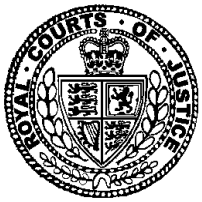

Neutral Citation Number: [2021] EWHC 1851 (Comm)

Case No: CL-2018-000699

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTRY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 16/07/2021

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

ID	**Claimant/ Respondent**
- and -	
LU	**1st Defendant**
BZ	**2nd Defendant/ Applicant**

- -
- -

Mr Huw Davies QC, Mr Felix Wardle and Ms Katherine Ratcliffe (instructed by **Peters & Peters Solicitors LLP**) for the **Claimant/Respondent**
Mr Richard Power (instructed by **JMW Solicitors LLP**) for the **First Defendant**
Mr Adam Baradon and Mr Barnaby Lowe (instructed by **Joseph Hage Aaronson LLP**) for the **Second Defendant and Applicant**

Hearing dates: 9-10 June 2021

- -

Approved Judgment

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

.....

HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is an application by the second defendant for

   (a) A declaration that the English Court has no jurisdiction to try the claim brought against the second defendant or, alternatively, that the English Court should not exercise any jurisdiction which it may have;

   (b) An Order setting aside

      a) The order of Picken J dated 8 May 2019 granting permission to serve the Claim Form and the Particulars of Claim and any other documents in these proceedings on the second defendant out of the jurisdiction; and

      b) The purported service of the Claim Form and the Particulars of Claim on the second defendant;

      and

      c) An Order that this hearing take place in private.

2. The application that the hearing take place in private was made on the basis that included within the extensive evidence filed in support and answer to the application are copies of pleadings and witness statements filed in an arbitration between some of the parties to this Claim. That application was not strenuously opposed but in any event was granted for the reasons given by me at the outset of the hearing. Directions concerning the conduct of the hand down hearing and whether this judgment should be anonymised are set out at the end of this judgment.

3. I record at the outset that the hearing bundle for this application runs to 969 pages, the authorities bundle contains 58 different items including 50 case reports, 4 extracts from statutes and conventions and 4 extracts from textbooks. At the hearing I was provided with a further textbook extract, and extracts from the Supreme Court Practice 1988 and various statutory instruments amending the Rules of the Supreme Court. The second defendant's skeleton submission ran to 43 pages and that of the claimant to 36 pages. The estimated reading time was 1 day and the hearing lasted the better part of 2 days. Given the tests that have to be applied on applications of this sort are now well established, I question whether this was either reasonable or proportionate.

4. The overarching point made on behalf of the second defendant is that this claim has nothing to do with the English jurisdiction because it depends on the allegation that the second defendant gave various undertakings to the first defendant and claimant in Ukraine, in respect of deposits made by Ukrainian nationals in a Ukrainian bank in which the second defendant has an interest and a further oral agreement alleged to have been reached by the defendants and the claimant (known in these proceedings as the Tripartite Agreement) in Ukraine and an EU Member State ("The EU Member State"). The claimant is a Ukrainian national living either there or in The EU Member State,

both defendants are Ukrainian nationals. The first defendant is resident in The EU Member State and the second defendant in Kiev. It is not suggested that either of the defendants have assets in England.

5. Although various gateways were relied on by the claimant when applying for permission to serve these proceedings on the second defendant, at the hearing before me, whilst not abandoning the other gateways on which he had relied before Picken J, the claimant relied all but exclusively on Gateway 3 arguing that (i) the first defendant had submitted to the English jurisdiction (even though it is common ground that he did not have to) and so (ii) is the anchor defendant for the purpose of Gateway 3 and (iii) the second defendant is a necessary or proper party to the claim because the claimant's claims against the second defendant relate to the same Tripartite Agreement on which his claims against the first defendant are based.

6. The second defendant maintains that it is not open to a claimant relying on Gateway 3 to rely on a defendant who has voluntarily submitted to the English jurisdiction as being an anchor defendant. In any event, the second defendant maintains that there is not a serious issue to be tried as between the claimant and second defendant and finally that England is not the *forum conveniens* for the determination of this dispute.

7. The claimant has a cross application for permission to amend his Claim Form and Particulars of Claim. There is a dispute between the parties as to whether, assuming that application succeeded, the claimant would have to apply for further permission to serve the amended proceedings out of the jurisdiction. It was agreed, sensibly, that I should approach this application on the basis that permission to amend had been granted and without regard to the question whether the claimant would need permission to re-serve the proceedings on the second defendant out of the jurisdiction if permission to amend is granted.

Factual Background

8. Each of the parties are Ukrainian nationals, who have been known to each other for about 30 years. The claimant and second defendant are both domiciled and resident in Ukraine. The first defendant is a Ukrainian national who is and was at all material times domiciled in The EU Member State. It is common ground that he is and was at all material times unable to leave that EU Member State.

9. The claimant is a businessman who has interests in and/or is an official in the following companies, each of which is involved in gas distribution and/or trading:

   (a) PJSC A;

   (b) JSC B;

   (c) JSC C; and

   (d) JSC D.

   The first defendant controls a group of companies known as "*Group XY*". The second defendant is the majority owner of, and used to control, "The Bank", a Ukrainian bank that entered administration on 2 March 2015.

10. There are two other individuals who are central to the issues between the parties. The first is YA, who is a confidant of and conducts business including negotiations on behalf of the claimant. He is a member of the PJSC A board, as well as being on the supervisory boards of JSC B and JSC D. The other is GH, who was at all material times the second defendant's business associate. He was a manager at another Ukrainian bank before moving to The Bank in or around 2014.

11. The claimant alleges that in late 2012 or early 2013, the second defendant, by GH, approached the claimant requesting that he move his corporate banking business to The Bank. Following discussions, the claimant agreed to do so and the companies referred to above went on to place considerable funds with The Bank. The claimant's case is that he agreed to do so only after the second defendant agreed that he would undertake personal responsibility for all monies that the companies placed with The Bank. The claimant alleges that it was expressly agreed by the claimant and second defendant that this oral agreement was governed by English law. These arrangements are denied by the second defendant. It is entirely unclear whether the claimant alleges that these alleged obligations are primary (indemnity) obligations or (secondary guarantee) obligations. The claimant further alleges that in or about December 2013, the claimant and YA on behalf of his wife ("Mrs YA") deposited about US$1.7m of their personal funds in The Bank accounts. The claimant alleges that these deposits were the subject of similar undertakings by the second defendant. If and to the extent these oral agreements (a) were made, (b) were agreed expressly to be subject to English law, and (c) were secondary guarantee obligations, then they would be unenforceable by operation of s.4 of the Statute of Frauds 1677 because they were alleged to have been made orally rather than in writing and signed as required by the statute.

12. The first defendant alleges that he and his companies deposited sums totalling about US$35m in accounts at The Bank against similar undertakings, which the first defendant characterises in his Defence in these proceedings as indemnities – see paragraph 9. If that is so then s.4 of the Statute of Frauds 1677 would be of no application.

13. In 2015, The Bank entered administration having been declared insolvent by the National Bank of Ukraine. The claimant alleges that at that date the sums due to him, his companies and Mrs YA totalled US$47,934,036.14.

14. In December 2014, JK Limited, a company controlled by the second defendant issued arbitration proceedings against LI GmbH (a company controlled by the first defendant) seeking US$ 171,850,067. This arbitration is referred to in these proceedings as the "*Corporate*" arbitration. At or about the same time, the second defendant issued a personal arbitration claim against the first defendant for US$30m. This arbitration is referred to in these proceedings as the "*First Personal*" arbitration. On 7 April 2015, these arbitrations were settled by agreements to make payments totalling US$40m contained in two settlement agreements, each of which was in writing and was expressly made subject to English law. The claimant alleges that the reason why the settlement was for about US$161m less than the sum claimed was because the first defendant agreed to waive any claims he or certain of his companies might have against the second defendant under the undertakings referred to above.

