



Neutral Citation Number: [2019] EWCA Civ 2073

Case No: A4/2019/1783 & A4/2019/1783 (B)

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**  
**MR DANIEL TOLEDANO QC (Sitting as a Deputy Judge of the High Court)**  
**CL2017-000782**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 26/11/2019

**Before :**

**THE CHANCELLOR OF THE HIGH COURT**  
**LORD JUSTICE FLAUX**  
and  
**LADY JUSTICE ROSE**

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**Between :**

**E D & F MAN CAPITAL MARKETS LTD**

**Claimant**  
**(Respondent)**

**- and -**

**STRAITS (SINGAPORE) PTE LIMITED**

**Tenth**  
**Defendant**  
**(Appellant)**

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**Mr David Lewis QC & Mr Andrew Dinsmore (instructed by Reed Smith LLP)**  
**for the Appellant**  
**Mr Huw Davies QC & Mr John Robb (instructed by Clyde & Co. LLP)**  
**for the Respondent**

Hearing date: Tuesday 5 November 2019  
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**Approved Judgment**

## Lord Justice Flaux:

### Introduction

1. This is an appeal by the tenth defendant (to which I will refer as “Straits”) against the Order dated 4 July 2019 of Daniel Toledano QC sitting as a Deputy High Court Judge in the Commercial Court dismissing Straits’ challenge to the jurisdiction of the Courts of England and Wales pursuant to CPR Part 11. Permission to appeal was granted by Henderson LJ. The appeal (like the challenge itself) is limited to a contention that the third requirement for grant of permission to serve out restated by Lord Collins in *AK Investments v Kyrgyz Mobil* [2011] UKPC 7 has not been met, in other words the requirement that England is the proper place in which to bring the claim. It is accepted by Straits that the first two requirements are met, namely that there is a serious issue to be tried on the merits in relation to each of the alleged causes of action and that there is a good arguable case that each cause of action falls within one or more of the jurisdictional gateways under CPR PD6B. In this case, it is accepted that there is a good arguable case under the necessary or proper party gateway in PD6B paragraph (3).
2. The factual background to the claims of the claimant (to which I will refer as “MCM”) are set out at [4] to [10] of the judge’s judgment and it is unnecessary to repeat that background here. By way of overall summary, MCM claims that it has been the victim of a US\$284 million fraud perpetrated by the defendants.

### Procedural history in Singapore and England

3. To make the present appeal comprehensible it is necessary to set out the procedural history in a little detail, although much of what follows is derived from the judgment, for which I am grateful.
4. On 25 May 2017, MCM commenced pre-action disclosure proceedings in Singapore against Straits (in OS [Originating Summons] 533) seeking various categories of documents and seeking to administer interrogatories. As the judge found at [21] and [22] of the judgment, under the relevant Singapore law there was only jurisdiction to make such an Order in respect of intended proceedings in Singapore, not elsewhere, and the relevant rule of Court (O.24 r.6) required an application to be supported by an affidavit stating whether the person against whom the order was sought was likely to be party to subsequent proceedings in the Singapore Court. MCM accepted before the judge that, when it issued OS533, its provisional intention was to commence substantive proceedings against Straits in Singapore if such proceedings were justified by the evidence. Straits filed affidavit evidence in opposition from Ms He contending that MCM was not entitled to the information and documents requested.
5. On 21 December 2017, MCM commenced proceedings in England against Come Harvest and Mega Wealth (the first and second defendants), only asserting causes of action in deceit and unjust enrichment. The Master Agreements between MCM and those two defendants were governed by English law and provided for the exclusive jurisdiction of the Courts of England and Wales. These English proceedings were not disclosed by MCM to the Court in Singapore until 7 March 2018, even though Straits was seeking discovery from MCM in OS533 of what proceedings it was taking worldwide. On 14 June 2018, MCM told the Court in Singapore that the English proceedings were “strictly irrelevant” so far as Straits was concerned. The judge found

at [23] that by issuing and pursuing OS533 and by indicating to the Singapore Court that the English proceedings were irrelevant so far as Straits were concerned, MCM gave the impression to the Singapore Court that it intended to pursue any proceedings against Straits in Singapore, as was indeed its intention prior to August 2018. There is no suggestion that MCM misled the Singapore Court in that regard.

