and 6 September 2019;
  - (2) Two witness statements of Mr Andrea Parrella, Leonardo’s General Counsel, dated 30 April and 5 September 2019;
  - (3) Two witness statements of Clive Higgins, a director of AW Ltd, dated 21 June and 6 September 2019;
  - (4) The witness statement of Simon Amos, Senior’s solicitor, dated 19 July 2019.

### **INTIMATIONS OF A CLAIM AGAINST AW LTD**

22. It is correct to say that save in one respect, there was no suggestion of any claim against AW Ltd until late 2017. There is some correspondence, however, which is relevant to matters discussed.
23. On 12 September 2011, Clyde & Co., then acting for Senior sent two claim letters in the same terms to “the Insurance Manager” of “Agusta-Westland” at Yeovil and at Farnborough. The letters make reference to the initial CENIPA report and some other documents, as a result of which it was said that Senior considered that the responsibility for the loss rests with “Agusta-Westland” on the basis of the design and manufacture of the tail-rotor assembly and its associated components which was defective, or that there was inadequate warning of latent defects. They sought early “without prejudice” discussions including as to the funding/settlement of passenger claims in particular. They also said that they would be seeking recovery of the value of the helicopter hull together with other costs arising. Those letters (or one of them) were then forwarded by Mr Mike Bird, then Head of Risk Management with AW Ltd, to some loss adjusters or insurers, but which were then forwarded in turn to AW S.p.A.. Mr Bird’s email stated:

“.. It would seem that Clyde & Co. are trying to draw Agustawestland Ltd into this action which, on my present understanding, is probably erroneous. As this case is being handled by Agustawestland S.p.A. would you please request the legal team in Cascina Costa and Insurers etc to respond to this letter repudiating any involvement of Agustawestland Ltd. Would you please keep me copied into such correspondence and any issues etc that involve or name Agustawestland Ltd.”
24. On 29 September 2011, Gates and Partners, solicitors, wrote to Clyde & Co. as follows:

“We refer to your letter of 12<sup>th</sup> September to Agusta Westland and write to advise you we are instructed on behalf of the company and its Insurers in relation to this matter. We are advised that the addressees of your letters have no involvement with any relevant aspect of this incident. We are making enquiries into the circumstances of the case and will revert to you with regard to the matters that you have raised as soon as possible.”

25. According to Mr Parrella, Mr Gates of that firm had never actually been instructed on behalf of AW Ltd, as opposed to AW S.p.A. for whom he had been instructed for a while. That explanation actually fits with the contents of his letter.
26. At any rate it seems that there was no further correspondence involving AW Ltd. It appears that there were further letters written by Clyde & Co. on 31 October and 28 November 2011 but to AW S.p.A. in Italy. One can see this from the further letter dated 21 November 2012 to AW S.p.A.. The terms of this letter are similar to those from 12 September 2011. The letter ends by saying that given the time that had passed since previous communications if there was no response to this letter within the next 21 days advising whether or not AW S.p.A. was interested in entering into early without prejudice discussions, “we will have no option but to enter into formal recovery proceedings.” As we know, that did not happen until 2017.

## **THE LAW**

### **Strike-out**

27. A claim will be struck-out if it discloses no reasonable grounds for bringing the claim. See CPR 3.4 (a). Another basis for striking-out a claim is where it is an abuse of process. AW Ltd invokes this ground as well, but on the basis that the claim made against it is part of an abusive invocation of Article 8 (1), so as to bring in the other Defendants. I consider that issue in the context of both sets of applications.

### **Summary Judgment**

28. Part 24 provides that the Court may give summary judgment if
  - “(a) it considers that—
    - (i) that claimant has no real prospect of succeeding on the claim or issue; or
    - (ii) that defendant has no real prospect of successfully defending the claim or issue; and
  - (b) there is no other compelling reason why the case or issue should be disposed of at a trial.”
29. So far as the existence or otherwise of a real prospect of a successful defence (or, as here, claim) is concerned, I can take the relevant principles from paragraph 29 of AW Ltd’s skeleton argument which refers to the decision of Lewison J (as he then was) in *Mellor v Partridge* [2013] EWCA Civ 477 at paragraph 3 (and as summarised by me):
  - (1) there must be a “realistic” as opposed to “fanciful” prospect of success;
  - (2) the former is one which carries some degree of conviction and more than merely arguable;
  - (3) to decide this, the court must not conduct a “mini-trial”
  - (4) but this does not mean that the court must take at face value and without analysis everything that the party facing the application for summary judgment says in his statements. Sometimes it may be clear that there is no real substance in factual assertions, particularly if contradicted by contemporaneous documents;
  - (5) however, the court must also take into account any evidence that can reasonably be expected to be available at trial though not before it then;
  - (6) the court should hesitate to make a final decision without a trial even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for

believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the judge and so affect the outcome of the case;

(7) on the other hand if there is a short point of law or construction and the court has all the evidence necessary to decide it, the court should grasp the nettle and do so; if it is possible to show by evidence that, while there is not presently any material in the form of documents or oral evidence to show the documents in another light, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would then be a real prospect of success. But it is not enough to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on construction.

30. So far as another compelling reason for a trial is concerned, this arises for consideration, strictly, only when the Court has decided that there is no real prospect of success. There was no extended argument before me about the scope of “compelling reason” but in practice it will only be exceptionally that a Court will permit a claim or defence to proceed to trial where it is not viable on the merits. That follows from the use of the word “compelling”. It may be because of the same issues arising anyway with other parties. It may be because there is something about the case that requires the “full glare of publicity” but on the other hand, a Micawberist hope that “something may turn up” at trial is not sufficient under this head just as it is not sufficient to show a real prospect.

### **Article 8 (1) and “the Merits Test”**

#### *Introduction*

31. Article 8 (1) provides as follows:

“a person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

32. The Defendants’ contention is that in order for Article 8 (1) to apply at all, the claim against the anchor defendant must at least be a sustainable one. I described this as “the Merits Test”. For present purposes, the requirement of sustainability can be equated with “viability”, “a real prospect of success”, a “serious issue to be tried” or a “good arguable case”. Neither party sought to argue that any fine point of distinction between these various expressions was relevant here. As already noted, the Defendants allege that there is no viable claim and accordingly, there is no jurisdiction as against AW S.p.A. or Leonardo.

33. Senior, for its part denies the existence of a Merits Test as asserted by the Defendants although it accepts that the application of Article 8 (1) can fail where it constitutes an abusive attempt to bring in foreign defendants - but this is not one of those cases.

34. Senior also contends, if necessary, that if the claim is not struck out or dismissed and is permitted to go to trial because (and only because) there is a compelling reason for a trial, the absence of merit in the underlying claim cannot be a reason to oust the operation of Article 8 (1) even if it otherwise would be. That subsidiary point of law only arises if there is such a compelling reason and I prefer to address it in that context later in this judgment.

35. In order to deal with the Merits Test, it is necessary to consider a number of English and EU authorities.

#### *The Case-law*

36. I propose to deal with this chronologically.

37. In *Reisch Montage v Kiesel* [2007] I.L.Pr 10, the claim against the anchor defendant in Austria was held to be inadequate under Austrian law because that defendant was in fact already bankrupt. By the time this point emerged, the claimant had joined the guarantor of the anchor defendant's debts, a German company, under Article 6 (1) of the Brussels Regulation (the same provision is in Article 8 (1) and where I refer simply to Article 6 (1) because of the context, that must be borne in mind).
38. In deciding that the claim against the non-anchor defendant should not be dismissed, the CJEU held that:
- (1) there was no express wording in Article 6 (1) requiring the "admissibility" of the claim against the anchor defendant;
  - (2) the scope of Article 6 (1) had to be determined independently and not by reference (for example) to a domestic provision governing admissibility.
39. The Court concluded thus:
- "32. However, the special rule on jurisdiction provided for in Art.6(1) of Regulation 44/2001 cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled... However, this does not seem to be the case in the main proceedings.
33. In the light of all of the above considerations, the answer to the question referred must be that Art.6(1) of Regulation 4/2001 must be interpreted as meaning that, in a situation such as that in the main proceedings, that provision may be relied on in the context of an action brought in a Member State against a defendant domiciled in that state and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant."
40. It appears (from the Austrian judgment at first instance) that the claimant was unaware that the anchor defendant was bankrupt when the proceedings were issued. This probably explains the last sentence of paragraph 32.
41. In *Freeport v Arnoldsson* [2008] QB 634, the CJEU dealt again with the interpretation of Article 6 (1). The first question is not relevant save that it should be noted that the Court observed this:
- "41. It is for the national court to assess whether there is a connection between the different claims brought before it, that is to say a risk of irreconcilable judgments if those claims were determined separately and in that regard to take account of all necessary factors in the case file which may, if appropriate, yet without its being necessary for the assessment, take into consideration the legal basis of the actions brought before that court."
42. The second question asked was whether, in addition to its express requirements, there was a requirement that the sole object of its invocation was not simply to bring in the foreign defendants, out of their "home" jurisdiction as it were. I refer to this as the "Sole Object Prohibition". The Court said that there was no such prohibition (cf the Court in *Reisch*).
43. The third question was whether the likelihood of success on the claim as against the anchor defendant was relevant to the determination of the risk of irreconcilable judgments. The Court considered that it was not necessary to deal with that question.
44. The Advocate-General's Opinion was that there was a Sole Object Prohibition. He argued at paragraph 61 that if there was no such prohibition then the risk of fraud or abuse could not be eliminated.
45. In *Brown v InnovatorOne* [2010] EWHC 2281, the issue was (a) whether, on the application of Article 6 (1) it was necessary to show a viable claim against the non-anchor defendant and (b) if so, whether there was such a claim there. Hamblen J (as he then was) held that it was necessary to show an arguable claim but there was not such a claim in that case. He also held that there was no realistic possibility of proceedings elsewhere anyway. However, he also made the following *obiter*



observations as to the position in relation to the anchor defendant, albeit that the claimant there had already conceded that it needed to show a serious issue to be tried:

“25. I accept that in order to show that it is expedient to hear the claims together, it will generally be necessary for the claimant to establish that there is a serious issue to be tried against the co-defendant as well as the anchor defendant. This is because, if the court concludes that the claim against the co-defendant is not seriously arguable, then it is unlikely to be expedient to determine it together with the claim against the anchor defendant since there is no sufficiently arguable claim to found the requisite connection, and there is unlikely to be any risk of irreconcilable judgments since, even if the proceedings could be and were brought elsewhere, the outcome would be the same, if there is no seriously arguable claim.