15. Against that background, I come to the agreement that is relevant to these proceedings. This is referred to in these proceedings as either the "*Tripartite Agreement*" or the "*May Agreement*". The claimant's case is that at a meeting on 9 May 2015, between the claimant, first and second defendants, it was agreed by and between them that the total amount due to the second defendant from the first defendant following the settlement of the First Arbitration Proceedings would be paid by the first defendant paying (a) the second defendant US$6.2 million by 1 July 2015 and (b) the balance of US$33.8 million to the claimant after the first defendant's extradition proceedings were resolved. The claimant alleges that the second defendant agreed to pay to the claimant 25% of all sums paid to him in satisfaction of the first defendant's obligation to pay US$6.2 million by 1 July 2015.

16. The claimant also alleges that in the course of the meeting, it was agreed that the second defendant would pay what was due to the claimant under the undertakings referred to earlier over a period and at sums to be agreed and the sum due was quantified as the gross sum allegedly due inclusive of interest (US$54.43m) less US$33.8m to be paid by the first defendant to the claimant under (b) above and US$1.55m being the 25% of the sum referred to in (a) above leaving a net sum payable by the second defendant to the claimant of US$19m. The claimant alleges that the second defendant agreed to terminate the Corporate and First Personal arbitrations within 14 days after receipt of the sum referred to in (a) above.

17. The claimant and first defendant maintain that the Tripartite Agreement was partially performed because by early June 2015, the first defendant had paid about US$5m to the second defendant by way of part discharge of the obligation referred to in paragraph 15 (a) above and that in consequence the second defendant is bound to pay the claimant US$1.05m. The claimant alleges that the second defendant has paid him US$450,000 but not the full amount. The second defendant denies that the Tripartite Agreement was entered into or if it was that it was valid or enforceable. The second defendant alleges that the payments made by the first to the second defendant were not in performance of the Tripartite Agreement.

18. On 20 November 2017, the second defendant commenced what is known in these proceedings as the "*Second Personal Arbitration*" against the first defendant for non-payment of sums which were originally due to him under the Personal Settlement Agreement. The first defendant's defence was that it had been agreed as part of the Tripartite Agreement that the sum which the second defendant was claiming would be paid by the first defendant to the claimant in part discharge of the second defendant's alleged debt. On two occasions the claimant sought to be joined as a party to this arbitration. On each occasion the attempt received active support from the first defendant. This is unsurprising given the nature of his defence. Those attempts were resisted by the second defendant and failed. A point that the claimant makes on this application is that these proceedings would have been unnecessary had that application succeeded and that there is a pressing necessity for all three parties to have their rights and obligations against each other resolved by a single tribunal and that these proceedings represent an opportunity for that to happen. This is relied on principally as a *forum conveniens* factor pointing towards a conclusion that this court is the appropriate court for the resolution of the disputes between the parties.

19. A month after these proceedings were issued, on 30 November 2018, the first and second defendants settled the Second Personal Arbitration by an agreement known in these proceedings as the Second Personal Settlement Agreement. Under that agreement the first defendant agreed to pay the second defendant everything claimed by the second defendant and accrued interest and the first defendant agreed to defend these proceedings on the basis that he now defends them – that is to say he denies that the Tripartite Agreement is effective or binding.

20. As will be apparent from what I have said so far, it is not alleged that the Tripartite Agreement was expressly made subject to English law or that it was agreed between the parties that the English courts would have jurisdiction in respect of any claim under or concerning it. The second defendant disputes that there was ever an agreement to the effect characterised as the Tripartite Agreement. The first defendant maintains that the Tripartite Agreement was agreed but is unenforceable for various legal reasons but importantly for the purpose of this application both the claimant and first defendant maintain that the agreement was made at a meeting between the parties at the Grand Hotel in The EU Member State. It is common ground that each of the Personal Settlement Agreements contained entire agreement clauses, a no oral variation or rescission clause, a no waiver clause and an anti-assignment clause. The Second Personal Settlement Agreement was subject to an entire agreement clause and a no oral variation waiver or rescission clause. The corporate agreement is immaterial because the parties to that agreement did not include the parties to these proceedings.

21. A key point relied on in this application is a submission that in effect the first defendant and claimant are in a collusive relationship and that is the reason why the first defendant was willing to submit to the jurisdiction of the English court – in effect to bring about what the claimant and first defendant sought but failed to achieve in the Second Personal Arbitration namely a set of proceedings in which the claimant is a party as well as the first and second defendants.

22. In support of this point, the second defendant relies on the facts that (i) the claimant applied to be joined as a party to the Second Personal Arbitration with the active support of the first defendant, (ii) after that application had been dismissed by the arbitrator the claimant then provided witness statements in support of the first defendant in those proceedings and finally (iii) the claimant commenced these proceedings in which at paragraph 3 of the Claim Form, the claimant sought:

> "(i) a declaration that the parties entered into the Tripartite Agreement as per the terms particularised in the attached Particulars of Claim; and (ii) injunctive relief restraining the First and Second Defendants from continuing the arbitration until such time as this claim has been determined."

In the Particulars of Claim the claimant alleged that the Second Personal Arbitration had been commenced in breach of the Tripartite Agreement and sought by way of remedies:

> "(1) A declaration that Messrs [ID, LU and BZ] entered into a valid and binding tripartite contract ….

> (2) All necessary orders requiring Messrs [LU and BZ] to implement in full the agreement referred to at paragraph (1) above and to give effect thereto.
>
> (3) All necessary injunctive relief, including injunctive relief:
>
> (i) restraining [BZ] and/or [LU] from continuing the Second Personal Arbitration until such time as this claim has been determined by a Court of competent jurisdiction; and
>
> (ii) restraining [LU] from making any payment to [BZ] in payment of or satisfaction of the claim brought by [BZ] …
>
> (4) Either additionally or alternatively to the injunctive relief referred to at paragraph (3) above, a declaration that any monies paid by [LU] to [BZ] pursuant to any award in the Second Personal Arbitration rendered before this claim has been determined by a court of competent jurisdiction are held by [BZ] on trust for [ID]."

23. The facts material to this issue for present purposes are that on 1 November 2018, the claimant sent a copy of the Claim Form (which had been issued on 26 October) together with the Particulars of Claim to the first defendant. It is not suggested that the first defendant was aware of the Claim Form prior to this or that he had agreed to submit to the jurisdiction in respect of the claims contained in the Claim Form prior to it being issued. On 9 November 2018, the claimant applied again to be joined as a party to the Second Personal Arbitration. On 21 November 2018, the first defendant acknowledged service and by so doing voluntarily submitted to the jurisdiction of the English court. There is no evidence of any agreement with the claimant that he would do so. The second joinder application failed and was dismissed by the arbitrator by an order made on 23 November 2018. As the arbitrator noted when dismissing this application, the claimant's interests " … *are clearly firmly opposed to those of the [second defendant], but his position in this arbitration is closely aligned with that of the [first defendant], with whom he is making common cause*". On 8 May 2019, the claimant obtained leave from Picken J to serve the proceedings out of the jurisdiction on the second defendant, principally on the ground that he was a necessary or proper defendant to the claim brought against the first defendant, who having submitted to the jurisdiction of the court was treated as being the anchor defendant for the purpose of that application.

24. The only other point I need mention at this stage concerns the application to amend. The application seeks to raise for the first time a claim for damages quantified in the sum of US$34.8m for anticipatory repudiatory breach and anticipatory breach of the Tripartite Agreement. The claimant maintains that if and to the extent permission is required, he is entitled to it either under Gateway 4A or 9.

