



Neutral Citation Number: [2022] EWHC 1714 (Comm)

Case No: CL-2021-000336

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
Fetter Lane,
London,
EC4A 1NL

Date: 04 July 2022

Before :

MRS JUSTICE COCKERILL DBE

Between :

W NAGEL (A FIRM)

Claimant

- and -

(1) CHAIM PLUCZENIK
(2) PLUCZENIK DIAMOND COMPANY NV
(3) VARDA SHINE

Defendants

Jonathan Cohen QC (instructed by DWF Law LLP) for the Claimant
Ian Quirk QC (instructed by Mishcon de Reya LLP) for the First and Second Defendants
Ruth den Besten (instructed by Farrer & Co LLP) for the Third Defendant

Hearing dates: 20-21 June 2022

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I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 4 July 2022 at 10:30am

Approved Judgment**Mrs Justice Cockerill :**

1. There are two applications before me:
 - i) An application by the First and Second Defendants that the Court (i) set aside an order made on 10 September 2021 by Moulder J for service out of the jurisdiction and (ii) grant declaratory relief pursuant to CPR Part 11.1 that this Court has no jurisdiction to try this claim, alternatively should not exercise any jurisdiction which it has;
 - ii) An application by the Third Defendant that the Court stay the proceedings on *forum non conveniens* grounds (the Third Defendant having been served in England without the need for permission).
2. I have decided to grant these applications. I will briefly set out the relevant background then take the applications in turn.

Relevant Background

3. The Second Defendant, Pluczenik Diamond Company (“PDC”), is a leading manufacturer and distributor of diamonds, many of which it purchases uncut from De Beers UK Limited (“De Beers”). PDC is a Belgian company. The First Defendant, Mr Pluczenik, is the Managing Director of PDC.
4. The Claimant, W Nagel (“Nagel”), is a broker in the diamond industry. Nagel, or members of the Nagel family, provided brokerage services to PDC from the 1960’s until the termination of their relationship in August 2013.
5. It is fair to say that the termination of the relationship appears to have resulted in extremely hostile feelings on both sides of the dispute.
6. The Third Defendant, Ms Shine, was the CEO of a subsidiary of De Beers – De Beers Trading Company – from 2006 until January 2014. She has never worked for either of the Claimant or the First or Second Defendants.
7. After the termination of the Nagel-PDC relationship, two claims were brought in England and Belgium. They are central to the present proceedings.
8. In March Nagel issued a claim against PDC in the English High Court (the “English Claim”). The claim sought damages for breach of contract, alternatively under the Commercial Agency Regulations. The dispute centred on alleged failures to pay commission and/or give appropriate notice of termination. It did not immediately serve the claim, but sent a letter before action which indicated that it intended to bring proceedings in England.
9. In May 2015, PDC issued a claim in the Belgian Courts against Nagel and a related Belgian company, Simona NV (“Simona”). The claim was brought because of the threat of English proceedings and Mr Pluczenik would later accept in cross examination in the English Claim that Simona was named as a defendant to provide a base to found jurisdiction against Nagel.

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10. A further claim was issued in Belgium on 22 September 2015 by PDC against Nagel, Willie Nagel (the founder of the Nagel brokerage business, since deceased) and Simona (Nagel's representative in Belgium). Those claims have been consolidated by the Belgian Court, and I refer to them together (the "Belgian Claim"). I refer to the various defendants in the Belgian Claim as the "Nagel parties".
11. In the Belgian Claim, PDC alleges failures by the Nagel parties in performance of their brokerage duties causing PDC losses valued at €20 million. Specifically, PDC alleges that Nagel: (i) failed to submit a document about PDC's business to De Beers prior to the relevant deadline in March 2005 ("the Missed Deadline Allegation"); (ii) made negative remarks about PDC to De Beers in 2011 ("the Negative Comments Allegation").
12. On 8 June 2015 (i.e. after issue of the original Belgian Claim), Nagel amended the English Claim to seek negative declaratory relief to the effect that it was not liable in respect of either of the Missed Deadline Allegation or the Negative Comments Allegation. That was itself a direct reaction to the Belgian Claim.
13. Late in 2015 Ms Shine indicated in a brief statement that she would be prepared to give a statement in the Belgian proceedings.
14. The English Claim was contested and on 13 July 2017, Popplewell J gave judgment in it: *W Nagel (A Firm) v Pluczenik Diamond Company NV* [2017] EWHC 1750 (Comm). Ms Shine was not called as a witness by either side; both sides sought her evidence, she indicated an unwillingness to be called and neither side chose to seek to compel her. Popplewell J found for Nagel, including in respect of the negative declaratory relief.
15. He plainly took a very dim view of the case advanced by PDC and its conduct, making the following findings:
 - i) As regards the Missed Deadline Allegation: "*The incident was exaggerated and mischaracterised in order to provide some basis for a claim in Belgium. There was no breach of contract or duty by WN*".
 - ii) As regards the Negative Comments Allegation: "*This allegation is equally unfounded*".
 - iii) As regards the Belgian Claim more generally: "*The Belgian proceedings were commenced for tactical reasons in an attempt by Pluczenik to found jurisdiction in Belgium and to dissuade WN from bringing its claim in these proceedings, which had been foreshadowed in a letter before action.*"
16. Popplewell J's judgment (as regards this issues) was affirmed by the Court of Appeal: [2018] EWCA Civ 2640. That appeal did not concern the declaration of non-liability, permission to appeal having been refused on that point. The English claim has now ended, with all payments due having been made.
17. Meanwhile the Belgian Claim continued. In late 2017 Ms Shine gave a statement supporting PDC's case ("the Shine Statement"). She says this is because she had discovered the outcome of the English Proceedings dismissing the Alleged Defaults and it did not accord with her recollection.

