



Neutral Citation Number: [2021] EWHC 2485 (Comm)

Case No: CL-2020-000797

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/09/2021

Before :

MR JUSTICE JACOBS

Between :

CHEP EQUIPMENT POOLING BV

Claimant

- and -

- (1) ITS LIMITED**
- (2) ITS ESTONIA OU**
- (3) BART DE LAENDER**
- (4) KLAUS MITTELBERGER**
- (5) MARCELO DI BENEDETTO**

Defendant

Victoria Windle (instructed by **Taylor Wessing**) for the **Claimant**
Adam Cloherty (instructed by **Bird and Bird**) for the **3rd Defendant**

Hearing date: 28 July 2021

Approved Judgment

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

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MR JUSTICE JACOBS

Mr Justice Jacobs:

A: Introduction

1. The 3rd Defendant, Mr Bart de Laender (“Mr de Laender”) applies to set aside service of proceedings commenced by the Claimant on 8 December 2020. His principal argument is that the claim against him falls within Article 22 of Regulation 1215/2020 (“the Brussels Recast Regulation”). Since these proceedings were commenced before 1 January 2021, it is common ground that the Brussels Recast Regulation is the applicable jurisdictional regime.
2. Section 5 of Chapter 2 of the Brussels Recast Regulation contains the jurisdictional rules concerning individual contracts of employment. Article 20(1) provides:

“In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8”.
3. Article 22(1), which is the article relied upon by Mr de Laender, in turn provides:

“An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled”.
4. There is no dispute that, between 7 September 2010 and 13 February 2020, Mr de Laender was indeed an employee of the Claimant. The key issue, in relation to Articles 20 and 22, is whether the claims made in the present proceedings can properly be regarded as “relating to” Mr de Laender’s contract of employment with the Claimant. In determining that issue, the relevant question is whether the Claimant has a good arguable case that the claims are not so related.
5. If the Claimant succeeds on the question of the inapplicability of Article 22, then a further question arises as to whether the Claimant can invoke Article 7 (2) of the Brussels Recast Regulation in order to displace the general rule (in Article 4) that persons should be sued in the state where they are domiciled. In the case of Mr de Laender, that would be Belgium. The Claimant contends, however, that proceedings in the present case can be brought in England, because it is the “place where the harmful event occurred” within the meaning of Article 7 (2).

B: Factual background

6. The Claimant company was formerly CHEP Equipment Pooling NV, becoming “BV” in 2019. It is a company incorporated in Belgium as part of the Brambles Group of companies. The Brambles Group is, among other things, a supplier of wooden pallets. It obtains these pallets from various manufacturers who in turn procure materials from raw material suppliers.
7. The First Defendant (“ITS”) is a company incorporated in the Isle of Man. The Second Defendant (“ITS Estonia”) is a subsidiary of ITS incorporated in Estonia. Mr de Laender, the Fourth Defendant (“Mr Mittelberger”), and the Fifth Defendant (“Mr Di Benedetto”) are each former employees of companies within the Brambles Group. Mr

de Laender and Mr Mittelberger were both former employees of the Claimant itself, but Mr Di Benedetto was not.

8. Mr de Laender is a Belgian national domiciled in Belgium. He was employed by CHEP Benelux NV (“CHEP Benelux”), a company in the Brambles Group incorporated in Belgium, between 3 April 2000 and 1 September 2010. He was then employed by the Claimant itself (at a time when it was CHEP Equipment Pooling NV) from 1 September 2010 to 13 February 2020. He worked under a number of first and second line managers. The former included Mr Di Benedetto. At some point after June 2010, he took over responsibility for procurement from Mr Di Benedetto, and his job title became “Director of Procurement”.
9. Mr Mittelberger was an employee of CHEP Benelux and subsequently of the Claimant between 8 September 2008 and 15 August 2017.
10. Mr Di Benedetto was an employee of CHEP (UK) Limited between 26 August 2003 and 15 December 2012.
11. While he was employed in the Brambles Group, Mr Di Benedetto was the direct manager of Mr de Laender. Mr de Laender, in turn, was the direct manager of Mr Mittelberger. Mr Di Benedetto was therefore the most senior of the three relevant individuals (collectively “the former employees”).
12. The Claimant’s claims concern payments made under two related agreements, known as the Supply Agreement and the Audit Agreement.
13. On 1 June 2010, ITS entered into a Supply Agreement (“the Supply Agreement”) with Brambles Enterprises Limited (“Brambles Limited”), a Brambles Group company incorporated in England. The Supply Agreement was entered into by Brambles Limited “for and on behalf of itself as well as any other legal entity belonging to the Brambles Group of Companies, in existence or not at the time of this agreement, responsible for the purchasing of CHEP wooden pallets”. The Claimant had not yet been incorporated as at 1 June 2010, but in due course it was a company which became responsible for purchasing CHEP wooden pallets and thus came to be bound by the Supply Agreement.
14. The Supply Agreement provided that ITS would be responsible for the procurement of raw materials and the onwards sale of those materials to wooden pallet manufacturers, at prices negotiated by the Brambles Group (or prices lower than those negotiated by the Brambles Group). The Brambles Group would then purchase the completed wooden pallets from the manufacturers for onwards supply. The initial term of the Supply Agreement was 1 July 2010 to 30 June 2013, thereafter renewing annually for consecutive 12-month periods unless terminated.
15. The Claimant’s case is that Mr de Laender and/or Mr Mittelberger and/or Mr Di Benedetto were responsible for negotiating the Supply Agreement on behalf of the Brambles Group, and that Mr de Laender was responsible for deciding on behalf of every member of the Brambles Group whether to renew the Supply Agreement beyond the initial term, and each year thereafter.
16. On 1 October 2013, the Claimant entered into an agreement with ITS Estonia pursuant to which ITS Estonia agreed to provide quality control audits of the pallets produced

by pallet manufacturers (“the Audit Agreement”). In October 2017, the Claimant and ITS Estonia agreed an addendum to the Audit Agreement (“the Audit Agreement Addendum”).

17. The Claimant’s case is that that Mr de Laender and/or Mr Mittelberger negotiated the Audit Agreement on behalf of the Claimant, and/or caused the Claimant to enter into the Audit Agreement, and that Mr de Laender negotiated the Audit Agreement Addendum and/or was responsible for deciding whether to renew the Audit Agreement beyond the initial term, and each year thereafter. By the time that the Audit Agreement was concluded in 2013, Mr Di Benedetto was no longer with the Brambles Group.
18. The Claimant alleges that, at all material times, the former employees were the ultimate beneficial owners and/or controllers of ITS and ITS Estonia. At no time did the former employees or ITS or ITS Estonia inform any Brambles Group company that the former employees were the ultimate beneficial owners of and/or exercised significant control over ITS and ITS Estonia. The Claimant alleges that if the former employees had disclosed their interest in ITS and/or ITS Estonia, Brambles Limited would not have entered into the Supply Agreement on behalf of the Brambles Group, and the Claimant would not have entered into the Audit Agreement.
19. As a result of Brambles Limited entering into the Supply Agreement, for and on behalf of itself and other legal entities belonging to the group including the Claimant, and the Claimant itself entering into the Audit Agreement and Addendum, the Claimant contends that it has paid out sums it would not otherwise have paid out. In relation to the Supply Agreement, those sums consist of additional sums paid by the Claimant to the pallet manufacturers who supplied pallets to the Claimants. The reason that the Claimant paid additional sums to those manufacturers was because the latter passed on to the Claimant the fees they were obliged to pay to ITS. In relation to the Audit Agreement, the Claimant claims for the audit fees paid directly or indirectly by the Claimant to ITS Estonia. The Claimant contends that if it had known of the former employees’ interest in or control over ITS and ITS Estonia, it would not have paid out those sums.
20. The Claimant pleads three causes of action against each of the three former employees, including Mr de Laender: breach of fiduciary duty; dishonest assistance of the breaches of fiduciary duty by the other former employees; and unlawful means conspiracy.

C: The claim advanced in the Particulars of Claim

21. The case against Mr de Laender set out in the Particulars of Claim pleads the following material matters and causes of action.
22. Mr de Laender from at least 1 July 2011, whilst employed by the Claimant, held a position as “director” or “senior director” with responsibility for procurement. From at least 1 January 2008, alternatively 1 November 2010, he was responsible for negotiating on behalf of companies in the Brambles Group procurement contracts in relation to wooden pallets and raw materials. Together with Mr Mittelberger and Mr Di Benedetto, he was responsible for the negotiation of the Supply Agreement on behalf of the Brambles Group. Additionally, or in the alternative, he was responsible for deciding on behalf of every member of the Brambles Group whether to renew the Supply Agreement beyond its initial term, and each year thereafter. Mr de Laender

and/or Mr Mittelberger negotiated the Audit Agreement or caused the Claimant to enter into that agreement. In addition, Mr de Laender negotiated (or caused the Claimant to enter) an Audit Agreement Addendum in October 2017, which related to the mechanism of charging audit fees. He was also responsible for deciding whether to renew the Audit Agreement beyond the initial term, and each year thereafter.