6. On 13 August 2018, Assistant Registrar Zeslene Mao dismissed MCM's application in OS533. MCM appealed against that decision on 24 August 2018. In the meantime, the first and second defendants had served their Defence in the English proceedings on 28 June 2018. This appeared to implicate Straits in the alleged fraud perpetrated on MCM. Other documentation not previously available to MCM had also been obtained. For those reasons, by September 2018 MCM had changed its mind about commencing substantive proceedings against Straits in Singapore and had decided to apply to join Straits, together with various other entities allegedly implicated in the fraud, as defendants to the English proceedings.
7. Accordingly, on 7 September 2018, MCM filed an application to amend its Particulars of Claim in the English proceedings to join the third to tenth defendants and to serve those proceedings on those defendants out of the jurisdiction. In its draft amended pleading and the evidence in support of its application, MCM relied upon the material which had been disclosed by Ms He in OS533 in Singapore. In its application, MCM accepted that it would discontinue the appeal in Singapore against the dismissal of OS533. MCM's application was not resisted by the first and second defendants. It came before the judge on an *ex parte* basis on 23 November 2018. He granted permission to amend to join the other defendants including Straits and granted permission to serve out.
8. On 24 January 2019, Straits issued its application under CPR Part 11 challenging the jurisdiction of the English Court. This had two particular aspects: (i) Straits contended that in using material disclosed by Ms He in Singapore MCM had breached an implied undertaking to the Singapore Court about the use of such material, so that the 23 November 2018 Order of the judge could not stand and should be set aside in its entirety; and (ii) Straits contended that by issuing and pursuing proceedings for pre-action disclosure in Singapore, MCM had exercised a choice in favour of any substantive proceedings against Straits in Singapore, such that it could not change course and now pursue Straits in England.
9. So far as developments in Singapore are concerned, on 11 February 2019, MCM discontinued its appeal against the dismissal of its application in OS533. On 1 March 2019, Straits issued a summons for an anti-suit injunction seeking to restrain the English proceedings against it and an injunction restraining the use of the materials obtained in OS533. By an Order dated 31 May 2019, the Singapore High Court (Aedit Abdullah J) granted an injunction restraining MCM from using in the English proceedings any of the material covered by the implied undertaking, but refused to grant the anti-suit injunction sought.
10. In dismissing the application for an anti-suit injunction, the judge said:

“5. As for the Anti-suit injunction, I was not persuaded that Singapore was the clearly more appropriate forum. There were factors, relied on by [Straits], which pointed to Singapore; but

just as much there were factors pointing instead to England. It suffices to note that given this close balance, the Defendant did not make out the first requirement for the issuing of an ASI.

6. Additionally, I would note that none of the factors relied on by the Defendant were to my mind sufficient in any event to establish vexation and oppression of the degree that would justify the issuing of an anti-suit injunction. The mischief or conduct raised could be better and specifically targeted by the injunction against use of documents.”

11. In view of the injunction restraining the use of the material disclosed by Ms He, by the time that Straits’ jurisdiction challenge was heard by the judge on 20 June 2019, MCM had amended its draft pleading against the third to tenth defendants and its evidence in support of permission to serve out of the jurisdiction in order to redact any reference to that material. The proposed amendments with redactions were provided to Straits before the hearing. On 14 June 2019, Butcher J had refused an application by Straits for an adjournment of its jurisdiction challenge. He held that the hearing had been fixed for some time and that issues as to redaction could be adjudicated on at the hearing.