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18. Nagel originally objected to jurisdiction on the ground of *lis pendens* (Articles 29 and 30 of the Brussels Regulation). It also argued that the three key documents on which reliance was placed – including Ms Shine’s statement - were forgeries. It did not raise issues of defendant jurisdiction; it says that it did not do so because under the approach of the Belgian Courts all that matters is what is said on the originating summons.
19. On 19 May 2020, the Belgian Court directed that a hearing be fixed to determine jurisdiction and the existence of the forgeries, and requested that the parties file additional submissions for that purpose.
20. The Belgian claimant submitted its arguments in July 2020. They contended for jurisdiction under Article 7 of the Brussels Regulation on the basis that services were provided in Belgium, via Simona’s offices and the reason for the arrangement was to work together in Antwerp. That was supported by statements giving evidence that Mr Nagel used to attend offices in Antwerp and do business there. On that basis it was argued that the centre of gravity or characteristic performance was in Antwerp.
21. On 30 September 2020, the Nagel parties filed their submissions in response to the Belgian Court’s directions. They did not make any substantive submissions on jurisdiction. There was no reference to and therefore no dispute of the points based on Article 7.
22. A hearing then took place in the Belgian Court on 5 January 2021, leading to an “Interim Judgment” on 2 February 2021. The hearing was attended by Nagel and their Belgian lawyers.
23. In that Interim Judgment, the Belgian Court found that:
 - i) “*it is necessary to first consider the question of international jurisdiction (and competence), and only after that can the forgery claim be considered*”. I accept the submission of the First and Second Defendants that this means that it found that it had to determine jurisdiction before the forgery issues.
24. It stated that the assessment of jurisdiction had to be based on the phrasing of the summonses independent of the merits:

“In ruling on the international jurisdiction and competence of the court, one cannot anticipate the assessment of the merits, nor can one assess given documents. At best, there can be a prima facie assessment of given documents or a given merit of the matter (insofar as such is useful in judging the question of jurisdiction and competence), while a claim of forgery requires a specific investigation, as laid down by the Judicial Code.”
25. It considered the *lis pendens* issue noting that it could no longer apply now that the English Claim was concluded. It then concluded that it had jurisdiction to determine the dispute. The Court noted that “*the defendants apparently do not (or no longer) dispute*” that the services were performed in Antwerp.

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26. The Court found that, as submitted by PDC, the services provided by the Nagel parties were performed in Belgium founding jurisdiction under Article 7.1 of the Brussels Regulation:
- “PLUCZENIK demonstrates that the services were provided in Belgium, which is neither refuted nor disputed by the defendants. ... The court thus finds that it has the required jurisdiction to take cognisance of the claims made by the parties”.
27. On the forgery issue the Court found that it was “manifestly unfounded”.
28. The Nagel parties were represented at the 5 January 2021 hearing and Popplewell J’s judgment in the English Claim was before the Belgian Court, which noted that that the English Court had “*pronounced a declaration of non-liability*” with respect to the Missed Deadline Allegation and the Negative Comments Allegation.
29. The Interim Judgment is the only judgment to date in the Belgian Claim. The Belgian Court by the Interim Judgment scheduled a further hearing for 23 November 2021 to rule on further preliminary issues, including whether the matters before it are *res judicata*.
30. The Nagel parties confirmed in their submissions dated 7 May 2021 for the further preliminary hearing that they no longer contested jurisdiction. They did however contend that the Belgian Claim should be dismissed because “...*the English judgment has the status of res judicata with regard to the present proceedings, so that the court on the basis of Article 23 and 25 Judicial Code is currently prohibited from again deciding on the claim...*”.
31. On 27 May 2021 (three months after the Interim Judgment), Nagel commenced the present claim in the Commercial Court. The claim alleges that the Belgian Claim constitutes a tortious abuse of process and forms part of an unlawful means conspiracy between the Defendants. Ms Shine is the Third Defendant. It is said that the provision of the Shine Statement and its (lack of) merits justify an inference that she was involved in the abuse of process and the conspiracy.
32. Nagel seeks damages in respect of legal costs caused by the Belgian claim, wasted management time and damage to commercial standing and reputation. It also seeks declarations that the Belgian Claim has been brought for improper purposes, that the Defendants have engaged in a conspiracy, that the Belgian Claim relies upon facts that the Defendants know to be false and is a fraud on the Belgian Court and (despite the terms of the Interim Judgment) it is pleaded that “*there has never been and is no prospect whatsoever that the Belgian Court ... would have jurisdiction*”.
33. Nagel filed an application without notice on 3 August 2021 for permission to serve proceedings on PDC and Mr Pluczenik outside the jurisdiction. The application was supported by the First Witness Statement of Mr Andrew Thomas Leach (“Leach 1”) who is a partner at DWF (Nagel’s solicitors), and Exhibit ATL1 to that Witness Statement. That application was submitted for determination on paper. The paper application was referred to me and I considered the matter sufficiently complicated that it should be referred for an oral hearing, supported by a skeleton argument. I note here

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as a point of practice that while it is usual for applications for permission to serve out to be determined on paper without a skeleton it is desirable, where an application is particularly complicated or marginal, for a skeleton to be lodged and for the application either to be listed for an oral hearing, or for that possibility to be flagged to the Court at the time of submission.

34. I shall refer to the contents of the application documents, which form the basis for the application to set aside on the basis of lack of full and frank disclosure, in more detail below.
35. The application was then heard by Moulder J, without notice, on 3 September 2021. Moulder J gave a short oral judgment on the same date. I have not been provided with a transcript of the hearing, but an attendance note records the Judge as finding that permission should be granted on the basis that the claim met limb (a) of the tort gateway (PD 6B, para. 3.1(9)(a), viz *“damage was sustained, or will be sustained, within the jurisdiction”* (Mr Cohen having submitted that Nagel trades from England, paid sums to Belgian lawyers from a bank account in England and has consequently suffered loss here). She refused permission on two other gateways – necessary and proper party and tort committed within the jurisdiction.
36. On 10 September 2021 (i.e. one week after oral judgment and on the same day as the making of the Judge’s order), Mr Cohen sent an email to Moulder J’s clerk. His email attached a proposed order and a Second Witness Statement from Mr Leach (“Leach 2”). He said that the witness statement was being submitted because *“a concern developed after the hearing that observations made by Mr Leach about the proceedings in Belgium in his first witness statements could be read in ways not intended. Some time was therefore taken to obtain further information from the Claimant’s Belgian lawyers for the purposes of precision.”*
37. Leach 2 is a four-page statement. The key points for present purposes are:
 - i) Mr Leach accepted that Leach 1 may have given the impression that jurisdiction issues had been deferred to trial. He explained that this was not correct. He said that the Belgian Courts look to see if there is an ostensible claim on the face of the summons against the anchor defendants and if there is such an ostensible claim, there is no opportunity to challenge the inclusion of the anchor defendant. He further stated that while Nagel had attempted to persuade the Belgian Court to address the question of whether it lacked jurisdiction due to the English Claim as a preliminary issue, the Belgian Court refused to do so with the result that that issue was deferred to trial. He noted that in the intervening period the English Claim had terminated, meaning that the relevance of the English Claim became *“res judicata ... which is now in issue in Belgium.”* He concluded that *“no jurisdictional issue is now extant at trial in Belgium. There is no jurisdiction point under Belgian procedural law left to be taken.”*
 - ii) As to time to trial, Mr Leach pointed out that *“if the Defendants were parties to this application, they might say that at least some of the reason for the duration of the proceedings in Belgium has been the nature of Nagel’s defence.”* He referred to two applications made as part of that defence: one to ask the Belgian Court to determine that certain documents were a forgery, the other to join De Beers.