26. Briggs & Rees on Civil Jurisdiction and Judgments (5th ed.) summarises the matter as follows at para.2.202:

"To begin with, there must be a genuine claim or a claim which is properly brought against the defendant who is being sued in the courts of his domicile. It is obvious that the claim against this anchor defendant cannot be allowed to be an entirely spurious one and if there is no proper claim against the one defendant it will be impossible to satisfy the requirement that it be necessary to hear and determine the claims against two defendants together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

Then at the end of that paragraph:

"There must of course also be a proper basis for making a claim against the co-defendant for just the same reason."

46. In *Bord v British Polythene* [2012] EWHC 3346, one of the jurisdictional challenges made by the non-anchor defendant was as to the application of Article 6 (1). In the event, that challenge failed because it was parasitic on the success or otherwise of a separate application which itself failed. Nonetheless, Flaux J (as he then was) decided the point since it has been fully argued. One aspect of the argument was that the question of the application of Article 6 (1) had to be decided as at the time of the issue of the proceedings and not later, for example, as at the determination of an interlocutory application by the relevant defendant (for example to strike out the claim on the merits). Reliance was placed on the decision in *Reisch*. As to that, Flaux J first observed:

“79. Before considering that decision, it seems to me there are two obvious objections to this argument. First, there are a number of decisions of the English courts to the effect that in order to invoke the jurisdiction under Article 6(1) the claimant must show a sustainable claim against the anchor defendant, in the sense of a serious issue to be tried or a real prospect of that claim succeeding: see for example per Tuckey LJ in *FKI Engineering Ltd v De Wind Holdings Ltd* [2008] EWCA Civ 316 at [18]. It is difficult to see how that requirement can be satisfied if the court has decided that the claim against the anchor defendant should be struck out, as on the hypothesis that the BPI application had succeeded would be the position here. Second, since the proviso to Article 6(1) clearly postulates that it is expedient to hear and determine the claims together to avoid the risk of irreconcilable judgments, it is difficult to see how that proviso can ever be satisfied if the claim against the anchor defendant has been struck out. A fortiori, if one claim has been struck out, the two claims will never be heard whether together or separately and there is no risk of irreconcilable judgments.”

47. Having then referred to *Reisch* he said that he found it hard to reconcile the reasoning in that case with his paragraph 79. He concluded thus:

“83. If the issue had arisen directly (which it does not because I have concluded the claimants have a fully arguable case against BPI, the anchor defendant) I would have decided that *Reisch Montage* was distinguishable because it was only purporting to determine the position where an otherwise sustainable claim against the anchor defendant was precluded for some procedural reason under the national law. It was not purporting to decide that, if the claim against the anchor defendant was unsustainable because substantively, as opposed to procedurally, it had no real prospect of success.. the requirements of Article 6(1) were nonetheless satisfied. Accordingly, if contrary to my decision on BPI’s application, I had concluded that the claim against BPI was not arguable, I would have concluded that jurisdiction under Article 6(1) could not be maintained.”

48. *Kolassa v Barclays Bank* 28 January 2015, C- 375/13 did not directly concern Article 6 (1). Rather, it dealt with specific heads of jurisdiction concerned with consumer claims. But one question asked was whether, in the context of its consideration of jurisdiction under Articles 25 and 26, the court

should conduct “a comprehensive taking of evidence in relation to disputed facts which are of relevance both for the question of jurisdiction and for the existence of a claim..or whether, [it should] start from the premise that the facts as asserted by the applicant are correct?”. The Court’s answer to that point was:

“65. Having regard to the foregoing, the answer to Question 4 is that in the context of the determination of international jurisdiction... it is not necessary to conduct a comprehensive taking of evidence in relation to disputed facts that are relevant both to the question of jurisdiction and to the existence of the claim. It is, however, permissible for the court seised to examine its international jurisdiction in the light of all the information available to it, including, where appropriate, the allegations made by the defendant.”

49. In *Cartel Damage v Akzo* [2015] QB 906, involving the same constitution of the CJEU, the claimant had brought a claim in Germany against the anchor defendant and also a number of companies not domiciled there on the basis of Article 6 (1). It subsequently settled its claim against the anchor defendant. The other defendants applied to set aside the claim against them on jurisdictional grounds, including the allegation that the settlement had in fact been agreed prior to the commencement of proceedings and its conclusion was simply delayed until proceedings were instituted and Article 6 (1) could be invoked. The court stated as follows in the light of the earlier case-law:

“28 The court has nevertheless stated that, where claims brought against various defendants are connected within the meaning of article 6(1)... when the proceedings are instituted, the rule of jurisdiction laid down in that provision is applicable without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the member state where one of the defendants is domiciled: *Freeport*...

29 It follows that where, when proceedings are instituted, claims are connected within the meaning of article 6(1) of Regulation No 44/2001, the court seised of the case can find that the rule of jurisdiction laid down in that provision has potentially been circumvented only where there is firm evidence to support the conclusion that the applicant artificially fulfilled, or prolonged the fulfilment of, that provision’s applicability.

30 In the case in the main proceedings, some of the parties allege that, before the action in the proceedings was brought, an out-of-court settlement was reached ... and that the parties purposefully delayed the formal conclusion of that settlement until proceedings had been instituted, for the sole purpose of securing the jurisdiction of the court seised of the case as against the other defendants.

31 In order to be able to exclude the applicability of the rule of jurisdiction laid down in article 6(1) of Regulation No 44/2001, an allegation of that nature must nevertheless be supported by firm evidence that, at the time that proceedings were instituted, the parties concerned had colluded to artificially fulfil, or prolong the fulfilment of, that provision’s applicability.

32 Although it is for the court seised of the case to assess such evidence, it must nevertheless be made clear that simply holding negotiations with a view to concluding an out-of-court settlement does not in itself prove such collusion. However, it would be otherwise if it transpired that such a settlement had, in fact, been concluded, but that it had been concealed in order to create the impression that the conditions of application of article 6(1) of Regulation No 44/2001 had been fulfilled.”

50. I refer to the exception to the operation of Article 6 (1) set out above as “the Artificial Fulfilment Exception”.
51. I turn next to the decision of the Court of Appeal in *Sabbagh v Khoury* [2017] EWCA Civ. 1120. The claims all concerned alleged misappropriation of the assets of the claimant’s father who had died intestate. The First Defendant constituted the anchor defendant. Jurisdiction over all except one of the non-anchor defendants was asserted on the basis of article 6 (1). Jurisdiction in respect of the remaining (non EU) non-anchor defendant was on the basis of CPR 6.37 and paragraph 3.1 of 6BPD. For the purpose of the latter, there was an express requirement that there be a “real issue” between the claimant and the relevant defendant “which it is reasonable for the Court to try”. It was common ground that to that extent, a Merits Test as against the anchor defendant had to be satisfied.
52. The Judge held that the claim made against the anchor defendant was devoid of merit and should be struck out. On that footing, she held that there was no jurisdiction against any of the non-anchor

defendants. In effect, therefore, so far as jurisdiction under Article 6 (1) was concerned, she held that it, too, contained a Merits Test.

53. On appeal, the Court of Appeal held unanimously that the Judge had been wrong to strike out the claim because it did in fact have merit. That being so, jurisdiction was otherwise established against all non-anchor defendants. That made it unnecessary to decide the separate point as to whether, for the purpose of Article 6 (1) there was a Merits Test requirement. However, because the point been fully argued the Court of Appeal delivered an *obiter* judgment in that regard, too. Here, however, it was not unanimous. The majority (Patten and Beatson LJ) decided that there was such a test whereas the minority (Gloster LJ) held that there was not.
54. The majority view, set out in paragraphs 32-72 of the judgment, may be summarised as follows:
- (1) Article 6 (1) expressly requires it to be “expedient” to hear the claims together in the jurisdiction of the anchor defendant. It is hard to see how this could be made out if the claim against that defendant had been struck out as having no merit, and reference was made here to *InnovatorOne* and *Bord*;
  - (2) *Reisch* was a case of a “procedural bar”. That should be distinguished from the substantive merits or otherwise of the underlying claim because the purpose of Article 6 (1) was to avoid the risk of irreconcilable judgments. A procedural bar may still create a risk because there may be no such procedural bar in another jurisdiction. On the other hand, if there is no merit at all in a claim, then there is no real risk of an irreconcilable judgment because the decision (that there is no merit) will be or is likely to be the same elsewhere;
  - (3) In *Freeport*, the CJEU did not have to, and did not, address the Merits Test question at all. As to *Kolassa*, all it precluded was a “full review of the evidence” which could be equated with the prohibition of a “mini-trial” in the context of summary judgment. But that did not mean that there should not be any assessment of the merits and *Kolassa*, therefore, did not establish that there is no need for such an assessment or that national courts could not look at the merits when deciding whether they had jurisdiction under Article 6 (1);
  - (4) As for *Cartel Damage*, while the Court had focused on the Artificial Fulfilment Prohibition because of what arose in that case, it did not follow from this that the Court was also ruling out a Merits Test;
  - (5) The majority differed from the *obiter* view of Aikens LJ in *Aeroflot v Berezovsky* [2013] EWCA 784 that the Court is not concerned with the merits of the claim against the anchor defendant, just as it is not concerned with the merits of the claims against the non-anchor defendants, which was the point at issue. In particular, in paragraph 66 of the judgment, the majority considered that there was a significant distinction because the claim against the anchor defendant was fundamental to establishing jurisdiction over claims against foreign co-defendants, away from their domicile. If the claims against one or more foreign co-defendants fell away that would not affect the claim against the anchor defendant or other foreign co-defendants. In contrast, without a legitimate claim against the anchor defendant there was no reason for the foreign co-defendants to be ousted from their home jurisdiction. It could not be expedient to determine a claim against an anchor defendant that is not seriously arguable together with a claim against a foreign-co-defendant over whom there would otherwise be no jurisdiction;
  - (6) That the majority then went on to say this:

