Neutral Citation Number: [2022] EWHC 1674 (Comm)

Case No: LM-2021-000059

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 1 July 2022

Before :

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

- -

Between :

DR VÉRONIQUE MARIE ELISABETH SIMON	**Claimant**
- and -	
(1) MS ANNE "ANOUK" TACHÉ **(2) MS CAROLE LÉVY** **(3) TWIG SRL**	**Defendants**

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Timothy Sherwin and **Alex Peplow** (instructed by **Suttons Solicitors**) for the **Claimant**
James Ruddell (instructed by **Fladgate LLP**) for the **Defendants**

Hearing date: 8 June 2022

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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.

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This judgment was handed down by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.30am on Friday 1 July 2022.

HHJ CAWSON QC

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Introduction

1. By his Order dated 30 March 2021 ("**the Service Out Order**") HHJ Pelling QC, sitting as a Judge of the High Court, granted permission to the Claimant, Véronique Marie Elisabeth Simon ("**Dr Simon**"), to serve the Claim Form, and any other documents which require to be served in the present proceedings, on each of the Defendants out of the jurisdiction in Belgium.

2. By application dated 30 July 2021 ("**the Jurisdiction Application**"), the Defendants challenge jurisdiction on the basis that:

    i) The Court should decline to hear, or should stay the present proceedings on a proper application of Articles 29 and 30 of the Regulation (EU) No 1215/2012 ("**Brussels Recast**"); and

    ii) In any event, the Court should set aside the Service Out Order, together with the Claim Form in the present proceedings and the service thereof, on the basis that Dr Simon is unable to show that, at the time of the Service Out Order:

        a) She had a good arguable case that any of the grounds for service out of the jurisdiction set out in paragraph 3.1 of CPR Practice Direction 6B applied;

b) So far as the Defendants, Anne Taché ("**Ms Taché**") and Carole Lévy ("**Ms Lévy**") (together "**the Individual Defendants**"), are concerned, she had a reasonable prospect of success in her claim as against them; and

c) In any event, England was clearly the appropriate forum for the determination of the issues raised by the present proceedings, i.e., the forum conveniens.

3. By application dated 16 November 2022 ("**the Amendment Application**"), Dr Simon applies to amend her Claim Form and her Particulars of Claim in order to add as against the Individual Defendants a claim of dishonest assistance based upon a case that they dishonestly assisted the Third Defendant, Twig SRL ("**Twig**"), to act in breach of its fiduciary duties owed to Dr Simon, and for permission to serve the amended claim out of the jurisdiction.

4. Amongst the many other issues arising for determination on the applications before me, the Jurisdiction Application raises novel questions for determination concerning the effect of Article 67 of the EU-UK Withdrawal Agreement ("**the Withdrawal Agreement**") on proceedings issued in the UK after the end of the transition period provided (31 December 2020), and as to whether, for the purposes of Article 32 Brussels Recast, this Court should *"be deemed to be seised"* of the present proceedings as from the making of the Service Out Order, or, alternatively, on the subsequent issue of the present proceedings ("**the English Proceedings**") on 10 May 2022, when the Claim Form was issued.

5. Dr Simon was represented by Timothy Sherwin and Alex Peplow of Counsel, and the Defendants were represented by James Ruddell of Counsel. I am grateful to them for their helpful and detailed written and oral submissions.

Evidence

6. The following evidence is before the Court in relation to the Jurisdiction Application and the Amendment Application:

i) The witness statements of the Defendants' Solicitor, Thomas Robert Bolam ("**Mr Bolam**"), dated 30 July 2021, 17 December 2021 and 19 May 2022;

ii) The witness statement of Dr Simon's Solicitor, Stephen Sutton, dated 16 November 2021, made in support of the Amendment Application;

iii) The witness statement of Dr Simon dated 16 November 2021;

iv) The witness statement of Ms Lévy dated 17 December 2021; and

v) The witness statement of Jeremy Read ("**Mr Read**") dated 22 May 2022, made in support of Dr Simon's case.

7. In addition to the above evidence, on 12 January 2022, HHJ Pelling QC granted the parties permission to rely upon expert evidence on matters of Belgian procedural law, and the following expert evidence is before the Court:

i) The report of Prof. Jean-Francois van Drooghenbroeck ("**Prof. JFvD**") dated 14 December 2021, relied on by the Defendants;

ii) The report of Prof. Jacques Englebert ("**Prof. Englebert**") dated 2 March 2022, relied on by Dr Simon;

iii) The supplemental report of Prof. JFvD dated 19 May 2022; and

iv) The supplemental report of Prof. Englebert dated 23 May 2022.

Background

The Claimant

8. Dr Simon describes herself as a French national who has resided in London since March 2009, having then relocated from France. She is a qualified medical practitioner, who has specialised in cosmetic treatments. She says that she no longer practices medicine, preferring to: *"focus on my interest in modern and contemporary art and interior design."* It is her evidence that her primary medical practice was in London, but that she had previously practised medicine in France, Turkey, Mexico and other parts of the World.

9. It is Dr Simon's evidence that she initially lived 34 Cadogan Place, London SW1, but subsequently lived and worked at 9A West Halkin Street, London SW1. A lease of this latter property dated 27 April 2015 to Simon Therapie Ltd ("**STL**"), a company controlled by Dr Simon and incorporated in England and Wales through which Dr Simon used to run a medical practice, has been produced. The terms of this lease provide for commercial use only, and prohibit any residential use. In his witness statement, Mr Read refers to the fact that Dr Simon had a double sofa bed installed at 9A Halkin Street, and that she lived on the third floor between 2016 and 2018. However, I note that in a letter dated 2 February 2022, Ms Simon's solicitors referred to her having lived on the third floor of 9A Halkin Street *"temporarily"*.

10. Dr Simon refers to having purchased what she describes as her current residence at 8 Pelham Place, South Kensington, London in November 2016, but to this property requiring renovation such that she was unable to move into it full-time until August 2019. Notwithstanding this, she does describe 8 Pelham Place as *"my home since 2016"*.

11. It will be necessary to return further to the evidence relating to Dr Simon's residence in London in due course. However, there are a number of aspects thereof that require to be noted at this stage:

i) In her witness statement, Dr Simon refers to having opened a medical practice in Istanbul in 2012 to which she travelled once a month for 4-5 days for approximately six years. She says that she *"became subject to UK tax in March 2019"*, and that *"I was non-domiciled but resident in the UK for tax purposes."* Her evidence in support of the application for service out of the jurisdiction had stated that: *"For a period commencing in September 2016 during the tax year 2016-17, the Claimant was non-domiciled and non-resident in the UK on the advice of her accountant."* However, in her witness statement, Dr Simon says

that she was *"non-UK tax resident (and non-domiciled) for the 2015-2016 tax year"*, and she describes the reference to the tax year 2016-17 in the application for permission to serve out as a *"typographical error"*.

ii) Returns made to Companies House in respect of STL referred to Dr Simon as being resident in Turkey between 29 September 2016 and 15 March 2021. Dr Simon seeks to explain this in paragraph 17 of her witness statement where she refers the fact that in the summer of 2016, she was working in both Istanbul and London and that, although she was in the UK for *"extended periods"*, she was *"non-resident for UK tax purposes"*. She says that, for this reason, her accountants filled in the relevant forms submitted to Companies House. As she puts it: *"for compliance purposes at Companies House as I was no longer resident in the UK my accountants filed a change in my status and since I was working both in Istanbul and London changes were made to the entries at Companies House."*

iii) Dr Simon refers in her witness statement to her daughter living in Paris, and to her visiting her daughter there, but she says that: *"I do not live there myself."* All of the artwork the subject matter of the present proceedings was delivered to an address on Rue Champfluery in Paris ("**the Paris Address**"), even where the artwork had been sourced in the UK. Dr Simon says that this was for storage purposes pending the renovation of 8 Pelham Place, and that 9A West Halkin Street was unsuitable for this purpose. Dr Simon has not explained in evidence the ownership of the Paris Address, and in relation to the delivery of one of the pieces of artwork to this address, Dr Simon wrote in an email dated 17 May 2016 that: *"As I am away next week, please contact my housekeeper Alice on 3367563376124 for both the 24th and the 26th"* [emphasis added]. Further, in a letter of complaint written to the Defendants on 21 November 2019, Dr Simon gives the Paris Address, in addition to 8 Pelham Place, as her address.

iv) Dr Simon has, at all relevant times, retained a French telephone number, and although she may have had a UK landline and mobile number at one stage, she says that she cancelled them about three years ago, retaining the French number: *"so as not to lose touch with my various business and personal contacts in France."*

The Defendants

12. The Individual Defendants are Belgian nationals. They have at all times been domiciled and resident in Belgium. Twig is a Belgian company, incorporated by the Individual Defendants on 2 December 1998. The Defendants' evidence is that Twig initially operated an art gallery in Brussels, but in December 2012 began to focus on art advice and consultancy.

13. Dr Simon relies upon the fact that in the Belgian proceedings referred to below, the Defendants describe themselves as *"internationally recognised experts in modern and contemporary art"*. Further reliance is placed by Dr Simon on the fact that the Defendants operate an English-language website with an international domain: www.twig-art.com in which they advertise: *"expertise in international modern and contemporary art"* and advertise that: *"Working with shipping agents and insurance*

brokers across the world, gives the possibility for Twig to provide cost-effective logistical support as well as appropriate information on VAT and import sales and taxes."

14. On the other hand, in seeking to play down Twig's international connections, in her witness statement, Ms Lévy explains that Twig's website is in English because Belgium is a multi-lingual country and English is a *"dominant language in the art market"*. She further says that the websites of all the Belgian art galleries that she deals with are in English.

15. Ms Lévy further says that Twig does not market its services to English customers, and the Defendants rely upon the further description of the Defendants' business as provided by Twig's website:

> *"For the last ten years Anouk Tache and Carole Levy have been advising major industrialists in the Walloon and Flemish regions as well as business people in Antwerp, helping them to invest their money wisely as they build up art collections that are true to their images".*

Dr Simon's introduction to the Defendants

16. Dr Simon was introduced to the Individual Defendants, and thus to Twig, by a business acquaintance of the Individual Defendants, Mr Jean Grimbert, a Belgian who had previously opened an art gallery in Brussels. In her witness statement, Dr Simon refers to inviting the Individual Defendants to lunch in Paris and to establishing a professional relationship with the Defendants: *"Over the course of numerous telephone calls and meetings in Paris and at various art fairs around the world in early 2016."* It is Dr Simon's evidence that over the lunch in Paris, she explained that her goal with her collection was to create *"a strong collection as a legacy from my children"*. She goes on to say that *"[a]t all times"* , she made it clear to the Individual Defendants that the artworks that she wished to purchase were to furnish her house at Pelham Place, Dr Simon adding that after *"our meeting"* she was presented with the first piece of artwork that she bought on the Defendants' advice, and that she *"then travelled to Brussels to meet them a couple of months later to see the Anthony Gormley piece. From there, they advised me to buy the rest of the pieces on the list."*

17. In her witness statement, Ms Lévy emphatically denies that Dr Simon ever said to the Individual Defendants, whether initially or at any later stage, that the artworks were being purchased to furnish a property owned by Dr Simon in London. To the contrary, Ms Lévy says that the Defendants were led to believe by Dr Simon that the artwork was to be delivered to the Paris Address in order to be displayed at that property, which they understood to be Dr Simon's primary residence. The Defendants point out that Dr Simon did not acquire 8 Pelham Place until November 2016, almost a year after Dr Simon had been introduced to them.

The relationship between the parties

18. Between early 2016 and 2018, the Defendants, they say through Twig, provided consultancy services to Dr Simon in relation to 17 artworks, all of which were delivered to the Paris Address.

19. It is Dr Simon's case that these services were provided pursuant to an oral contract of agency, formed in early 2016, under which the Defendants all (including the Individual Defendants) assumed contractual, tortious and fiduciary duties to her. The Defendants dispute that there was any overarching contract, or any contract of agency, and further maintain that any contractual relationship was between Dr Simon and Twig, and that at all times the Individual Defendants simply acted in their capacity as directors of and shareholders in Twig.

20. There is a dispute between the parties as to the governing law of the relevant contractual relationship, Dr Simon maintaining that it is governed by English law, and the Defendants maintaining that it is governed by Belgian law. As the Defendants point out, the proper scope of the contract and the obligations undertaken is likely to be substantially affected by its governing law.

21. In the course of the relationship between the parties:

    i) When Dr Simon wished to purchase an artwork, which she did acting on the Defendants' advice, she either did so:

        a) By purchasing the artwork from Twig, which in turn purchased the artwork from the original seller (and then included its commission in the sale price to Dr Simon); or

        b) By purchasing the artwork directly from the seller (in which case Twig invoiced the seller for its commission).

    ii) All artworks and relevant documents were delivered to the Paris Address, where there was the housekeeper who Dr Simon has, as I have mentioned, described as *"my housekeeper"*, with whom, the email correspondence shows, some deliveries were coordinated. At least one substantial sculpture was installed at the Paris Address, according to Ms Lévy by *"drilling into the ground to install metal rods"*, albeit that it was suggested on behalf of Dr Simon that this was required to be done for storage purposes.

