Neutral Citation Number: [2021] EWCA Civ 981

Case No: A4/2021/0079

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT
Mr Stephen Houseman QC (sitting as a Deputy High Court Judge)
[2020] EWHC 3394 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2021

Before :

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT

LORD JUSTICE HENDERSON

and

LADY JUSTICE NICOLA DAVIES

- -

Between :

PERFORM CONTENT SERVICES LTD	**Appellant**
- and -	
NESS GLOBAL SERVICES LTD	**Respondent**

- -
- -

Mr Ricky Diwan QC (instructed by **Addleshaw Goddard LLP**) for the **Appellant**
Ms Anna Dilnot QC (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Respondent**

Hearing date : Tuesday 25 May 2021

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Approved Judgment

Sir Julian Flaux C:

Introduction

1. This appeal, with permission granted by Males LJ, raises a novel point as to the application of Article 33 of the Brussels Recast Regulation (which applies to the proceedings, as they were commenced before 1 January 2021) in circumstances where the defendant is domiciled in England and the parties agreed to the non-exclusive jurisdiction of the Courts of England and Wales. The defendant, as it was entitled to do without breaching that agreement, commenced proceedings on the same cause of action before the Superior Court of New Jersey in the United States, which was the court first seised.

2. The claimant then commenced proceedings in the London Circuit Commercial Court. The defendant issued an application under CPR Part 11 to stay those proceedings or for the English Court to decline jurisdiction pending the final determination of the New Jersey proceedings. That application was heard by Stephen Houseman QC sitting as a Deputy High Court judge and, by his Order dated 21 December 2020, he dismissed the application. That is the Order under appeal.

Factual background

3. The factual background is relatively uncontentious and can be shortly stated. The claimant ("Ness") and the Defendant ("Perform") are both companies incorporated and thus domiciled in England. Ness is a provider of software development services and designs and builds offshore development and support centres. It is a subsidiary of Ness Inc, a company incorporated in Delaware. Perform provides products and services in relation to sports data and analytics. In July 2019 it was acquired by the US based STATS Group.

4. On 28 February 2019, Perform, Ness and Ness Inc entered into a Development Center Agreement ("DCA") pursuant to which Ness agreed to operate an offshore extended development centre ("EDC") in Kosice, Slovakia and provide software development engineers and personnel to work at the EDC. Perform agreed to pay Ness for the services and personnel provided. Pursuant to clause 19 of the DCA, Ness Inc guaranteed the liabilities of Ness under the DCA.

5. Clause 20(f) of the DCA was the jurisdiction and governing law clause:

> "**Governing Law and Jurisdiction.**
>
> The Agreement shall be governed by and construed in accordance with the laws of England and Wales and the parties hereby irrevocably submit to the non-exclusive jurisdiction of the Courts of England and Wales as regards any claim, dispute or matter arising under or in connection with this Agreement."

6. A dispute between the parties arose in late 2019, following an inspection by the Group CTO of Stats Perform (the renamed STATS Group after the acquisition of Perform) of the EDC in mid-December 2019 and subsequent "commit data" analysis by Stats Perform engineers based in the United States as to various performance criteria within

the scope of the DCA. Perform stopped paying invoices submitted by Ness. On 15 January 2020, Perform sent a formal notice requiring various alleged breaches of the DCA to be remedied pursuant to clause 15. Ness retaliated by sending a Notice of Dispute to Perform on 21 February 2020 in respect of unpaid invoices totalling €1,023,227.70 and threatening legal proceedings in accordance with clause 20(f).

7. Perform then commenced the proceedings before the Superior Court of New Jersey ("the NJ proceedings"), filing a Complaint on 4 March 2020 against both Ness and Ness Inc, seeking damages (including punitive damages) and declaratory relief. The damages sought were for breach of the DCA, common law fraud and negligent misrepresentation. The non-contractual claims are advanced on the basis of New Jersey law rather than English law. The declaratory relief sought is that Perform is entitled to terminate the DCA for "cause" pursuant to clause 15(c). Ness Inc was sued as guarantor.

8. On 9 April 2020, Ness commenced the present proceedings against Perform seeking declaratory relief and payment of its outstanding invoices. Ness Inc is not a party to these proceedings.

9. On 1 May 2020 Ness filed a motion challenging the jurisdiction in the NJ proceedings, which was dismissed by the Superior Court on 2 November 2020. Ness submitted a motion on 12 November 2020 asking the Superior Court to reconsider its decision. The result of that motion was not known at the time that the judge handed down his judgment in the present proceedings, but it was dismissed on 1 March 2021, prior to the hearing of this appeal.

The legal framework

10. The Brussels Recast Regulation No. 1215/2012 ("the Regulation") superseded and restated Council Regulation No. 44/2001 ("Brussels I") which had itself superseded and replaced the 1968 Brussels Convention. The provisions of Brussels I regulating *lis pendens* between Member States (Articles 21 and 22) were reproduced with some revisions as Articles 29 and 30, with the addition of two new Articles 31 and 32 within Section 9 of the Regulation. Two new provisions were also included in Section 9 regulating *lis pendens* involving non-Member states, Articles 33 and 34. These introduced some flexibility in the approach of a second seised court in response to the decision of the European Court of Justice in *Owusu v Jackson* [2005] QB 801.