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38. The judge approved and sealed the Order. The Defendants were notified of the present claim by letter from Nagel’s solicitors on 10 September 2021.
39. On 19 October 2021 (i.e. eight months after the Interim Judgment), the Nagel parties issued an appeal against the Interim Judgment on the question of forgery only. It did not appeal jurisdiction, although De Beers did. The effect appears to have been that because an interim hearing on this appeal was listed on 22 November 2021 the hearing scheduled for 23 November 2021 was adjourned. The Belgian Claim is now scheduled for trial in January 2023.

First and Second Defendants’ Set Aside Application*The Parties’ Submissions*

40. PDC and Mr Pluczenik make the following points:
- i) There was a serious breach of the Claimant’s duty to provide full and frank disclosure at the application for permission to serve out (“Disclosure Failure”). The Claimant failed to disclose either the existence or content of the Interim Judgment.
 - ii) That was compounded by the events afterwards in which the Interim Judgment was still not referred to.
 - iii) There is no serious issue to be tried (“No Serious Issue”). There has been no case in which the abuse of process tort has been used in the context of foreign proceedings and the Claimant is pursuing the same arguments in Belgium. The issue of whether the proceedings are abusive is one for the Belgian Court.
 - iv) There is no good arguable case that one of the gateways in PD6B applies (“Gateways”). The claim against the purported anchor defendant (Third Defendant) in this claim has no real prospect of succeeding (as Moulder J found). The acts did not happen in this jurisdiction. Nor has the Claimant demonstrated that any damage was sustained in England.
 - v) England is not the *forum conveniens* (“Forum Conveniens”). The Belgian Court has ruled that it has jurisdiction over the claim in Belgium. The present claim concerns whether the claim in Belgium is being pursued without proper evidence and in abuse of the Belgian Court’s process. Those same arguments are being pursued in Belgium and are by their nature a matter for the Belgian Court to determine. Nagel’s claims here will necessarily create overlapping claims with the Belgian claim where Nagel has submitted to the jurisdiction of the Belgian Court.
 - vi) This is part of a pattern of delay. Having held up matters in Belgium, Nagel issued the claim form at the last gasp and held on to serve until the last day of validity.
41. Nagel’s responses to these arguments are as follows:
- i) **Disclosure Failure.** Nagel submits that if it had a means of getting out of the Belgian jurisdiction it would do so. The Interim Judgment does not record any

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concession by Nagel to the effect that the relevant services were performed in Belgium, nor does it show that Nagel in effect submitted to Belgian jurisdiction. Nagel explains that on uncontroverted witness evidence in Belgium, whether or not there is defendant jurisdiction is determined on the face of a summons and there is no testing of the assertion or merits examination: if it is said, as here, that services are performed by or through a party domiciled in Belgium then jurisdiction is made out. Even if it had made such a concession or so submitted, says Nagel, these are points which do not fall within the duty of disclosure but rather go to the merits. Moreover:

- a) The suggestion that Mr Leach misled the Court by suggesting that jurisdiction was taken because Simona was an anchor defendant (rather than under Article 7 of the Brussels Regulation) is unavailing because they are indistinguishable: jurisdiction arises because the services were performed through Simona as PDC's "Antwerp branch".
 - b) Leach 2, which Nagel says successfully "disentangled" the issues of defendant jurisdiction and *lis pendens* jurisdiction, was provided in time and was correct.
- ii) **No Serious Issue.** There is an abuse of process tort – there is ample authority and this is not the place to try to settle the boundaries of the tort. Nagel reaffirms the existence of the alleged tort by reference to *Willers v Joyce* [2016] UKSC 43 and *Crawford Adjusters (Cayman) Limited v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366, the legal complexity of potential damages issues and the application of the tort to the facts. Authorities will shape the ambit and it is premature and inappropriate to cut it off now. There is no real argument on the merits hurdle. Nagel says that English law applies pursuant to Articles 4(1) and 4(3) of Regulation EC No 864/2007 ("Rome II").
- iii) **Gateways.**
- a) Nagel seeks to uphold Moulder J's finding that its claim falls within limb (a) of the tort gateway in PD 6B para. 3.1(9) on the basis that damage was sustained within the jurisdiction. It submits that it is not necessary to distinguish between direct and indirect damage for the purposes of the tort gateway. It is said that more than enough has been done to establish damage – of which management time and reputation would plainly fall here, but so too would excess legal costs.
 - b) Nagel also submits that its claim falls within: (i) limb (b) of the tort gateway on the basis that the Shine Statement was signed in London, and; (ii) the "*necessary and proper party*" gateway in PD 6B para. 3.1(3) on the basis that the summary judgment test is surmounted for the claim against Ms Shine and the strength of the case against her surmounts the hurdle; while PDC and Mr Pluczenik are proper parties as alleged co-conspirators.
- iv) **Forum Conveniens.** Nagel refers to the following considerations: (i) a determination that Belgium is the appropriate forum would perpetuate the abuse of process complained of; (ii) the fact that the alleged defaults have already been

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adjudicated on by the English Courts, applying English law, with PDC submitting to the jurisdiction means that the “centre of gravity” is England; (iii) it is appropriate for the English Courts to protect their own jurisdiction and the authority of their judgments by determining whether proceedings which attack them abroad are abusive – this is not a case of exorbitant jurisdiction particularly when the tort of abuse of process is so underdeveloped and so difficult for a foreign court; (iv) English law applies and it is inappropriate for a Belgian Court to adjudicate on an English tort which is underdeveloped and of uncertain ambit; (v) the claim is concerned with vindication of reputation and a judgment of the English Courts has greater vindicatory force; (vi) Nagel and Ms Shine are domiciled in England, while witnesses from De Beers are English and live and work in England; (vii) PDC has had English lawyers instructed in respect of the English Claim since no later than 2015 and they continue to represent PDC on the present application; (viii) the Shine Statement was signed in England; (ix) if witnesses were required in relation to the alleged defaults, they would be Ms Antonia Nagel and Ms Shine, both of whom reside in England; (x) there is a risk of inconsistent judgments if the abuse of process claim is not tried in England; (xi) Nagel would have limitation problems in Belgium and has acted reasonably in commencing proceedings in England (and not unreasonably in not commencing them in Belgium); (xii) the Belgian Court has determined not to decide the claim that the Shine Statement is a forgery, meaning Nagel cannot obtain the same justice in the Belgian Claim as it would in England.

