Neutral Citation Number: [2020] EWHC 1315 (Comm)

Case No: CL –2018-000787

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22/05/2020

Before :

Mr Justice Butcher

- -

Between :

THE FEDERAL REPUBLIC OF NIGERIA

Claimant

- and -

(1) ROYAL DUTCH SHELL PLC
(2) SHELL EXPLORATION AND PRODUCTION AFRICA LTD
(3) SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED
(4) SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED
(5) SHELL NIGERIA ULTRA DEEP LIMITED
(6) SHELL PETROLEUM N.V.
(7) SHELL INTERNATIONAL EXPLORATION AND PRODUCTION B.V.
(8) ENI S.p.A.
(9) NIGERIAN AGIP EXPLORATION LIMITED
(10) NIGERIAN AGIP OIL COMPANY
(11) AGIP ENERGY AND NATURAL RESOURCES (NIGERIA) LIMITED
(12) MALABU OIL AND GAS LIMITED
(13) ENERGY VENTURE PARTNERS LIMITED

Defendants

- -

- -

Roger Masefield QC and Richard Blakeley (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant**
Lord Goldsmith QC and James Willan (instructed by **Debevoise & Plimpton LLP**) for the **1st to 7th Defendants**
Richard Handyside QC and Alex Barden (instructed by **Allen & Overy LLP**) for the **8th to 11th Defendants**
Charles Fussell (Solicitor Advocate of Charles Fussell & Co LLP) for the **13th Defendant**

Hearing dates: 28, 29 and 30 April 2020

- -

Approved Judgment

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

.....

MR JUSTICE BUTCHER

Mr Justice Butcher :

Introduction

1. These have been applications by three groups of Defendants challenging the jurisdiction of the court. Those groups may be described as: (1) 'the Shell Defendants', namely the First to Seventh Defendants; (2) 'the Eni Defendants', namely the Eighth to Eleventh Defendants; and (3) the Thirteenth Defendant ('EVP').

2. In broad outline, the Claimant ('the FRN') has brought this action claiming that certain Nigerian oil rights, namely rights in respect of the Oil Prospecting Licence for block 245 ('OPL 245'), were procured by a fraudulent and corrupt scheme, in which the Defendants knowingly participated, and that the Defendants are liable to it for bribery, dishonest assistance and unlawful means conspiracy.

3. The principal basis on which the Defendants dispute the jurisdiction of the court is that the FRN is already pursuing claims in Italy to obtain financial relief against, amongst others, the First Defendant ('RDS'), the Second Defendant ('SEPA'), the Fourth Defendant ('SPDC') and the Eighth Defendant ('Eni SpA'). The Defendants contend that those claims are the same claims as the FRN now seeks to bring here, and that the court should decline jurisdiction in respect of those claims pursuant to Article 29 of the Brussels Regulation (Recast) ("the Regulation"). The Defendants contend that, if the court declines jurisdiction under Article 29 of the Regulation over the claims against RDS and Eni SpA, the entire proceedings should be dismissed. This is because RDS is the 'anchor defendant'. It is because RDS is domiciled in England that the FRN asserts that the court has jurisdiction over the remaining Defendants: under Article 8(1) of the Regulation in the case of the Sixth and Seventh Defendants and of Eni SpA and pursuant to CPR 6.36 and paragraph 3.1(3) of PD6B in the case of the other Defendants. In the alternative to the application under Article 29, the Defendants seek a stay of these proceedings under Article 30 of the Regulation or, in the further alternative as a matter of case management, pending a final determination, including all appeals, of the claim that the FRN has brought in Italy.

4. The Shell and the Eni Defendants also seek an order that the court should decline jurisdiction over the FRN's claim to a declaration that it is entitled to rescind the relevant agreements on the basis that there is no serious issue to be tried in this regard.

5. Finally, the Shell and Eni Defendants seek the setting aside, on the grounds of material non-disclosure, of the order made by Cockerill J on 11 March 2019 granting the FRN permission to serve these proceedings out of the jurisdiction on SEPA, the Third Defendant ('SNEPCO'), SPDC, the Fifth Defendant ('SNUD'), and on the Ninth to Eleventh Defendants.

6. The FRN's position is that Article 29 of the Regulation does not apply. It accepts that a short stay is appropriate. It says that it does not matter greatly whether that stay is under the court's case management powers or under Article 30 of the Regulation; but if it matters, it submits that a case management stay is the appropriate course. It contends that there is a serious issue to be tried as to whether it is entitled to a declaration as to entitlement to rescind. And it contends that there was no material non-disclosure or failure to comply with its duty of full and frank disclosure or to make a fair presentation in its application to Cockerill J.

Factual Background

7. It is convenient to begin by setting out an account of the factual background. This is not intended to make findings as to the underlying facts, insofar as they are in dispute, but to allow for comprehension as to the issues which arise.

8. Block 245 is an ultra-deep offshore petroleum block in Nigerian territorial waters. In April 1998 Chief 'Dan' Etete, the then Nigerian Minister for Petroleum serving under President Abacha, awarded OPL 245 to the Twelfth Defendant ("Malabu"), which was a newly-incorporated company. It appears that those interested in Malabu included Mr Etete and Mr Mohammed Abacha, the son of President Abacha.

9. President Abacha died in 1998 and was replaced by President Obasanjo. In March 2000 the new government confirmed Malabu's licence. In July 2001, however, it revoked it. After a bidding process, in May 2002 the FRN awarded the rights to OPL 245 to SNUD. In 2003, SNUD entered into a production sharing agreement with the Nigerian National Petroleum Corporation ("NNPC") pursuant to which SNUD agreed to pay, and did pay, a signature bonus of US$210 million to the FRN in return for a 40% interest in OPL 245.

10. Following this award to SNUD, ICC arbitration proceedings ensued between SNUD and Malabu. Malabu brought proceedings in the USA and in Nigeria against the FRN and various Shell entities. The Nigerian House of Representatives also launched an enquiry into OPL 245. It concluded in May 2003 that OPL 245 had been legally awarded to Malabu, that the revocation of Malabu's licence should be set aside, and that Shell should pay US$550 million in compensation to Malabu. In November 2004, however, the ICC arbitral tribunal decided that the revocation of the award of OPL 245 to Malabu was legitimate and that SNUD was not in breach of any obligations to Malabu.

11. Two years later, on 30 November 2006, the FRN settled its litigation with Malabu and re-awarded or purported to re-award OPL 245 to Malabu. In April 2007, SNUD commenced ICSID proceedings against the FRN under the Netherlands-Nigeria Bilateral Investment Treaty alleging the unlawful expropriation of SNUD's rights to OPL 245. The substantive hearing of the ICSID proceedings took place in March 2010.

12. The Eni group appears to have become involved in 2010, as Malabu was seeking to sell the interest which it asserted it had in OPL 245. Discussions between Shell, Eni, the FRN and Malabu took place over a period of about 12 months. These discussions culminated in three agreements made in April 2011 ('the April 2011 Agreements'), as follows:

    (1) An agreement ('the Resolution Agreement') between SNUD, SNEPCO, the Ninth Defendant ('NAE'), the FRN and NNPC, under which SNEPCO and NAE jointly acquired the equity interest in OPL 245 for US$1.3 billion. This amount was comprised of (i) a cash payment of US$1.092 billion to the Federal Government of Nigeria ('FGN') which was paid by NAE into a JP Morgan escrow account, and subsequently released by JP Morgan into the FRN's depositary account at JP Morgan; and (ii) the release to the FRN of a signature bonus in the amount of US$207.96 million. The Resolution Agreement also provided for the exercise of 'back-in' rights by the FRN.

(2) An agreement between SNUD, SNEPCO and the FRN under which all claims as between them were settled ('the Shell Settlement Agreement').

(3) An agreement between the FRN and Malabu by which the FRN agreed to pay Malabu US$1.092 billion in full and final settlement of Malabu's claims ('the Malabu Settlement Agreement').

13. The FRN's case is that a large proportion of the money paid by the FRN to Malabu under the Malabu Settlement Agreement was used to pay bribes. It alleges that some US$812 million was paid to entities controlled by Mr Abubakar Aliyu, who is alleged in turn to have made payments to, amongst others, Mr Etete, and to senior officials of the Nigerian government in office at the time of the April 2011 Agreements including President Goodluck Jonathan, Attorney General Adoke, and the Minister for Petroleum Resources, Ms Alison-Madueke. As I have already indicated, the FRN contends that the Defendants participated in the scheme to pay bribes to these officials.