11. The relevant provisions of the Regulation for the purposes of the present appeal are as follows:

> "SECTION 1
>
> General provisions
>
> Article 4
>
> 1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
>
> […]

Article 5

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

[…]

SECTION 7

Prorogation of jurisdiction

Article 25

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

Article 26

1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.

[…]

SECTION 9

Lis pendens — related actions

Article 29

1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 31

1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.

Article 33

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

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

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

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

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

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

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

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

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

Article 34

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

(a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

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

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

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

(a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;

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

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

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

> 3. The court of the Member State may dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.
>
> 4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion."

12. The following recitals to the Regulation were also of relevance:

> "(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.
>
> (16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.
>
> (19) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.
>
> (21) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of lis pendens and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously.
>
> (23) This Regulation should provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will

> be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice.
>
> (24) When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.
>
> That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction."

The judgment below

13. Having set out the factual background and the legal framework, in a section headed: "Internal hierarchy" the judge emphasised the importance of domicile as the foundation of jurisdiction within the Regulation, but noted that, as was common ground, Article 24 (exclusive jurisdiction) and Article 25 (prorogation in so far as it confers exclusive jurisdiction) rank above domiciliary jurisdiction within the hierarchy of the Regulation. He noted at [38]-[39] of his judgment that, unlike its predecessor in Brussels I, Article 23, Article 25 of the Regulation recognises the distinction between exclusive jurisdiction agreements and non-exclusive jurisdiction agreements, although there is no reference to non-exclusive jurisdiction in the Recitals or provisions of the Regulation. He noted at [42] that there was therefore no provision for the consequences or status of non-exclusive prorogated jurisdiction within the hierarchy, but that the textbooks (*Briggs: Civil Jurisdiction and Judgments (6th ed)* and *Joseph: Jurisdiction and Arbitration Agreements and their Enforcement (3rd ed)*) assumed that it ranked equally with domiciliary jurisdiction.

14. At [43] he said:

> "Irrespective of the internal hierarchy, it is now clearly established that Article 25 operates mandatorily irrespective of whether there is an EJA [exclusive jurisdiction agreement] or Non-EJA [non-exclusive jurisdiction agreement]. In other words, both exclusive and non-exclusive prorogated jurisdiction are (equally or indistinguishably) mandatory, such that the court so chosen has no residual power or discretion to stay the proceedings before it on domestic private international law grounds such as *forum non conveniens*: see *UCP plc v. Nectrus Ltd* [2018] EWHC 380 (Comm); [2018] 1 WLR 3409 at [39]; *Citicorp Trustee Co Ltd v. Al-Sanea* [2017] EWHC 2845 (Comm) at [49]-[50]."

15. At [44] he noted that the Regulation is silent as to priority where more than one provision confers jurisdiction on the courts of the same member state, saying that the Regulation did not deal with this because it did not need to, as there was no conflict to resolve. At [45] he rejected Perform's submission that there was no scope for concurrent jurisdiction within the Regulation, noting that it was possible that both Article 4 and one or more of the bases of special jurisdiction (Articles 7, 8 and 9) operate to confer jurisdiction on the relevant court in the same instance. At [46] he noted that no other provision in the Regulation used the opening words of Articles 33 and 34: "where jurisdiction is based on".

16. In a section headed "Reflexive Application" beginning at [47] the judge noted that following the decision of the ECJ in *Owusu v Jackson* English courts began applying a principle of interpretation derived from civilian law known as reflexive application in order to inject some flexibility into the court's jurisdictional position where the relevant events in dispute occurred or were located in a Non-Member State. He noted that provisions in Brussels I, notably the exclusive jurisdiction provision in Article 22 and the *lis pendens* regime in Article 28, had been held to apply reflexively i.e. by analogy to situations involving a Non-Member State: *Ferrexpo AG v Gilson Investments* [2012] EWHC 721 (Comm). The Court of Appeal had applied the *lis pendens* regime in the Lugano Convention reflexively in *Privatbank v Kolomoisky* [2019] EWCA Civ 1708. After a further discussion not relevant for present purposes, the judge said at [54] that the concept of reflexive interpretation was confined to situations where a provision was applied as if it referred to a Non-Member or Non-Contracting State, notwithstanding that it referred to a Member or Contracting State. He concluded: "Where it applies, it operates as a further qualification to or derogation from the basic rule of domiciliary jurisdiction enshrined within the scheme or structure of the Regulation."

17. He went on to deal with Articles 33 and 34 which were introduced for the first time in the Regulation. The motivation for their introduction was not known, but it could be assumed that it was in response to the adoption by certain courts of reflexive interpretation of the *lis pendens* regime in Brussels I. These Articles represent an additional derogation from the basic rule of domiciliary jurisdiction in the Regulation.

18. At [58], the judge noted the differences between Articles 29 and 30 and Articles 33 and 34. First, unlike Article 29 which is mandatory, Article 33 is discretionary so that the Regulation accepts the risk of irreconcilable judgments more readily in the case of *lis pendens* involving Non-Member States as compared to Member States. Second, unlike Article 29, Article 33 does not yield to Article 31(2), so does not expressly embrace the difference between exclusive and non-exclusive prorogated jurisdiction. Third, Articles 33 and 34 contain the specific jurisdictional gateway language: "based on".