Rules Applicable to Service Out of the Jurisdiction

25. CPR r. 6.36 and r. 6.37 provide:

> "6.36 In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction

> with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply.
>
> 6.37
>
> (1) An application for permission under rule 6.36 must set out –
>
> (a) which ground in paragraph 3.1 of Practice Direction 6B is relied on;
>
> (b) that the claimant believes that the claim has a reasonable prospect of success; and
>
> (c) the defendant's address or, if not known, in what place the defendant is, or is likely, to be found.
>
> (2) Where the application is made in respect of a claim referred to in paragraph 3.1(3) of Practice Direction 6B, the application must also state the grounds on which the claimant believes that there is between the claimant and the defendant a real issue which it is reasonable for the court to try.
>
> (3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.
>
> …"

26. Practice Direction 6B sets out the grounds on which a party seeking permission to serve out of the jurisdiction is entitled to rely. Since it is only if one of these grounds is made out that permission to serve out of the jurisdiction can be granted these grounds are referred to colloquially as gateways.

27. As I have said, the gateway on which the claimant relied at the hearing before me (without formally abandoning reliance on the other gateways to which I refer below) was Gateway 3 contained in paragraph 3(3) of 6BPD. In so far as is material, it provides:

> "3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
>
> …
>
> 3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

The claimant also relies on Gateways 4A, 6 and 9 as I have explained. In so far as is material, those paragraphs provide as follows:

> "…
>
> (4A) A claim is made against the defendant in reliance on one or more of paragraphs (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts.
>
> …
>
> Claims in relation to contracts
>
> (6) A claim is made in respect of a contract where the contract –
>
> (a) …
>
> (c) is governed by English law; or
>
> (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.
>
> …
>
> **Claims in tort**
>
> (9) A claim is made in tort where—
>
> (a) damage was sustained, or will be sustained, within the jurisdiction; or
>
> (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.
>
> …"

Gateway 3 – Availability

28. It is convenient to consider first the submission made on behalf of the second defendant that the claimant is not entitled to rely on Gateway 3 because the first defendant is not a defendant who is to be treated as being a person on whom the claim form has been or will be served because the court has jurisdiction over the first defendant only because he has voluntarily submitted to the jurisdiction of the English Court. This issue turns principally on the true construction of paragraph 3(3) of 6BPD although like all construction issues context is important.

29. The first defendant is as I have said earlier a Ukrainian national who at all material times was and is domiciled in The EU Member State. As Mr Baradon submits, at the time when the first defendant was served with the proceedings he had an unanswerable objection to jurisdiction by reference to Art. 4 of Regulation (EU) No 1215/2012 ("Brussels Recast"), which provides that "*persons domiciled in a Member State shall,*

whatever their nationality, be sued in the courts of that Member State" and is the primary rule regulating the jurisdiction of each member state to entertain claims against persons domiciled in member states – see Lungowe v. Vedanta Resources plc [2019] UKSC 20; [2020] AC 1045 *per* Lord Briggs JSC at paragraphs 29-30.

30. As I have explained, the Claim Form was issued on 26 October 2018. The Claim Form was required to be served in the jurisdiction unless CPR r. 7.7(2) or 6.11 or Section IV of CPR Part 6 applies – see CPR r.6.6. It is not suggested that CPR r. 6.7(2) (which concerns service on a solicitor in Scotland or Northern Ireland) or r.6.11 (which is concerned with contractually nominated places or methods of service) applies. It follows that (aside from a voluntary submission to the jurisdiction by the first defendant) if the Claim Form was to be served on the first claimant it could be served on him only in accordance with Section IV of CPR Part 6.

31. In fact, the first defendant voluntarily submitted to the jurisdiction of the English court as I have explained when his solicitors acknowledged service of the Claim form on 21 November 2018 indicating an intention to defend the claim but not to contest jurisdiction. There is no evidence from either the claimant or first defendant as to the circumstances in which this submission came to be made. The first defendant served his Defence on 20 February 2019.

32. Mr Baradon submits that following the decision of the House of Lords in John Russell and Company Ltd v. Cayzer Irvine and Company Ltd [1916] 2 AC 298 ("John Russell"), Gateway 3 is not available to the claimant against the second defendant, because the first defendant has voluntarily submitted to the jurisdiction of the English Court.

33. The rule permitting service out of the jurisdiction on the basis that the person to be served was a necessary or proper party to an action commenced in England was in different terms when John Russell was decided from that which currently applies. The rule applicable when John Russell was decided was RSC O.11 r.1(g), which permitted service out of the jurisdiction where:

> "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

34. John Russell was concerned with a claim against two Scottish registered companies in respect of the loss of a cargo due to the sinking of the vessel in which the cargo was being carried. As in this case, the first defendants decided to submit to the jurisdiction of the English court and their London solicitors accepted service on their behalf. The plaintiffs with leave of the Court under RSC O.11, r.1(g), issued a concurrent writ (the procedure that applied under the RSC, where it was intended to serve the Writ on a defendant out of the jurisdiction of the court) and served it on the second defendants in Scotland. That defendant applied to have the writ and service of it set aside on the basis that the action had not been "…. *properly brought against some other person duly served within the jurisdiction*.". The claimant's submission is succinctly stated in the summary of Mr Roche KC's argument at [1916] 2 AC at 300 as being that the " … *first defendants, by appointing their London solicitor to accept service are in the same*

position as if they were served within the jurisdiction …". That was unanimously rejected by the House of Lords. Lord Sumner said that:

> "…the persons who are already defendants in the action, although they may submit to the jurisdiction and so preclude themselves from raising any objection, cannot by that procedure affect the rights of third parties. The party out of the jurisdiction in my view is entitled, before he is brought into a proceeding to which he would normally remain a stranger, to this protection, that the procedure laid down in the rules and orders shall have been followed, and not merely put in force against another party, who has not objected to the procedure being departed from."

He considered this to be the effect of the words "*properly brought"* but also considered that the words "*duly served"* reinforced that construction or had the same effect – see the final paragraph of his opinion on page 304. Lord Parmoor agreed with Lords Sumner and Haldane. Lord Wrenbury also agreed, saying that the phrase meant

> "brought with a due observance of the process of the Court against a person who could properly be served with the process of the Court, and not because he chooses voluntarily to submit himself to the jurisdiction of the Court."

Mr Baradon submits that although John Russell depended on the construction of RSC Order 11, r.1(g) rather than paragraph 3(3) of 6BPD, that is not to the point because there is no material difference between the effect as a matter of construction of the language used in paragraph 3(3) of 6BPD and that used in the Rule considered by the House of Lords in John Russell, when read in the context of the effect of that paragraph on persons with no connection to this jurisdiction.

35. The submission that there is no functional difference between the words "*…a person ('the defendant') on whom the claim form has been or will be served …"* (paragraph 3(3) of 6BPD) and *"…. properly brought against some other person duly served within the jurisdiction."* (RSC Order 11, r.1(g)) depends upon reading "*served"* in paragraph 3(3) as meaning served as permitted by law and not merely because the person served "*… chooses voluntarily to submit himself to the jurisdiction of the Court*". If this construction is correct, then there can be no sensible objection to a declaration that the English Court has not got or should not exercise any jurisdiction which it may have over the second defendant and to the discharge of Picken J's order unless the claimant is able to rely on one of the other gateways referred to earlier.

36. In attempting to answer that question the legal context is an important consideration. As Lord Collins stated in Altimo Holdings and Investment Ltd v, Kyrgyz Mobil Tel Ltd [2011] UKPC 7; [2012] 1 WLR 1804 at paragraph 73:

> "The necessary or proper party head of jurisdiction is anomalous, in that, by contrast with the other heads, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts: Tyne Improvement Comrs v Armement Anversois SA (The Brabo) [1949] AC 326, 338, per Lord Porter."

