



Neutral Citation Number: [2019] EWHC 1666 (QB)

Case No: QB/2018/0292

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 July 2019

Before :

JOHN KIMBELL QC
(Sitting as a Deputy High Court Judge)

Between :

GULF INTERNATIONAL BANK BSC **Claimant**
- and -
SHEIK BADR FAHAD IBRAHIM ALDWOOD **Defendant**

Matthew Cook (instructed by **Enyo Law LLP**) for the **Claimant**
Lexa Hilliard QC and Jamie Randall
(instructed by **Kingsley Napley LLP**) for the **Defendant**

Hearing dates: 1, 2 May 2019

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.

.....

John Kimbell QC (sitting as a Deputy High Court Judge):

Introduction

1. On 18 January 2019, the Defendant (**‘Mr Aldwood’**) was served in London with the claim form in these proceedings (**‘the Claim Form’**) and a worldwide freezing order (**‘the WWFO’**). The sum claimed in the Claim Form is SAR137.5 million (around £29 million). This is said by the Claimant to be due under a personal guarantee signed by Mr Aldwood on 28 July 2012.

The Defendant’s applications

2. By an application notice dated 19 March 2019, Mr Aldwood applies to:
 - (i) set aside the Claim Form on the ground that this court has no jurisdiction to hear the claim; alternatively,
 - (ii) stay these proceedings on the ground that the courts of the Kingdom of Saudi Arabia, more specifically, the Banking Disputes Committee (also known as the Committee for the Settlement of Banking Disputes or SAMA Committee) is clearly and distinctly the more appropriate forum to determine the claim; and,
 - (iii) discharge and set aside the WWFO.

The Claimant’s application

3. The Claimant opposes Mr Aldwood’s application and seeks the continuation of the WWFO until judgment or further order.

Factual Evidence

4. The Claimant relies on three affidavits by Nicholas Jones, a solicitor and partner at Enyo Law LLP (**‘Enyo’**) sworn on 12 December 2018, 17 January 2019 and 19 March 2019.
5. Mr Aldwood relies on two witness statements by Richard Foss, a solicitor and partner at Kingsley Napley LLP (**‘KN’**) dated 19 March 2019 and 26 April 2019.

Foreign Law Evidence

6. Both parties rely on expert evidence of Saudi Arabian law. Mr Aldwood relied on a report by a retired judge, Dr Al Massad and a Memorandum of Advice by a Mr Aldowish, who is

a lawyer employed by Clyde & Co. in their office in Riyadh. The Claimant relies two reports by a Mr Al Harbi.

7. Both parties' expert evidence was simply served as exhibits to the factual evidence referred to above. Neither party sought permission under CPR 35.4 to adduce expert evidence and all of the reports failed to comply (in varying degrees) with the requirements of CPR Part 35 and the accompanying practice direction. Unhelpfully, each report addressed different issues and each one raised new points not covered in the previous report.
8. This highly unsatisfactory state of affairs is strikingly similar to that described by Andrew Baker J. in B.B. Energy (Gulf) DMCC v Al Moudi and Others [2018] EWHC 2595. In that case, which was also an application to challenge jurisdiction, he said this:

“49. [I]t is a matter of significant regret that neither side identified, as undoubtedly they ought to have, that this was a heavy application that needed case management, not least because neither side had permission for reliance upon any expert evidence, permission being required for interlocutory hearings as much as for trials. ...[T]hey ought to have appreciated that there was a need to regularise the matter and raise with the court what expert evidence would be required; but equally on the claimant's side, seeing that, identifying immediately, as they will have done, that there were matters seemingly asserted by the expert opinion that had been provided that would be contentious, the claimant ought to have identified that the defendants had not yet sought permission, that the claimant for its part would wish to challenge and deal with the matters of foreign law on their substance, not on the technicality of whether permission had been granted, and ought therefore to have raised with the defendants the need to come to court.

50. That is not a pedantic procedural concern on the part of the court in this case. In my view it has been a case, albeit that in the end these concerns have not become determinative of the application, in which the absence of either an agreed or directed-by-the-court review of what expert evidence was required, from what experts, answering what questions, has led to the exchange, through the service and counter-service of evidence, of an escalating volume of material not always addressing the same questions or analysing the case for the identification of the questions to be addressed in a consistent fashion and culminating in the late service of a second report by the claimant to which I referred earlier and in respect of which the defendants made a particular complaint.”

9. I share Andrew Baker J's concerns. Better case management is clearly needed for challenges to jurisdiction which involve foreign law expert evidence. Permission ought to be sought under CPR 35.4 to reply on foreign law evidence in all cases. It would also assist if there were a list of issues approved by the court for the foreign experts to address at the

very latest before the applicant's initial report (usually served with the application to challenge jurisdiction) is responded to. The enforcement of the requirement to obtain permission and the production of a list of issues for foreign law experts would go a long way in preventing the situation which has occurred both in this case and in B.B. Energy (Gulf) DMCC v Al Moudi and Others recurring.

Factual Background

10. The Claimant (**'the Bank'**) is a bank based in the Kingdom of Bahrain. It operates a registered branch in Riyadh in the Kingdom of Saudi Arabia (**'KSA'**).
11. Mr Aldwood is a 51 year-old businessman. He is citizen of the KSA.
12. In April 2013, Mr Aldwood purchased a leasehold interest in a substantial house in Chester Terrace near Regent's Park in London NW1 for £7.7 million. Mr Aldwood also owns a property on the Côte D'Azur in France.
13. In July 2013, Mr Aldwood sought advice on how to apply for a visa from KN. KN formally accepted instructions in January 2014 to "prepare and submit an application for a Tier 1 (Investor) entry clearance for you, your wife and children"
14. The renovation work on his house in Chester Terrace was complete in May 2015. Later that year Mr Aldwood sought further legal advice from KN on an "overall strategy" for his move to the UK and he began to consider appropriate schools in London for his three children.
15. Mr Aldwood's visa application was finally submitted in April 2016 and applications were made for school places for his children for entry in September 2016. The visa application form stated that Mr Aldwood's planned arrival date was June 2016. In fact, he arrived in London with his wife and three children in July 2016.
16. Mr Aldwood was granted a Tier I (Investor) visa in August 2016. His children have attended schools in London since September 2016.
17. By the time of the hearing before me, it was common ground that Mr Aldwood was domiciled in England both on the day these proceedings were issued and the day they were

served on him. I am satisfied on the evidence I have seen that he has been domiciled in England within the meaning of Article 9(2) of the Civil Jurisdiction and Judgments Order 2001 since August 2016.

DMT

18. Before he left Saudi Arabia in July 2016, Mr Aldwood was the owner of a majority shareholding in, and was a director of, the Dar Al Mustawred Trading Company ('DMT'), a limited liability company incorporated in KSA. He retains those shares but they are said to be worthless.
19. It appears that DMT ran into financial problems in 2016. It is no longer trading. DMT sold a wide variety of products including office supplies, construction materials and medical products and purchased metals such as copper, zinc, lead and aluminium.

The 2012 Commodity Agreement

20. In 2012, the Bank made available to DMT a revolving credit facility on the terms set out in a Commodity Murabaha Financing Agreement dated 28 July 2012 ('**the Commodity Agreement**'). DMT is defined as "the Customer" in the agreement but the benefit of the facility is extended to three other companies by clause 2(i).¹ Under the Commodity Agreement, the Bank provided DMT and the three other companies an aggregate sum of SAR50 million (around £8.5 million at the time) for the purchase and sale of goods. The terms are set out in parallel English and Arabic text. Amongst its terms were the following (English text only):

"Clause 2

*(b) Without Prejudice to Clauses (17) "Events of Default" of this Agreement, the Facility shall not, unless the Bank otherwise agrees in writing, be available for utilization after June 27 2013 (**Termination Date**)*

(c) If the Parties agree to renew the Facility following the Termination, then renewal shall be subject to renewal fee to be determined by the Bank

(i) Subject to the Bank consent, the Facility shall be availed for utilization by Tawreedkom for Trading Co. Baher Al Ahbar for Trading Co and Adweyatcom Trading Est

¹ Tawreedkom for Trading Company (a limited liability company incorporated under the laws of the KSA) Adweyatcom for Trading Est (an establishment under the laws of the KSA) and Baher Al-Ahbar Group for Trading Co. (a limited liability company incorporated under the laws of the KSA).

Clause 4 Condition Precedent

The Customer may not make a request to enter any Murabaha Transaction pursuant to Clause (5) of this Agreement unless the Bank has received in form and substance satisfactory to it:

...

(d) Irrevocable and unconditional personal guarantee dully (sic) signed by Mr Badr Fahad Aldwood in form and substance acceptable to the Bank.

(e) Irrevocable and unconditional cross corporate guarantee dully (sic) signed by each of Tawreedkom for Trading Co. Baher Al Ahbar for Trading Co and Adweyatcom for Trading Est in form and substance acceptable to the Bank” (“the Cross Guarantors”)

Clause 28

(a) Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the Kingdom of Saudi Arabia.

(b) Jurisdiction

1. The Parties agree that the Committee for Settlement of Banking Disputes established in the Kingdom of Saudi Arabia pursuant to the Royal Order No. 729/8 dated 10/07/1407H (corresponding to March 10 1987) and operating under the aegis of the Saudi Arabian Monetary Agency (the “SAMA Committee”) shall have jurisdiction to hear and determine any suit action or proceeding arising out of or in connection with this Agreement and for that purpose irrevocably submits to the non-exclusive jurisdiction of SAMA committee.

2. The submission to the jurisdiction of the SAMA Committee shall not (and shall not be construed so as to limit the right of the Bank to take proceedings against the Customer in any other court of competent jurisdiction, including without limitation, the Board of Grievances of the Kingdom of Saudi Arabia”

The renewals of the CMF Agreement in 2013 and 2014

21. The CMF Agreement was renewed twice by amending agreements signed on 10 July 2013 and 21 August 2014. Each amendment substituted a new clause 2 (b) and thereby set a new termination date for the facility. For each amendment DMT was charged a facility renewal fee. The amendments both stipulated as follows on page 2:

“The other Clauses of the Agreement, not subject to this Amendment shall remain unchanged”

The 2012 Letters of Credit Agreement

22. In parallel with the CMF Agreement, the Bank also provided a letters of credit facility to DMT in an agreement dated 28 July 2012 ('the LC Agreement'). The LC Agreement contained terms which were for all practical purposes identical to those I have described above. The method and dates of renewal were the same.

23. I will refer to the LC Agreement and the CMF Agreement collectively as the 2012 Facilities.

The Personal Guarantee

24. On 28 July 2012 Mr Aldwood signed a Personal Guarantee ('the Guarantee') limited to SAR137.5 million. Among the terms of the Guarantee were the following:

"I, **Mr. Badr Fahad Ibrahim Aldawood** Saudi National, of ID #: 001036000048, my address: P. O. Box 10637 Riyadh 11443 Tel.#: _____ Fax#: _____ (the "Guarantor")

بهذا أضمن أنا، السيد / بدر فهد إبراهيم الداود، سعودي الجنسية، سجل مدني رقم **001036000048**، وعنواني: ص. ب. 10637 الرياض 11443 المملكة العربية السعودية، تلفون: _____، فاكس: _____ ("الضامن")؛

hereby irrevocably and unconditionally guarantee to pay the Indebtedness as it falls due pursuant to the terms and conditions of this personal guarantee (the "Guarantee"),

على نحو غير قابل للرجوع عنه ودون أي شروط دفع المديونية عند تاريخ استحقاقها وفقاً لشروط وأحكام هذه الكفالة ("الضمان")،

Clause 1

I undertake to pay to the Bank on its first written demand any and all amounts of the Indebtedness which the Borrower fails, for any reason whatsoever, to repay to the Bank up to a maximum amount of SAR 137,500,000/- (Saudi Riyal One Hundred Thirty Seven Million Five Hundred Thousand Only). In addition, I will pay to the Bank on its first written demand: (i) any and all amounts that are necessary to reimburse the Bank for losses or additional expenses it certifies it has incurred or will incur as a result of the Borrower failing to pay any amount of the Indebtedness; and (ii) any and all amounts that are necessary to reimburse the Bank for its cost and expenses (including, without limitation, legal and other professional fees) incurred in connection with the execution or enforcement of the Agreement or this Guarantee.

سأدفع إلى البنك عند أول مطالبة خطية يتقدم بها أي من وكافة مبالغ المديونية التي تعثر العميل في سدادها لأي سبب مهما كان، وإن أسدد إلى البنك مبلغ أقصاه -NPTIRMMMM- ريال سعودي (فقط مائة سبعة وثلاثين مليون وخمسمائة ألف ريال سعودي لا غير). إضافة إلى ذلك، سأدفع إلى البنك عند أول مطالبة خطية يتقدم بها: (N) أي من وكافة المبالغ المطلوبة لرد أي نفقات إلى البنك بالنسبة لأي خسائر أو مصروفات إضافية يُثبت البنك أنه تكبدها أو قد يتكدها نتيجة لإخفاق العميل في دفع أي مبلغ من المديونية؛ و(O) أي من وكافة المبالغ المطلوبة لرد أي نفقات إلى البنك مقابل تكلفته ونفقاته (بما في ذلك، على سبيل المثال لا الحصر، الأتعاب القانونية والأتعاب المهنية الأخرى) التي تكبدها البنك فيما يتعلق بتوقيع أو تنفيذ اتفاقيات التمويل أو هذا الضمان

Clause 4

My obligations and liabilities will not be discharged, impaired or otherwise affected by:

لا يتم إبراء ذمتي من التزاماتي ومطلوباتي كما لن يتم إضعافها أو بأي طريقة أخرى لن تتأثر بأي مما يلي:

.....