23. Paragraphs 25 – 29 of the Particulars of Claim pleaded the duties of the former employees. These comprised fiduciary duties and duties as employees.
24. The fiduciary duties were alleged to arise by virtue of their positions as senior employees of the Claimant or CHEP Benelux with responsibility for “negotiating the Supply and/or Audit Agreements and/or causing or advising Brambles Ltd to enter into and continue the Supply Agreement and CHEP Equipment to enter into and continue the Audit Agreement”. The fiduciary duties were owed to Brambles Group companies, including the Claimant, in connection with the Supply and/or Audit Agreements. The duty included a duty not to profit from his position at the expense of Brambles Group companies, including the Claimant, without the informed consent of the relevant company, and not to place himself in a position where his interests conflicted with the interests of Brambles Group companies including the Claimant. Additionally, Mr de Laender was alleged to owe duties of a fiduciary nature to Brambles Group under Belgian law, by virtue of his role in negotiating the Supply and Audit Agreements or advising or causing Brambles Ltd to enter into and continue the Supply Agreement or advising the Claimant to enter into and continue the Audit Agreement.
25. Mr de Laender’s duties as an employee arose under Belgian law, which governed his contract of employment. These duties required him to carry out his work carefully, honestly and accurately. His contract also specifically provided that he could not exercise any other professional activity throughout the duration of the agreement without express approval.
26. The first cause of action pleaded against Mr de Laender is breach of his fiduciary duties to the Brambles Group, including the Claimant. This related to his placing himself in a position where his interest in ITS conflicted with those of the Brambles Group including the Claimant. This occurred at the time when he negotiated the Supply and Audit Agreement, and on each occasion when he allowed those agreements to renew. He was also in breach in making a profit from his position “as a senior employee of CHEP Equipment and/or his position as the person tasked with negotiating the Supply and/or Audit Agreement and/ or advising or causing the Supply and/or Audit Agreement to be renewed”.
27. Paragraph 31 of the Particulars of Claim pleaded that the facts relevant to breach of fiduciary duty also constituted a breach of Mr de Laender’s duties as an employee under Belgian law. Ms Windle on behalf of the Claimant stated, however, that no claim as such was being advanced for breach by Mr de Laender of his duties as an employee. That statement is consistent with the way in which the claim is formulated in the prayer to the Particulars of Claim, and with the claim as explained by Mr de Ferrars, the solicitor for the Claimant, in his second witness statement.
28. The second cause of action is for dishonest assistance. This was the assistance by each former employee in relation to breach by the other former employees of their fiduciary duties. In other words, Mr Mittelberger and Mr Di Benedetto each owed fiduciary duties

to the Brambles Group including the Claimant, and Mr de Laender dishonestly assisted them to breach those duties. The dishonest assistance of breach of fiduciary duty, pleaded in paragraph 36 of the Particulars of Claim, concerned: (i) authorising or causing ITS to enter into and/or continue the Supply Agreement with Brambles Ltd; (ii) authorising or causing ITS Estonia to enter into and/or continue the Audit Agreement with the Claimant; and (iii) “failing to notify his employer that he and the other Former Employees were the ultimate beneficial owners and controllers of ITS and ITS Estonia”.

29. The third cause of action is for unlawful means conspiracy. Paragraphs 41 and 42 alleged a conspiracy to injure the Claimant by unlawful means. Reliance was again placed upon the conclusion and continuation of the Supply Agreement and the Audit Agreement. The unlawful means utilised by the Defendants were “the breaches by the Former Employees of their fiduciary duties and/or employment contracts” as well as the “dishonest assistance the Defendants provided to the Former Employees” previously pleaded.
30. Paragraph 44 pleaded the loss and damage suffered by the Claimant, comprising excess sums paid out to pallet manufacturing companies. The particularised claim began with € 748,000 paid in the financial year ending 31 July 2015, with increasing sums paid out in the following three financial years, and €609,000 paid in the year ending 31 July 2019. Paragraph 45 pleads that the Claimant also suffered loss and damage in the years 2010 – 2014, and subsequent to 1 August 2019. The Claimant reserved its rights to bring a claim in relation to such loss and damage, but the present pleading does not particularise that claim. A claim was also made for £ 195,928 spent investigating the Defendants’ wrongdoing.

D: The parties’ evidence

31. The evidence relating to Mr de Laender’s application comprised evidence from Ms Sophie Eyre (a partner in Bird & Bird LLP) in support of the application; a responsive statement from Mr David de Ferrars (a partner in Taylor Wessing LLP); and a statement in reply from Mr de Laender himself.
32. Ms Eyre’s witness statement described Mr de Laender’s employment history and role within the Claimant, describing him as being “in a position of subordination” despite his title as “Director of Procurement”. The statement set out the reasons why the English court had no jurisdiction.
33. Mr de Ferrars’ witness statement verified the facts set out in the Particulars of Claim. The majority of the witness statement was then directed towards the question of where the harmful event occurred. Mr Ferrars explained the strength of the connections between the claim and England. These included the fact that the Supply Agreement appeared to have been negotiated in England, at a time when Mr Di Benedetto was resident and working in the Brambles Group’s office in Weybridge. Acts promoting the Supply Agreement to Brambles Ltd, and recommending it for signature, were likely to have taken place in England. It was more likely than not that the agreement had been signed, on behalf of Brambles Ltd, in England. He also said that it was “more likely than not that at least some of the discussions in which the conspiracy was formed took place in England”. He described direct damage being suffered in England. From 14 August 2017, the Claimant made payments to pallet manufacturers from its English

bank account. The statement expanded upon these points by reference to the available evidence.

34. In his statement, Mr de Laender described the way in which the Brambles group purchased pallets prior to June 2010. This involved various CHEP entities purchasing and owning pallets across Europe. The procurement team in Belgium managed the day-to-day commercial relationships with the pallet manufacturers. The Belgian team would liaise with the operational procurement back office team in the UK. The position in June 2010 was that Mr Di Benedetto was responsible for procurement.
35. The Claimant was created because of a planned move of all procurement and finance operations and pallet purchasing operations to Belgium. In around June 2010 onwards, the procurement of pallets operation moved entirely to Belgium, and thereafter the Claimant became the only entity responsible for the purchase of pallets across the entire Brambles Europe network. This change was implemented to centralise all pallet purchases into one legal entity based in Belgium, thereby enabling a tax saving to be made. As part of the shift of operations to Belgium, Mr de Laender took over procurement from Mr Di Benedetto. This was initially on an interim basis, but in due course he was appointed as Director of Procurement. Between around June 2010 and the end of July 2017, every single Purchase Order for wooden pallets was then issued by the Claimant out of Belgium, and every payment was made out of a Belgian bank account.
36. At some time, probably in around 2016, the tax saving was no longer applicable, and Mr de Laender described the movement of procurement operations back to England. The Claimant established an “official branch” in England on 1 April 2017, albeit that it remained a Belgian company. At that point, Mr de Laender handed over procurement in Europe to a Mr Morwood who was based in England. He understood that there was a requirement for the manager responsible for pallet procurement and the decision maker to be based in England moving forward.
37. At the time of the Supply Agreement entered into on 1 June 2010, Mr de Laender’s job title was “Sourcing Manager”. His direct manager was Mr Di Benedetto, and his second line manager was a Mr Alonso-Bernaola, based in Madrid. Mr de Laender’s evidence was that he was not involved in the negotiations between Brambles and ITS leading to the signing of the Supply Agreement. He only found out that it was signed when Mr Di Benedetto sent him a copy by e-mail. He did not know whether Mr Di Benedetto was in England at the time of signature.
38. As far as renewals of the Supply Agreement were concerned: Mr de Laender’s evidence was that he was not involved in any discussions surrounding renewal, and that it would have been beyond his authority at the time to “take a decision not to renew the contract”. He was, however, aware of the provision in the agreement for automatic renewal. He pointed out that the agreement continued in operation even after his responsibility for pallet procurement had moved to Mr Morwood.
39. Mr de Laender accepted that he was involved in the process which led to the Audit Agreement. There were RFQs (Requests for Quotation) sent to a number of companies. Discussions about the RFQs took place in Belgium. Since ITS was already working under the Supply Agreement, it was “an obvious choice” to give it an opportunity to also get involved in the audit process. ITS was the successful bidder. The decision to

engage ITS, for a trial period, was taken by Mr de Laender and a colleague, Ms Vael, who was based in Belgium. The performance of ITS during the trial period was monitored by Ms Vael and another individual in Madrid, Mr Fernandez. After the trial period, Mr de Laender and his Belgian colleague negotiated the terms of the Audit Agreement to which ITS Estonia was party. The various individuals involved in the process of concluding the Audit Agreement were all outside England, as were those subsequently responsible for monitoring performance of that agreement. Various discussions identified changes to the Audit Agreement that were desirable, and these led to the Addendum signed in October 2017. Those discussions included Mr de Laender and Ms Vael identifying improvements beyond those suggested by colleagues.