#### The judgment

12. Having set out the background and the procedural history, the judge dealt first with the submission by Straits that the 23 November 2018 Order could not stand and should be set aside in its entirety. The judge recorded at [26] that MCM did not dispute that it should not have used the material and had now redacted it. Its use was through an inadvertent mistake. On the basis of Singaporean legal advice (in respect of which privilege was not waived) it had considered itself at liberty to refer to the He affidavit on the basis that it had been voluntarily disclosed by Straits.
13. The judge rejected Straits’ submission at [31] to [33]. He noted that MCM contended that permission to serve out on 23 November 2018 could be justified without any reference to the He material and if that was right Straits would be asking the Court to set aside the Order and service pursuant to it only for permission to be re-granted on the basis of the redacted material now before the Court. The judge could see no purpose in taking that course, which would not accord with the overriding objective. He accepted the evidence that the use of the material was a result of an inadvertent error and noted that the Singapore High Court had not considered that in using the material MCM had acted oppressively or vexatiously such as to justify an anti-suit injunction. Also MCM was not asserting new causes of action but the same causes of action but without reference to the He material.
14. He also noted that MCM accepted that it would be required to amend its pleading in due course so as to ensure that all references to the He material were removed, and to seek permission from the Court to do so but said that it could not make that application for permission in the present jurisdiction challenge because it affected all the other defendants, not just Straits, and they were not before the Court. I note that subsequent to the judge’s judgment, permission to re-amend so as to give effect to the redactions was granted by Popplewell J.

15. The judge recorded at [35] to [38] that it was common ground that the first two requirements for the grant of permission to serve out restated by Lord Collins in *AK Investments* were satisfied. In particular, it was accepted that there was a good arguable case in respect of the gateway in PD6B para. (3), in other words a good arguable case that Straits was a necessary or proper party to the claim against the first two defendants. The judge noted at [39] that MCM relied on two other gateways: the tort gateway in para. (9) and the gateway for constructive trust claims in para. (15). In light of Straits' acceptance of the applicability of the necessary or proper party gateway, the parties had not focused much on the other gateways and the judge considered that he did not need to reach a view on their applicability. The real dispute concerned the third requirement. Straits contended that the Court should not exercise its discretion to permit service out because MCM had not demonstrated that England was the proper place to bring the claim.
16. The judge referred to CPR6.37(3) which gives expression to the *forum conveniens* test as described by Lord Goff in *The Spiliada* [1987] AC 460 at 475-484 and to the formulation of the test more recently by Lord Collins JSC in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [88], that the task of the Court is: "to identify the forum in which the case can suitably be tried for the interests of all the parties and for the ends of justice". The judge referred to the judgment of Lord Briggs JSC in *Lungowe v Vedanta Resources plc* [2019] UKSC 20; [2019] 2 WLR 1051 confirming at [68] that in multi-defendant litigation the Court was looking for "a single jurisdiction in which the claims against all the defendants may most suitably be tried." The judge said at [42]:

"As Lord Briggs pointed out [69]-[70], one factor, albeit a very important one, was the desire to avoid multiplicity of proceedings and the risk of inconsistent judgments. In cases where the claimants will in any event continue against the anchor defendant in England, this has frequently been found to be decisive in favour of England as the proper place, even in cases where all the other connecting factors appeared to favour a foreign jurisdiction."
17. The judge discussed the issue in *Vedanta* which was whether that approach was the correct one in circumstances where the claimants, having a choice, had brought on themselves the risk of irreconcilable judgments. The claimants had sued the UK parent company and its Zambian subsidiary. The parent company had offered to submit to the jurisdiction of the Zambian Courts to enable the whole case to be tried there, but the claimants had chosen to continue against the UK parent company in England, arguing that it followed that the proper place for the case against the Zambian subsidiary must be England. The judge said at [44] that the Supreme Court had held at [84]-[87] that the risk of irreconcilable judgments was not a "trump card" where the risk arose purely from the claimants' choice to proceed against one of the defendants in England rather than against both of them in Zambia.
18. Straits sought to rely on that concept of choice in *Vedanta*, arguing that MCM had exercised a choice at the outset by commencing OS533, thereby intending any substantive proceedings should also be brought in Singapore and that MCM should be held to that choice, which Straits contended exerted a "gravitational pull" towards Singapore. At [46] the judge said he was unable to accept these submissions. There was

a world of difference between the choice being considered in *Vedanta* and the choices in this case. MCM never had a straightforward choice to sue all the defendants in Singapore, as it was bound by the exclusive jurisdiction clauses in the Master Agreements to sue Come Harvest and Mega Wealth in England. There was no evidence that, if approached, they would have been willing to give up their rights under those clauses. The judge considered that MCM was entitled to say that it had no choice but to sue Come Harvest and Mega Wealth in England and having done so, there was real force in its submission that England was the proper place for all claims against all parties as the only place where a single composite forum could be achieved.

