Neutral Citation Number: [2020] EWHC 3191 (Comm)

Case No: CL-2018-000716

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/11/2020

Before :

THE HONOURABLE MR JUSTICE BUTCHER

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Between :

(1) NOPPORN SUPPIPAT
(2) SYMPHONY PARTNERS LIMITED
(3) NEXT GLOBAL INVESTMENTS LIMITED
(4) DYNAMIC LINK VENTURES LIMITED
Claimants

- and -
(1) NOP NARONGDEJ
(2) EMMA LOUISE COLLINS
(3) THUN REANSUWAN
(4) AMAN LAKHANEY
(5) KHADIJA BILLAL SIDDIQUE
(6) COLOME INVESTMENTS LIMITED
(7) KELESTON HOLDINGS LIMITED
(8) ALKBS LLC
(9) GOLDEN MUSIC LIMITED
(10) SIAM COMMERCIAL BANK PUBLIC COMPANY LIMITED
(11) ARTHID NANTHAWITHAYA
(12) CORNWALLIS LIMITED
(13) WEERAWONG CHITTMITTRAPP
(14) KASEM NARONGDEJ
(15) KHUNYING KORKAEW BOONYACHINDA
(16) PRADEJ KITTI-ITSARANON
(17) NUTTAWUT PHOWBOROM
Defendants

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Anthony Peto QC, Victoria Windle, Shane Sibbel and Andrew Trotter (instructed by **Willkie Farr & Gallagher (UK) LLP**) for the **Claimants**
Ciaran Keller and Benedict Tompkins (instructed by **Harcus Parker Ltd**) for the **1st and 17th Defendants**
David Peters and Ted Loveday (instructed by **Stephenson Harwood LLP**) for the **2nd, 4th, 5th, 6th & 8th Defendants**
John Taylor QC (instructed by **Simmons & Simmons LLP**) for the **3rd & 7th Defendant**
Anna Dilnot (instructed by **CMS Cameron Mckenna Nabarro Olswang LLP**) for the **9th, 12th & 15th Defendants**
Jonathan Davies-Jones QC and David Simpson (instructed by **Reynolds Porter Chamberlain LLP**) for the **10th Defendant**
Patricia Robertson QC and John Robb (instructed by **Clyde & Co LLP**) for the **11th & 13th Defendants**

Hearing dates: 10th, 11th and 12th November 2020

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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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THE HONOURABLE MR JUSTICE BUTCHER

The Honourable Mr Justice Butcher :

1. I heard a CMC over three days last week in this substantial case. There were two issues on which I reserved judgment, and I give my decision on those two points now. The first relates to the costs of a re-amendment to plead foreign law; the second is an application to strike out or for summary judgment in respect of a claim under s. 423 Insolvency Act 1986.

2. In order to understand these issues, it is necessary to outline the nature of the case. In what follows I have drawn on the summary given in the Case Memorandum which is at least substantially agreed between the parties.

The Nature of the Case

3. These proceedings concern, on the Claimants' analysis, an alleged fraudulent conspiracy to deprive the Claimants of shares, with an estimated value (on the Claimants' case) of US$1-2 billion, in Thai energy companies (Renewable Energy Corporation Co Ltd ("REC"), which in turn held shares in Wind Energy Holding Co Ltd ("WEH")). The Claimants allege that the First Defendant conspired fraudulently to induce the Claimants to transfer their shares in REC, under certain share purchase agreements, to companies owned, or majority owned by the First Defendant. Thereafter, the Claimants allege, the WEH shares were fraudulently and covertly transferred out of REC away to various individuals and offshore entities, thereby depriving the First Defendant's companies of any valuable assets against which the Claimants might enforce any judgments or arbitral awards. It is alleged that various Defendants took measures to conceal and obscure these steps.

4. This alleged conspiracy is denied by all of the Defendants, with the exception of the Fourteenth Defendant who has ceased to engage and has been debarred from defending these proceedings since March 2020. They deny that it existed and that they participated in it. Further, they deny that the characterisation of the case as a case of conspiracy is valid or meaningful because the Claimants' principal claims are advanced by reference to Thai law which does not recognise conspiracy as a cause of action.

5. REC and WEH were founded by the First Claimant. They specialise in large-scale wind energy projects. In late 2014, criminal charges were brought against the First Claimant in Thailand. He contends that these charges were politically motivated and denies wrongdoing. He fled Thailand, was granted political asylum in France, and sought to sell his interest in REC, which was held through his other companies (the Second to Fourth Claimants).

6. The Claimants allege that the First Claimant negotiated with the First and Seventeenth Defendants a transaction (the "Global Transaction") in which the Claimants would firstly sell their REC shares to the First Defendant via share purchase agreements made with the First Defendant's Companies (the "REC SPAs"), and under which the Claimants would thereafter have a right to repurchase the shares by exercising call options following an IPO of WEH. The Claimants allege that the First, Second and Seventeenth Defendants made misrepresentations which induced the Claimants to enter into the share purchase agreements and transfer their shares in REC to the First Defendant's companies.

7. These alleged misrepresentations are denied by the First, Second and Seventeenth Defendants. They deny that there was any Global Transaction and that there was ever a right to repurchase the shares. The First and Seventeenth Defendants take the position that the First Defendant was prepared to discuss a separate call option exercisable agreement if the charges against the First Claimant were dropped on appropriate commercial terms, but that ultimately no such agreement was entered into.

8. The REC SPAs provided, broadly, that shares in REC would be purchased by the First Defendant's companies. US$175 million was payable within 60 days of the share transfer. Further potential payments of US$525 million were contingent and payable in instalments triggered by each of WEH's six outstanding projects achieving their commercial operation dates or an IPO.

9. Alongside these negotiations, the Second, Third and Fifth Defendants (the Fifth Defendant acting at the Fourth Defendant's direction) entered into an Advisory Services Agreement (the "ASA") with the Third Claimant, under which they were to provide various services relating to (*inter alia*) the REC SPAs.

10. One of the First Defendant's companies did not pay its first instalment on the payment date specified in the REC SPAs. The First and Seventeenth Defendants contend that the company believed the payment schedule to have been modified. On 6 March 2018, the company paid the amount due under its first instalment into escrow following a partial arbitral award (to which I return). This sum has now been released to the First Claimant's companies.

11. The Claimants allege that the First and Seventeenth Defendants made further misrepresentations to dissuade the Claimants from seeking to rescind the REC SPAs at that time and attempting to recover the shares in REC. These allegations are denied by the First and Seventeenth Defendants.