It was that consideration that led Lloyd LJ to remark in Golden Ocean Assurance Ltd v Martin [1990] 2 Lloyd's Rep. 215 at 222 that "*... caution must always be exercised in bringing foreign defendants within our jurisdiction under Order 11 r.1(1)(c).*". It was this requirement that permeates all of the opinions in John Russell.

37. However, following the Alexandros P [1986] 1 QB 464, John Russell must be read subject to the decision of the Court of Appeal in the Benarty [1983] 1 Lloyds Rep 361. That was an appeal heard without notice from the dismissal of an appeal heard without notice by Sheen J from a decision of the Admiralty Registrar on a without notice application giving permission to serve a writ out of the jurisdiction. As was the case in the Alexandros P (ibid.) at 469F, no authority has been cited to me to the effect that a decision of the Court of Appeal on a without notice appeal is not a decision to which the ordinary rules of precedent apply.

38. Returning to the Benarty (ibid.) the Court of Appeal confined the effect of John Russell to cases where at the time when the writ was issued there was no one on whom the Writ could be served and only at a later stage did one of the defendants accept service in the jurisdiction. In other words the answer to the question whether the claim had been properly brought "*... fell to be answered by deciding whether at the date of the issue of the Writ, the action was properly constituted as an action complying with the rules ...*" – see the Benarty (ibid.) *per* Cumming Bruce LJ at 362 (RHC). In that case, the Court of Appeal considered that rule did not apply because, before the Writ had been issued, "*… the first defendant, under threat of arrest of a ship owned by it, had agreed to accept service of the proceedings by its solicitors in England*". Whatever doubts I may have as to why that distinction impacts materially on the rationale for the conclusions reached in John Russell I am as bound by the decision in the Benarty as was Webster J in The Alexandros P – unless as a matter of construction this limitation has been removed by the drafting of the current iteration of the rule. It would appear that the current editors of Dicey Morris and Collins, Conflict of Laws, 15th Ed. consider that the narrow view of the principle continues to apply - see paragraph 11-163, final sentence and footnote 462, which cites the Benarty (ibid.) as authority for the proposition set out in that sentence.

39. John Russell has not been expressly or impliedly overruled by any subsequent decision of either the House of Lords or the Supreme Court. It is true to say that John Russell was not referred to by Lord Briggs in Lungowe and others v Vedanta Resources plc and another [2019] UKSC 20; [2020] AC 1045. However, the issue with which John Russell and this case are concerned did not arise in Vedanta (ibid.). There, the anchor defendant had not voluntarily submitted to the jurisdiction of the English court but had been sued in accordance with the jurisdiction conferred by Article 4 of Parliament and Council Regulation (EU) No 1215/2012. The challenge to jurisdiction in that case was on *forum non conveniens* grounds. It is therefore entirely unsurprising that John Russell was not cited to the Supreme Court.

40. Similarly, I do not regard Altimo Holdings and Investment Ltd and others v Kyrgyz Mobil Tel Ltd and others (ibid.) as material to this issue either. That case was not concerned with the effect of the anchor defendant having voluntarily submitted to the jurisdiction of the Manx courts. It is unsurprising therefore that John Russell is not anywhere referred to in Lord Collins' judgment. That case was concerned with different issues being whether the motive for suing the anchor defendant was a relevant

consideration – see paragraph 74 of the judgment - and the impact of the claim against the anchor defendant being one that was bound to fail – see paragraph 80. The issue I am now considering simply did not arise. Whilst the phrase "*properly brought*" plainly was relevant to those issues that did arise in that case for the reasons explained by Lord Collins, his conclusions on those issues say nothing about the issue that I am now considering.

41. There is no evidence that suggests that there was any agreement reached between the claimant and the first defendant by which the first defendant agreed to submit to the jurisdiction of the court prior to the issue of the Claim Form in these proceedings or for that matter afterwards. All the evidence establishes is that the first defendant voluntarily submitted to the jurisdiction. Had the claimant wished to assert that any such agreement had been made it could and should have done so in its evidence filed in answer to the second defendant's application. On that basis I accept Mr Baradon's submission that whether the wider view of John Russell or the narrower view adopted by the Court of Appeal in The Benarty (ibid.) is correct is immaterial for present purposes because (assuming the rule continues to exist at all following the Rules changes since those cases were decided) the second defendant is entitled to succeed in either event.

42. Finally, it is necessary to consider whether the change in the language of the Rules has removed the requirement identified in John Russell or removed the limitation on it imposed by The Benarty (ibid.). Mr Davies submits that the words "*properly brought"* are absent from PD6B paragraph 3.1(3) and, therefore, that John Russell is no longer of any relevance or application.

43. As is apparent from the quotation set out earlier, Gateway 3 imposes two requirements in relation to the anchor defendant being that (a) it is a defendant "… *on whom the claim form has been or will be served (otherwise than in reliance on this paragraph*)…" and (b) " … *there is between the claimant and the defendant a real issue which it is reasonable for the court to try* …". In contrast, the version of the rule considered in John Russell and The Benarty (ibid.) provided that the claim against the anchor defendant had to be one that was (a) "*... properly brought ...*" against that defendant and (b) that defendant had been "*... duly served within the jurisdiction ...*".

44. The requirement that the anchor defendant be served within the jurisdiction has disappeared so as to permit a claimant relying on Gateway 3 to rely on either service within the jurisdiction or service by any other gateway other than Gateway 3 or otherwise is permitted by the CPR. However that does not of itself impact the issue that arises because the rationale of the principle identified in John Russell is that a party with no connection to this jurisdiction should not be brought against its will into litigation in this jurisdiction otherwise than in accordance with "… *the procedure laid down in the rules and orders ... , and not merely put in force against another party, who has not objected to the procedure being departed from* …". Extending the scope of Gateway 3 to cases where the anchor defendant has been served either within or outside the jurisdiction does not affect the rationale for not permitting a claimant to rely on an anchor defendant who has voluntarily submitted to the jurisdiction when he could not otherwise have been served in accordance with the CPR.

45. In submitting that there has been a substantive rather than mere semantic change, Mr Davies submitted that some assistance could be derived from the changes to what was

RSC Order 11 made by the Rules of the Supreme Court (Amendment No.2) 1983. The new RSC O.11 r.4(1)(d) imposed a new requirement that the affidavit in support of an application for leave to serve out of the jurisdiction on the necessary or proper defendant ground should be supported by an affidavit deposing to the grounds for believing that there was a real issue to be tried as between the claimant and the anchor defendant. The then editors of the White Book stated, that was a new and clearer safeguard against specious claims against the anchor defendant and "*… takes the place of the old requirement that the action must have been properly brought, which gave rise to conflicting rules"*. This analysis is not shared by the current editors of Dicey, Morris and Collins – see paragraph 38 above. Whilst the requirement to demonstrate the existence of a real issue guards against specious claims against anchor defendants who are properly served, it does nothing to address the point that concerned the House of Lords in John Russell, which was concerned with anchor defendants who could not be served but who nonetheless submitted to the jurisdiction. The issue does not concern the quality of the claim against the anchor defendant but that a defendant with no connection to the jurisdiction could be forced to litigate against its will here simply because the anchor defendant chose for its own purposes to submit to the jurisdiction. This issue is unaffected by a requirement to demonstrate the existence of a real issue between the claimant and anchor defendant.