19. At [63] and following, the judge touched on the difference between exclusive jurisdiction agreements and non-exclusive jurisdiction agreements, on which there is a great deal of case law in this jurisdiction. He did not consider it necessary to set that out, noting only that it was not always certain or predictable, as a matter of legal analysis, which type of agreement the parties have made. He said that the key point was that clause 20(f) of the DCA operates to confer mandatory jurisdiction on the court by virtue of Article 25 of the Regulation, a mandatory jurisdiction which it was common ground leaves no room for domestic discretionary principles.

20. The judge said that the first and main question to be decided was whether the conferral of this non-exclusive prorogated jurisdiction precludes the application of Article 33 due to its specific jurisdictional gateway wording, notwithstanding the defendant's domicile. He went on to analyse this issue. At [73] he noted that Perform accepted that exclusive prorogated jurisdiction outranks and thereby ousts domiciliary jurisdiction, but submitted that the same cannot be said of non-exclusive prorogated jurisdiction which ranks alongside and enjoys parity of status with domiciliary jurisdiction. The answer given by Ness was that Article 25 confers mandatory jurisdiction, irrespective of whether it is exclusive or non-exclusive. If it had been intended that Articles 33 and 34 should apply when the court derived jurisdiction under Article 25, the legislators could easily have said so.

21. The judge concluded at [76] and [77] that it is a pre-condition to the applicability of Articles 33 and 34 that the foundation of the second seised court's jurisdiction is provided by one of the four specified Articles: 4, 7, 8 or 9. If that is not the case because jurisdiction is conferred by another provision of the Regulation, Articles 33 and 34 are not engaged. That is so even if jurisdiction is also conferred by one of those four Articles, constituting a concurrent or cumulative ground of jurisdiction. The judge considered that this is what *"based on"* means and requires.

22. The judge also concluded, at [80] and following, that the internal hierarchy of the Regulation has no direct role in interpreting or applying the gateway language in Articles 33 and 34, since the internal hierarchy is concerned with regulating conflict between bases for allocating jurisdiction so as to allocate jurisdiction to the courts of one Member State. It is not concerned with situations involving concurrent or cumulative grounds of jurisdiction conferred upon the same forum. The judge considered that to speak of ouster in this context misses the point. Where a jurisdictional basis other than Article 4 confers jurisdiction, it cannot be said that the court's jurisdiction is *"based on Article 4"*.

23. He made the point at [83] that there is no good reason to distinguish between an exclusive jurisdiction agreement and a non-exclusive agreement, as Article 25 confers jurisdiction on a mandatory basis in either case. Unlike Article 29, Article 33 does not defer to Article 31(2) and so does not yield to what the judge described as the somewhat amorphous distinction between exclusive and non-exclusive prorogated jurisdiction.

24. The judge considered that some support for his interpretation was to be found in the decision of Cockerill J in *UCP plc v Nectrus Ltd* where the claimant brought proceedings here under an agreement containing a non-exclusive jurisdiction clause in favour of the English courts. The defendant, registered in Cyprus, applied to dismiss or stay the proceedings on the basis of earlier commenced proceedings between the parties in the Isle of Man, the claimant's place of domicile. Cockerill J noted that Articles 33 and 34 proceed solely by reference to the domicile and special jurisdiction regimes in Article 4 and Articles 7 to 9 from which it was to be inferred that there was intended to be no discretion to decline jurisdiction in other cases particularly where jurisdiction is founded on Article 25. Cockerill J dismissed the jurisdiction challenge on the basis that there was no residual discretion to stay proceedings. The judge in the present case considered that, although that case did not involve domiciliary jurisdiction, Cockerill J's reasoning pointed against the applicability of Articles 33 and 34, in circumstances where Article 25 confers jurisdiction upon the courts of the second seised Member State, irrespective of whether that is exclusive or non-exclusive prorogated jurisdiction.

25. At [87] the judge noted that this interpretation might be said to produce an odd result because, where parties have conferred only non-exclusive jurisdiction on the second seised forum, that is more likely to throw up a *lis pendens* scenario in practice, which is when Articles 33 and 34 are needed. The judge said he could "feel the pull of that point from the perspective of an English contract lawyer and commercial litigator" but it ignored the mandatory effect of Article 25 and the distinct basis of applicability of Articles 33 and 34 (non-Member States) as compared with Articles 29 and 30 (Member States).

26. The judge made a further point at [89]:

> "…assuming that Articles 33 and 34 cannot apply where there is prorogated jurisdiction, whether exclusive or non-exclusive, it is difficult to see why the existence of *additional* connections to (the courts of) the 'second seised' forum should activate a flexible discretionary power to stay such proceedings in favour of a 'first seised' forum where none otherwise exists via Article 25. If anything, the co-existence of jurisdictional basis under Article 4 or Articles 7-9 ought to diminish the need for such discretionary power rather than increase it where the parties have made such a choice for themselves."

27. He also said at [92]:

> "The flaw in Perform's analysis is that it relies upon splitting Article 25 for the purposes of answering the simple and separate question of whether the court's jurisdiction is "*based upon*" domicile. In so far as such distinction forms part of the internal hierarchy, there is no good reason to apply such hierarchy to the present situation in the absence of any conflict between provisions and in order to determine the application of a provision which itself forms part of such hierarchy."

He noted in that context at [93] that both Professor Briggs and David Joseph QC assume that Articles 33 and 34 are not available where there is *"prorogated jurisdiction"* drawing no distinction between exclusive and non-exclusive prorogated jurisdiction and without resort to the internal hierarchy.