12. The Claimants commenced arbitrations on 26 January 2016 seeking rescission of the REC SPAs or the sums they claimed were due under the REC SPAs. The arbitral awards which resulted therefrom held that the full purchase price of approximately US$700 million under the REC SPAs was due and it was ordered that such sums (to the extent they had not already been paid) plus interest and costs be paid by the First Defendant's companies to the Second, Third and Fourth Claimants. Save for approx. US$176 million, these sums remain unpaid. The arbitral tribunal dismissed the claim for rescission and certain fraud claims. It also dismissed certain counterclaims.

13. The Claimants allege that after the REC shares were transferred to the First Defendant's companies and the arbitrations were commenced, the Defendants procured a series of transactions intended to put the WEH Shares acquired under the REC SPAs beyond the reach of any attempt by the Claimants to either rescind the REC SPAs or otherwise to enforce against the REC/WEH shares their alleged rights under the REC SPAs and/or any arbitral award.

14. The Claimants allege that the WEH shares held by REC were transferred to the First Defendant's father, the Fourteenth Defendant. The Fifteenth Defendant says that the Fourteenth Defendant received and held those shares as her agent. By a series of later transactions, WEH shares were transferred to: (a) the Sixth to Eighth Defendants (beneficially owned by each of the Second to Fourth Defendants); (b) the Ninth Defendant, which the Claimants allege is owned beneficially by the First Defendant, but which the First and Fifteenth Defendants allege is owned by the Fifteenth Defendant; (c) the Twelfth Defendant, which is said to be beneficially owned by the Eleventh Defendant and/or the First Defendant, but which the Fifteenth Defendant alleges is owned by the Fifteenth Defendant; (d) the Sixteenth Defendant, and, the Claimants allege, but the Sixteenth Defendant denies, persons holding them on his behalf.

15. The Claimants allege that the shares in the Ninth and Twelfth Defendants were then transferred to the Fifteenth Defendant, who holds these shares for the benefit of the First Defendant. This is denied by both the First and the Fifteenth Defendant.

16. The Claimants allege that these transactions were unlawful for various reasons, including that they took place for no consideration, or at an undervalue, or involved breaches of law and duty, or were carried out for an unlawful purpose. The Defendants deny that any of the transactions were wrongful or unlawful. They say that the transfers of the WEH shares were carried out for the legitimate purpose of protecting WEH and its project companies, because the Tenth Defendant, its principal lender, refused to permit the drawdown of any facilities whilst it was possible that the Claimants might regain ownership of the WEH shares and whilst the First Claimant remained subject to criminal charges in Thailand. The relevant Defendants say that the price paid on the transfer to the Fourteenth Defendant reflects the difficulty the First Defendant faced in finding a buyer of the shares.

17. Each of the Defendants (save for the Fifth Defendant) is sued under (*inter alia*) Thai law. It is said that the facts give rise to claims in misrepresentation, breach of contract, breach of fiduciary duties, inducing breach of contract, and transfers contrary to s. 423 of the Insolvency Act 1986 (claims for relief in respect of transactions alleged to have been at an undervalue and/or entered into for the purpose of putting the WEH shares beyond the reach of the creditors). The Defendants allege that relief should not be granted pursuant to s.423 because, among other things, there is no sufficient connection with England and Wales; and, as will be considered later, the Tenth Defendant contends that the s. 423 claim against it should be struck out or summary judgment given in respect of it, on this basis.

18. As far as the Tenth Defendant is concerned more generally, the Claimants plead that pursuant to the alleged conspiracy, the Tenth Defendant instigated the transfer of WEH shares to the Fourteenth Defendant by inducing other Defendants to effect this transfer, contrary to Thai law, and that the Tenth Defendant instigated or assisted in the concealment of the transfer of shares to the Fourteenth Defendant by requiring WEH to procure a legal opinion from the firm in which the Thirteenth Defendant is a senior partner. This is denied by the Tenth Defendant. The Claimants also allege that the Tenth Defendant is vicariously liable for unlawful acts of the Eleventh and Thirteenth Defendants. This is denied by the Tenth Defendant.

19. The Defendants (save for the Fourteenth Defendant) assert that the claims are time-barred under the applicable foreign law. The Second, Third and Fifth Defendants bring a counterclaim in respect of sums said to be due from the Third Claimant under the ASA. The Defendants (save for the Fourteenth Defendant) all deny the Claimants' losses.

The First Issue: Costs of Amendments to the Re-Amended Particulars of Claim

20. The issue concerns which parties ought to bear the costs of the Claimants' third and most recent round of amendments to their Particulars of Claim. The Claimants' contend that the order should be for costs in the case. The Defendants submit that the usual order that the Claimants pay the costs of and occasioned by those amendments is appropriate. The issue was reserved by Jacobs J by an Order made on 4 August 2020 on paper, where he granted permission for the Claimants to plead foreign law in their Re-Re-Amended Particulars of Claim.

Relevant Procedural History

21. Proceedings in this case were commenced by a Claim Form issued over two years ago on 7 August 2018. The Claimants filed their Particulars of Claim and on 8 November 2018, the Claimants were granted permission to serve the Claim Form and Particulars of Claim out of the jurisdiction and, at least in some cases, by alternative means. Defences were filed on 29 November 2019, and on the same date the Claimants sought permission to amend their Particulars of Claim, which were filed pursuant to an Order by HH Judge Pelling QC granting that permission on 9 December 2019. On 21 January 2020, by my Order, I approved a procedural timetable for further proposed amendments to the Particulars of Claim. On 17 March 2020, the Re-Amended Claim Form and Re-Amended Particulars of Claim were filed pursuant to an Order of Bryan J, dated 13 March 2020. On 8 June 2020, Replies were filed and the Claimants applied to amend the Re-Amended Claim Form and the Re-Amended Particulars of Claim. Permission was granted to amend the Re-Amended Claim Form and Re-Amended Particulars of Claim to plead the content of foreign law on 4 August 2020 and the costs of this application was reserved to the CMC before me now.

22. The original Particulars of Claim, for which permission to serve out was granted on 8 November 2018, advanced various claims under English law. The Claimants advanced a claim at para. [153] of the original Particulars of Claim that the Second Defendant was liable for negligent misstatement, pleading that this is *"an actionable wrong under Thai or Chinese law*". A further claim in unlawful means conspiracy was pleaded at para. [154] of the original Particulars of Claim. The original Particulars of Claim also contained various references to aspects of foreign law. A breach by the First Defendant, the Seventeenth Defendant, and the WEH Managers (the Second, Third and Fourth Defendants) of s.1139(2) of the Thai Civil and Commercial Code was pleaded at para. [129.1]. In addition, the Claimants originally sought declarations that as a matter of Thai law transfers of the relevant WEH shares were void and of no effect. That relief is now no longer sought.