40. Until August 2017, the Claimant paid the pallet manufacturers, who were located across Europe, out of a Belgian bank account. When procurement operations then moved to the UK in August 2017, the bank account was moved to the UK as well, and the decision-making authorities relating to purchasing via the Claimant moved to Mr Morwood and the UK as well. At that point, Mr de Laender ceased to have responsibility for pallet procurement for the European market and instead became responsible for strategic projects as well as procurement on a global scale. He was promoted to Senior Director of procurement.
41. Mr de Laender gave some evidence as to his meetings and discussions with Mr Di Benedetto and Mr Mittelberger in the period 2009/2010 when ITS was formed and the Supply Agreement was concluded. This was largely directed towards the evidence, in Mr de Ferrars' statement, that discussions relating to the alleged conspiracy were likely to have taken place in England. Mr de Laender accepted that he did travel frequently for his work, including to England. But he made no trips to England in the 5-month period preceding the signing of the Supply Agreement. He said that he was certain that he never discussed the entering into or renewal of the Supply Agreement, or subsequent agreements including the Audit Agreement, "with the Defendants in England". He did not recall any meetings with the other two individual defendants in the UK, apart from procurement team meetings, for the period up to and including June 2010. Thereafter, Mr Di Benedetto left England, and there was no reason for them to meet in any place, and definitely not in England. He did, however, speak to Mr Di Benedetto frequently by phone, when Mr Di Benedetto was in London and Mr de Laender in Belgium. Similarly, he spoke to Mr Mittelberger frequently by phone, from the respective countries in which they were based (Austria and Belgium). Mr de Laender described a number of business trips to the UK in 2009 and 2010, explaining the purpose of those trips.
42. As further discussed in Section H below, this evidence – as to meetings and discussions with Mr Di Benedetto and Mr Mittelbeger – gave no real information or detail about how and where, or indeed whether, they reached agreement as to the formation of ITS and its potential and then actual deployment as the contracting party under the Supply Agreement.

E: The Article 22 issue – legal principles

43. There was no dispute that if the claim fell within Article 22 of the Brussels Recast Regulation, this court must stay the proceedings against Mr de Laender. This was because the rules in Section 5 of the Regulation trump the rules elsewhere.
44. It was also common ground that each claim against Mr de Laender had to be considered separately: see *Cuneo Resources NV and others v Daskalakis and others* [2019] EWHC 87 (Comm) (“*Cuneo*”) para [23].
45. Mr Cloherty submitted that the focus of the jurisdictional enquiry must be upon the claims made against Mr de Laender, rather than the other defendants. Ms Windle did not really disagree with this proposition, although she did from time to time point to the claims against other defendants in arguing for the correctness of her submissions. I agree with Mr Cloherty that, as indicated by *Cuneo*, it is necessary to focus on the claims made against Mr de Laender. There are outstanding jurisdictional applications by Mr Di Benedetto and Mr Mittelberger. Whilst this judgment may have an impact on their arguments, I am not considering their positions in this judgment.
46. It was common ground that the relevant standard for present purposes was good arguable case, in line with the well-known three-limbed test set out by the Supreme Court in *Goldman Sachs International v Novo Banco* [2018] UKSC 34at [9] and elaborated by the Court of Appeal in *Kaefer Aislamientos SA de CV v AM Drilling Mexico SA de CV* [2019] EWCA Civ 10. In his second decision in the *Bosworth* litigation described in more detail below ([2020] EWHC 2757 (Comm)) (Burton J) helpfully summarised the approach to be taken as follows:

“[13] My interpretation of the state of the law and the three limb test is straightforwardly as follows:

(i) In limb (i) the Court must decide if it can who has the better of the case. If it decides that the claimant has the better of the case, he will have a good arguable case or a plausible evidential basis. If the defendant has the better of the case then the claimant fails.

(ii) Limbs (ii) and (iii). The judge may have to struggle because at the jurisdiction stage the evidence may be wholly uncertain and insufficient and, in particular, because there has been no testing of that evidence by cross-examination or otherwise, and usually no adequate disclosure of documents by either side. He or she may not be able to reach even a provisional conclusion as to which party has the better case, and even if the judge tried to do so he or she may well turn out to be wrong. In such a circumstance where the judge cannot decide, after conscientiously doing his or her best, who has the better of the case, then it is sufficient if the claimant has a plausible evidential basis and that will suffice for a good arguable case.”

47. The Court of Appeal said that he had applied the right test: see [2021] EWCA Civ 687 para [6].
48. I was referred to a number of authorities which have considered the application of Articles 20 (1) and 22 (1). This has been considered in detail by the Court of Appeal in *Alfa Laval Tumba AB v Separator Spares International Ltd* [2012] EWCA Civ 1569 (“*Alfa Laval*”) and *Bosworth and anr v Arcadia Petroleum Ltd and others* [2016] EWCA Civ 818 (“*Bosworth*”). The relevant principles are to be found in those cases, and it is therefore unnecessary to look much beyond them. I was, however, referred to the subsequent decisions at first instance in *Cuneo* and *Semtech Corp and others v Lacunaspace Limited and others* [2021] EWHC 1143 (Pat), both of which contain useful observations on *Bosworth*.
49. *Alfa Laval* concerned a claim against a Polish employee, Mr Jasikowski, for infringement of copyright and breach of confidence. The Claimants produced marine separators which were manufactured by a Polish subsidiary. The First Defendant was alleged to have conspired with Jasikowski to obtain confidential drawings and other intellectual property. Jasikowski’s argument, that the case fell within Article 22 (1), succeeded on appeal to the Court of Appeal.
50. The principal judgment was given by Longmore LJ. He disapproved a test of “legal relevance” which had been developed in a number of first instance cases. He said that it was: “much better to stick with the actual words of Article 18 (1) and ask oneself the question “do the claims made against an employee relate to the individual’s contract of employment?”.” (Article 18 (1) is Article 20 (1) in the Brussels Recast Regulation). He went on to say, at para [25]):
- “This is a broad test which should be comparatively easy to apply. Sir Andrew Morritt C indicated in argument that (without proposing a test of any kind) it might in many cases be helpful to ask whether the acts complained of by the employer constitute breaches of contract by the employee. If so, the claims would be likely to “relate” to the contract of employment”.
51. Davis LJ added some observations of his own. He said that Jasikowski’s status as employee was directly and substantially material in point of fact to the claim advanced: it was artificial to say otherwise. He went on to endorse the simple question posed by Longmore LJ and the fact that this was a broad test:
- “ It is true that in *Glaxosmithkline v Rouard* (Case C-462/06) [2008] ICR 1375 it is indicated that rules of special jurisdiction are to be interpreted strictly. But that does not require ignoring the evident purpose behind Regulation No 44/2001 as exemplified in recital (13). Nor does it require giving article 18(1) itself an interpretative gloss significantly more restrictive than the actual language connotes. “Relating to”, in the context of article 18(1), are broad and unqualified words of nexus and do not require artificial limitation, even though it may be accepted that the nexus must be material.

52. He went on to say that it was necessary “to have regard to the substance of the matter in each case”.
53. Sir Andrew Morritt agreed with both judgments.
54. *Bosworth* involved an alleged oil trading fraud in which various defendants were accused of siphoning off sums in excess of US\$ 300 million from the Arcadia group by inserting corporate entities into the supply and purchase chains of the groups, with profits accumulated in those entities benefiting the defendants to the detriment of the group. The jurisdictional issue concerned the former CEO and CFO of the group, Mr Bosworth and Mr Hurley. The causes of action against those Defendants were, as in the present case, breach of fiduciary duty, unlawful means conspiracy and dishonest assistance and (additionally) a claim of knowing receipt.
55. At first instance, Burton J decided that that the court had no jurisdiction over claims brought by the First, Second or Third Claimants against Mr Bosworth and Mr Hurley for breach of fiduciary duty occurring whilst they were employed by the relevant respective Claimant. This was because any such claims were matters relating to individual contracts of employment pursuant to article 18 of the Lugano Convention (Article 20 of the Brussels Recast Regulation), with the result that such claims must be brought against those individuals in Switzerland, their domicile. There was no appeal by the Claimants against this aspect of Burton J’s decision.
56. Conversely, the claims for breach of fiduciary duty were outside article 18, and therefore within the jurisdiction of the English court, where there was “no contractual nexus between the party who has suffered the loss and is claiming breach of fiduciary duty, and the alleged tortfeasor”: see *Bosworth* para [21] quoting paragraph [75] of Burton J’s judgment.
57. Burton J also decided that the claims in conspiracy and dishonest assistance were outside the scope of article 18 of the Lugano Convention as were the claims for breach of fiduciary duty which were brought by companies other than those which employed Mr Bosworth and Mr Hurley. The judge agreed with a submission of counsel for those individuals that *Alfa Laval* was a castigation of the pleading approach (ie seeing exactly how the case had been pleaded, and whether it could be pleaded without specific reference to the employment contracts), but rather “seeing if the nature of the claim is essentially a breach of contract”. He said that this was a case “relating to alleged wrongs caused by a combination of wrongdoers, not a claim relating to an individual contract of employment”: see *Bosworth* para [20], quoting the judge in paragraphs [42] – [44] of his judgment.
58. Burton J’s decision, to retain jurisdiction over these claims, was upheld by the Court of Appeal, where the leading judgment was given by Gross LJ. He began by considering the conspiracy claims. The English and European authorities were fully reviewed in that judgment. In the section of his judgment headed “Pulling some threads together” at para [63], Gross LJ said that the court was bound by *Alfa Laval* as well as prior CJEU cases, and that there was no conflict between them. He referred to the need to focus “on the substance of the conduct in question, not on the substance of the cause of action”. He rejected the appellants’ argument that the only question was whether the conspiracy claims could have been pleaded as a breach of the appellants’ contracts of employment, repeating that the test “is one of the substance of the conduct in issue”.