19. At [47] the judge recognised that between May 2017 and the summer of 2018, MCM appears to have considered that it was best served by suing Come Harvest and Mega Wealth in England whilst intending to bring substantive proceedings against Straits in Singapore. In the event, however, MCM did not bring substantive proceedings in Singapore, but in England. In effect it changed its mind and the judge could see no proper basis for saying that MCM must be stuck with its originally contemplated forum. The issue was whether, as at 23 November 2018, when the application for leave to serve out was made, England was the proper forum for all the claims. By that date, MCM had changed its mind and indicated that it wished to bring all the claims in England. The judge rejected Straits' submission that the principle of approbation and reprobation applied.
20. Straits also relied upon the fact that MCM had told the Singapore court that the proceedings against Come Harvest and Mega Wealth were irrelevant. The judge said that, at that stage, there was no cause of action in conspiracy and the position changed once MCM sought to join additional parties and to add that cause of action. It was not suggested that MCM had said anything false to the Singapore Court.
21. At [51]-[52] the judge said that, unlike *Vedanta*, this was a case where the need to avoid multiplicity of proceedings and the risk of irreconcilable judgments should bear considerable weight in the evaluation of proper forum. This was especially so given that claims were being advanced of an overarching conspiracy against the first to fourth defendants and Straits. Those claims needed to be considered alongside all the claims asserted against all the defendants. Documents and evidence should be available to all defendants. This pointed to the desirability of a single composite forum.
22. At [54] the judge said: "I therefore conclude that the multiplicity point is a factor of great significance in the present case and that it points strongly to England as the proper place for the resolution of the claims against Straits."
23. He then went on to consider other factors, first governing law, noting that both sides accepted that it was unlikely to be very significant as the dispute was more likely to turn on factual issues than legal ones and there was no evidence of any difference between English law and Singapore law or any other law in respect of the causes of action pleaded. The judge then considered at [59] to [73] the submissions and authorities relied upon in relation to Article 4 of the Rome II Regulation as to the governing law of the torts relied upon. He concluded that the direct damage for the purposes of Article 4(1) occurred in England so that English law governed the claims in conspiracy and knowing receipt.

24. In relation to other factors the judge took account of the fact that MCM was based in England and Straits in Singapore, with other defendants in Hong Kong and California. This did not carry much weight especially as most defendants had now submitted to the jurisdiction of the English Court. Other factors relied on by Straits were not ones on which the judge would place significant weight.

25. At [76] he concluded:

“Taking into account all of the factors I have addressed above and giving due prominence and weight to the desire to avoid multiplicity of actions and the risk of inconsistent judgments, I have reached the conclusion that MCM has demonstrated that England is clearly the proper place in which to bring its claim against Straits. I would have reached the same conclusion even if I had concluded that some or even all of the claims against Straits were governed by Singapore law (or Malaysian or Korean law).”

#### Grounds of appeal

26. Straits advanced seven grounds of appeal which are as follows:

- (1) The judge erred in concluding that it was unnecessary for MCM to apply for and obtain permission to amend before it could rely on the draft amended pleading at the hearing of the CPR Part 11 application.
- (2) The judge erred in ratifying the order granting permission to serve out where that order permitted service out of documents which had since been withdrawn or substantially redacted.
- (3) The judge erred in principle in disregarding the need for caution where the necessary or proper party gateway was the only one relied upon.
- (4) The judge erred in principle in concluding that MCM could rely upon avoidance of multiplicity of proceedings as an overwhelming factor where multiplicity was previously its chosen course, disregarding the step-change in the law set out in *Vedanta*.
- (5) The judge erred in holding that the direct damage arising from a fraudulent sale of goods contract for the purposes of Article 4 of Rome II is suffered where the claimant initiates payment and receives fraudulent paperwork. The correct analysis is that direct damage is suffered where a claimant fails to obtain title in and/or delivery of the goods.
- (6) Pursuant to the errors of principle in grounds 3 to 5, the judge erred in holding that MCM had established that England was clearly the proper place for its claim against Straits.
- (7) The judge failed to address whether MCM’s conduct, particularly commencing proceedings on the basis of material deployed in breach of an undertaking to a foreign court provided a good reason for declining jurisdiction as part of the Court’s general discretion.