69. It is important, and the CJEU is clearly concerned to ensure, that Article 6(1) is not misused. In our judgment, it would be a misuse of Article 6(1) to allow hopeless claims to oust the jurisdiction of domicile of foreign co-defendants. To allow the claim to proceed in the present appeal would

undermine the principle that a defendant may be sued only before the courts for the place where he is domiciled. It is said that the merit of an approach which eschews any examination of the merits of the claim absent evidence of abuse or fraudulent intention to artificially fulfil the requirement of connection under Article 6(1) is that it avoids the risk of irreconcilable judgments and protracted disputes about the substance of a claim at the jurisdiction stage. But it does so by a bright line binary rule which does not address the fact that derogations from the general principle that civil actions are to be brought against defendants in the courts of the place where they are domiciled must be restrictively interpreted. It is open to question whether this is justified or whether this is the true import of the decisions of the CJEU which have not directly addressed the question that is before us. It is also said that defendants may, subsequently, if they wish, attempt to strike out the claims. That, however, would simply shift to strike out and summary judgment applications what is said to be undesirable and impermissible in the context of jurisdiction...

71. ... It is certainly not artificial to bring a claim which ultimately fails, but maybe artificial to the claim which is hopeless, though not abusive.”

55. As against that view, the judgment of Gloster LJ included the following points, first in relation to the state of EU case-law:

- (1) The distinction drawn by the majority between procedural bars and lack of substantive merits in the context of the risk of irreconcilable judgments was not sound. While on the merits, another Court might be likely to reach the same conclusion, it was not necessarily such. And the tenor of the EU case-law was that any risk of irreconcilable judgment's should be eliminated and not merely reduced;
- (2) In fact, a procedural bar problem should be regarded as less serious from the point of view of irreconcilable judgments. All the court of the anchor defendant has done is to prevent the claim proceeding against that defendant, regardless of merit. There is no finding on the merits at all. Therefore, (if Article 6 (1) did not apply) the procedural bar imposed could not thereby affect any claim made against the non-anchor defendants in a different Court. There is really no irreconcilability at all. And yet, the Court in *Reisch* still found that there was. All the more so, then, where it is not a procedural bar but a merits bar, as it were;
- (3) Further, it will not always be clear where to draw the line, for example, if the issue is whether the alleged contract affecting all defendants fulfilled a formal requirement without which it could not be valid. Different courts might reach different conclusions as to whether the formal requirement was fulfilled, which would be a real case of irreconcilability;
- (4) The CJEU in *Freeport* must have impliedly taken the view that the merits of the claim against the anchor defendant were irrelevant since it rejected the Sole Object Prohibition which itself could only operate if there were no merits;
- (5) In truth, the Court in *Kolassa* did not suggest that an assessment of merits was relevant. Nor did the Court in *Cartel Damage*; rather, the only implied restriction on the operation of Article 6 (1) was fraudulent abuse, not (also) the application of national rules on the merits of the claim against the anchor defendant;
- (6) Thus, there was clear EU authority that Article 6 (1) could be used to establish jurisdiction against non-anchor defendants even if the claim against the anchor defendant will not proceed, unless the claimant is engaged in a fraudulent abuse thereof.

56. Gloster LJ then turned to the majority's argument that there could be no risk of any irreconcilable judgments from a close connection between the claims against the defendants because there was now no claim against the anchor defendant at all; so there would never be a judgment on it which could possibly be inconsistent with some other judgment elsewhere against the non-anchor defendants. She considered that argument to be incorrect because, among other things,

- (1) if it were correct, there could be no point of distinction between procedural and merits bars;
- (2) what is to be evaluated is the nature of the claims as enunciated at the outset. What happens to any of them thereafter is irrelevant;
- (3) the logic of this argument means there should also be a Merits Test in respect of the claims against the non-anchor defendants and yet (because of *Aeroflot*) there was now no such test;
- (4) it was true that Article 6 (1), is a derogation from the overarching principle that a defendant should be sued in the country of its domicile, and so should be interpreted restrictively; but the imposition of a Merits Test is in reality a restriction imposed by national rules not an independent principle of Brussels Regulation jurisprudence. The addition of the Merits Test would also increase unpredictability and uncertainty about the outcome of a putative application of Article 6 (1).

57. Finally, Gloster LJ dealt with the argument that proceeding against an anchor defendant where there was no merit in the claim was itself a fraudulent abuse of Article 6 (1) which was a recognised exception to its operation. She pointed to the fact that the Court in *Cartel Damage* made clear that this was a narrow exception based on the position as at the time of instituting the proceedings. Moreover, in the instant case, the Judge had found that the claim against the anchor defendant was unsustainable as a result of evidence emerging since the claim had been issued. And if the argument was correct, it is hard to see how the decision in *Reisch* was correct. She also supported the *obiter* view of the court in *Aeroflot* which did not support the existence of a Merits Test. She concluded in paragraph 218 that:

“the English court will have jurisdiction under Article 6(1) if the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. In verifying whether this requirement is satisfied, the court will use all available information and take a common-sense approach. However, the court will not have regard to whether the claim against the anchor defendant or the claim against the non-anchor defendant will fail due to a procedural bar or due to a lack of merit. As a matter of EU law, whether a claim will succeed is irrelevant to the question of whether the claims are closely connected, because the function of Article 6(1) is to avoid a risk of irreconcilable judgments. If the requirement is fulfilled, the English court can only deny the application of Article 6(1) if the sole purpose of bringing a claim against the anchor defendant was to remove the non-anchor defendants from the courts of their member state(s) of domicile, in the sense articulated by *Reisch Montage, Freeport* and *CDC*.”

58. She said that such an outcome would promote certainty and predictability. It would also remove the peculiarity in the instant case where the non-anchor defendants could take the point on merits whereas the anchor defendant could not because (not itself being domiciled here) could not challenge the claim against it without submitting to the jurisdiction.

59. Finally I deal with *JSC v Kolomoisky* [2019] EWCA Civ. 1708. At first instance, the Judge had set aside the proceedings on the basis, among other things, that where Article 6 (1) of the Lugano Convention (to the same effect as Article 8 (1)) was in play, the claim against the anchor defendants was not permitted to have been brought with the sole object of joining in the relevant non-anchor defendants. Thus the Court of Appeal had to decide the correctness or otherwise of the inclusion of the Sole Object Prohibition. A majority (David Richards and Flaux LJ) held that there was no such prohibition while Newey LJ held that there was. But again, and as with *Sabbagh* this was strictly *obiter* since the Court of Appeal unanimously held that there was no sole object on the facts here anyway.

60. At paragraph 22, the Court noted that the claimant had established a good arguable case that there have been a fraudulent scheme “on an epic scale”. In the course of discussing the *Reisch* case, the Court expressed the view at paragraph 63 that paragraph 32 of the decision of the CJEU was

referring to the fact that, as stated by the Austrian Court below, it had not been established and could not be assumed that the claimant knew from the outset that the claim against the anchor defendant was inadmissible because he was bankrupt. The implication was that if this had been the case then the implication of Article 6 (1) may have been found to be abusive and impermissible. The majority considered that the only implied exception to the application of Article 6 (1) was the narrow one of the Artificial Fulfilment Prohibition as distinct from the wider Sole Object prohibition. Thus they stated in paragraph 87:

“Other examples of an artificial fulfilment might be the hypothetical case posited by the Advocate General in *Freeport* of proceedings being commenced against a fictitious anchor defendant and a claimant in a case such as *Reisch Montage* commencing proceedings against the anchor defendant knowing that such proceedings were inadmissible against him.”

61. I refer to the following paragraphs of the judgment which are important:

“101. As regards the test of artificial fulfilment of the express condition of connected claims under article 6(1) set out in *Cartel Damage*, Mr Howard submitted that it was simply another way of expressing the sole object test. They were two sides of the same coin. Artificial fulfilment was not limited to collusive conduct of the type contemplated by the CJEU in *Cartel Damage*. It encompassed the situation where a claimant commenced an action in the court of one state against an anchor defendant for the sole purpose of subjecting a foreign defendant to the jurisdiction of that court. The fact that the claim against the anchor defendant had merit would not affect the application of the sole object test.

102. While we see the force in these submissions, we have concluded that they do not represent the correct position as regards article 6(1) of Brussels 1 and of the Lugano Convention and article 8(1) of the Recast Brussels Regulation. An artificial fulfilment of the express condition of a close connection will not permit reliance on article 6(1). However, if the question is asked, is a claimant with a sustainable claim against an anchor defendant, which it intends to pursue to judgment in proceedings to which a foreign defendant is joined as a co-defendant, entitled to rely on article 6(1) even though the claimant’s sole object in issuing the proceedings against the anchor defendant is to sue the foreign defendant in the same proceedings, we consider that the question should be answered affirmatively...