(d) any amendment to, or any variation, waiver or release of the Facilities or the Indebtedness or of any person under any other security;

أي تعديل على أو أي تغيير أو تنازل عن التسهيلات أو المديونية أو إعفاء أي شخص آخر بموجب أي ضمان آخر

Clause 11

A statement in writing signed by the Bank certifying the amount due at any time from the Borrower and/or myself shall be conclusive evidence of the matters so certified

سيكون الإقرار الكتابي الموقع من قبل البنك بتحديد المبلغ المستحق في أي وقت على العميل و/ أو على شخصي دليلاً قاطعاً على الأمور الواردة فيه.

Clause 15

This Guarantee shall be governed and construed in accordance with the laws of the Kingdom of Saudi Arabia.

يُحكَم هذا الضمان ويُفسر بموجب أنظمة المملكة العربية السعودية.

Clause 16

I agree that:

(a) the Committee for Settlement of Banking Disputes established in the Kingdom of Saudi Arabia pursuant to the Royal Order No. 729/8 dated 10/07/1407H (corresponding to March 10, 1987) and operating under the aegis of the Saudi Arabian Monetary Agency (the "SAMA Committee") shall have jurisdiction to hear and determine any suit, action or proceeding arising out of or in connection with this Guarantee and for that purpose irrevocably submits to the non-exclusive jurisdiction of SAMA Committee, and

إن لجنة تسوية المنازعات المصرفية التي تم تأسيسها في المملكة العربية السعودية بموجب الأمر الملكي رقم UTOV بتاريخ NQM/M/NM هـ (الموافق 10 مارس 1407هـ) والتي تعمل تحت دعم مؤسسة النقد العربي السعودي، سيكون لها الاختصاص لسماع والفصل في أي قضية أو دعوى أو إجراءات تنشأ من أو تتصل بهذا الضمان وعلى هذا النحو أقر على نحو لا رجعة عنه بالخضوع للاختصاص غير الحصري للجنة ساما، و

أوافق على ما يلي:

(b) the submission to the jurisdiction of the SAMA Committee shall not (and shall not be construed so as to) limit the right of the Bank to take proceeding against me in any other court of competent jurisdiction, including without limitation, the Board of Grievances of the Kingdom of Saudi Arabia.

إن الخضوع لاختصاص لجنة ساما يجب أن لا يُقيد (وإن لا يُفهم أنه يقيد) حق البنك في اتخاذ أي إجراءات في مواجهتي أمام أي محكمة مختصة، ويشمل ذلك على سبيل المثال لا الحصر، ديوان المظالم في المملكة العربية السعودية.

Clause 22

I irrevocably and unconditionally waives any immunity to which I or my rights, assets and property may at any time be or become entitled, whether characterized as sovereign immunity or otherwise, from any set-off or legal action in the Kingdom of Saudi Arabia or elsewhere including immunity from service of process, immunity from jurisdiction of any court or tribunal, and immunity of any of my rights, assets and property from attachment prior to judgment or from execution of a judgment."

أتنازل بموجب هذا الضمان على نحو غير قابل للرجوع عنه ودون أي شروط عن أي حصانة لي ولحقوقتي وموجوداتي وممتلكاتي أو قد أتمتع بها في أي وقت من الأوقات سواء كانت ذات طابع سيادي أو خلافه من أي مقاصة أو إجراء قانوني في المملكة العربية السعودية أو خارجها بما في ذلك الحصانة فيما يتصل بأي تبليغ أو الحصانة من الاختصاص أو أي محكمة أو لجنة والحصانة فيما يتصل بأي من حقوقه وأصوله وممتلكاته من أي حجز قبل إصدار أي حكم أو من تنفيذ أي حكم.

The Cross Guarantee

25. A cross guarantee ('the Cross Guarantee') was executed by the three companies referred to in Clause 2 (i) of both the Commodity and LC Agreements.

The Promissory Note

26. On 21 August 2014, DMT executed a promissory note ('the Promissory Note') in favour of the Bank in the sum of SAR137,500,000. The Promissory Note was signed by Mr Aldwood. The provision of the Promissory Note coincided with the renewal of the 2012 Facilities for the year to 27 July 2015.

No charge on Mr Aldwood's property

27. The security for the 2012 Facilities thus comprised the Guarantee, the Cross Guarantee and the Promissory Note. The Bank did not take any security in the form of a charge or mortgage over any property owned by Mr Aldwood. The Bank did not put in to evidence any information it held about Mr Aldwood's assets in KSA before it advanced the 2012 Facilities or on the occasion of either of the renewals in 2013 and 2014.

Expiry of the 2012 Facilities in 2015

28. The 2012 Facilities expired without further renewal on 27 July 2015. There was no evidence as the terms on which the facilities were operated after 27 July 2015.

Events in 2016

29. In February 2016, the Bank began to chase for DMT for repayment of sums which were due. The demands became more frequent and urgent in tone in April 2016.

First Letter of Demand

30. On 8 May 2016, the Bank sent a letter of demand to DMT for the attention of Mr Aldwood. The letter demanded the immediate repayment of SAR733,753.56 (about £150,000). Although the Bank was clearly making demand on DMT (rather than Mr Aldwood) for this sum, the letter goes on to say:

“In the case of failure to settle the current outstanding, the Bank will have no choice but to take all legal measures available to it including, but not limited to listing of the name of the Borrower as well as the guarantors to the list of defaulters (blacklist) in the Saudi Credit Bureau and to file a claim lawsuit before Committee for Settlement of Banking Disputes and/or any other judicial body”

31. A meeting between Mr Aldwood and the Bank scheduled for 11 May 2016 in Riyadh did not take place. However, representatives of the Bank did visit the offices of DMT that day and spoke to senior management.

19 May 2016 meeting

32. A meeting did finally take place between the Bank and Mr Aldwood on 19 May 2016. The Bank's internal note of this meeting records that Mr Aldwood requested a restructuring of DMT's borrowing. The Bank asked for outstanding amounts to be cleared first and demanded collateral before it was prepared to discuss any restructuring.

33. The meeting on 19 May 2016 appears to have been the last face to face meeting between the Bank and Mr Aldwood before he left Saudi Arabia in July. Mr Aldwood did not inform the Bank that he was moving to London or provide his UK contact details to the Bank.

Second Letter of Demand

34. On 25 May 2016, a further letter of demand was sent to DMT for the attention of Mr Aldwood. The sum demanded was the same as in the first letter of demand, namely SAR733,753.56 (about £150,000).

The first enforcement action in KSA

35. On 22 June 2016 the Bank obtained a judicial decision against DMT in the KSA (Decision No. 37354469) in response to enforcement application made in relation to the Promissory Note. The decision declared that DMT is obliged to pay the Bank SAR137.5 million to the Bank. Mr Aldwood says that this action by the Bank caused all DMT's accounts to be frozen and ultimately caused DMT to cease trading.

Application for extension of repayment obligation

36. On 29 June 2016, DMT wrote to the Bank to seek an extension in these terms:

“With reference to the sums due, we inform you that in view of the economic circumstances and the conditions with regard to collection generally, we will not be able to pay the sums due in full. We hope you will be able to agree to the scheduling of the entirety of the facilities over a period of 60 months...”

Internal Memo of 17 August 2016

37. In August 2016, there were two meetings involving representatives of the Bank and three Saudi banks which had advanced credit facilities to DMT. An internal memo of these two meetings dated 17 August 2016 recorded that the finance manager at DMT had resigned.

38. The memo continues:

“There is no-one with power to answer customer queries and/or allay bank concerns. Client representative Ahmad Allafouza is still attending our calls. However, he is not a decision maker.

According to information available, the owner, Badr [i.e. Mr Aldwood] was in London since the past few days and was neither returning calls nor responding to messages...

The personnel mentioned that Badr [i.e. Mr Aldwood] has two palaces in Riyadh amounting to SAR250-300 along with other villas and apartment he supposedly owns. Although he has assets overseas, the extent of his wealth outside the country is not known. A total of two banks have already filed the case against the customer in the enforcement court. ANB has filed its case with SAMA. ...

Attendants of the meeting mentioned that the total exposure of the three banks namely ANB, GIB, SABB, SHB amounted to a total of SAR450 million+, with SHB at the highest level (SAR 180MM+).

The second enforcement action in the KSA

39. On 28 July 2017, the Bank obtained a further judicial decision under the Promissory Note (Decision No. 38788678). This decision was against Mr Aldwood personally. The Decision required him to pay SAR137.5 million. Mr Aldwood says that he was unaware that the Bank had taken this action in the KSA against him until the WWFO evidence was served on him on 18 January 2019. The Bank says that Mr Aldwood would have come to hear of the decision because he would have been notified of it by mobile phone via his *Absher* account (which is the electronic means by which public authorities in the KSA disseminate information to citizens).

Instruction of Enyo

40. In July 2017, the Bank instructed Enyo in relation to its potential claim under the Personal Guarantee. Surveillance agents instructed by Enyo located Mr Aldwood by examining planning application records in London boroughs in which it was thought he was most likely to have settled. He was also photographed by them in London.

2018

41. It was not until 29 November 2018 that the Bank instructed Enyo to issue a claim against Mr Aldwood under the Personal Guarantee in England. The Claim Form was issued on 13 December 2018.

2019

42. On 18 January 2019, the Bank obtained the WWFO from Mr Justice Murray and served it and the Claim Form on Mr Aldwood later that day near his home.

43. That is the factual background against which both applications must be decided. I will deal with the challenge to jurisdiction first.

I. The challenge to the court's jurisdiction

44. There were initially two challenges to the jurisdiction of this Court:

First: the Court should declare that it has no jurisdiction because the Personal Guarantee contains an exclusive jurisdiction clause in favour of the courts of KSA;

Secondly: this Court should not exercise jurisdiction to hear the claim under the Personal Guarantee because the KSA courts are clearly and distinctly the more appropriate forum.

45. Before me, Ms Hilliard QC, who appeared with Mr Randall on behalf of Mr Aldwood, did not pursue the first challenge. She was right not to do so. Once it was conceded: (a) that Mr Aldwood was domiciled in England and Wales at the time the proceedings were commenced and (b) that the Banks's claim is a "civil and commercial matter" within the meaning of Regulation 1215/2012 (**'the Recast Regulation'**), it follows that the Court has jurisdiction to hear the claim under Article 4(1) of the Recast Regulation.

46. The second challenge was also considerably modified by Ms Hilliard. The argument set out in the skeleton argument served on behalf of Mr Aldwood invited the court to decline to exercise any jurisdiction it might have over Mr Aldwood by reference to the principle of *forum non conveniens* as set out in Spiliada Maritime Corporation v. Cansulex Ltd [1987] 1 AC 460 per Lord Goff at 474B-478E and "The Rothnie" [1996] 2 Lloyd's Rep 206 at 209(cl 2) -210. However, the argument advanced orally had a different emphasis.

47. In her oral submissions, Ms Hilliard invited me to stay these proceedings on the basis of the discretionary power described in The Eleftheria [1970] and The El Amria [1981] 2 Lloyd's Rep 119. This discretion was described in The El Amria in the following terms:

"(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case.

The following matters, where they arise, may properly be regarded: (a) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies, and if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a timebar not applicable in England; or (iv) for political, racial, religious or other reasons unlikely to get a fair trial.”

48. In Konkola Copper Mines PLC v Coromin [2005] EWHC 898, Colman J. said the following about an application for a stay on The El Amria grounds:

“The approach is not dissimilar to a forum non conveniens analysis albeit the concept of “strong cause” gives substantial weight to the applicability of the jurisdiction clause. The decision of the House of Lords in Donohue v. Armco Inc [2002] 1 Lloyd’s Rep 425 adopts substantially the same approach as Brandon LJ, Lord Bingham substituting “strong reasons” for “strong cause” and taking into account as a highly material fact, the risk of proliferation of litigation.”

49. Ms Hilliard submitted that it was permissible for the Court to entertain an application for an El Amria stay where jurisdiction was founded under Article 4(1) of the Brussels Recast Regulation. She relied on a number of first instance decisions under the Regulation’s predecessors (the Brussels Convention and Regulation 44/2001). She placed particular reliance on Winnetka Trading Corp. v. Julius Baer International Ltd and another [2009] Bus LR 1006 at [18] in which Norris J acceded to an application to stay a claim against a company domiciled in England and Wales. The court in that case had jurisdiction under Art 2 of Regulation 44/2001 but the parties had entered into an agreement which contained a jurisdiction clause in favour of the courts of Guernsey.

