Neutral Citation Number: [2017] EWCA Civ 1120

Case No: A3/2015/0188 and 0184

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HON MRS JUSTICE CARR
[2014] EWHC 3233 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2017

Before :

LADY JUSTICE GLOSTER
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE PATTEN
and
LORD JUSTICE BEATSON

- - - - - - - - - - - - - - - - - - - -

Between :

SANA HASSIB SABBAGH	**Claimant/ Appellant**
- and -	
(1) WAEL SAID KHOURY **(2) SAID TOUFIC KHOURY** **(3) SAMER SAID KHOURY** **(4) TOUFIC SAID KHOURY** **(5) SAMIR HASSIB SABBAGH** **(6) SUHEIL HASSIB SABBAGH** **(7) WAHBE ABDALLAH TAMARI** **(8) CONSOLIDATED CONTRACTORS GROUP SAL (HOLDING COMPANY)** **(9) CONSOLIDATED CONTRACTORS INTERNATIONAL COMPANY (SAL) (OFFSHORE)** **(10) HASSIB HOLDING SAL**	**Defendants/ Respondents**

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Mr Laurence Rabinowitz QC, Mr John Wardell QC, Mr Anthony Peto QC, Mr Simon Colton, Mr James Walmsley and Mr Peter Head (instructed by Mishcon de Reya LLP) for the Claimant
Mr Andrew Hunter QC and Mr Andrew Scott (instructed by Jones Day) for the 1st Defendant
Mr Philip Edey QC and Mr Andrew Fulton (instructed by Baker and McKenzie LLP) appeared for the 2nd, 3rd, 4th, 8th and 9th Defendants

Mr Alexander Layton QC and Ms Jessica Hughes (instructed by Olswang LLP) appeared for the 5th, 6th, 7th and 10th Defendants

Hearing dates : 6-10 February 2017

- -

Approved Judgment

Lady Justice Gloster, Lord Justice Patten and Lord Justice Beatson:

1. Subject to one point, this is the judgment of the Court to which we have all contributed. As will be seen below, we disagree about the jurisdictional test under Article 6 (1) of the Brussels Regulation, which, in the event, given our agreed determination of the other issues, does not affect the outcome of the appeal. While conscious of the disadvantages of adding to the obiter statements on the topic, as we heard full argument on it, we set out our conclusions. Accordingly, the majority views of Patten and Beatson LJJ on this point are set out at paragraphs 32 to 72 below, and the minority view of Gloster LJ is set out at paragraphs 166 to 220 below.

Introduction

2. These appeals raise a number of jurisdictional and other issues which will determine whether these proceedings are properly justiciable in England. The claimant, Ms Sana Hassib Sabbagh ("Sana" or "the claimant"), is the only daughter of the late Mr Hassib Sabbagh ("Hassib") who died intestate on 12 January 2010. It is common ground that along with her two younger brothers, Mr Samir Hassib Sabbagh ("Samir") and Mr Suheil Hassib Sabbagh ("Suheil"), she is one of her father's heirs under Lebanese law and is entitled to one-third of his estate at the time of his death. On 21 April 2010 the Lebanese Court made a declaration to that effect. Samir and Suheil are the fifth and sixth defendants.

3. Along with the late Mr Said Toufic Khoury ("Said"), Hassib, a Palestinian, founded what became the Consolidated Contractors Company group of companies ("the CCC group") in 1950. The CCC group was subsequently re-established in Lebanon. The CCC group is referred to in its literature and in a number of documents relevant to the appeals as "CCC" but it has no corporate identity in its own right. Since its incorporation in 1984 the holding and ultimate parent company in the CCC group has been Consolidated Contractors Group SAL ("CCG"), the eighth defendant. Another company in the CCC group, Consolidated Contractors International Company (SAL) Offshore ("CCIC"), is the ninth defendant.

4. The CCC group is the largest group of engineering and construction companies in the Middle East and the evidence is that it is valued in the sum of at least US$5 billion. All of the companies in the CCC group were incorporated in Lebanon.

5. The first defendant, Mr Wael Said Khoury ("Wael"), is the non-executive chairman of CCG. His two brothers, Mr Samer Said Khoury ("Samer") and Mr Toufic Said Khoury ("Toufic"), the third and fourth defendants, are directors of CCG together with all the other individual defendants except Samir. Wael, Samer and Toufic are the three sons of Said and are cousins of Sana. The seventh defendant, Mr Wahbe Abdallah Tamari ("Wahbe"), is another cousin.

6. The tenth defendant, Hassib Holding SAL ("HH"), is a Lebanese company owned and controlled by Samir and Suheil of which they, together with Samer and Wahbe, are the directors.