28. The judge went on to deal with an alternative argument by Perform that, even if it was wrong on the first issue, Article 33 could nevertheless be applied reflexively so as to make it applicable in circumstances where the second seised court's jurisdiction was not *"based on Article 4"* as he had construed those words. He rejected that argument. Since it was not repeated on this appeal, it is not necessary to say any more about it.

29. Finally the judge dealt with the issue whether, if Article 33 applies, the Court should exercise its discretion to stay the English proceedings. As he said, the issue did not arise given his conclusion on the main issue, but since it had been fully argued he dealt with it. Ness disputed that a stay was *"necessary for the proper administration of justice"* within Article 33(1)(b). The judge referred to recent first instance cases suggesting that the discretionary power under the Article was equivalent in practical terms to common

law *forum non conveniens* principles: see *Gulf International Bank v Aldwood* [2019] EWHC 1666 (QB) per John Kimbell QC at [88]-[92] and *Municipio de Mariana v BHP Group plc* [2020] EWHC 2930 (TCC) per Turner J at [204]-[207].

30. The judge noted that there was no obvious hook within Recital (24) for consideration of a non-exclusive jurisdiction agreement in favour of the second seised court tasked with exercising this discretion. On the contrary, the connections that appear to matter are those concerned with the first seised forum. However, he said both sides' analysis proceeded on the basis that the court should look both ways.

31. He said at [109] that, on balance, he would have declined to grant a stay. Whilst there was a material connection between the parties and New Jersey, the centre of gravity of the dispute appeared to be Slovakia as the place of performance of the DCA. He bore in mind the unchallenged reasons given by Judge Padovano in his 2 November 2020 decision in the NJ proceedings as to the convenience of New Jersey as a forum, but the evidence from both sides as to the location of corporate officers and key personnel was not decisive.

32. The contractual claims were governed by English law under clause 20(f) of the DCA and, if the non-contractual claims were pursued by way of counterclaim in these proceedings, there was a strong argument for saying that they too would be governed by English law pursuant to applicable choice of law rules. Such claims were better determined in this jurisdiction.

33. The judge's conclusion on this issue was at [112]-[113]:

> "112 Without engaging in a full granular balancing exercise, given that this is a hypothetical inquiry in the present case, I am not persuaded that it is or would have been *necessary* for the proper administration of justice to stay these proceedings in favour of the NJ Proceedings. The parties bargained for or at any rate accepted the risk of jurisdictional fragmentation and multiplicity of proceedings by agreeing clause 20(f). That risk has manifested, largely through the tactical choice made by Perform to commence proceedings pre-emptively in New Jersey. The continuation of these proceedings, notwithstanding the existence of the NJ Proceedings, is a foreseeable consequence of the parties' free bargain and a risk that Perform courted by suing first elsewhere.
>
> 113 I reach this contingent conclusion without acceding to the primary contention of Ness in this context, i.e. that the most important circumstance or consideration to be taken into account in the court's exercise of discretion under Article 33 is the Non-EJA in favour of this court. The existence of that jurisdictional bargain nevertheless enables the court to sense-check its overall evaluation as to the proper administration of justice under Article 33."

Grounds of appeal

34. The two grounds of appeal can be summarised as follows:

(1) The Court was wrong as a matter of law to interpret Article 33 to mean that jurisdiction was not "based on" domicile by reason of a non-exclusive English court jurisdiction clause that conferred prorogated jurisdiction on the English Court pursuant to Article 25;

(2) The Court was wrong to conclude that a stay was not necessary for the proper administration of justice within the meaning of Article 33(1)(b). The court wrongly failed to place any or any sufficient weight on the fact that the NJ and English proceedings were mirror image proceedings giving rise to the risk of irreconcilable judgments, the core purpose of Article 33 and a core feature of the concept of the administration of justice under the Article. The court wrongly took account of the non-exclusive English court jurisdiction clause and/or an English governing law clause and/or wrongly took account of its assessment that the centre of gravity was Slovakia and/or failed to place any or any sufficient weight on the material connections between the parties and the United States and/or wrongly placed significant reliance on connections between the parties, the dispute and the UK.

Summary of the parties' submissions

35. On behalf of Perform, Mr Ricky Diwan QC emphasised the autonomous and independent meaning to be given to the Regulation. It is settled law that the Regulation is to be interpreted purposively or teleologically, as set out by Professor Briggs at 2-05. The primary gateway into application of the Regulation was the domiciliary one in Article 4, which was fundamental, as the Supreme Court recognised in *Vedanta Resources plc v Lungowe* [2019] UKSC 20; [2020] AC 1045. Recital (15) made clear that this took precedence except in a few well-defined situations where the subject-matter of the dispute or the autonomy of the parties warranted a different connecting factor. Mr Diwan QC submitted that, whilst an exclusive jurisdiction agreement ousted domicile, a non-exclusive jurisdiction agreement did not and Recital (15) made clear that domiciliary jurisdiction was always available, unless there were an ouster.

36. Where there was domiciliary jurisdiction under Article 4 you had to pass through that gateway before you look at whether other jurisdictions might apply. This was clear from Article 5 which provides: *"Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter."* Since the exclusive jurisdiction provisions in Article 24 were in Section 6, you still had to go through Article 4 as the gateway to jurisdiction.