59. It is clear that Gross LJ was not intending to depart from the straightforward test identified in *Alfa Laval*. He had described this as binding, and in para [65] referred to the judgments in that case. The question of whether the claims made “relate to individual contracts of employment” was “a broad test and involves a broad enquiry”. He emphasised, however, the point made by Davis LJ that the nexus between the claims and the contracts of employment needed to be material, and that it was necessary to have regard to the substance of the matter. He accepted the observation of Sir Andrew Morritt C that in many cases it might be helpful “to ask the question of whether the acts complained of by the employer constituted a breach of the contract of employment by the employee”. But it would be wrong to elevate that question into a test or touchstone. Gross LJ’s conclusion was that:

“... the correct approach as a matter of English law is to consider the question whether the reality and substance of the conduct relates to the individual contract of employment, having regard to the social purpose of Section 5”.

60. In para [65], Gross LJ discussed the principal CJEU cases, and again rejected the case that the only question was whether the conduct complained of may be considered a breach of contract. He reiterated that the focus of the enquiry was “the substance of the matter, with the result that it is ‘indispensable’ to consider the contract in order to resolve the matter in dispute”. This was a reference to paragraph [26] of the decision of the CJEU in *Marc Brogsitter v Fabrication de Montres Normandes EURL* (Case C-548/12) [2014] QB 753, where the court said that the basic question was whether:

“the purpose of the claims brought by the applicant ... is to seek damages, the legal basis for which can reasonably be regarded as a breach of the rights and obligations set out in the contract which binds the parties in the main proceedings, which would make its taking into account indispensable in deciding the action.”

61. At paragraph [67], Gross LJ turned to apply the law to the facts, asking in that context a number of questions:

“As a matter of reality and substance, do the conspiracy claims relate to the appellants’ individual contracts of employment? Is there a material nexus between the conduct complained of and those contracts? Can the legal basis of these claims reasonably be regarded as a breach of those contracts so that it is indispensable to consider them in order to resolve the matters in dispute? As it seems to me and however precisely the test is formulated, the answer is the same and is clearly ‘no’.”

62. He then gave six reasons for that conclusion, on the facts of that case. These included the fact that the key to the alleged fraud lay not in the appellants’ contracts of employment but in their de facto roles as Arcadia Group CEO and CFO respectively. None of the individual contracts of employment had required them to perform those roles. The substance of the matter was that the overarching claims concerned the appellants acting outside of their contracts of employment and ranging across the Arcadia Group. Gross LJ also referred to the contracts as simply forming part of the

history, and thus a very small part of the picture. They provided the opportunity for the appellants' alleged nefarious activities but no more than that. The nexus between the conspiracy claims and the appellants' individual contracts of employment was tenuous and not material. He elaborated upon this in paragraph [72], by explaining that the control which the appellants exercised over the Arcadia Group was relevant: it illuminated the substance of the matter and the conduct complained of, rendering "the individual contracts of employment no more than part of the history".

63. At paragraph [70], he made it clear that it did not follow that every conspiracy fell outside individual contracts of employment. It was the substance of the matter "and the facts of the particular case which determine its proper characterisation".
64. He then considered the claims for breach of fiduciary duty. The principal issue concerned the fact that the relevant claims were made by the claimants with whom there was no contractual relationship with the appellants. The Court of Appeal upheld the judge's approach, that the absence of a contractual relationship was of critical importance in the context of that case. This issue does not arise in the present case, as far as Mr de Laender is concerned: since the only claimant in the present proceedings did have a contractual employment relationship with Mr de Laender. Burton J had, as described above, held that there was no jurisdiction in respect of the breach of fiduciary claims brought by the companies with whom, at the material times, there was a contractual relationship.
65. Gross LJ then dealt briefly with dishonest assistance and knowing receipt, where it was not seriously in dispute that the outcome of those claims would follow the outcome in respect of the conspiracy claims – where jurisdiction had been upheld.
66. The Court of Appeal decision in *Bosworth* had a substantial afterlife: see [2020] EWHC 2757 (Comm) (Burton J) paras [1] – [4], and [2021] EWCA Civ 687 paras [20] – [29]. In summary, the case had been resolved in favour of the Claimants, on the basis that (the Lugano Convention equivalent of) Article 22 (1) was inapplicable to a number of significant claims brought by the Claimants. Permission was obtained to appeal to the Supreme Court, which then made a reference to the CJEU on a number of questions. These included the issue of whether the appellants were employees at all for the purposes of the Lugano Convention – a point that had apparently been accepted by the Claimants at first instance and in the Court of Appeal. The consequence of the reference to the CJEU was that the Supreme Court did not rule on the Court of Appeal's analysis. The reference to the CJEU encompassed both the "employee" argument which was not considered by the Court of Appeal, as well as the critical issue which had been considered. In the event, it was the "employee" argument which formed the basis of the CJEU's decision. This then resulted, after further argument in the Supreme Court, in the case returning to the Commercial Court for determination of the facts relating to that argument. The Claimants were again successful both at first instance and on appeal. The result of all this is that neither the CJEU nor the Supreme Court has considered the reasoning of the Court of Appeal in *Bosworth*, although it was considered by Advocate General Saugmansgaard OE (see Case C603/17). It was, however, common ground, that the (first) 2016 decision of the Court of Appeal in *Bosworth* remains binding upon a first instance judge.

F: The parties' arguments

67. On behalf of Mr de Laender, Mr Cloherty submitted the entire gravamen of the claim centred around – and at the very least “relates to” – Mr de Laender’s employment by the Claimant. This could be tested in various ways. The Claimant would not be able to bring any claim but for the employment relationship. The acts or conduct complained of did constitute breaches of the employment contract. The claim as a whole relates to his employment. All the claims fell within Article 22, because essentially the self-same alleged acts, omissions and conduct were relied upon in support of each cause of action; namely the conduct of causing the entry into or continuation of the Supply Agreement and Audit Agreement and/or failing to inform the Claimant and obtaining its informed consent to contracts made with entities in which Mr de Laender was financially interested. Employment was central to all the claims made. It was the fact of Mr de Laender’s employment by the Claimant that gave rise to all the claims.
68. In the course of his argument, Mr Cloherty emphasised that any claim by the present Claimant – which was only incorporated in 2010 and began to employ Mr de Laender in September 2010 – must concern contracts continued or concluded after that date. There could be no claim by the Claimant against Mr de Laender in respect of the period before he was even employed – in particular in relation to Brambles’ entry into the Supply Agreement in 2010 in the first place. He referred in his oral submissions to paragraph 44.1 of the Particulars of Claim, where the particularised damage occurred in the financial year ending in 2015. This must be referable to the Supply Agreement renewed from 2015 onwards and the Audit Agreement, rather than the original Supply Agreement. The renewal and the Audit Agreement were clearly connected with the employment of Mr de Laender by the Claimant after 2010.
69. In his oral submissions, Mr Cloherty said that the fiduciary duties could only spring from the relevant employment contract in this case. Even if fiduciary duties were owed to other companies in the Brambles Group, there was no explanation of how these could be owed absent the relevant employment contract. In any event, this was irrelevant, because the only company bringing the claim was the employing company, namely the Claimant itself.
70. In relation to the conspiracy claim, he submitted that the principal unlawful means relied upon was the breach of the employment obligations, and indeed the breach of fiduciary obligations. These unlawful means were clearly related to the contracts of employment. Where a claim was in fact pleaded as a breach of the employment contract and employment relationship, that was a strong pointer to the whole claim being within article 22. He also emphasised, by reference to the *Semtech* decision, that both the conspiracy and dishonest assistance claims were a form of secondary liability, where the primary liability in the present case consisted of breaches of the relevant employment contracts, whether fiduciary obligations or otherwise. Those primary liabilities were all employment related.
71. On behalf of the Claimant, Ms Windle submitted – in the context of the claim for breach of fiduciary duties – that the Claimant’s case was that Mr de Laender owed fiduciary duties to the Brambles Group as a whole, not simply to the Claimant his employer. His fiduciary duties arose not as a simple corollary of his appointment as an employee, but specifically because of the trust in which he was placed across the wider corporate group in relation to the impugned agreements. His employment did no more than

provide him with the opportunity to abuse the position of trust in which he was placed. There was no sufficient nexus between Mr de Laender's abuse of trust and his contract of employment. In those circumstances, the claim for breach of fiduciary duty was not a contractual claim, and did not relate to Mr de Laender's contract of employment.