23. At the *ex parte* hearing on service out of the jurisdiction and service by alternative means, the Claimants, in observance of their duty of full and frank disclosure, recognised that the conspiracy claim and/or the misrepresentation claims which were advanced under English law might be manifestly more closely connected with Thailand. It was further recognised that various aspects of the claims advanced might be governed by Chinese, Singapore, Thai or BVI law. The Claimants had, at this stage, obtained outline advice from these different potentially relevant jurisdictions. An expert report from Professor Dr. Jumphot Saisoonthorn was obtained by the Claimants on 26 October 2018 which detailed aspects of Thai law on wrongful acts and the liability of joint actors. This report considered whether claims made in the original Particulars of Claim gave rise to liability under Thai law.

24. Between September and October 2019, the Claimants received numerous Requests for Further Information from the First, Ninth, Eleventh, Twelfth, Thirteenth, Fifteenth, Sixteenth and Seventeenth Defendants. Several of these requests sought clarification as to whether or not reliance on foreign law was being pleaded. In response, the Claimants informed the Defendants that they were not obliged to set out provisions of foreign law unless they were relying on these. These Requests and the Responses pre-dated the filing of the various Defences in November 2019. In those Defences, some Defendants alleged that the Claimants ought to have pleaded the substantive provisions of the relevant foreign law. Others, including the Tenth Defendant, pleaded that the default rule should not be applied in the circumstances of the case. All the active Defendants pleaded certain substantive provisions of foreign law.

25. The first round of amendments to the Particulars of Claim following service of the various Defences included amendments in response to a pleading by various Defendants that the claims (under ss. 420 and 432 of the Thai Civil Code) were time barred under Thai law. However, the Claimants made clear that they initially sought limited amendments, while they considered which further amendments, if any, were appropriate. This then led to the Consent Order of 21 January 2020 in which it was recorded that the parties would have a period of time in which to decide which amendments to the Particulars of Claim should be effected. The Order stated that *"[t]he Defendants' costs of and occasioned by the amendments shall be paid by the Claimants* […]". Following this Order, some amendments were made which did plead aspects of Thai law in support of a claim for inducing breach of contract against the First, Second, Third, Fourth and Seventeenth Defendants (*see*, paras. [160D-G] of the Re-Amended Particulars of Claim).

26. On 16 April 2020, solicitors for the Tenth Defendant wrote to the Claimants' solicitors seeking clarification on the position taken by the Claimants as to the law applicable to the unlawful conspiracy claim. In this letter it was stated:

> *"[…] we accept […] that it was not necessary for the Claimants to plead as to what they considered the applicable law, or to plead provisions of that law, in their Particulars of Claim as originally formulated. They were entitled to rely on the evidential presumption that English law would apply. However, it is equally clear […] that it is open to the Defendant to plead that English law does not apply and that the default application of English law is inappropriate […]*".

The same letter concluded by stating: "*Please note that we would object to any attempt to introduce causes of action under Thai law by means of your clients' Replies to the Defences. This would clearly be an abuse of the pleading process.*"

27. In response, the Claimants, by a letter dated 28 April 2020 stated:

"*[t]o the extent that our clients, having seen the assertions as to foreign law made by some of the Defendants, wish to respond by reference to foreign law, they are entitled to do so, and in particular to respond as to whether and how foreign law applies to the facts already detailed in the Re-Amended Particulars of Claim […] We trust this is not disputed*."

The Tenth Defendants' solicitors replied by a letter, dated 4 May 2020 by stating: "*It is clear that the only appropriate way for your clients to introduce new claims under Thai law is by way of further amendments to the Re-Amended Particulars of Claim*". Shortly thereafter, on 4 August 2020, permission was sought and granted to amend the Re-Amended Claim Form and Re-Amended Particulars of Claim.

The Parties' arguments

28. In his argument, Mr Taylor QC, who presented the Defendants' arguments on this aspect of the case, submitted that the usual rule under CPR Part 17 is that a party applying to amend their claim is ordinarily responsible for the costs of and arising from those amendments and that in the circumstances of this case, the usual rule is not displaced. He made three broad points. Firstly, it was said that the Particulars of Claim did, in fact, seek to advance claims under foreign law, but that these had been insufficiently particularised. It was submitted that rule 25(2) in *Dicey & Morris* (to which I shall return) did not apply in circumstances where a party seeks to rely on foreign law but fails properly to plead that law. Secondly, he submitted that the Claimants were well aware at the point at which they sought permission to serve their Claim Form and Particulars of Claim out of the jurisdiction, that foreign law applied and was materially different from English law so that it was unrealistic to suppose that the court would end up applying the default rule in this case. It was also said that even if it had been right to rely on rule 25(2) initially, the Claimants had now sought to introduce new claims under foreign law, having abandoned a number of their claims under English law, most notably, the claim in unlawful means conspiracy. In these circumstances, the usual order as to costs should follow when a case is abandoned and replaced by another. Thirdly, Mr Taylor QC submitted that the Claimants ought to have pleaded Thai law and other foreign law claims in response to my Order of 21 January 2020 and that they ought not now to be allowed to circumvent the costs order therein by now re-re-amending the Particulars of Claim.

29. Mr Peto QC for the Claimants submitted that the Claimants had clearly relied on rule 25(2) by pleading English law initially while recognising that an applicable law might be foreign. It is insufficient to displace the default rule to concede that foreign law might be applicable. Once the Defendants had pleaded their positions under applicable foreign laws, it was then open for the Claimants to respond by way

of Reply. Mr Peto QC submitted that where an amendment is sought which could and should have been raised earlier then the party seeking the amendment would usually bear the costs, but in this case, the Claimants had been entitled to rely on the presumption in rule 25(2) until it was displaced by the Defendants. He submitted that the factual basis of the Claimants' case had remained unchanged. Faced with the prospect of a strike out application from the Defendants had the Claimants sought to respond by way of Reply, the Claimants had sought to amend their Particulars of Claim. The Claimants had made it clear in their responses to the Requests for Further Information which had been served prior to the service of the Defences that they were relying on rule 25(2) and it was incumbent on the Defendants, at that juncture, to raise any issues of foreign applicable law. Mr Peto QC argued that rule 25(2) served an important and beneficial purpose; namely to encourage parties to litigate matters as economically as possible. To hold that a party who reasonably relies on rule 25(2) is liable for the costs consequences of amendments in response to a defendant's pleading of foreign law would be to provide an incentive for claimants always to plead foreign law, thereby incurring greater expense.

Dicey & Morris' Rule 25 (2) & the Authorities considering its Application

30. The parties' submissions focussed on reliance on the so-called '*default rule'*, rule 25 in *Dicey & Morris*. That rule is expressed in this way:

"*Rule 25 – (1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.*
(2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case."

The Claimants call particular attention to the second limb of the rule.