14. There was an investigation of matters related to OPL 245 by the FRN's Economic and Financial Crimes Commission ('EFCC') in 2012. I will refer to this further in due course. In 2013 three NGOs wrote to the Public Prosecutor of Milan ('PPM') raising concerns about the transactions in relation to OPL 245, prompting an investigation in Italy.

15. In 2015 President Goodluck Jonathan was defeated in an election in Nigeria. He was replaced by President Buhari, who assumed office in May 2015 and continues to be President of the FRN. On 1 September 2016, the EFCC produced a report to the Attorney General of the FRN. That report advised, amongst other things, that the FGN should consider 'unwinding' the whole process, review the legality or otherwise of the actions of the previous administration, and initiate relevant civil proceedings against the oil companies.

16. On 22 December 2016, the PPM filed a Notice of Closure of Preliminary Investigations relating to OPL 245. This named the FRN as a '*persona offesa*' (injured person) in respect of the alleged wrongdoing. In February 2017 the PPM charged a number of individuals with the offence of international bribery, including certain current or former officers or employees of companies in the Eni and Shell groups. The PPM also charged RDS and Eni SpA with the offence of administrative wrongdoing. On 20 December 2017 the Italian Court issued a Decree for Committal to Trial ('the Decree for Committal') against various defendants, including certain officers of companies in the Shell and Eni groups, as well as against RDS and Eni SpA themselves.

17. By a Declaration Bringing Civil Action in the Interest of the FRN dated 5 March 2018 ('the Declaration'), the FRN joined the Italian criminal proceedings as a civil claimant (or 'parte civile'). On 20 June 2018 a Request to summon was submitted in the Milan Court (7th Criminal Section) ('the Request to summon') at the instance of the FRN, seeking that RDS and Eni SpA be summoned on the basis that they were 'liable subjects for civil obligations for the damage caused to the civil party [ie the FRN] for the crime of accused individuals'. SEPA and SPDC were subsequently joined to the proceedings as 'responsabili civile'. These steps in the Italian proceedings are central to the Defendants' application based on Article 29 of the Regulation, and I will consider them in more detail below.

18. English proceedings were first mooted by Letter of Claim dated 6 November 2018. The Defendants have drawn attention to the fact that the Letter of Claim made reference only to financial relief, and not to rescission. A Claim Form was then issued, on 12 December 2018. Again, it did not contain a claim for rescission. A copy of the Claim Form was sent to Allen & Overy on behalf of the Eni Defendants on 12 December 2018. On 13 December 2018 Allen & Overy replied raising a number of points, one of which was that the English claim covered 'precisely the same facts and allegations' as raised in 'FRN's civil claim' in Milan, and that Articles 29 or 30 of the Regulation were applicable.

19. Permission to serve out on the Defendants where permission was required was granted by Cockerill J on 5 March 2019, following a without notice hearing. The Particulars of Claim relied on contained a claim for a declaration that the FRN was entitled to rescind the April 2011 Agreements. I will consider the claims made in the Particulars of Claim in more detail in due course.

20. The Defendants' applications seeking an order that the court should decline jurisdiction or alternatively stay these proceedings and set aside the order of Cockerill J of 5 March 2019 were issued at the start of November 2019.

The Italian Proceedings

21. It is necessary to set out in more detail the nature of the action and the claims made in the Italian proceedings.

22. There were a series of preliminary hearings after the PPM brought charges in February 2017. At a hearing on 11 July 2017, two of the accused, Mr Di Nardo and Mr Obi – neither of whom is a present or former officer or employee of the Eni or Shell Defendants – elected for a 'fast track' trial.

23. As I have already mentioned, on 20 December 2017 the PPM served the Decree for Committal to Trial. This sets out the charges against Eni SpA and against RDS. It also sets out the charges and their grounds against Paolo Scaroni, Claudio Descalzi, Roberto Casula, Ciro Antonio Pagano and Vincenzo Armanna, each of whom is a current or former officer or employee of an Eni company (collectively, "the Eni Individuals"), and against Guy Colegate, John Coplestone, Peter Robinson and Malcolm Brinded, who are former officers or employees of Shell companies (collectively, "the Shell Individuals"). The Eni and Shell Individuals are charged with international bribery. The elements of the offence of international bribery under Italian law are as follows:

    (1) The corrupted party must be a public official or a person acting in the capacity of a public official of a foreign state;

    (2) The public official must have received, or accepted a promise to receive, money or other benefits for himself or third parties;

    (3) The public official must have omitted or delayed an official act, or performed an act contrary to official duties, in consideration for the money or benefit offered; and

(4) The corrupting party must have committed the violation in order to obtain an undue advantage for himself or other parties in a transaction or in order to maintain an economic or financial activity.

24. RDS and Eni SpA are charged with liability under Legislative Decree 231/2001 for 'administrative wrongdoing'. Those allegations are not germane to the present applications, however, because the civil claims in Italy, which are what the Defendants contend constitute proceedings in the 'court first seised' for the purposes of Articles 29 and 30 of the Regulation, are not founded on this alleged liability, but rather upon Eni SpA's and RDS's being allegedly '*responsabile civile*' (often translated as being 'vicariously liable') for the allegedly criminal conduct of the individuals I have mentioned in the preceding paragraph.

25. The individuals are alleged to have committed the offence of international bribery by reason of the matters set out in the Decree for Committal to Trial. These allegations include that some or all of the Eni Individuals: (i) met with President Jonathan; (ii) met with Attorney General Adoke and Mr Abubakar Aliyu; (iii) met with Mr Obi, and agreed to his being an intermediary; (iv) were aware of Mr Etete's role and met him; (v) were aware that 'most of the sums were paid by Eni to the political sponsorships of the transaction'; (vi) organised meetings with Shell in Nigeria 'in order to discuss the terms of the deal and the payment of fees to public officials and intermediaries'; and (vii) in at least the case of Mr Armanna, received Eur 917,952 out of the consideration via former Attorney General, Chief Bayo Ojo. In the case of the Shell Individuals the Decree, as amended, contains allegations that some or all of them: (i) connected with General Gusau to help Shell; (ii) collected information about the 'economic demands of [Ms] Alison-Madueke … and of the President Goodluck Jonathan to give the green light to the deal'; (iii) met with Mr Obi; (iv) met with Attorney General Adoke and with Mr Abubakar Aliyu; and (v) coordinated the deal with Eni.

26. What is alleged against all the Eni and Shell Individuals is that they (with others):

> 'carried out convergent actions aimed to attribute to Eni and Shell companies the 50% each of the exploration rights on block 245 in Nigeria as return for the payment of the sum of $1,092,040,000 in favor of Malabu company (referable to Dan Etete) alleged owner of the rights on the block 245, being agreed, in course of the negotiations for the purchase of the block, that such amounts, net of the sums retained by the said Etete (about $300 million used by Dan Etete for his own benefit and for the benefit of several other beneficiaries in order to purchase real estate properties, airplanes, armored cars, etc.) were destined, as confirmed in fact, to the remuneration:
>
> - of Goodluck Jonathan, President of Nigeria, and of other members of the Nigerian government holding the offices at the time – specifically the Minister of Oil Diezani Alison Madueke and the [Attorney General], Muhammed Adoke Bello
>
> - of other Nigerian public officials such as the National Security Advisor Aliyu Gusau …

> - of the former [Attorney General] Christopher Bajo Oyo (sic), for his role in the rearrangement of the OPL 245 license to Malabu on November 30th, 2006 and the following activity as 'advisor'
>
> - and in part retained by intermediaries and in part paid back in favor of Eni's and Shell's directors
>
> …'

27. As already set out, the FRN has joined the Italian criminal proceedings as a civil claimant, and that the nature of its claim is set out in the Declaration. The Declaration refers to the criminal charges against the Shell and Eni Individuals set out in the Decree for Committal (as amended). In the 'Causa Petendi' it is contended that the FRN is a party injured by the alleged crimes. In the 'Petitum', it is stated that the aim of the civil action is to obtain 'the conviction of the defendants to the sentence considered law-abiding and to the compensation of the **patrimonial and not patrimonial damages** suffered as a result of the alleged crimes'. It is pleaded that those damages fall to be determined in accordance with a number of parameters, which include 'the profit that the criminal negotiation has in fact produced to Eni-Shell'; and that the damages are 'certainly higher, but cannot be lower than the amount of the paid criminal bribe (ie USD 1,092,040,000)' because the Shell and Eni defendants would have calculated that 'the sum paid would at least be returned without loss for [the] companies'.