72. Ms Windle emphasised that a critical part of the claim related to breaches which occurred before any contractual relationship existed between the Claimant and Mr de Laender, and in respect of which the Claimant would have no standing to bring a contractual claim. The position was therefore analogous to the claimants in *Bosworth* with whom there was no contractual nexus, and who were therefore permitted to bring claims for breach of fiduciary duty.
73. The existence of fiduciary duties owed to the Brambles Group as a whole, as opposed to merely his employer, was significant. Entities which had suffered loss, but which were not his employer, would also be entitled to bring claims. This showed that the claim did not relate to his contract of employment. Furthermore, as she submitted orally, the existence of wider duties showed that they did not arise from his employment contract, but rather from the role that Mr de Laender performed.
74. She submitted that the conduct complained of in respect of the claim for breach of fiduciary duty was inextricably intertwined with the wider factual context. The substance of the claim was not that he acted in a manner inconsistent with his obligations as an employee, but that he participated in a scheme with others to abuse their respective positions of trust within the group. His contract of employment had no direct bearing on the resolution of the claim for breach of fiduciary duty, and was certainly not "indispensable" to it.
75. In relation to the unlawful means conspiracy and dishonest assistance claims, she submitted that his employment provided him with the opportunity to carry out his part of the unlawful means conspiracy, and dishonestly to assist the other employees in breaching their own duties, but it did no more than that. There was, however, a wide-ranging and free-standing conspiracy cutting across a number of different companies at different points in time, and it could not be said to fall within the scope of any relevant contract of employment. Two of the defendants (ITS and ITS Estonia) had no employment connection to the Claimant or any other Brambles Group company. Similarly, a critical element in the dishonest assistance consisted of Mr de Laender authorising or causing ITS and ITS Estonia to enter into the impugned agreements. Those acts had no relationship with Mr Laender's employment relationship. There was therefore no basis for characterising the claims as relating to any contract of employment.
76. She submitted that there were striking similarities between the alleged conspiracy and that in *Bosworth*. As in that case, the link between the conspiracy and the contracts of employment was tenuous. Furthermore, the wrongdoing included wrongdoing which did not relate in any way to Mr de Laender's contract of employment or status as an employee, including assisting other employees to breach their fiduciary duties. The obligation not to use unlawful means to injure the Claimant was a free-standing one, not contained within or dependent upon any contract. This was demonstrated by the fact that two of the relevant defendants, ITS and ITS Estonia, had no employment connection.

77. In relation to dishonest assistance, the same considerations relevant to conspiracy were applicable. The relevant dishonest assistance consisted of authorising or causing ITS and ITS Estonia to enter into and continue the Supply and Audit Agreements, as well as failing to notify Brambles Group of the conflict of interest arising in relation to those contracts. The dishonest assistance did not rely upon there being any contract between the Claimant and the person or entity dishonestly providing the assistance, and therefore could not relate to any such contract.
78. Ms Windle drew attention to the lack of any contract of employment between the Claimant and Mr Di Benedetto, ITS and ITS Estonia. A conclusion that the claim against Mr de Laender related to his contract of employment could not be right in circumstances where the materially identical claim against those other parties would not be.
79. In her oral submissions, Ms Windle accepted that each claim had to be scrutinised separately. But it was helpful, when looking at the question of whether the claims in substance and reality relate to Mr de Laender's employment contract, to consider the identical claims made against other parties who had no employment contract with the Claimant.
80. In responding to the argument that the dishonest assistance claim was a secondary liability, she emphasised that the claim against Mr de Laender was not secondary to a claim for breach of his contract of employment. Rather it was, if secondary at all, secondary to a claim for breach of the fiduciary duties owed by Mr Di Benedetto and Mr Mittelberger under their respective contracts. Mr de Laender's contract of employment was irrelevant to that claim, and had nothing to say about the claim. The claim for dishonest assistance was made against ITS and ITS Estonia as well. Those companies had no contracts of employment, and owed no fiduciary duties. Furthermore, the relevant assistance was at the "ITS end of the contractual relationship rather than at the Brambles' end". So it was not assistance by using Mr de Laender's influence with the Brambles Group to cause the contract to be made or renewed. Rather, it was to cause ITS to make the contracts and then to renew them. The dishonest assistance related to his involvement with those companies, and this was entirely separate from his contract of employment. Mr de Laender's position as an employee was insignificant to that claim.
81. In relation to the conspiracy claim, Ms Windle relied upon the fact that, at the time when the conspiracy was formed, the relevant fiduciary and employment duties were owed to various Brambles Group entities other than the Claimant itself, which had yet to be formed. The unlawful means used at that time, which were the breaches of these duties, were therefore breaches of obligations owed to entities other than Mr de Laender's employer. In so far as the breaches were related to a contract, it was a contract with his then employer CHEP Benelux. Accordingly, the contract with the Claimant was not an essential part of the conspiracy claim at all. By the time Mr de Laender became an employee of the Claimant, the conspiracy to which he was party already existed and had to some extent been acted upon, because the Supply Agreement had been concluded. Similarly, the dishonest assistance had already taken place. Accordingly, the employment contract was not significant to that claim at all. There was no legal reason why a claim could not be made by the Claimant in respect of conduct occurring prior to its incorporation and which resulted in loss suffered thereafter. It was also an accident that the Claimant happened to be the party which

suffered loss as a result of the conspiracy; it could easily have been one of the other companies in the Group, with whom there was no employment relationship.

82. Overall, Ms Windle argued the reality and substance of the claims concerning the Supply Agreement was that they were unrelated to Mr de Laender's employment contract, but derived from a combination between three individuals to insert themselves into the contractual chain in order to injure the Claimant and benefit themselves. Nothing material changed thereafter, when the Supply Agreement was continued and the Audit Agreement and its Addendum were entered into and also continued. The only thing that changed is the Claimant employed Mr de Laender. At most, that added additional unlawful means, but it did not change the nature of the conspiracy or the unlawful means used to date. But if the claims in relation to the Supply Agreement itself were not related to his employment contract, then the position was no different in relation to the continuation of that agreement or the subsequent agreements.

G: Discussion

83. The authorities in this area encourage concise judgments: see *Kaefer* para [124] and the second Court of Appeal judgment in *Bosworth* para [33]. I will therefore endeavour to state my conclusions as briefly as possible.
84. The authorities also show that the fact that there is a contract of employment between the Claimant and Mr de Laender is not sufficient to establish that the claim is one relating to that contract. Nor is it determinative that the relevant claims could have been pleaded as a breach of Mr de Laender's employment.
85. *Breach of fiduciary duty*: I start with the claims for breach of fiduciary duty. These are claims which, in the present case, are brought by the Claimant's employer against its former employee. The potentially complicating factor (addressed at first instance and on appeal in *Bosworth*) of a claim for breach of fiduciary duty between parties who have no contractual relationship does not therefore exist in this case.
86. In the present case, fiduciary duties can only have been owed by Mr de Laender to the Claimant once the Claimant came into existence in 2010. Mr de Laender was employed by the Claimant at around the same time. The contract of employment with Mr de Laender is in my view the obvious source of the fiduciary obligations which, on the Claimant's case, were owed to the Claimant as from the time that Mr de Laender was employed, and which are alleged to have been breached. Applying the broad test and broad enquiry required by the words "relating to", I have no doubt that the breach of fiduciary duty claims are related to Mr de Laender's employment contract, or at least that Mr de Laender has the better of the argument on this issue.
87. I do not consider that the present case can be distinguished from the decision in relation to fiduciary duties in *Bosworth*, where Burton J declined jurisdiction in relation to the relevant claims made by the companies with whom Mr Bosworth and Mr Hurley were employed in so far as they related to their conduct during the period of that employment.
88. I therefore do not accept Ms Windle's argument that there is a material distinction arising from the fact that Mr de Laender allegedly acted in breach of fiduciary duty towards other companies in the group, including his then employer CHEP Benelux, prior to September 2010. I agree with Mr Cloherty that this is irrelevant, in

circumstances where I am not considering claims by any of those companies for breach of fiduciary duty in that period. Rather I am considering a claim made by Mr de Laender's employer in respect of breaches of fiduciary duty which necessarily post-dated the incorporation of the Claimant and the employment of Mr de Laender. In any event, it seems to me that, in relation to the period after September 2010, any duties owed to other companies spring from, and are certainly related to, Mr de Laender's contract of employment with the Claimant.