31. This rule has recently been the subject of consideration both in Iranian Offshore Engineering and Construction Co v Dean [2018] EWHC 2759 (Comm) and in FS Cairo (Nile Plaza) LLC v Christine Brownlie [2020] EWCA Civ 996.

32. In the Iranian Offshore case, Andrew Baker J gave a summary of his analysis of the relevant principles at paragraph [11], as follows:

[11] My analysis is as follows:

i) It is not necessary for a claimant to plead the existence of, or an intention to rely at trial upon, Rule 25(2). It goes without saying that it will apply – otherwise it would not be the default rule that it is – unless reason not to apply it be demonstrated.

ii) It follows that even a plea as to applicable law, let alone a plea as to the content of some possibly applicable foreign law, is not a material averment a claimant is required to make if the matters, as pleaded, that it says create liability

do not involve or imply the advancing by it of any case as to the content of some foreign law.

iii) A claimant might of necessity plead some matter of foreign law, but for which it would fail to disclose any cause of action (imagine, for example, a negligence claim for bad advice about possible US tax liabilities); or a claimant might choose, whether or not it would have a claim by reference to English law, to base its claim upon a system of foreign law it said was applicable. In either type of case, different considerations would arise.

iv) Where, however, as in this case, a claimant neither needs nor chooses to plead foreign law, in order to plead what would be a complete and viable cause of action if the claim be determined under English law, as by default it will be, a contention that it is inappropriate to determine the claim by reference to English law, so that it should fail come what may, is a reasoned denial of liability. Since determination of the claim under English law is the default rule in English proceedings, even where (in principle) the law governing a claim is or might be a foreign law, any contention that it is inappropriate to apply that rule must necessarily be founded upon matters particular to the claim in question.

v) In principle, therefore, and in line with CPR 16.5(2)(a), it is for a defendant, if it wishes to raise any such contention at trial, to plead it as a reasoned denial of liability, setting out the matters particular to the claim said to render it inappropriate to judge it by reference to English law. If it does not do so, then no such contention will be open to it at trial, subject to (vi) below. The particular matters said to render the default application of English law inappropriate might well include, and perhaps often will include, relevant propositions of foreign law, but not necessarily.

vi) There is no absolute rule precluding the possibility of relying at trial on a contention that ought to have been pleaded, whether in support of or in defence of a claim. There could be a late amendment, or the grant of indulgence at trial to rely on an unpleaded case, or perhaps even the raising of the point of the court's own motion at trial. Of course, it will be a rare case where it will be fair for that to occur only at (or on the eve of) trial, assuming proper pre-trial case management. But the existence of those procedural possibilities means, as I say, that there is no absolute rule of preclusion.

33. The decision in FS Cairo, a recent decision of the Court of Appeal, was the subject of detailed submissions before me. In that case, an Egyptian hotel company brought an appeal against a decision granting the claimant permission to serve the Claim Form out of the jurisdiction on the appellant in Egypt. The case had originally been pleaded by reference to English law, but the Claim Form had been amended to state that the claim for damages was made pursuant to Egyptian law. A draft Particulars of Claim also stated that the claim was made under Egyptian law, but no particulars of Egyptian law were given.

34. The relevant issue which was considered by the Court of Appeal was whether the claimant had shown that there was a good arguable case in relation to a direct claim

in tort (i.e. as opposed to one based on vicarious liability) and in contract. There had been evidence before the judge as to a claim based on vicarious liability in Egyptian law. There had been no evidence of Egyptian law on the issues of direct liability in tort and liability in contract. What the claimant had submitted, however, was that, to the extent that the Egyptian law expert evidence submitted on the application to serve out was silent, it could rely on rule 25(2). This led to a divergence of views in the Court of Appeal.

35. McCombe LJ considered that, when the expert evidence, the pleadings and the possible application of rule 25(2) were taken together there was a good arguable case in relation to all the claims; and the appeal against the grant of permission to serve out should be dismissed, but with a direction, in the exercise of case management powers, and not as a condition of permission to serve out, that the Particulars of Claim should be amended to plead more details as to Egyptian law. Of particular relevance for present purposes are paragraphs [21], where McCombe LJ stated that he disagreed with Arnold LJ's judgment on what was called "ground 2", and paragraph [58] where he said:

> [58] Underhill and Arnold LJJ have stated their diverging views upon the application of the "presumption"/"default rule" that a foreign law is taken to be the same as English law. I do not intend to add significantly to that debate or to say more on the question of whose procedural responsibility it is (claimant or defendant) to plead first the content of a foreign law when it is said to differ from English law.

36. Arnold LJ considered that the claimant had not established a good arguable case in relation to direct liability in tort, or in contract. She had put in expert evidence of Egyptian law, but it had not, in Arnold LJ's view, established a good arguable case; and he considered that there was no room for any reliance on rule 25(2), when in her Claim Form she said that the claim was made under Egyptian law, and she had adduced Egyptian law evidence.

37. Arnold LJ put this as follows, in paragraph [151]:

> [151] In those circumstances there is simply no room for any presumption or default rule that Egyptian law is the same as English law. Moreover, any attempt to apply such a presumption or default rule in this case would lead to absurdity. First, it would involve Lady Brownlie relying upon a mixture of Egyptian law and English law, particularly in relation to the direct claim in tort. Secondly, at least in relation to the contract claim, it would involve Lady Brownlie relying upon the legal content of the provisions contained in the 1934 Act and the 1976 Act, despite having rightly accepted that she cannot rely upon those Acts and deleting all references to them. This is because Mr Edge's only discussion of Lady Brownlie's capacity to claim damages under Egyptian law is in paragraphs 59 and 60 of his first report. In context, he is discussing her claim for vicarious liability in tort. Given what he says in paragraph 20, it is reasonable to suppose that the same principles would apply to a direct claim in tort; but given the absence of any discussion of contractual liability, there is no basis for concluding that they would also apply to a claim in contract.

38. Accordingly Arnold LJ would have held that the permission to serve out in respect of the direct tort and contract claims should be set aside, and that there should be a condition imposed on the grant of permission to serve out the claim form insofar as it contained the vicarious liability cause of action that the Particulars of Claim be amended to plead the relevant principles and sources of Egyptian law ([155]).

39. Underhill LJ considered that the claimant had shown a good arguable case in relation to contract and direct tort, as well as in relation to vicarious liability, because in the absence of expert evidence of Egyptian law directly dealing with those causes of action, she was entitled to rely on the default rule in rule 25(2).