*Discussion**Introduction*

42. This is a case with an unhappy history. As I have already noted, it bears every sign of a very severe fall out, going well beyond a mere business disagreement. It is regrettable that, some five years on from the Popplewell Judgment, I am considering the question of jurisdiction in relation to a claim which is brought because there are proceedings in Belgium which certainly appear to deal with matters which have previously been decided by the English Courts with the consent of both parties.
43. I note that the Missed Deadline Allegation and the Negative Comments Allegation were before Popplewell J in *W Nagel (A Firm) v Pluczenik Diamond Company NV*, and, as recorded by the Judge at [116], “[i]t was common ground that the claim by WN for a declaration of non-liability was properly a matter for this Court to decide”. Popplewell J found in favour of Nagel on that issue and permission to appeal was not granted. His finding is accordingly final.
44. PDC appears now to say in the Belgian Claim that the Judge’s ruling on the non-liability aspect of the English Claim concerned only breach of contract and left open the question of whether tortious wrongs were committed (or at least that the English Court was concerned only with contractual issues). On this, I note that:
 - i) Popplewell J’s Order dated 21 July 2017 has wording which on its face appears to go wider, stating that:

“The Claimant has no liability to the Defendant for breach of contract or otherwise arising from its performance of the

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Contract in respect of the matters raised by the Defendant in the proceedings issued by it in Belgium on 29 May 2015 and 29 September 2015 and to date against the Claimant, W Nagel Limited, or William Nagel.”

- ii) While I have not had cause to go back into the pleadings and detailed arguments in the English Claim, and hence the precise ambit of the issues which were live, the terms of Popplewell J’s judgment at [116]-[121] provide an indication that this wording of “otherwise” is intended to refer to other forms of liability, such as liability in tort. Thus in respect of the Missed Deadline Allegation, Popplewell J found at [117] that “*There was no question of it being a final deadline or of non-submission of data risking the loss of the Sight.*” He concluded that “[t]here was no breach of contract or duty by WN.” Popplewell J similarly found at [120]-[121] that the Negative Comments Allegation was not made out factually (“*It was an attempt to promote both their respective interests by questioning the CPQ system and feedback, and seeking to understand and improve it*”) and therefore that there was no “breach of contract or duty”.
45. However, the issue which I have to decide is that of whether service against the First and Second Defendants should be set aside. In that context the key issues are the questions of material non-disclosure and *forum conveniens*. I address them first before passing on to the remainder of the issues.

Material Non-Disclosure

46. The nature of a claimant’s duty of disclosure on a without notice application is not in dispute. As set out by Bingham J in *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd’s Rep 428, 437 the applicant:
- “must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the court may discharge the injunction even if after full inquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure.”
47. As noted by Ralph Gibson LJ in *Brink’s Mat v Elcombe* [1988] 1 WLR 1350 at 1356: “*The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.*”
48. Non-disclosure of material facts may lead to the setting aside of the order obtained, without examination of the merits: *Sloutsker v Romanova* [2015] EWHC 545 (QB) at [51], per Warby J where he said:
- “(i) An applicant for permission to serve proceedings outside the jurisdiction is under the duty of full and frank disclosure which applies on all applications without notice.

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(ii) The duty requires the applicant to make a full and fair disclosure of those facts which it is material for the court to know: *Brinks Mat v Elcombe* [1988] 1 WLR 1350, 1356 (1) and (2) (Ralph Gibson LJ). Put another way, disclosure should be made of ‘any matter, which, if the other party were represented, that party would wish the court to be aware of’: *ABCI v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485, 489 (Waller J).

(iii) Non-disclosure of material facts on an application made without notice may lead to the setting aside of the order obtained, without examination of the merits. It is important to uphold the requirement of full and frank disclosure.

(iv) But the court has a discretion to set aside or to continue the order. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues that were to be decided. The answer to the question whether the non-disclosure was innocent is an important, though not decisive, consideration. See *Brinks Mat* at pp1357 (6) and (7) and 1358 (Balcombe LJ).

(v) In the context of permission for service outside the jurisdiction the court has a discretion to set aside the order for service and require a fresh application, or to treat the claim form as validly served and deal with the non-disclosure by a costs order: *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, [2011] 2 AC 495, [136] (Lord Collins).”

49. A distinction has been sought to be drawn by Nagel between the duty of disclosure as it applies in the context of freezing injunctions (because of the severity of the consequences) and how it applies in the context of service out of the jurisdiction. Mr Cohen directed my attention to *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2004] 1 Lloyd's Rep 731, where Toulson J said this at [26]:

“An application for permission to serve out of the jurisdiction is of a very different nature. The general principles about disclosure on without notice applications still apply, but the context is different. The focus of the inquiry is on whether the court should assume jurisdiction over a dispute. The court needs to be satisfied that there is a dispute properly to be heard (i.e. that there is a serious issue to be tried); that there is a good arguable case that the court has jurisdiction to hear it; and that England is clearly the appropriate forum. Beyond that, the court is not concerned with the merits of the case.”

50. A similar point was made by Roth J in *DSG Retail Ltd v Mastercard Inc.* [2015] CAT 7 at [44]:

“44. This application was heard without notice, as is usually the case for an application for permission to serve out. As on any

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application without notice, the applicant is under a duty to make full and frank disclosure of matters material to the application. That means not only that care needs to be taken in setting out the factual basis for the application, but also that the Tribunal's attention should be drawn to any significant objections to the application that the defendants could reasonably be expected to raise if they were before the Tribunal. The duty does not require disclosure to the same degree as on an application for a without notice injunction, such as a freezing order, where granting the application has immediate and potentially serious consequences for the defendant. The factors relevant to an application to serve out are only those which relate to the limited inquiry the Tribunal carries out in determining whether to grant such permission. Nonetheless, within the limited scope of that inquiry, if the claimant is aware of such factors as might cause the Tribunal to doubt whether permission should be granted, they should be clearly disclosed ...”