50. Winnetka was followed in Plaza v The Law Debenture Trust Corporation PLC [2015] EWHC 43 (Ch). In that case, Proudman J reviewed a number of first instance decisions including: Konkola Copper Mines plc v. Coramin Limited [2005] EWHC 898 (Comm), Ferrexpo v. Gilson Investments [2012] EWHC 721 (Comm) [2012] 1 Lloyds Rep. 588, and Winnetka and concluded:

“75. I agree with Norris J’s decision in Winnetka and Lawrence Collins LJ’s observations in Masri. The parties’ autonomy to choose the forum in which to settle their disputes is an important one which exists in European law as well as national law as can be seen from article 23 (1) itself. The court should not lightly override that principle.

76. I note that article 23 (1) is a mandatory exception to article 2, unlike forum non conveniens. In my judgment Owusu does not bar a reflexive application of article 23 (1). A mandatory exception to a rule does not have the same potential to undermine legal certainty as a discretionary exception.”

Meaning of ‘reflexive effect’

51. It is important to be as clear as possible about what is meant by “reflexive application” of the Recast Regulation. The term ‘reflexive effect’ appears to have been coined by the French private international lawyer Georges Droz (1931 – 2004) but I was not taken to any of his writings on the subject. What I understood Ms Hilliard to mean by it in the context of her application is that the English court may have recourse to its own discretionary rules albeit applied in such a way as to reflect the terms of the Recast Regulation. In Catalyst Investment Group Limited v Lewinsohn [2009] EWHC 1964 (Ch) Barling J described the submission made in that case for the reflexive application of Article 27 of the Regulation 44/2001.

“Mr Phillips submits that the existence in the present case of parallel proceedings in the non-EU jurisdiction in question takes us outside Owusu. Mr Phillips does not, at least in his primary submission, rely upon lis pendens in Utah as a free-standing ground for a stay. Rather he argues that because of the existence of those parallel proceedings Article 27, interpreted “reflexively”, triggers this Court’s ability to apply conventional, discretionary, forum conveniens principles. In other words, provided only that one of the factors in a case is the existence of such parallel proceedings, this Court can exercise its discretion to stay proceedings of which it is properly seised under Article 2, by applying conventional forum conveniens criteria.”

52. In *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm), a case concerning the reflexive application of Article 22 of Regulation 44/2001 (exclusive jurisdiction), Andrew Smith J said this at [125] and [127]:

“[125] *I have referred to the arguments that article 22 and article 28 should be given a “reflexive application”, although the expression does not, as I understand it, have a precise meaning. (I have, as I think is conventional, referred to the question in terms of whether article 22 should be given a reflexive effect, although it might also be expressed in terms of whether this effect should be given to article 25, but that is only semantics.) It covers at least three lines of argument that in some circumstances the court may decline jurisdiction or stay proceedings in favour of the jurisdiction of a non-member state, and that Owusu does not (or does not always) preclude the court from doing so.*

i) The most rigid reflexive theory would require the court to apply provisions of the Brussels Regulation by analogy, as though non-member states were member states, so that:

a) the court would not have jurisdiction in a case that would be covered by article 22 (or at least the relevant parts of article 22) if the non-member state were a member state; and

b) in a case that would be covered by article 28, the court would have similar discretion as in a case where the related action was before a court of a non-member state.

*ii) The most flexible reflexive theory would afford the court discretion whether or not to accept jurisdiction in cases involving issues covered by (at least the relevant parts of) article 22, exclusive jurisdiction agreements, *lis alibi pendens* and related actions.*

iii) The third theory would allow the court to exercise powers available under the doctrines of national law in cases where, had there been a similar connection with a member state, the court would have had to decline jurisdiction.

*See Clarkson and Hill, *The Conflict of Laws* (4th Ed, 2011) at p.143.*

...

[127] *The argument that the law does require a reflexive application of these articles of the Brussels Regulation (rather than the law should do so) does not, as I see it, suppose that the Brussels Regulation itself confers on the court the power to decline jurisdiction or stay proceedings. Rather it is that the Regulation allows the court to exercise the powers available to it under its national law: here the Civil Procedure Rules (“CPR”) include a power to “stay the whole or part of any proceedings or judgment either generally or until a specific date or event” (CPR 3.1(2)(f)), a power expressly recognised by section 49 of the Senior Courts Act, 1981. Its proper*

exercise is not unfettered, in that the court must not order a stay that is contrary to the letter or purpose of the Brussels Regulation. The argument for giving some articles reflexive effect is that this is required in order to give effect to the purpose (albeit not the letter) of the Regulation. If the court accepts this argument and therefore decides not to accept jurisdiction, to my mind (pace Cheshire, North and Fawcett 2007, 14th Ed p.333) the proper form of order is to stay the proceedings”.

53. In Plaza, Proudman J said this:

“Reflexive application is a term of art in the field of conflicts of law, allowing the court to apply by analogy provisions of European law by treating non-member states as they were member states...The court’s vehicle for analogous application is via a purposive use of its discretion to stay proceedings under the CPR” [65]

54. It would appear that reflexive effect, at least as it is understood by the English courts, involves a Member State court applying its own national law in such a way as to treat a non-Member State as if it were a Member State. As to the national law being applied, in England that will generally be a procedural power such as CPR 3.1(2)(f). The exercise of this power is informed by a principles developed at common law such as those in The El Amria for applications involving jurisdiction agreements in favour of the courts of a non-Member State.

55. Ms Hilliard did not refer me to any decision of the European Court of Justice or any opinion of an Advocate General of that court which supports the doctrine of reflexive effect. However, in C-420/07 Apostolides v Orams [2009] ECR I-3571, Advocate-General Kokott said this:

“It is admittedly disputed in academic writings whether Article 22(1) produces a ‘reflex effect’ in favour of non-member States. However, the Court appears to reject such an effect.”

56. I understood Ms Hilliard’s submission (based on the English authorities I have referred to) to be that the existence of clause 16 in the Personal Guarantee permits the court to exercise its domestic discretionary power to impose a stay on the basis of the principles set out in The El Amria. This is said to be consistent with the Recast Regulation because it amounts to a reflexive application of Article 25 (i.e. by treating the KSA as if it were a EU Member State). It is justified because it promotes the principle of autonomy which is one of the aims of the Recast Regulation.

The Bank's submissions in response

57. Mr Cook's submissions in response falls into three parts. He has a general submission of law, a more specific submission on the facts of this case and, finally, a fall-back submission if the discretion in The EL Amria as contended for by Ms Hilliard is available to be exercised in this case.

58. His general submission of law is that on its proper interpretation there is no scope under the Recast Regulation for the court of Member State to have resort its own national law for a discretionary power to stay claims for which it has jurisdiction under Article 4(1) in order to enforce a jurisdiction clause in favour of third State regardless of whether that power is exercised 'reflexively' or not.

59. His argument was based on the following propositions:

- a. The Regulation is based on the fundamental principle set out in Article 4(1) that jurisdiction is to be based on the defendant's domicile. This general rule is for the benefit of both claimants and defendants. It promotes certainty and predictability.
- b. On its true construction the only permitted exceptions to jurisdiction based on Article 4(1) are those to be found in the Recast Regulation itself. This promotes certainty, predictability and uniformity of outcome across the courts of Member States.
- c. To permit a court of a Member State to have recourse to a discretionary power in its national law to stay a claim within the domain of the Recast Regulation would undermine the principal aims of the Recast Regulation (see Owusu v. Jackson C-281/02 [2005] QB 801).
- d. Unlike its predecessors, Articles 33 and 34 of the Recast Regulation now regulate the circumstances in which in which a court which has jurisdiction based on domicile (pursuant to Article 4(1)) may stay a claim in favour of a court in a third State. Among the circumstances which may be taken account of is whether the parties have agreed a jurisdiction clause in favour of that third State. This new

feature of the Recast Regulation makes it clear that a parallel national discretionary power to stay proceedings in favour of a court in a third State cannot be permitted.

- e. The EU is a party to the Hague Choice of Court Convention which is a convention based on the principle of reciprocity. The Hague Convention and the Recast Regulation leave no space for a discretionary stay based on the domestic law of individual Member States.

60. His alternative more fact sensitive submission is as follows:

- a. If an application for a stay on El Amria grounds may be made in respect of a claim for which the court has jurisdiction under Article 4(1) of the Brussels Recast Regulation, no stay should be granted in this case because clause 16 in the Personal Guarantee is not an exclusive jurisdiction clause but an asymmetrical jurisdiction clause which permits these proceeding to be brought here.
- b. Therefore Mr Aldwood is not entitled to a stay in any event.

61. Thirdly, he submits that even if he is wrong on both his first and second submissions and Clause 16 of the Personal Guarantee is an exclusive jurisdiction clause which the Bank is in breach of, on the facts of this case no stay ought to be imposed in any event.

The Bank's first submission

62. Mr Cook's first submission is firmly based on what he submits is the proper interpretation of the Recast Regulation.

63. It was common ground that the issue of interpretation has not been decided in any previous reported case under the Brussels Recast Regulation.

64. Mr Cook quite properly drew my attention to the fact the current editors of *Dicey and Morris on the Conflict of Laws* are against him on his first submission. In the current supplement to the main work they say this:

*“It is tentatively submitted that the views expressed in this paragraph of the main work that it is permissible for an English court at its discretion, to grant a stay in these circumstances apply also in respect of the recast Brussels I Regulation”.*²

The correct approach to the interpretation of the Recast Regulation

65. In my judgement, the correct approach is (i) to interpret the Recast Regulation in accordance with the well-established autonomous European law principles of construction; (ii) to apply the decisions of the courts binding on me (iii) to consider previous first instance decisions in this jurisdiction under previous incarnations of the Regulation. In respect of step (iii), I am mindful that it is not the role of a first instance judge to engage in academic debates about the correctness or otherwise of decisions under previous versions of the Regulation. My duty is to decide the respective rights of the parties in these proceedings under the present form of the Regulation according to the authorities binding on me.

66. It is settled law that the Recast Regulation must be interpreted purposively or teleologically.

Prof Briggs has described the position thus:

“The Regulation is the latest incarnation of a legislative text designed and drafted by civil lawyers trained in the continental legal tradition, and subject to authoritative interpretation by judges who are almost all civilian lawyers. It was made and has to be understood, to be interpreted according to European canons of construction, at least if it is to be understood in a way which will confirm to the views of the European Court.

*The English approach of interpreting, more or less literally, the precise relevant words following the prior decisions of earlier courts, is not exactly the European way. Instead the Regulation must be interpreted purposively, or teleologically; that is to say with a view which gives predominant weight to achieving the overall purposes of the instrument as a whole, as distinct from seeking to ascertain the natural meaning of a single provision taken in isolation from the rest of the text”*³

67. Prof Briggs goes on to say:

“[A]ttention to the general principles underpinning the Regulation, as the European Court has declared them ... is the proper first step in the interpretation of any individual provision. Where they point in different directions, an argument

² 5th cumulative supplement – additional text to para. 12-024.

³ *Civil Jurisdiction and Judgments* (6th ed. 2015) para. 2.05, citing C-45/13 Kainz v Pantherwerke AG [2015] QB 34 [18]-[19].

which is well founded by reference to the purpose of the Regulation as a whole has the greatest prospect of being found to be correct.”

68. I agree.

The applicable principles

69. What are the general principles underpinning the Regulation which constitute the first step in interpreting its provisions? There are at least four which have been identified in the case law and commentary:⁴

- a. *The Regulation ought to be interpreted so as to promote legal certainty and predictability.*
- b. *The principle of effectiveness.* According to this principle, rules of national procedure must not be permitted to undermine the application and intended effect of the Regulation
- c. *Where the Regulation has a general rule and exceptions, the latter are to be construed narrowly.* This is self-explanatory but has particular relevance to cases in which jurisdiction is based on Article 4(1).
- d. *The principle of continuity.* According to this principle, unless it is plain that a change in the wording was meant to produce a different outcome, the answers and interpretations given in relation to the previous incarnations of the Regulation continue to apply for the purposes of the Regulation.

70. The principle of legal certainty and predictability is expressed in clear terms in Recital (15) where it is linked with Article 4(1):

“The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile.”

71. The principle of effectiveness is given expression in Recital (13) which states:

“There must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly common rules of jurisdiction should in principle apply when the defendant is domiciled in a Member State”.

⁴ See Briggs para. 2.06 and 2.08 and the cases cited therein.

72. Recital 13 may be contrasted with Recital (14) which states:

“A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised.”

73. Thus, both the principles of effectiveness and predictability are linked in the Recitals to the principle of founding jurisdiction by reference to the domicile of the Defendant.

Articles 4 and 6

74. Recitals 13 and 14 are reflected in the text of Articles 4 (1) and 6(1):

Article 4

- 1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*
- 2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.*

Article 6

- 1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.*
- 2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.*

75. The combined effect of Articles 4 and 6 of the Regulation would appear to be that for claims within its domain (as defined by Article 1), it is the common rules of the Regulation which apply, either in full, pursuant to Article 4(1), or in part, pursuant to Article 6(1). To put it the other way, the domestic law of Member States courts has no role in determining jurisdiction for Defendants domiciled in the EU, only partial effect for Defendants in proceedings in the EU who are not domiciled in the EU but applies entirely free from the effect of the Regulation for claims falling outside the domain of the Regulation altogether.