89. *Conspiracy*. I reach the same conclusion, that Mr de Laender has the better of the argument, in relation to the conspiracy claim. It is clear from *Bosworth* that the mere fact that a Claimant alleges conspiracy does not mean that Article 22 (1) is inapplicable. Indeed, the decisions in both *Alfa Laval* and *Semtech*, in both of which Article 22 (1) or its equivalent was held applicable, involved conduct amounting to a conspiracy between an employee and a third party. Conspiracy was specifically alleged in *Semtech*, although it does not seem to have been pleaded as such in *Alfa Laval*.
90. The legal ingredients of an unlawful means conspiracy are: (i) a combination or understanding between two or more people; (ii) an intention to injure the claimant. The intention to injure does not have to be the sole or predominant intention: it is sufficient if the defendant intends to advance its economic interests at the expense of the claimant; (iii) unlawful acts carried out pursuant to the combination or understanding; and (iv) loss to the claimant suffered as a consequence of those unlawful acts. See eg *Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300.
91. In the present case, the unlawful means relied upon include, as significant elements, the breaches by Mr de Laender of his duties as an employee as well as his fiduciary duties: see paragraph 42 of the Particulars of Claim. A direct claim for breach of Mr de Laender's duties as an employee would, as the Claimant accepts, clearly fall within Article 22. Hence no direct claim is in fact made. A direct claim for breach of Mr de Laender's fiduciary duties also falls, for the reasons set out above, within Article 22. Given that direct claims are related to Mr de Laender's contract of employment, the same is in my view true – applying the broad test – where it is alleged that the same breaches constitute unlawful means for the purposes of a conspiracy claim.
92. In that regard, I consider that the observation of Mr Iain Purvis QC, sitting as a Deputy Judge of the High Court in *Semtech* paragraph [67], was well made:
- “Where a party has gone to the trouble of pleading out the employment contract and making specific allegations of breach of that contract as component parts of the causes of action relied on, it would be bizarre if the Court refused to take this into account. Indeed, where a disputed allegation of breach of an employment contract forms a critical element of a component part of the main cause of action, it is hard to see how a Court can say that the action did not ‘relate to’ the employment contract.”
93. I recognise that, in addition to the allegation of breach of employment obligations and fiduciary duties, the Claimant also relies (as unlawful means) upon dishonest assistance. However, that additional aspect of the unlawful means case is not sufficient, applying the broad approach, to mean that the conspiracy case does not relate to the employment contract, in circumstances where material aspects of that case are based upon breaches

of obligations contained in or arising from that contract. In any event, for reasons discussed below, I consider that the dishonest assistance claim itself relates to Mr de Laender's employment contract.

94. It seemed to me that the most attractive argument against this relatively straightforward conclusion was Ms Windle's point that the conspiracy, on the Claimant's case, predated the incorporation of the Claimant and the employment of Mr de Laender in September 2010, and that therefore the relationship with his employment contract was lacking or at least immaterial. I did not think that Mr Cloherty's argument – that the Claimant's cause of action in conspiracy was incomplete until damage was suffered by the Claimant, which could only have been after Mr de Laender's employment – provided a persuasive answer to the Claimant's argument on this issue. The authorities require focus on the substance of the conduct which gives rise to the claim, rather than the substance of the cause of action: see *Bosworth* paras [62] – [65]. However, I was also unpersuaded that a focus on the substance of the conduct in issue yielded an answer favourable to the Claimant, notwithstanding the likelihood that the conspiracy predated Mr de Laender's employment by the Claimant. There are two reasons for this.
95. First, as Mr Cloherty pointed out, the particularised financial claims all relate to the period commencing with the financial year 2014/2015 and continuing to the financial year 2018/2019. The losses incurred during that time period must have arisen in consequence of the continuation of the Supply Agreement beyond its initial 3-year term – a continuation for which, on the Claimant's case, Mr de Laender was responsible in his capacity as Procurement Director to which he had been promoted subsequent to 2010. They also arose in consequence of the Audit Agreement in October 2013 and the Addendum thereto in 2017, and the continuation of those agreements. Again it was alleged that Mr de Laender was responsible, by virtue of his role as Procurement Director, for the conclusion of these agreements and their continuation. It seems to me that the substance of the conduct giving rise to the financial claim actually made in these proceedings (as distinct from a claim in respect of prior years which the Claimant has reserved the right to bring) squarely took place in the period after Mr de Laender had been employed by the Claimant.
96. In that context, I do not accept Ms Windle's argument that, once the conspiracy had been formed prior to Mr de Laender's employment by the Claimant, nothing of substance changed apart from the fact of that employment. The Claimant's pleaded case, reflecting the likely factual position, is that there were material developments after Mr de Laender's employment. It is thus alleged in paragraph 15 of the Particulars of Claim that Mr de Laender was responsible for deciding on behalf of every member of the Brambles Group whether to renew the Supply Agreement beyond the initial term, and each year thereafter. It is also alleged in paragraph 23 that Mr de Laender (together with Mr Mittelberger) negotiated the Audit Agreement and its Addendum on behalf of the Claimant and/or caused the Claimant to enter into those agreements; and that he was responsible for deciding whether to renew the Audit Agreement beyond the initial term, and each year thereafter. Although the agreements contained provisions for automatic renewal unless terminated, it is obvious that some consideration would need to be given by the Claimant to the question of whether or not the agreements should indeed continue. Although Mr de Laender denies in his evidence discussing that issue with anyone else, that fact (if true) is a likely consequence of Mr de Laender's financial interest in ensuring that the agreements continued. It does not detract from the

Claimant's case that Mr de Laender, who after all was Procurement Director, was the person responsible for deciding upon the continuation of the agreements.

97. I was also unpersuaded by the Claimant's related argument that it is accidental that, in the present case, the entity which has suffered the loss happens to be the Claimant, which is Mr de Laender's employer; and that it could easily have been other companies in the Brambles Group, in which case the employment relationship would not have existed. The supposed accidental connection was not a point which was made in the evidence served by the Claimant. In contrast, Mr de Laender's evidence was that plans were being made, prior to the conclusion of the Supply Agreement itself, to move pallet procurement to Belgium. This replaced prior arrangements where pallet purchases had not been centralised in a single entity. The centralisation happened in June 2010, and shortly after (on 1 July 2010) the Claimant was incorporated, with Mr de Laender becoming employed by the Claimant on 1 September 2010 and in due course being appointed as Procurement Director. The fact that the loss in the present case was suffered by the Claimant, which had become responsible for all pallet purchases, and that Mr de Laender was employed by the Claimant as Procurement Director, does not seem to me to have been accidental. Indeed, it is also not difficult to see that the proposed, and then actual, centralisation of pallet purchasing in a single company, may have facilitated the impugned arrangements involving ITS.
98. I also consider that, on any realistic view of the facts, Mr de Laender's responsibilities, as an employee, for procurement, including his promotion to the position of Procurement Director, is (to use the expression of Davis LJ in *Alfa Laval*) directly and substantially material in point of fact to the claim advanced. As indicated above, the Claimant's case is that Mr de Laender was the, or at least a, key individual in relation to the decision to continue the Supply Agreement and then conclude and continue the Audit Agreement and the Addendum. It also seems to me that his appointment as Procurement Director is likely to have been a significant reason why, as Mr de Laender's evidence suggests, there were no discussions about the termination of the Supply Agreement: because it was in Mr de Laender's financial interests to continue it, and avoid any such discussion. His position as Procurement Director is also, again based on Mr de Laender's evidence, a reason why ITS was initially engaged to carry out audit work, with Mr Laender suggesting additional tasks that could be carried out, and approving the initial appointment of ITS for those purposes.
99. Secondly, irrespective of the fact that the particularised losses arise in 2014/2015 and thereafter, I consider that the Claimant's argument, based on a conspiracy formed in 2010 prior to the Claimant's incorporation, takes too narrow a view as to the substance of the conduct which gives rise to the claim. The substance of that conduct includes, on any view, the various actions which Mr de Laender is alleged to have taken subsequent to 2010 in relation to the renewal of the Supply Agreement after its first 3-year term in 2013, and the conclusion and renewal of the Audit Agreement and the Addendum. However, it also seems to me that the substance of the conduct in issue also includes conduct prior to 2013, with Mr de Laender allowing the conspiracy to produce its desired effects (benefitting himself and the other two employees, and disadvantaging the Claimant) notwithstanding his duties as an employee and his fiduciary duties. For example, paragraph 26 pleads various fiduciary duties imposed on Mr de Laender, including accounting to his principal for funds dealt with in his capacity as a mandatory, and informing his principal of any conflicts of interest. Paragraph 30.3 contains an

allegation of breach, because Mr de Laender made a profit from his position as a senior employee of the Claimant and/or his position as the person tasked with negotiating the Supply and/or Audit Agreement. There are equivalent, albeit not necessarily identical, allegations made against Mr Di Benedetto and Mr Mittelberger. The important point for present purposes is that the unlawful means relied upon by the Claimant – and the substance of the conduct in issue – did not simply take place at the time when the Supply Agreement was concluded, with nothing material happening thereafter until 2013. It took place and continued throughout.

100. I do not accept that there is any real analogy that can be drawn between the facts of the present case, and those in *Bosworth*, with the consequence that if the conspiracy claim survived the jurisdictional challenge in *Bosworth*, the same should apply here. In *Bosworth*, there were various factors – including the de facto control of the whole Arcadia Group exercised by the appellants, and the absence of any appointment under their employment contracts to the roles of CEO and CFO which they carried out – which led the Court of Appeal to conclude that the contracts of employment simply formed part of the history and a very small part of the picture. I do not consider that these facts have any parallel with the present case.
101. In any event, it is generally not a useful exercise to seek to compare and contrast the facts of particular cases with each other in context such as the present. I must seek to apply the relevant broad test of “relates to” to the particular facts here. Applying that test, including the need for a material nexus between the conduct complained of and the relevant contract, I consider that Mr de Laender has the better of the argument.
102. *Dishonest assistance*. The submissions of both parties recognised that, as in *Bosworth*, the jurisdictional decision on the dishonest assistance claim was likely to be the same as the decision on the conspiracy claim. Given that the conduct relied upon is largely the same, I consider that it would be surprising if the analysis of the dishonest assistance claim produced a different result. Nevertheless, I will consider the argument in a little more detail.
103. At the heart of Ms Windle’s submissions was the proposition that the relevant dishonest assistance did not concern Mr de Laender’s contract of employment. She emphasised that the contracts of employment which were potentially relevant were those of Mr Di Benedetto and Mr Mittelberger; because a claim for dishonest assistance requires assisting in a breach of fiduciary duty, and those individuals breached their fiduciary duties under those contracts. However, that did not make Mr de Laender’s contract of employment relevant. What mattered was the assistance which he gave – and that assistance related to the utilisation of ITS and ITS Estonia, in his capacity as one of the owners or controllers of those companies.
104. In my view, this argument does not pay sufficient regard to the overall conduct giving rise to the claim. As a matter of pleading, the Claimant’s case goes beyond simply an allegation relating only to the use of ITS and ITS Estonia. Paragraph 36.3 pleads dishonest assistance by: “failing to notify his employer that he and the other Former Employees were the ultimate beneficial owners and controllers of ITS and ITS Estonia”. This plea therefore concerns an obligation on each individual defendant to notify his employer – in the case of Mr de Laender, the Claimant. This does seem to me to relate to Mr de Laender’s contract of employment.