111. Accordingly, we conclude in the present case that the Bank, which has a sustainable claim against the English Defendants and which intends to pursue the claim to judgment against those defendants in combination with its claims against Mr Kolomoisky and Mr Bogolyubov, is entitled to rely on article 6(1) even if its sole object in commencing the proceedings against the English Defendants is to be able also to sue those individuals at the same proceedings.”

62. For his part, in paragraphs 270-278 of the judgment, Newey LJ took the view that the relevant EU authorities confirmed the continued existence of the Sole Object Prohibition.

63. On a fair reading of paragraph 102 of the judgment, I consider that it does proceed on the assumption that apart from anything else, the claimant does need a sustainable claim against the anchor defendant before being able to invoke Article 6 (1). It was submitted to me that this is not correct and that the reference to “sustainable claim” in paragraph 102 was only there because paragraph 101 had rehearsed the argument made by the defendants that “the fact that the claim against the anchor defendant has merit would not affect” the Sole Object Prohibition. I do not agree and consider that it is a general reference. This is supported by the reference, again, to a “sustainable claim” in paragraph 111. Nor do I detect in the minority judgment of Newey LJ any disagreement with that assumption.

#### *Analysis*

64. In the light of all that, I venture to set out my own observations on the issue.

#### In Principle

65. First, it must be accepted that there must be some sort of implied limitation on the operation of Article 8 (1). At the very least, it is the Artificial Fulfilment Prohibition. This is unsurprising. It would be very odd indeed if any kind of abuse or bad faith in invoking Article 8 (1), itself a derogation from the general principle, did not have consequences. Commencing a claim which the

claimant knows is hopeless is likely to fall within that prohibition in my view. It is, analytically, no different from commencing a claim against a fictitious defendant although the latter example is more extreme.

66. However, I have to deal in principle with the Merits Test which, while it has been approved in some English cases, has never been made subject to a gloss which requires also, a finding of abuse, bad faith or matters of that kind. The reason is because if it exists at all, it is an implied exception whose judicial base is and must be different.
67. The first and main basis for the existence of the Merits Test and the one which has found the most support is what I will call the “Irreconcilable Risk Argument”. This states that where there is no arguable claim against the anchor defendant there is, in truth, no “close” connection because there is no connection. Moreover, there is no risk of irreconcilable judgements because if the proceedings (against the other defendants) have to be brought elsewhere, the outcome (as against those other defendants) would be the same. Assuming for present purposes that the same governing law would apply, whether the court of the anchor defendant assesses the merits or whether the court of the non-anchor defendants does so, if there is no merit in the case at all, both courts are likely to reach the same conclusion. See paragraphs 25 and 26 of the judgment of Hamblen J in *Innovatrone* cited above and paragraph 79 of the judgment of Flaux J in *Bord*. This was the reasoning adopted by the majority in *Sabbagh* at paragraphs 43 and 44. A likelihood of such a result at least was recognised by Gloster LJ in her paragraph 179.
68. A frequent reason why the risk of conflicting judgements might arise is because, for example, the claims against all defendants depend on some finding of fact common to all of them. So that if Article 8 (1) is not applied, the court here might find facts which mean there is no claim against the anchor defendant; yet, when the claimant sues the non-anchor defendant elsewhere (as it would now putatively be forced to do) the court there finds facts which establish the claim against those defendants and which mean that the claim against the anchor defendant would be established as well.
69. But in the context of the Merits Test a decision that there is no viable claim at all is different from one reached after a trial and consideration of all the evidence. It is that the claim simply does not get off the ground. That is why the risk of irreconcilable judgements is either low or non-existent.
70. In that regard, take this case as an example. The claims made against all three Defendants are composed of different elements or causes of action but the core points are the same. One or more of them designed and/or manufactured the Helicopter and the TRB, and did so negligently. AW Ltd says that it had no design or manufacturing role. The other Defendants agree and say that AW S.p.A. had this role. If I find those contentions are clearly established so that there is no viable basis for saying that AW Ltd had any such role, the notion that an Italian Court could or would find that in fact, AW S.p.A. had no such role (in which case, of necessity, AW Ltd, or some other entity did) is in real terms impossible. In reality there is no risk of irreconcilable judgements at all.
71. I accept that, depending on the particular merits points it may be that one cannot guarantee that the outcome would be the same, just that they are likely to be so. Unlike Gloster LJ, I do not see this as an obstacle to the existence of the Merits Test.
72. I now deal with some objections in principle to the Merits Test. First it is true that the Merits Test does not, after *Aeroflot*, apply to non-anchor defendants. However, I respectfully agree with the reasoning of the majority in *Sabbagh* at paragraph 66 to the effect that there is a real difference between the question of merits as against the anchor defendant on the one hand and the non-anchor defendants on the other.
73. Equally, I do not accept that the Merits Test is ruled out because Article 8 (1) refers to a close connection between the “claims” which must therefore be evaluated at the outset. I do not see that this excludes the Merits Test. If the claim fails the Merits Test, it is artificial to refer to it as a

“claim”. Paragraph 205 of the judgment of Gloster LJ shows that her concern is about applying the Merits Test at some later point in time. I see that, but the Merits Test, properly applied will be confined to the initial stage of the proceedings. This is because it can only arise at two possible stages: (a) the claimant’s own assessment of the application of Article 8 (1) which it must certify as applicable when issuing the Claim Form (which by definition involves no assessment by the Court) and (b) on any subsequent jurisdiction challenge. The latter has to be made and decided at an early stage because that is what the rules provide. The decision of the Court on such a challenge is the end of the matter so far as jurisdiction is concerned. Absent fraud, it cannot be revisited later. The fact that the hearing of the jurisdiction challenge may be some time after commencement of the proceedings because of stays, extensions of time etc is irrelevant. Take this case, there has been a delay but it remains the position that the proceedings are effectively paused at an early stage because of these extant applications.

74. Next, the fact that in connection with a Merits Test, it would be logical for the anchor defendant to apply itself to discharge the proceedings against it makes no difference. The relevant “home” for the Merits Test, is the jurisdiction challenge brought by the non-anchor defendant. If the failure of the Merits Test then has the consequence that the claim against the anchor defendant goes nowhere that does not alter the fact that this will be decided at an early stage. For that reason, the spectre of jurisdiction somehow being undone some way down the line because of an application of the Merits Test late in the proceedings, is an unrealistic one. Hence the observations of the majority in *Sabbagh* at paragraph 71. For the same reason, the fact that a claim may later be settled, or struck out because of non-compliance with an “unless” order, for example, is irrelevant. That cannot entail the application of the Merits Test in relation to jurisdiction.
75. On the other hand, if, on a jurisdiction challenge, the claim is found to be unsustainable as a result of evidence not adduced at the outset that makes no difference. The issue is not when the evidence emerges but what is decided at the hearing of the jurisdictional challenge.
76. A further objection (and one enunciated by Gloster LJ) is that a Merits Test would introduce an unacceptable degree of uncertainty and unpredictability. With respect I disagree. Regardless of national procedural rules for the obtaining of a strike-out or summary judgment (which may differ as to scope or even availability) the fact that there is simply nothing in the claim at all - because it is hopeless - is different from seeking to predict the ultimate outcome of what is at least a viable claim. And in my experience, most Courts that are subject to the Brussels Recast Regulation are familiar with the notion of a claim or defence which is so lacking in substance that it should not proceed.
77. So as a matter of principle, I consider that the “Irreconcilable Judgements Argument” is a sound basis for the existence of the Merits Test. It may be implied in one sense but it arises from a proper application of the words of Article 8 (1).
78. It might be said that there is no need for the Merits Test because of the Artificial Fulfilment Prohibition. But the former it is not the same as latter. For example, suppose a claimant brings a claim against the anchor defendant which is plainly well-founded, for example a claim in debt and the defendant is the principal debtor, a company with little or no assets and in liquidation. The prospect of any recovery is next to nothing. Suppose also that it is agreed between the claimant and the defendant that the latter will not defend the claim and in return the claimant will not seek to enforce any judgment it obtains and it will seek no costs against the defendant. The claimant by this inexpensive means hopes to bring in the foreign guarantor under Article 8 (1). That scenario may well move into the territory of artificial fulfilment, abuse or bad faith. But the Merits Test would be satisfied and a different principle would be needed to prevent the operation of Article 8 (1). Equally, I do not believe that the Merits Test should be justified as in fact a part of the Artificial Fulfilment Prohibition. Nor, for that matter, can it be also justified as being within the Sole Object



Prohibition (as the majority in *Sabbagh* thought) not least because of the *obiter* view of the majority in *Kolomoisky*.