76. Mr Cook referred me to Knauf UK GmbH v British Gypsum Ltd [2002] 1 WLR 907 at [49] in support a submission that the rule of domicile in Article 4(1) is not solely for the benefit

of the Defendant but is also intended to benefit creditors who wish to know in which court to bring claims. I accept this submission. Article 4(1) is clearly intended to have this double aspect. Although it was not cited to me the recent judgment of the Supreme Court in Lungowe v Vedanta Resources PLC [2019] UKSC 20 endorses this interpretation at [16].

77. For better or worse, the authors of the Regulation and its predecessors chose a system which favoured the certainty of a basic general rule of jurisdiction based on domicile over flexibility and discretion. The contrast between the common law approach and the European approach has recently been commented upon by the Court of Appeal in these terms in Merinson v Yukos International UK BV [2019] EWCA Civ 830:

“Regulation (EU) No. 1215/2012 of the European Parliament and of the Council (“Brussels Recast”) and its predecessors introduced jurisdiction rules differing markedly from those hitherto prevailing at common law. In place of flexibility and judicial discretion (including the doctrine of forum non conveniens), fixed rules were introduced, prioritising certainty and predictability, in accordance with the philosophy underpinning Brussels Recast.”

78. The words “*Subject to this Regulation*” at the beginning of Article 4(1) are in my judgment a strong indication that it is the terms of the Regulation alone which should govern jurisdiction for Defendants who are domiciled in the EU.

79. Interpreting article 4(1) as meaning that the basic rule of domiciliary jurisdiction may only be departed from when expressly permitted by the terms of the Regulation itself is supported by Case No C-51/97 *Réunion Européene* [1998] ECR I-6511, in which the ECJ said (at para 16):

“It is settled case-law that under the system of the Convention, the general principle is that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction and that it is only by way of derogation from that principle that the Convention provides for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Contracting State. Consequently, the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention.” (emphasis added)

80. The words “*which are exhaustively listed*” support Mr Cook’s submission that any exceptions to the exercise of jurisdiction based on the domicile must be found in in the Convention itself or not at all.

81. Article 4(1) could have for example said “*Subject to this Regulation and such jurisdiction rules of the court of the Member State seised in so far as they are consistent with the terms of this Regulation and promote its aims*” but it does not. The reason it does not is because the system is set up to promote legal certainty, predictability and uniformity over local rules some of which may provide a greater discretionary flexibility.

82. Opening the door to the domestic rules of 28 Member States which may or may not provide a power to stay claims where jurisdiction is based on the domicile of the Defendant but it appears to the court seised that a court of non-EU state may be more appropriate would create widespread unpredictability and inconsistency. This would seem to me to be the case even if those local rules were applied in such a way as to be consistent with the broad aims of the Regulation.

Article 25

83. Article 25 permits parties in principle to agree which court of a Member State shall have jurisdiction to determine certain types of disputes. If they are valid and enforceable, such agreements may override jurisdiction based on Article 4(1) by means of a mandatory stay. This is consistent with the respect for party autonomy. This is specifically recorded in Recital 19:

“The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation”

84. However, the commitment to the principle of autonomy in the Recast Regulation is qualified, in a number of significant respects:

- a. To be effective any agreement must satisfy certain formal requirements;
- b. Only agreements stipulating that courts located within the EU benefit from protection by mandatory stay;
- c. A jurisdiction agreement may not override certain categories of exclusive jurisdiction; and

- d. Any agreement which is contrary to Articles 15, 19 and 23 (which contain special rules for consumer contracts, insurance and employment contracts) will have no legal force.

85. Like all other exceptions, to the basic rule of Article 4(1), Article 25 is interpreted restrictively. Thus, it is built into the structure of the Recast Regulation that the respect paid to party autonomy ranks in general terms below the basic rule of jurisdiction based on domicile.

Articles 33 and 34

86. Articles 33 and 34 of the Recast Regulation are new. They provide courts of Member States with a power to stay proceedings founded on the domicile of the Defendant in the EU where the proceedings in the third State involve the same cause of action and the same parties (Article 33) or are related (Article 34) on the following terms:

Article 33

1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:

(a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and

(b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

2. The court of the Member State may continue the proceedings at any time if:

(a) the proceedings in the court of the third State are themselves stayed or discontinued;

(b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or

(c) the continuation of the proceedings is required for the proper administration of justice.

3. The court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

4. *The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.*

Article 34

1. *Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:*

- (a) *it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;*
- (b) *it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and*
- (c) *the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.*

2. *The court of the Member State may continue the proceedings at any time if:*

- (a) *it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;*
- (b) *the proceedings in the court of the third State are themselves stayed or discontinued;*
- (c) *it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or*
- (d) *the continuation of the proceedings is required for the proper administration of justice.*

3. *The court of the Member State may dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.*

4. *The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.*

87. One of the factors relevant to the discretion to stay under both Articles is whether the stay is “*necessary for the proper administration of justice*”. Recital (24) says this:

“When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.”

That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction.” (my emphasis)

88. The Recital thus makes clear that in applying the power to stay proceedings under Article 33 and 34 a court in a Member State may take into account a very wide range of factors including “connections between the facts of the case and the parties”. Such circumstances may clearly include the existence of a jurisdiction agreement in favour of the third State court, or facts which if the state in question had been a Member State would have founded exclusive jurisdiction. It is therefore clear that some aspects of reflexive effect have now been incorporated into the Regulation itself.
89. The range of factors a court is able to take into account under an application for a stay under Article 33 or 34 is very similar to the factors as English Court would take into account on an El Amria stay application at common law. There are, however, two major differences:
- a. In order to be able to rely on a jurisdiction clause in favour of non-Member State to support a stay under Article 33 the party in question must have actually commenced proceedings in that state; and
 - b. There is no presumption in favour of a stay.
90. The Recast Regulation continues to give greater protection for jurisdiction agreements designating a court of a Member State. For this category, subject to meeting all the other conditions, a stay is mandatory whereas for jurisdiction agreements designating a court of a non-Member State there is only a discretion and even that only exists if proceedings have actually been commenced in that state.
91. As a result of the inclusion of Articles 33 and 34 it cannot be said of the Recast Regulation that it is concerned only with regulating the jurisdiction between the courts of Member States or that it fails to provide a mechanism to give effect to jurisdiction agreements in favour of countries outside the EU. It plainly now does both. Its rules do not give the same

degree of importance as the English rules to the principle of party autonomy because of the differences described in paragraph 89 above.

92. In my judgment, in light of the inclusion of Articles 33 and 34, to interpret the Recast Regulation as permitting a Member State court to have recourse to a parallel local discretionary power to stay a claim in which jurisdiction was established under Article 4(1) with different preconditions and differently weighted factors than under Articles 33 and 34 would conflict with all first three of the principles underpinning the interpretation Regulation which I set out in paragraph 69 of this Judgment.

The case law

93. Pursuant to the principle of continuity it is necessary to consider the European case law on previous incarnations of the Regulation. The main case on which Mr Cook bases much of his submissions is Owusu v Jackson C-281/02 [2005] QB 801. However, given the way Ms Hilliard puts her case, it also necessary to consider the earlier case of C-387/98 Coreck Maritime GmbH v. Handelsveem BV ECR I-9337.

94. In Ferrexpo v. Gilson Investments [2012] EWHC 721 (Comm) [2012] 1 Lloyds Rep. 588, which is one of the cases relied upon by Ms Hilliard, it was said at [131] that the ECJ had decided in Coreck that it is permissible for a national court to decline to exercise jurisdiction based on what is now Article 4(1) in at least some circumstances and that Owusu cannot be read as “overturning this decision”. I disagree with this interpretation of the Coreck decision and see nothing in it which entitles me to give a restricted interpretation to Owusu.

Owusu v Jackson

95. The facts of Owusu are as follows. Andrew Owusu had rented a holiday villa in Jamaica from a Mr Jackson. Mr Owusu suffered a catastrophic spinal injury when he dived into the sea and hit a sandbank whilst bathing on the private beach which was attached to the villa. He sued Mr Jackson in contract for failing to provide a safe holiday.

96. Mr Jackson was domiciled in England. The claim form was therefore served on him in England in the usual way. Mr Owusu relied on Article 2 of Regulation 44/2001 to give the English Court jurisdiction. There were three other Defendant domiciled in Jamaica who were also served with proceedings out of the jurisdiction pursuant to CPR 6.20(3). Mr

Jackson (and the other two Defendants) applied for a stay on *forum non conveniens* grounds. They asserted that matters in question and the evidence were all more closely connected to Jamaica than England.

97. The Deputy High Court Judge who heard the application rejected a stay based on the following part of the judgment in UGIC v Group Josi Reinsurance Co SA (C-412/98) [2001] QB 68 at [55]:

“The Convention enshrines, on the other hand, the fundamental principle that the courts of the Contracting State in which the defendant is domiciled or established are to have jurisdiction.”

98. Mr Jackson appealed. As part of its reasoning for referring the matter to the ECJ, the Court of Appeal⁵ noted that Advocate-General Darmon had expressed the view in two cases that the Brussels Convention was not intended to regulate jurisdictional disputes which might arise between courts in a contracting state on the one hand and those in a non-contracting state on the other [42].

99. The Court of Appeal also considered that the point of principle raised in the case went beyond whether *forum non conveniens* could be relied upon as basis for staying a claim in contract:

“The present case is concerned with the doctrine of forum conveniens, when applied as between a member state and a non-member state. But it might just as easily have been concerned with the doctrine of lis alibi pendens, or “prorogation of jurisdiction”, or the rule that disputes concerned with rights in rem over immovable property should be heard in the state where the property is situated, or any of the other situations for which the Brussels Convention provides discretionary or mandatory exceptions (in Sections 2 to 6 of Title 2 of the Convention).” [45]

100. I agree. Viewed from the perspective of Brussels Convention or the Recast Regulation the precise categorisation at domestic level of the nature of the discretion to stay is less important than its substance. The issue which the Court of Appeal identified was whether it is consistent with the Convention for any discretionary stay under national law to be permitted where jurisdiction has been founded on domicile.

⁵ [2002] EWCA Civ 877

101. The Court of Appeal referred the following two questions to the ECJ. The very general words used in Question 1 are in my judgment important because they correspond to the point made in the passage from paragraph 45 of the referring court’s judgment:

***Q1** Is it inconsistent with the Brussels Convention on Jurisdiction and the Enforcement of Judgments 1968, where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise **a discretionary power, available under its national law**, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State:*

(a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue;

(b) if the proceedings have no connecting factors to any other Contracting State?

***Q2** If the answer to question 1(a) or (b) is yes, is it inconsistent in all circumstances or only in some and if so which?*

(Emphasis added)

The ECJ’s answer

102. The answer provided by the Grand Chamber of the ECJ to Question 1 was an emphatic ‘Yes’. The court held that it was inconsistent with the Convention for a court to exercise a discretionary power to stay a claim against a person domiciled in the relevant Member State.

103. The following passages from the judgment of the Grand Chamber are in my judgment particularly important (with my emphasis added):

“Article 2 of the Brussels Convention applies to circumstances such as those in the main proceedings, involving relationships between the courts of a single Contracting State and those of a non-Contracting State rather than relationships between the courts of a number of Contracting States” [35]

*“It must be observed, first, that **Article 2 of the Brussels Convention is mandatory in nature** and that, according to its terms, **there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention**” [37]*

Application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that

of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention [41]

*[A]llowing forum non conveniens in the context of the Brussels Convention would be likely to affect the uniform application of the rules of jurisdiction contained therein in so far as that doctrine is recognised only in a limited number of Contracting States, whereas **the objective of the Brussels Convention is precisely to lay down common rules to the exclusion of derogating national rules** [43]”*

104. The Grand Chamber could not have been any clearer. Paragraphs [37] and [43] seems to me to be free of ambiguity. In my judgement, those two paragraphs provide very strong support for Mr Cook’s submission that only those powers to stay a claim against a Defendant domiciled in Member State as are provided for in the Recast Regulation may be relied upon by an applicant who seeks to challenge jurisdiction for a claim within the domain of the Recast Regulation. Put simply, local discretionary stays are excluded.

105. It is important to note that although the court referred in the course of its judgment at various points specifically to the doctrine of *forum non conveniens*, the tenor of the judgment (which is binding on me) is not so specific. It states more generally that the Convention:

“precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State”

106. The use of the general words “would be a more appropriate forum” suggest that that recourse to any national rule leading to a finding that a court of a non-Member state is more appropriate is precluded if jurisdiction is founded under what is now Article 4(1). It does not appear to matter why the court is more appropriate. It could be because of an existing set of proceedings in that court or an exclusive jurisdiction clause or because of where evidence is located. Thus, just as the question referred to the ECJ by the Court of Appeal was not confined to *forum non conveniens* applications in the narrow sense, nor was the answer the European court gave.

107. Owusu has been the subject of a great deal of criticism from English commentators. It has been said to be “depressing”, “suspect”, “superficial” and “wrong”.⁶ However, not only is the decision of the Grand Chamber directly binding on me but the tendency to approach Owusu with suspicion and to seek to persuade courts to take a restrictive view of it (e.g. as being a case on its own particular facts) has recently been expressly disapproved in both the Court of Appeal and Supreme Court.