7. On 29 June 2002 Hassib suffered a severe stroke which incapacitated him for the rest of his life and, it is alleged, rendered him unable to make any business decisions or to manage his own affairs. In proceedings issued in the High Court on 9 July 2013 Sana

alleged that the principal defendants conspired from a date shortly after Hassib's stroke to misappropriate assets belonging to Hassib and that since his death in 2010 they have also conspired to deprive her of her entitlement to the shares in CCG which she claims belonged to Hassib at the date of his death. These two claims have been labelled the asset misappropriation claim and the share deprivation claim and, for convenience, we shall adopt the same terminology.

8. The asset misappropriation claim relates for the most part to dividends from Hassib's shares in CCG which were used either to make investments in other companies and property or to meet expenses such as the running costs of an aircraft. It is not in dispute that before his stroke Hassib used and authorised CCIC to pay family expenses and charitable donations out of his income from dividends and other investments. But the allegation is that, following Hassib's stroke, accumulated dividends and other income were used knowingly by the defendants (other than Wahbe and HH) to make improper or unauthorised investments in their own names and that, when sold, the proceeds of sale from these investments were not accounted for or applied for the benefit of Hassib. To the extent that they would otherwise have formed part of Hassib's estate on death, Sana seeks damages for conspiracy based on the value of the misappropriated assets.

9. The share deprivation claim depends upon Hassib having retained ownership of shares in CCG at the date of his death. Sana relies on a confirmation by the Commercial Registry in Beirut ("the Commercial Registry") dated 16 January 2010 that its register contained an entry which records that, as at 10 May 2009, Hassib continued to hold 399,915 shares in CCG. She alleges that following her father's death, the defendants conspired to deprive her of her entitlement under Lebanese law to a third of this shareholding by unlawfully procuring the transfer of the shares to HH.

10. The defendants accept that HH is now the registered holder of 399,915 shares in CCG following general meetings of the members of CCG held in July 2010 which confirmed HH as the holder of the shares. But their case is that there was no unlawful conspiracy and that the shares now held by HH are derived from transfers of shares in CCG which Hassib made prior to his death (and prior to his stroke) in favour of Sana, Samir and Suheil. We will come to the detail of this later in the judgment but it is now common ground that by three share transfer agreements made in 1993 ("the 1993 Agreements") Hassib agreed to transfer to his children 199,960 of his then holding of 199,970 shares in CCG subject to the retention by him of a usufruct in the shares for his life. Sana became entitled to receive 20,000 shares (for a stated consideration of US$1,333,333) and Samir and Suheil each became entitled to receive 89,980 shares at a price of US$6m. In September 1993 Hassib agreed to transfer 2 more of his remaining shares in CCG to each of his sons leaving him with only 6 shares.

11. Further agreements were entered into in 1995 between Hassib and his children and between Sana and her two brothers, the cumulative result of which (after taking into account increases in the share capital of CCG) was that Sana became entitled to 100,000 shares and Samir and Suheil to 199,960 and 199,961 shares respectively. Then in 1998 Sana transferred her entire holding of 100,000 shares back to Hassib who in turn transferred them to CCIC. His remaining 3 shares in CCG were transferred to Suheil. If this sequence of agreements was effective to pass ownership of the shares and any necessary corporate formalities were complied with, the net

result of the agreements and transfers executed between 1993 and 1998 was that Hassib had ceased to own any shares in CCG but had retained his usufruct rights over 399,915 shares. By an agreement dated 16 July 2006 (but whose date is in issue) Samir and Suheil transferred 399,915 shares to HH subject to Hassib's usufruct. CCIC retained the shares it had acquired in April 1998.

12. Sana's original position was that the family agreements made between 1993 and 1998 were artificial or sham transactions with no legal effect. But she no longer disputes the existence, validity or effectiveness of the agreements as such. Her case now is that, as a matter of Lebanese law, the agreements fall to be treated as gifts rather than agreements to sell which would continue to bind Hassib (and his heirs) even after his death. As gifts they would lapse on death unless completed as transfers before then. She says that the agreements were ineffective to divest Hassib of ownership of the shares which were later transferred to HH because the formalities of board approval, registration and reissuing of the shares required under Lebanese law and the articles of association in relation to the earlier agreements were not complied with. It is not disputed that Sana received US$50m at the time she agreed in 1998 to give up her shareholding in CCG. But she disputes that the money (or at least all of it) was paid as consideration for her shares.