37. The other gateway was where the defendant is not domiciled in a Member State, in which case Recital (14) and Article 6 apply. Recital (14) provides:

> "A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised.
>
> However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain

> rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile."

Article 6 provides:

> "If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State."

38. In relation to Article 25 itself, Mr Diwan QC submitted that the words *"regardless of domicile"* in the first line did not mean that there was an ouster or that Article 25 was superior to Article 4. Although Ness placed weight on the word *"shall"* in *"that court or those courts shall have jurisdiction"* it was not mandatory but neutral, it just meant *"not superior"*. He relied on the French text of the Regulation which used the words: *"ces jurisdictions sont compétentes"* which did not suggest an ouster.

39. Mr Diwan QC placed particular reliance on the passage from the Pocar report cited by Henderson LJ at [61] of his judgment in *Etihad Airways PJSC v Flöther* [2020] EWCA Civ 1707; [2021] 2 WLR 939 and [62] of that judgment:

> "61 In paragraphs 106 and 107 of his Report, Professor Pocar discussed "The exclusive or the non-exclusive nature of the prorogation clause". He said this:
>
> > "106. The 1988 Convention lays down that a prorogation clause that meets the requirements of the Convention always confers exclusive jurisdiction on the designated court or courts. But under the laws of some of the States bound by the Convention - under English law in particular - the parties will often agree a choice of forum clause on a non-exclusive basis, leaving other courts with concurrent jurisdiction, and permitting the plaintiff to choose between several forums; and English case-law has accepted that a non-exclusive clause constitutes a valid choice of forum under the Convention. On a proposal from the United Kingdom delegation, the *ad hoc* working party re-examined the question of the exclusive effect of a choice of forum clause, and reached the conclusion that, since a clause conferring jurisdiction was the outcome of an agreement between the parties, there was no reason to restrict the parties' freedom by prohibiting them from agreeing in the contract between them that a non-exclusive forum should be available in addition to the forum or forums objectively available under the Convention.
> >
> > A similar possibility was in fact already provided for, though within certain limits, by the 1988 Convention, Article 17(4) of which allowed a choice of forum clause to be concluded for the benefit of only one of the parties, who then retained the right to bring proceedings in any other court which had jurisdiction by virtue of the Convention, so that in that case

> the clause was exclusive only as far as the other party was concerned. That provision was obviously to the advantage of the stronger party in the negotiation of a contract, without producing any significant gain for international commerce. The 1988 Convention has now been amended to give general recognition to the validity of a non-exclusive choice of forum clause, and at the same time the provision in the 1988 Convention that allowed a clause to be concluded for the benefit of one party only has been deleted.
>
> 107. Article 23 does still give preference to exclusivity, saying that the agreed jurisdiction "shall be exclusive unless the parties have agreed otherwise". A choice of forum clause is therefore presumed to have exclusive effect unless a contrary intention is expressed by the parties to the contract, and not, as was initially proposed, treated as a non-exclusive clause unless the parties agree to make it exclusive."

> 62 Mr Joseph relied on this passage as providing an authoritative explanation of how the wording of what is now Article 25 of Brussels Recast achieved its present form. With that I can readily agree. He also submitted that the passage provides further support for his taxonomy because Professor Pocar's discussion of the English proposal shows that the working party had asymmetric jurisdiction agreements firmly in mind, and it dealt with them not by providing that they were to count as exclusive jurisdiction clauses, but rather by recognising that parties were free to enter into a non-exclusive jurisdiction agreement in the interests of party autonomy. That may be so, but I can find nothing in this passage to suggest that Professor Pocar was addressing his mind to the question whether the exclusive part of an asymmetric jurisdiction clause can properly be regarded as an exclusive agreement in relation to claims brought by the party who is bound by it and does not have the benefit of a wider choice of forum. The focus of the discussion is on the validity of the non-exclusive part of the agreement, not on the exclusive nature of the agreement for the party who has no choice of forum."

40. He emphasised the reference at the end of the first paragraph of [106] to a non-exclusive forum being available <u>in addition</u> to the forum(s) objectively available under the Convention, now the Regulation, which would include Article 4. He submitted that where the court of a Member State had domiciliary jurisdiction under Article 4, from a Regulation perspective, a non-exclusive jurisdiction agreement was not an expression of autonomy; it did not extend jurisdiction which already existed under Article 4 and certainly did not oust it. He relied on two passages from David Joseph QC's book. First at 2.73 dealing with the hierarchy where he said at 4.:

> "If parties have concluded a non-exclusive jurisdiction agreement, then the parties will have conferred jurisdiction on the identified court or courts in addition to the courts that have

> jurisdiction by virtue of the general rule regarding domicile and the special jurisdiction provisions."

Second, at 3.15 where it is stated:

> "However, where parties have agreed that an identified court or courts shall have non-exclusive jurisdiction, this does not oust the substantive jurisdiction of other courts under the provisions of [the Regulation]. By way of example, parties who have agreed that the English courts shall have non-exclusive jurisdiction do not oust the substantive jurisdiction of the courts of the domicile of the putative defendant so long as that court is first seised."

41. Mr Diwan QC noted that the reason why an exclusive jurisdiction agreement has a superior position in the hierarchy is Article 31(2), whereas in relation to a non-exclusive jurisdiction agreement the first seised rule in Article 29 is not displaced. He submitted that within the Regulation no priority was given to a non-exclusive jurisdiction agreement, it served no Regulation function.