108. In Lungowe v Vendata [2017] EWCA Civ 1528 Simon LJ said this.

[33] Vedanta raises a number of arguments as to why Owusu v. Jackson is not dispositive of this aspect of the jurisdiction issue. It is said, first, that Owusu v. Jackson was a case on its own particular facts and does not apply to the present case; secondly, that the rule in Owusu v. Jackson was not intended to apply where, as in the present case, non-EU claimants are using the existence of the claim against an EU domiciled party as a device to ensure that their real claim, against another defendant, is litigated in this jurisdiction rather than in the natural forum; thirdly, that the reasoning of the ECJ was flawed and should not be followed in the circumstances of the present case, or alternatively that there should be a reference to the ECJ on the effect of Owusu v. Jackson in the circumstances of the present case; fourthly, that the approach in Owusu v. Jackson cannot apply where the proceedings amount to an abuse of EU law; and fifthly, that either there is no real issue between Vedanta and the claimants or, if there is, the claim against Vedanta is so weak that this should be reflected in the exercise of the court's discretion in allowing KCM's application; in which case a stay of the claim against Vedanta is justified.

*[34] I can take the first, second and third arguments together. In my judgement, these arguments are not open to Vedanta. **The effect of the ECJ decision in Owusu v. Jackson is that article 4 of the Recast Regulation precludes the English Court from declining what is a mandatory jurisdiction where the defendant is a company domiciled in England and Wales.***

109. The Supreme Court’s Judgment is consistent with this passage. Paragraphs 29 and 30 of the Judgment of Lord Briggs, with whom all the other Supreme Court Justices agreed, says this:

[29] The starting point is the need to recognise that, following Owusu v Jackson, what is now article 4.1 lays down the primary rule regulating the jurisdiction of each member state to entertain claims against persons domiciled in that state. The Recast Brussels Regulation itself (like its predecessors) contains a number of

⁶ Prof Briggs in *The Impact of Recent Judgments of the European Court on English Procedural Law* Briggs, Oxford Legal Studies Research Paper No. 11/2006, p. 18

express provisions which derogate from that primary rule. As exceptions to it, they are all to be narrowly construed. If, therefore, the Recast Brussels Regulation also contains (as it probably does) an implied exception from the otherwise automatic and mandatory effect of article 4, based upon abuse of EU law, then that is also an exception which is to be narrowly construed.

[30]. *The centrality of article 4, as the basis of member states' jurisdiction over their own domiciliaries, is laid down not only in Owusu v Jackson itself, but in a series of later authorities, and fully recognised by academic writers, even those who, prior to Owusu v Jackson, had taken the opposite view where the relevant competition between jurisdictions lay between a member state and a non-member state. Decisions of the Court of Justice which have re-emphasised the centrality of article 4, and the need to construe any exceptions or derogations from it restrictively, include Melzer v MF Global UK Ltd (Case C-228/11) [2013] QB 1112, at paras 23 to 24 of the judgment. Dicta in the English courts to the same effect include, in this court, A v A (Children: Habitual Residence) [2014] AC 1, per Lady Hale at para 31 and, more recently, AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft mbH [2018] AC 439, per Lord Hodge at para 13."*

110. Paragraph 34 in the Judgment in the Court of Appeal and paragraph 29 of the Judgment in the Supreme Court are both entirely consistent with paragraph 37 in Owusu itself. In my judgement, they provide overwhelming support (binding on me) for the proposition advanced by Mr Cook that jurisdiction under Article 4(1) is mandatory and subject only to the terms of the Regulation itself (express or implied).

Coreck Maritime

111. No decisions of the European Court since Owusu which doubt or qualify it were drawn to my attention. However, I need to consider the decision of the fifth chamber of the ECJ in Coreck Maritime, which was decided five years before Owusu, because Ms Hilliard relies on Ferrexpo AG v Gilson Investments Ltd [2012] EWHC 721 (Comm) [2012] 1 Lloyd's Rep 588.

112. In Ferrexpo, Andrew Smith J came to the conclusion that because of the decision in Coreck, Owusu should not be read as precluding national courts from having resort to discretionary stays outside the Convention. In paragraphs [130] and [131] of his judgment he said this:

"[130] However, the defendants rely on article 22 to argue that the court should decline jurisdiction. They refer to the decision of the ECJ in Coreck Maritime GmbH v Handelsveem BV (Case C-387/98), which concerned article 17 of the Brussels

Convention, an article about jurisdiction agreements (broadly corresponding to article 23 of the Brussels Regulation). Although article 17 referred to an agreement that a court or the courts of a contracting state should have exclusive jurisdiction to settle disputes and therefore did not apply to agreements designating a court of a noncontracting state, the ECJ did not consider that therefore the Brussels Convention prevented the courts of contracting states from giving effect to the parties' agreement as to jurisdiction. At paragraph 19 of its judgment, the ECJ said that, "A court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including the conflict of law rules, where it sits ...". It cited the Schlosser Report at para 176.

[131] *This in itself shows that paragraph 37 of the judgment in Owusu v Jackson, upon which Mr Smouha relied (see para 119) is not to be understood to prevent the national court declining jurisdiction in all circumstances unless they are expressly recognised by the Brussels Regulation. A basic principle of the Regulation emphasised by the ECJ in Owusu itself is that a well-informed party should be able to predict where he might be sued and where he is entitled to sue, and it would not promote this principle to interpret the Regulation so as to defeat the parties' express agreement for exclusive jurisdiction, an agreement that is generally designed to achieve just such certainty. I cannot accept that in Owusu v Jackson the ECJ intended to overturn its decision in Coreck Maritime. Further, Briggs and Rees on Civil Jurisdiction and Judgments (5th Ed, 2007) observe at para 2-256 fn 5, that so to interpret paragraph 37 of the Owusu judgment would not easily fit with the ECJ's description of the second question that they were asked as "hypothetical". The ECJ itself, in the context of explaining the applicability of article 2 although only one contracting state was involved in the relevant legal relationship, said (at para 28), "... the rules of the Brussels Convention on exclusive jurisdiction or express prorogation of jurisdiction are likely to be applicable to legal relationships involving only one contracting State and one or more non-Contracting States".*

113. Andrew Smith J's understanding of Coreck is based largely on the interpretation of it provided by Prof Briggs. According to Prof Briggs, Coreck is authority for the proposition that a court of a Member State is permitted to determine for itself whether, and if so on what conditions, to give effect to a jurisdiction agreement for a non-Member state. Prof Briggs then uses the Coreck to give a restrictive interpretation to Owusu.⁷ He puts it in this way:

"Some have been tempted to argue that Owusu has, in effect, reversed this aspect of the decision in Coreck Maritime. The suggestion that the Court has insouciantly overturned Coreck Maritime so soon after giving the decision without publicizing its decision is unsustainable"⁸

⁷ Briggs *Civil Jurisdiction and Judgments* (6th edition, 2015) para. 2.305 and to similar effect in *Agreements on Jurisdiction and Choice of Law* (2008) para 7.98

⁸ *Ibid.* para 7.99 and to similar effect in CJ&J para 2.305 ("not credible").

114. I disagree with this analysis of Coreck. For the same reason I disagree with the conclusion reached in the first sentence of paragraph 131 in Ferrexpo, which supports Ms Hilliard's interpretation.
115. Coreck concerned a dispute about damage to cargo of groundnut kernels transported by sea from China to the Netherlands. The insurers of the cargo, who included Handelsveem, brought a claim in Rotterdam against both the Russian owner of the vessel and Coreck Maritime GmbH, who had time chartered the vessel and issued bills of lading. Coreck Maritime is a German company and its bills of lading stated that any dispute arising under the bill should be decided in the country in which the carrier has his principal place of business, which for Coreck was Germany.
116. Handelsveem relied on Article 5 (1) of the Brussels Convention (place of performance of the obligation in question) as giving the Rotterdam Court jurisdiction. Coreck Maritime requested the court to decline jurisdiction on the basis that the German courts had jurisdiction for any claim against it either under Article 2 (domicile of Coreck Maritime) or under Article 17 (exclusive jurisdiction clause). The court in Rotterdam dismissed the challenge to jurisdiction on the basis that the jurisdiction clause in the bills was insufficiently clear. Coreck appealed.
117. The appeal court referred four rather lengthy questions to the ECJ for a ruling.

'(1) Must the first sentence of Article 17 of the Brussels Convention (in particular, the words "have agreed"), read in conjunction with the case-law of the Court of Justice according to which "the purpose of Article 17 is to ensure that the [consent of the] parties ... to such a clause, which derogates from the ordinary jurisdiction rules laid down in Articles 2, 5 and 6 of the Convention, ... is clearly and precisely demonstrated", be interpreted as meaning:

(a) that, in order for a clause vesting jurisdiction in a given court, as provided for in that article, to be valid as between the parties, it is necessary in each case for that clause to be formulated in such a way that its wording alone makes it quite clear or at least easy to ascertain (even) for persons other than the parties - and in particular to the court concerned - which court is to have jurisdiction to settle disputes arising from the legal relationship in the context of which that clause is stipulated; or

(b) that - generally or now, in consequence of or in connection with the progressive relaxation of the rules in Article 17 of the Brussels Convention, (9) together with the case-law of the Court of Justice concerning the circumstances in

which such a clause is to be regarded as having been validly concluded - in order for such a clause to be valid, it is enough that the parties themselves clearly know, on the basis (inter alia) of the (other) circumstances of the case, which court is to have jurisdiction to settle such disputes?

(2) Does Article 17 of the Brussels Convention also govern the validity, as against a third party holding a bill of lading, of a clause which specifies as the forum having jurisdiction to settle disputes “under this Bill of Lading“ the courts of the place where the carrier has his “principal place of business“ and which is laid down in a bill of lading also containing an “identity of carrier“ clause, that bill of lading being issued for the purposes of the carriage of the goods, where (a) the shipper and one of the possible carriers are not established in a Contracting State and (b) the second possible carrier is indeed established in a Contracting State but it is not certain whether his “principal place of business“ is situated in that State or in a State which is not a party to the Convention?

(3) If the answer to Question 2 is in the affirmative:

(a) Does the fact that the jurisdiction clause contained in the bill of lading must be regarded as valid as between the carrier and the shipper mean that it is also binding on any third party holding the bill of lading, or is that the position only as regards a third party who, upon acquiring the bill of lading, succeeds by virtue of the applicable national law to the shipper's rights and obligations?

(b) Assuming that the jurisdiction clause contained in the bill of lading must be regarded as valid as between the carrier and the shipper, does the answer to the question whether it is also binding on a third party holding the bill of lading also possibly depend to some extent on the contents of the bill of lading and/or the particular circumstances of the case, such as the particular state of knowledge of the third party concerned or the fact that the latter has a long-standing business relationship with the carrier and, if so, can the third party be deemed to be aware of the particular circumstances of the case if the contents of the bill of lading do not make it sufficiently clear to him that the clause in question is valid?

(4) If the answer to Question 3(a) is as just suggested, which national law governs the decision as to whether the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations, and what is the position if the national law in question has not hitherto provided, either in its legislation or in its case-law, an answer to the question whether the third party, upon acquiring the bill of lading, succeeds to the shipper's rights and obligations?'

118. The questions are somewhat dense and involved but boil down to two questions about the formal requirements of Article 17 and one question about the circumstances in which third parties may be bound by jurisdiction agreements in bills of lading agreed by a shipper and a carrier.

119. The Court was clearly not being asked to rule on the question of when a court of a member state may decline to exercise jurisdiction it may otherwise have under Article 2 of the Convention in favour of a court of a non-Member State. This is hardly surprising given that the referring court did not have jurisdiction under Article 2 and Coreck Maritime was not arguing that a non-Member State court ought to have jurisdiction.

120. The Advocate General delivered an opinion answering the questions in the following terms:

- a. In order for a jurisdiction agreement to be valid under Article 17, it is not necessary for the court to be identified by name. It is sufficient that the identity can be ascertained by objective criteria.
- b. For the purposes of Article 17 one of the parties must have a place of business in a Contracting State.
- c. A third-party holder of a bill of lading is bound by a jurisdiction clause in a bill of lading if either (a) the third party has succeeded to the shipper's rights (which is a matter to be determined under relevant national law) or (b) the third-party consented.
- d. It is for the national court to decide which national law is to be applied in order to determine whether the third-party holder of a bill of lading has succeeded to the shipper's rights and obligations.

121. He made no reference to the idea that a court in a contracting state may be entitled to stay a claim in favour of the court in a non-contracting state. That question simply did not arise for consideration in the case.

122. The Court's judgment answered the first three questions in essentially the same way as the Advocate General had recommended but declared that the fourth question was inadmissible.

123. Prof Briggs' view on Coreck seems to be based on just one sentence in paragraph [19] in the Judgment of the Court (underlined below):

“As to the second condition, Article 17 of the Convention does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits (Report by Professor Schlosser on the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the enforcement of judgments in Civil and Commercial matters and to the Protocol on its interpretation by the Court of Justice, OJ 1979 C 59, p. 71, paragraph 176).”

124. In my judgement the sentence highlighted in the above passage does not bear the weight attached to it by Prof Briggs or justify the conclusion reached in Ferrexpo about the relationship between Coreck and Owusu.