28. In the Request to summon the FRN sought that the Court summon Eni SpA and RDS, on the basis that 'pursuant to articles 185 Criminal Code and 2049 Civil Code, the aforementioned companies are liable subjects for civil obligations for the damage caused to the civil party [FRN] for the crime ascribed to the above-mentioned defendants, respectively referable to them [ie the Eni Individuals for Eni SpA and the Shell Individuals for RDS] by reason of the close organic and dependence relationship … which, at the time of the facts in question, linked each of the defendants indicated with the relevant Company and the obvious interest and huge profit that the Companies have achieved, in the hypothesis of the allegation, as result of the behaviour of said defendants…' On this basis it was said that Eni SpA and RDS were 'liable subject[s] for civil obligations for the fact attributed to the defendants attributable to them'. The summons was accordingly sought

> "… in order to extend to these liable subjects for civil obligations the requests asked by the [Declaration] and to obtain, as jointly liable with the defendants, upon verification of the criminal liability and conviction of the defendants: 1) pursuant to articles 538 and 539 Code of Criminal Procedure the sentence to the refunds and to the compensation of the damage in every its part deriving from the crime, to be paid, possibly also in an equitable way, as specified in the written conclusions of the civil party…"

29. In the 'fast track' trial for which they had opted, Mr Obi and Mr Di Nardo were convicted on 20 September 2018. They have appealed. It was not in dispute before me that the findings in the 'fast track' trial judgment are not binding on the other parties.

30. The main trial commenced in March 2018 and is continuing. The FRN has participated in the trial. One aspect of its participation is that it has served an expert report on

quantum, which puts a commercial value on the OPL 245 licence in April 2011 of US$3.511 billion.

31. Evidence is now closed in the trial. The most recent estimate is that a decision will be made in around autumn of this year and that written reasons for that decision will be handed down within around 90 days after the announcement of the decision. The evidence indicated that any party can appeal against the judgment, and that an appeal would normally take 12-18 months to resolve, with a further appeal possible to the Supreme Court on points of law.

The English Proceedings

32. The FRN's summary of its claims in the English proceedings, in paragraph 13 of the Particulars of Claim is:

> 'By way of summary, the FRN's claims arise out of the purported acquisition by a Shell/Eni consortium in 2011 of an oil exploration licence known as OPL 245, previously owned by Malabu. That acquisition was, as more particularly set out below, part of a fraudulent and corrupt scheme (referred to in shorthand as the 'Scheme') that involved the payment of bribes (via Malabu, EVP and [International Legal Consulting Ltd ('ILCL')] to corrupt FRN officials and former officials. Shell and Eni knew of, participated in and assisted in the Scheme. It is the FRN's case that the Scheme also involved (or at least intended) the payment of bribes (via Malabu, EVP and ILCL) to Shell and/or Eni executives.'

33. Three causes of action are identified in the Particulars of Claim. It is pleaded that, in relation to these, Nigerian law is materially the same as English law. Those three causes of action are: (i) fraud and/or bribery; (ii) dishonest assistance; and (iii) unlawful means conspiracy.

34. As to (i), it is alleged, inter alia, that:

> "[63(4)(c)] Bribes were paid to at least the following Nigerian FGN officials …: President Jonathan (through front companies of Abubaker Aliyu), Alison-Madueke, Adoke and Gusau. Each of these FGN officials owed duties to the FRN which would be classified as fiduciary under English law …. The receipt of those bribes and the participation in the Scheme of said officials was in breach of their fiduciary duties and Nigerian criminal law…"

It is further pleaded (paragraph 64) that there is an irrebuttable presumption that the FRN would not have entered into the April 2011 Agreements but for the bribes.

35. As to (ii), it is alleged that the Defendants assisted officers or agents of the FRN to breach their fiduciary duties by participating in the Scheme.

36. As to (iii), it is alleged that the Defendants were part of a combination, arrangement or understanding, an intention of which was to harm the FRN, by the use of unlawful means, including (a) bribery and corruption, (b) the obtaining by Shell and Eni of the OPL rights by illegitimate means, including the payment of bribes and/or monies to Malabu, (c) the receipt by Malabu of over US$800 million when it had no legitimate claim to any payment, and (d) breaches of duty by officials of the FRN.

37. The FRN claims, as against all the Defendants:

    i) 'a declaration that the FRN is entitled to rescind the April 2011 Agreements because the same were procured by bribery and corruption and/or in breach of fiduciary duty, which breach was known to Shell and/or Eni';

    ii) US$1,092,040,000 (or lesser sums) as money had and received and/or compensatory damages;

    iii) Compensatory damages for the undervalue at which the OPL 245 rights were sold;

    iv) An account of profits;

    v) "Such further and other relief as the Court in its discretion thinks fit".

The Issues on the Applications

Application based on Article 29 of the Regulation

38. Articles 29 and 30 of the Regulation provide for a regime dealing with proceedings brought in the courts of more than one Member State.

39. They are in the following terms:

    '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.'

40. The English text of Article 29 refers to the two actions having to be between the same parties and to involve the same 'cause of action'. The French and other texts however do not simply refer to 'cause of action', but to two concepts: in French expressed as '*le même objet et la même cause*'. The English version must be construed in accordance with that distinction.

41. An authoritative summary of the guidance in the case law of the CJEU in relation to Article 29 is given in The 'Alexandros T' [2013] UKSC 70, [2014] Bus LR 873, at [28] per Lord Clarke, as follows:

> '(i) The phrase "same cause of action" in Article [29] has an independent and autonomous meaning as a matter of European law; it is therefore not to be interpreted according to the criteria of national law: see Gubisch at para. 11.
>
> (ii) In order for proceedings to involve the same cause of action they must have '*le même objet et la même cause*'. This expression derives from the French version of the text. It is not reflected expressly in the English or German texts but the CJEU has held that it applies generally: see Gubisch at para. 14, The Tatry at para. 38 and Underwriting Members of Lloyd's Syndicate 980 v Sinco SA [2008] 2 CLC 187, per Beatson J at para 24.
>
> (iii) Identity of *cause* means that the proceedings in each jurisdiction must have the same facts and rules of law relied upon as the basis for the action: see The Tatry at para. 39. As Cooke J correctly stated in JP Morgan Europe Ltd v Primacom AG [2005] 1 CLC 493 at para 42:
>
> "The expression "legal rule" or "rule of law" appears to mean the juridical basis upon which arguments as to the facts will take place so that, in investigating "cause" the court looks at the basic facts (whether in dispute or not) and the basic claimed rights and obligations of the parties to see if there is coincidence between them in the actions in different countries, making due allowance for the specific form that proceedings may take in one national court with different classifications of rights and obligations from those in a different national court."
>
> (iv) Identity of *objet* means that the proceedings in each jurisdiction have the same end in view: see The Tatry at para. 41, Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV (Case C111/01) [2003] ECR I-4207 at para 25, Primacom at para. 42 and Sinco at para. 24.
>
> (v) The assessment of identity of cause and identity of object is to be made by reference only to the claims in each action and not to the defences to those claims: see Gantner at paras 24-32, where the CJEU said this in relation to Article 21 of the Brussels Convention:
>
> "… in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter,

account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant."

See also to similar effect Kolden Holdings v Rodette Commerce Ltd [2008] 1 CLC 1, per Lawrence Collins LJ at para. 93 and Research in Motion UK Ltd v Visto Corp [2008] 2 All ER (Comm) 560, per Mummery LJ at para. 36.

(vi) It follows that Article [29] is not engaged merely by virtue of the fact that common issues might arise in both sets of proceedings. I would accept the submission on behalf of the CMI that this is an important point of distinction between Articles [29] and [30]. Under Article [30] it is actions rather than claims that are compared in order to determine whether they are related.

(vii) After discussing Gubisch, The Tatry, Sarrio, The Happy Fellow and Haji-Ioannou v Frangos [1999] CLC 1075, Rix J summarised the position clearly and, in my opinion, accurately in Glencore International AG v Shell International Trading and Shipping Co Ltd [2000] CLC 104 at 110:

"It would appear from these five cases … that, broadly speaking, the triple requirement of same parties, same *cause* and same *objet* entails that it is only in relatively straightforward situations that art 21[1] bites, and, it may be said, is intended to bite. After all, art 22 is available, with its more flexible discretionary power to stay, in the case of 'related proceedings' which need not involve the triple requirement of art 21. There is no need, therefore, as it seems to me, to strain to fit a case into art 21. The European Court, when speaking in Gubisch (at para 8) of the purpose, in the interests of the proper administration of justice within the European Community, of preventing parallel proceedings in different jurisdictions and of avoiding 'in so far as is possible and from the outset' the possibility of irreconcilable decisions, was addressing arts 21 and 22 together, rather than art 21 by itself.