51. Mr Cohen also emphasised by reference to *National Bank Trust v Yurov* [2016] EWHC 1991 (Comm) at [20] (itself quoting from Toulson J in *Crown Resources AG v Vinogradsky* (15 June 2001) which was adopted by the Court of Appeal in *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381, [2014] 1 CLC 451 at [36]) that it is not appropriate to base a non-disclosure case on disputed facts and that a sense of proportion must be maintained. As it was put in that cited passage:

“... issues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself. ...

Secondly, where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion. ...

I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees. ...

In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of

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prejudice which could be advanced under the guise of discretion.”

52. The first question is whether there was a material non-disclosure. I consider that Nagel did fail to disclose material points at the without notice hearing before Moulder J.
53. The critical point is that Nagel did not provide the Judge with nor make any reference to the Interim Judgment. In broad terms, as I indicated in the course of argument, it is immediately startling that an application for service out which was all about allegedly abusive proceedings in Belgium, and which had a significant *forum conveniens* aspect did not include even a statement as to the existence of the Interim Judgment. The expectation would be that there would be at least a mention of it, with the date and a full summary of its conclusions; more usual would be for that to be supplemented by a translation of the judgment.
54. However Mr Cohen QC rightly pointed out that it is important for such points to be properly analysed and for penal consequences only to follow when there has been at least the omission of a material fact and most often the deliberate omission of a material fact. It is not necessary for the fact not disclosed to be critical to outcome (see for example *Behbehani v Salem* [1989] 1 WLR 723 at 729 per Woolf LJ), but the fact not disclosed must have a real importance to the issues decided on the relevant application.
55. So far as the material facts not disclosed are concerned the core material fact - and the point expressly relied upon by the Defendants – is the content of the Interim Judgment. The Interim Judgment dealt with two aspects – the forgery claim and jurisdiction. It dealt with jurisdiction on the basis of Article 7 (i.e. acts committed in the jurisdiction) and not by reference to the “anchor defendant” concept (Article 8).
56. The Belgian Court recorded as follows:

“The court cannot establish otherwise than that the defendants apparently do not (or no longer) dispute that the services they performed as agent/broker (which was the object of the contractual relationship with PLUCZENIK) were performed in Belgium (in Antwerp).

Where the parties do not dispute such facts, the court must examine the matter further and must assume that the services were performed in Belgium.

In these circumstances and on the basis of these considerations, the court finds that it has the required jurisdiction to take cognisance of the claims by PLUCZENIK vis-à-vis the defendants on the basis of art. 7.1 of the Brussels *Ibis* Regulation. Indeed, PLUCZENIK demonstrates that the services were provided in Belgium, which is neither refuted nor disputed by the defendants.

With due regard for the fact that the defendants no longer dispute the jurisdiction of the Belgian courts, article 26.1 of the Brussels *Ibis* Regulation can no longer be applied either.”

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57. The only reference to the Interim Judgment in the materials before Moulder J was a brief reference in the “full and frank disclosure” section of the witness statement of Mr Leach, the solicitor for the Claimant, to the issue of fraud, in relation to which it said, “*The Belgian Court determined that it did not need to deal with this issue as a preliminary matter in order to deal with the claim in the Belgian Court.*”. In the supposedly corrective statement of Mr Leach the nearest approach to mentioning the Interim judgment was this:
- “[The] defence has involved two applications, each of which has caused some delay to the action. One of those applications has been to ask the Belgian court to determine that certain documents were a civil forgery (mentioned in my first witness statement at paragraph 41(h)); The other has been joinder of De Beers into the proceedings,”
58. The absence of any reference to the Interim Judgment might not be material if there had been no mention of jurisdiction in the Interim Judgment or if the position as to jurisdiction had been accurately summarised.
59. In the presentation made to Moulder J there was no suggestion that the Belgian Court had yet considered jurisdiction. On the contrary there was an implicit statement that there had been no such consideration and that there would be no such consideration until trial: “*the Belgian courts were chosen as the vehicle for oppressive and vexatious proceedings because of ... the reluctance of those courts to determine jurisdiction as a preliminary issue*”.
60. At the same time there was however a clear – and inaccurate - statement both in Mr Leach’s evidence and in the skeleton argument of Mr Cohen QC that jurisdiction had been founded – falsely - on the basis of an anchor defendant:
- i) “*The Belgian Claim sought to found jurisdiction in the Belgian courts by claiming against an anchor defendant (a Belgian incorporated entity) with no connection to the dispute at all. Belgium has no legitimate connection at all with the Alleged Defaults.*”
 - ii) “*The method of obtaining jurisdiction in Belgian was a device. The litigation in Belgium named a Belgian company, Simona NV as an anchor defendant.*”
61. There and elsewhere much emphasis was put on the jurisdictional approach being a device. Thus in his skeleton Mr Cohen QC said that a key part of the inference giving rise to the abuse of process tort was that the Belgian Claim had been “*deliberately brought in a country with no genuine jurisdiction*”. That point was repeated in oral submissions, including by reference to the cross-examination of one of the Defendants.
62. In “correcting” the position after the hearing Mr Leach said that
- “Whether there is a good claim against Simona is one that was determined in Belgium on the face of the Company's summons there, in accordance with usual practice.The Belgian court ... simply looks to see if there is an ostensible claim on the face of the summons against the anchor defendant. If so, there is no

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opportunity to challenge inclusion of the anchor defendant and the consequential inclusion of other defendants against whom closely connected claims are brought under Brussels Recast Article 8(1).”