125. Paragraph 19 appears in the part of the judgment where the court is addressing the formal requirements for a jurisdiction agreement under Article 17. In the first sentence of paragraph 19 the court is simply pointing out that Article 17 only provides criteria for judging the validity of agreements which designate a court in a contracting state. That was the case in Coreck itself because the designated court was in Hamburg so there was no need to go on to consider what the position might be where the court is outside the EU. Nevertheless, and only by way of an aside, the Court pointed out in the second sentence of paragraph 19 that, given that the criteria of Article 17 cannot determine the validity of such a clause, a court seised would have (a) to apply its own conflict of laws rules to determine the law to apply to any issue of validity and (b) use that applicable law or legal system to assess its validity.

126. The second sentence does not in my judgement even begin to address the question of what effect such a clause (if found to be valid) might have on the jurisdiction of the Court. Still less does it say that if valid, such a clause might be capable of justifying a court seised imposing a discretionary stay where jurisdiction is based on domicile of the Defendant. I prefer Prof Harris’s assessment of the passage in question to that of Prof Briggs:

“It refers to the validity of a choice of court clause for a Non-Contracting State, not to the effects that the courts of a Contracting State should give to that clause.”⁹

⁹ “Stays of Proceedings and the Brussels Convention” (2005) 54 ICLQ 933, 944

127. Prof Harris’ assessment of paragraph 19 in the Coreck judgment also explains why neither the Grand Chamber nor the Advocate General in Owusu felt the need to refer back to Coreck even in passing. It was simply irrelevant.
128. What of the paragraph in the Schlosser Report referred to by the court in Coreck? The passage in question with additional numbers in square brackets is set out below:

“Agreements conferring jurisdiction on courts outside the Community

*176. (a) [1] In cases where parties agree to bring their disputes before the courts of a State which is not a party to the 1968 Convention there is obviously nothing in the 1968 Convention to prevent such courts from declaring themselves competent, if their law recognizes the validity of such an agreement. [2] The only question is whether and, if so, in what form such agreements are capable of depriving Community courts of jurisdiction which is stated by the 1968 Convention to be exclusive or concurrent. [3] There is nothing in the 1968 Convention to support the conclusion that such agreements must be inadmissible in principle (46). [4] However, the 1968 Convention does not contain any rules as to their validity either. [5] If a court within the Community is applied to despite such an agreement, its decision on the validity of the agreement depriving it of jurisdiction must be taken in accordance with its own *lex fori*. In so far as the local rules of conflict of laws support the authority of provisions of foreign law, the latter will apply. [6] If, when these tests are applied, the agreement is found to be invalid, then the jurisdictional provisions of the 1968 convention become applicable.”*

129. The assertion in sentence [1] is uncontroversial since it refers to the power of courts outside the European Community to assess the validity of an agreement between parties conferring jurisdiction on it and then declaring itself competent.
130. Sentence [2] poses a very specific question about agreements conferring jurisdiction on courts outside the EU. The question is whether and if so how such agreements might be capable of depriving a court of jurisdiction which is either “exclusive” or “concurrent”. What appears to be being referred to are the two categories of exceptional jurisdiction in Section 5 (i.e. the “exclusive jurisdiction” in Article 16) and Section 2 (“special jurisdiction”)¹⁰ in Articles 5 and 6 of the original Brussels Convention. These are the only bases of jurisdiction under discussion. What does not appear to be under discussion is

¹⁰ These jurisdictional bases are sometimes called ‘concurrent jurisdictions’ by commentators rather than the technically correct ‘special jurisdictions’ because they are additional places in which a Defendant may be sued.

whether jurisdiction under the general rule of Article 2 might be displaced by an agreement to confer jurisdiction on a court in a non-contracting state.

131. “Such agreements” in sentence [3] plainly refers back to those agreements under discussion in [2] and the footnote refers to three commentators including Georges Droz. The reference in Schlosser is tentatively expressed as a double negative. This is far from being a ringing endorsement of even the limited potential effect described in the previous sentence, let alone a statement that the Brussels Convention should positively be interpreted and applied in this fashion.

132. It is sentences [4] and [5] which the court in Coreck must have in mind when they cited the Schlosser Report. They correspond exactly to the point at issue in Coreck which is how a Community Court should assess the validity of a jurisdiction agreement in favour of a non-Community Court. To the extent therefore that the 5th chamber of the European Court endorsed the Schlosser report in Coreck it did so, in my judgement, to the limited extent of adopting what it said about the need to use the applicable law of a jurisdiction agreement designating a non-Convention State in order to determine its validity.

133. The final sentence [6] makes the uncontroversial statement that if a Community Court finds that the jurisdiction agreement is invalid, then the possibility of the Brussels Convention jurisdiction being displaced by it falls away. The Report is, however, completely silent on what happens if the agreement is found to be valid. In my judgement, it therefore offers little, if any, support for the type of discretionary stay sought by Mr Aldwood.

134. Even if paragraph 176(a) of the Schlosser Report can be said to at least not rule out the idea of a jurisdiction agreement displacing the jurisdiction of a court in a Contracting State, in some circumstances, other parts of the report make clear that the idea of a discretionary stay of jurisdiction based on domicile is an anathema for the original parties to the Brussels Convention – see, in particular, paragraphs 76 – 78:

“DISCRETIONARY POWERS REGARDING JURISDICTION AND TRANSFER OF PROCEEDINGS

76. The idea that a national court has discretion in the exercise of its jurisdiction either territorially or as regards the subject matter of a dispute does not generally

*exist in Continental legal systems. Even where, in the rules relating to jurisdiction, tests of an exceptionally flexible nature are laid down, **no room is left for the exercise of any discretionary latitude.** It is true that Continental legal systems recognize the power of a court to transfer proceedings from one court to another. Even then the court has no discretion in determining whether or not this power should be exercised. In contrast, the law in the United Kingdom and in Ireland has evolved judicial discretionary powers in certain fields. In some cases, these correspond in practice to legal provisions regarding jurisdiction which are more detailed in the Continental States, while in others they have no counterpart on the Continent. It is therefore difficult to evaluate such powers within the context of the 1968 Convention. A distinction has to be made between the international and national application of this legal concept.*

77. (a) *In relationships with the courts of other States and also, within the United Kingdom, as between the courts of different judicial areas (see paragraph 11) the doctrine of forum conveniens — in Scotland, forum non conveniens — is of relevance. The courts are allowed, although only in very rare and exceptional cases, to disregard the fact that proceedings may already be pending before foreign courts, or courts of another judicial area. Exceptionally, the courts may refuse to hear or decide a case, if they believe it would be better for the case to be heard before a court having equivalent jurisdiction in another State (or another judicial area) because this would increase the likelihood of an efficient and impartial hearing of the particular case. There are several special reasons why in practice such discretionary powers are exercised: the strict requirements traditionally imposed by the laws of the United Kingdom and Ireland regarding changes of domicile (see paragraph 72); the rules allowing establishment of jurisdiction by merely serving a writ or originating summons in the territory of the State concerned (see paragraphs 85 and 86); the principles developed particularly strongly in the procedural law of these States requiring directness in the taking of evidence with the consequent restrictions on making use of evidence taken abroad or merely in another judicial area; and finally, the considerable difficulties arising in the application of foreign law by United Kingdom or Irish courts.*

78. *According to the views of the delegations from the Continental Member States of the Community such possibilities are not open to the courts of those States when, under the 1968 Convention, they have jurisdiction and are asked to adjudicate. Article 21 expressly prohibits a court from disregarding the fact that proceedings are already pending abroad. **For the rest the view was expressed that under the 1968 Convention the Contracting States are not only entitled to exercise jurisdiction in accordance with the provisions laid down in Title 2; they are also obliged to do so. A plaintiff must be sure which court has jurisdiction. He should not have to waste his time and money risking that the court concerned may consider itself less competent than another.** In particular, in accordance with the general spirit of the 1968 Convention, the fact that foreign law has to be applied, either generally or in a particular case, should not constitute a sufficient reason for a court to decline jurisdiction. Where the courts of several States have jurisdiction, the plaintiff has deliberately been given a right of choice, which should not be weakened by application of the doctrine of forum conveniens..”.* (emphasis added)

The above paragraphs (in particular the passages I have highlighted) are consistent with the decision of the Grand Chamber in Owusu and inconsistent with the existence of a discretionary latitude to stay claims where jurisdiction is based on domicile.

135. In summary, in my judgement, there is nothing in Coreck or The Schlosser Report (read as a whole) which either casts doubt on the decision of Owusu or which provides support for reading it restrictively.

136. Drawing the various threads together, Mr Cook is right, in my judgement, to submit that Owusu (in particular paragraphs 37 and 43 thereof), when properly read and applied to the Recast Regulation, is a complete answer to Mr Aldwood's application. Ms Hilliard is asking the court to do exactly what Owusu says it is not permitted to do, namely to apply a rule of national law (the discretionary power to stay on The El Amria grounds) in order to derogate from jurisdiction established under Article 4(1).

137. He is right too, in my judgement, in his submission that the Recast Regulation properly interpreted leads to the same result. Mr Cook's interpretation, in my judgment, is consistent with the first three principles of interpretation set out in paragraph 69 above and better promotes the general aims of the Recast Regulation. Ms Hilliard's submission would, in my judgement, by contrast tend to undermine the certainty, predictability and uniformity in application of the Recast Regulation.

The English case law under the Brussels Convention / Regulation 44/2001

138. I am not dissuaded from my conclusion on the correct interpretation of the Recast Regulation by the first instance decisions to which Ms Hilliard referred me for the following reasons:

- a. None of them were considering the Recast Regulation.
- b. They were part of a larger picture of first instance decisions pulling in different directions, as noted by Andrew Baker J in B.B. Energy (Gulf) DMCC v Amoudi and Others [2018] EWHC 2595 (Comm) at [21] – [22] and Proudman J in Plaza BV v The Law Debenture Trust Corporation [2015] EWHC 43 (Ch) at [82] and [87].
- c. Insofar as they do provide support for the possibility of having recourse to national law for a discretionary stay, they generally did so by taking an overly restrictive

approach to Owusu. Such an approach is no longer open to me (if it ever was) in light of the judgments of the Court of Appeal and the Supreme Court in Lungowe v Vendanta Resources PLC [2019] UKSC 20; [2019] 2 WLR 1051.

- d. The decision of the ECJ in Coreck has, in my judgement, been given an inappropriately wide interpretation.
- e. To the extent that the cases relied on permitted recourse to domestic law by way of a reflexive application of the Brussels Convention or Regulation 44/2001, that reasoning has been overtaken by the fact that the doctrine of reflexive effect has now been incorporated into the Recast Regulation itself (in Articles 33 and 34). In particular, Ferrexpo has already (correctly) been declared to no longer be good law under the Recast Regulation in B.B. Energy (Gulf) DMCC v Amoudi and Others [2018] EWHC 2595 (Comm) at [23].
- f. To allow a wider parallel domestic discretionary power to be exercised on the basis of the factors identified in The El Amria to operate alongside the power to stay proceedings in favour of third State courts now in Articles 33 and 34 of the Regulation would, in my judgement:
 - i. tend to undermine the effectiveness of the Regulation by permitting stays in a wider set of circumstances than envisaged by the terms of the Regulation itself;
 - ii. contradict the principle of interpreting exceptions to jurisdiction based on Article 4(1) restrictively;
 - iii. undermine certainty and predictability of outcome by adding a secondary discretionary layer whose content would vary from Member State to Member State.

139. I therefore reject Ms Hilliard's contention that I have a discretionary power to stay the claim against Mr Aldwood. He is domiciled in England and a Defendant in proceedings involving a claim within the domain of the Recast Regulation. She accepts that there is no relevant power she can rely on under the Recast Regulation itself. It follows that, in my judgement, Mr Aldwood may not have resort to domestic law to stay the Bank's claim because jurisdiction under the Article 4(1) of the Recast Regulation is mandatory in this case.

140. I have naturally hesitated before reaching a conclusion which is not in accordance with the tentative conclusion in the current edition of *Dicey and Morris*. I note though that other commentators do not agree that a discretion to stay proceedings against defendants domiciled in the EU on the basis of a jurisdiction agreement in favour of a third State has survived under the Recast Regulation.¹¹ However, as I have observed earlier, it is my duty to decide the issue based on the arguments I have heard. I am in no doubt that based on the authorities and principles of interpretation binding on me, Mr Cook's interpretation of the Recast Regulation is much closer aligned to the logic, policy and intended aims of the Recast Regulation than that proposed by Ms Hilliard.

Hague Convention on Choice of Court Agreements

141. I am not persuaded by Mr Cook that the coming into force of the Hague Convention has any material bearing on this case. It applies only where the state of the court seised and the state in which the court chosen by the parties to the agreement are both parties to the convention. That is not the case here because KSA is not a party to the Hague Convention. Thus, the jurisdiction of this court and the issue of whether or not it ought to exercise that jurisdiction or not is one that can only be decided by application of the Recast Regulation or domestic law or (as appropriate) a combination of the two.