#### EU Case-Law

79. I now turn to consider the position so far as the EU authorities are concerned.
80. None of them in my view rule out the Merits Test in any way, save possibly for *Reisch* to which I therefore turn. That decision has not been overturned or criticised as to the result, so far as I am aware, in any subsequent decision of the CJEU.
81. In *Reisch*, and as noted above, the CJEU there disagreed with the Opinion of the Advocate-General that the procedural bar to civil litigation against bankrupts was an obstacle to the operation of Article 6 (1). The Court also had addressed to it the Irreconcilable Judgements Argument; see paragraph 17 of the judgment. The view of the French Government (cited at paragraph 19), was that there were in effect no restrictions on the operation of Article 6 (1) provided only that the claims were connected. There was no Sole Object Prohibition. The Commission, while also agreeing that Article 6 (1) did apply here, said that there was a Sole Object Prohibition, but the national court had not decided that point.
82. The view of the CJEU was that there was no express qualification on Article 6 (1) by reference to admissibility under national law. And while some provisions of the Regulation made express reference so as to allow for the operation of national rules, this one did not. Accordingly, Article 6 (1) could apply. The Court also agreed that there was a Sole Object Prohibition but it did not apply here. However, it did not address the Irreconcilable Judgements Argument. The Court's conclusion was clearly based on the content of a national provision which rendered a claim inadmissible.
83. As with Flaux J in *Bord*, I do not find the reasoning of the CJEU here persuasive and I consider that the decision should be distinguished if possible. It can be distinguished because it is very clear from the judgments that the focus was on a national rule as to admissibility of the claim. Even allowing for differences of language, the expression "procedural bar" is not apt to include a lack of any substantive merit. *Reisch* is not therefore an obstacle to deciding that there is a Merits Test.
84. There is, in addition, a real distinction between a procedural bar and the Merits Test in my view. It is not so much because with a procedural bar there remains a risk of irreconcilable judgements while the same is not true of the application of the Merits Test, as stated by the majority in *Sabbagh* at paragraph 43. In that regard, and with respect, I see the force of the answer given by Gloster LJ to that point at her paragraph 180.
85. Instead, I consider that the reasoning of the court in *Reisch* was concerned more with what it simply saw as an illegitimate incursion of a domestic procedural rule (a bankrupt cannot without more be sued in ordinary litigation) into the operation of Article 6 (1). That, in and of itself decided the point. It was a question of form and not substance. But the Merits Test is a matter of substance.
86. I would just add some further observations:
- (1) I do not see *Cartel Damage* as ruling out the Merits Test; it did not do so either expressly or impliedly by the articulation of the Artificial Fulfilment Test;
  - (2) The fact that the Sole Object Test has been rejected does not in any way imply that the Merits Test must be taken not to exist either. I do not accept that the former (for example as enunciated by the CJEU in *Reisch*) necessarily entailed an absence of merits as well as the relevant motive (as Gloster LJ had suggested in *Sabbagh*). The two things are separate and indeed it could be argued that non-availability of the Sole Object Test almost assumed that there was a Merits Test (see *Kolomoisky* above).

87. So in my view the EU cases do not rule out the existence of the Merits test.

English Cases

88. I have set these out above. There is no direct authority on the point but substantial *obiter* support for the Merits Test.

Article 36 (1) of the Regulation

89. A further argument in support of the existence of the Merits Test was that an Italian Court would (now) be bound to recognise any judgment here dismissing summarily the claim against AW Ltd and so again there could be no risk of irreconcilable judgments. Indeed Mr Marland argued that this was a point that would have been determinative in *Sabbagh* had it been run. In the light of my conclusions above, it is not necessary for me to address this further argument and I do not do so.

Conclusion

90. Accordingly, there is a Merits Test which must be satisfied before Article 8 (1) can be invoked.

**Other Points of Law**

91. There are some substantive questions of law arising in connection with particular defences (including as to limitation) raised as against particular claims. I propose to deal with those in context, below.

**GENERAL MERITS OF THE CLAIM AGAINST AW LTD**

92. The assessment here is not about proof of any particular cause of action like negligence. It is whether on the facts, AW Ltd had any role in the design manufacture or marketing of the Helicopter or its constituent parts, including the TRB and the TRSOV, at all. If there is no real prospect of showing that it did, the claim against it is not viable.

**The Defendants' Position**

93. First, AW Ltd has adduced evidence from Mr Higgins, one of its directors. He states that although it was only notified of the present claim in October 2017, it undertook detailed internal reviews to see if it had any involvement in the Helicopter. He says that the only involvement was from 1 January 2009 when it started to manufacture 3 driveshaft assemblies, the intermediate gearbox and the tail rotor gearbox for the AW 139 type helicopter pursuant to a sub- contract with AW S.p.A. However there was no design input. Before that time, the manufacturing sub-contract was held with Westland Transmissions Ltd (“WTL”) (not a party to this claim). AW Ltd took over the sub-contracts because as from 1 January 2009 WTL’s business was transferred to it.

94. He goes on to say that while AW Ltd did make helicopters until 31 December 2016 this did not include the AW139 in respect of which it never had any responsibility. AW Ltd did not design make or supply the Helicopter or the AW139 type in general. Nor did it have any responsibility in terms of maintenance, manuals etc. It was not referred to in the CENIPA report nor those dealing with the two previous incidents.

95. There is then the evidence of Mr Parrella, General Counsel to Leonardo, which now owns the relevant helicopter business. He says that the Helicopter was manufactured by AW S.p.A. in Italy and had been completed by April 2007. AW S.p.A. also made the TRB. However, the relevant TRSOV was made by CIRCOR Industria, a French company with a US parent company and not part of the Leonardo group. CIRCOR supplied the part to AW S.p.A.. The specification for the TRSOV was provided by AW S.p.A. and CIRCOR then designed it to meet that specification. The original design of the Helicopter was pursuant to a collaboration between AW S.p.A. and Bell Helicopters. The design authority in the relevant documents is shown as AW S.p.A. which also designed the TRB.

96. In his second witness statement, Mr Parrella answered a number of points which Mr Amos raised on behalf of Senior arising out of some documents. I deal with those matters in context below, but at paragraph 13-15, Mr Parrella provided some further design information. He produced some design documents through Mr Giorgio Dossena of Leonardo's Airworthiness Department and who had previously been employed by AW S.p.A. All those documents indicated that the designer was AW S.p.A.. The documents produced show that the TRB was designed and certified by AW S.p.A. See in particular, the "Rotors and Rotating Control Design Assessment Report" of 14 November 2003 ("the Rotors Assessment Report") and the signatures of the then Chief Designer Mr Scapinello and the Chief Project Engineer, Mr Monti, both employed by AW S.p.A. The Mr Hawkins who prepared the report, was a UK consultant at the time employed by AW S.p.A. whose role was limited to preparing documentation such as this. A second document was the Tail Rotor Blade Revision A document prepared by a Mr Facchini and signed (again) by Mr Scapinello and Mr Monti. That document is said to give a "static substantiation" of the TRB assembly with part number 3G6410A00101. That is the part number cited within the EASA type-certification datasheets.
97. The Defendants' stated position is that AW Ltd had no relevant role at all whereas AW S.p.A. positively did have such a role. Notwithstanding Senior's points as to whether the particular witnesses whose evidence is adduced on behalf of the Defendants can speak to all aspects of this issue, it remains the case that:
- (1) the Leonardo group of companies includes a major, substantial and long-standing manufacturer of helicopters;
  - (2) Senior's contention is that I should disbelieve the evidence put forward on behalf of all the Defendants. That entails saying either that Mr Parrella is being misleading or untruthful or that he has been so deprived of relevant information that everything he says is unwarranted speculation. The same goes for the evidence of Mr Higgins. As a starting point (and only a starting point) I have to say that this seems to me to be most unlikely.
98. Mr Marland, on behalf of the Defendants, and in response to a suggestion from me, in fact offered an undertaking to this Court that in any Italian proceedings, they would not seek to resile from what they have said about their respective roles. That is, at least, some measure of their conviction.
99. Unsurprisingly, then, this is not a case where Senior can point to some clear and significant contradiction showing expressly that AW S.p.A. was involved. Instead, what it has done is to assemble a large amount of evidence from many different sources from which it says it can be inferred (or at least there is a real prospect of a court at trial inferring) that it had such a role. To that end, Senior engaged the services of a Mr Tony Cable of Accident and Failure Technical Analysis Ltd. He carried out extensive research using public sources as well as his own industry contacts. He is not an expert witness as such although I appreciate that he may know what to look for in terms of information. Nor has he produced any kind of report setting out in detail what he did (or did not) find. Instead, what we have from Mr Amos's witness statement is this:
- "46 .Mr Cable's feedback on the question of D2 's involvement in relevant matters included the following:
- (1) It appeared possible that the AW139's Tail Rotor had been developed from the Westland Lynx helicopter (a British military helicopter) that had been designed and manufactured by D2 at its premises in Yeovil.
  - (2) There were indications that manufacture (and possibly design) of the AW139's tail rotor gear box was carried out by D2 .
  - (3) There were indications that D2 (or potentially a related company) was a key player in the global helicopter blades market.
  - (4) Enquiries with Mr Cable's industry contacts led him to believe (albeit without certainty) that an element of the AW139's TRB design may have been carried out by D2.

47. Mr Cable was clear that it was surprisingly difficult to get conclusive evidence as to who was responsible, among the companies within the Defendants' group, for the design of the TRB, but he was of the view, on the information he had, that it was possible that D2 had some responsibility and that it could not be ruled out. His essential advice was that the information he had received indicated that an element of the design of the TRB (but not all) may have been carried out by D2.”

100. This is the extent of Mr Cable’s contribution. Taken by itself, it hardly goes anywhere, in my view.
101. In addition, Mr Amos himself (or his associates at his firm) made some further enquiries and findings as set out in his paragraphs 48-50.
102. The above was the position in terms of what Senior had, prior to commencement of proceedings. There was then a significant further investigation into the issue by Mr Amos, following the issue of proceedings and in the context of the present application is made by the Defendants.
103. For present purposes, I do not need to distinguish between what was found initially and what has been found later. I consider all of the evidence submitted by Senior in its totality.

### **Analysis of the evidence**

104. I consider the evidence reference to the following:

- (1) Mr Cable’s information;
- (2) Design History;
- (3) Patents;
- (4) The Qinetiq Report;
- (5) Mr Brocklehurst’s PhD thesis;
- (6) Press Release 1999;
- (7) The 1999 accounts
- (8) Press release 2015;
- (9) Marketing for the AW139.