Thus a prime example of a case within art 21 is of course where party A brings the same claim against party B in two jurisdictions. Such a case raises no problem. More commonly, perhaps, the same dispute is raised in two jurisdictions when party A sues party B to assert liability in one jurisdiction, and party B sues party A in another jurisdiction to deny liability, or vice versa. In such situations, the respective claims of parties A and B naturally differ, but the issue between them is essentially the same. The two claims are essentially mirror images of one another. Gubisch and The [Tatry] are good examples of this occurrence.

On the other hand, Sarrio v KIA is a case where the same claimant was suing the same defendant on different bases giving rise to different issues and different financial consequences, and where liability on one claim did not involve liability (or non-liability) on the other. Haji-Ioannou v Frangos illustrates the situation where even though the cause is the same, and even though there is some overlap in the claims and issues, nevertheless different claims, there the proprietary claim to trace, may raise sufficiently different issues of sufficient importance in the overall litigation for it to be concluded that the objet differs. …"'

[11] Of the Brussels Convention.

42. In the present case, the Defendants contend that the claim against RDS in the Milan proceedings, and in the English proceedings, satisfies the three 'identities', of parties, *cause* and *objet*. They say that the case falls within the category of Rix J's 'prime example', of where party A (the FRN) has brought the same claim against party B (RDS) in two jurisdictions. FRN for its part, on the other hand, denies that any of the three identities is present. It is therefore necessary to consider them in turn.

Are the proceedings 'between the same parties'?

43. There is no doubt that the Italian civil claim is brought by the FRN against RDS (as well as Eni SpA), and that the FRN is suing RDS (amongst others) in the English action. It is also clear that it is not a requirement for the operation of Article 29 that all the parties are the same in both sets of proceedings. As the CJEU decided in The Tatry Article 29 will apply to the extent to which the parties before the courts second seised are parties to the action previously commenced. The fact that there may be other parties to the second action does not prevent this.

44. What the FRN contends, however, is that the two actions are nevertheless not between the same parties because the PPM is a party to the Italian proceedings, and is not a party to the English proceedings. Furthermore, the FRN argues that the PPM is the key party to the Italian proceedings. It calls attention to the following:

    (1) The PPM has control over the Italian proceedings.

    (2) Specifically, as is uncontested, the PPM determines which crimes the individual defendants should be charged with. Only the prosecutor can change the factual or legal components of the charge; the *parte civile* cannot advance a different case theory from that of the PPM; and the *parte civile* cannot allege different facts as constituting the relevant criminal offence.

    (3) Whilst the PPM cannot withdraw the charge once made, he can request that the Court should acquit the defendants with a view to abandoning the case, and if the Court grants that request the claim by the *parte civile* will also be discontinued.

45. The Defendants contend, on the other hand, that only the FRN is the claimant to the civil action in the Italian proceedings. The fact that the PPM may be able to seek the acquittal of the defendants and bring about the end of the civil claim does not make any difference. They also say that their case is supported by the decision of the CJEU in Aannemingsbedrijf Aertssen NV v VSB Machineverhuur BV (Case C-523/14) [2016] I.L.Pr. 16 (2015). In that case the CJEU held that, while criminal proceedings are outside the scope of the Regulation, a civil action which has as its object obtaining monetary compensation for harm suffered by the complainant, which is joined to the criminal proceedings and is ancillary thereto, does fall within the Regulation. Further, while it was 'without prejudice to the determination to be made by the referring court' as to whether the two actions fell within what is now Article 29, the CJEU made it clear that it considered that they were (paragraph [47]); and thus did not regard the fact that, in the first (Belgian) proceedings, the civil claim had been joined to a criminal investigation before an investigating magistrate as entailing that the parties to the first action were different from those which were party to the second (Netherlands) action.

46. In my judgment, in the present case the two sets of proceedings against RDS are 'between the same parties' for the purposes of Article 29.

47. The main point relied on by the FRN is, as I have said, that the PPM is a party to the Italian and not to the English proceedings. I am, however, satisfied that the PPM is not a party to the Italian civil claim, or at least is not a party in any sense relevant to Article 29. Insofar as the Italian proceedings are criminal proceedings, they do not fall within the scope of the Regulation. The civil claim made as an adjunct to those proceedings does fall within the Regulation, as confirmed in Aertssen. This necessarily involves considering it, for these purposes, as a distinct claim. That claim was commenced by the Declaration, which specifies the FRN (alone) as 'the plaintiffs'. Similarly the Request to summon was issued on behalf the FRN (alone). At least for the purposes of the autonomous interpretation of Article 29, I consider that 'the parties' to the civil claim did not include the PPM.

48. If that is wrong, it is nevertheless clear from The Tatry that there does not have to be complete identity of the parties to the two proceedings for Article 29 to be applicable. That Article applies to the proceedings insofar as there is identity of parties. The CJEU said, at paragraph [36]:

> '… on a proper construction of Article 21 of the Convention, where two actions involve the same cause of action and some but not all of the parties to the second action are the same as the parties to the action commenced earlier in another contracting state, the second court seised is required to decline jurisdiction only to the extent to which the parties to the proceedings before it are also parties to the action previously commenced; it does not prevent the proceedings from continuing between the other parties.'

49. Just as the fact that there may be other parties to the second action does not prevent the application of Article 29 insofar as there are parties to it which are also parties to the first action, so it must be the case that the fact that there are other parties to the first action does not prevent the application of Article 29 to the extent that there are some of the same parties in the second action. Accordingly I conclude that Article 29 is applicable insofar as there are proceedings between the FRN and RDS in the two actions, and that the presence in either of different parties does not prevent its application.

50. I am not persuaded by the FRN's contention that this should not be the case because the PPM is a 'key' party to the Italian proceedings, on the basis, in particular, that the PPM could seek the acquittal of the defendants and bring the civil action to an end. This does not appear to me to affect the fact that there are two sets of proceedings in which a claim is made by the FRN against RDS, and thus two sets of proceedings which are 'between the same parties'. Furthermore, I do not consider that the fact that another party to the Italian proceedings (on the hypothesis that the PPM is a party to those proceedings in a relevant sense) may have a degree of control over those proceedings means that it must be regarded as being a relevant party for the purposes of determining whether Article 29 is applicable. Thus if there were an action involving multiple cargo claimants in a situation similar to that in The Tatry, and it were factually the case that one group of cargo owners had the greatest financial interest in the outcome and was the only one with the resources to pursue an action to trial, that group might have *de facto* control over whether proceedings against the shipowner were continued or not.

That would not, as I see it, affect the potential application of Article 29 to other groups of cargo owners if they were, and the first group were not, parties to proceedings in another Member State. I do not consider that any meaningful distinction exists between the 'control' exercised in that type of case by the first group of claimants and the control which the PPM is said by the FRN to have over the Italian proceedings against RDS in this case.

51. For the purposes of completeness, I should refer to the FRN's argument in this context based on Haji-Ioannou v Frangos [1999] 2 Lloyd's Rep 337. The FRN refers to the passage in the judgment of Lord Bingham CJ (at 352 RHC) where it was said that it would be 'wholly inappropriate' for there to have been a stay under Article 22 of the Brussels Convention given that 'this claim in Greece is tacked on as an appendage to criminal proceedings'. I do not consider that this helps the FRN in relation to its case as to Article 29. It was, as Mr Handyside QC submitted, clearly *obiter*, given the Court of Appeal's decision in relation to Article 2 of the Convention. Furthermore, it related to Article 22, the equivalent of Article 30 of the Regulation, and not to the equivalent of Article 29. In relation to Article 29 it is clear from Aertssen that it is potentially applicable in relation to civil proceedings brought as an adjunct to criminal proceedings. Once that is recognised, it has to be applied in accordance with its terms.

52. For these reasons I consider that the present proceedings are, as far as RDS is concerned, between the same parties as the Italian civil claim.

Do the present proceedings have the same cause as the Italian proceedings?

53. The FRN contends that its claim against RDS in the present proceedings does not have the same *cause* as that in the civil claim in Italy. It accepts that there is no material difference in the facts at issue in the two proceedings (Skeleton paragraph 141), but contends that the legal basis of its claim here is different. In particular it relies on the following: (1) that the Italian claims are for vicarious liability on the part of RDS for the criminally wrongful acts of its employees, whereas the claims in the English proceedings do not involve establishing criminal culpability on the part of the individual defendants and include claims against RDS as a direct tortfeasor; (2) that the Italian proceedings do not involve any requirement that FRN prove that the relevant ministers of the FRN were fiduciaries; (3) that in the Italian proceedings it is not required that the FRN show that RDS assisted in a breach of duty or was a direct tortfeasor; (4) that in Italy it is not necessary, as is required for the English conspiracy claim, to show that RDS and Eni did acts which furthered the commission of the bribery or did so pursuant to a common design; and (5) there is in the Italian proceedings a requirement that the individual defendants should have had the necessary intent, which is not the case in the English proceedings.