22. It is not in dispute that the Individual Defendants, at all times communicated with Dr Simon through her French telephone number. Dr Simon says that she was generally in England when relevant telephone conversations took place, although the Defendants say that, even if that was the case, they were not aware thereof.

23. As to the commission that Twig received, it is the Defendants' case that Dr Simon knew about the existence thereof, and that the Individual Defendants were open with her that it was around 10%, which the Defendants say is a customary percentage in the art market. However, Dr Simon alleges that she was told (orally) that the commission would be only 5%, that she was not given any indication that the commission would be any greater than this, and that any commission above 5% that has been taken represents undisclosed commission unlawfully obtained.

24. The purchase of two artworks in particular is the subject of dispute, namely:

i) A Franz West sculpture ("**the Franz West Sculpture**") that was purchased in July 2016 for €560,000, which Dr Simon accepts was paid for by a transfer of funds from her Swiss bank account while she was working in Istanbul; and

ii) A George Condo work ("**the George Condo Work**") that was purchased in June/July 2018 for US$176,650, that was paid for by a transfer from Dr Simon's US savings accounts.

25. In early 2019, the Defendants informed Dr Simon that they would not accept any further assignments from her. Since that time, the parties have been in an ongoing dispute, with Dr Simon initially instructing French lawyers.

Belgian Proceedings

26. On 26 October 2020, the Defendants commenced proceedings against Dr Simon in the French-speaking division of the Tribunal of First Instance of Brussels (case no. 20/6539/A) ("**the Belgian Proceedings**"). In these proceedings it was alleged that Dr Simon had undertaken acts of harassment and defamation, and the Defendants sought by way of relief, an injunction to prevent such behaviour, and damages.

27. The essence of the Defendants' case in the Belgian Proceedings has been that:

i) Dr Simon had made serious and unfounded allegations against the Defendants, including that they had engaged in *"fraudulent transactions"*, had *"abused her trust"* and had *"embezzled"* (including in relation to the George Condo Work and other artworks acquired by Dr Simon).

ii) Dr Simon had contacted (and/or threatened to contact) third parties to convey and publicise her allegations, including various art galleries and mutual business acquaintances in Belgium and the chairman of the World Jewish Congress. The Defendants alleged that this was a deliberate tactic, Dr Simon having stated that she would continue to *"give this matter the necessary publicity so as to alert the TWIG ART supporters and, more generally, the Art World"*, unless the Defendants agreed to rescind the purchase of the George Condo Work.

iii) Dr Simon's conduct constituted harassment, in particular because, so it was alleged, she also:

a) Wrote to the parents of Ms Taché to *"inform you before the situation escalates any further and the reputation your family has built up is tarnished"*

b) Repeatedly called Ms Taché's cousin, and stated that she would *"ruin"* Ms Taché's *"career"*;

c) Travelled to the headquarters of SA Taché, the business of Ms Taché's parents in Antwerp, to harass her father and threaten the reputation of the Taché family; and

d) Threatened to commence proceedings in the UK where *"the costs of legal proceedings … are steep and will exceed the cost of reimbursing me for the* [George Condo Work]*"*.

28. In paragraph 5 of his first report, Prof. Englebert described the Belgian Proceedings as being: *"based exclusively on alleged quasi-criminal (extra-contractual) misconduct by Dr Simon against the Twig Parties. Its legal basis [was] Article 1382 of the Civil Code (summons, p. 10; summary submissions by the Twig Parties dated 5 August 2021, pp. 14 et seq.), which is the basis for extra-contractual liability. The court was being asked to order the cessation of this behaviour and to compel Dr Simon to pay compensation for the damages caused to the Twig Parties by her behaviour (moral and material damages)"*

29. On 10 March 2021, Dr Simon filed responsive submissions in the Belgian Proceedings ("**the 10 March Submissions**") in which, most significantly, she:

i) Alleged that a contractual relationship of agency was formed between the Defendants and herself in early 2016;

ii) Identified the existence of disputes in relation to some of the artworks sold, including the Franz West Sculpture and the George Condo Work. Her grievances in relation to the Franz West Sculpture were set out at some length and mention was made of proceedings in *"the English High Court"* to obtain redress. Further, in relation to the George Condo Work, and *"based on the commercial relationship of the parties, the obligations of the plaintiffs with respect to the pleading party and the amounts that the pleading party believes to have suffered as damages due to the violation of these obligations"*, Dr Simon set out detailed evidence and argument to the effect that the George Condo Work was sold at an excessive price. Again, mention was made of proceedings in *"the English High Court"* concerning the George Condo Work;

iii) Admitted that she had carried out most of the acts relied on by the Defendants as having been acts of harassment or defamation, albeit disputing that they amounted to harassment or defamation; and

iv) Disputed liability on the basis, in essence, that:

a) Her conduct was directed at obtaining a reimbursement for all or part of the George Condo Work;

b) Her claim for reimbursement was justified because it was *"based on numerous comments that she had on Condo's work and more particularly on three expert reports"*; was *"supported by the documents produced"*; and the Defendants had not provided *"any expert report that would demonstrate that the work was acquired, at the right price"*; and

c) She had been *"knowingly deceived by the* [Defendants]*"* in connection with the George Condo Work.

30. Dr Simon also disputed the jurisdiction of the Belgian Court in relation to the Defendants' claims, indicating, as I have mentioned, an intention to commence a claim

in *"the English High Court"*. As to the latter, she identified that they would be *"based on the commercial relationship of the parties, the obligations of the plaintiffs with respect to the pleading party and the amounts that the pleading party believes to have suffered as damages due to the violation of these obligations."* However, she maintained that: *"These questions are not relevant in the context of this civil liability action initiated by the plaintiffs and Your Court does not have to rule on these questions in a way that would prejudge the decision of the English High Court of Justice."*

Permission to serve out obtained in England

31. On 30 March 2021, Dr Simon made a without notice application seeking permission to serve the Defendants in Belgium ("**the Service Out Application**") pursuant to CPR r.6.36-6.38 (i.e. under the common law regime). The following grounds or *"gateways"* set out in paragraph 3.1 of CPR PD 6B were relied upon:

    i) Paragraph 6(c) (contract governed by English law);

    ii) Paragraph 7 (breach of contract in England);

    iii) Paragraph 9 (tortious claim for damages sustained in England);

    iv) Paragraph 11 (property in England);

    v) Paragraph 15 (claim against constructive trustee arising out of acts in England); and

    vi) Paragraph 20 (claims under an enactment).

32. The Service Out Application was made before the issue of the Claim Form, but was given the same *"claim number"* (LM-2021-000059) as was subsequently given to the English Proceedings commenced on 10 May 2021 with a view to being served out of the jurisdiction pursuant to the permission granted by the Service Out Order.

33. The Service Out Application was supported by Particulars of Claim and evidence from Dr Simon's solicitors as set out in continuation sheets contained within the application.

34. In essence, the claims advanced in the English Proceedings are for:

    i) Damages for breach of contractual and tortious duties of care in advising Dr Simon to purchase the Franz West Sculpture and George Condo Work at an alleged overvalue; and

    ii) An account (and related declarations) in relation to alleged secret commissions, such claim being advanced on the basis that the Defendants have admitted openly in correspondence that they received commissions of 10% in circumstances in which, on Dr Simon's case, the Defendants agreed orally to charge only 5%.

35. The evidence in support of the Service Out Application dealt briefly with the Belgian Proceedings asserting that:

i) The Belgian Court did not have jurisdiction over Dr Simon, and that her Belgian lawyers had filed submissions to that effect;

ii) In any event, the Belgian Proceedings concerned *"distinct issues from those raised in the Claimant's claim"* such that this Court's exercise of jurisdiction would not create a risk of conflicting judgments even if the Belgian Proceedings were permitted to continue. As to this, it was asserted that:

a) The Defendants had sued Dr Simon in tort in an extracontractual action, relying on alleged *"extracontractual wrongdoing"* rather than claiming under the contract between the parties; and

b) Whilst the Belgian Proceedings did contain allegations by the Defendants as to the nature of their commercial relationship with Dr Simon, the purchase of artwork through the Defendants, and Dr Simon's dissatisfaction with some of those purchases, those matters were alleged by way of *"background only to the main allegations in respect of which the Defendants claim relief."*

36. On 30 March 2021, HHJ Pelling QC dealt with the Service Out Application on paper, and made the Service Out Order without a hearing. The sealed order was sent to the Claimant's Solicitors under cover of an email of that date which included the following note from HHJ Pelling QC:

> *"It may be arguable that the claim in Belgium is a sufficiently [related] claim to render Belgium the better jurisdiction for the resolution of all the claims - as to which see the notes at White Book, Vol. 1 para 6.37.20 and the authorities there summarised but that issue can only be resolved on an application to set aside service. As the evidence currently stands the issues that arise are sufficiently different from those in the proceedings in Belgium to justify the commencement of these proceedings."*

37. There was then some delay between the making of the Service Out Order on 30 March 2021 and the issue of the Claim Form on 10 May 2021. However, copies of the Service Out Application and the Service Out Order were sent to the Defendants' Belgian lawyers on 1 April 2021.

38. It has been suggested on behalf of Dr Simon that the delay in issuing the Claim Form was down to delays in obtaining translations of the relevant documentation, and delays involving the Foreign Process Office at the Royal Courts of Justice.

Amendments to the Belgian Proceedings by the Defendants

39. On 3 May 2021, and prior to the Claim Form being issued on 10 May 2021, the Defendants filed their submissions in the Belgian Proceedings ("**the 3 May Submissions**"). By these Submissions, the Defendants expanded upon their existing case of harassment/defamation by referring specifically to Dr Simon's allegedly slanderous allegations that the Defendants had taken excess commissions in relation to the George Condo Work, and positively asserted that Dr Simon's allegations of wrongdoing against them were incorrect (and therefore did not justify her acts of harassment and defamation).

40. Section 4 of the 3 May Submissions is headed *"THE REQUEST REGARDING THE OPERATIVE PART OF THE JUDGMENT"*. Paragraph 99 immediately under this heading then reads: *"The claimants ask You, subject to all their rights and without detrimental recognition, to decide as follows in the Your judgment"*, before then setting out the relief that the Defendants claim in the Belgian Proceedings. The 3 May Submissions added by way of amendment to the relief originally sought the following: *"The court ruled (sic) that Ms Simon does not prove any fault on the part of the claimants."*

41. This latter claim was added as a *"fourth plea"* in section 3.4 of the 3 May Submissions, where the Defendants set out the reasons why they say that they are not liable to Dr Simon. In so doing, they set out evidence in relation to, amongst other things, the value of the Franz West Sculpture and the George Condo Work, and the commissions received which, it might be assumed, they would want the Belgian court to take into account in considering whether Dr Simon had established fault on their part.

42. It is the Defendants' case that the further relief sought by way of amendment by the 3 May Submissions amounted to a claim for a negative declaration in respect of the claims that Dr Simon makes in the present proceedings. Dr Simon disputes that the amendment had this effect. The issue is essentially one of Belgian law and procedure which is the subject of expert evidence on which Prof. JFvD and Prof. Englebert express a different view, and which I will have to determine.

English Proceedings issued

43. On 10 May 2021, Dr Simon filed her Claim Form. This Claim Form, together with other relevant documentation, was served out of the jurisdiction on the Defendants on 11 June 2021.

44. The Jurisdiction Application was made on 30 July 2021.

Further submissions in the Belgian Proceedings

45. Dr Simon filed further submissions in the Belgian Proceedings on 5 July 2021 ("**the 5 July Submissions**") in which, in essence, she:

    i) Relied on further evidence to seek to justify her allegations that the artworks were overpriced;

    ii) Asserted that this additional evidence further justified her acts of alleged harassment; and

    iii) Asserted that her publicised statements were not slanderous because of *"the fact of the pleading party [i.e. Dr Simon] having overpaid for the Condo"*.

46. The Defendants filed further submission on 5 August 2021 ("**the 5 August Submissions**"). By these submissions, further evidence and argument was set out as to why the Defendants are not liable to Dr Simon.

47. The claim for relief as added by amendment by the 3 May Submissions was amended so as to read as follows: *"The court declares that the claimants did not fail in their obligations in their relationship with Ms Simon and they are not liable to Ms Simon."*

48. The Defendants maintain that this amendment simply amounted to the use of slightly different language to achieve the same thing, namely a negative declaration. Dr Simon, on the other hand, submits that this further amendment was highly significant, in that by this amendment the Defendants did, only at this stage, and by the 5 August Submissions, seek a negative declaration in respect of the relief sought by Dr Simon in the present English Proceedings.