Exercise of a discretion on El Amria grounds (if this is available under the Regulation)

142. If I am wrong in my interpretation of the Brussels Recast Regulation and the court has a discretion at common law or under the CPR to impose a stay on the ground that the parties have agreed to refer any dispute under the Personal Guarantee to the Courts in KSA, the following points were not in dispute:

- a. Any such discretion must be applied reflexively having regard to the terms of the Recast Regulation in particular Article 25 thereof i.e. I am to treat KSA as if it were a Member State of the European Union.

¹¹ See e.g. Hartley, *Choice of Agreements under the European and International Instruments* para 5.19, *The Brussels I Regulation* Ed. Dickinson and Lein (2015) 11.67 and Kistler, 'Effect of exclusive choice of court agreements in favour of third states within the Brussels I Regulation Recast' JPIL 2018 Vol 14 No. 1 66 at 94.

- b. An important factor in the exercise of the discretion was whether Clause 16 is an exclusive jurisdiction clause under which the parties agreed to refer all disputes to the SAMA committee in KSA (and nowhere else) or not.
- c. The interpretation of clause 16 is governed by the law of KSA.

143. Ms Hilliard's submission, in summary, was:

- a. Having regard to the expert evidence of KSA law and its terms Clause 16 was plainly an exclusive jurisdiction clause which required all disputes to be referred to a court in KSA and prohibited proceedings being commenced outside the KSA.
- b. Absent strong grounds to the contrary, this court ought to enforce by imposing a stay on these proceedings brought here in breach of it.

144. Mr Cook's submission, in summary, was:

- a. Clause 16 is an example of a standard asymmetrical non-exclusive jurisdiction clause which is commonly found in finance agreements. He referred me in particular to the comments of Popplewell J in Mauritius Commercial Bank v Hestia [2013] EWHC 1328 (Comm) at [42] and Cranston J in Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc [2017] EWHC 161 at [40] and [41].
- b. Clause 16 on its true construction entitles the Bank to commence proceedings in any competent court.
- c. By virtue of Article 4(1) of the Recast Regulation, this court is a competent court.
- d. Therefore these proceedings are not in breach of any agreement and no reason to impose a stay under the principles in The El Amria.

145. Ms Hilliard’s response to Mr Cook’s submission was that “a jurisdiction clause which permits a claim to be pursued in any other competent court in the world does not make any sense”.

The proper scope of foreign law evidence on the interpretation of clause 16

146. All three experts instructed by the parties (two for Mr Aldwood and one for the Bank) expressed their own views on whether or not clause 16 permitted the Bank to bring proceedings outside the KSA. The experts themselves cannot be criticised for this. It is quite clear that in their instructions they were asked how *they* interpreted clause 16 of the Personal Guarantee.

147. The experts ought not to have been asked this question. The expert evidence adduced by the parties on this question is in my judgement inadmissible. In Deutsche Bank AG v Comune Di Savona [2018] EWCA Civ 1740 Longmore LJ said this about the proper scope of foreign law evidence for the interpretation of jurisdiction clauses:

“I must confess to considerable unease about the proliferation of expert evidence of foreign law on jurisdiction applications which are supposed not to be excessively complicated and to be capable of determination in hours rather than days, see Spiliada v Cansulex [1987] A.C. 460, 465F per Lord Templeman. In a case in which the main, let alone the only, issue is as to the construction of a foreign jurisdiction clause as opposed to an English jurisdiction clause, the only relevance of evidence of foreign law is to inform the court of any difference of law in relation to the principles of construction, see King v Brandywine [2005] 2 All E.R. (Comm) 1 para 68 per Waller LJ and Vizcaya Partners Ltd v Picard [2016] 1 All E.R. (Comm) 891 para 60 per Lord Collins. It is not to have competing arguments as to how the highest court in the foreign jurisdiction would decide the question whether a claim brought in England would (or would not or would also) fall within the foreign jurisdiction clause.”

148. Although this was said in the context of a dispute as to whether a claim fell under one jurisdiction clause or other, it applies equally well in the context of this case. If the court is required to interpret a clause in a contract governed by a foreign law, it does not cede that task to the foreign law experts instructed by the parties by choosing between the rival views provided by those experts. The question which the experts in this case ought to have been

asked (but were not) was: “What are the main principles of contractual interpretation under the law of the KSA applicable to the interpretation of Clause 16”.

149. It is only to the extent that the parties can persuade an English court that there are materially different principles of construction that an applicable foreign law will make any difference in any event. This is because of the well-established rule that absent satisfactory evidence of different rules of construction, the court will apply English law - see Iranian Offshore Engineering and Construction co. v Dean Investment Holdings SA [2018] EWHC 2759. In that case Andrew Baker J. said this:

“[2] *Dicey Rule 25 is in the following, familiar terms:*

(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 footnote to Rule 25(2) reads as follows: “This Rule was explicitly approved in Bumper Development Corp. v Commissioner of Police of the Metropolis [1991] 1 W.L.R. 1362, 1369 (CA). However, for qualifications to the absolute form of the Rule, see further below, para.9-026.”

[3] Dicey para.9-025 states correctly that the burden of proving foreign law lies on the party who bases a claim or defence upon it and expresses the view that “... it is better to abandon the terminology of presumption, and simply to say that where foreign law is not proved, the court applies English law.” A little care therefore must be taken when reading Dicey Rule 25(1), lest it be thought to suggest that whenever a claim is governed by foreign law, it is necessary for the claimant to plead and prove the material content of that law (or indeed, as a logically prior matter, to plead a case as to governing law at all). I am quite clear that is not the law.

150. The expert evidence served by the parties in this case did not contain any satisfactory evidence that the law of KSA as to the interpretation of contractual clauses in general or jurisdiction clause in particular is materially different to English law. I therefore propose to interpret clause 16 using standard English law principles of interpretation.

151. In my judgment, clause 16 is a fairly straightforward clause to interpret. It was agreed that the only material difference between the English and Arabic text is that the Arabic text

in section (b) corresponding to words “any other court of competent jurisdiction” might be more accurately translated as “any competent court”.

152. The structure of clause 16 is that it is divided into two parts. Part (a) is a submission by Mr Aldwood “I agree that...the SAMA committee shall have non-exclusive jurisdiction”. The second part of the clause is a proviso to that submission which grants the Bank to bring a claim in “any competent court”.

153. I can see no reason why the words “any competent court” should not be given their natural meaning.

154. The evidence adduced by Mr Aldwood as to the modernisation and expansion of the jurisdiction of the Board of Grievances in KSA in 2012 certainly explains why that court is specifically mentioned as an alternative jurisdiction in part (b) but the words “including without limitation..” make it clear that Mr Aldwood’s obligation to submit to the jurisdiction to submit to the SAMA Committee is without prejudice to the Bank’s right to seek to bring a claim in any other competent court.

155. Under the clause Mr Aldwood irrevocably submits only to one jurisdiction in advance, namely that of the SAMA committee. For all other courts or dispute resolution bodies, the Bank must rely on the court seised declaring itself to be competent.

156. I cannot see any reason to read into clause 16 an implied restriction that the Bank only has the right to bring claims in the KSA. The words “in any other competent court” do not themselves warrant such a restrictive reading. I cannot see any good commercial reason why a bank based in Bahrain would want to limit itself to bringing proceedings in the KSA.

157. The commercial considerations favour the opposite conclusion. A commercial bank will generally speaking want to enforce its security in any jurisdiction in which the debtor has assets. That is the commercial explanation for asymmetrical jurisdiction clauses. Mr Cook it seems to me is perfectly entitled to point to the fact that clauses of this type are recognised in the English courts as unobjectionable and ubiquitous – see Mauritius Commercial Bank v Hestia [2013] EWHC 1328 (Comm) at [42] and Cranston J in Commerzbank

Aktiengesellschaft v Liqumar Tankers Management Inc [2017] EWHC 161 at [40] and [41].

158. Whilst Ms Hilliard was right to point out that the article by Prof Fentiman cited by Popplewell J in Mauritius Commercial Bank v Hestia [2013] EWHC 1328 (Comm) was itself focussed on the validity of such clauses in Europe, the general point remains that the English courts recognise this type of clause as a commonly occurring one in international finance agreements and that their purpose is to maximise the financing bank's chances of making a recovery if the client defaults by permitting the court to proceed in a wide range of jurisdictions.
159. Contrary to Ms Hilliard's submission, clauses which give a financing institution a world-wide range of potential jurisdictions make perfectly good commercial sense. Mr Aldwood is required under Clause 16 to submit to only one jurisdiction, that of the SAMA Committee. For all other potential jurisdictions, the Bank must rely on them declaring themselves competent. There is in my judgment nothing oppressive or imbalanced about this. Mr Aldwood has sought and obtained a right to reside in England. That carries with it certain consequences.
160. Furthermore, in my judgement, clause 22 of the guarantee undermines Ms Hilliard's submission that only proceedings in the KSA are contemplated. Whatever the precise scope of the waiver in clause 22, the words "in the Kingdom of Saudi Arabia or elsewhere" in combination with "any court or tribunal" in my judgment plainly contemplate that the Bank might take legal action outside of KSA. They are consistent with a reading of clause 16 that the Bank may bring proceedings in any competent court both inside and outside the KSA.
161. For those reasons, I accept Mr Cook's submissions that on the true construction of Clause 16. The Bank was not confined to bringing claims in the KSA. On the contrary, under the clause the Bank is in my judgement expressly permitted to bring a claim under the Personal Guarantee in any competent court whether inside or outside the KSA. This court is competent within the meaning of the clause by virtue of Article 4(1) and the fact that Mr Aldwood is domiciled here.

Discretion

162. If I had been persuaded by Ms Hilliard that I had a discretionary power to stay the claim on the ground that the courts of the KSA had been chosen by the parties as the exclusive jurisdiction agreement, I would have granted the stay. The Bank could not in those circumstances point to any strong reasons for permitting the claim here to proceed in breach of an exclusive jurisdiction agreement.

163. Although Mr Cook referred me to Sharab v Prince Al Saud [2009] EWCA Civ 353 [63] and Inter-Tel Inc v Ocis Plc [2004] EWHC 2269 (QB) at [22] – [25] in which the enforceability of a judgment was held to an important factor when considering jurisdictional challenges, he adduced no evidence demonstrating that a judgment obtained in KSA had limited enforceability.

164. Furthermore, the two cases he relied upon concerned enforceability of a judgment in a general *forum non conveniens* application. In the context of an application for a stay on the principles set out in The El Amria the complaint that judgments of the exclusively chosen court are less readily enforceable than the court seised cuts little ice because if that was a concern the claimant ought not to have chosen it as an exclusive jurisdiction for dispute resolution in the first place. Far stronger reasons are required to defeat the application properly mounted under the grounds set out in The El Amria.

II. The Freezing Order

The legal test

165. There was no dispute between the parties as to the correct legal test to apply on an application to continue a freezing injunction. The Bank was required to demonstrate:

- a. A good arguable case on the merits
- b. A real risk that the defendant will dissipate his assets
- c. It is just and convenient to grant the relief

Good arguable case

166. The Bank's claim against Mr Aldwood in my judgment easily meets this test for the following reasons:

- a. The Bank has a judicial decision in its favour against DMT for the sum secured.
- b. There is no dispute that DMT ran into severe financial difficulties in April 2016 and by 29 June 2016 could not pay the sums which it accepted were due to the Bank.
- c. There is no dispute about the validity of the Personal Guarantee itself.
- d. The Bank has the benefit of certificate of debt clause. Even if this were not conclusive evidence of the sum due, there is no real dispute that DMT borrowed a very substantial sum from the Bank and then defaulted.
- e. The only basis on which Mr Aldwood seeks to defend the claim is that the Personal Guarantee lapsed in 2013 under KSA law because it was not specifically referred to in the renewal agreements. In my judgement, the Bank's response that the Personal Guarantee was clearly understood to be a continuing security and that this captured and expressed by the clause in each amendment which stipulated that all other terms of the agreement remained in full force represents at least a good arguable case that the Personal Guarantee has remained valid and enforceable under KSA law. It is not the role of the court at this interlocutory stage in a claim to balance the finer points of expert foreign law evidence against each other.
- f. On the basis of language used by the parties in renewing the agreements and the agreements themselves, it seems clear to me that both the Personal Guarantee and the Cross Guarantee were intended to be continuing security is (at the very least) a good arguable case on the merits.

Risk of dissipation

167. In Ninemia Maritime Corporation v Trave GmbH [1983] 3 WLR 1412, the Court of Appeal described the relevant test at 1422H in these terms:

“In our view, the test is whether, on the assumption that the plaintiffs have shown at least a “good arguable case” the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied.”

168. In Congentra AG v Sixteen Thirteen Marine SA (“The Nicholas M”) [2008] 2 Lloyd’s Rep 602, Flaux J. said this at [49]:

“The relevant legal principle in determining whether for the purposes of granting or maintaining a freezing order a claimant has shown a sufficient “risk of dissipation” is that the claimant will satisfy that burden if it can show that:

(i) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business: The Niedersachsen [1983] 2 Lloyd’s Rep 600 per Mustill J as interpreted by Christopher Clarke J in TTMI v ASM Shipping [2006] 1 Lloyd’s Rep 401 at 406 (paragraphs 24-27) or

(ii) that unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes: Stronghold Insurance v Overseas Union [1996] LRLR 13 at 18-19 per Potter J and Motorola Credit Corporation v Uzan (No 2) [2004] 1 WLR 113 at 153 (paragraphs 142-146) where the Court of Appeal was applying the same principle in the context of disclosure of assets by the defendant.”