40. At paragraph [175]) Underhill LJ considered the rationale behind the default rule. He said this:

> [175] Thirdly, although observations can be found in some of the cases which refer to the rule with disfavour, as representing an outdated and parochial assumption of the superiority of English law, I do not share that view. On the contrary, in those cases where its application is not inappropriate it seems to me to represent a sensible and just way of avoiding the expense and complication of the parties having to investigate and prove foreign law. That is most obviously sensible where the likelihood is that the effect of the applicable law will be substantially the same as that of English law (typically, though not only, where the law in question is that of a common law jurisdiction). But it may also be attractive to the parties in cases where it is recognised that the foreign law in question is very different in its sources and structure, so that it is entirely conceivable that it might produce a different substantive outcome from English law; even in such a case the trouble and expense of establishing whether that is so may be viewed by the parties as disproportionate. It is important not to lose sight of the fact that the rule only applies if both parties are content that it should: either can ensure that the relevant foreign law is applied substantively as well as nominally by pleading and proving its content. Once it is appreciated that that is the purpose of the rule, many of the criticisms sometimes made of it fall away. In cases where it is applied the court is not wilfully shutting its eyes to the obvious fact that (say) the Egyptian law of contract does not look like anything in Chitty. Rather, it is proceeding, for good pragmatic reasons, on the assumed basis that Egyptian law will be, in the relevant respects, to substantially the same effect as English law, whatever the differences in its structure or formulation. That will sometimes be contrary to the actual facts, but to regard that as an objection misses the point that the whole object of the exercise is not to have to go to the trouble of finding out what the facts are. It is for the same reason no objection to say that the exercise is "artificial": in one sense artificiality is necessarily inherent in the default rule.

41. Underhill LJ then addressed (at [178]-[179]) the situation where a claimant accepts that a foreign law applies but does not place reliance on it:

> [178] I turn to the position where the claimant accepts that foreign law – say, Ruritanian law – applies but does not wish to rely on its actual content and is willing to rely on the default rule. In my view it is obvious that in this case also

> (subject to para. 181 below) they cannot be obliged to plead from the start the relevant content of Ruritanian law. If it were otherwise there would be no scope for the application of the default rule. That conclusion is consistent with the Civil Procedure Rules. Rule 16.4 (1) (a) requires a claimant to plead in their particulars of claim only a concise statement of the facts on which they rely: thus if they are not relying on the content of Ruritanian law they are not required to plead it. That is confirmed by Arden LJ at para. 110 of her judgment in OPO, where she says that "the overriding objective of the CPR does not require a party to plead a case on which he does not rely": I respectfully disagree with Arnold LJ's explanation of this observation at para. 145 of his judgment, which seems to me inconsistent with the primary point being made by Arden LJ at para. 108 (see para. 171 above). It follows that the claimant in this situation can and should simply plead their case as if English law applied. (I would add that in my view it would nevertheless be good practice in such a case for the claimant to plead that they accept that Ruritanian law applies, while making it clear that in reliance on the default rule they do not intend to plead its content: that will let everyone know where they stand and would promote the over-riding objective. I cannot however see that the Rules impose a specific obligation to this effect.)
>
> [179] If in such a case the defendant wishes to rely substantively on Ruritanian law, then the ordinary principles of pleading – see CPR 16.5 (2) – require them to plead in their defence (a) that Ruritanian law applies (unless the claimant has already conceded that that is the case) and (b) its relevant content; and the claimant would plead any contrary case by way of reply (or perhaps, if that were more convenient, by way of amendment to their particulars).

42. At paragraph [182] Underhill LJ expressed his agreement with Andrew Baker J's summary of the law in Iranian Offshore, which I have quoted above. He then stated, at [184] that the default rule was to be applied flexibly, and that it was always open to a court to direct that where a claimant accepts that a foreign law applies to its claim, it should plead the content of that law first: that "might be appropriate for case management or other reasons peculiar to the case…"

43. Underhill LJ's overall conclusion was that the claimant had not been obliged to adduce evidence of the content of Egyptian law and that the appeal should be dismissed, but agreed that on case management grounds, in the particular circumstances of that case, that she should plead the content of Egyptian law on all three heads of claim. Given that Underhill LJ agreed in this with McCombe LJ, they were in the majority. In the circumstances, whether or not it is to be regarded strictly as the ratio of the majority, I consider that I should regard the law as being authoritatively stated in the judgment of Underhill LJ rather than in that of Arnold LJ to the extent that they differ.

Decision

44. The starting point, as stated in CPR 17PD is that a party applying for an amendment will usually be responsible for the costs of and arising from the amendment. That position can of course be departed from in an appropriate case.

45. In the present case, I consider that it is appropriate to depart from that position, and to order that the costs occasioned by the amendments to plead Thai law should be costs in the case. My reasons follow.

46. While it was submitted that this was a case in which the Claimants had relied on Thai law from the outset but had simply failed to plead and particularise it properly, I do not consider that this is so. The original pleading adverted to the fact that there was an applicable foreign law or laws, but did not, in the relevant respects, plead reliance on provisions of that law. To the extent that there were no provisions of the foreign law pleaded, reliance was being placed on the *Dicey & Morris* default rule. That this is what the Claimants were doing was confirmed in the Responses to the Requests for Further Information dated 14 October 2019. That it was a course which they were entitled to take is to my mind clear, and is confirmed by paragraph [178] of Underhill LJ's judgment in FS Cairo.

47. The Defendants also submitted that, even if the Claimants had been entitled to rely on the default rule at the outset, they were now amending to plead Thai law, and should bear the costs of the change. This however has to be considered in the light of the fact that it was the Defendants who chose to plead the content of Thai law, in their Defences. They were of course entitled to do that, but they coupled that course by taking the stance that the Claimants could not simply plead to that case in their Replies, and would apply to strike out the Particulars of Claim unless they were amended. However, as indicated in paragraph [179] of Underhill LJ's judgment in FS Cairo a claimant will often be entitled to plead to the content of foreign law, if it is raised by the defendant, in its reply. I do not consider that, as a general matter, it can be said that claimants necessarily have to amend their Particulars of Claim to plead the elements of the foreign law on which they rely in answer to the defendants having relied on such law, even if those elements go to the cause of action under the foreign law which the claimant is relying on.

48. As recognised by Underhill LJ in paragraph [179] of FS Cairo, however, it may be more convenient for the foreign law relied on by the claimant to be pleaded in the particulars of claim. This leads to what appears to me to be the Defendants' strongest argument on costs in the present case, namely that it was or should always have been obvious to the Claimants that the Defendants would rely on Thai law, and always obvious that, if they did, it would be more convenient, for the purposes of having intelligible and logical statements of case, that this should be pleaded in the Particulars of Claim. On this basis, it is argued by the Defendants that if the Claimants went ahead and pleaded the Particulars of Claim without reference to the relevant foreign law, then they took the risk as to costs of having subsequently to amend them.