Judgment in Belgium and appeal

49. On 22 October 2021, the Belgian court gave judgment in respect of the Belgian Proceedings. In summary, it found that whilst it had jurisdiction, and whilst it found that Dr Simon had committed *"misconduct"*, it found that there was insufficient evidence of loss to the Defendants. Consequently, the claim for an injunction and damages for harassment/defamation failed.

50. Further, the Belgian court declined to rule on the Defendant's claim for a negative declaration because the allegations were before this (English) court. As to this, under the heading *"The Facts"*, the Belgian court simply set out: *"Whereas the ensuing dispute was never resolved and is currently the subject of a lawsuit in London, such that this court will refrain from commenting on the merits of that case."* It is common ground between the experts that the Belgian court's reasoning is deficient in this respect in that it failed to engage with whether it was seised of the Defendants' claim for a negative declaration before this Court was seised of the claim sought to be pursued by Dr Simon by the Claim Form and Particulars of Claim in these English Proceedings, and as to whether Articles 29 and/or 30 of Brussels Recast were engaged. As to this, and as further considered below, it is the Defendants' case that the Belgian court was first seised on 3 May 2021, before this Court was first seised on 10 May 2021 on the issue of proceedings. On the other hand, it is Dr Simon's case that this Court was first seised on the making of the Service Out Application and/or the making of the Service Order on 30 March 2021, alternatively on the issue of the Claim Form on 10 May 2021, but that the Belgian court was only seised when the Defendants' claim for a negative declaration was filed on 5 August 2021.

51. On 2 December 2021, the Defendants appealed to the Court of Appeal of Brussels (the **"Belgian Appeal Court**"). Dr Simon has also cross-appealed the finding of fault. Consequently all the issues before the Belgian court at first instance will be revisited by the Belgian Appeal Court, including the Defendants' claim for a negative declaration, subject to the issue as to whether the Belgian court was first seised of the negative declaration, or whether this Court was first seised of the Dr Simon's claim, and the operation of Articles 29 and 30 of Brussels Recast dependant thereupon.

52. I do not understand it to be in dispute that, as a matter of Belgian procedural law, it would be open to Dr Simon to raise a counterclaim in respect of the causes of action that she seeks to pursue by the English Proceedings in the Belgian Proceedings, and to do so notwithstanding that they are now before the Belgian Appeal Court.

53. On the basis of instructions, Mr Sherwin on behalf of Dr Simon suggested that an appeal to the Belgian Appeal Court could take some five years to be heard. Again on the basis of instructions, Mr Ruddell on behalf of the Defendants offered a more optimistic assessment of possibly little longer than a year. There is no formal evidence before the Court on this question.

Amendment Application

54. Further to the Jurisdiction Application, and mindful perhaps that the Jurisdiction Application maintains that there is no seriously arguable case against the Individual Defendants, on 16 November 2021, Dr Simon issued the Amendment Application. Of particular significance is that this seeks to add a new dishonest assistance claim against the Individual Defendants, based on their assistance in Twig's alleged breach of fiduciary duty by taking a commission in excess of 5%.

Articles 29 and 30 of Brussels Recast Regulation

Introduction

55. The Defendants' first basis for seeking, by the Jurisdiction Application, to challenge jurisdiction relies upon the application of Article 29, alternatively Article 30 Brussels Recast, insofar as still applicable following the exit of the UK from the European Union.

EU-UK Withdrawal Agreement

56. It is the Defendants' case that Articles 29 and 30 continue to apply in the circumstances of the present case because the Belgian Proceedings were commenced in 2020, before the expiration of the transition period provided for by Article 126 of the Withdrawal Agreement, on 31 December 2020.

57. Article 67 of the Withdrawal Agreement provides that:

> *"1. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, in respect of legal proceedings instituted before the end of the transition period and in respect of proceedings or actions that are related to such legal proceedings pursuant to Articles 29, 30 and 31 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council* [i.e. Brussels Recast] *... the following acts or provisions shall apply:*
>
> *(a) the provisions regarding jurisdiction of Regulation (EU) No 1215/2012; ...*
>
> *2. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts or provisions shall apply as follows in respect of the recognition and enforcement of judgments, decisions, authentic instruments, court settlements and agreements:*
>
> *(a) Regulation (EU) No 1215/2012 shall apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period ..."*

58. Article 67 is directly incorporated into domestic law by s. 7A of the European Union (Withdrawal) Act 2018 – see *Easygroup Ltd v Beauty Perfectionists Ltd* [2022] Bus LR 146 (Ch) at [24]-[25]. Further, whilst Brussels Recast was revoked, with effect from the end of the transition period on 31 December 2020, by Regulation 89 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019/479, Regulation 93A of the latter regulations provided that nothing in these regulations affected the application of Article 67(1)(a) of the Withdrawal Agreement.

59. It can therefore be seen that Article 67 applies in both the UK and EU Member States in situations involving the UK to proceedings commenced before 31 December 2020. A number of issues arise as to the scope of this provision, which I will return to.

60. Articles 29 and 30 of Brussels Recast fall within Section 9 of Brussels Recast headed *"Lis Pendis - related actions"*.

Article 29 of Brussels Recast

61. Article 29 provides, so far as is relevant, as follows:

> *"1. … where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established".*
>
> *…*
>
> *3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."*

62. There are a number of general points that required to be noted in respect of the operation of Article 29:

i) The purpose of both Article 29 and Article 30 is to prevent the courts of two member states from giving inconsistent judgements and to preclude, so far as possible, the non-recognition of a judgment – see *Starlight Shipping Co v Allianz Marine & Aviation, The Alexandros T* [2013] UKSC 70, [2014] 1 All ER 590, at [27] per Lord Clarke SCJ.

ii) Briggs, Civil Jurisdiction and Judgments (7th ed, 2021) ("**Briggs**") at pages 321-323 notes:

> "*Article [29] is meant to be interpreted reasonably broadly, the better to serve one of the overriding purposes of [Brussels Recast]. That purpose is to prevent parallel litigation of matters which fall within the scope of [Brussels Recast] which might result in irreconcilable, and hence unrecognisable or unenforceable judgments.*"

iii) Article 32 of Brussels Recast provides, so far as is relevant, that a court shall be deemed to be seised: *"(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to*

take to have service effected on the defendant." In the present case, there are issues between the parties, which I will return to, as to when this Court was first seised of the English proceedings, and as to when the Belgian court was first seised of proceedings involving the same cause of action as the English proceedings.

iv) I do not understand it to be in dispute that a court remains seised while there is a pending appeal lodged in time on the question of jurisdiction – see *Easygroup Ltd v Easy Rent A Car Ltd* [2019] 1 WLR 4630 (CA) at [19]-[20] per David Richards LJ, and *Van Heck v Giambrone & Partners* [2022] EWHC 1098 (QB) at [48] et seq, per Soole J. On this basis, if a foreign court was seised first and Article 29 is otherwise applicable, the English court must stay proceedings to allow an appeal in the foreign proceedings to take its course.

v) Lord Clarke JSC in *The Alexandros T* (supra) at [23] and David Richards LJ in *Easygroup v Easy Rent* (supra) at [23] helpfully set out the principles to applied in considering whether proceedings involve *"the same cause of action"*. In essence:

a) Whether two claims involve the "*same cause of action*" is to be determined autonomously;

b) For proceedings to involve the same cause of action they must have "*le même objet et la même cause*", an expression which derives from the French version of the text;

c) Proceedings have the same "*cause*" if they involve the same facts and rules of law as the basis for the action;

d) Proceedings have the same "*objet*" if they have the same end in view; and

e) Regard should be had only to the claims, and not to the defences.

vi) Whether the proceedings involve the same "*cause*" and the same "*objet*" is to be assessed broadly and at a high level of generality. At paragraph 6 of his supplemental report, Prof. Englebert expresses agreement that the CJEU applies *"a broad interpretation"* to the concept of *"the same cause and same aim"*. In *JP Morgan Europe Ltd v Primacon* [2005] 1 CLC 493 (Comm), Cook J said at [42] (in a passage endorsed in *The Alexandros T* (supra) at [28](iii)) that:

> *"The court looks to the basic facts (whether in dispute or not) and the basic claimed rights and obligations of the parties to see if there is co-incidence between them in the actions in different countries, making due allowance for the specific form that proceedings may take in one national court with different classifications of rights and obligations from those in a different national court."* (Emphasis added)

vii) In relation to "*objet*", in *Glencore International AG v Shell International Trading and Shipping Co Ltd* [1999] 2 Lloyds Rep 692 at 695, Rix J said that one needs to identify and compare the "*essential issue*" which arises in the two

claims, observing that *"the objet may be the same although the claims may not be identical"*. In *Aannemingsbedrijf v VSB* C-523/14 at [45], the Court of Justice of the European Union recognised that the concept "*cannot be restricted to the claims being formally identical and is to be interpreted broadly*" (at [45], see also at [39] and [50]).

viii) As Mr Ruddell identified in his submissions, applying the above principles:

a) In *JP Morgan* (supra), it did not prevent a finding that there were proceedings with the same cause of action where the claims in England would be governed by English law and the claims in Germany determined by rules of German law/public policy (see at [44]-[45], [47]);

b) In *Easygroup v Easy Rent* (supra), it did not matter that the claims arose under different domestic causes of action (contract and tort) – see per David Richards LJ at [32];

c) In *The Tatry* C-406/92 [1999] QB 515 (ECJ)**,** it did not matter that one claim was a personal claim for a negative declaration, and the other was an admiralty claim in rem against a ship – see at [48]); and

d) In *Aannemingsbedrijf* (supra), it did not matter that one claim was in the form of a complaint seeking to be joined to a judicial investigation in a criminal proceedings (at [52]).

ix) As Mr Ruddell further identified, Article 29 is commonly applied in circumstances where the first seised claim is one for a declaration of non-liability (see e.g. *Overseas Union Insurance Ltd v New Hampshire Insurance Co* C-351/89 [1992] 1 QB 435 (ECJ), and *The Tatry* (supra)). In such cases, the claims have the same "*cause*" (even though the nature of the claims necessarily differs) and the same "*objet*" (because they are both focussed on the existence of the same liability).

x) Article 29 requires the mechanical application of the relevant test of the court first seised, and if this test is satisfied, then the Court is obliged to stay the proceedings pursuant Article 29 without there being any scope for any overriding consideration of the merits – see *Easygroup v Easy Rent* (supra) at [74] per David Richards LJ and *Van Heck* (supra) at [74] per Soole J.

63. To the extent that the English Proceedings are not caught by Article 29, then the possibility arises that Article 30 should be held to apply.

Article 30 of Brussels Recast

64. Article 30 provides, so far as relevant, that:

> *"1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings".*
>
> ...

> *3. "For the purposes of this Article, actions are deemed to be related where they 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"*

65. The following principles emerge from the authorities:

i) The purpose of Article 30 is to improve co-ordination of the exercise of judicial functions within the EU and to avoid conflicting and contradictory decisions, thus facilitating the proper administration of justice - see *The Alexandros T* (supra) at [27] per Lord Clark JSC.

ii) There are three stages to the analysis as to whether Article 30 should apply:

a) Are the proceedings related;

b) If so, which court was first seised; and

c) If the English court is second seised, should a stay be granted?

iii) In relation to the first issue as to whether the proceedings are related, the courts adopt a deliberately expansive interpretation of "*related*". Thus:

a) In *Sarrio SA v Kusati Investment Authority* [1999] 1 AC 32 at 41F, Lord Saville referred to the Court adopting a "*broad common-sense approach*";

b) In *Top Optimized Technologies SL v Vodafone* [2021] EWHC 46 (PAT) at [42] Marcus Smith J said that: "*It seems to me that the purpose of Article 30 is best served by having a wide ambit*"; and

c) In *The Tatry* at [53] it was said that: "*[the] interpretation must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive*".

iv) The court is required to compare the "*proceedings*" as a whole at the time it considers the application challenging jurisdiction – see *FKI Engineering Ltd v Stribog Ltd* [2011] 1 WLR 3264 (CA) at [47]-[48]; [54]. On this basis, it is appropriate to consider both the claims and the defences raised in the two sets of proceedings (Ibid at [103]).

v) As to the second question as to which court was seised first, one simply asks which proceedings were commenced first. The court does not have regard to the time of any amendments subsequently made, and the question as to whether the proceedings were related when initially commenced is irrelevant for this purpose - see *The Alexandros T* (supra) at [75]-[76], per Lord Clark JSC referring to *FKI Engineering v Stribog* (supra).

vi) In relation to the third issue, namely if the English court is second seised, should the Court grant a stay, the Court has a broad discretion. There is European

authority for the proposition that, given the purpose of avoiding parallel proceedings, in cases of doubt the national court should stay the proceedings – see the Advocate General's Opinion in *Owens Bank v Bracco* (C-129/92) [1994] QB 509 at [75]. In expressing this view, the Advocate General referred to the decision of Ognall J in *Virgin Aviation Services Ltd v CAD Aviation Services* [1991] I.L.Pr. 79 where Ognall J had held that there was a *"strong presumption"* in favour of allowing an application for a stay. But the Advocate General did identify three particular factors which might be relevant to the exercise of discretion vested in a national court, namely the extent of the relatedness and the risk of mutually irreconcilable decisions, the stage reached in each set of proceedings, and the proximity of the courts to the subject matter of the case. In *Alexandros T* at [92], Clark SCJ endorsed this approach.

vii) The "*strong presumption*" was also referred to by Cook J in *JP Morgan* (supra) at [65]. However, as Mr Sherwin has pointed out on behalf of Dr Simon, in *FKI Engineering v Stribog* (supra), at [131], Rix LJ disagreed with Ognall J in *Virgin Aviation Services* (supra) to the extent that Ognall J had, in that case, suggested that: *"where actions are related the first duty of the court is to stay the proceedings"*. Rix LJ identified a concern that this approach might relegate the discretion to a rule which eradicated the discretion.

viii) As to the factors relevant to the exercise of the discretion, as touched upon above, these include (but are not limited to):

a) The stage reached in each set of proceedings;

b) The extent of the relatedness and the risk of conflicting decisions; and

c) The proximity of the courts to the subject matter of the case

See - *The Alexandros T* (supra) at [92] per Clark JSC and *Easygroup v Easy Rent* at [56]-[57] per David Richards J.