54. I recognise that there are differences in the elements of what has to be established in the Italian and in the English proceedings for the FRN to succeed. One of those is that, in the Italian proceedings, what is relied on is 'vicarious liability', whereas in the English proceedings the FRN relies both on vicarious liability and on direct attribution of responsibility. The approach I have to adopt is that set out in JP Morgan v Primacom, as approved and summarised by Lord Clarke in The 'Alexandros T', as follows: that I must look 'at the basic facts (whether in dispute or not) and the basic claimed rights and obligations of the parties to see if there is coincidence between them in the actions in different countries, making due allowance for the specific form that proceedings may

take in one national court with different classifications of rights and obligations from those in a different national court'.

55. Applying that test, I am firmly of the view that the *cause* is the same in the two proceedings against RDS. In each case, the basic facts are clearly (and concededly) the same. So also, in my judgment, are the basic claimed rights, which I would characterise as being the right not to be adversely affected by conduct of RDS which involves or facilitates the bribery and corruption of the FRN's ministers and agents, and the right to redress if there is such bribery and corruption. That there are differences in what in English legal jargon would be described as the 'causes of action' does not, as I see it, alter this. I do not consider that the legal rules involved in the English and Italian proceedings are more different than the English and German legal rules which were raised in the two sets of proceedings in JP Morgan v Primacom or than the legal rules which applied in the English and Cyprus proceedings in Easygroup Ltd v Easy Rent a Car Ltd [2019] EWCA Civ 477, [2019] 1 WLR 4630. Fundamentally, as it was put by Cooke J in paragraph [45] of JP Morgan v Primacom, what is involved is the rights and obligations of the parties in relation to the same basic (alleged) facts, namely here the alleged bribery relating to OPL 245. The differences in the way in which the FRN formulates its rights and its claim in the two sets of proceedings appear to me to fall within the 'due allowance for the specific form that proceedings may take in one national court with different classifications of rights and obligations from those in a different national court', as referred to in paragraph [42] of JP Morgan v Primacom.

56. The *obiter* consideration of whether the two actions in England and in Greece fell within Article 21 of the Brussels Convention in Haji-Ioannou provides some support for the conclusion that the two actions involved in the present case have the same *cause*. In that case, the action in Greece was a civil claim brought by Mr Haji-Ioannou as an adjunct to criminal proceedings which he had instituted by filing an indictment alleging embezzlement by Mr Frangos. The civil claim was for 'moral damages' for alleged torts. The claim in England brought by Mr Haji-Ioannou was based on Mr Frangos's alleged position as a trustee, fiduciary or accounting party. The judgment of the Court of Appeal considered a number of authorities of the European Court of Justice, including Sonntag v Waidmann [1993] 1 ECR 1963, where it had been held that, even if joined to criminal proceedings, a civil action for compensation for injury following a criminal act was civil in nature; and Gubisch Maschinenfabrik A.G. v Palumbo [1987] ECR 4861. Having conducted that review, Lord Bingham CJ, giving the judgment of the Court, said this (at 351):

> 'It appears to us that, in the language of the European Court of Justice, the same facts and rule of law form the basis of each proceedings. Although in England the plaintiffs are asserting that the same underlying agreement gave rise to different legal consequences from which different obligations and, therefore, different legal remedies flowed, the cause would appear to be the same in both countries.'

57. There are significant similarities, in relation to the issue of whether the *cause* was the same, between the relationship of the two actions in Haji-Ioannou and of those in the present case. There, like here, the foreign proceedings involved a civil claim which was an adjunct of criminal proceedings, and involved different asserted legal obligations and rights (in tort) from those asserted in the purely civil English proceedings (which involved allegations of trust and breach of a status as a fiduciary). These were, however, regarded as raising the same *cause*, because they concerned the

same basic complaint about the same basic facts, namely Mr Frangos's alleged misuse or misapplication of sums which, on the plaintiffs' case, had been entrusted to him and/or his failure to return those sums and their proceeds. The parallel here is that the two sets of proceedings raise claims arising from the same alleged bribery as part of the same transactions relating to OPL 245.

Do the present proceedings have the same objet as the Italian proceedings?

58. The FRN contends that its present proceedings do not have the same *objet* as the civil claim in the Italian proceedings. It contends that the only claim made in the Italian proceedings is for monetary damages, while in the English action claims are also made of a declaration of entitlement to rescind the April 2011 Agreements, other declaratory relief, an account of profits and tracing remedies.

59. The Defendants contend that the two proceedings have the same *objet*. They argue that it is sufficient for this purpose if the end in view in each is establishing the liability of RDS (and Eni SpA) in respect of the alleged misconduct. As to the specific points made by the FRN, they contend that it is only the claims made against Eni SpA and RDS, and in particular against the latter as the 'anchor' Defendant, which are relevant. Tracing remedies are sought in the present proceedings only against Malabu and EVP and are accordingly irrelevant for these purposes. As to the claim for a declaration of entitlement to rescind, they say that there is no serious issue in relation to this, but in any event rescission itself could not be claimed against RDS (or Eni SpA) because they were not parties to the April 2011 Agreements. As to the account of profits: no profits have been made as OPL 245 is a prospecting licence and no oil mining lease has yet been granted; and in any event profits to 'Eni-Shell' are specified as a parameter for assessing damages in the Italian claim.

60. The issue to be addressed here is, as it was summarised by Lord Clarke in point (iv) in The 'Alexandros T', whether the two proceedings have the 'same end in view'. That concept 'cannot be restricted to the claims being formally identical … and is to be interpreted broadly' (Aertssen, paragraph [45]). Further, when considering whether the existence in one action of a particular claim which is not in the other means that the *objet* of the proceedings is different, it is necessary to consider, as Rix J put it in Glencore (cited by Lord Clarke in point (vii) in The 'Alexandros T'), whether that claim raises 'sufficiently different issues of sufficient importance in the overall litigation for it to be concluded that the *objet* differs'.

61. In seeking to answer whether there is the same *objet*, the focus must, as it seems to me, be on the claims against RDS here and in the Italian civil claim. I consider that those two claims do have the same 'end in view', interpreting that concept broadly. That 'end in view' is to obtain redress for RDS's alleged responsibility for bribery and corruption in relation to OPL 245. Further, it is apparent that a key part of the redress claimed in the English proceedings is monetary compensation, which is the (only) relief claimed in the Italian proceedings. On that basis I consider that the two sets of proceedings do have the same *objet*.

62. In my judgment the fact that there are, in the English proceedings, tracing claims against Malabu and EVP is not of relevance, as there is no tracing claim against RDS. As to the claim for an account of profits, that is a claim for a personal financial remedy as a result of the alleged bribery, and personal financial remedies for such bribery are the

objet of the Italian proceedings. Furthermore, the Defendants are correct to say that in the Italian civil claim it is pleaded (at paragraph 3.5.1 of the Declaration) that 'a parameter for determining the damage can be provided by the profit the criminal negotiation has in fact produced to Eni-Shell'. In those circumstances I do not consider that it can be said that the claim for an account of profits in the English action raises 'sufficiently different issues of sufficient importance' that it can be said that it has a different *objet*.

63. The point particularly relied upon by Mr Masefield QC for the FRN was that there is, in the English proceedings, a claim for a declaration of an entitlement to rescind the April 2011 Agreements. I will assume for present purposes that there is an argument which has a real prospect of success that the FRN can obtain a such a declaration, including against RDS. Nevertheless it appears to me impossible to say that the obtaining of such a declaration is the end in view of the English proceedings against RDS. RDS was not a party to the April 2011 Agreements. There is and can be no claim for rescission against RDS. Furthermore, a declaration of an entitlement to rescind against RDS would not, of itself, avail the FRN without, at least, a declaration against the parties to the April 2011 Agreements. In those circumstances it seems to me that it would be artificial to say that the end in view of the English proceedings against RDS was the obtaining of such a declaration, or that the claim to obtain such a declaration meant that, overall, the 'end in view' (broadly interpreted) of the English proceedings against RDS was different from that in the Italian civil claim.