169. In National Bank Trust v Yurov and Others [2016] EWHC 1913 (Comm), Males J helpfully summarised the law on dissipation of assets in seven propositions which were approved and applied by Picken J in Gulf Air BSC v One Inflight Ltd & Others [2018] EWHC 1019 (Comm). They are as follows:

- a. The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant’s assets.
- b. That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient.
- c. It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.

- d. The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.
- e. The nature, location and liquidity of the defendant's assets are important considerations.
- f. Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.
- g. So too is the defendant's behaviour in response to the claim or anticipated claim.

170. Finally, Holyoake v Candy [2018] Ch 297, Gloster LJ approved the following formulation of the dissipation test at [39]:

“The applicant must, in my judgment, show a real risk, supported by solid evidence, that a future judgment would not be met because of unjustifiable dissipation.”

171. In the same case, the Court of Appeal emphasised at [40] the need to maintain close regulation of freezing injunctions given the “nuclear effect” they have of prohibiting the affected party from dealing with his assets.

172. I also remind myself that the purpose of a freezing order is not to provide the claimant with security but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business or personal expenditure and in a way which will have the effect of making itself judgment proof.

173. Mr Cook invited me to accept that the meaning of “a real risk” could helpfully be illustrated by contrasting it with a risk which was fanciful or insignificant. He referred me to an Australian case cited in a footnote in *Gee on Commercial Injunctions: Commissioner of State Taxation (WA) v Mechold Pty Ltd* (1995) A.T.C 4053. I was not taken to the case itself. It does not seem to have been cited or approved in any English case. I am not persuaded that this is a helpful gloss in any event. I consider it is preferable to ask whether I am satisfied that I have been presented with “solid evidence” of a “real risk” of dissipation. It is, as the Court of Appeal put in in Holyoake, a “binary threshold” for the court to apply in each case.

174. Finally, Ms Hilliard referred me to Cherney v Neuman [2009] EWHC 1743 [77(5)] as authority for the proposition that prolonged delay may amount to evidence that the “claimant does not genuinely believe” that there is a real risk of dissipation. In my judgment, whilst any delay may be part of the overall evidential picture in which the court has to assess the risk of dissipation and may also be relevant to the final exercise of discretion, it is not helpful to introduce a subjective element into the test itself. The assessment of whether there is a risk of dissipation must be objective and the relevant enquiry is not what the claimant believes or has believed in the past but whether the court is satisfied that on the evidence presented there is a current real risk of dissipation of assets now held. I do not consider that delay is a useful addition to the seven considerations set out above.

Applying the dissipation test

175. In my judgment on the evidence I have before me the Bank falls a long way short of meeting the required threshold. The Bank has placed far too much weight on the assertion that Mr Aldwood “fled” KSA without providing contact details in order to “hinder enforcement” and that unless restrained from doing so he will do the same again. There are a number of problems with this assertion. First, to the extent that the Bank is seeking to rely on paragraph 49(ii) in the Nicholas M rather than a traditional dissipation argument based on paragraph 49(i), the evidence adduced by the bank does not disclose any illegitimate dealing “with assets”. The Bank has not provided any evidence at all of any assets leaving KSA with Mr Aldwood or being transferred by him at that time. All that is in evidence is that he and his family left the KSA in the summer of 2016.

176. There is a vague reference in one internal meeting note to Mr Aldwood having two palaces in KSA but it is not clear who said this and what his or her source was. There is no concrete evidence adduced by the Bank of its understanding of Mr Aldwood’s net asset position at any time before he was compelled to provide the affidavit required by the WWFO. It is highly surprising that a bank would advance such large sums to a company against nothing more than a personal guarantee and a promissory note without making at least some enquires and background checks on the assets of the person who is owner of the business and the personal guarantor.

177. There is no evidence which the Bank can point to link the purchase of his house in London or his property in France or indeed any other asset to his departure from the KSA in 2016. Far from being a hasty exit in order to escape the potential demands of the Bank, the move to London appears to have been in planning for at least three years beforehand.

178. The reference to Mr Aldwood fleeing KSA to hinder “enforcement” also seems to me to be unjustified. The Bank did not bring any claim or make any demand on Mr Aldwood until July 2017. When he left the KSA in July 2016, action had only been taken against DMT.

179. I fully accept that Mr Aldwood has not provided any explanation of why DMT ran into financial difficulties in early 2016 and it is entirely possible that one of the reasons why Mr Aldwood left KSA was because his company was failing. It might be said to be somewhat shoddy to simply leave a country when a company whose debts you have guaranteed is about to fail. However, the freezing order jurisdiction does not exist to punish individuals for not communicating as fully as might one expect with their creditors. Even on this point the Bank’s evidence was not exactly persuasive, still less analogous with fraud or dishonesty. There was no evidence that the Bank at any stage asked DMT for Mr Aldwood’s address in the U.K. and that this was withheld nor did the Bank assert that Mr Aldwood was in breach of any obligation (either under the law of the KSA or in contract) to inform the Bank of his new address. All that is said is that he did not volunteer his new U.K. address to the Bank before he left the KSA.

180. It may well be that Mr Aldwood’s net asset position worsened considerably before he left KSA. He may have chosen to pay off certain creditors and not others but such changes in his financial position do not constitute “unjustified dealing” with an asset by Mr Aldwood. Even if one of the reasons why DMT failed was because Mr Aldwood neglected it by choosing to spend money and time on his yacht or his houses in France or England, that would not constitute an improper dissipation of assets or an unjustified dealing with assets in order to avoid enforcement.

181. The Bank then relies on evidence that Mr Aldwood was a shareholder in a BVI-registered company which was incorporated in 2010 and then dissolved in August 2016 and on his use of a Swiss-based trust company. This is insufficient. As the Court of Appeal noted in Holyoake at [59(b)], there is nothing implicit in complex offshore corporate structures

which evidences an unjustifiable risk of dissipation. As Arnold J put it in VTB Capital Plc v Nutritek Int Corp [2012] 2 BCLC 437, 517 para 233:

“It is not uncommon for international businessmen, and indeed quoted UK companies, to use offshore vehicles for their operations, particularly for tax reasons. This may make it difficult to enforce a judgment. But in that respect claimants such as VTB must take defendants such as Mr Malofeev as they find them”.

182. In my judgement, that observation of Arnold J applies with equal force in this case. Before the Bank advanced the 2012 Facilities to Mr Aldwood and throughout the period in which the 2012 Facilities appeared to be functioning normally, it is clear that Mr Aldwood spent very significant periods of time outside the KSA (165 days in 2011; 233 days in 2012; 244 days in 2014 and 219 days in 2015). The Bank chose to lend to a company whose principal shareholder clearly spent the majority of his time outside the KSA and who had acquired substantial assets outside the KSA in England and France.

183. The Bank also chose to advance facilities to DMT with only a bare guarantee and promissory note from Mr Aldwood without the backing of a charge over his property in the KSA. In these circumstances, even if he sold property in KSA to pay for renovations of his house in London and then decided to move to England full time in 2016 at a time when DMT was failing, that does not amount to solid evidence of a risk of an illegitimate dissipation of assets or an unjustified dealing with assets to avoid enforcement. Leaving others to deal with the Bank’s demands on his company, whilst not exactly admirable behaviour, is not dishonest and does not come anywhere near to the sort of evidence from which it would be reasonable for the court to infer that he was seeking to dissipate his assets then, still less that there is real risk of a dissipation / unjustified dealing now.

184. Finally, Mr Cook makes a number of complaints about how Mr Aldwood has responded to the WWFO. He has described his response as “at best inappropriately casual and at worst deliberately evasive”.

185. One of Mr Cook’s preliminary points was that aside from the two affidavits of assets, Mr Aldwood has not served a witness statement. Instead he has instructed his solicitors, KN, to speak on his behalf. I do not accept this is a valid criticism. Mr Aldwood’s knowledge of English is far from perfect. I can well imagine why he felt that in response to the WWFO

it was prudent to give instructions to his English solicitor and let them file evidence on his behalf. I was handed a very helpful table which showed the source of each assertion in the witness statements of Mr Foss. Those witness statements quite properly referred to a documents or to Mr Alwood as a source of the information put before the court.

186. In his submissions, Mr Cook made four particular complaints about Mr Aldwood's response to the claim:

- a. Mr Aldwood had understated the value of a yacht.
- b. Mr Aldwood failed to disclose in his schedule of assets three bank accounts containing US\$481,946, £15,029 and £120,009 respectively.
- c. Mr Aldwood sought permission to release a tax payment of £400,000 said to be required urgently but then revised down to £183,936 when questions were asked.
- d. Payments totalling EUR50,000 were made from a bank account controlled by Mr Aldwood contrary to the WWFO.

187. In relation to the yacht complaint, the fact that Mr Aldwood had been advertising his yacht for a much higher sum does not assist the Bank. I accept what Mr Foss says about this in paragraphs 45 – 47 of his second witness statement. What Mr Alwood was required to do was to disclose the asset which he did and give a reasonable estimate of its value. The Bank has not persuaded me that Mr Aldwood has deliberately understated or suppressed its true value.

188. As to the second complaint, I accept Mr Foss' explanation as to why the cash balances in the three investment portfolios were accidentally omitted. The portfolios were themselves all declared along with their total asset value. All that happened was that Mr Aldwood mistakenly believed that any cash element in the portfolio was included in the overall asset value. This mistake was corrected by KN who sent over to Enyo the full statements.

189. As to the tax liability, I have no reason to doubt what Mr Foss says about this in paragraph 59 and 60 of his second statement. It is not unknown for sums estimated by accountants to change. It was the accountant who first estimated the figure to be £400,000 and then revised

it down after discussions with Mr Aldwood. KN informed Enyo that the exact amount would be confirmed. I can find nothing sinister in any of this.

190. As to the final complaint, the sums transferred came from an account in the name of a Greek Company, Falcon MCPY which is the legal owner of the yacht. This is an account controlled by the management company, Nilina which deals with chartering the yacht. I accept Mr Foss's explanation as to the reasons why sums were paid out of this account.

191. None of the matters raised by the Bank as evidence of Mr Aldwood whether taken individually or collectively came anywhere near to demonstrating that he had been inappropriately casual in his response to the WWFO still less that he had been deliberately evasive. In his second witness statement, Mr Foss gives a detailed account of the way in which Mr Aldwood responded in the short time scale involved and how he has responded to the Bank's follow-up questions. I can find nothing in any of that material which amounts to evasion still less dishonesty.

192. Taking each of the seven factors listed by Males J in National Bank Trust v Yurov in turn as a checklist, I find as follows on the evidence I have seen:

- e. I have not seen any evidence of any unjustified dealing by the Defendant with any of his assets in 2016 or subsequently.
- f. The Bank's case on dissipation of assets and unjustified dealing in assets is very thin indeed and is largely based on the inference that when he left the KSA in 2016 he did so to flee his creditors and if the injunction is discharged he may do the same again. The Bank's case does not on proper analysis rise above the level of general assertion which is not sufficient to meet the threshold for this type of injunction.
- g. The Bank does not assert that Mr Aldwood has been dishonest.
- h. There is no solid evidence of a current risk of dissipation. Mr Aldwood has lived in England since 2016 and his children are at school here. His major assets are his home here and a house in France, a yacht and an investment portfolio necessary for his Tier 1 (Investor) visa. There is no evidence from which I can infer that there is a real risk of these assets being dissipated illegitimately.

- i. Mr Aldwood's response to the claim and to the WWFO has not been inappropriately casual or evasive.

193. Standing back and looking at all the evidence in the round, I find that the Bank has fallen a long way short of meeting the required threshold of satisfying me by reference to solid evidence that there is a real risk of Mr Aldwood illegitimately dissipating his assets to frustrate any judgment that the Bank might obtain in these proceedings or dealing with his assets in an unjustified way so as to frustrate the enforcement of any such judgment.

194. I have accordingly not found it necessary to consider what if any effect the delay on the Bank's part could be said to have had.

195. I therefore reject the Bank's application to continue the WWFO granted by Murray J and will grant Mr Aldwood's application to discharge it.

Full and frank disclosure

196. Given that I have decided to discharge the WWFO, it is unnecessary for me to give detailed consideration to the points made in relation to the alleged failure on the Bank's part to give full and frank disclosure when they applied without notice for the WWFO. I would only say that having read Mr Cook's skeleton, the evidence put before the Court and the transcript of the hearing with care, I was not satisfied that there had been any failure on the Bank's part. I have applied the relevant test for the continuation of the order which is of course the same as for the granting it in the first place on the basis of far more evidence than was available to Murray J. and following an *inter partes* hearing lasting two days.

III. Disposal

197. The applications are accordingly disposed of as follows:

- a. The Defendant's application for a stay is dismissed. The court has jurisdiction to hear the claim.

- b. The Defendant's application to discharge the order made by Mr Justice Murray on 18 January 2019 is granted.

- c. The Claimant's application to continue or reinstate the order made by Mr Justice Murray as varied by consent is dismissed.