42. In relation to the case law, he submitted, correctly, that no case had addressed the situation where Article 4 and a non-exclusive jurisdiction agreement both conferred jurisdiction on the courts of the same Member State. He submitted that the crucial difference between the present case and *UCP v Nectrus* was that that was a case where the gateway to jurisdiction under the Regulation was Article 6, not Article 4, because the defendant was not domiciled in a Member State. Likewise *Citicorp* where the defendant was domiciled in Saudi Arabia. The decision of Popplewell J (as he then was) in *IMS SA v Capital Oil and Gas Industries Ltd* [2016] EWHC 1956 (Comm); [2016] 4 WLR 163, upon which Ness also relied, was a case where the defendant was a Nigerian company.

43. Mr Diwan QC said that he did not accept that where Article 4 or Articles 7 to 9 and a non-exclusive jurisdiction agreement were both in play, jurisdiction could be said to be based on the non-exclusive jurisdiction agreement. As Professor Pocar says in the passage of his report cited in *Etihad*, the purpose of a non-exclusive jurisdiction agreement is to confer jurisdiction in circumstances where it is not otherwise available under the Regulation.

44. In relation to Ground 2, Mr Diwan QC submitted that, once the Court had concluded that Article 25 was not engaged by the non-exclusive jurisdiction agreement (the hypothesis on which this ground proceeds) the non-exclusive jurisdiction agreement was completely irrelevant. The test in Article 33 and Recital (24) as to what was required "for the proper administration of justice" was not concerned with factors which point to this jurisdiction, but with the risk of irreconcilable judgments, but the judge had wrongly converted this into the domestic *forum non conveniens* test.

45. He submitted that the factors to be considered under Recital (24) were not concerned with a comparative analysis between the two jurisdictions, but only with the facts and circumstances in the third state. He relied on what David Joseph says in his book at 10.79:

> "These provisions [Articles 33 and 34] are designed to address some of the unsatisfactory aspects of the decision of the CJEU in *Owusu*, in the particular context of lis pendens. The new provisions do not give a general discretion to stay proceedings on the grounds of forum non conveniens. The discretion which is introduced is targeted towards the proper administration of justice in the context of lis pendens in a third state."

46. He also relied upon a passage in *Briggs* at 2.293, whilst noting that the editors of *Dicey, Morris and Collins on the Conflict of Laws* 15th ed at 12-024, p 171 take a somewhat different approach. He submitted that, contrary to what Turner J said in *Mariana* at [206], the test was not concerned with *forum non conveniens* but was focused on the third state. Ness' contrary argument gave too much emphasis to the first sentence of Recital (24).

47. He submitted that the non-exclusive jurisdiction agreement was not engaged at the place of domicile and had no function there. The judge had accepted that there was a risk of irreconcilable judgments, from which it followed that the administration of justice test was satisfied. The non-exclusive jurisdiction agreement did not detract from that, because it was not part of the Recital (24) analysis and once it was taken out of the equation, the material connections were between the parties and the third state, New Jersey. By relying on a *forum non conveniens* analysis in favour of Slovakia and then on the fact that English law governs the DCA, the judge had approached the exercise from the wrong end.

48. The primary submission on Ground 1 of Ms Anna Dilnot QC for Ness was, as she said, a simple one: the English Court has jurisdiction under Article 25 and Article 33 is not engaged where there is jurisdiction under Article 25. Mr Diwan QC's submissions about the scheme of the Regulation were entirely artificial; none of his analysis is to be found in the Regulation. Where jurisdiction was independently available under Article 25, you simply did not get to Article 33. This was a case of parallel jurisdiction. The non-exclusive jurisdiction agreement in the DCA reinforced domiciliary jurisdiction and coincided with it, so all roads led to this Court.

49. She asked rhetorically why on earth Article 33 would be engaged here. It made absolutely no sense and was against the fundamental principles of the Regulation. The default rule under the Regulation was that a defendant should be sued in the jurisdiction of its domicile and the purpose of that rule was to prevent the defendant being sued elsewhere against its will. The argument for Perform here did not seek to enforce that rule but go against it.

50. Ms Dilnot QC submitted that one of the main purposes of the Regulation is party autonomy. There was more emphasis on this in the Regulation than in Brussels I, with express recognition of non-exclusive jurisdiction agreements. Article 31(2) was also new. The Regulation stressed the need for predictability of allocation of jurisdiction. Where there was a jurisdiction agreement in favour of the English courts and the defendant was domiciled in England, it would be expected that the English courts had jurisdiction.

51. In relation to the avoidance of irreconcilable judgments, Ms Dilnot QC made the point that between Member States a stay in favour of the first seised court was mandatory

unless Article 31(2) applied, in contrast to the position with non-Member states under Article 33. Unlike the position between Member States, where the pending proceedings are in a third State, the Regulation tolerates the risk of irreconcilable judgments. Where there is a jurisdiction agreement, exclusive or not, Article 25 gives the chosen Court mandatory jurisdiction and Article 33 does not apply. Perform's argument that it did apply, because the English Court would also have had jurisdiction under Article 4, was completely illogical and artificial. The non-exclusive jurisdiction agreement reinforced the domiciliary rule so that there was no reason to apply Article 33 and cede priority to a third State Court.