64. Further, if Article 29 were not recognised as applicable in this case, there would be the possibility of the type of inconsistent decisions which Article 29 is aimed at avoiding. Thus, in the Italian proceedings the FRN's damages are premised on OPL 245 having been validly awarded to RDS and Eni SpA's subsidiaries, and the claim includes the difference between the amount paid by the consortium and the amount which the FRN would have obtained in an open market auction. If the English proceedings were regarded as involving a significantly different claim, namely one relating to rescission, and could go ahead, that would give rise to the possibility of a judgment in one awarding damages on the basis of the validity of the April 2011 Agreements and the other finding that those Agreements were capable of rescission. That would appear to me to be a situation of where there is effectively a 'mirror image' of the case in one jurisdiction in the other, with the unusual feature that both are part of the case of the same party. The avoidance of two sets of proceedings involving 'mirror images' of issues is part of the object of Article 29: see Glencore, cited by Lord Clarke in The 'Alexandros T' at point (vii).

65. Mr Masefield QC submitted that the treatment of *objet* in Haji-Ioannou indicated that the inclusion of the claim in relation to rescission in the English proceedings here should be regarded as meaning that the *objets* of the two actions differed. I was not persuaded by that submission. That was a case in which the tracing claim and a claim to a beneficial interest in acquired assets was made against Mr Frangos in England. That was considered to be a 'large part' of the English proceedings against him (351 RHC). That case did not involve the issues which arise here where the claim which is said to mean that the English proceedings have a different *objet* is a claim for a declaration in relation to a contract to which the relevant Defendant was not a party, but where there is a very substantial financial claim made in both jurisdictions. There was also no issue relating to the risk of potentially irreconcilable decisions as a result of divergent

positions of the claimant as to whether agreements were to be treated as valid or could be rescinded. In any event, the treatment of all the issues relating to Article 21 of the Brussels Convention was, as I have already said, *obiter*. The view expressed by the Court as to there being a different object in that case was clearly fact-specific. My task in this case is to determine whether the English proceedings have a different end in view, and my judgment is that they do not.

66. I should add the following. If I am wrong in saying that the additional claims in the English proceedings do not have the effect of meaning that the *objet* of those proceedings is different from that of the Italian proceedings, the effect would, in my judgment, be the need to recognise that there is more than one *objet* of the English proceedings. I would regard it as quite unrealistic to describe the claims for financial compensation against RDS (and Eni SpA) in the English proceedings as not being a real and significant 'end in view' or *objet* of those proceedings. The question then arises as to whether, if there can be said to be more than one *objet* of one of the sets of proceedings, Article 29 is entirely inapplicable, or whether Article 29 applies in so far and to the extent that there is an overlap in 'causes of action', that is to say, an overlap of the same *cause* and *objet* in the two sets of proceedings.

67. The FRN submitted that the answer to this question was 'No'. Its case was that each action had to be looked at holistically, and that, unless it could not be said that the single *objet* of the second set of proceedings was the same as that of the first, then Article 29 was inapplicable. Once again reliance was placed on Haji-Ioannou. By contrast, the Defendants, as an alternative to their case that the single *objet* of the English proceedings was the same as that of the Italian civil claim, submitted that the court had to adopt a 'claim by claim approach' and that Article 29 applied insofar as there was a claim with the same *cause* and *objet* in each set of proceedings. In support of that the Defendants cited a passage in the opinion of the Advocate General in The Tatry: [1999] QB 515 at 524 (paragraph 18). They also cited a decision of the Lord Ordinary, Lord Reed, in the Outer House of the Court of Session in Jacobs & Turner Ltd v Celsius Sarl [2007] CSOH 76, (2007) SLT 722. In paragraph [46] of his judgment, having conducted a review of authorities of the CJEU, Lord Reed said this:

> 'Accordingly, it appears that art 21 can apply to proceedings in part, and that art 22 may be applicable to a part of proceedings to which art 21 is not applicable. Although *The Tatry* was concerned with proceedings which involved different parties, I would infer that the same principle – that art 21 can apply to proceedings in part – can also apply where proceedings involve different claims. If some of the claims brought in the different proceedings were based on the same cause of action and had the same subject matter, but other claims did not, then art 21 would be engaged in respect of the former, but not in respect of the latter. In those circumstances, it appears to me that the court second seised would have to decline jurisdiction under art 21 in respect of the former claims only, although it would have to consider whether art 22 should also lead it to dismiss the latter claims (on the basis that there would be consolidation in the first court), or to assist its proceedings in order to await the outcome of the proceedings in the court first seised. I note that a similar view was expressed in *The Tatry* by Advocate General Tesauro, at para 18 of his opinion.'

68. In my judgment the Defendants' submissions on this point are to be preferred. In particular I respectfully agree with the analysis of Lord Reed in Jacobs and Turner Ltd.

It is consistent with the logic of The Tatry and the objective of avoiding irreconcilable decisions. Difficulties which might otherwise arise from the fragmentation of proceedings can usually be addressed by reference to Article 30 or, in this jurisdiction, by a case management stay.

69. I do not regard Haji-Ioannou as persuasive authority to the contrary. It does not appear that there was a detailed consideration of this point. What was there said, *obiter*, is explicable on the basis that the court considered that there was in reality only one *objet* of the English proceedings, which was different from that of the Greek proceedings. The court was not seeking to express a rule that there could only be one *objet* in a set of proceedings.

70. Accordingly if, contrary to my conclusion as stated above, the presence in the English proceedings of claims other than for financial compensation means that these proceedings cannot be regarded as involving only the same 'cause of action'[2] as those in Italy, I would have decided that there was more than one 'cause of action' in the English proceedings; and that the claims for financial redress against RDS (and Eni SpA), in which I include paragraphs (2), (3) and (4) of the Prayer for Relief in the Particulars of Claim, are the same 'cause of action' as raised in the Italian proceedings, and are subject to Article 29.

71. This situation does not, however, arise on my primary conclusion in relation to Article 29, which, as set out above, is that these proceedings against RDS (and Eni SpA) do involve the same cause of action and are between the same parties as in the Italian civil claim. There is no doubt that the jurisdiction of the Italian court is established. Accordingly, this court must decline jurisdiction in favour of the Italian court, under Article 29.3 of the Regulation. Given that RDS is the 'anchor' Defendant that means that the court will not have jurisdiction in respect of the other Defendants.

72. The operation of Article 29, where it applies, is automatic. It is not affected by arguments as to whether justice in the particular case is best served by its application. There was, however, some argument before me as to whether the court's declining jurisdiction would produce an injustice. I do not consider that it would. The primary reason which the FRN has given for wishing to have proceedings here is to protect itself against limitation arguments should the PPM end the Italian prosecution. I have been told that there is no indication that the PPM will take that course. In any event, the FRN made what was presumably an informed choice to join and make a claim in the Italian proceedings. There are clearly some advantages to it in doing so, in that much of the burden of the case will fall upon the Prosecutor. In those circumstances, however, it does not appear to me that it can be said to be unjust that the FRN should not be able to pursue proceedings in England. Had it wished to proceed here, it could have not joined the Italian proceedings or dropped those claims before issuing proceedings here.

73. I also do not consider that there is any injustice by reason of the fact that in the Italian proceedings there will, for certain purposes, be the application of a higher (criminal) standard of proof than the balance of probabilities which will be applied in proceedings here. Clearly, here too, this is a matter which the FRN must have considered before joining the Italian proceedings. But in any event, the evidence before me indicates that, in the Italian proceedings, in the event of an acquittal of the individual defendants by

[2] In the sense in which it is used in the English text of Article 29.

reference to the criminal standard of proof, and even if the PPM does not appeal, the *parte civile* has a right of appeal in respect of the dismissal of its civil claim by the Criminal Court; and can invite the Appeal Court to determine for the purposes of its civil claim (i) that the defendant did in fact undertake the relevant conduct and (ii) that the defendant or the party which is *responsabile civile* is civilly liable and should pay damages; and that the standard of proof of those matters is the civil standard.

The Applications under Article 30 or for a Case Management Stay

74. Given my conclusions as to Article 29, the position under Article 30 and the question of whether there should be a stay of these proceedings on case management grounds do not arise for decision. Nevertheless, as there was argument in relation to some aspects of these matters, I consider it appropriate briefly to consider them.

75. As I have already said, the FRN accepted that there should be a 'short' stay of the proceedings, until the handing down of the written first instance judgment in the main trial in the Italian proceedings. Its position is that 'it does not matter much whether this is imposed via Article 30 or the Court's inherent case management powers.'[3] It contends, however, that if and to the extent that it matters, the stay should be imposed pursuant to the Court's case management powers.