The application of Article 67 of the Withdrawal Agreement

66. Mr Sherwin, on behalf of Dr Simon, submits that Article 67 should be construed such that, in considering whether there are *"legal proceedings instituted before the end of the transition period and in respect of proceedings or actions that are related to such proceedings"*, it is necessary that the two sets of proceedings should have been so related at the end of the transition period, i.e. 31 December 2020.

67. This is of significance as an issue in the present case because it is said by Dr Simon that, on the Defendants' own case, the Belgian Proceedings could only have become related on 3 May 2021 by the lodging of the 3 May Submissions, and this Court only became seised of the English proceedings after 31 December 2020, either on the making of Service Out Application or on the subsequent issue of the English Proceedings. On this basis, if Dr Simon is correct, it would not be open to the Defendants to rely upon Article 67 as applying Articles 29 and 30 of Brussels Recast to the English Proceedings, and I would have to proceed on the basis that Articles 29 and 30 require to be treated having been revoked for the purposes of the English proceedings.

68. Mr Sherwin's essential submission is that in the context of the UK's exit from the European Union, and the expiration of the transition period on 31 December 2020, it cannot be right that a party to supposed related proceedings can have been intended to have the benefit of an open-ended opportunity to subsequently (i.e. after the expiration of the transition period) improve their position by commencing or amending proceedings so as to cause proceedings that would not otherwise have been related, to become related for the purposes of Articles 29 and 30 of Brussels Recast.

69. I do not consider Mr Sherwin's interpretation to be correct.

70. One necessarily begins with the language of Article 67, which introduces two concepts. Firstly, legal proceedings instituted before the end of the transition period, and secondly, proceedings or actions that are related to such legal proceedings pursuant to Article 29, 30 and 31 of Brussels Recast. If the latter, in contrast to the former, were required to be instituted so as to give rise to the necessary relationship prior to the expiration of the transitional period, then one would have expected Article 67 to have said so. More fundamentally, perhaps, if it were a requirement that the necessary relationship existed as at the end of the transition period, then Brussels Recast would have applied in any event without the need for Article 67 because both sets of proceedings would necessarily have been instituted before the end of the transitional period and so Union law would have continued to have effect by virtue of Articles 126 and 127 of the Withdrawal Agreement. On this basis, Article 67 and the additional wording *"and in respect of proceedings or actions that are related to such legal proceedings"* only makes sense if construed as encompassing a relationship that only arose after the end of the transitional period, cf. Briggs at page 20.

71. Although perhaps of more limited weight following the exit of the UK from the EU, support for the Defendants' construction is provided by the European Commission's *"Notice to Stakeholders"* dated 27 August 2020 which, at paragraph 1.1 thereof, comments as follows:

> *"Article 67(1) of the Withdrawal Agreement specifies that EU rules on jurisdiction also apply to "proceedings or actions that are related to such legal proceedings" even if such related proceedings or actions are instituted after the end of the transition period. This addresses situations where proceedings involving the same cause of action and between the same parties are brought in the courts of a Member State and the United Kingdom ("lis pendens") before and after the end of the transition period respectively (or vice-versa). The aim is to ensure that, in these cases, the EU rules on conflict of jurisdictions continue to apply where the court has been Seised after the end of the transition period in an EU Member State or in the United Kingdom."*

72. Of particular significance is the aim identified in respect of the operation of Article 67, namely to ensure that in respect of the situation where one set of proceedings is commenced prior to the end of the transition period, and another set of proceedings is commenced after the end of the transition period, the pre-existing regime should continue to apply to both sets of proceedings.

73. Although there is no judicial authority on the point as such, I note that in *On the Beach Ltd v Ryanair UK Ltd* [2022] EWHC 861 (Ch), albeit in circumstances in which the

parties were agreed on the point, Nugee LJ (sitting at first instance) at [22] recorded that: "*Since all the Irish proceedings were instituted before the end of the transition period, … Art 30 of [Brussels Regulation] applies to this application, notwithstanding that this action was commenced in England after the end of the transition period*" (emphasis added).

74. Mr Ruddell, on behalf of the Defendants, makes the point that Article 67 preserves the applicability of Brussels Recast to *"proceedings"* and not to particular claims in proceedings. On that basis, and having regard to what I consider to be the proper construction of Article 76, I accept Mr Ruddell's submission that Brussels Recast continues to apply to new claims added to proceedings commenced prior to 31 December 2020 and claims against new defendants joined to such proceedings after that date. This is also consistent with the approach of Morgan J in *Benkel v East-West German Real Estate Holding* [2021] EWHC 188 (Ch) at [43], albeit (again) on the basis of an agreed position as to the law, and is supported by the commentary in Briggs at pages 19-20.

75. In short therefore, I do not consider it to be an objection to the potential application of Articles 29 and 30 of Brussels Recast in the present case that the Belgian Proceedings and the English Proceedings might only have become related for the purposes of Articles 29 and 30 after 31 December 2020, the key point being that the Belgian Proceedings were commenced prior to 31 December 2020.

Does Article 29 apply so as to require the English proceedings to be stayed?

Introduction

76. As already identified, the key issues are as to

    i) Whether the Belgian Proceedings and the English Proceedings involve the same *"cause of action"* within the meaning of Article 29; and

    ii) If so, as to whether the Belgian court or this Court was first seised of proceedings that involved that *"cause of action"*.

77. It is common ground that from 5 August 2021, and the lodging of the 5 August Submissions with the Belgian court, the Belgian Proceedings and the English Proceedings did involve the same cause of action on the basis that it is accepted by Dr Simon that by that stage (but not earlier) the Defendants were seeking a negative declaration in the Belgian Proceedings that mirrored the claims being pursued by Dr Simon in the English Proceedings. However, that does not assist the Defendants in their reliance upon Article 29 because, by that date, this Court was plainly seised (either as from the making of the Service Out Application, or the subsequent issue of the English proceedings).

78. The issue between the parties as to the application of Article 29 therefore boils down to the following questions:

    i) Did this Court become seised of the English Proceedings by the making of the Service Out Application (on 30 March 2021) or, alternatively, only on the actual issue of the Claim Form in the English Proceedings on 10 May 2021; and

ii) If this Court only became seised of the English proceedings on the issue thereof on 10 May 2021, whether the Belgian court became seised of proceedings concerning the relevant cause of action on the lodging by the Defendants in the Belgian court of the 3 May 2020 Submissions, in which case Article 29 would apply to the English proceedings.

79. I consider each of these questions in turn.

When did this Court become seised?

80. As I have already identified, the question as to when the courts of a particular country have become seised of particular proceedings is to be determined by reference to Article 32 of Brussels Recast under which a court is to be deemed to be seised, so far as is relevant: *"at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant."*

81. I do not understand it to be in dispute but this is a question to be determined autonomously by reference to European law rather than by reference to domestic law, albeit having regard to English procedural law and how it works – see e.g. *Barclays Bank Plc v Ente Nazioale Di Previdenza* [2016] EWCA Civ 1261, [2017] 2 All ER (Comm) at [10], per Moore-Bick VP.

82. Ordinarily, the language of Article 32 would, having regard to English rules of procedure, point to a court becoming seised on the issue of proceedings – see Briggs at 334. The question that arises is as to how this fits in with a regime which permits an application for permission to serve out of the jurisdiction to be made either before, or after the formal issue of proceedings.

83. Mr Sherwin on behalf of Dr Simon points to fact that the availability of the option to seek permission to serve out of the jurisdiction before or after the issue of proceedings is recognised by, for example, paragraph 11.7 of the current (as at June 2022) version of Chancery Guide which refers to applications for service out of the jurisdiction *"normally"* being made before the claim is issued.

84. Mr Sherwin points to the fact that the English Proceedings, when issued on the issue of the Claim Form, were give the same *"claim number"* as had been given to the Service Out Application, and to the fact that the Service Out Order and the relevant documentation relating thereto was sent to the Defendants shortly after having been obtained.

85. Mr Sherwin submits that it would be odd if it was open to a defendant served in circumstances such as this to be given the opportunity to *"torpedo"* the ability of the party that had obtained the order for service out to pursue proceedings in the jurisdiction by using the opportunity provided by any delay in the formal issue of the proceedings, by the issue of the claim form, to commence proceedings relating to the same cause of action, e.g. for a negative declaration, in another jurisdiction and frustrate proceedings in England by invoking Article 29 Brussels Recast.

86. Further, Mr Sherwin points to European case law on claims for interim relief, and to the fact that the in the family case, *C-296-10 Purrucker v Vallés Pérez (No 2)* [2011] Fam 312, the Court of Justice noted at [49] that "*[p]roceedings for interim relief, together with substantive proceedings brought subsequently, constitute one procedural unit.*" He submits that the description *"one procedural unit"* is entirely apt to apply, in the present case, to a pre-issue application for permission to serve out a defined but unissued claim, taken together with the substantive claim which is then issued, where the claim itself cannot proceed to service without permission.

87. Mr Ruddell on behalf of the Defendants points to the fact that the Service Out Order simply gave Dr Simon permission to serve the English Proceedings out of the jurisdiction *if issued*. He submits that, until then, this Court cannot properly be considered to have been seised of the proceedings ultimately issued on 10 May 2021, even though the Service Out Order and accompanying documentation, including draft claim form and particulars of claim, might have been served on Dr Simon shortly after 30 March 2021.

88. Mr Ruddell points to the fact that unless and until the English Proceedings were actually issued, the opportunity to challenge jurisdiction never arose, and that time would not have ceased to run for limitation purposes.

89. As to *Purrucker* (supra), Mr Ruddell suggests that the form of interlocutory relief granted in that case was akin to the grant of a freezing order or other relief parasitic upon the claim advanced in the proceedings subsequently issued, and he points to the fact that as a matter of the relevant Spanish procedural law, the interim relief in that case would have ceased to have taken effect had not the substantive proceedings been brought within 30 days following the service of the interim relief order. He submits that, in those circumstances, one can see why, on the facts of that case, the application for interim relief and the substantive proceedings subsequently issued could be regarded as *"one procedural unit"* such that the bringing of the application for interim relief could properly be regarded as being when the court was seised of the proceedings as a whole, including the substantive proceedings. This he submits is very different from a purely permissive order permitting service out made prior to the formal issue of proceedings by claim form.

90. I prefer the Defendants' analysis to that advanced on behalf of Dr Simon.

91. The wording of Article 32 refers to the institution of proceedings and the lodging of a document with the relevant court for that purpose, subject to a proviso that the lodging claimant does not subsequently fail to take the steps that he is required to take to have service effected on the defendant.

92. Although Article 32 does require to be construed autonomously by reference to European law, the language points, in my judgment, when applied to English procedure, to the formal lodging of a claim form in order to issue proceedings, rather than the taking of some preliminary step to obtain permission with regard to the service of proceedings which might never be issued, and which such preliminary steps would only become relevant if the proceedings were in fact issued.

93. In this context, I find it difficult to see that the obtaining of permission to serve out of the jurisdiction and the actual issue of proceedings to be served is properly to be

regarded as *"one procedural unit"*. I agree with Mr Ruddell that the position is to be distinguished from the obtaining of interlocutory injunctive relief prior to issue, which such interlocutory injunctive relief will generally be parasitic upon the relief that will be sought by the substantive proceedings, and where the obtaining of interim relief in such circumstances will, if the relief was granted prior to the issue of proceedings, invariably require the party obtaining the relief to undertake to issue and serve the proceedings in short order at risk of losing the benefit of the interim relief, cf. the position in *Purrucker*, where the interim relief granted in Spain would have fallen away if substantive proceedings were not issued within 30 days.