52. That in such circumstances a contractual choice of jurisdiction reinforced the domiciliary rule was supported by the decision of the CJEU in *Nikolaus Meeth v Glacetal* [1979] 1 CMLR 520 cited at [64] of his judgment in *Etihad* by Henderson LJ:

> "That wording [of Article 17 of the original Brussels Convention], which is based on the most widespread business practice, cannot, however, be interpreted as intending to exclude the right of the parties to agree on two or more courts for the purpose of settling any disputes which may arise. This interpretation is justified on the ground that Article 17 is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction to settle disputes falling within the scope of the Convention, other than those which are expressly excluded pursuant to the second paragraph of Article 17. This applies particularly where the parties have by such an agreement reciprocally conferred jurisdiction on the courts specified in the general rule laid down by Article 2 of the Convention [the predecessor of Article 4]."

53. Ms Dilnot QC submitted that the reason why Article 25 was not referred to in Article 33 was the importance of party autonomy which was a good reason not to have a stay in favour of a third State, a point made by Professor Briggs at 2-292. The editors of *Dicey, Morris and Collins* at 12-024 p 170 state that Articles 33 and 34 do not apply where the Court of a Member State exercises jurisdiction under Article 25 by virtue of a jurisdiction agreement. The same point is made by David Joseph at 10-80 of his book. None of the textbook authors draws any distinction between an exclusive jurisdiction agreement and a non-exclusive jurisdiction agreement in the context of Article 33.

54. She submitted that Article 25 conferred mandatory jurisdiction even where there was a non-exclusive jurisdiction agreement. This was clear from the express wording of the Article: "that court or these courts shall have jurisdiction, unless the agreement is null and void…" That there was mandatory jurisdiction even if the agreement was non-exclusive was borne out by the decisions at first instance in *Citicorp* and *UCP*.

55. In relation to Ground 2, Ms Dilnot QC submitted that Recital (24) required the Court to have regard to "all the circumstances of the case" in assessing what was the proper administration of justice. There was no reason to narrow down that wording in the way that Perform contended and no presumption in favour of the third State. There was no question of the judge having made an interpretative error by having regard to the connections of the case with the Member State. This argument could not withstand that clear wording of Recital (24).

56. The argument for Perform that the judge had erred in having regard to the non-exclusive jurisdiction agreement would also not withstand scrutiny and could not be extrapolated from the second paragraph of Recital (24).

Discussion

57. In my judgment, a fundamental flaw in Mr Diwan QC's argument is the suggestion that a distinction is to be drawn between an exclusive jurisdiction agreement and a non-exclusive jurisdiction agreement so far as Article 4 and Article 33 are concerned. He accepted that an exclusive jurisdiction agreement would take precedence over domiciliary jurisdiction under Article 4, but submitted that a non-exclusive jurisdiction agreement would not, so that where a defendant was domiciled in the relevant Member State, Article 33 would apply, even if there was a non-exclusive jurisdiction agreement in favour of the Courts of that Member State. The basis for this distinction was never satisfactorily explained. It is certainly not to be found in the wording of the Regulation.

58. In particular, nothing in Article 25 itself supports the distinction he sought to draw. It is clear that the words of the Article: "that court or these courts shall have jurisdiction, unless the agreement is null and void" are equally applicable whether the agreement is exclusive or non-exclusive and confer mandatory jurisdiction. As Henderson LJ said during the course of argument, unless the agreement is null and void, this is an absolute rule that the Court on which the agreement confers jurisdiction (whether exclusive or non-exclusive) shall have jurisdiction. The analyses by Peter Macdonald Eggers QC in *Citicorp* at [51] of his judgment and by Cockerill J in *UCP* at [32] and [39] of her judgment are clearly correct.

59. Mr Diwan QC's contention that the word "shall" is neutral or somehow means "not superior" to domicile is unsustainable, as a matter of language and construction of Article 25. The words in the opening line of the Article; "regardless of their domicile" make it clear that, where there is a jurisdiction agreement, whether exclusive or non-exclusive, domicile is disregarded. In those circumstances, where Article 25 applies, Articles 33 and 34 have no application.

60. Although Cockerill J in *UCP* was not dealing with a situation where the Court had cumulative or parallel jurisdiction under Article 25 and Article 4, she decided at [41], quite correctly, that where Article 25 applies, Articles 33 and 34 have no application:

> "They [Articles 33 and 34] therefore proceed solely by reference to the domicile and special jurisdiction regime set out in Article 4 and Articles 7, 8 and 9. There is no mention of a reservation in the event jurisdiction is established under Article 25. This carries with it, in my judgment, an inference that there is intended to be no discretion to decline jurisdiction in other cases, in particular where the jurisdiction is founded under Article 25."

61. I agree with Ms Dilnot QC that Mr Diwan QC's submissions on the scheme of the Regulation were artificial and not borne out by the wording of the Regulation. Domicile under Article 4 is a default rule the purpose of which is to prevent a defendant being sued elsewhere against its will. Where the defendant has contractually submitted to a particular jurisdiction, even on a non-exclusive basis (as here: *"the parties hereby irrevocably submit to the non-exclusive jurisdiction of the Courts of England and*

Wales"), Article 4 cannot be relied upon to override that mandatory jurisdiction under the jurisdiction agreement. Contrary to Mr Diwan QC's submission, there is no question of Article 4 somehow taking precedence over Article 25 where a non-exclusive jurisdiction agreement is involved since jurisdiction under Article 25 is mandatory whether the jurisdiction agreement is exclusive or non-exclusive. Furthermore, the opening words of Article 4 itself: *"Subject to this Regulation"* demonstrate that it does not take precedence as contended.