Summary of the parties' submissions

27. In his oral submissions Mr David Lewis QC on behalf of Straits accepted that if he failed on ground 4, the appeal would fail altogether, so that his submissions focused on why the judge had erred in distinguishing *Vedanta*. He submitted that the judge had adopted an approach of regarding the risk of irreconcilable judgments as a “trump card” in favour of English jurisdiction, the approach adopted by Leggatt J in *OJSC VTB Bank v Parline Ltd* [2013] EWHC 3538 (Comm) which the Supreme Court in *Vedanta* had disapproved and overruled. He submitted that a claimant could not rely upon that risk of irreconcilable judgments where the claimant had chosen to bring that risk on itself.
28. The choice did not have to be irrevocable. In commencing OS533 in Singapore, MCM had made an implied representation that, if any substantive proceedings were commenced against Straits, they would be in Singapore, a representation which was repeated over the course of the Singapore proceedings, including that the English proceedings were irrelevant. Mr Lewis QC submitted that he did not need to go so far as to say that the representation was binding for all time. It represented prior inconsistent conduct by MCM which denuded multiplicity of proceedings as a decisive factor.
29. He emphasised three particular aspects of the choice made by MCM in 2017: (i) that the exclusive jurisdiction clauses in the Master Agreements with Come Harvest and Mega Wealth were always present to anchor any conspiracy claims and yet MCM sought to pursue Straits in Singapore regardless; (ii) the jurisdictional requirement of pre-action disclosure proceedings was known to MCM who gave the impression to both the Singapore Court and Straits that any substantive proceedings against Straits would be in Singapore. Had Straits known the true position, it would have stopped the pre-action proceedings at the outset for want of jurisdiction; and (iii) pre-action disclosure could have been sought by MCM in England from the outset.
30. Mr Lewis QC submitted that *Vedanta* had effected a step-change in the law. Wherever the claimant had chosen to proceed against different defendants in different jurisdictions as had occurred here, multiplicity of proceedings and the risk of irreconcilable judgments ceased to be a factor of any real significance.
31. His alternative submission was that the doctrine of approbation and reprobation was applicable, precluding MCM from now arguing that England was the proper place for the claim because of multiplicity of proceedings and the risk of irreconcilable judgments. He submitted that English law had moved on from the decision of the House of Lords in *Lissenden v Bosch* [1940] AC 412, relied upon by Mr Huw Davies QC on behalf of MCM, which equated the Scottish doctrine of approbation and reprobation with the equitable doctrine of election. He referred to a more general statement of the principle by Sir Nicolas Browne-Wilkinson V-C in *Express Newspapers Plc v News (UK) Ltd* [1990] 1 WLR 1320:

“There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance,



cannot thereafter be permitted to go back and adopt an inconsistent stance.

To apply that general doctrine to the present case is, I accept, a novel extension. But, in my judgment, the principle is one of general application and if, as I think, justice so requires, there is no reason why it should not be applied in the present case.”

32. Mr Lewis QC submitted that this more general application of the principle had been cited with approval by Jeremy Cousins QC sitting as a Deputy High Court Judge of the Chancery Division in *Twinsectra Limited v Lloyd’s Bank plc* [2018] EWHC 672 (Ch) at [80] to [87] where he concluded that:

“I therefore have come to the conclusion that the doctrine of approbation and reprobation has now become an established feature of English law (and it would seem Scots law) for the wider principle described in *Express Newspapers*.”

33. Mr Lewis QC submitted that this wider doctrine applied here and that, having made the continuing representations to the Singapore court upon which he relied, it was too late for MCM to change its mind.

34. In relation to ground 3, Mr Lewis QC submitted that the judge had erroneously disregarded the need for caution where the necessary or proper party gateway was the only one relied upon. Whilst he accepted that it was not necessary for the judge to mention expressly that he had exercised caution, given that he had not mentioned it, the presumption was that he had overlooked the need to exercise caution.