94. I am not persuaded that this construction of Article 32 would, in circumstances where permission to serve out was obtained prior to the issue of proceedings, provide a charter for the defendant to *"torpedo"* the proceedings intended to be brought in this jurisdiction by commencing proceedings elsewhere. It has not really been explained in the present case why proceedings were not promptly issued following the obtaining of Service Out Order, albeit that there may have been some delay in being able to serve the proceedings. In most, if not all cases, it would be open to the party wishing to pursue the claim in this jurisdiction to ensure that the proceedings were issued promptly having obtained permission to serve out of the jurisdiction, and then address any practical issues regarding service.

95. Consequently, I find that this Court became seised of the English Proceedings on 10 May 2021, when the Claim Form was issued, and not 30 March 2021, when the Service Out Application was made, and the Service Out Order granted.

When did the Belgian court become seised of proceedings involving the same cause of action as the English Proceedings?

96. One starts with the point that where a particular cause of action is only raised by amendment to on-going proceedings, the relevant court will only be seised of that cause of action from the date of the amendment, and not from the earlier commencement of the proceedings – see *Barclays Bank v ENPAM* (supra) at [15] to [19]. As identified above, the issue in the present case is as to whether the Belgian court became seised of the relevant cause of action by way of the amendments to the Belgian Proceedings made by the Defendants by the 3 May Submissions, as they contend, or whether the Belgian court only became so seised when, as contended by Dr Simon, the Belgian Proceedings were amended by the 5 August Submissions.

97. Dr Simon's key points, supported by the expert evidence of Prof. Englebert, are as follows:

    i) The 3 May Submissions did not amount to a new *"claim"* but simply a new *"argument"*, put forward in response to Dr Simon's defence in the Belgian Proceedings to the effect that her complaints/allegations were well founded, and therefore the Defendants had no cause for complaint in respect of the matters alleged by the Defendants in the Belgian Proceedings.

    ii) The ruling sought by the Defendants by way of relief in the 3 May Submissions was not in respect of the same *"cause of action"* as the English Proceedings because it only sought a declaration that Dr Simon had not *"proved"* any wrongdoing, and not a declaration as to the absence of any wrongdoing as

eventually sought by the 5 August Submissions. In other words, the Defendants were simply asking for a ruling on the defence raised by Dr Simon to the claims made by the Defendants in the Belgian Proceedings.

98. As to the second of these points:

i) The point is made by Mr Sherwin that Dr Simon was not the plaintiff in the Belgian Proceedings, and he submits that even if the Belgian court had found that Dr Simon's allegations, as raised in the English Proceedings, were not proved, that would merely reflect the fact that she has adduced no evidence to so prove, because that was not the point of the Belgian Proceedings. It is therefore submitted that there was no risk of irreconcilable judgements.

ii) Particular reliance is placed upon Prof. Englebert, in his report, as having explained that:

a) "*The court is not (as of 3 May 2021) being asked to state as a matter of law that [the Defendants] have not committed contractual misconduct (which would constitute a new claim, for a negative declaration), but merely to accept as a matter of argument in reply to what Dr Simon has stated that Dr Simon has not proved the events that she alleges*."

b) The Defendants' argument as to lack of proof is *"a defence in response to an argument raised by Dr Simon in her initial submissions".*

99. As previously referred to, the 3 May Submissions had specifically requested the Belgian court to rule that *"Ms Simon does not prove any fault on the part of the claimants."* However, Mr Sherwin contrasted this with what he described as the *"markedly different relief"* sought by the 5 August Submissions, namely that: *"The court declares that [the Defendant's] did not fail in their obligations in their relationship with Ms Simon and that they are not liable to Ms Simon"*. It is submitted that the 5 August Submissions did contain a request for a declaration of no liability, whereas the 3 May Submissions did not.

100. On this basis, it is submitted on behalf of Dr Simon that the 3 May Submissions did not concern the same *"cause"* and *"objet"*, and so Article 29 of Brussels Recast is not engaged. Reliance is placed by Mr Sherwin on *Barclays Bank* (supra), and the differences identified in that case between the proceedings in London and the proceedings in Milan.

101. Prof. JFvD responds to Prof. Englebert's evidence on this point in his supplemental report where he maintains that the Defendants asking the Belgian court to rule that Dr Simon has not proven the breaches she alleges against the Defendants did: *"constitute a new claim in the light of Article 29 [Brussels Recast] and Article 807 of the Judicial Code".* He puts forward three essential reasons for coming to this conclusion:

i) Firstly, Prof JFvD identifies that, contrary to what he considers to be the approach taken by Prof. Englebert, the concept of *"the same cause of action between the same parties"* in Article 29 Brussels Recast requires to be interpreted autonomously, and not solely by reference to national law, and referring to *Tatry* (supra), Prof. JFvD identifies that Article 29: *"cannot be*

restricted to claims being formally identical ***and is to be interpreted broadly****"*. By reference to *Tatry* (supra), he further identifies that: *"the object of the action […]* ***means the end the action has in view****"*. He thus concludes that, in view of the broad definition of cause of action: *"(i) arguing that a party has not proved alleged misconduct and (ii) claiming that there has been no alleged misconduct are clearly one and the same (i.e. "the end the action has in view" is the same)*".

ii) Secondly, Prof. JFvD makes the point that the Defendants, in the 3 May Submissions, were not merely advancing arguments in respect of the defence raised by Dr Simon that her conduct was justified by the breaches on the part of the Defendants of their contractual obligations, but that the 3 May Submissions went further and specifically, in the relief that they sought, sought a ruling from the Belgian court in respect of the allegations that Dr Simon was making. Prof. JFvD maintains that Prof. Englebert was in error in failing to recognise this.

iii) Thirdly, Prof. JFvD maintains that Prof. Englebert was in error: *"by claiming that there is a distinction between (i) the argument that a party has not proved alleged misconduct and (ii) a claim of no alleged misconduct, on the ground that the legal basis for this type of argument (Article 870 of the Judicial Code) is different from the legal basis for a claim."* He suggests that Prof. Englebert has misinterpreted this latter provision, and points out that the complete wording of this provision says: *"a claim pending before the court may be extended or modified if new submissions, filed in inter partes proceedings, are based on a fact or an act cited in the summons,* ***even if their legal categorisation is different****"*[emphasis added by Prof. JFvD].

102. Prof. Englebert maintains his own position in his supplemental report prepared in response to Prof. JFvD's report. The essential points to be derived therefrom, and from Mr Sherwin's submissions dealing with the latter are that:

i) If the relief sought by the 3 May Submissions did have the same object as that sought by the 5 August Submissions, then there would have been no need to make the latter; and

ii) However it might be put by the Defendants, the substantive question as to whether or not the Defendants were actually liable to Dr Simon was not before the Belgian court on 3 May 2021, and there is a radical difference between a statement that Dr Simon had failed to prove something, and a request for a negative declaration as to liability.

103. Although the question of the proper application of Article 29 of Brussels Recast to the present circumstances, and whether and if so when there were on foot proceedings involving *"the same cause of action, between the same parties"*, requires to be determined by interpreting Article 29 autonomously, the exercise necessarily involves a consideration of Belgian procedural law, in respect of which I have been assisted by the evidence of the two experts.

104. I prefer the conclusions reached by Prof. JFvD to the extent relevant to the issue that I am required to determine.

105. I consider it important to consider with some care how matters developed procedurally in respect of the Belgian Proceedings. By the 10 March Submissions, Dr Simon made allegations, in particular in relation to the Franz West Sculpture and the George Condo Work, to the effect that the Defendants had acted in breach of their contractual obligations that, so far as these allegations are concerned, substantially replicate the allegations made in support of the claims that she seeks to bring by the English Proceedings, albeit in the Belgian Proceedings deployed by way of defence. This step could, itself, have no bearing upon the application Article 29 because the latter is concerned with claims and not defences.

106. In reply, by the 3 May Submissions, the Defendants responded to the allegations that Dr Simon had made in the 10 March Submissions, but went further and specifically added to their existing prayer in respect of the relief that they sought in the Belgian Proceedings, a request that the Court should rule: *"that Ms Simon does not prove any fault on the part of the claimants"*, i.e. the Defendants were, as I see it, specifically asking the Belgian court to adjudicate on whether Dr Simon could or could not show that they were at fault, at least unless Dr Simon chose no longer to run her line of defence.

107. Thus, as I see it, the Defendants were, in the relief that they sought, seeking from the Belgian court a determination as to whether Dr Simon could prove or establish any liability on the part of the Defendants in respect of the matters that Dr Simon had alleged in the Belgian Proceedings, but has also raised in the English Proceedings.

108. I accept Mr Ruddell's submission, supported by Prof. JFvD, that a broad approach should be adopted to the application of Article 29, and that it is incumbent upon the Court to look at the substance of the claim, i.e. the additional relief introduced by the 3 May Submissions, and I accept that if one does in the present circumstances, there is no substantive difference between asking the Court to rule that Dr Simon had not proved any wrongdoing, and seeking a declaration that there was no wrongdoing. I accept that, for the purposes of Article 29, a declaration that there was no liability is, in substance, the same thing as a determination by the Belgian court that no liability has been proved by the parties bearing the burden to establish that liability.

109. I consider that the point can be tested by considering how matters are likely to have been dealt with in the Belgian court at first instance had it been prepared to deal with the Defendants' claim added by way of amendment rather than deferring to this Court in the way that it did, and had it grappled with Article 29 in the way that the Defendants, by their Belgian appeal, contend that it should have done, and which by their appeal, the Defendants argue that the Belgium courts should now do. Even if the Defendants' claim had remained in its form as at 3 May 2021 as set out in the 3 May Submissions, rather than as further developed by the 5 August Submissions, the Belgian court would, as I see it, still have had to have considered, on the evidence, whether Dr Simon's allegations that the Defendants were in breach of their contractual obligations etc. were made out so as to provide her with a defence, and to rule, as sought by the relief claimed by the Defendants, as to whether Dr Simon could prove fault on the Defendants' part. These are the very issues that the English court is being asked to determine in the English proceedings.

110. On this basis, I consider that the two proceedings do involve the same cause of action in the sense that they involve *"le même objet et le même the cause"*, namely the consideration as to whether the Defendants acted in breach of their obligations as alleged by Dr Simon.

111. It is certainly correct that the 5 August Submissions are more clearly expressed in terms of seeking a negative declaration as to the Defendants' liability, and it may be that the Defendant sought to strengthen the position by the use of this rather clearer language. But that does not prevent the Court from analysing the effect of the 3 May Submissions, and concluding that Article 29 was engaged based thereupon. A key consideration is that Section 9 of Brussels Recast is concerned with avoiding the risk of irreconcilable judgments resulting from separate proceedings. If the position is, as I consider it to be, that the Belgian court is being asked by the Defendants to determine the same essential questions as raised by the English Proceedings, then there must, as I see it, be a real risk of the Belgian court, consequential upon the appeals process, and this Court, coming to irreconcilable decisions.

112. I note that, for the purposes of Article 29, it does not matter that the claims and the different proceedings arise under different domestic causes of action - here Dr Simon's defences to the Defendants' quasi-criminal/tortious claims in the Belgian Proceedings, and the claims of breach of contract and fiduciary duty sought to be pursued by the English proceedings. See *Easygroup v Easyrent* (supra) at [32] referred to above.

113. In conclusion therefore, I find that the Belgian court became seised of the same cause of action as that sought to be pursued in the English proceedings on the lodging by the Defendants of the 3 May Submissions on 3 May 2021.

Conclusion in respect of the application of Article 29

114. It follows from my finding that the Belgian court became seised of proceedings involving the relevant *"cause of action"* on 3 May 2021, and before this Court became seised of the English Proceedings involving *"the same cause of action"* on 10 May 2021, that as the two sets of proceedings involved *"the same cause of action between the same parties"*, I am bound by the provisions of Article 29 to stay the English proceedings until such time as the jurisdiction of the Belgian court is established, and to declare that if jurisdiction is so established, then this Court is required to decline jurisdiction.

Application of Article 30

115. In view of my finding in respect of Article 29, it is strictly unnecessary for me to determine the position so far as the application of Article 30 is concerned.

116. Any consideration of Article 30 must necessarily be upon the basis that I am wrong in respect of the conclusions that I have reached in respect of Article 29. In these circumstances, I consider there to be a number of difficulties in seeking to decide the issues that arise in considering the application of Article 30, given not least that:

    i) Matters might well depend upon the reasons as to why I might be wrong as to the approach that I took in respect of Article 29.

ii) The obvious counterfactual of me being wrong would be that this Court was seised first of proceedings involving the relevant cause of action, either because this Court became seised on 30 March 2021 (when the Service Out Application was made), or because the Belgian court only became seised on 5 August 2021 (when the 5 August Submissions were lodged). In those circumstances, bearing in mind that it is common ground that the two sets of proceedings did involve the same cause of action, at least as from 5 August 2021, the logical conclusion would be that the Belgian court would be bound in accordance with Article 29 to stay the claim as introduced by amendment by the Defendants in the Belgian Proceedings in favour of the issues being determined in the English proceedings albeit that the self same issues might, potentially at least, have to be gone into in the Belgian Proceedings in any event dependent on the result of the appeal.