62. The position is an *a fortiori* one where, under Article 4, the same Courts as under the jurisdiction agreement would have jurisdiction. As Ms Dilnot QC pointed out, where the contractual agreement coincides with the domiciliary rule, all roads lead to this Court having jurisdiction and Article 33 having no application. Nothing from the passage in the Pocar report cited in *Etihad* compels a contrary conclusion. When he talks of a non-exclusive forum being available in addition to forum(s) objectively available under the [Regulation] he is not addressing the current situation where jurisdiction under Article 25 and under Article 4 coincide, a situation not considered by the case law of the CJEU or by Professor Pocar himself.

63. In any event, the argument on behalf of Perform that Article 33 applies, because the Court would have had jurisdiction under Article 4 if there had not been a jurisdiction agreement in favour of the Court, does go against the domiciliary rule rather than enforce it. It produces the bizarre and illogical result that, whereas, if the defendant had been domiciled in the United States, a non-exclusive jurisdiction agreement would confer mandatory jurisdiction under Article 25 and Article 33 would have no application whatsoever, because the defendant is domiciled in England, which reinforces the connection with this jurisdiction, the flexible discretionary power under Article 33 to stay the present proceedings comes into play. This was the point the judge made at [89] of his judgment which I quoted at [26] above. The argument makes no sense and contradicts the clear wording of Article 25, which confers mandatory jurisdiction on the Courts of England and Wales, whether the jurisdiction agreement is exclusive or non-exclusive. I agree with the judge that where Article 25 applies, as here, it cannot be said that jurisdiction is "based on" Article 4. Thus Articles 33 and 34 have no application.

64. Nothing in the wording of the Regulation contradicts this conclusion and, indeed, the mandatory wording of Article 25 supports it. No more elaborate or detailed analysis is required. In my judgment, the appeal on Ground 1 must be dismissed.

65. In the circumstances, Ground 2 does not arise but, since the issue was fully argued I will deal with it, albeit briefly. In my judgment, the short answer to Mr Diwan QC's contention that the judge erred in principle in having regard to the connections with this jurisdiction, including the non-exclusive jurisdiction agreement, is that the first sentence of Article 24: *"When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it"* means what it says. It is no answer that the second sentence focuses on the connections with the third State since the sentence is permissive and not exhaustive: *"Such circumstances may include*". The submission by Mr Diwan QC that, in some way, the Court's discretion in assessing the proper administration of justice is limited to the connections with the third State and the risk of irreconcilable judgments flies in the face of the words of those first two sentences.

66. The words: *"all the circumstances of the case"* are extremely wide and not limited to connections with the third State, as the permissive and non-exhaustive wording of the second sentence make clear. Those circumstances can plainly include the connections of the case with the second seised Member State, including the existence of a jurisdiction agreement in favour of the Courts of that Member State and the fact that the relevant contract is governed by the law of that Member State. The submission by Mr Diwan QC that clause 20(f) is somehow irrelevant to the assessment the Court has to make ignores that it is clearly one of the circumstances of the case. In my judgment, in assessing what the proper administration of justice required, the judge was entitled to take into account that in clause 20(f) the parties had contractually agreed for the English Court to have non-exclusive jurisdiction. Because the agreement was non-exclusive, the parties were clearly contemplating that there might also be proceedings brought in another jurisdiction without breaching the DCA and were therefore prepared to take the risk of irreconcilable judgments. That is all highly relevant to the assessment the Court would have been making under Article 33(2) if Article 33 had had any application.

67. I consider that in considering all the circumstances of the case, the judge was entitled to have regard to all the factors connecting the case with this jurisdiction. The submission that in doing so, he engaged in an impermissible common law *forum non conveniens* exercise is misconceived. I consider that the correct analysis is that set out by Turner J at [206] of the judgment in *Mariana*:

> "The decision in ***Owusu***, to which I have already made reference in the context of the strike out application, was directed, at least in part, against the risk that the application of the broad discretion afforded by the common law doctrine of forum non conveniens was liable to undermine the predictability of the rules imposed by the Brussels Convention and its successors. It follows that a defendant cannot circumvent the requirements of Article 34, simply by taking a forum non conveniens shortcut however cunningly disguised. It does not mean, however, that, provided the jurisdictional prerequisites have been satisfied, the court is required when considering the proper administration of justice criterion to jettison any consideration of factors thereunder which might also have been theoretically relevant to a forum non conveniens argument. Such an approach would achieve the object only of throwing the baby out with the bathwater."

68. In other words, the fact that the factors which the judge considered meant that the proper administration of justice did not require a stay of these proceedings might theoretically have also been relevant in a common law *forum non conveniens* exercise does not invalidate the judge's approach. It follows that, if Article 33 had applied, the judge would not have erred in the exercise of his discretion in refusing a stay of the present proceedings. Ground 2 of the appeal must also be dismissed.

Lord Justice Henderson

69. I agree.

Lady Justice Nicola Davies

70. I also agree.