63. While on one level, as Mr Cohen contended forcefully before me, it may well be the case that in considering the question of jurisdiction the Belgian Court takes even less account of merits than does the approach adopted in this jurisdiction, on no analysis could what was said be regarded as a full or a fair presentation of the position in the Belgian litigation – the more so when (i) it is quite clear from the documents that the Belgian Court sought submissions on jurisdiction and (ii) that the co-defendants, De Beers, did argue jurisdiction and were appealing the determination on that point. Although Mr Cohen submits that a dispute on the basis of an arbitration clause - such as that relied on by De Beers - is qualitatively different to the issues which would arise in relation to a dispute by Nagel it shows that it cannot be the case that “*there is no opportunity to challenge [jurisdiction]*”.
64. In short the findings on jurisdiction and the existence of a judgment which dealt in terms with jurisdiction should on any view have been put before Moulder J, particularly in circumstances where a central limb of Nagel’s case was put before Moulder J on the grounds that PDC had obtained “false” jurisdiction. One might argue (as Mr Cohen did) that the point does not bear directly on any of the individual questions which the judge had to decide, but:
- i) It was plainly relevant to *forum conveniens* to know that, the submission that there was no window for disputing jurisdiction, at all until trial (and that the abuse relied on was thereby perpetuated until trial) was at best an oversimplification and to understand the nature of the jurisdictional consideration which had already taken place.
 - ii) It was also plainly relevant for the judge to know that to the extent the argument on abuse was “sold” very much by reference to the anchor defendant “device” and “false” jurisdiction that was not accurate, and that the argument on abuse had to be constructed rather differently.
65. There is then the question of whether this breach of the duty was deliberate. I conclude that it was, in this sense. Mr Leach, who would be aware of the duty of full and frank disclosure, must have been aware that the existence and proceedings in the Belgian Claim were potentially material to the Court’s consideration. He was aware that there had been a judgment, because he had been provided with extracts from that judgment in February 2021. He appears to have taken the decision prior to the application to rely upon a summary provided by the Belgian lawyer rather than either (i) to get all the relevant materials and read them himself, or get someone on the English legal team to read them or (ii) to get the Belgian legal team to provide a full written summary (whether by statement or letter of advice) which could be appended to and referenced in his statement. At the same time someone within Nagel’s team did take the decision, which can only have been deliberate, only to provide Mr Leach with parts of the most recent event in the Belgian Claim (i.e. the Interim Judgment) – and inferentially to withhold from him the portions relating to jurisdiction.

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66. Further later, prior to providing his “corrective” statement, Mr Leach was provided with a full copy of the Interim Judgment, but despite his concerns about jurisdiction he chose not to get it translated, or (it would seem) as an alternative to get the Belgian lawyer to take him through it point by point to ensure that the “correction” he provided was accurate.
67. I do therefore regard this as a serious and deliberate breach of the duty of full and frank disclosure.
68. That is not my only concern about the omission of reference to the Interim Judgment. While this was not separately argued and I do not therefore place weight on it when I come to consider what results in relation to the breach of the obligation, I do consider that the failure to mention the Interim Judgment was not without an effect in the presentation of the application in circumstances where Mr Leach also said this about the proceedings:
- “Nagel has not yet been able to vindicate its position in the Belgian Claim. Despite it having been active for 6 years, it has yet to come to trial and it remains unclear when it will do so.
- ...the Belgian courts were chosen as the vehicle for oppressive and vexatious proceedings because of the long delays in actions there coming to trial and ...”
69. Orally this was supplemented thus by Mr Cohen QC (as summarised in the attendance note):
- “Disadvantage of Belgian courts. Mr Leach in his witness statement para [21(d)] refers to long delays in the Belgian court and you can see that in the instant claim. 1st summons was May 2015. Summons 2 was September 2015. 6 years later there has been no trial and as far as I am aware I believe no trial has been listed.
- [Later] I have been told a hearing has been scheduled in Belgium for November 2021, but because Mr W Nagel has recently passed away we think that hearing date will go as other parties will be brought into proceedings. So there is possibly an end in sight but it is not entirely clear.”
70. This goes to two aspects of the presentation. The first is the weight which was put on delays in Belgium, and the picture which was sketched that proceedings were in effect in limbo. That was plainly not accurate. But also Nagel did not inform the Judge at the without notice hearing that the Belgian Court was not just seized of the *res judicata* issue but was actually scheduled to deal with it on 23 November 2021 (just over two months after the without notice hearing before Moulder J). Again, this is a matter that should have been disclosed, particularly in circumstances where Nagel was at the same time submitting that there was “*no end immediately in sight*” as regards the Belgian Claim. Had the November hearing gone ahead and Nagel’s *res judicata* defence succeeded, the end would presumably in fact have been very near.

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71. I accept that there was an ambiguity to the issue: Mr Cohen is recorded as having stated before Moulder J that the November hearing was likely to be adjourned because of the death of Mr Nagel, though no application had then been made to do so. And indeed the hearing did not take place – an event which did not result from the death of Mr Nagel but rather seems likely to have resulted from the appeals against the Interim Judgment which were launched a little after the hearing before Moulder J. But I do not consider that a belief that the hearing was likely to go off relieved Nagel of the obligation to draw the Judge’s attention to the fact that the Belgian Court (i) had given a judgment and (ii) was apprised of the *res judicata* issue and was intending to deal with it on a preliminary basis.
72. The combined effect of these two non-disclosures is significant. When one is aware of the existence and content of the Interim Judgment and the Belgian Court’s (then) intention to deal with the issue of *res judicata* in relatively short order, the overall picture begins to look quite different from the picture that seems to have been before Moulder J.
73. The short point is this: had there been proper mention of the Interim Judgment and the way the proceedings were progressing, and still more if it had been revealed that the hearing scheduled was a trial, there is no way that the highly prejudicial submissions in relation to the Belgian proceedings’ progress and prospects could properly have been made.
74. The question which follows is what should result. The best summary of the Court’s approach to this question is in my judgment to be found in *Arena Corporation Ltd v. Schroeder* [2003] EWHC 1089 (Ch) at [213] (in the context of a without notice application to continue freezing orders made against the defendant):

“On the basis of the foregoing review of the authorities, I would summarise the main principles which should guide the court in the exercise of its discretion as follows:

(1) If the court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.

(2) Notwithstanding that general rule, the court has jurisdiction to continue or re-grant the order.

(3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.

(4) The court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.

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(5) The court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.

(6) The court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.

(7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.

(8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.

(9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances.”

75. A number of the same points can be found at [18] in *Yurov*. To some extent the point is academic, because I actually conclude, as further set out below, that looking at the matter *de novo* and on the basis of the full information England is not the *forum conveniens*. But bearing in mind the significance of the points as to jurisdiction and the position in the Belgian proceedings to the *forum conveniens* analysis, even if the result at that stage were different, I would conclude that the non-disclosures were material and sufficiently so that the correct answer would be to set aside service.