13. Of the various defendants to the claim only Wael is domiciled within the jurisdiction. He resides in London. The other individual defendants are or, in the case of Said, were before death all domiciled abroad: Said, Samer, Toufic, Samir and Suheil in Greece; and Wahbe in Switzerland. The corporate defendants are all incorporated in Lebanon. However, CCG and CCIC accepted service of the claim form in Greece (where each has an office) and the proceedings have proceeded on the basis that they are domiciled in Greece for jurisdictional purposes. HH, by contrast, is domiciled in Lebanon.

14. Wael is therefore the anchor defendant for the purpose of establishing jurisdiction against the other defendants. He is sued under Article 2(1) of Regulation 44/2001 ("the Brussels Regulation") on the basis of his domicile in England. The original Brussels Regulation is applicable because the claim pre-dates the recast Brussels Regulation (Regulation 1215/2012).

15. Jurisdiction is asserted against the other individual defendants, CCG and CCIC under Article 6(1) of the Brussels Regulation or in the case of Wahbe under Article 6(1) of the Lugano Convention, which is in the same terms. We will refer to these defendants (that is, all of the defendants except Wael and HH) as the "non-anchor defendants".

16. Article 6 of the Brussels Regulation provides:

> "A person domiciled in a Member State may also be sued:
>
> (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims 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.

> (2) as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case."

17. HH is the sole defendant in respect of whom jurisdiction is asserted under domestic private international law. On 22 January 2014 Flaux J permitted HH to be served out of the jurisdiction as a "necessary or proper party" to the proceedings against Wael in accordance with CPR 6.37 and PD6B para 3.1(3). CPR 6.37 provides:

> "(1) An application for permission under rule 6.36 must set out:
>
> (a) which ground in paragraph 3.1 of Practice Direction 6B is relied on;
>
> (b) that the claimant believes that the claim has a reasonable prospect of success;…
>
> (3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim."

18. So far as material, paragraph 3.1 of Practice Direction 6BPD states:

> "3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where ….
>
> (3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

19. It is apparent from the terms of paragraph 3.1 that the joinder of HH as a necessary or proper party to Sana's claim depends upon first establishing that there is a real issue which it is reasonable for the Court to try here against Wael. A real issue for these purposes means a claim which has a real as opposed to a fanciful prospect of success. There are also issues between the parties which we will come to in due course as to whether HH is a necessary or proper party to be joined under paragraph 3.1, even if a serious issue to be tried can be established against Wael. Sana no longer seeks an order against HH for the restitution of the shares. Her only subsisting claim against the company is one for damages for conspiracy. But it is common ground that the jurisdictional threshold under CPR 6.37 is not crossed unless a sufficiently arguable claim is made out against the anchor defendant as well as against HH, the defendant domiciled abroad.

20. The position is not, however, the same in relation to the non-anchor defendants sought to be joined under Article 6(1) of the Brussels Regulation and the Lugano Convention. They applied to the Commercial Court to set aside the service on them of the claim form on the ground that Sana could not establish a good arguable case against the anchor defendant or, alternatively, against them. Carr J decided that Sana had established a good arguable case in conspiracy for jurisdictional purposes against each of the defendants including Wael in relation to the asset misappropriation claim and there is no appeal from that part of her decision. But she held that no such case had been made out against Wael in relation to the share deprivation claim and she ordered it to be struck out. This is of course, in terms of value, the major part of Sana's claim. Part of the defendants' case on this issue was that Sana was in any event estopped by the 1995 and/or 1998 agreements, which she signed, from asserting any entitlement to such shares as Hassib may have owned in CCG at his death. But the judge said that she would not have accepted this alternative challenge to the share deprivation claim had she been of the view that the claim otherwise had a real prospect of success. Sana has been given permission to appeal against the judge's determination about the merits of the share deprivation claim and the defendants seek to challenge the judge's rejection of their alternative claim based on estoppel. But Sana has also been given permission to appeal in relation to a point which was not taken before Carr J. This is whether the Court's jurisdiction to try the share deprivation claim against the other defendants depends, as under CPR 6.37, on showing that the claim has a real prospect of success against the anchor defendant. This point becomes material if the judge was wrong to find that Hassib no longer had any interest in the CCG shares at his death but right to find that Wael did not have the knowledge necessary to make him liable as a co-conspirator.

21. Permission is not required for service of proceedings out of the jurisdiction in cases to which the Brussels Regulation and the Lugano Convention apply: see CPR 6.33. But, as indicated earlier, the general rule is that defendants should be sued in the courts of the member state where they are domiciled (see Article 2(1)). Article 6(1) creates an exception to this in the case of multiple defendants with different domiciles only where (as stated earlier) the claims 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": see Article 6(1).