49. I have concluded that this point is, again, not a reason why the Claimants should be ordered to pay the costs of and occasioned by the relevant amendments. I say this because I consider that the approach implicit in this argument is not in accordance with the way in which the default rule is employed in practice. The default rule is, as Underhill LJ said in the FS Cairo case, one which is very useful in helping to avoid the trouble and expense of pleading foreign law, given that the parties may prefer simply to proceed on the basis of the presumption. Moreover, it allows the parties to choose to have some parts of the case dealt with under a foreign law, and

other parts under the presumption; and they can thus choose on which points to plead and evidence foreign law. They may well make that choice on the basis of which points matter. It would undermine this useful effect of the rule, if a party could too readily be penalised in costs if it has to amend its Particulars of Claim; and would provide an incentive to claimants to plead out a case under a foreign law in the initial Particulars of Claim, with the attendant costs, because of the risk that it will be said that it should have been anticipated that the claimant would end up pleading that case in the Particulars of Claim anyway. There will undoubtedly be cases in which it can be said to be unreasonable for the claimant ever to rely on the presumption in pleading its Particulars of Claim. That might well, for example, apply where the parties have already been communicating with each other about the matter and the defendant has made its position in relation to the applicability of provisions of the foreign law clear. I do not consider that this is such a case.

50. The final argument addressed by the Defendants was that the Claimants should bear the costs because of the terms of the order of 21 January 2020. The Claimants, on this argument, should have made these amendments pursuant to that order and on its terms as to costs. I accept Mr Peto QC's submission that, as at that juncture, there had been no indication that the Defendants would be contending that any relevant pleas as to foreign law would have to be raised by way of amendment to the Particulars of Claim, and that the Claimants were reasonably proceeding on the basis that it could be dealt with in the Replies. Accordingly I do not consider that the amendments with which I am currently concerned were within the scope of the amendments being contemplated by the order of 21 January 2020, or, to put it another way, I do not consider that there is any circumvention of that order by these new amendments now being dealt with on different terms as to costs.

51. For those reasons I have reached the conclusion that, in all the circumstances of the case, the just order in relation to these amendments is that they should be costs in the case.

The application to strike out

52. An application was made on behalf of the Tenth Defendant to strike out paragraphs 160H to 160K of the Re-Re-Amended Particulars of Claim under CPR 3.4(2)(a) or the inherent jurisdiction of the court, or for summary judgment on the claim made in those paragraphs.

53. The claim made in those paragraphs is that certain of the transfers of the shares in WEH to and from the 14th Defendant amounted to transactions at an undervalue within the meaning of s. 423 Insolvency Act 1986.

54. That claim was added after the Claimants had obtained permission to serve the Claim Form out of the jurisdiction. It had still not been formally added at the time that the Tenth Defendant submitted to the jurisdiction in September 2019. At the time that the Tenth Defendant did submit to the jurisdiction this was expressed to be on the basis that it was without prejudice to any argument that it had that relief under ss. 423 / 425 of the Insolvency Act would be inappropriate because, inter alia, there was no sufficient connexion with the jurisdiction. This was confirmed by the Claimants. The plea was then added in March 2020. The order of Bryan J

permitting the amendments contained a Recital which recorded that the introduction of the relevant amendments should be without prejudice to any argument that "the Court should decline to grant relief under s. 423".

55. Section 423 of the Insolvency Act provides in part:

> "(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if –
> (a) He makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration; or
> …
> (b) He enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.
> (2) Where a person has entered into such a transaction, the court may, if satisfied under the next sub-section, make such order as it thinks fit for –
> (a) restoring the position to what it would have been if the transaction had not been entered into, and
> (b) protecting the interests of persons who are victims of the transaction …"

56. The range of orders that can be made by the court under s. 423 is non-exhaustively set out in s. 425 and these include, in s. 425(1)(d) an order to "require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct."

57. In Re Paramount Airways (No. 2) [1993] Ch 223, the Court of Appeal considered these sections. In his judgment, Sir Donald Nicholls V-C construed the words "any person" to bear their literal and natural meaning. He went on, however, (at 239-240) to say the following:

> **The court's discretion: a sufficient connection with England**
> This conclusion is not so unsatisfactory as it might appear at first sight. The matter does not rest there. Parliament is to be taken to have intended that the difficulties such a wide ambit may create will be sufficiently overcome by two safeguards built into the statutory scheme. The first lies in the discretion the court has under the sections as to the order it will make. Section 423(2) provides that the court "may" make such order as it thinks fit for restoring the position and protecting victims of transactions intended to defraud creditors. Sections 238, 239, 339 and 340 provide that the court "shall," on an application under those sections, make such order as it thinks fit for restoring the position. Despite the use of the verb "shall," the phrase "such order as it thinks fit" is apt to confer on the court an overall discretion. The discretion is wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction or the person to whom the preference was given. In particular, if a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. This connection might be sufficiently shown by the residence of the defendant. If he is resident in England, or the defendant is an English company, the fact that the transaction concerned movable or even immovable property abroad would *by*

> *itself* be unlikely to carry much weight. Likewise if the defendant carries on business here and the transaction related to that business. Or the connection might be shown by the situation of the property, such as land, in this country. In such a case, the foreign nationality or residence of the defendant would not *by itself* normally be a weighty factor against the court exercising its jurisdiction under the sections. Conversely, the presence of the defendant in this country, either at the time of the transaction or when proceedings were initiated, will not necessarily mean that he has a sufficient connection with this country in respect of the relief sought against him. His presence might be coincidental and unrelated to the transaction. Or the defendant may be a multinational bank, carrying on business here, but all the dealings in question may have taken place at an overseas branch.
>
> Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question, whether the defendant acted in good faith, and whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections.

The parties' submissions

58. The Tenth Defendant's argument was that in the present case the claim under s. 423 which the Claimants sought to bring lacked any, let alone a sufficient, connexion with this jurisdiction. In this regard, the Tenth Defendant pointed to the following matters which were not in issue or capable of dispute:

(1) The Tenth Defendant is incorporated in and carries on business in Thailand. It has no place of business in England and Wales, and does not carry on any banking business in England and Wales.
(2) The First Claimant has no connexion with England and Wales, being a Thai national who is currently domiciled in France.
(3) The Second to Fourth Claimants have no connexion with England and Wales, being companies incorporated in Hong Kong for the purposes of holding the shares of the First Claimant in REC, which is a Thai company carrying on business in the renewable energy sector in Thailand.
(4) The only impugned transaction with which the Tenth Defendant is alleged to have had any involvement (i.e. the transfer of the relevant WEH shares from REC to the Fourteenth Defendant) has no connexion with England and Wales, being the transfer of shares in a Thai company to a Thai individual resident in Thailand.
(5) That transfer took place in 2016, well before these proceedings were commenced in 2018.