105. Furthermore, the need to focus on the substance of the relevant conduct – rather than the way in which the matter is pleaded – leads to the conclusion, in my view, that it is artificial simply to consider the assistance provided by Mr de Laender in the context of what he authorised or caused ITS and ITS Estonia to do. Mr de Laender, as Procurement Director, was involved on the Brambles/ Claimant side of the transaction as well. The contracts which were ultimately concluded or continued were, looking at the Claimant’s case overall, at least as much a consequence of his work on the Brambles/ Claimant side of the fence as his work on the ITS side. The dishonest assistance provided by Mr de Laender cannot therefore be viewed as narrowly as Ms Windle’s argument posits.
106. Accordingly, I consider that Mr de Laender has the better of the argument on the dishonest assistance claim as well.
107. In relation to all three causes of action, I consider that, for the reasons given above, the claims relate to Mr de Laender’s contract of employment, and also that the connection between Mr de Laender’s contract and the conduct relied upon is material. It cannot be described as tenuous, or a small part of the picture, or simply part of the history. I also consider that the legal basis of the claims can reasonably be regarded as a breach of his contract, so that it is indispensable to consider the contract in order to resolve the matters in dispute.
108. *Bosworth* indicates (see para [65]) that in many cases it may be helpful to ask the question whether the acts complained of by the employer constitute a breach of the contract of employment. The answer to that question is: yes. Indeed, the pleading contains allegations of breach of contract, including breach of fiduciary duty, in relation to the impugned conduct. Whilst a positive answer to this question is not determinative, it does serve as a useful cross-check on the conclusions which I have reached.
109. Accordingly, Mr de Laender’s jurisdiction argument succeeds on the basis of Article 20 and Article 22.

H: Harmful event

110. My conclusion in Section G means that it is not necessary to consider the application, or otherwise, of Article 7. However, I will state my conclusions on that issue in the light of the arguments addressed by the parties.

Legal principles

111. There was no substantial dispute as to the relevant principles, but rather as to how they applied to the facts of the present case.
112. Article 7(2) of the Brussels Recast Regulation provides, by way of derogation from Article 4, that a person domiciled in a Member State may be sued in another Member State “in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur”.
113. The expression “the place where the harmful event occurred or may occur” permits a claimant to sue in either (i) the place of the event giving rise to the damage, or (ii) the

place where the damage occurred: *Handelskwekerij G J Bier BV v Mines de potasse d'Alsace SA*, 21/76 [1978] QB 708 at [19]. I was referred by the Claimant to a number of authorities concerning “the place of the event giving rise to the damage”.

114. In *Shevill v Press Alliance* (Case C-68/93) [1995] 2 AC 18, the CJEU held, in the context of a libel claim, that the place of the event giving rise to the damage was the place where the publisher was established, since that was the place where the harmful event originated and from which the libel was issued and put into circulation.
115. In *JSC BTA Bank v Ablyazov* [2018] UKSC 19 (“*Ablyazov*”), in the context of a claim for unlawful means conspiracy, the claimant bank submitted that the place of the event giving rise to the damage was the place where the conspiracy between the defendants was allegedly hatched, which was inferred to be in England on the basis that one of the defendants, who lived in England at the relevant time, was identified as the driving force in the conspiracy. At first instance, the judge held that the event which gave rise to the damage was not the hatching of the conspiracy in England, but rather its implementation by dealings abroad with the foreign assets. The Court of Appeal overruled that finding and held that it was “the making of the original agreement, not the giving of later instructions by [the primary conspirator], which is the place of the event giving rise to the damage”: [2017] EWCA Civ 40, at [85] and [76]. The Supreme Court upheld the decision of the Court of Appeal. The applicable legal test requires the court to identify the “originating event” or “the harmful event which set the tort in motion”: *Ablyazov* at [34] and [41].
116. As far as concerns the identification of “*the place where the damage occurred*” Christopher Clarke LJ in *AMT Futures Ltd v Marzillier mbH* [2015] EWCA Civ 143 identified the following questions at [54]:
- “(i) what is ‘the place where the event giving rise to the damage directly produced its harmful effects upon’ [the claimant] ... ; or (ii) where was the ‘actual damage’ which ‘elsewhere can be felt’ or the ‘initial damage’ suffered ...; or (iii) what was the place where the damage which can be attributed to the harmful event ... by ‘a direct and causal link’ ... was sustained”? (Internal citations omitted; emphasis in original).
117. In *Universal Music International Holding BV v Schilling* (Case C-12/15) [2016] QB 967, the CJEU recognised that damage may occur in the place where the claimant made payments from its bank account, provided there are other circumstances which link the case to that jurisdiction. The Court held (at [38]-[40]):
- “[38] Consequently, purely financial damage which occurs directly in the applicant’s bank account cannot, in itself, be qualified as a ‘relevant connecting factor’, pursuant to Article 5(3) of Regulation No 44/2001. In that respect, it should also be noted that a company such as Universal Music may have had the choice of several bank accounts from which to pay the settlement amount, so that the place where that account is situated does not necessarily constitute a reliable connecting factor.

[39] It is only where the other circumstances specific to the case also contribute to attributing jurisdiction to the courts for the place where a purely financial damage occurred, that such damage could, justifiably, entitle the applicant to bring the proceedings before the courts for that place.

[40] In the light of the foregoing considerations, the answer to the first question is that article 5(3) of Regulation No 44/2001 must be interpreted as meaning that, in a situation such as that in the main proceedings, the “place where the harmful event occurred” may not be construed as being, failing any other connecting factors, the place in a member state where the damage occurred, when that damage consists exclusively of financial damage which materialises directly in the bank account of the applicant and is the direct result of an unlawful act committed in another member state”.

Application to the facts of the present case

118. For the reasons that follow, I consider that the Claimant has much the better of the argument that the place of the event giving rise to the damage was England.
119. The Claimant’s argument, in relation to the conspiracy claim, was that it was appropriate to focus on the formation of the conspiracy, rather than upon the steps taken subsequently to implement it. The formation of the conspiracy was the relevant “originating event” or “the harmful event which set the tort in motion” in accordance with the decision in *Ablyazov*. I consider that this is the correct approach in principle.
120. The Claimant’s primary case in relation to the other causes of action, for breach of fiduciary duty and dishonest assistance, was again to focus on the formation of the conspiracy. For his part, Mr Cloherty on behalf of the Defendant did not suggest that any distinction was to be drawn, in the present context, between the different causes of action. I therefore accept that, in the context of these causes of action as well, it is appropriate to look at where the conspiracy was formed.
121. There were a number of related themes in the Claimant’s argument that the conspiracy originated in England.
122. First, there was the presence in England, both at the time of incorporation of ITS in November 2009, and the negotiation and conclusion of the Supply Agreement in 2009/2010, of the most senior of the alleged conspirators, Mr Di Benedetto (the 5th Defendant). It is clear from the evidence of Mr de Ferrars, as supplemented by the evidence of Mr Alonso-Bernaola in his second witness statement (served in relation to jurisdictional challenges by the 4th and 5th Defendants) that, in the period up to conclusion of the Supply Agreement in June 2010, Mr Di Benedetto was based in Weybridge. During the period 2009 to the end of June 2010, Mr Di Benedetto spent only 28 days in 2009 out of the Weybridge office, and only 24 of those were out of England. During the first six months of 2010, 19 days were spent away from the Weybridge office and only 16 out of England. It was only after the Supply Agreement had been signed that Mr Di Benedetto’s new role resulted in his move to Cologne in July/ August 2010.