Forum Conveniens

76. So far as the *forum conveniens* analysis goes it must be borne in mind that the hurdle is that of whether England is or is not “*clearly or distinctly the appropriate forum for the trial of the dispute*” (*AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7).
77. The short point is that once these factors have been taken into account it is in my judgment impossible to conclude that England is clearly or distinctly the most convenient forum such that the English Court should exercise its discretion to permit service of proceedings out of the jurisdiction. Plainly there is some not inconsiderable weight to be placed on the factors on which Nagel relies – the past English judgment on these matters, the “perpetuation” of the abuse. But those points face the counterweight of the facts that (i) the jurisdiction of the Belgian Courts appears to have been established by PDC and accepted by Nagel (at least on a *prima facie* basis), (ii) the Belgian claim is progressing and (iii) there is scope for determination of a *res judicata* issue (which replicates the issues sought to be brought here) and (iv) a determination of the *res judicata* issue is (and was) likely to be determined relatively soon. As at the date of the hearing before Moulder J, the *res judicata* issue was to be determined in just over two months; as at the date of the hearing before me I am told that all issues are to be determined in Belgium within seven months.

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78. The result if I were to permit this claim to continue would seem to be to bring about English proceedings which effectively duplicated matters occurring in Belgium but with a time lag – and an inevitable risk of inconsistent judgments. That is a wholly undesirable outcome.
79. Then one adds in the “conventional” *forum conveniens* points: the Belgian Claim is one brought by a Belgian company (PDC), arising out of services provided in Belgium (as the Belgian Court has held), alleging fraud on the Belgian Court.
80. One aspect which gave me considerable pause for thought in relation to this part of the argument was that the tort claim was one which was governed by English law and (particularly as a novel and difficult area) should be tried here; reference being made both to *Surrey (UK) Ltd v Mazandaran Wood and Paper Industries* [2014] EWHC 3165 (Comm) per Eder J at [40] and my own decision in *VTB v Sberbank* [2021] EWHC 1758 (Comm) as well as also *Dicey, Morris & Collins on the Conflict of Laws* (15th ed.) at 12-034.
81. However the issue is more apparent than real: the tort claim which is sought to be pursued here is (arguably – as to which see further below) an English Law tort claim. But the tort claim is not a necessary part of the claim in Belgium; the same points are already made in the proceedings in Belgium in a way which would naturally be governed by Belgian law. The tort claim here is simply the juridical mechanism which would have to be employed in this jurisdiction to run those arguments. It was suggested in argument that the Interim Judgment stated that the existing claims were English Law claims. The passage relied upon says this:
- “PLUCZENIK, a Belgian company, has in this matter brought claims against three parties under English law as well as one Belgian company. The defendants subsequently summoned an additional company under English law, DE BEERS, as a third party to the proceedings.”
82. While I understand why this point comes to be suggested I conclude, reading the passage in context, that the submission of PDC that this simply refers to the places of incorporation of the various companies is correct.
83. As for the other factors (such as location of witnesses) those are as Mr Quirk QC submitted, peripheral. The relative status and utility of a judgment of this Court and that of a Court in an EU country is hardly an attractive point. As for limitation I am persuaded that if Nagel does have limitation issues they are of its own making - remedies not dissimilar to those available for the abuse of process tort are available in Belgium. Nagel can apply to strike out the claims on the grounds that those claims are “*tergend en roekeloos geding*”, or “reckless and vexatious” and it already seeks damages in civil falsehood in those proceedings, consistent with and/or overlapping with its claims made in the present proceedings.
84. I turn now to the two other limbs of the service out test, on both of which the Defendants also rely in arguing that permission should be set aside: (i) that there is no serious issue to be tried, and; (ii) that there is no good arguable case that the claim falls within a gateway under Practice Direction 6B. I take them in turn.

Approved Judgment*Serious issue to be tried*

85. As regards the merits test, I will deal first with the aspects where it seems to me that the relevant hurdle was surmounted.
86. The first question is whether Nagel has a real prospect of demonstrating that the abuse of process tort exists. This question seems relatively straightforward. The tort was recognised by the Court of Exchequer Chamber in *Grainger v Hill* (1838) 4 Bing NC 212 and its existence was not doubted by Lord Wilson as part of the majority in the Privy Council in *Crawford*. Lord Toulson was undoubtedly more sceptical in the Supreme Court in *Willers v Joyce*, but I do not consider that his comments at [25] (to the effect that it might be better to view *Grainger* as an instance of malicious prosecution rather than a separate tort) mean that Nagel’s case has no real prospect of success. As Lord Toulson noted in the same passage, *Grainger* demonstrates the willingness of the Courts to grant a remedy when faced with provable loss suffered as a result of civil proceedings brought maliciously and without proper justification.
87. I can also sensibly deal here with the point (which was not a matter of serious dispute) as to whether if it exists the tort applies to civil proceedings. I regard it as plainly arguable that it does. There is no obvious basis in principle for a finding that malicious prosecution would apply to civil proceedings but a tort of abuse of process would not.
88. I can also deal relatively briefly with the question of whether Nagel has a real prospect of showing that English law is applicable.
89. Article 4(1) of Rome II provides that the law applicable to a non-contractual obligation arising out of a tort/delict:
- “shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”
90. The argument is that Nagel’s claim for loss of reputation and for wasted management time/lost profits is direct damage in England given that Nagel is an 1890 Act partnership trading in England. There appears to be no actual evidence supporting this contention, and the argument proceeded on the basis of a presumption. However while the Defendants have drawn attention to the lack of evidence substantiating the losses claimed, they do not appear to have disputed that Nagel trades from England and accordingly that any such loss as does exist in respect of the first two heads of damage would likely have been suffered here.
91. The position as to wasted legal costs is slightly more complicated. Argument proceeded by reference to my decision in *Kwok Ho Wan & Ors v UBS AG (London Branch)* [2022] EWHC 245 (Comm), and the decision of Marcus Smith J in *MXI v Farahzad* [2018] 1 WLR 5553. In *MXI* Marcus Smith J, noted the “distinct resonance” between the Brussels regime and Article 4(1) and found that the same test had been applied under both. While the Brussels-Lugano regime no longer applies to new claims under English law, that point still seems likely to be a good one. This would suggest that my analysis in *Kwok Ho Wan* where I endorsed Briggs’ synthesis of the relevant European