(6) Under the analogous provisions of Thai law, in section 237 of the Thai Civil and Commercial Code, only the creditors of REC would have standing to bring a claim in relation to the transfer of shares in WEH away from REC; and the Claimants, not being creditors of REC, would not have standing to bring the analogous claim in Thailand.
(7) There are no other English law causes of action now relied on against the Tenth Defendant.

59. The Tenth Defendant relied on the approval and application of the "sufficient connexion test" by the Court of Appeal in the recent case of Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd [2018] EWCA Civ 1660. That was a case which involved the question of whether service out of the jurisdiction of a claim under s.423 should be set aside. It was held that it should be. In the course of his judgment, Lewison LJ held that such a claim could be served out, the relevant jurisdictional 'gateway' being paragraph 3.1(20)(a) of PD 6B.

60. At paragraphs [49]-[50] Lewison LJ said this, referring to the safeguards enunciated by Sir Donald Nicholls in Re Paramount Airways including in particular the sufficient connexion test:

> 49. The safeguards are important. In most cases which fall within one of the "gateways" the claimant is asserting that a legal right of his has been infringed. In very general terms, where a legal right has been infringed it is the function of the legal system to provide a remedy. But section 423 does not create a legal right on the part of a creditor. The person against whom the claim is made owed no legal obligation not to do what he is alleged to have done. Rather, the section enables a victim to ask the court to exercise a discretion. The likelihood or otherwise of the court's exercise of discretion is thus one of the important safeguards to which Nicholls V-C referred.
>
> 50. In my judgment those safeguards fall for consideration at the stage of considering whether to grant permission to serve proceedings outside England and Wales. I agree with Mr Pearce that they do double duty: both in considering whether the claim has a real prospect of success; and again in considering whether England and Wales is "the proper place" to bring the claim.

61. The Tenth Defendant also placed reliance on paragraphs [59]-[60] of Lewison LJ's judgment, where he said this:

> 59. Contrary to the tentative view expressed by the judge, I consider that there is insufficient connection with England and Wales for the court to give permission to serve the claim out of the jurisdiction; and that it does not need a trial to resolve that question. None of the protagonists are incorporated in England and Wales. None of them carry on business here. There is no evidence that any of the defendants has any assets here. Nor is there evidence that Orexim has any assets here; or that any loss would be suffered in England and Wales. The vessel has never been flagged in this jurisdiction. There is no evidence that she has ever entered territorial waters. The impugned transactions all took place outside the jurisdiction, between foreign corporations. Zen's purchase of the vessel was

financed by an Indian finance house. All the impugned transactions were governed by the law of Singapore. They took place before the making of the settlement agreement, which is the foundation of Orexim's assertion that there is sufficient connection with England and Wales. It is not suggested that those dates were manufactured. Although it is true to say that section 423 can apply even if there is no particular creditor in contemplation, the timing of the transactions fatally undermines Mr Adair's argument that the purpose of the transactions was to frustrate a judgment of an English court. At the time when the transactions took place there was no connection with England and Wales at all. None of the human actors in the story are resident or domiciled in England and Wales. Although the settlement agreement between Orexim and MPT is governed by English law, neither Singmalloyd nor Zen, which is the real target as the current owner of the vessel, was party to that agreement. Although it is alleged (and hotly disputed) that MPT, Singmalloyd and Zen acted in bad faith, that is not enough in itself weighed against all the other factors. While the claim under section 423 may be motivated by a desire to enforce the claim under the settlement agreement (if that claim were to be successful), it has its own distinct factual and juridical basis. I cannot, therefore, regard the existence of the settlement agreement as providing the necessary connection between the claim under section 423 and England and Wales: compare *Erste Group* at [131].

60. Mr Adair relied on the decision of Tomlinson J in *Dornoch Ltd v Westminster International BV [2009] EWHC 1782 (Admlty), [2009] 2 CLC 226*. In that case the judge set aside the transfer of a ship registered in the Netherlands, but located in Thailand, to a Nigerian corporation. However, the impugned sale took place in the course of a dispute between the owners and underwriters which was already on foot. Indeed, the sale took place after the owners had been served with proceedings in England and had been notified of an application for an injunction to stop any disposal of the vessel (see *Dornoch* at [82] and [83]). The dispute itself arose under a policy of insurance governed by English law, placed in the London market with English underwriters. It also contained an exclusive jurisdiction clause. The facts of that case could well be viewed as an attempt to frustrate any award of an English court arising out of a dispute that was already before the court. The facts of this case are entirely different.

62. The Tenth Defendant submitted that it was apparent from Re Paramount Airways and from Orexim that a sufficient connexion with the jurisdiction was not by itself enough to trigger the exercise of the discretion to grant relief pursuant to s. 423, but was a necessary pre-condition which had to be satisfied in any case with a foreign element before the court would consider whether to exercise the discretion or not. Here, that necessary pre-condition was not satisfied.

63. For the Claimants it was submitted that the Tenth Defendant's approach was not supported by the authorities. There was no separate and anterior question of connexion with England and Wales. What had to be considered was a unitary question: whether the grant of relief under s. 423 would be fair and just as opposed to unfair and oppressive, in all the circumstances, including the question of connexion with England and Wales.

64. The Claimants pointed in particular to the decision in Jyske Bank (Gibraltar) Ltd v Spjeldnaes [2000] BCC 16, where Evans-Lombe J had held that Re Paramount Airways did not establish that the court could never grant an order under s. 423 in the absence of the type of connexions with England and Wales which were there set out. Evans-Lombe J had decided that he should grant s. 423 relief, and gave essentially two grounds for doing so, namely: (a) that he had heard the main action and was well aware of the facts, and that for him to make the order would be both quicker and less costly than having fresh proceedings in Ireland; and (b) the issue had been dealt with as part of the wider claims in the action and the defendants had been able to deal with it.

65. As the Claimants submitted, Jyske Bank had been cited with approval by Tomlinson J in Dornoch Ltd v Westminster International BV, The WD Fairway [2009] EWHC 1782 (Admlty) at [134] and by Flaux J in Fortress Value v Blue Skye Special Opportunities Fund LLP [2013] EWHC 14 (Comm) at [116]-[117]. It had not been overruled in Orexim.

66. In the present case, the Claimants submitted, there was nothing unfair or oppressive in the Tenth Defendant having to answer a case for s. 423 relief. Jurisdiction was established over the Tenth Defendant on bases independent of a claim under s. 423. It was a necessary or proper party to claims which were made against a Defendant domiciled here (the Second Defendant), and to claims against other Defendants (the Third and Fifth Defendants) which were subject to a jurisdiction clause in favour of England. It would accordingly be involved in this litigation in this jurisdiction anyway. Furthermore, the claims against all the Defendants were, in effect, for damages in respect of transactions at an undervalue. The s. 423 claim overlapped almost entirely with the factual issues which would be looked into at the trial.