123. Secondly, there was the significant role which Mr Di Benedetto played in relation to the Supply Agreement. The Claimant's evidence, which was not materially challenged by Mr de Laender on this point, was that Mr Di Benedetto was the main individual responsible for negotiating the Supply Agreement on behalf of the Brambles Group entities, which he did in 2009/2010 whilst based in Weybridge. The contract negotiations went on for 6 – 12 months, with Mr Alonso-Bernaola giving Mr Di Benedetto responsibility for the negotiation and supervising it. Mr Alonso-Bernaola used to visit Weybridge approximately twice a month, and his discussions with Mr Di Benedetto included the negotiation of the Supply Agreement. Ultimately, the Supply Agreement was signed by Mr Alonso-Bernaola, whose evidence was that it was more likely than not that it was signed in England.
124. Thirdly, there was the timing of the relevant events. ITS, the entity allegedly owned by Mr de Laender and the other alleged conspirators, was incorporated on 26 November 2009. This was, therefore, during the 6-12 month window when the Supply Agreement was under negotiation. The Claimant was able to point to evidence that Mr Di Benedetto and one or both of Mr de Laender and Mr Mittelberger were present together in England on occasions in the period leading up to the time, and at around the time, when ITS was incorporated. The Weybridge office visitor logbooks for Brambles Group colleagues for June 2009 to June 2010 show that Mr de Laender and Mr Mittelberger visited Weybridge at the same time on 28 July 2009 (for 2 days), 8 October 2009 (for two days), 8 December 2009 (for two days). In addition, Mr de Laender made visits to Weybridge in September 2009, twice in November 2009, and in January 2010, and Mr Mittelberger visited Weybridge in November 2009. By contrast, Ms Vael (who worked alongside Mr de Laender) did not recall many visits to Belgium from Mr Di Benedetto, suggesting that when Mr de Laender and Mr Di Benedetto did meet, it was in England. There was some evidence from Mr de Laender that Mr Mittelberger had not been present for the 8 October 2009 meeting. However, it did not seem to me that, even if this were so, this detracted from the Claimant's basic point that meetings involving Mr Di Benedetto and the other two alleged conspirators were occurring in England at around the time that ITS was incorporated and the negotiations, which eventually led to the Supply Agreement, were in their initial stages.
125. Fourth, there was the absence of any positive evidence from Mr de Laender as to how, why, where and when the decision was made to incorporate ITS and how it came to be involved with the Supply Agreement negotiated in 2009/2010. In that regard, Mr de Ferrars' witness statement drew attention to the fact that conspiracies are typically hatched in secret, and therefore "although the Defendants will be well aware of where they were when they decided to establish ITS ... and cause Brambles Ltd, on behalf of itself and the Claimant to contract with ITS ..., the Claimant would not expect to be able to find much documentary evidence of where and how the conspiracy was made". He went on to say that "it appears more likely than not that at least some of the discussions in which the conspiracy was formed, took place in England". In paragraphs 38 – 41 of his witness statement he referred to the evidence of visits to England and meetings between the three alleged conspirators, before again stating that it was reasonable to conclude that at least some of the discussions in which the conspiracy was formed took place in England
126. It did not seem to me that Mr de Laender's witness statement provided any significant evidence in response to the point that was being made. Nothing was said about how,

why, where and when the decision was made to incorporate ITS, and how it came to be involved with the Supply Agreement which was under negotiation at around the time of its incorporation. There was, for example, no positive evidence that Mr de Laender had discussions with Mr Di Benedetto, in relation to these matters, other than in England where the latter was based and the former was a regular visitor. He did make the bald statement that he never discussed the entering into (or renewal of) the Supply Agreement, or other agreements, “with the Defendants in England”. However, that statement did not concern the establishment of ITS, which had been expressly identified as a relevant matter in Mr de Ferrars’ witness statement. Nor did it explain the nature and location of discussions leading to the involvement of ITS (of which Mr de Laender was, on the present evidence, an ultimate beneficial owner) with the Supply Agreement.

127. Ms Windle on behalf of the Claimant submitted that it was to be inferred that Mr Di Benedetto, as the most senior individual and the person responsible for negotiating and promoting the Supply Agreement, was the driving force behind the conspiracy. The potential significance of an individual being the driving force behind the conspiracy is that it would support the conclusion that the relevant conspiracy was hatched in the place where that individual was located. I consider that the Claimant does have the better of the argument on the question of whether Mr Di Benedetto was the driving force behind the conspiracy. He was the most senior of the three individuals, with broad responsibilities for both sourcing and quality control. It is (as the Claimant submitted) far more likely that the senior manager, with broad responsibilities, would approach more junior employees rather than vice-versa. Furthermore, the central pillar of the conspiracy, and its primary means of implementation, was the Supply Agreement. Mr Di Benedetto had responsibility for negotiating and promoting that agreement. The conspiracy could not really go anywhere unless he was prepared to drive the Supply Agreement forward, and the evidence suggests that this is indeed what he did. Indeed, Mr de Laender in his evidence seeks to distance himself from the negotiation and conclusion of the initial Supply Agreement. Mr Di Benedetto was also the person who would be most exposed if the conspiracy came to light. All of these considerations strongly support the Claimant’s case that Mr Di Benedetto was indeed the driving force behind the conspiracy, and hence that the conspiracy was hatched in England where he was located at the material times.
128. However, the determination of the question of whether or not Mr Di Benedetto was the driving force behind the conspiracy is not critical to the question of where the conspiracy was hatched. Even if, as Mr Cloherly submitted, all three individuals were equal participants, the fact remains that a very significant participant (Mr Di Benedetto) was at all material times working in England, which is the place where important steps were taken by that participant. There is also evidence of meetings in England between that significant participant and both of the other (alleged) conspirators at the material times described above, and a contrasting lack of evidence from Mr de Laender which identifies any other location where the conspiracy was hatched.
129. Furthermore, to the extent that Mr de Laender’s evidence identifies by inference any alternative location, this appears to be a conspiracy formed in the course of the regular phone conversations between himself and Mr Di Benedetto referred to in paragraph 30.2 of Mr de Laender’s evidence. At the time of those conversations however, as Mr de Laender acknowledges, Mr Di Benedetto was “based in England”. Assent to the

conspiracy given in phone conversations by a significant conspirator such as Mr Di Benedetto in England would – particularly if Mr Di Benedetto was the driving force behind the conspiracy, as to which there is a good arguable case for reasons set out above –in my view be sufficient for jurisdictional purposes: see paragraphs [72] and [76] of the judgment of the Court of Appeal in *Ablyazov*.

130. I therefore do not accept Mr Cloherty’s argument that the Claimant’s evidence, as to the location of the originating event, is insufficient to meet the good arguable case standard.
131. Nor do I accept his principal argument that any sustainable conspiracy claim as far as the Claimant is concerned must centre on the allegation of causing the continuation of the Supply Agreement in 2013 and subsequent years, by which time Mr Di Benedetto had left Brambles and was no longer concerned with the Supply Agreement. Whilst it is true that the Claimant was not formed until 1 July 2010, this does not affect the fact that the originating event, and the event which set the tort in motion, was the conspiracy which had previously been hatched, and whose object was for ITS to be inserted into the contractual chain of supply contracts with Brambles Group companies and for profits to be extracted thereby. This is particularly the case in circumstances where (as described in Mr de Laender’s evidence summarised in Section D above) there had been, some time prior to the incorporation of the Claimant itself, a planned move of all procurement and finance operations and pallet purchasing operations to Belgium.
132. I have considered whether a distinction should be drawn between the Supply Agreement (and its renewals) on the one hand, and the Audit Agreement on the other. The evidence indicates that the opportunity for ITS (and in the event ITS Estonia) to extract profits via an Audit Agreement was not the original focus of the conspiracy, since it does not appear that any consideration was given by Brambles to an audit agreement until around 2013. However, I accept Ms Windle’s argument that it is appropriate to take a broad view of the conspiracy when considering the originating event or the event which set the tort in motion. The essence of the conspiracy was for the conspirators to form their own company and insert it into the relevant contractual chain and to extract profits. The conspiracy was implemented initially by the conclusion of the Supply Agreement in 2010, and then by the subsequent (automatic) renewals in 2013 and subsequently. The conclusion of the Audit Agreement in 2013 was as Ms Windle submitted, simply one part of the chain of events originating with the hatching of the conspiracy. Indeed, Mr de Laender’s evidence was that since the Supply Agreement was already in place, ITS was “an obvious choice” when it came to finding a company for the proposed audit of manufacturers. This was therefore one conspiracy implemented in steps which repeat or expand over time, but where there is a common originating event. For reasons given, there is a good arguable case that this originating event occurred in England.
133. It is therefore unnecessary to discuss in detail the Claimant’s alternative case that England was the place where the damage occurred. On that issue, each side argued for a single place: Belgium (on Mr de Laender’s case) or England (on the Claimant’s case). I considered, however, that the present is a case where, as in *Shevill*, it is inappropriate to identify a single location. The position in my view is that prior to the point in time in 2017 when the Claimant’s operations transferred back to London, the damage was suffered in Belgium. The consequence is that the English court has no jurisdiction, on this basis, in respect of that aspect of the claim. However, the Claimant’s relevant

operations were all transferred back to England in 2017, and thereafter payments were made substantially from the Claimant's bank account in this jurisdiction. Whilst the existence of such payments would not be sufficient on its own to establish jurisdiction, this is a case where there were additional significant factors which meant that, after the transfer of operations in 2017, the relevant damage occurred in this jurisdiction. Accordingly, if the determination of the present application had come down to this particular point, I would have upheld the court's jurisdiction on this limited basis.

Conclusion

134. Since I consider that Mr de Laender has the better of the argument on the Article 22 employment issue, his application succeeds.