35. In relation to ground 5, Mr Lewis QC made detailed submissions on the law to the effect that the decided cases fell into two categories: (1) where the sole or predominant issue is that the claimant has not received goods or money where it should have done, in which case direct damage was suffered where the goods or money should have been received; and (2) where the claimant’s complaint is focused on having parted with money, so that direct damage is suffered where the claimant parts with the money. He submitted that this case was in a third category not dealt directly with by the decided cases, where the claimant has parted with money and not received what it expected in return. He submitted that the damage caused by the conspiracy was not complete until the metal was not received in Singapore.

36. His submissions raised interesting and difficult points on Article 4 of Rome II. Since he accepted that unless he could succeed on ground 4 the appeal would fail and, for reasons elaborated in the Analysis and Conclusions section of this judgment, I consider that ground 4 is not made out, it is not necessary for the determination of this appeal to reach a conclusion as to whether ground 5 is correct or not. In the circumstances, it seems to me preferable not to decide the issue, since it will not be determinative of the appeal. In this context, I have in mind the salutary observation of Mummery LJ in *Housden v The Conservators of Wimbledon and Putney Commons* [2008] EWCA Civ 200; [2008] 1 WLR 1172 at [30]:

“It is unnecessary to decide the issue for the purpose of disposing of the appeal. In general, it is unwise to deliver judgments on

points that do not have to be decided. There is no point in cluttering up the law reports with *obiter dicta*, which could, in some cases, embarrass a court having to decide the issue later on.”

37. So far as the other grounds of appeal are concerned, Mr Lewis QC accepted that ground 6 would stand or fall with ground 4. He pursued ground 7 as a free-standing ground, submitting that the Court retained a general discretion to refuse permission to serve out of the jurisdiction, even if it otherwise found that England was the proper place for the claim. He relied on [150] of the judgment of the Court of Appeal in *Erste Bank v JC VMZ Red October* [2015] EWCA Civ 379; [2015] 1 CLC 706. He submitted that there had been a misuse by MCM of the material from the He affidavit. Whilst this had been purged to some extent by the redactions, it counted against the exercise of discretion in MCM’s favour. There had been continuing representations to the Singapore court and a lack of candour culminating in informing the Court that the present proceedings were irrelevant in relation to Straits.
38. Mr Lewis QC did not develop grounds 1 and 2 orally, whilst not formally withdrawing them. He accepted that in the light of the subsequent grant of permission to re-amend by Popplewell J, they were no longer a sufficient basis to uphold the jurisdiction challenge. Mr Lewis QC submitted that they remained relevant because the judge had ordered Straits to pay the costs of the adjournment application reserved by Butcher J. That order should be set aside because, absent an application to amend, an adjournment was the only available alternative to the judge aside from upholding the jurisdiction challenge.
39. Mr Huw Davies QC on behalf of MCM also focused his oral submissions on ground 4. He described the suggestion that MCM should be prevented from relying on the important factor as to proper forum of multiplicity of proceedings and the risk of irreconcilable judgments, because it had sought pre-action disclosure, as begging belief. The pre-action disclosure proceedings had been dismissed and there had never been any substantive proceedings in Singapore. The first time there were any conspiracy proceedings in any jurisdiction is when MCM applied to amend its claim and add the third to tenth defendants and sought permission to serve out.
40. He pointed out that at [27] of his skeleton argument Mr Lewis QC had identified three relevant principles arising from *Vedanta*:
  - (1) The unspoken assumption behind the search for a single jurisdiction in multi-defendant litigation is the risk of irreconcilable judgments but the case law showed that that risk was only one factor albeit a very important one: [69] of *Vedanta*;
  - (2) Prior decisions holding that where the claim will continue against the anchor defendant in England the avoidance of irreconcilable judgments was decisive in favour of England as the proper place even where all the connecting factors pointed to a foreign jurisdiction (specifically *Parline*) were wrong: [70][71] and [76]-[79] of *Vedanta*;
  - (3) The risk of irreconcilable judgments to the prejudice of the claimant should not be a decisive factor or “trump card” when it is a factor which the claimants, having a choice, have brought on themselves: [75] and [82]-[84] of *Vedanta*.