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- judgments, i.e. that damage would manifest in the bank account from which the money was lost to the account holder would prove an arguable basis for Nagel's position.
92. On that basis it is more than merely arguable that loss in the form of wasted legal costs occurred in England, because the bank account from which Belgian legal fees were paid was apparently an English account.
 93. For completeness, I note that I do not consider that any argument the Defendants might make under Article 4(3) of Rome II displaces the conclusion that Nagel has a real prospect of showing Article 4(1) results in the application of English law. It is well established that Article 4(3) is only to be used on an exceptional basis and while it might be argued that the fact that the tort is founded on the pursuit of Belgian proceedings creates a powerful connecting factor with Belgium, that is in my view counterbalanced by the fact that the English Claim, which pre-existed the Belgian Claim, is also an important connecting factor and would mean that the exceptionality hurdle would not be met.
 94. I therefore conclude that Nagel has a real prospect of proving the applicability of English law.
 95. Segueing from the question of the location of wasted legal costs to the broader question of loss, I am satisfied that the three heads of loss pleaded by Nagel are more than merely arguable and that their recoverability is more properly a matter for trial. In the context of malicious prosecution, Lord Toulson saw at [43] of *Willers* "no difficulty in principle about [claims for] ... damage to reputation, health and earnings" and held at [59] that Mr Willers' claim for excess costs could proceed to trial. I am not persuaded by the Defendants' objection that Nagel has not properly particularised the losses it alleges. The plausibility of the existence of such losses if the abuse is made out is self-evident. Thus, I consider that Nagel also has a real prospect of showing that it suffered recoverable damages.
 96. The part of the analysis which has caused me the most difficulty is the question of whether any abuse of process tort is applicable to *foreign* civil proceedings. On this I would, if necessary have decided that the tort is not applicable to foreign legal proceedings. As already noted the jurisprudence in relation to the tort is slim to the point of near invisibility; it is perhaps therefore unsurprising that there is nothing in the history of the torts of malicious prosecution and abuse of process as summarised by Lord Wilson in *Crawford* which deals with the question of whether the tort can apply to foreign proceedings.
 97. In the end however it appears to me to be out of step with the ethos of the posited tort. It has its roots in the Court's control of its own powers and resources. Thus in the 1698 malicious prosecution decision of *Savile v Roberts* (1698) 1 Ld Raym 374, Holt CJ referred to the ill of people "mak[ing] use of law for other purposes than those for which it was ordained". The law and the purposes are the law and purposes of this court in this jurisdiction. It is not for this court to police or to second guess the use of courts of or law in foreign jurisdictions.
 98. In the absence of clear authority one might argue that such a matter is best determined at trial. However the authorities suggest that this Court should make determinations on disputed points of law; Lord Collins said at [81] of *AK Investment*:

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“A question of law can arise on an application in connection with service out of the jurisdiction, and, if the question of law goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case...”

99. In addition, it is unlikely that a great deal more authority could be cited on this point, precisely because of the rarity of the abuse of process tort. Of course, given my other conclusions, this point is not determinative of this application.

Gateways

100. I turn now to the question of the tort gateway. I am satisfied that there is a good arguable case that the claim falls within limb (a) of the tort gateway in PD 6B, para. 3.1(9).
101. As I have already indicated, I think it is more than merely arguable that Nagel has suffered the pleaded heads of damage in England. But for the purposes of limb (a) of the tort gateway, I do in addition conclude that there is a “good arguable case” (i.e. Nagel has a much better argument on this than the Defendants do).
102. Pursuant to the Supreme Court’s *obiter* findings in *FS Cairo (Nile Plaza) LLC v Brownlie* [2021] 3 WLR 1011, “damage” in the context of the tort gateway means both direct and indirect damage. Despite the evidential deficiencies to which I have referred above, I am satisfied that given Nagel trades from England it is likely to have a much better argument than the Defendants as to its having suffered some form of damage in England.
103. It is accordingly not necessary for me to consider limb (b) or the necessary or proper party gateway. Had it been necessary I would (like Moulder J) have concluded that they were not applicable.
- i) As to limb (b), *the* substantial and efficacious act in Nagel’s pleaded case is in my view the bringing of proceedings in Belgium. It is hard to conceive of that other than as an act done in Belgium. The argument that the signature of documents by Ms Shine constitutes substantial and efficacious acts in perpetration of either the alleged abuse of process or the alleged conspiracy is, to put it kindly, a stretch.
 - ii) Similarly, I do not consider that there can be said to be a real issue which it is reasonable for the Court to try as against Ms Shine for the purposes of the necessary or proper party gateway. It is not clear to me that the substance of Nagel’s case against Ms Shine goes much beyond (i) the complaint that she provided a witness statement in the Belgian Claim and (ii) the associated inference that she must have been conspiring with PDC and Mr Pluczenik. The former is plainly not enough. As to the latter I do not need to determine the merits of the argument at this stage; but I do consider that on the basis of the material I have seen the merits of that argument appear quite insufficient to form a basis for an anchor defendant jurisdiction.

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104. It follows that had I not concluded that England is *forum non conveniens* (and that the material non-disclosures were sufficient to discharge the order without further examination of the merits), I would still have acceded to the set aside application.

The Third Defendant's Stay Application

105. It was sensibly not really in issue that in the event I reached the conclusions which I have, the position as regards Ms Shine dovetailed to a great extent with the position as regards the First and Second Defendants.
106. The question is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice: *AK Investment*, per Lord Collins JSC at [71] and [88].
107. My conclusion as regards *forum conveniens* means that the convenient forum for any claim as regards Ms Shine is clearly Belgium. That is the more so when Ms Shine has stated that she is content to testify in the Belgian Claim, and equally that she will submit to the jurisdiction of the Belgian Courts if the allegations raised against her are to proceed there. It follows that Nagel will lose nothing as against Ms Shine if the proceedings here are stayed against her. This will also be the fairest outcome in respect of Ms Shine, who remains a witness in the Belgian Claim, irrespective of what happens next in the present proceedings.
108. I therefore conclude that the proceedings against Ms Shine should be stayed pending the outcome of the Belgian proceedings.