76. In my judgment it would quite clearly be appropriate, if jurisdiction is not declined pursuant to the operation of Article 29, for there to be a stay of the present proceedings. The facts, issues and parties in these proceedings overlap or are closely connected with those in the Italian civil proceedings, and there is undoubtedly a risk of inconsistent decisions if the two sets of proceedings proceed in parallel.

77. As the FRN submits, it may not therefore greatly matter as to whether that stay is pursuant to the Court's case management powers or under Article 30. I would impose a stay under either or both. I say this on the following basis:

(1) I consider that Article 30 is in principle potentially applicable. Though it was not suggested that the present proceedings could be consolidated with the Italian proceedings, in my judgment this is not of itself a complete bar to the application of Article 30.

(2) In this regard, there was some debate as to the status of the decision of the Court of Appeal in JSC Commercial Bank Privatbank v Kolomoisky [2019] EWCA Civ 1708, [2020] 2 WLR 993 in relation to the circumstances in which Article 30 is potentially applicable, in light of the subsequent decision of the Court of Appeal in Euroeco Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports [2019] EWCA Civ 1932, [2019] 4 WLR 156. In the Kolomoisky case, it was decided that the word 'expedient' in the phrase 'it is expedient to hear and determine them together' which appears in Article 28.3 of the Lugano Convention (as it does in Article 30.3 of the Regulation), is more akin to 'desirable' that the actions 'should' be heard together, than to 'practicable or possible' that the actions 'can' be heard together: paras. [182]-[192]. In the Euroeco Fuels case, having referred to the Kolomoisky case, the Court of Appeal nevertheless appears to have proceeded on the basis that the court had no discretion to order a stay under Article 30 when there was no real

[33] FRN Skeleton para. 11(4).

possibility of the two claims being heard together in the same foreign court: paras. [52]-[53], [61].

(3) The Court of Appeal in Euroeco Fuels did not suggest that it disagreed with the reasoning on this point in Kolomoisky or that it was not bound by it. I consider that it was not deciding that Kolomoisky was wrong. In any event, I consider that I am bound by the carefully-reasoned decision on this point in Kolomoisky, and would in any event, if I were at liberty and had to decide between the two, have followed it, as I am in respectful agreement with it.

(4) While I recognise that the impossibility of these proceedings being consolidated with the Italian proceedings is a factor militating against a stay under Article 30, I consider that in the present case it is outweighed by other considerations, and in particular by: (i) the degree of relatedness of the two proceedings; (ii) the reality of the risk of inconsistent decisions; (iii) the fact that the Italian proceedings are now considerably more advanced than the English proceedings; and (iv), which is connected with (iii), the fact that the Italian Courts and Italian legal teams are now immersed in the facts of the matter.

(5) In any event, even if not under Article 30, there should be a stay under the Court's case management powers, and in particular pursuant to s. 49(3) Senior Courts Act 1981 and CPR 3.1(2)(f). Such a stay would not, in my judgment, be inconsistent with the Regulation, and is required to further the Overriding Objective in the sense of saving expense, ensuring that cases are dealt with expeditiously and fairly, and allotting to any particular case an appropriate share of the Court's resources. Given that the Italian proceedings are well advanced, and that after the determination of the Italian proceedings English proceedings may well either be unnecessary or curtailed in scope, there appear good grounds to consider that a stay of the English proceedings will result in savings in costs and time, including judicial time.

78. There was, however, also an issue between the parties as to the terms on which any stay should be imposed, and specifically in relation to the duration of any such stay. As I have said, the FRN contended that the stay should be until the written judgment at first instance in the main trial in Italy. The Defendants, by contrast, contended that it should be until the final determination of the civil claims in the Italian proceedings, including any appeals.

79. On analysis it appeared to me that there was not a great deal between the parties in relation to this. If I were to stay these proceedings until the final determination of the civil claims in Italy, including appeals, I would nevertheless consider it necessary that the parties should have liberty to apply to lift the stay in the event of a material change of circumstances. If I were to stay the proceedings pending the first instance judgment, on the other hand, that would not prevent the parties from applying to continue the stay. In my view the better course would be to stay the proceedings pending the written judgment at first instance in the Italian proceedings. As I have said, that would not prevent the parties from applying for, or the court granting, a continuation of the stay. It would, however, avoid the arguments which there might well be as to whether there had been any material change of circumstances by reason of the terms of Italian first instance judgment if the stay were to be expressed to last until the resolution of all appeals.

80. For completeness, I should also state that, had I considered that the English court had to decline jurisdiction under Article 29 in respect of some of the claims made and not others (ie the point considered in paragraphs [67]-[70] above), I would have imposed a stay under Article 30 or on case management grounds on the remainder of the action, again initially until the written judgment at first instance in the Italian proceedings.

The Claim for a Declaration as to a Right to Rescind

81. The Shell and Eni Defendants contend that the FRN's claim for a declaration of an entitlement to rescind the April 2011 Agreements has no real prospect of success. They argued that that was relevant in two ways. First, that it was relevant if the rescission claim were a point of difference between the two proceedings which is of significance to the analysis in relation to Article 29 or 30 of the Regulation. Secondly, that the most relevant Defendants in respect of the rescission claim are NAE, SNUD, SNEPCO and Malabu, each of which is a non-EU domiciled party, joined under CPR PD6B para. 3.1(3). For there to be permission to serve out, the FRN would have to show that it had a real prospect of success, and the Shell and Eni Defendants contend that it cannot do so in relation to this claim.

82. Given the conclusion which I have reached in relation to Article 29, even making the assumption that the claim in respect of a declaration as to an entitlement to rescind has a real prospect of success, it is unnecessary for me to deal with the arguments which were made on this point in any detail.

83. It suffices to say the following. The grounds on which the Shell and Eni Defendants were contending that the claim for a declaration of entitlement to rescind stood no real prospect of success were, at the outset of the hearing, five-fold, including that rescission was barred by affirmation and lapse of time. At the outset of his submissions, Mr Handyside QC indicated that those two points would not be pursued at this hearing, and that his submissions would be confined to arguing that the claim to a declaration of an entitlement to rescind had no real prospect of success for three reasons, namely: (i) that such a declaration, as opposed to an order for rescission, was an inappropriate form of relief *per se*; (ii) that there was no prospect of the court's making such an order when NNPC was not a party to the action; and (iii) there was no prospect of the court's making such an order because *restitutio in integrum* was not possible.

84. Having heard the argument which was addressed on these issues, I was clearly of the view that, while the Shell and Eni Defendants have significant arguments on each of the points pursued, it cannot be said that the relevant claim has no real prospect of success. In light of that conclusion I do not consider it necessary or appropriate to say more on this point.

Was there a Failure to Make Proper Disclosure?

85. The Shell and Eni Defendants also submit that the order made by Cockerill J on 11 March 2019 granting the FRN permission to serve these proceedings out of the jurisdiction on SEPA, SNEPCO, SPDC, SNUD, and on the Ninth to Eleventh Defendants should be set aside for non-disclosure in the making of the application for permission.

86. Again, in light of my decision in relation to Article 29, this point does not call for decision. It was, however, the subject of very extensive argument at the hearing, and I will briefly set out my conclusions in relation to it.

87. The submission of the Shell and Eni Defendants was as follows:

(1) That the FRN had been under an obligation to make a full and fair disclosure of all material facts. Material facts are those which it is material for the judge to know in dealing with the application made. Materiality is to be decided by the court and not by the applicant or its advisers. The applicant must make proper enquiries and the duty therefore extends to those matters which the applicant would have known if it had made such enquiries. If material non-disclosure is established the Court should be astute to deprive the applicant of any advantage which it derived.