117. The first two requirements with regard to Article 30 are satisfied, in that the proceedings as they now stand are related, and have been as from at least from 5 August 2021 (on Dr Simon's case), and the Belgian court is to be taken to be the court *"first seised"* for the purposes of Article 30, even though the proceedings only became related once the amendments were made to the Defendants' claim in the Belgian Proceedings - see paragraph 65(v). Thus I consider that my discretion under Article 30 to stay the English proceedings still arises notwithstanding the considerations that I have identified.

118. However, Mr Sherwin makes the forceful point that as the obvious counterfactual is that the English court was first seised for the purposes of Article 29, and anticipating the approach of the Belgian court, particularly bearing in mind the decision in Belgium at first instance, the only proper course would be to allow the English proceedings to continue, and not to stay them.

119. Nevertheless, on balance, and taking into account, amongst other things, the relevant factors identified in paragraph 65(viii) above, I would still have granted a stay pursuant to Article 30 having regard, in particular, to the following considerations:

i) The approach of the Belgian Court of Appeal to the Article 29 point cannot be predicted with certainty, particularly bearing in mind that, in relation to the point concerning the 3 May Submissions in particular, this is tied up with matters of Belgian law and procedure.

ii) For reasons that I will develop when dealing with the challenge to the Service Out Order, I consider that the causes of action raised have a significantly closer proximity to Belgium then England, an important consideration being that I consider that the governing law of the contractual relationship between Dr Simon and the Defendants is likely to be Belgian law.

iii) The experts agree that in the Belgian appeal Dr Simon can dispute the claim for a negative declaration, and bring a claim for damages herself. On this basis, it is only in Belgium that the proceedings can be consolidated, and there is likely to be significant advantage to all parties in the matter being consolidated. Further, such a course of action would serve to wholly eliminate the risk of inconsistent decisions.

120. Consequently, should I be wrong in respect of my conclusions in respect of Article 29, I would, in respect of Article 30, have been prepared to make the order sought by the

Defendants, namely that the English proceedings be stayed until the Belgian Court of Appeal determines the proceedings in the claim brought by the Defendants against the Claimant in claim number 20/6539/A.

The Defendants' contention that permission for service out should not have been granted

Introduction

121. Any consideration of whether permission for service out should have been granted turns upon the application of the familiar three stage test under which it is incumbent upon Dr Simon to persuade the Court that:

i) There is a good arguable case that a jurisdictional gateway in CPR PD6B, paragraph 3(1) applies – see *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] 1 WLR 3514 at [72]-[80];

ii) There is a serious question to be tried on the merits; and

iii) In all the circumstances, England is clearly or distinctly the appropriate forum for the trial of the dispute – see *VTB Capital plc v Nutritek International Corp* [2013] 2 AC 337 (SC) at [164] per Lord Clarke.

122. I will deal with each of the stages of the test in turn.

Good arguable case as to procedural gateway?

123. The correct approach of the Court to the question as to whether a good arguable case is demonstrated as to the application of a particular procedural gateway was helpfully analysed, by reference to the authorities, in *Kaefer Aislamientos v AMS Drilling* (supra) at [72] – [80]. One gets therefrom that the proper test is whether the claimant has supplied a plausible evidential basis for the application of a jurisdictional gateway, i.e. a plausible evidential basis showing that the claimant has the better argument. However, where there is an issue of fact about jurisdiction, or some other reason for doubting whether jurisdiction applies, the court is required to take a view on the material available if it can reliably do so. Nevertheless, the nature of the issue and the limitations of the material available at the interlocutory stage might be such that no reliable assessment can be made, in which case there will be a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis.

124. I will consider in turn the various gateways that are relied upon.

Paragraph 3.1(6)(c): Contract "governed by English law"

125. Article 66(a) of the Withdrawal Agreement provides that Regulation (EU) No. 493/2008 ("**Rome I**") shall apply in the UK in respect of contracts concluded before the end of the transition period (31 December 2020). Rome 1 therefore applies in the circumstances of the present case because the relevant contract or contracts were concluded prior to 31 December 2020.

126. Unless some other provision applies, governing law is determined pursuant to Article 4 Rome I which, so far as relevant, provides pursuant to Article 4(1)(b) that in the

absence of a governing law provision, in the case of a contract for the provision of services, the contract will be governed by the law of the country where the service provider as his habitual residence.

127. Dr Simon seeks to rely upon the exception provided by Article 6 Rome I in the case of consumer contracts. Under this provision, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) is to be governed by the law of the country where the consumer has his habitual residence provided that, the professional:

> *"(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence; or*
>
> *(b) by any means, directs such activities to that country or to several countries including that country;*
>
> *and the contract falls within the scope of such activities."*

128. Dr Simon contends that she is to be regarded as a consumer and that Defendants are to be regarded as professionals, that she was at all relevant times habitually resident in the London, that the Defendants did direct their activities to the UK, or to several countries including the UK, and that the relevant contract or contracts fall within the scope of such activities. On this basis, Dr Simon submits that Article 6 applies, and that English law is therefore to be regarded as governing the relevant contract or contracts thereby satisfying paragraph 3.1(6)(b).

129. Seeking to applying the proper test as to whether a good arguable case is shown, I am not persuaded that Dr Simon has a good arguable case that Article 6 applies in the circumstances of the present case.

130. Firstly, I do not consider that the evidence supports the case that the Defendants directed their commercial or professional activities to the UK. Even if one were able to take into account what is said by the Defendants on Twig's website[1], the reference to working with shipping agents and insurance brokers across the world, and having expertise in international modern and contemporary art does not, as I see it, point to the directing of activities to the UK. Indeed what is said on the website about Twig's client base suggests, consistent with Ms Lévy's evidence, that Twig directed its business at Belgian clients.

131. Further, I consider it highly significant that Dr Simon was introduced to the Defendants by a Belgian individual with interests in the Belgian art world, and that the relationship was initially taken forward not in the UK, but at a meeting in Paris. It may be that the Individual Defendants did subsequently meet with Dr Simon in London in respect of which there is an issue between the parties as to the nature and extent of such contact, but that does not, as I see it, support a case that the Defendants were specifically directing their activities to the UK. This would, in itself, be enough, as I see it, to show that Dr Simon has no good arguable case as to an ability to rely upon Article 6.

[1] Cf. Recital (24) to Rome I.

132. It is a further condition of Article 6 that the relevant contract should fall within the scope of the activities that are said to have been directed to the UK – see further on this Recital (24) to Rome I. I find it difficult to see how the contractual relationship between Dr Simon and the Defendants could have fallen within the scope of activities directed to the UK if the genesis of the relationship was an introduction effected by a Belgian individual outside the UK. This, as I see it, provides a further difficulty for Dr Simon.

133. Further, the governing law would have been determined by the circumstances as they existed in early 2016 when Dr Simon entered into the contractual relationship which she pleads in her Particulars of Claim. As Dr Simon says herself in her own evidence, at that time, i.e. during the tax year 2015-2016, she was *"non-UK tax resident bracket (and non-domiciled)"*. As Mr Ruddell demonstrates by reference to HMRC's *"RDS3: Statutory Residence Test (SRT) notes"*, in order to achieve this status, Dr Simon can be supposed to have been able to show that she had a limited connection with the UK during the relevant period of time. Even apart from, but my view being strengthened by the further evidence as to Dr Simon's connection with the Paris Address, the reference to residence in Turkey in forms submitted to Companies House, and the somewhat odd circumstances in which Dr Simon might have made use of a sofa bed in what was essentially commercial accommodation at 9A West Halkin Street, I remain unpersuaded on the evidence that Dr Simon has a good arguable case that she had her *"habitual residence"* in London at the relevant time.

134. In short, therefore, I do not consider that Dr Simon has a good arguable case that the relevant contract or contracts are governed by English law, and I consider that the better argument for these purposes is that the contract or contracts are governed by Belgian law.

135. Consequently, I consider that Dr Simon fails to establish this gateway.

Paragraph 3.1(7): Claim for breach of contract within the jurisdiction

136. The Defendants' position is that the alleged breach of contract was not within the jurisdiction, that the breaches alleged concern the giving of allegedly negligent advice, and that that advice was given in Belgium. Mr Ruddell draws an analogy with the position where a party repudiates a contract by correspondence, where it has been held that the breach occurs at the place where the correspondence is sent and not where it is received - see the authorities referred to in the White Book 2022, at [6HJ .21].

137. Dr Simon's case is that, for the most part, her dealings with the Defendants took place when she was in London, including when she received advice by telephone. She submits that the breaches alleged concerned advice wrongfully or negligently given, and that this advice was received predominantly in England. In answer to the Defendants' point that the advice was given by the Defendants from Belgium, Mr Sherwin refers to Dicey, Morris and Collins, Conflict of Laws, 15th ed, ("**Dicey**"), at [11-202] where, citing *The Piraeus* [1974] 2 Lloyd's Rep 266, it is noted that: *"An implied warranty of authority has been held to have been broken where the warranty was relied upon."*

138. The commentary in Dicey (supra) at [11-197] is to the effect that, in the case of the failure of a party to perform one or more obligations under a contract, the general principle is that the breach will be treated as having occurred where the contract was to

be performed, and that it is not sufficient to show that there has been a breach within the jurisdiction if the contract or part of it might be performed in either England or abroad, it being necessary that the contract or part of it was to be performed in England and not elsewhere.

139. Properly applied to the circumstances of the present case, there was nothing to require performance within the jurisdiction, and it would appear that the relevant advice was, in fact, given in a variety of ways. On this basis, I am not persuaded that Dr Simon has a good arguable case that any breach of contract occurred within the jurisdiction, and I am not persuaded that a proper analogy can be drawn with a claim for breach of warranty of authority. The better analogy is, I consider, that identified by Mr Ruddell referred to in paragraph 136 above.

140. Consequently, I consider that Dr Simon also fails to establish this gateway.

Paragraph 3.9(1): Tortious claim for damages sustained within the jurisdiction

141. The wording of the relevant paragraph is such as to require that the claim *"is made in tort"*, and either *"(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."*

142. Dr Simon's case is that her evidence is that she purchased at least some of the artworks using money in a UK bank account (paragraph 12 of her witness statement), and therefore that relevant damage was sustained in the jurisdiction. Further, Mr Sherwin submits that torts based on negligent statements made between countries are committed where the statement is received and acted upon – see Dicey at [11-213].

143. As against this, the Defendants identify that the claim is for pure economic loss, which Dr Simon claims to have suffered in England, and they submit that:

    i) No pecuniary loss was suffered in England given that the relevant monies were paid out of accounts in the USA and Switzerland - see the evidence relied upon in support of the Service Out Application, and paragraph 52 of Dr Simon's witness statement. Reliance is placed by the Defendants on *ABCI v Banque Franco-Tunisienne* [2003] 2 Lloyd's Rep 146 at [44] as authority for the proposition that in a case such as the present involving pure economic loss, where the loss has been suffered as a result of transfers from a particular bank account, the loss is to be regarded as suffered in the jurisdiction where the bank account was held.

    ii) Dr Simon was in Istanbul when the Franz West Sculpture was purchased - see paragraph 51 of Dr Simon's witness statement; and

    iii) There is no good arguable case that Dr Simon was in England at the time she purchased the George Condo Work, given the inconsistencies in her evidence, and the fact that it would have been easy for her to produce the relevant evidence.

144. A difficulty with paragraph 12 of Dr Simon's witness statement is that she merely says that some artworks were purchased using money in a UK bank account, without

identifying which, and in particular without identifying any in respect of which she claims to have suffered loss or damage as a result of the matters complained of as against the Defendants. In paragraph 14.1 of her evidence in support of the Service Out Application, Dr Simon identified most of the relevant payments as having been made out of a bank account in the USA, and in paragraph 52 of her first witness statement, she referred to the Franz West Sculpture as having purchased with monies transferred from Switzerland. There is, as I see it, simply no sufficient evidence to support the proposition that any artwork in respect of which she claims to have suffered any loss was paid for out of funds held in England.

145. On this basis, I do not consider that Dr Simon has a good arguable case that she has sustained damage in the jurisdiction as a result of any tortious conduct alleged.

146. As to whether any damage has been sustained that results from an act committed within the jurisdiction, the passage that Mr Sherwin relies upon from Dicey at [11-213] was concerned with the position prior to the amendment of the Rules of the Supreme Court ("**RSC**") in 1987 to adopt an equivalent jurisdiction to that conferred by Article 5(3) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (as set out in Schedule 1 to the Civil Jurisdiction and Judgments Act 1982).