67. The Claimants further referred to the judgment of Cockerill J in Avonwick Holdings Ltd v Azitio Holdings Ltd [2018] EWHC 2458 (Comm). In that case there was an issue as to whether a lack of connexion of the s. 423 claim with the jurisdiction should operate to prevent an order for service out of the jurisdiction. At paragraph [53] Cockerill J said:

> It is clear from Orexim that I must have regard to these specific factors [i.e. those mentioned by Sir Donald Nicholls in Re Paramount Airways], but that I may, indeed must, look at all the relevant circumstances and perform a balancing exercise. Looking first at the listed factors, here it might certainly be said that there are similarities to the position in Orexim in terms of these headline connecting factors. As Mr Malek QC has pointed out, looking at the personnel, the businesses and the transactions involved in the new claims, there is little which points to a connection here. However, it cannot be right and it was plainly not intended that this should be an exhaustive list, nor, I think, is it a correct approach to the balancing exercise to perform it by reference to other cases; for example, to say that this is 'Orexim plus' or 'Orexim minus'. The correct approach is to focus on the particular case and balance the factors, though the result in other cases may then be a useful cross-check."

68. Cockerill J proceeded to balance the factors in that case. At paragraphs [55]-[57] she said this:

> 55. So here what might be termed the preponderance of the standard factors do point away, but I do need to consider any other relevant factors together with them.
>
> 56. Where there is litigation in this jurisdiction between the same parties, which litigation is related to the section 423 claim, that is of itself in my judgment a factor. Here, there is such a link and it pre-dates the transactions; in that the claims in this case had been live since mid-2016, with the additional claims becoming live in mid-2017.
>
> 57. Such proceedings must also constitute more of a link if there is not just a connection in a broad sense, but there is an apparent crossover between the impugned transactions and the litigation.

69. Cockerill J's conclusion on the issue was expressed at paragraph [66] as follows:

> 66. Overall, I conclude that there is sufficient material for me to say that there is a real prospect of establishing that, despite the relative lack of indications within the initial or standard factors, there is a sufficiently close connection to make the exercise of the discretion appropriate and that it would therefore be appropriate, subject to forum conveniens, to grant permission to serve out. Those factors are the ones that I have been through, the link in the existence of the litigation itself, the links in relation to English law, the case in relation to motivation and the factual overlap of issues.

70. The Claimants pointed to this decision, and these passages, as confirming that it was not only the "initial or standard" connecting factors which should be taken into account, and that the fact that litigation is taking place here, which will examine the relevant transactions, is a factor which can and should be taken into account. While it was the case that in Avonwick, as in Dornoch, there was an argument that the relevant transactions might have been intended to thwart the litigation, which was not the case here, that was not decisive.

Decision

71. Despite the skill with which Mr Davies-Jones QC advanced the point on behalf of the Tenth Defendant, I do not accept that this is a case in which the Claimants' s. 423 claim against the Tenth Defendant should be struck out or summary judgment entered for the Tenth Defendant on it at this stage.

72. As Sir Donald Nicholls V-C put it in Re Paramount Airways no s. 423 relief will be granted unless the court is satisfied that "in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element". The list of factors which he then gave going to the question of whether there was a sufficient connexion was not intended to be exhaustive. Instead, the court has to look at all the relevant circumstances of the case, in order to ensure that "it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections".

73. The present applications are to strike out or for summary judgment. It was not suggested by the Tenth Defendant that there was not an arguable case that section 423 relief might be appropriate if there was a sufficient connexion with England. The question before me is therefore, in effect, whether there is an argument which has a realistic prospect of success that there is a sufficient connexion of the Tenth Defendant with England to mean that it would be "just and proper" to make such an order notwithstanding the foreign elements.

74. I consider that there is here such an argument. I recognize that what Cockerill J called the "initial or standard" factors do not indicate a significant connexion with England. However, in this case, the Tenth Defendant will be involved in this litigation in any event, irrespective of the claim under s. 423. Specifically, and importantly, the Tenth Defendant will, in any event, have to answer claims for damages in respect of the transfer of the WEH shares to the Fourteenth Defendant, which the Claimants say was induced by the Tenth Defendant, knowing its nature and purpose: see RRAPC paras. 74-94.

75. The decision in Jyske Bank indicates that the involvement of the relevant defendant in litigation here, even in the absence of other "initial or standard" connecting factors can, in an appropriate case, mean that there is a sufficient connexion. Jyske Bank has been cited with approval in both Dornoch and Fortress Value. It was not overruled or adversely commented upon in Orexim. Further, in paragraph [56] of her judgment in Avonwick Cockerill J stated that the existence of litigation in this jurisdiction between the same parties and which is related to the s. 423 claim is itself a connecting factor. I agree with that. It is true that it is likely to be a weightier factor if the impugned transaction is said to have been designed to thwart proceedings here, as was the case in Dornoch, but I do not consider that it can have no weight in other circumstances. How much weight it has will depend on the circumstances of the case. In Orexim, it was considered that it would have little. That, however, was a case in which it appears from the report of the first instance decision ([2017] EWHC 2663 (Comm)) that the only claims which could have been made in this jurisdiction against Zen Shipping and Ports India Pte Ltd and Singmalloyd Marine (S) Ltd, had service out been permitted, were the claim under s. 423 and for a declaration that the impugned transaction was a sham. In the case of Mahavir Port and Terminal Private Ltd there was, it is true, a different claim against it for damages for breach of a settlement agreement which it had entered into with Orexim, but that claim for damages appears to have been legally and, at least in significant part, factually distinct from the claims aimed at impugning the relevant transfer. The s. 423 claims could, therefore, as Cockerill J put it at paragraph [68] of Avonwick, be regarded as "in effect a free standing claim". I consider that to be significantly different from the present case where, as I have said, the Tenth Defendant is in any event facing a claim for damages in respect of the same transfers of the WEH shares to the Fourteenth Defendant, and where that claim for damages is itself based on the contention that they represented an evacuation of assets at an undervalue.

76. For these reasons, in my judgment the Claimants have a realistic prospect of success in their argument that it may be just and convenient to make an order pursuant to s. 423 despite the foreign elements of the claim. This will mean that the claim can go forward. However, at trial, it will be open to the Tenth Defendant to

rely on all the circumstances of the case, including its points as to the absence of connexions with England, as arguments why there should not be any relief pursuant to s. 423.

77. Accordingly I dismiss the Tenth Defendant's application.