### *Mr Cable’s Information*

105. I have already dealt with this above. It is speculative at best.

### *Design History*

106. I have been able to discern the key elements in the Helicopter’s design history from the numerous documents produced.
107. Issue 22 of the Type Certification Data Sheet for the Helicopter (which was originally known as AB139 and then AW139 after the merger) provides much useful information. The application for type-approval (i.e. once the Helicopter was designed, subject to any further variations) was 12 March 1999. The approval body was the Italian Civil Aviation Authority known as ENAC. The ENAC certification was granted on 18 June 2003. The European Aviation Safety Agency (EASA) certification followed on 28 September 2003. From 18 June 2003 until 31 December 2015, the type certificate holder was AW S.p.A.. From 1 January 2016 until now it has been Leonardo.
108. On 12 February 2001 the merger was announced in a press release referring to “... A new JV called “AgustaWestland” which is fully operational with each company owning 50% of the “newly created company” pursuant to an agreement made on 26 July 2000.” 18 days earlier, it had been announced that the “Bell/Agusta Aerospace company AB 139” had made its first successful test flight on 3 February 2001. Initial airworthiness tests were performed with a (then) expected certification date of 2002. The announcement went on to say as follows:

“In addition to Agusta, an AgustaWestland company, and Bell Helicopter, several leading international companies have collaborated, as risk-sharing partners, during the development phase leading to this successful event. This includes Pratt & Whitney of Canada, Honeywell of the USA, GKN Westland Aerospace of the UK, PZL Swidnik of Poland, Liebherr of Germany, Kawasaki of Japan, and others.”

109. There is no mention there of AW Ltd is a risk-sharing partner. Senior suggests that the reference to “GKN Westland Aerospace” (GKN Westland Aerospace Ltd was a separate company within the GKN group) must have been or at least arguably was, a misnomer for GKN Westland Helicopters Ltd (AW Ltd’s former name). This was because, it was said, the former only dealt with fixed wing aircraft. That, however, is speculation. There is no evidence about what the former’s activities encompassed at the relevant time and whether they were all limited to developments of fixed wing aircraft as a risk-sharing partner in a larger project. It would also seem very odd if a specific press announcement got it wrong. It is true that the announcement also refers to the involvement of “others” which could conceivably include AW Ltd or indeed any other company. But that is as far as this goes. Moreover, if a mistake was made, it was made twice because of an article from 8 October 1999 referring to the “maturing” program for the AB 139 with the same description of the risk-sharing parties. Mr Higgins, who referred to the corporate existence of the Aerospace company suggested that if anything was to be made of this point, Senior should investigate and approach the Aerospace company. He was taken to task by Senior over that suggestion because he did not set out what Aerospace’s involvement may have been. I do not think there is anything in this. Aerospace is not part of the Leonardo Group.
110. Senior makes reference to a Qualification Test Procedure (QTP) document for the power control module which is exhibited to Mr Parrella’s witness statement. It does so because this document bears a date of 8 January 2004. The point then made was that this showed that the design process was continuing even by this date and of course AW Ltd had been a formal part of the group since 2001; hence, it was said, the greater likelihood that it could have been involved. There is nothing in this; the document is all about the procedure for determining airworthiness (a continuous process for any aircraft continuing to be used) and appears to have nothing to do with design. Save for any design modifications, it would be very odd for design work to go beyond June 2003 when the Helicopter received its certificate. While Issue 22 does show some later design modifications after type-approval, there is nothing to indicate, for example, that they concerned the TRB or some feature critical to the accident here. See, for example, the design drawings at pages 539-540 of the hearing bundle. Senior also referred to the Rotors Assessment Report to suggest ongoing design. But this document is about the assessment of the design (and the type approval date of 11 June 2003 is given) not some further design work. Indeed the text at page 2047 is about the modification of documents to include “a more detailed and complete failure analysis”, not modification of the Helicopter’s design. Paragraph 1.2 at page 2051 makes that plain. Moreover, the signatories were all from individuals at all working for AW S.p.A. as Mr Parrella noted above.
111. Senior seeks to downplay the significance of these individuals by saying that they may have signed simply because they worked for the type-certificate holder. However, that still does not provide any evidence of the involvement of AW Ltd.
112. Senior also referred to the above documents to suggest that paragraph 9 of AW Ltd’s Defence was plainly wrong because it said that the use of the previous name of AW Ltd was from 1996 until 12 February 2001 i.e. during “the totality of the design phase”; in other words, according to the Defence the design process had ended by 2001. However, essentially that must have been so since the application for approval was submitted in 1999 subject only to design modifications in response (presumably) to comments or requirements of the approval bodies. So I do not think any adverse inference can be drawn against the Defendants from how it was put in paragraph 9.

#### *Patents*

113. Senior refers to a patent application made by AW Ltd in 1998 going under the name GKN Helicopters Limited. The claimed invention was a metallic component consisting of a tubular bush with a circular wall. The purpose was to strengthen the joint between fibre-reinforced matrix materials to metallic structures when the composite materials could be subject to mechanical loading. One example given was the fixing of a reinforced-fibre helicopter rotor blade to the road

ahead by a metallic fastening. The invention was supposed to improve the durability of this fixing. There is no evidence that this patent was ever granted.

114. From this, Senior argues that (a) AW Ltd has been involved in design work which encompassed work on rotor blades and (b) it was at least possible if not likely that AW Ltd had some role in the design of the TRB especially where one aspect of the failure of the TRB was said to relate to the fixing of the rotors of the rotor head. However, it is not disputed that AW Ltd was involved in the design and manufacture of helicopter rotor blades and indeed was known for this. But I do not see that this points to any real evidence of its involvement in the design of the rotor blade with which I am concerned. It is not as if it can be suggested that Agusta (as the then helicopter arm of Finmeccanica) or Bell Helicopters were not capable of designing such an element.
115. Further, as Mr Marland has pointed out, it is far from clear that the relevant fixing in the case of the TRB here employed a bush at all. Paragraph 2.1.1 of the Qinetiq Report (see below) refers to it as constituted by an elastomeric bearing to transmit loads between the rotor hub and blade. See also paragraphs 1.6.7.2-1.6.7.4 of the report into the earlier incident in Hong Kong. It is fair to say that there has been no expert evidence on this (or any other) point from either party although the Particulars of Claim themselves refer to the elastomeric bearing. So Mr Marland's observations can hardly be conclusive; but they do at least illustrate the speculative nature of the reference to this particular patent. I cannot safely draw anything from it concerning the allegation that AW Ltd was involved in the design of the TRB.
116. In that regard, and as an alternative, Mr Reeve, for Senior, suggested that at all events, AW Ltd's involvement in the issue about a secured joint between the rotor blades and the rotor head constituted material which, perhaps, AW S.p.A. (as designer), should have considered, because it revealed a risk. Accordingly, AW S.p.A. was negligent. As to this, (a) that suggestion is speculative in the extreme and (b) in any event it does not help Senior here because it is all about evidence potentially relevant to the claims against the other Defendants.

#### *The Qinetiq Report*

117. This was a report into the accident, produced on 24 May 2012. It states that the "Customer Organisation" was AW Ltd and the contact was a Mr Luigi Candiani. Senior suggests that this shows at least some involvement of AW Ltd. There might have been something in this, except that the actual Purchase Order dated 21 December 2011 shows that the client was in fact AW S.p.A. and that the report was ordered on its behalf by Mr Mollino. Furthermore, Mr Parrella has produced a letter from Leonardo dated 4 September 2019 to the effect that Qinetiq's stated contact, Mr Candiani, had been employed full-time by AW S.p.A. between 1981 and 2018 when he retired and he had never worked for or been seconded to AW Ltd. See further, paragraphs 10-12 of Mr Parrella's second witness statement. So there is nothing in this point. I should add that much was made in argument about the fact that there was reference to an internal specification document called STAP 106. Senior had asked the Defendants to produce a copy of it but they refused saying that it contain confidential information. But there is no mystery as to what it was about; it prescribed porosity limits – see page 106 of the Qinetiq Report. This was relevant because it is alleged that the material of which the blade consisted was made too porous. None of that assists Senior.

#### *Mr Brocklehurst's PhD Thesis*

118. Mr Alan Brocklehurst published his PhD thesis entitled "High-resolution Methods for the Aerial Design of Helicopter Rotors" on 6 June 2013. He had worked at AW Ltd and retired in April 2011. Some aspects of the thesis are relied upon by Senior to show the possible or likely involvement of AW Ltd in the design and/or production of the TRB.
119. It is most convenient if I refer to particular pages of the thesis in numerical order:

- (1) Page 130: the list of patents involving him did not include the patent applied for by AW Ltd referred to above; while they are obviously to do with helicopters and in some cases rotor blades, there is nothing to connect them to the Helicopter or the TRB;
  - (2) Page 135: there are references to square-cut tail rotor blade tips often used in military contexts but it is said they also appear in “some recent helicopters such as the A 109 and AW 139”; but that does not suggest any connection between AW Ltd and the Helicopter;
  - (3) Page 138: it is stated here that prior to the start of his academic research, Mr Brocklehurst had designed a new tail rotor blade for “what is now the AW 159”; but he does not suggest he did any design work in respect of the Helicopter;
  - (4) Page 140: reference is made to the WHL “model tail rotor” but that says nothing about the Helicopter either;
  - (5) Page 152: there are references to wind-tunnel tests although at this point in the thesis they seem to be those carried out by others and which are recorded in the existing literature which Mr Brocklehurst is surveying at this point;
  - (6) Page 165: this recounts the design work carried out by AW Ltd for the Sea King helicopter including square -tipped blades. Again there is also reference to literature from Mr Brocklehurst’s time at AW Ltd; again, this does not assist;
  - (7) Page 181: this records a new model rotor rig developed at AW Ltd in the late 1980s to test a range of tip shapes; it seems that in 1994, Mr Brocklehurst reported on some wind tunnel tests; there is no reference to the Helicopter;
  - (8) Page 208: this refers to the development of the Vane Tip design in the 1990s but adds nothing;
  - (9) Page 230: this refers to work at AW Ltd on aerofoils;
  - (10) Page 232: this refers to Mr Brocklehurst’s own work on rotors in the early 1980s; however there is a footnote referring to the use of an aerofoil testing code used by him and others at “AgustaWestland (UK, Italy)” as part of rotor design development and research tasks. It is not clear how “recent” (to 2013) these years were, but again, this says nothing about the design of the AW 139;
  - (11) Finally, page 264: this refers to tests carried out by Mr Brocklehurst at AW Ltd 1980 and 1984 to support the development of the Sea King and Lynx helicopters.
120. I have in this exercise looked not only at the particular references relied upon by Mr Amos in his witness statement but have skim-read the entire thesis. The truth is that there is nothing to indicate that AW Ltd was involved in the design of the Helicopter or the TRB its production at material times. Nor is there any legitimate inference to this effect which can be drawn from the references individually or collectively.