147. Referring to *Newsat Holdings Ltd v Zani* [2006] EWHC 342 (Comm), the White Book 2022 at [6HJ.23.1] comments that, in the context of a claim for negligent or fraudulent misstatement, the place where the harmful event giving rise to the damage has occurred is where the misstatement was made rather than where it was received. In *Newsat Holdings Ltd v Zani* (supra) at [30] et seq, David Steel J explains that it is a well established matter of English law that the tort of fraudulent misrepresentations is committed in the place where the misrepresentation was received and acted upon and not the place from where it was sent, but he then refers to the amendment to the RSC in 1987, and to the different test now applicable on an application for permission to serve out of the jurisdiction in relation to a tortious claim. He concludes, as set out in the White Book 2022 at [6HJ.23.1], that the revised wording, which still broadly applies, requires that, in a claim for negligent or fraudulent misrepresentation, the misrepresentation relied upon was made, and not just received, in the jurisdiction.

148. I therefore conclude that Dr Simon is unable to show that she has a good arguable case that the tortious gateway applies.

Paragraph 3.1(11): Claims about property within in the jurisdiction

149. Paragraph 3.1(11) refers, so far as relevant, to a claim were: *"The subject matter of the claim relates wholly or principally to property within the jurisdiction…"*

150. Dr Simon's case is, in essence, as follows:

i) The subject matter of the claim is a number of artworks, all of which are (now at least) kept by Dr Simon in the jurisdiction.

ii) *In re Banco Nacional de Cuba* [2001] 1 WLR 2039 at [33], per Lightman J, is authority for the proposition that this gateway extends to personal property, and also for the proposition that: *"instead of the whole claim having to be confined*

to a claim to a proprietary or possessory interest, it is sufficient that the whole claim relates to property … the rule cannot be construed as confined to claims relating to the ownership or possession of property. It extends to any claim for relief, whether for damages or otherwise, so long as it is related to property located within the jurisdiction."

iii) The concept of a claim which *"relates only or principally to property within the jurisdiction"* is a broad, and therefore the Court should not interpret too restrictively the degree of relation required between the property and the claim, since such matters can be considered in the round at the forum conveniens stage of the test – see *In re Banco Nacional de Cuba* (supra) at [36].

iv) The present case is wholly based upon losses Dr Simon claims to have suffered as a result of acquiring the particular artworks referred to in the Particulars of Claim, and the gateway thus applies.

151. As against this, the Defendants submit that this gateway is inapplicable because the claim does not relate *"wholly or principally"* to property in England, but rather the claim principally relates to alleged breaches of contractual, tortious and fiduciary duties by the Defendants. They submit that the current location of the artwork is irrelevant, and that in any event there is no evidence that the Franz West Sculpture and the George Condo Work are amongst those moved to London bearing in mind that it is Dr Simon's evidence that two artworks remain in Paris, without her specifying which.

152. The difficulty with the Defendants' *"wholly or principally"* argument is, as I see it, that *In re Banco Nacional de Cuba* (supra) at [33] Lightman J expressed the view that gateway: *"extends to any claim for relief, whether for damages or otherwise, so long as it is related to property located within the jurisdiction."* I take the Defendants' point that Dr Simon's evidence does not go so far as to confirm that the two key artworks have been transferred to London. However, I do bear in mind that the claim for breach of fiduciary duty in respect of the receipt of commissions extends to other artworks, and that the relationship as a whole related to the supply of artwork the vast majority of which is now within the jurisdiction.

153. In these circumstances, I am, on balance, just about satisfied that Dr Simon is able to make out a good arguable case to the effect that the requirements for this gateway are satisfied.

154. However, as Lightman J pointed out *In re Banco Nacional de Cuba* at [33] and [36], the Court retains a discretion in considering forum conveniens, and factors such as those identified by the Defendants, such as that the claim is fundamentally about a claim for damages for breaches of contractual, tortious and equitable duties owed by the Defendants, rather than ownership of property within the jurisdiction, are factors that the Court could, if appropriate to do so, take into account in exercising this discretion.

Paragraph 3.1(15): Claims against constructive trustee

155. Paragraph 3.1(15) reads as follows: *"A claim is made against the defendant as constructive trustee, or as trustee of a resulting trust, where the claim arises out of acts committed or events occurring within the jurisdiction or relates to assets within the jurisdiction."*

156. Dr Simon's case is that she claims against the Defendants as constructive trustees in respect of unauthorised commission received in their capacity as agents. She submits that the claim arises out of events occurring within the jurisdiction, namely Dr Simon (whilst present in the jurisdiction) authorising the Defendants to purchase artworks on her behalf at the stated price.

157. Dr Simon further submits that the claim *"relates to"* assets within the jurisdiction within the meaning of paragraph 3.1(15), namely the artworks in relation to which she alleges that the Defendants received unauthorised commission.

158. Dr Simon submits that English law governs the constructive trust, pursuant to Article 7 of the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985, as incorporated into UK law by the Recognition of Trusts Act 1987 ("**Hague Convention**"). She submits that the trust is most closely connected with English law, being the appropriate test for the purposes of Article 7, for the reasons set out in the Service Out Application at paragraphs 12-15.

159. The Defendants make the point that the claim as against them as constructive trustees is based solely on the allegation of their having taken a secret commission, that there is no allegation that any of the relevant acts in connection therewith occurred in England, and that all commissions were received in Belgium. The Defendants refer to the fact that Briggs, at page 520, in commenting on this particular gateway, observes that: *"The typical case will be where it is alleged that a breach of fiduciary duty has been committed by acts done within the jurisdiction."*

160. I consider that the Defendants are correct that Dr Simon has no good arguable case that the relevant acts giving rise to the claim of constructive trusteeship were committed in the jurisdiction, or based on events that occurred within the jurisdiction. The alleged secret commission was taken and received in Belgium, and I do not consider that the mere fact that Dr Simon might have authorised the Defendants to purchase artworks on her behalf whilst happening to be in the jurisdiction means that the claim is based on events that occurred within the jurisdiction. I consider this particularly so bearing in mind Dr Simon's evidence that the initial agreement that she says was concluded in respect of the taking of commission at a rate of 5% was concluded out of the jurisdiction.

161. However, there remains the second limb of this gateway, namely that the claim *"relates to assets within the jurisdiction"*. The Defendants have not, in terms, addressed this point, although they would no doubt say that the claim relates to a failure to account for commission rather than property as such. However, I consider that Dr Simon must have a good arguable case that the comments made by Lightman J *In re Banco Nacional de Cuba* (supra) at [33] apply by analogy to this head, and that as a claim against the Defendants under this head does *"relate"* to the artwork in the sense that it relates to the commission received in respect thereof, Dr Simon has a good arguable case that this particular gateway applies.

162. However, similar discretionary considerations will arise when it comes to considering forum conveniens. For this purpose an important consideration will be the proper law of any trust.

163. Under Article 7 Hague Convention, where no applicable law has been chosen, a trust is to be governed by the law with which it is most closely connected. In ascertaining the law with which a trust is most closely connected reference should be made, in particular, to:

    i) The place of administration of the trust designated by the settlor;

    ii) The situs of the assets of the trust;

    iii) The place of residence or business of the trustee; and

    iv) The objects of the trust and the places where they are to be fulfilled.

164. The language of Article 7 is directed more at an express trust than a constructive trust of the kind alleged to have arisen in the present case. However, having regard to the considerations identified by the Defendants as referred to in paragraph 159 above as to why the constructive trust gateway does not apply, and bearing in mind in particular that the Defendants are based in Belgium, that the commissions in respect of which the Defendants are said to be constructive trustees were received in Belgium, and that the underlying contract is likely to be governed by Belgian law, I consider the constructive trust that Dr Simon contends for is likely to be governed by Belgian law rather than English law.

Paragraph 3.1(20) – Claims under an enactment

165. Paragraph 3.1(20) applies where a claim is made: *"under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph."*

166. The English Proceedings include a claim against the Defendants for a reduction in price under s. 56 of the Consumer Rights Act 2015 ("**CRA**").

167. Dr Simon's case is as follows:

    i) This gateway requires that: *"as a matter of construction, the enactment in question allows proceedings to be brought against persons not within England and Wales"* - see *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] 1 WLR 4847 at [35]. There is no requirement for the enactment expressly to authorise the bringing of proceedings against persons abroad - ibid at [48].

    ii) S. 56 of the CRA (and the CRA regime in general) allows proceedings to be brought against persons not within England and Wales, because:

        a) The CRA was enacted in the context of the Brussels regime, an international framework which expressly provides consumers with a right to sue or be sued in their home jurisdiction; and

        b) S. 32 of the CRA expressly provides that provisions of the CRA will apply to sales contracts with a *"close connection to the United Kingdom"* even where the parties have chosen that the law of a non-UK

country will apply to the contract, which plainly contemplates international parties.

168. The Defendants submit that this gateway is inapplicable for the following reasons:

i) The provisions of the CRA relied upon by Dr Simon are said to give rise to implied terms of the relevant contract, and a claim for a reduction in the price paid. However, the relevant contract is not governed by English law (as I have found is likely to be the case as above);

ii) Dr Simon was not habitually resident in England at the time the contract was formed;

iii) The claims do not arise *"under"* the CRA, but rather they arise under the alleged contract;

iv) There is no basis to conclude that, contrary to the usual presumption which applies, Parliament intended the Court to have extra-territorial jurisdiction over all claims which refer to the CRA 2015 – see *Orexim Trading Ltd v Mahavir Port and Terminal Pvt Ltd* [2018] 1 WLR 4847 (CA) at [22] and [35].

169. If, as I consider to be the case, the governing law of the relevant contract or contracts is Belgian law, and not English law, then I do not consider that there is any realistic scope for Dr Simon to invoke the CRA in a claim against the Defendants. As analysed in *Orexim Trading*, it may be that a claim under the CRA could technically qualify for the gateway provided for by paragraph 3.1(20) even if it unsustainable. However, if that is right, then I consider that any reliance on this particular gateway would fail at the reasonable prospect of success stage, on the basis that the CRA plainly does not apply to the present facts given my conclusion as to governing law, and would not be permitted to be pursued as a matter of discretion in the same way that the claim under s.423 of the Insolvency Act 1986 was not allowed to be pursued in *Orexim Trading*.

Paragraph 3.1(4A) – Related claim

170. This is relied upon by Dr Simon in respect of the claim as against the Individual Defendants that Dr Simon seeks to introduce by the Amendment Application. Paragraph 3.1(4A) applies where a claim is made against the defendant *"in reliance upon one or more of paragraphs [3.1](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."*

171. I agree with the Defendants that any such reliance by Dr Simon must be dependent on there being an otherwise applicable gateway for the original claim. However, given my findings in relation to the application of the gateways referred to in CPR 6BPD.3, paragraph 3.1(11) and (15), this gateway, I consider that Dr Simon has a good arguable case that this gateway is available in respect of the claim sought to be introduced by the amendment application on the basis that the claim arises out of the same or closely related facts.

Conclusion on paragraph 3.1 gateways

172. In conclusion therefore, in respect of gateways, I do, on balance, consider that Dr Simon does have a good arguable case that the gateways referred to in CPR 6BPD.3, paragraph 3.1(11) and (15) apply, as does paragraph 3.1(4A) in respect of the claim sought to be introduced by the Amendment Application, but not the other gateways that she seeks to rely upon.

Serious case to be tried

173. So far as this stage of the test is concerned, the Defendants limit their challenge to a submission that there is no serious issue to be tried as against the Individual Defendants. It is submitted that all the claims against the Individual Defendants depend upon the Individual Defendants having personally contracted with Dr Simon or assumed personal responsibility to her. It is said that the Individual Defendants, at all times, acted as directors of Twig, rather than in a personal capacity, and that in the circumstances there is a strong presumption, at least in English law, against individual directors being held personally liable in respect of the claims that Dr Simon seeks to advance. Further submissions are made as to the lack of merit of the dishonest assistance claim that Dr Simon seeks to introduce by the Amendment Application.

174. I can see force in the submissions made by the Defendants so far as establishing liability as against the Individual Defendants in a personal capacity is concerned. However, I consider it at least possible that the Individual Directors did occur a personal liability based upon their involvement in the discussions that they had with Dr Simon, particularly if the contractual relations are governed by Belgian law.

175. In the circumstances, I do not consider that it can safely be said that there is no serious issue to be tried so far as a personal claim against the Individual Directors are concerned. Consequently, I do not consider that the entitlement of Dr Simon to serve out of the jurisdiction on the Individual Defendants is undermined by this point at least.

Is England the appropriate forum?

176. I agree with Mr Ruddell that the relevant principles to apply are as follows:

i) The burden is on the claimant, not merely to persuade the court that England is the appropriate forum, but *"to show that this is clearly so"*;

ii) The *"fundamental principle"* is that the court *"has to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice"*; and

iii) The Court has to reach an evaluative judgment taking into account all the relevant factors.