46. Whilst the requirement for a claim to have been "*properly brought"* was omitted from the new formulation of the necessary or proper party rule, that rule still required the anchor defendant to have been "*… duly served within or out of the jurisdiction …"*. As noted earlier at least Lord Sumner considered (albeit *obiter*) that the words "*duly served"* had the same effect as "*properly brought"*.

47. In the current iteration of the rule, the requirement for a claim form to have been "*duly served"* (as opposed to merely "*served"*) has been dropped. Does this make any difference? The word "*duly"* usually means properly or correctly. In context, the inclusion of the word "*duly"* adds nothing because either a claim form has been served or it has not. A claim form that has not been properly or correctly served has not been served at all. I conclude therefore that as a matter of construction the omission of the word "*duly"* is immaterial.

48. In my judgment the primary importance of John Russell now is that it sets part of the context in which paragraph 3.1 of 6BPD should be construed by identifying one rationale for adopting a restrictive construction of what has consistently been described as an anomalous provision that has the capacity to be exorbitant in its reach. The current iteration of the necessary or proper party rule has two elements that together prevent that effect. The first is the requirement that "*… the claim form has been or will be served (otherwise than in reliance on this paragraph*) …" on the anchor defendant. The second requirement is that "*… there is between the claimant and the defendant a real issue which it is reasonable for the court to try …*". Both are necessary constraints that have to be applied to an anomalous jurisdictional provision that is capable of operating unfairly against those without any connection to this jurisdiction.

49. The first requires that at least at the time the Claim Form was issued the claimant must be able to serve the anchor defendant either within the jurisdiction or out of the jurisdiction in accordance within one of the provisions with paragraph 3.1 of 6BPD (other than under Gateway 3) or as permitted out of the jurisdiction without permission.

The various provisions within 6BPD under which service out of the jurisdiction can be permitted are a carefully calibrated list of exceptions to the general rule that requires service to be on a defendant in the jurisdiction. Permitting service on an allegedly necessary or proper party by reference to an anchor defendant who has voluntarily submitted to the jurisdiction defeats that careful construct in relation to an anomalous jurisdiction as well as being contrary to the express terms of Gateway 3. This suggests that permitting such an outcome as a matter of construction would defeat that construct and the reasons for it.

50. There is no reason to suppose that the drafters of the current version of the rule would have wanted to reduce the protections conferred on parties with no connection to this jurisdiction. There is as much a need for such protection under the current iteration as there was under the earlier ones. The case law in relation to Gateway 3 has consistently noted it to be anomalous and on the need for caution if it is not to be exorbitant in its scope. Although Mr Davies submits that I should conclude otherwise because it has no support in the textbooks, I reject that submission. As I have said the existence of such a curtailment is referred to in at least one of the leading textbooks in this area – see paragraph 38 above.

51. The second requirement – that "… *there is between the claimant and the defendant a real issue which it is reasonable for the court to try* …" – is also concerned with protecting parties with no connection to the jurisdiction being drawn into litigation in England but the protection it confers is different and focusses on a different source of unfairness. The first requirement is concerned with ensuring that such a party is not brought against its will to litigation in England just because another defendant to such a claim also outside the jurisdiction who could not be served with the proceedings other than by consent, considers it convenient that the claim against it be resolved in England and the second is a merits-based protection, designed to ensure that a party who is out of the jurisdiction cannot be brought within the jurisdiction by reference to a claim against an anchor defendant who has been served out of the jurisdiction but by reference to a claim that is bound to fail (tested to the summary judgment standard), which is being used as a device to bring the non-anchor defendant into the jurisdiction – see Altimo Holdings and Investment Ltd v, Kyrgyz Mobil Tel Ltd (ibid.) *per* Lord Collins at paragraphs 80 and 82. Each of these requirements is a principled and proportionate means by which the anomalous and potentially exorbitant jurisdiction conferred by Gateway 3 can be controlled in the interest of defendants with no other connection with this jurisdiction.

52. In summary, in relation to the issue I am now considering, I conclude that at least the narrower view of the John Russell principle adopted by the Court of Appeal in The Benarty (ibid.) continues to apply on a true construction of paragraph 3.1 of 6BPD, in addition to the requirement that there is between the claimant and anchor defendant a real issue which it is reasonable for the court to try. Given that there is no evidence from the claimant that the claim against the first defendant does not fall within the narrower view of this principle the second defendant's challenge to jurisdiction succeeds on this point.

53. In light of the conclusions I have so far reached, I intend to address albeit shortly the other issues that arise in relation to Gateway 3, then the other gateways relied on and then the forum conveniens issues.

Gateway 3 – The Other Issues

54. As Lord Briggs summarised the position:

> "The express terms of the practice direction set out only part of what a claimant relying upon the necessary or proper party gateway must show. It is common ground that, by reference to those terms and well-settled authority, the claimant must demonstrate as follows: (i) that the claims against the anchor defendant involve a real issue to be tried; (ii) if so, that it is reasonable for the court to try that issue; (iii) that the foreign defendant is a necessary or proper party to the claims against the anchor defendant; (iv) that the claims against the foreign defendant have a real prospect of success; (v) that, either, England is the proper place in which to bring the combined claims or that there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place, or the convenient or natural forum."

– see Lungowe and others v Vedanta Resources plc and another (ibid.) at paragraph 20.

Issues i, ii and iv

55. The first and second of the issues identified by Lord Briggs JSC can be taken together. A real issue is one that meets the test for summary judgment – see Lungowe v Vedanta Resources plc (ibid.) *per* Lord Briggs JSC at paragraph 80. This means that the familiar principles summarised in relation to summary judgment applications in Easyair Limited v. Opal telecom Limited [2009] EWHC 339 (Ch) by Lewison J (as he then was) at paragraph 15 and approved by the Court of Appeal in AC Ward & Sons Limited v. Catlin (Five) Limited [2009] EWCA Civ 1098; [2010] Lloyds Rep IR 301 apply in this area. In particular, (a) it has to be shown that what is alleged carries some degree of conviction as opposed to being fanciful; (b) in deciding that question the court should not and should not be invited to carry out a "mini trial"; but (c) if it is clear that a factual allegation has no real substance, particularly if contradicted by contemporaneous documentation, then the court should not feel inhibited from concluding that the allegation is fanciful. If the issue is one of law or construction the court should resolve it on the application only if satisfied that it has before it all the relevant material. In practice that is more likely to be so on a summary judgment application than it will be on a jurisdiction challenge.

56. As I have explained already, it is the Tripartite Agreement that lies at the heart of the claim by the claimant against the first defendant for damages quantified at US$34.8m. As between them there is not much if any dispute as to the claimant's account of the meetings or what was agreed in the course of them. The first defendant maintains that what was agreed is, however, not enforceable because:

    (a) The Tripartite Agreement is oral and therefore inconsistent with the requirement in the Personal and Corporate Settlement Agreements that "*no variation, waiver, rescission or other amendment shall be effective or enforceable unless made in writing*";

(b) That the Tripartite Agreement purported to assign contractual rights and therefore was required to be in writing if it was to be effective by operation of s.136(1) of the Law of Property Act 1925;

(c) The first defendant did not provide any consideration for the obligations that ostensibly he undertook under the Tripartite Agreement; and

(d) It was not intended that the Tripartite Agreement would be legally binding.

The claimant's answers to these points are summarised at paragraph 35 of Mr Woodland's 1st witness statement. In summary (a) the question whether the parties intended the Tripartite Agreement to be legally binding is squarely in dispute and can only be resolved at trial; (b) the terms of the Personal Settlement Agreement are immaterial because the claimant was not a party to them; (c) the Tripartite Agreement is not an assignment so s.136 of the Law of Property Act 1925 is immaterial; and as an overarching point (d) the Tripartite Agreement is a free-standing agreement by which the parties agreed to resolve their various outstanding obligations to each other.