41. Mr Davies QC submitted that none of these principles was controversial and the judge applied them. The judge was right to distinguish *Vedanta*, the facts of which were very different from the present case. In terms of the ratio of *Vedanta* which is really at [87] of the judgment, there was no other principle. There was no sliding scale in relation to multiplicity of proceedings, but it was all weighed in the balance. Given that MCM did not have a choice as to where to sue the anchor defendants in the present case, it did not get close to what Lord Briggs JSC was deciding in *Vedanta*.
42. In relation to ground 3, Mr Davies QC submitted that the judge had well in mind from discussion during the course of argument the need to exercise caution. In relation to ground 7 he submitted that the whole exercise in relation to the third requirement restated by Lord Collins in *AK Investments* was the exercise of general discretion. The points made by Mr Lewis QC in [49] of his skeleton argument about MCM's conduct were all run as part of his case as to why England was not the appropriate forum so had been considered in the overall exercise of discretion.

#### Analysis and conclusions

43. Since Mr Lewis QC accepts that the success of the appeal stands or falls with ground 4, I will consider that ground first. In my judgment, despite the ingenuity of Mr Lewis QC's submissions, there is nothing in the decision of the Supreme Court in *Vedanta* which represents a step-change in the law requiring the Court in the present case to discount the importance of the avoidance of multiplicity of proceedings and the risk of irreconcilable judgments as a factor favouring resolution of all the claims against all the defendants in one forum, England. The judge was correct to distinguish *Vedanta* in what was an impressive and careful judgment.
44. It is important to identify what general principle can be derived from *Vedanta* and what is the actual ratio of that decision. The general principle is stated at [69]:

“An unspoken assumption behind that formulation of the concept of *forum conveniens* or proper place, may have been (prior to *Owusu v Jackson*) that a jurisdiction in which the claim simply could not be tried against some of the multiple defendants could not qualify as the proper place, because the consequence of trial there against only some of the defendants would risk multiplicity of proceedings about the same issues, and inconsistent judgments. But the cases in which this risk has been expressly addressed tend to show that it is only one factor, albeit a very important factor indeed, in the evaluative task of identifying the proper place. For example, in *Société Commerciale de Réassurance v Eras International Ltd (The Eras Eil Actions)* [1992] 1 Lloyd's Rep 570, 591 Mustill LJ said: “in practice the factors which make the party served a necessary or proper party ... will also weigh heavily in favour of granting leave to make the foreigner a party, although they will not be conclusive.”
45. What follows is the application of that general principle to the particular facts of *Vedanta*, culminating in a summary of its application in that case at [87] of the judgment, which contains the ratio of the decision:

“In conclusion, it is sensible to stand back and look at the matter in the round. This case seeks compensation for a large number of extremely poor Zambian residents for negligence or breach of Zambian statutory duty in connection with the escape within Zambia of noxious substances arising in connection with the operation of a Zambian mine. If substantial justice was available to the parties in Zambia as it is in England, it would offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England, if the risk of irreconcilable judgments arose purely from the claimants’ choice to proceed against one of the defendants in England rather than, as is available to them, against both of them in Zambia. For those reasons I would have concluded that the claimants had failed to demonstrate that England is the proper place for the trial of their claims against these defendants, having regard to the interests of the parties and the ends of justice.”

46. In my judgment, Lord Briggs JSC cannot have been intending to lay down some wider general principle which would apply to factual situations other than the one he was considering, nor would any such wider general principle be binding on this Court. He clearly regarded the fact that the anchor defendant was offering to submit to the jurisdiction of Zambia as a critical factor: see [75] of the judgment. That gave the claimants a real ability to sue all the defendants in one jurisdiction, Zambia, whereas they were choosing to proceed against the anchor defendant in England. It is scarcely surprising that, applying the general principle, the Supreme Court concluded at [87] that England was not the proper place for the litigation to be conducted, when the risk of irreconcilable judgments arose purely from the claimants’ choice to sue the anchor defendant in England.
47. The judge recognised and applied the general principle at [42] of his judgment, which I have quoted at [16] above. He then identified correctly at [45] to [47] why that element of choice as it was meant in *Vedanta* was absent in this case. In my judgment, that element of choice was absent for two reasons: (1) in contrast with *Vedanta* the anchor defendants here, Come Harvest and Mega Wealth, on the material before the Court, have given no intimation of a willingness to waive the exclusive jurisdiction clauses, so that the claims against them will continue here regardless. This is not a case where the claimant has brought the risk of irreconcilable judgments on itself by making a choice to continue to sue the anchor defendant in England when that defendant is willing to be sued in another forum where all the claims can be heard together; and (2) MCM did not pursue substantive proceedings against Straits in Singapore. Whilst it had a provisional intention to do so, it changed its mind once it became apparent that a claim in respect of an overarching conspiracy was arguable against a number of defendants, including Straits and by the time that permission to serve out was sought on 23 November 2018, was intending to pursue all the claims against all the defendants in England.
48. That second reason is also the answer to Mr Lewis QC’s point about the doctrine of approbation and reprobation. It is not necessary to decide whether he is correct that