See the helpful summary of the relevant principles in the White Book 2020 at [6.37.16], referring, in particular, to *Spiliada Maritime Corp v Conulex Ltd* (The Spiliada) [1987] AC 160, per Lord Goff.

177. The relevant question is to be asked as at the date of the making of the Service Out Order, but it is appropriate to take account of later events which shed light on the position at that time – see *ISC Technologies v Guerin* [1992] 2 Lloyd's Rep 430 at 434.

178. I have come to the firm conclusion that Dr Simon is unable to show that England is the appropriate forum, let alone to show that this is clearly so. In my judgment Belgium is overwhelmingly the more appropriate forum for the resolution of the issue sought to be raised by Dr Simon in the English proceedings.

179. I reach this conclusion in light of the following factors considered cumulatively.

180. Firstly, Belgium was and is an available forum, the Defendants being domiciled there. It was possible for Dr Simon to bring the claim that she seeks to pursue by the English proceedings by way of counterclaim before the Belgian court, and that remains possible within the appeal proceedings in Belgium. Indeed, Belgium is the only forum in which the Defendants' claims, and Dr Simon's claims could all be heard together.

181. The fact that there were, and are pending related Belgium proceedings is a factor that potentially *"carries great weight"* – see *BAT Industries plc v Windward Prospects Ltd* [2014] 1 Lloyd's Rep 559 (Comm), at [70], and the White Book 2022 at [6.37.20]. I consider this particularly so bearing in mind that at the time of the Service Out Order, Dr Simon had already filed submissions and evidence in the Belgian Proceedings, including in relation to the alleged wrongdoing on the part of the Defendants that she complains of in the English Proceedings, albeit that these matters were deployed in the Belgian Proceedings in order to seek to justify Dr Simon's acts of alleged harassment and slander.

182. Secondly, the underlying facts are, in my judgment, significantly more closely connected to Belgium. In particular:

    i) The contract that forms the basis of the claims in the English proceedings is likely to be governed by Belgian law, and not English law, for the reasons explained above.

    ii) No, or no substantial loss has been suffered in England, the evidence suggesting that the relevant pieces of artwork were purchased using funds transferred either from the USA or Switzerland.

    iii) On her own evidence, Dr Simon was not domiciled or resident in England for tax purposes when the relevant contract was formed, and for much if not all of 2016. Her evidence as to her residence thereafter being in England is in my judgment, at best, opaque in the light of, amongst other things, the evidence concerning the use of a sofa bed at 9A West Halkin Street, representations made by Dr Simon to Companies House with regard to being resident in Turkey, and Dr Simon's connection with the Paris Address (and her housekeeper thereat), none of which has, I consider, been satisfactorily explained.

    iv) On their evidence, the Defendants understood Dr Simon not to be resident in England at all material times. This is consistent with the fact that Dr Simon, at all relevant times, used a French mobile telephone number, required deliveries to be made to the Paris Address, and transferred monies from other jurisdictions.

v) The Defendants have always been resident in Belgium, as Dr Simon was aware.

vi) All services were provided from, and payments received in, Belgium.

vii) No artworks were delivered to England, all being delivered to the Paris Address.

183. It is Dr Simon's case that she made known to the Individual Defendants at the start of the relationship with them that she was seeking to build up a collection of artworks to be transported to London, and displayed at her residence, 8 Pelham Place, and that pending renovation of the latter property, the artworks were to be stored in Paris. However, there are a number of difficulties with this, including that Dr Simon did not purchase 8 Pelham Place until late 2016. I note that in paragraph 10 of her evidence in support of the Service Out Application, Dr Simon referred to the artworks originally been delivered to a *"storage facility"* in Paris, which strikes me as a coy description of the Paris Address. Further one of the pieces of artwork (the Anthony Gormley) was actually installed at the French Address. This was, as I have said, explained by Mr Sherwin in the course of submissions as having been part of the storage process, but I do not consider this to have been satisfactorily explained. It is, of course, the Defendant's evidence that they were unaware that the artworks were to be transferred on to London.

184. I do not consider that the fact that the artworks are now in London, or Dr Simon's evidence as to how the artworks came to be in London, properly considered, outweighs the considerations that I have identified above.

185. Dr Simon relies, in support of her contention that England is the appropriate forum, on the Defendants having directed their business, and the services, to Dr Simon in England. However, I have already found that the Defendants did not direct their business to England as such, and that it is significant that the contractual relationship between Dr Simon and the Defendants was formed not as a result of any activity of the Defendants in England, but because a Belgian individual introduced Dr Simon and the Defendants to one another, which led to a meeting in Paris.

186. Thirdly, I consider the questions of practicality also favour Belgium, or at the very least do not weigh significantly in favour of England, given the following considerations:

i) The parties' communications were all in French, which will require translation if the proceedings are in England.

ii) The individual Defendants and Dr Simon would require translators for live evidence if the proceedings are in England.

iii) If the proceedings were to be in England, then expert evidence of Belgian law is likely to be needed.

iv) All the Defendants' documents are in Belgium.

v) A trial in England would require the Defendants to travel to give evidence, whereas there may not be a need for live witnesses in Belgium.

187. As against the factors set out in paragraph 186 above, it is submitted on behalf of Dr Simon that the following practical considerations favour England, namely:

i) A number of UK based individuals are identified in paragraph 84 of Mr Sherwin's Skeleton Argument who it is said that Dr Simon would be likely to call to give evidence, including herself, her personal assistant, an art expert, representatives of London galleries, and a former owner of the George Condo Work.

ii) The artworks are in England, and it is suggested that a viewing thereof would be required.

iii) Dr Simon's documents relating to the artwork are in London.

188. The considerations identified by Dr Simon are certainly considerations that are required to be taken into account as part of the relevant balancing exercise. However, travel between London and Brussels is now particularly easy by Eurostar, and it may well be that live evidence will not be required in Belgium in any event. I see no difficulty in Dr Simon's documents being transferred to Belgium as required. So far as any viewing is concerned, given the issues that arise, I would seriously question whether a viewing would be required, but again travel in order to facilitate a viewing if required would not be difficult. In short, I do not consider that the considerations identified by Dr Simon outweigh those referred to in paragraph 186 above.

189. Fourthly, I consider it to be a factor that Dr Simon has failed to show that she has a good arguable case as to the applicability of most of the gateways in paragraph 3.1 of CPR PD6B that she seeks to rely upon, and that in respect of those two gateways on which she has succeeded, she has succeeded only because claims that would otherwise not have found a gateway, have found a gateway because the claims are relate to property (the artworks) which is now in the jurisdiction. This requires, as I see it, a consideration as to how relevant to the question of forum conveniens it actually is that the artwork is in the UK.

190. As referred to above, in *In re Banco de Cuba* (supra), Lightman J, at [33], identified that this sort of situation might well give rise to discretionary considerations when it came to considering forum conveniens. As he put it: *"It* [i.e. the relevant gateway] *extends to any relief, whether the damages or otherwise, so long as it is related to property located within the jurisdiction. This construction vests in the court a wide jurisdiction, but since the jurisdiction is discretion the court can and will in each case consider whether the character and closeness of the relationship is such that the exorbitant jurisdiction against foreigners abroad should be properly exercised."* Similar considerations arose in *Orexim Trading* (supra).

191. In my judgment, the fact that the issues in dispute might relate to property (the artworks) which now happen to be in the jurisdiction is, on the facts of the present case, so incidental that it carries little weight as against the other factors that point, in my judgment, firmly against England being the appropriate forum.

192. I have considered whether I should, in my overall consideration of the position at this forum conveniens stage, take into account further the state of the Belgian Proceedings, and in particular the fact that the Defendants' claim was unsuccessful at first instance,

and that the matter is now before the Belgian Court of Appeal. I am not persuaded that I should do so, at least to any significant extent, bearing in mind that the Belgian Proceedings as a whole are likely to take on a rather different complexion in the light of my findings in respect of the application of Article 29 of Brussels Recast, and, perhaps more significantly, in light of the fact that it is not in dispute but that it remains open to Dr Simon to pursue the claims that she seeks to pursue by way of the English proceedings by way of counterclaim in the Belgian Proceedings notwithstanding that they are now the subject matter of an appeal.

193. Dr Simon also raises a costs point, namely that there is a less generous, fixed costs, regime in Belgium which would severely limit the costs that she could recover if successful, as compared with the costs that she would be required to incur. Indeed, in paragraph 29 of her evidence in support of the Service Out Application, she goes so far as to say that: *"substantial justice is not likely to be done if she is forced to bring a claim before the courts of Belgian."*

194. I consider that the more limited costs regime in Belgium is a factor that I am entitled to take into account in considering the overall question of forum conveniens. However, as Mr Ruddell points out a contention that substantial justice is not likely to be done in Belgium, if accepted, would amount to a conclusion that Belgium (and many similar jurisdictions with fixed costs regime is) routinely denies its citizens access to substantial justice, thereby breaching Article 6 of the European Convention on Human Rights, as a result of its fixed costs regime. That would, as I see it, be a surprising, and unwarranted conclusion.

195. Taking this costs point into consideration as part of the exercise of my discretion, I do not consider that it serves to outweigh the other considerations that do, in my judgment, point to Belgium being the appropriate forum, or at least to England not clearly or distinctly being the appropriate forum.

Conclusion on contention that permission for service out should not have been granted

196. For the reasons set out above, and principally because I consider Belgian to be the appropriate forum, or at least that England is not clearly or distinctly the appropriate forum, I consider that permission for service out ought not to have been granted.

197. On the evidence before him, it is quite understandable why and how HHJ Pelling QC came to make the Service Out Order, and the comments that he made explaining his reasons referred to in paragraph 36 above identified that the landscape might well be different on the hearing of an application to set aside.

Amendment Application

198. In view of my findings in respect of Articles 29 and 30 of Brussels Recast, and in respect of the application to set aside the Service Out Order, it is not necessary for me to consider further the Amendment Application.

Overall conclusion

199. In my draft judgment circulated to the parties, I said that:

i) In the light of my findings above, I considered that the appropriate course was to order and declare that this Court had no jurisdiction to hear the English proceedings, and that the Service Out Order, together with the Claim Form and the service thereof on the Defendants, be set aside.

ii) In view of this finding, it was probably unnecessary for me to make any order or declaration so far as concerns Articles 29 and 30 of Brussels Recast.

iii) Should I be wrong on the question as to whether this Court had jurisdiction to hear the English Proceedings, I would have ordered and declared pursuant to Article 29 of Brussels Recast that the proceedings be stayed until the Belgian Court of Appeal determined whether it had jurisdiction in the claim brought by the Defendants against Dr Simon number 20/6539/A, and if that court determined that it did have jurisdiction, that these (the English proceedings) should stand dismissed for the reasons explained above.

iv) The Amendment Application should also be dismissed.

200. In response to the draft judgment, Mr Sherwin, by email, took the point that I had held that the Brussels Recast regime was the relevant regime applying to the English Proceedings, that I had held that I was bound to stay the English Proceedings, and on this basis, that my consideration as to the common law position regarding service out was obiter as on my finding the common law position simply did not apply. Mr Sherwin thus invited me to revise the relevant paragraphs of my judgment so as to:

i) Stay the English Proceedings, as I am bound to do by Article 29 of Brussels Recast;

ii) Make it clear that, if the common law test had applied, I would have ordered and declared that the Court had no jurisdiction to hear the English Proceedings, and that the Service Out Order, together with the Claim Form and the service thereof on the Defendants, would have been set aside; and

iii) Stay the Amendment Application along with the English Proceedings.

201. In response to this Mr Ruddell, by email, contends that the course of action that I had proposed was the correct one. He disputes that I had, in fact, concluded that the Court had jurisdiction under Brussels Recast, and he points to the fact that the starting point concerning jurisdiction under Brussels Recast is that Article 4 thereof, which provides that the default rule is that defendants should be sued in the courts of their domicile (here Belgium). Mr Ruddell submits that prior to the hearing before me, Dr Simon had not asserted any head of *"special jurisdiction"* under Brussels Recast to displace this default rule. At the hearing, Mr Sherwin mentioned tort (Article 7(2)) and consumer contracts (Article 17), but Mr Ruddell submits that it was not suggested that Article 7(2) was any broader than the tort gateway at common law, and that I had rejected Dr Simon's case that one is concerned with a consumer contract falling within Article 17, albeit in the context of proper law. Mr Ruddell further argues that the only basis for jurisdiction properly and fairly advanced by Dr Simon was jurisdiction on the basis of the common law, which I have rejected, meaning that the appropriate conclusion is that I have found that this Court did not have jurisdiction.

202. Whilst, as presently advised, I am minded to deal with the matter as I had initially proposed as set out in paragraph 199 above, I would welcome further submissions on the point, addressing, in particular, the consequences of the Belgian Court of Appeal refusing jurisdiction, if it were to do so, when I deal with other consequential matters at a short hearing to be held in the near future.