57. In my judgment, the approach of the second defendant to the factual issues between the parties crosses the line into a mini trial. Thus it is submitted on behalf of the second defendant that the factual case advanced by the claimant and apparently largely accepted by the first defendant is "*deeply implausible"* because " … *neither the claimant nor the first defendant created any record of such important matters* …" and in support of the that submission the second defendant relies on the conclusion of Leggatt J (as he then was) in Blue v Ashley [2017] EWHC 1928 (Comm) at paragraph 49 that because " …*the value of a written record is understood by anyone with business experience, its absence may – depending on the circumstances – tend to suggest that no contract was in fact concluded"*. However, the reference to that authority shows the fallacy of this approach – aside from the fact that Leggatt J's " … *depending on the circumstances …"* qualification precludes what he said from being used in support of a general principle that the absence of a written record leads inevitably to the conclusion that no contract was concluded, the more fundamental point is that Leggatt J's dictum appears in a judgment following a trial at which by definition he had the opportunity to assess the whole of the evidence including the oral evidence of the relevant parties.

58. It is simply not appropriate to ask a court that is enquiring whether a factual allegation that an oral agreement has been concluded has real substance to conclude that it has not by reference to a point such as that I am now considering. As Flaux J (as he then was) observed in Erste Group Bank AG v. JSC "VMZ Red October" and others [2013] EWHC 2926 (Comm), unless it can be demonstrated that there is available to the party challenging jurisdiction a "*killer point"* that demonstrates the claimant's case to be unsustainable it is highly likely that the court will conclude that the summary judgment test applicable in this area will be satisfied. In my judgment the correct approach is that identified by Lord Hamblen JSC in Okpabi and others v Royal Dutch Shell plc [2021] UKSC 3; [2021] 1 WLR 1294:

> "Where, as will often be the case where permission for service out of the jurisdiction is sought, there are particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the

> cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupportable, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue."

59. For all the strenuous efforts made by Mr Baradon, I remain unconvinced that I can or should conclude that there is no real issue between the claimant and the first defendant that (aside from the point considered already) it would be reasonable for the court to try. At paragraphs 57-71 Mr Baradon makes a series of points as to why the claimant's case should be rejected, but these points are ones that are likely to be the subject matter of cross examination at a trial or the subject of final submissions following a trial. None of them individually or collectively demonstrate that the claimant's factual case is "*demonstrably untrue or unsupportable*".

60. Similar considerations apply to submissions to the effect that what the claimant alleges constituted the Tripartite Agreement was too complex to be credible or is commercially incredible because it imposes greater or other credit risks than would otherwise have been the case. It is for this reason that, as Mr Baradon accepted, the second defendant's case that there are no real issues to be tried as between the claimant and first defendant depends on showing that the documentation available contradicts the existence of the agreement on which the claimant relies.

61. At the hearing Mr Baradon at least implicitly recognised the difficulty created for the second defendant by this point and sought to rely on two documents as demonstrating that either there was no Tripartite Agreement at all or that any such agreement was not intended to have legal effect. If that is the conclusion to be reached from these documents on which Mr Baradon relies then that would go a long way to demonstrating that the claimant's case against both defendants was "… *demonstrably untrue or unsupportable* …". In my judgment however, that is not the effect of the documents on which he relies.

62. The first of the documents relied on was the first defendant's Defence in "The LCIA Arbitration". The short point made is that it was only in the amended iteration of this document that the first defendant relied on what he calls in that document the "*May Agreement*" which is referred to in these proceedings as the Tripartite Agreement. However, it is to be noted that the May Agreement was pleaded in the original version of the Defence document –see paragraph 15. As was submitted on behalf of the claimant, the document is not the claimant's document and was drafted and signed before the claimant's witness statement was served in the arbitration.

63. The other document on which the second defendant relied was a draft Deed of Undertaking. The parties to the Deed (had it ever been executed) were the claimant, first and second defendants, YA and GH. The document is merely a draft and contains redactions. It also contains a number of footnote references but the footnotes do not appear in the document. It is submitted by the second defendant that this document shows that there was no Tripartite Agreement or that any such agreement was not intended to have legal effect. I am not able to accept that this document demonstrates

that the claimant's case is untrue or unsupportable. On the contrary, parts of it support the claimant's case.

64. Recitals A to C support the existence of the undertakings that the claimant says led ultimately to the making of the Tripartite Agreement. The second sentence of Recital G reads:

> "In an effort to settle the obligation owed by [the second defendant] to [the claimant] pursuant to the Undertaking, in May 2015, [the second defendant], [the claimant] and [the first defendant] orally agreed that (i) [the first defendant] will cause the [the first defendant] companies to repay certain debts owed to [the second defendant] companies (the "[first defendant]" Funds") and (ii) [the second defendant] will pay an amount equal to 25% of the received [first defendant] Funds to the claimant, which will discharge in part [The] Bank's and [the second defendant's] obligations towards the claimant as described in paragraphs above"

As is submitted on behalf of the claimant, this largely reflects what the claimant has called the Tripartite Agreement. There are no doubt differences of detail between what is said and what is currently alleged but that does not lead to the conclusion that the claimant's case should be rejected as unreal. It suggests merely that it is one of those cases where there would have to be a trial in order to reach findings as to what occurred factually. Recital H provides some support for the claimant's case as to the part performance of the Tripartite Agreement.

65. It was submitted on behalf of the second defendant that clauses 1 and 2 are consistent with the continued survival of the undertakings said to have been given by the second defendant. That is realistically arguably so but by the same token these clauses are consistent with those undertakings not having been complied with which is what led ultimately to the Tripartite Agreement.

66. This document has all the hallmarks of a draft document prepared by a lawyer. According to the statement of YA filed in The LCIA Arbitration between the second and first defendant, the document was drafted by White & Case on the instructions of the claimant and YA. The implication of the redactions is that the draft was caveated. It is true to say as does YA that it was not signed by the second defendant. In fact it was not signed by any of the ostensible parties to it. I reiterate – it is impossible to say on the basis of this document that the claimant's case is so hopeless as to lead to the conclusion either that there is no real issue between the claimant and the first defendant or that it is not reasonable for the court to try that issue.

67. The only remaining issue to consider is whether as a matter of law the claimant's claims are so devoid of merit that even assuming all factual issues were resolved in his favour his claim against the defendants based on the Tripartite Agreement was bound to fail. I have summarised the parties' respective pleaded case on these points earlier. I accept the submission made on behalf of the claimant that these are not the sort of legal issues that can be resolved on an application such as this applying the 7th proposition in the summary of applicable principles in Easyair Limited v. Opal telecom Limited (ibid.).

These are not short points of law or construction; they are not points that can or should be resolved without detailed prior fact-finding and therefore they are not issues that should be resolved without the fuller factual investigation that a trial would permit. It is convenient to consider the points made by each of the defendants together.

68. The assertion by the second defendant that the Tripartite Agreement is unsupported by consideration depends upon whether the Undertakings allegedly given by the second defendant were themselves enforceable. That depends on the system of law applicable to them and on whether they are primary (indemnity) or secondary (guarantee) obligations. Those are not issues that can be resolved without a detailed factual enquiry. They are manifestly unsuitable for resolution applying the summary judgment principles. Similar considerations apply to the suggestion that the Tripartite Agreement is an agreement to agree. It is at least realistically arguable that the agreement should be interpreted either as being subject to an implied term that in the absence of agreement the sums agreed to be paid were to be paid within a reasonable time or as subject to an obligation to negotiate in good faith as to the dates when the payments were to be made.