*Press Release 18 March 1999*

121. This announcement of the joint venture says that the two companies were well known to each other. That is not disputed. Interestingly, it says that they worked together successfully on the E101 helicopter but makes no reference to any collaboration on the AW139 whose design would have been very current then.

*AW Ltd’s 1999 Accounts*

122. There is a reference to the merger here but this does not take the matter any further.

*Press Release 12 July 2015*

123. This was to commemorate 100 years of work at the Yeovil factory which was the base for AW Ltd. it was then the final assembly line for, among others, the A159 and the new AW 189 helicopters. It also said that rotor blades and transmission systems “are manufactured for all three members of the AW Family of helicopters” being AW 139, 169 and 189. The reference to transmission systems reflects what I have referred to above about the later supply of some parts for the AW 139 by AW Ltd to AW S.p.A. since 2009. I agree that rotor blades were not mentioned

as being manufactured in evidence about the position since 2009, but all that may mean is that the production of rotor blades came more recently. The reference here is thus not inconsistent with Mr Parrella's evidence and does not assist with the position at the time of the manufacture of the Helicopter or indeed the TRB.

*Marketing Brochure for the AW139*

124. This dates from about 2007. It is a brochure about the AW139. Under the heading "Agusta Westland Marketing and Sales" it refers to addresses in Italy and the UK. Therefore, it is said, that AW Ltd must at least have been involved in supplying the Helicopter. However, this is comprehensively answered by Mr Parrella in his second witness statement. For this purpose he obtained information from Mr Roberto Gravaglia, who has been employed by Leonardo since 1998 and who was responsible for helicopter marketing from 2007 until 2013. Also from Mr Paul De Jonge who is responsible for Product Marketing and Sales Engineering and finally Mr Emilio Dalmasso employed since 2002 and with responsibility for Helicopter Global Sales. This is to the effect that any request for information in relation to a potential sale would be forwarded on to Italy if it had been received by AW Ltd. No AW139 sale has ever been conducted through AW Ltd. While both helicopter business centres would be noted on sales brochures, it does not indicate that AW Ltd have any actual role here.

*Conclusions as to Real Prospect of success on the facts*

125. When one considers the pieces of evidence discussed above separately or together, there is really nothing of any substance which indicates that AW Ltd any role in designing and manufacturing supplying or marketing the Helicopter, the TRB or the TRSOV.
126. Further, this is not a case where it can be said that there is at least a real prospect that documents disclosed hereafter will or might realistically change the position. There is no reason to suppose that something will turn up which flatly contradicts the Defendants' position. It is said that they could in some respects have provided more comprehensive evidence by way of rebuttal or have approached others with more contemporaneous knowledge or disclosed further documents as to the design history if still available. Perhaps so, but at the end of the day, officers of both sets of Defendants have explained the position clearly and firmly.
127. It has also to be borne in mind that in reality, the Defendants are being asked to prove a negative ie that AW Ltd did not have at least some role in respect of the Helicopter and TRB. That is difficult to do, especially as Senior's case is not (or not necessarily) that AW S.p.A. had no such role. Rather it is that AW Ltd may have had such a role as well, so as to open up the possibility of more than one Defendant being liable. Accordingly, from Senior's point of view, more documents dealing with the role of AW S.p.A. would not be determinative.
128. It therefor follows that the claim against the anchor defendant has no real prospect of success on the facts.

**ANOTHER COMPELLING REASON FOR A TRIAL**

129. I have already indicated that there is no realistic basis to assume that contrary material will or might emerge later on. Senior relies upon the fact that all the relevant documentation will lie with the Defendants. I agree, but that does not assist where there is no realistic prospect of something different emerging.
130. The fact that the only patent application produced before me which specifically relates to the joint between rotor blades and the rotor head, is that made by AW Ltd does not go anywhere here. It is true that AW S.p.A. and Leonardo have not produced the set of patents that must exist in relation to the design of the Helicopter as a whole but I do not see why that is necessary, when the truth is there is nothing really pointing towards a role for AW Ltd. Equally, even if Mr Parrella could have asked some more questions about the original collaboration from someone like Mr Candiani, there



is nothing to suggest that he was avoiding the issue; he was simply obtaining information to deal with various points.

131. Nor is there anything suspicious about the stance taken by the Defendants which might require the Court to allow the case to go to trial anyway. Nor is this a case where for some reason the claim, although on its face unmeritorious, should be examined at trial in the “full glare of publicity”.
132. In my judgment, this case is plainly outside those narrow circumstances in which the Court would be persuaded to allow a case to go to trial even though it had no merit.

### **Failure to comply with the requirements of CPR 24**

133. It is correct that strictly speaking, paragraphs 37 of Ms Wilson’s second witness statement do not state in precise terms what they should because CPR 24 requires it to be deposed first that the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim to which the application relates, and second that the applicant knows of no other reason why the disposal of the claim or issue should await trial. Instead so far as the first part of that statement, what she said in paragraph 37 was that:

“For all of the above reasons, the Claimants’ claim against the Second Defendant should be struck out/the Second Defendant is entitled to summary judgment in its favour.”

134. However, she did depose correctly to the contents of her witness statement, she referred to the content of Part 24 in paragraph 11, and in paragraph 38 correctly deposed in the second respect of the required statement. In my view the substance of the requisite belief has in my view been stated, any formal defect should be waived and it would be completely disproportionate to allow this to render invalid the underlying application for summary judgment.

## **OTHER ARGUMENTS ON THE MERITS**

### **Introduction**

135. In the light of my conclusions above, that there is no viable claim on the facts, nor any compelling reason for a trial, the alternative arguments made by AW Ltd on different elements of the claims do not strictly arise and AW Ltd is entitled to summary judgment against Senior. Nonetheless, since the other points were argued before me, albeit on a fairly compressed basis, I should indicate briefly what I would have found had it been necessary.
136. As noted above, the two essential causes of action pleaded against the Defendants are breach of the Act and negligence. It is also alleged that there were wrongs committed under Italian Law but these were not argued before me. Equally, although the claim under the Act is also said to be made pursuant to EU Directive 85/374 which is effectively transposed into the Act, no separate argument was addressed by reference to the Directive.

### **The Claims under the Act**

137. Senior alleges that the Defendants were producers or suppliers of the Helicopter and the TRB. It alleges that each of these was defective. The particular heads of loss (for both causes of action) are set out in paragraph 13 above.
138. As against this, the Defendants allege first that the entirety of the claim under the Act fails because neither product was property which (a) by its description was ordinarily intended for private use or (b) was intended by the person suffering the loss mainly for his own private use. See section 5 (3) of the Act. Senior was a collection of commercial entities and was operating the Helicopter (and thus the TRB) for commercial use. There is no answer to the Defendants’ argument here. All that Senior can say is that it would like to test an argument that where the product concerned was hired out to a client for their private use (which seems unlikely here given the trip from the oil

platform) such a use would not fall foul of section 5 (3). That, however, is no answer to the present argument.

139. If they needed to go further, the Defendants further invoke section 5 (2) insofar as the allegedly defective product is the Helicopter itself. This sub-section states that there is no liability in respect of any defect in a product for the loss of or damage to the product itself. Again, that is a complete answer in relation to the claim for loss of value of the Helicopter where the Helicopter was the defective product. Of course, this would not remove any of the other claims for loss or the claim based on TRB as the defective product leading to the loss of the Helicopter. So it is a partial defence.
140. I then turn to some limitation arguments. Section 11A of the Limitation Act 1980 provides that there is a 10-year long stop limitation period after which the right of action under the Act is extinguished. Accordingly, this is a substantive bar. The “relevant time” for these purposes, so far as any claim based on the supply of the Helicopter is concerned, is no later than 21 May 2007. Accordingly, the long stop period expired on 21 May 2017, some 3 months before proceedings were issued on 17 August 2017. For this reason, therefore, the claim based on the Helicopter itself is substantively time-barred.
141. That argument would not apply to the relevant supply of the TRB which was on any view not before 2008, that being the date of the first supply, Senior also contending that there was a second relevant supply in 2010/2011 (see paragraph 10 above and paragraphs 38-41 and 59(3)(a) of the Particulars of Claim). However, section 11A (4) also provides that where the damages claimed “consist of or include damages in respect of personal injuries to the plaintiff or any other person or loss of or damage to any other property” the action “shall not be brought” after 3 years from the date of the accrual of the cause of action or the “date of knowledge” of the injured person. In this context, the claim for “damage to other property” would encompass a claim for the loss of value of the Helicopter as a result of the supply of the defective TRB.
142. The definition of “date of knowledge” is set out in section 14 of the Limitation Act, which of course applies otherwise in the context of ordinary claims for personal injuries, dealt with at section 11 thereof. As to that, Senior argues that it could not have had the relevant knowledge until after publication of the final report of CENIPA in 2017. However, the initial report published on 25 August 2011 raised the point about the defective design and/or manufacture of the TRB. Moreover, proof of Senior’s state of knowledge can be gleaned from the 2011-2013 correspondence referred to in paragraphs 23 to 26 above. In my judgment, that was sufficient by way of actual knowledge. Alternatively, Senior must have had constructive knowledge of the form set out in section 14 (3) of the Limitation Act ie knowledge which it “might reasonably have been expected to acquire (a) from facts of observable or ascertainable by..[it] or (b) from facts ascertainable by ..[it] with the help of ...appropriate expert advice which it was reasonable for it to seek.” I do not accept that actual or constructive knowledge was not obtained until after publication of the final report. Accordingly, there is a procedural limitation bar in respect of the claim based upon the TRB.
143. Finally, the Defendants contend that the Indemnity Claim is not within the purview of losses which can be claimed under the 1987 Act. This is because there is generally no right to recover from a wrongdoer, losses incurred by a third party as a result of the personal injury or death of the victim of the wrongful act; these are known as “relational losses”. See *Charlesworth and Percy on Negligence* 14<sup>th</sup> edition at paragraph 2-233. This is why a statutory exception for dependents of deceased persons had to be created by the Fatal Accident Act 1976. Senior has no answer to this point save to say that it would wish to rely upon the decision of the CJEU in *Boston Scientific v AOK* [2015] 3 CMLR 6 52-55. Here, a subrogated claim had been brought by insurers to enforce the rights of individuals who had had implanted into them defective heart pacemakers supplied by the defendants. The result was that the individuals had to undergo surgery in order to implant