(2) In the present case, the presentation to Cockerill J was seriously misleading, in a respect which was material. Specifically, Mr Cary's First Witness Statement ('Cary I') was misleading, or at least failed to make full and fair disclosure, in relation to the issue of limitation. Thus, Cary I had set out the position in relation to limitation in English law, and observed that the same position would pertain under Nigerian law. The witness statement had further identified an argument that time would not start to run for so long as the claimant was under the control of the wrongdoers. It had then set out four matters of fact which it was right to acknowledge, including that in May 2012, the EFCC had begun an investigation into allegations of bribery and corruption arising out of the OPL 245 transaction; that it had been reported in the Nigerian press in May 2012 that the investigation had 'suffered a setback since the presidency got wind of [it] … the report is gathering dust on the president's desk'; and that in June 2012 the House of Representatives in Nigeria had begun an investigation into OPL 245, holding hearings in December 2013, and reporting in early 2014. Cary I had then argued that the FRN had not had knowledge of the 'Scheme' (defined as 'a fraudulent and corrupt scheme … that involved the payment of bribes via at least the 12th to 14th defendants … to corrupt FRN officials and former officials') until October 2013. Specifically, paragraph 165 of Cary I had said:

> 'Furthermore, it has only been in the course of the Italian Criminal investigation that the evidence of the Scheme has started to emerge … As I have already noted, the Italian criminal investigation had only commenced in 2013 – and the present English proceedings were issued on 12 December 2018, and so on any view within the relevant 6-year limitation period … In those circumstances, I believe that the FRN has (to put it at its lowest) reasonable prospects of showing that the claims are not time-barred …'

(3) A similar approach had been adopted in the skeleton argument provided by the FRN for the hearing before Cockerill J and in the oral submissions of leading counsel for the FRN on that occasion. As the Shell and Eni Defendants put it:

> '… the thrust of the FRN's case on the facts was that evidence of the "Scheme" – and, in particular, evidence of the (alleged) payment of bribes by Malabu to Nigerian public officials – only started to emerge in the course of the Italian criminal investigation, which commenced in October 2013.'

(4) That presentation was misleading for two particular reasons: (1) that the statement in paragraph 165 of Cary I that it was only during the course of the Italian criminal investigation that evidence of the Scheme began to emerge was a misrepresentation; and (2) that the FRN failed to disclose the existence or contents of reports which the EFCC had prepared in March and September 2012, or the interviews which the EFCC had conducted during 2012. What the Defendants argued was that the EFCC had already, by March 2012, found that of the consideration paid by Shell and Eni some US$400 million had been paid into Malabu's account at First Bank of Nigeria and US$400 million into its account with Keystone Bank. Of the sum paid into First Bank of Nigeria, significant sums had been paid to, amongst others, A Group Construction Group Ltd ('A Group') and Novel Property and Development Ltd ('Novel'); and of the sums paid into Keystone Bank the majority had been transferred to Rocky Top Resources Ltd ('Rocky Top'). Mr Abubakar Aliyu, whose reputation for alleged involvement in the corruption of officials was a matter of public comment in 2012, was an owner of A Group, Novel and Rocky Top. Furthermore, during 2012 the EFCC conducted interviews with various individuals, which had indicated that Rocky Top may have made transfers to Bayo Ojo, a former Attorney General, and to Assunah Bureau de Change from which sums were withdrawn in cash. The Defendants say that these matters are the essential building blocks of the FRN's present case as to the occurrence of bribery, but none was disclosed to the court on the application for permission to serve out. Nor was the court told that the existence of the EFCC's investigation and findings in 2012 had been widely reported in the Nigerian press during 2012.

88. To this case, the FRN responded, in summary, as follows:

(1) There was no misrepresentation and no failure to make full and fair disclosure.

(2) The issue of limitation was very clearly put before the Court at the *ex parte* stage and the application left no doubt that limitation would be an issue at the trial. Cary I explained that the Defendants were likely to raise a limitation defence, but said that there were serious issues to be tried in this regard, both because (i) the FRN would contend that time could not have begun to run while the wrongdoers were in control, which it would contend was until May 2015 when President Jonathan lost office, and would rely on the decision of the Privy Council in Julien v Evolving Technologies [2018] UKPC 2, [2018] BCC 376 (the 'wrongdoers in control' point); and (ii) because there were serious issues to be tried as to whether the FRN had sufficient credible material before December 2012 to be able to plead that the Shell and Eni Defendants were involved in the fraudulent and corrupt Scheme which is now alleged to have existed (the 'statement of claim' point).

(3) The Defendants themselves now accept that the 'wrongdoers in control' point gives rise to an issue which can only be resolved at a trial.

(4) In the circumstances, the Court could see, correctly, that there would be serious issues to be tried in relation to limitation, and what it is now said should have been disclosed does not materially impact the jurisdictional analysis which the Court had to conduct in considering whether to give permission to serve out.

(5) In any event there was no misrepresentation or failure to give full and fair disclosure. The Court was told that there had been an investigation begun in 2012

> into bribery and corruption. That investigation had been prompted by a different alleged fraud, namely an allegation that Mohammed Sani Abacha had originally been a part owner of Malabu but had been wrongfully side-lined by Mr Etete. The EFCC investigations in 2012 had not produced credible evidence which would have allowed the FRN to plead, even had the alleged wrongdoers not been in control, that there had been bribes paid to President Jonathan, Mr Adoke, Ms Alison-Madueke or General Gusau. What had made the difference in this regard was evidence of funds frozen in Swiss bank accounts of Mr Obi and Mr Di Nardo, text messages obtained from Mr Obi, internal Shell emails, Italian and Dutch wiretap evidence, statements from key participants and evidence of kickbacks. These had been obtained after the commencement of the Italian criminal investigation.

89. As has been often and correctly said, the duty of full and frank disclosure on an *ex parte* application is of the utmost importance. The reasons for this were summarised by Popplewell J in Fundo Soberano de Angola v Dos Santos [2018] EWHC 2199 (Comm) at para. [51] as follows:

> "It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights. It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process."

90. The ultimate touchstone is whether the presentation is fair in all material respects, as Popplewell J further said, by reference to a number of authorities, in paragraph [52] of the Fundo Soberano case.

91. In the context of applications for permission to serve out, further guidance as to the correct approach is provided by what was said by Kerr J in BP Exploration Co (Libya) Ltd v Hunt (No. 1) [1976] 1 WLR 788, [1976] 3 All ER 879 at 894, as follows:

> '… the court should not consider the supporting affidavit as though it were marking an examination paper, deciding one way or the other merely on the basis of the extent to which the affidavit could have been improved. The primary question should be whether in all the circumstances the effect of the affidavit is such as to mislead the court in any material respect concerning its jurisdiction and the discretion under the rule.'

92. That guidance was followed and amplified by Lawrence Collins J in Konamaneni v Rolls Royce Industrial Power (India) Ltd [2002] 1 WLR 1269 at [180-181], where he said:

> '[180] On an application without notice the duty of the applicant is to make a full and fair disclosure of all the material facts, ie those which it is material (in the

> objective sense) 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; the duty is a strict one and includes not merely material facts known to the applicant but also additional facts which he would have known if he had made proper enquiries: Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350, 1356-1357. But an applicant does not have a duty to disclose points against him which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if it were present.
>
> [181] These principles have long been applied to applications for permission to serve out of the jurisdiction: see e.g. The Hagen [1908] P 189, 201. In that context it has been held that it would not be reasonable to expect an applicant for permission to serve out to anticipate all the arguments or points which might be raised against his case: see Electric Furnace Co v Selas Corpn of America [1987] RPC 23, 29. A failure to refer to arguments on the merits which the defendant might raise at trial should not generally be characterised as a "failure to make full and fair disclosure", unless they are of such weight that their omission may mislead the court in exercising its jurisdiction under the rule and its discretion whether or not to grant permission: BP Exploration Co (Libya) Ltd v Hunt [1976] 1 WLR 788, 788-789, approved in the Electric Furnace case [1987] RPC 23, 29.'

93. In the present case, had it been necessary for me to decide the issue, I would have concluded that there had not been shown to have been a failure to make full and fair disclosure of material facts. In particular it does not appear to me that there was a failure to disclose or misrepresentation of matters which might have misled the court in exercising its jurisdiction under the rule or its discretion as to whether or not to grant permission to serve out. Taking the content of Cary I with what was said in written and oral argument before Cockerill J, it is apparent that the likely limitation argument was flagged to the Court, as was also the fact that the EFCC had commenced investigations as early as 2012. The Court was also told that the FRN had two answers to that limitation defence, both of which raised issues which needed to go to trial, namely the 'wrongdoers in control' point, and the need to satisfy the 'statement of claim' test. It was also apparent that the FRN would be contending that it could not have satisfied the 'statement of claim' test without evidence which became apparent after the Italian investigation had commenced. That, it seems to me, was at least arguably the case. I think it is fair to say, using Kerr J's words, that Mr Cary's witness statement would have been improved by the addition of more information about the EFCC reports during the course of 2012. But it does not seem to me that the omissions were of sufficient weight to have created a real risk of the Court's being materially misled.

94. On that basis, had it been necessary to decide the point, I would have refused the application to set aside service out of the jurisdiction on the relevant Defendants on the basis of a failure to make proper disclosure at the *ex parte* stage.

Conclusion

95. For the reasons I have set out, I consider that the court must decline jurisdiction over the action against RDS pursuant to Article 29 of the Regulation. It will follow that the court has no jurisdiction over the other Defendants.