69. Both defendants rely on the fact that the Tripartite Agreement is unenforceable because it constituted a variation of the Personal Settlement Agreements, which contain terms which provide that any variation must by in writing. Whatever might be the consequence of that as between the defendants, it has no impact (or at least realistically arguably has no impact) on the claimant since he was not a party to either of those agreements.

70. Similarly, it is at least realistically arguable that the assignment point made by both defendants is misplaced. In summary this point is that the Tripartite Agreement constituted an assignment of contractual rights and thus cannot take effect unless it is in writing by operation of s. 136 of the Law of Property Act 1925. There are a number of points that arise, each of which make the issue one that it would be wrong to attempt to resolve on an application such as this. First, whilst the underlying agreements are subject to English law, it is not asserted that the Tripartite Agreement was expressly agreed to have been subject to English law. If that agreement is not the subject of English law then it is probably subject either to Ukrainian law or the law of The EU Member State. That may have an impact on how the agreement should be interpreted. In any event, it is at least realistically arguable that the Tripartite Agreement did not affect or purport to affect the assignment of rights but took effect as an agreement between the parties by which they agreed that in return for certain payments various existing obligations would be discharged.

71. It is now necessary to take a step back: in my judgment it is plainly realistically arguable that there is a real issue between the claimant and first defendant. My reasons for reaching that conclusion are set out above. I also conclude that the issues that arise are ones that it would be reasonable for a court to try. There are substantial sums in issue between the parties that in the absence of agreement can only be resolved by a court.

72. The second defendant's answer to this in essence is that the relationship between the claimant and the first defendant is entirely collusive. I am not convinced that is necessarily the case – when the claimant sought to intervene in the second arbitration on two occasions it was because the claimant had claims that stood the best chance of being resolved finally if determined in the course of a single procedure to which all

three individuals were parties. No doubt the first defendant was willing to support that approach for his own commercial self-interest. Similarly, I have little doubt that the first defendant submitted to the jurisdiction of this court for similar reasons. That does not lead to the conclusion that the claim against the first defendant is fictitious or otherwise one that it is not reasonable for a court to resolve. In that connection, it is worth recording at this stage that in the course of the hearing counsel for the claimant offered me on instructions an unqualified undertaking to the effect that the claimant's claim against the first defendant would be pursued even if the jurisdiction challenge by the second defendant succeeded. This is consistent with the existence of a real issue or real issues.

73. That said, none of this says anything about the point made in the previous section of this judgment concerning the effect of the first defendant's voluntary submission to the jurisdiction of this court. That there is a real issue between such a party and a claimant that it is reasonable for a court to try says nothing about where that issue should be resolved and whether a party with no connection to the jurisdiction should be brought into this jurisdiction against its will because another defendant to the proceedings considers it in his or her or its commercial best interests to voluntarily submit to the jurisdiction of this court.

Issue iii - Proper Party

74. I am satisfied that the second defendant would be a proper party if the first defendant could have been served with proceedings either in the jurisdiction or out of the jurisdiction by one of the gateway provisions other than Gateway 3 given my conclusions on the merits issues I have so far considered. Plainly had both defendants been within the jurisdiction both would have been sued by the claimant – see Altimo Holdings and Investment Ltd v, Kyrgyz Mobil Tel Ltd (ibid.) *per* Lord Collins at paragraph 87. As is submitted on behalf of the claimant "… *It is self-evident that if* [the second defendant] [the first defendant] *and* [the claimant] *were all resident in England and Wales, the claims arising out of the Tripartite Agreement would all be tried together*." I have addressed the merits of the claims against the second defendant already and need say no more about them. I am satisfied that the claim passes the summary threshold requirements.

Issue v - Forum Conveniens

75. I address this issue having considered albeit briefly the remaining gateways on which reliance is placed.

Gateway 6

76. This gateway applies where it is demonstrated that the claimant has a good arguable case that the claim against the relevant defendant is made in respect of a contract where the contract is governed by English law. By Article 3(1) of Regulation (EC) 593/2008 (Rome 1)

> "A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By

> their choice the parties can select the law applicable to the whole or to part only of the contract."

It is not alleged by any of the parties that the parties to the Tripartite Agreement expressly chose English law as the proper law of that agreement. Thus if the claimant is to succeed by reference to Gateway 6, he must show that he has a good arguable case that a choice of English is to be inferred from the circumstances of the case. The claimant's case on this issue is that the implied choice is established to this standard because:

(a) The Tripartite Agreement resolved disputes under the Personal Undertakings, which were governed by English law;

(b) The Tripartite Agreement was related to the 2015 Settlement Agreements, which were both governed by English law; and

(c) The common practice of Ukrainian businesspeople throughout the material period was to agree that English law should govern their contracts.

77. I reject this submission for the following reasons. First, aside from assertion, there is no evidence to support the contention that there was a general practice amongst Ukrainian businesspeople to agree English law. This is an issue therefore which if it is to be established requires "… *a plausible (albeit contested) evidential basis for it* …" – see Brownlie v Four Seasons Holdings Inc [2017] UKSC 80 at paragraph 7 and Goldman Sachs International v Novo Banco SA [2018] UKSC 34 at paragraph 9. I am not satisfied that there is such a basis.

78. Whilst it is alleged that all the underlying agreements were either in writing and had express choice of law provisions or were oral but likewise with it being agreed that the agreements would be subject to English law, there is no evidence that suggests the issue was ever mentioned much less agreed at the meetings in Vienna at which the Tripartite Agreement was agreed. The signal feature of the Tripartite Agreement therefore is that whereas in all the other agreements express agreement as to the applicability of English law was agreed, that is not what happened in relation to the Tripartite Agreement.

79. I am not satisfied that any inference of choice can be drawn from the terms of the settlement agreements because the claimant was not a party to them. In any event, as I have said earlier in this judgment, the Tripartite Agreement is an autonomous agreement by which the parties resolved the various claims that each had against the other. If the allegation that there is, or was, a general practice amongst Ukrainian businesspeople to choose English law was to be plausibly contended for, then significantly more, or more cogent, evidence was required than the bare self-serving assertion to that effect by the claimant in order for the test identified above was to be satisfied.

80. Further as is submitted on behalf of the second defendant:

> "There is no plausible evidential basis to submit that that the governing law identified by either Article 4(2), 4(3), or 4(4) [of Rome 1] would be English law. The Tripartite Agreement was, if made: (a) agreed between three Ukrainians who reside (or

> resided) in Ukraine and/or [The EU Member State]; (b) agreed in, variously, [The EU Member State], Ukraine, and France; (c) premised on a further agreement said to have been agreed in Ukraine, between two Ukrainians, in respect of deposits made by Ukrainians into a Ukrainian bank; (d) to be performed outside England. No party has provided any evidence of any connection between themselves, or the Tripartite Agreement, and England"

Gateway 9(b)

81. In order to succeed in passing through this gateway, the claimant must show to the standard summarised above in relation to Gateway 6 that his (amended) claim is a claim in tort, where the damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction. As the claimant submits:

> " … Gateway 9(b) applies where "damage has resulted from substantial and efficacious acts committed within the jurisdiction [by the relevant defendants] whether or not substantial and efficacious acts have been committed elsewhere" (Metall und Rohstoff A.G. v Donaldson [1990] 1 QB 391 at 437E-F)."

82. I accept that the location of the breaches allegedly induced as well as the resulting damage should be both taken into account in determining whether or not substantial and efficacious acts have been committed within the jurisdiction of this court. This leads the claimant to submit that the relevant breach occurred in England because it was in London that the first defendant filed his Defence in these proceedings, by which he denied the validity and enforcement of the Tripartite Agreement; it was in London where the 2018 Settlement Agreement was negotiated and where the consent order was made bringing The LCIA Arbitration to a conclusion. As to this last point, the consent order is neither a tortious act of inducing a breach of contract nor a breach of contract.