some more general wider principle than equitable waiver or election is available in the modern law in accordance with the Vice-Chancellor's judgment in *Express Newspapers*. As Mr Davies QC pointed out in his skeleton argument, that case and other first instance decisions which have followed it, including *Twinsectra*, are all cases where the doctrine was invoked to prevent a party from running a case which was inconsistent with either a prior judgment in its (or a privy's) favour or its own pleaded case. There was nothing of that kind here: MCM never brought substantive proceedings against Straits in Singapore and any intention to do so was only provisional, so there was no irrevocable election in this case. The judge was correct to reject the application of this principle at [48] of his judgment.

49. Contrary to Mr Lewis QC's submissions, the judge did not overstate the importance of avoidance of multiplicity of proceedings and the risk of irreconcilable judgments as a factor in determining the proper place for the claim to be tried in the interests of all the parties. He said at [51] that in the present case it should be given considerable weight and rightly recognised at [52] that the nature of the claim of an overarching conspiracy was such that it needed to be considered alongside all the claims against all the defendants, with mutual disclosure available. As he said, that all pointed to the desirability of a single composite forum for this litigation. Given the exclusive jurisdiction clause in the Master Agreements with the first and second defendants and the fact that the third to eighth defendants had submitted to the English jurisdiction, that single composite forum and the proper place for the overall litigation to be tried was England. In my judgment, the judge's evaluation as to why England was the proper place to bring the claim and the weight he gave to the avoidance of multiplicity of proceedings and of the risk of irreconcilable judgments were unimpeachable.
50. It follows that ground 4 fails. Given the concession by Mr Lewis QC, the other grounds can be dealt with shortly. In relation to ground 3, the judge clearly had in mind the need for caution when the only gateway relied upon is necessary or proper party. It was no doubt his recognition of the need for caution that led him to decide the issue of governing law in MCM's favour. As I have already indicated, given that grounds 3 and 4 fail, so that the judge was correct to conclude that Straits was a necessary or proper party to the claims against the other defendants and that England was the proper place for the claims overall to be brought, it is neither necessary nor desirable to decide ground 5.
51. Ground 7, which is concerned with residual discretion, is at best a make weight point which involves artificial dissection of the third requirement restated by Lord Collins in *AK Investments*, which in any event involves the exercise of discretion, as Mr Davies QC pointed out. To the extent that the claimant's motive and conduct have to be considered as part of the exercise of general discretion (which [150] of *Erste Bank* seems to be suggesting) it was not contended on behalf of Straits that any implied representation to the Singapore Court as to MCM's intention at the time was false or that anything else untrue had been said to the Singapore Court and, as the judge accepted at [31] of the judgment, the use of the He material in England was the result of an inadvertent error. In the circumstances, it would be quite disproportionate to conclude that this conduct was such as should have led to permission to serve out being refused, with all the multiplicity of proceedings and risk of irreconcilable judgments that would entail.

52. Straits itself accepts that grounds 1 and 2 are no longer a sufficient basis for upholding the challenge to the jurisdiction. In any event, I agree with Mr Davies QC that these grounds ignore the difference between a party who needs to amend its claim form to demonstrate a valid case to serve out and a party who is required to redact material from pleadings and evidence which after the redaction still demonstrate the same valid case for service out as when permission was given on the basis of the unredacted material. This was the point the judge himself made at [31] of the judgment. In those circumstances, I do not consider that the grant of formal permission to amend was required before the judge dismissed Straits' challenge to the jurisdiction.
53. In all the circumstances, the appeal must be dismissed.

**Lady Justice Rose**

54. I agree.

**Sir Geoffrey Vos C**

55. I also agree.