replacement pacemakers. The insurers argued that the cost of the operations was recoverable pursuant to the underlying consumer protection Directive. The Court agreed and held that:

“.. The damage caused by a surgical operation for the replacement of a defective product such as a pacemaker constitutes “damage caused by for personal injuries” for which the producer is liable, if such an operation is necessary to overcome the defect in the product in question”

144. I follow that but I fail to see how it assists Senior on the Indemnity Claim here, where it is not (whether directly or by subrogation) the party who has suffered the damage for personal injuries.
145. For all the reasons stated above, it follows that quite apart from the facts, the claim made under the Act cannot succeed. It does not matter that some of the defences are partial or that one of the limitation defences is procedural (insofar as that might affect the Merits Test) because the first defence raised is a complete answer and is clearly correct.

### **The Claims in Negligence**

146. The first point raised by the Defendants is that this is a claim made “in respect of personal injuries to the plaintiff or any other person” for the purposes of section 11 (1) of the Limitation Act so that there is a reduced limitation period of 3 years, again, from the accrual of the cause of action or the date of knowledge. Assuming section 11 (1) is engaged, the proceedings were issued after 3 years because the date of knowledge was earlier; see my analysis of this above.
147. The Defendants argue that the Indemnity Claim is itself a claim “in respect of” personal injuries suffered by others. This expression has been interpreted widely. So, for example, in *Howe v David Brown* [1991] 4 All ER 30, the original plaintiff who had suffered injury sought to add his business partner so as to make a claim (here in contract) on behalf of the firm. This was sought to be done after expiry of the 3 year period. The defendant argued that the firm’s claim, based upon financial losses incurred as a result of the accident, was covered by section 11 (1) and therefore the whole claim was time-barred. The Court of Appeal agreed. As Lord Justice Stuart-Smith put it:

“A typical case is where a plaintiff workman is injured by defective machinery provided for his use by his employer. He can sue the employer in tort under the Employer’s Liability (Defective Equipment) Act 1969 and perhaps also for negligence. Section 11 of the Limitation Act 1980 applies. The employer can sue in contract the supplier of the machinery; the measure of damages is an indemnity in respect of the workman’s claim. Such a claim in my judgment also plainly falls within section 11 . If the employer adds a claim in respect of his own losses resulting from the plaintiff’s injury (assuming such a claim will lie in law) the nature of the claim is not so different as to take it outside the section. Effectively this is what the firm’s claim is here, though of course it is not coupled with any claim for indemnity against a claim of the plaintiff. The final words of the section “in respect of personal injuries to the plaintiff or any other person ” , in my judgment add point to this construction. Accordingly the application falls to be considered under Order 15, rule 6(5)(b).”

148. Accordingly, the entire claim in negligence is time-barred.
149. Further or in the alternative, the Defendants argue that all of the financial claims made are claims for pure economic loss and the Indemnity Claim is moreover excluded as a relational loss. That seems to me to be right save in respect of the claim for the loss of the Helicopter insofar as that was caused by the supply of the defective TRB. But there will still remain the limitation point.
150. The upshot here is that the whole claim in negligence is subject to a procedural time-bar and significant parts of it consist of irrecoverable losses.

### **APPLICATION TO STRIKE-OUT**

#### **No reasonable grounds for bringing the claim**

151. This is now academic in the light of my decisions above. But I should say, that if I found there was a viable claim on the evidence, I would not have struck out the claim simply because the way in which it was formulated in the Particulars of Claim. The causes of action relied upon as against

the Defendants were properly particularised. I agree that the allegations as to their respective involvement in the design, manufacture marketing and so on of the Helicopter did not distinguish between them. There would have been a compelling case for further particulars here. But that would not have deprived the Particulars of Claim of any reasonable grounds.

### **Abuse of process**

152. Again, this is academic now, so far as the claim against AW Ltd is concerned. Had it been relevant, I would not have struck out the claim on this basis. It is true that Senior could have chosen to go against all the Defendants in Italy, relying there, upon AW S.p.A. and Leonardo as the anchor Defendants. Perhaps it was unwise to choose to start the proceedings here, although it may have thought that limitation problems could best be avoided by issuing here at least to begin with. But this does not suggest to me that there was some deliberate attempt to mount a knowingly unmeritorious claim as an artificial pretext in which to sue AW S.p.A. and Leonardo here, away from the jurisdiction of their domicile. Indeed, Mr Amos states that if there had been a different assessment so that the only proper defendants were all domiciled in Italy for example, his firm would probably have recommended the ultimate commencement of proceedings there. But that is not how, from his point of view, matters transpired. In my judgment, Senior thought that there was enough to bring a viable claim against AW Ltd; as it turns out, it was wrong in that regard, but that is as far as it goes.

## **CONCLUSIONS ON THE APPLICATIONS**

### **The Summary Judgment Application**

153. It follows first that for the reasons given above, all the claims against AW Ltd must be summarily dismissed.

### **The Jurisdiction Application**

154. Since I have found that (a) there is a Merits Test which must be satisfied in relation to the anchor defendant before Article 8 (1) can apply, and (b) there is no viable claim on the facts, Article 8 (1) does not apply. As this is the only basis for the claimed jurisdiction against AW S.p.A. and Leonardo, the Jurisdiction Application must succeed and the proceedings against must be set aside.

155. In deference to the arguments made in relation to other points which do not now strictly arise, and lest the matter goes further, I make the following brief observations:

- (1) If there is no Merits Test, I would not have found that Senior's invocation of Article 8 (1) fell foul of the Artificial Fulfilment Prohibition; this is for the reasons articulated in the context of abuse of process in paragraph 152 above;
- (2) If there is the Merits Test, and I found that there was no real prospect of success at trial on the facts but there was nonetheless a compelling reason for a trial, I would have found that this was sufficient for the Merits Test and thus for the applicability of Article 8 (1). This is because there would then be a trial of the claim against AW Ltd, and so the risk of inconsistent judgments would arise. It is true that the question of compelling reasons for a trial can only be raised under Part 24 as against AW Ltd. However, that question would be almost certain to arise if non-anchor defendants challenge jurisdiction on the basis of the merits of the claim against the anchor defendant and whether all the defendants were (as here) represented together; any such jurisdictional challenge would lead to an application by the anchor defendant that the claim against it should be dismissed. At which point the "compelling reason" question would arise. However, all of the above, is subject to the alternative arguments as to the merits. If the claims against AW Ltd would fail *in limine*

because of those other arguments, they could not be any compelling reason for a trial on the facts;

- (3) If there is the Merits Test but there was a viable claim on the facts, it follows from my *obiter* findings as to the alternative arguments that one way or another, the entire claim against AW Ltd would be summarily dismissed anyway. As the end result would be the absence of a viable claim against it, the Jurisdiction Application would succeed. It is correct that so far as the negligence claims are concerned, they would only be dismissed in their entirety because of the (procedural) 3 year time-bar. That would not in my view be an real obstacle to the challenge to the operation of Article 8 (1). This is because, notwithstanding its procedural character in the sense that it simply prevents the action from being brought (if pleaded against the claimant) as opposed to eliminating the right of action, I think that it is sufficiently close to the merits to be taken into account in the Merits Test. Moreover, the time-bar here would apply to all the Defendants (unlike *Reisch* where the procedural bar affected only the anchor defendant). A consequence of this is that even if the time bar could not itself prevent the application of Article 8 (1) in respect of the negligence claim, that claim would be held time-barred in a summary judgment application which the (now joined ) non-anchor defendants could now bring and which would be granted following the decision that AW Ltd's claim was time-barred.

156. In the event, however, the Jurisdiction Application has succeeded on the basis that there is no viable claim against AW Ltd.
157. Although I did suggest that the Defendants give an undertaking to this Court that in any proceedings in Italy they would not seek to suggest anything by way of defence which would be deviating from what is stated in their witness statements here, I do not consider that this is necessary for my decision. That being so, I do not consider it appropriate to require that undertaking.
158. I am extremely grateful to both Counsel for their most helpful oral and written submissions.