83. In any event, in my judgment it is unreal to conclude that any of these facts are sufficient to give the English court jurisdiction over this claim. The inducement was on the claimant's case the result of an agreement or understanding reached between the first and second defendants. The first defendant at all material times resided in The EU Member State and was domiciled either there or in Ukraine. The second defendant was at all material times domiciled and resident in Ukraine. There is no evidence that at any stage any of the contact that took place leading to what the claimant contends to be the inducement of a breach by the first defendant of the Tripartite Agreement took place otherwise than in either Ukraine or The EU Member State.

84. That the first defendant acted through English solicitors is not to the point – the solicitors are the agents for the first defendant. The 2018 Settlement Agreement was agreed in Ukraine so far as the second defendant is concerned – see paragraph 17 of Ms Duncan's 2nd witness statement, where she states:

> "… if the conduct complained of is [the second defendant's] decision to settle the Second Personal Arbitration Proceedings on the terms set out in the 2018 Settlement Agreement and/or [the first defendant's] acceptance of that reality, then that conduct took place in Ukraine (where [the second defendant]

> was located throughout the settlement process – I was in Ukraine with him) and/or [The EU Member State] (where I believe [the first defendant] has been located […] since [...]2013)."

Gateway (4A)

85. Gateway (4A) is of no application given the conclusions that I have so far reached and I need say no more about it.

Forum Conveniens

86. Even if I am wrong to have concluded that Gateways 3, 6 and 9(b) are not available to the claimant, and should have concluded that at least one was, I would nevertheless have concluded that jurisdiction over the second defendant should be declined on *forum conveniens* grounds. My reasons for reaching that conclusion are as follows.

87. As I have explained already, the claim has no real connection with this jurisdiction. None of the parties are either domiciled or resident in England or ever have been. The subject matter of the dispute has no connection with this jurisdiction and is exclusively connected to the Ukraine. All the parties are Ukrainian nationals; two of them are resident there as well and the first defendant is domiciled and resident in The EU Member State. There is no evidence that either defendant has any assets within this jurisdiction. All of the relevant events that matter took place between the parties out of the jurisdiction of the court and all of the losses were suffered elsewhere as well. The Tripartite Agreement would not have been performed in England and the currency in which the claim is denominated (for what that point is worth) not in sterling but US Dollars.

88. None of the witnesses who might be relevant are resident in England. None speak English or at any rate English as their first language. Any relevant documents will be located in Ukraine and The EU Member State other than those which happen to be in the custody of the parties' London solicitors. For the reasons identified earlier the proper law of the Tripartite Agreement is not English law and is probably Ukrainian law. No countervailing advantage has been identified by the claimant as one that will be obtained if these proceedings are allowed to continue against both defendants in England other than the avoidance of two sets of proceedings concerned with the same issues, an issue to which I turn below.

89. If, contrary to my conclusions set out above, the John Russell issue is not a technical basis for refusing jurisdiction under Gateway 3 any longer, I would nonetheless have regarded the fact that the only basis on which the Court could obtain jurisdiction is by the voluntary submission of another defendant as a powerful reason why permission to serve out should be set aside on *forum conveniens* grounds. I would have regarded this as a powerful discretionary factor for all the reasons that I refer to above as justifying the continued application of the John Russell principle. In summary Gateway 3 is anomalous for the reasons identified in the authorities cited earlier and its applicability in the circumstances set out above ought to be constrained as a matter of discretion since otherwise its effect would be to permit an individual with no connection to the jurisdiction to be brought into litigation here against his or her will simply by reason of the willingness of another defendant to submit to the jurisdiction for his own reasons.

90. The only countervailing considerations are that if the approach I have so far considered appropriate is ultimately adopted, it will mean that many and perhaps most of the same issues that arise in the claim against the first defendant in this jurisdiction will have to be resolved by a court elsewhere, probably in Ukraine or possibly The EU Member State.

91. As to this factor, as Lloyd LJ observed in Golden Ocean Assurance Ltd v Martin (ibid.) at 222, "… *It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction.*" This statement of principle was approved by Lord Collins in Altimo Holdings and Investment Ltd v, Kyrgyz Mobil Tel Ltd (ibid.) at paragraph 73. As Lord Briggs JSC held however in Lungowe v Vedanta Resources plc (ibid.) at paragraph 80:

> "That analysis does not mean, when the court comes to apply its national rules of private international law to the question whether to permit service out of the jurisdiction upon KCM, that the risk of irreconcilable judgments is thereby altogether removed as a relevant factor. But it does in my view mean that it ceases to be a trump card..."

92. I have so far considered the relevant factors other than the consideration that if I accede to the second defendant's submissions there will be trials of the same issues in different courts in separate jurisdictions, with the consequent risk that there may be different conclusions reached on the or some of the same issues by different courts (the "irreconcilable judgments factor"). The relevant factors other than the irreconcilable judgments factor all point firmly toward England and Wales not being "… *the proper place in which to bring the claim*" – see CPR r. 6.37(3).

93. Turning now to the irreconcilable judgments factor, in my judgment this does not lead to a different outcome when it is weighed in the balance with those I have so far considered. This situation only arises because the first defendant chose to submit to the jurisdiction of this court. As was submitted on behalf of the second defendant and as I concluded earlier, there was no basis on which this court could have obtained jurisdiction over the first defendant other than by him voluntarily submitting to this jurisdiction. The key point on that was always the effect of Art. 4.1 of Brussels Recast. Even if that is wrong, none of the gateways would have been available against the first defendant at the date when the Claim Form was issued or provided by the claimant to the first defendant. Gateway 6 was not available against the first defendant any more than it was available against the second defendant for the reasons set out above and no tort claim was alleged at that stage and in any event would not have been available for the reasons identified above.

94. In those circumstances, I accept the second defendant's submission that merely because these proceedings have been commenced against the first defendant does not provide a good reason for requiring the second defendant to submit to the jurisdiction of this court, when the much more natural forum for the resolution of these disputes is the Ukrainian court. The weight that can safely be attached to the factor I am now considering will be different in every case. It involves weighing the risk of inconsistent findings, the cost of running two claims in different jurisdictions and the degree of

overlap between the two sets of proceedings. However, in my judgment those factors (a) do not outweigh the other factors I considered earlier but (b) even if in other circumstances they would or might, the weight that can be given to the irreconcilable judgments factor in this case is much diminished by Gateway 3 being available only because of the first defendant's voluntary submission.

95. Looked at in the round this is a claim that should never have been started here, it is one where every relevant factor other than the irreconcilable judgments factor points squarely against England being the proper place in which to bring this claim and that factor does not outweigh those factors for the reasons that I have given.

Conclusion

96. The second defendant's application succeeds because (a) none of the gateways relied on by the claimant are available to the claimant in the circumstances and (b) even if that is wrong it is plain in all the circumstances that England and Wales is not the proper place in which to bring this claim. In those circumstances, the second defendant would appear entitled to all the remedies he seeks summarised in paragraph 1 above but I will hear counsel at the hand down of this judgment as to the form of order that is appropriate.

Directions

97. For the reasons set out in paragraph 2 above, the hearing at which the hand down of this judgment will take place will commence in private unless both parties confirm prior to the hearing that it can take place in public. If there is no agreement, the question whether the hand down hearing should continue in private will be decided at the start of the hand down hearing.

98. So far as anonymisation is concerned, that issue will be resolved at the hand down hearing. If both parties are agreed that anonymisation is either (a) required or (b) not required, the parties are directed to notify the court of that agreement by no later than the day before the hand down hearing is due to take place. If there is no agreement on this issue it will be resolved at the start of the hand down hearing.