22. Before Carr J a number of arguments were advanced by the defendants as to whether a risk of irreconcilable judgments from separate proceedings had been made out so as to support joinder of the defendants to the claim against Wael, but there was no challenge to the judge's view, based on what seems to have become established practice in the Commercial Court, that, as under CPR 6.37, it was still necessary to demonstrate the existence of a good arguable case against the anchor defendant as one of the factors which allows the court to take jurisdiction. The claimant now challenges this proposition. She relies on the decision of this Court in *Joint Stock Co "Aeroflot Russian Airlines" v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep. 242 ("*Aeroflot*") as establishing that in a case under Article 6(1) the Court is not required as part of the conditions for establishing jurisdiction to assess the merits or strength of the claims against the non-anchor defendants. The same logic should be applied, she says, to the position of the anchor defendant, a position she says is supported by a number of decisions of the CJEU.

23. The issues therefore to be decided in relation to Article 6(1) and the merits of the claim are:

    (1) whether the judge was wrong to consider the merits of the claim against the anchor defendant for the purpose of establishing jurisdiction against the non-anchor defendants under Article 6(1); ("issue 1");

    (2) if a merits test is applicable for jurisdictional purposes, whether the judge erred in concluding that Sana has no real prospect of success in relation to the share deprivation claim; in particular, was the judge wrong to conclude that there was no real prospect of establishing (i) that Hassib owned 399,915 shares in CCG at his death; and (ii) that there was intentional wrongdoing on the part of Wael; ("issue 2");

    (3) was the judge correct to conclude that, having signed the 1995 and/or 1998 agreements, Sana was not precluded by contractual estoppel or its equivalent under Lebanese law from asserting an entitlement to such shares (if any) in CCG as Hassib may have owned at his death; ("issue 3"); and

    (4) if the judge was right to strike out the share deprivation claim against Wael on the grounds she gave, is that a further reason why (independently of issue (1) above) the conditions of Article 6(1) were not satisfied in respect of that claim? ("issue 4").

24. The other jurisdictional issue affecting the non-anchor defendants is whether the subject matter of the claim is succession within the meaning of Article 1(2)(a) of the Brussels Regulation ("issue 5"). As the judge recognised, this question is logically anterior to the issues arising in relation to Article 6(1) and falls to be determined by reference to both the share deprivation claim and the asset misappropriation claim. If the claim is a matter of succession then it falls outside the Brussels Regulation and the Court's jurisdiction will depend on whether England is the appropriate forum for the determination of the claim. It is common ground that any issues of *forum conveniens* would have to be remitted to the Commercial Court.

25. Subject to one point, the remaining issues are all concerned with arbitration. Following the issue of the claim form, Samir, Suheil, CCG and HH initiated arbitration proceedings in Lebanon to which Sana has been made a respondent. There are arbitration clauses both in the 1993 Agreements and also in Article 45 of CCG's articles of association. In the Lebanese arbitration, the defendants have sought a determination as to their and Sana's entitlement to the shares in CCG and a determination of the balance of any monies owed from Hassib's shareholder's account in the company. Sana disputes the jurisdiction of the arbitrators and has refused to participate in the arbitration. But the defendants (in the alternative to their challenges to the Court's jurisdiction under Article 6(1)) also applied to Carr J for a stay of the English proceedings either under s.9 of the Arbitration Act 1996 or under the Court's inherent or case management jurisdiction.

26. Having decided to strike out the share deprivation claim, it was only necessary for the judge to consider a stay in relation to the asset misappropriation claim. This raised the question whether that claim falls within Article 45 as "any dispute arising during the lifetime of the company … whether among the shareholders themselves or between

them and the Company". Because, on any view, Sana has not been a shareholder in CCG since 1998 and the dispute does not relate to a period of time in which she was still a shareholder, the question largely turns on the consequences under Lebanese law of the fact that she brings the claim as Hassib's heir and whether the asset misappropriation claim can be said to be based on the articles of association.

27. The judge held that the claim was not based on CCG's articles of association so that neither Sana (nor, if he were still alive, Hassib) would be bound to submit the claim to arbitration. The issues on the appeal are whether the judge was right about Article 45 in relation to the asset misappropriation claim ("issue 6"); and whether (if otherwise triable in these proceedings) the share deprivation claim should also be stayed for arbitration under Article 45 or, in the alternative, under the 1993 Agreements ("issue 7").

28. A final point raised before the judge was whether the joinder of HH under CPR 6.37 as a necessary or proper party should be allowed to stand now that Sana no longer seeks an order for the re-transfer of the CCG shares. The judge did not have to decide this in the light of her finding that the share deprivation claim should be struck out but indicated that had she considered that the claim raised a triable issue she would have upheld the order for service out. We are now invited to set service on HH aside regardless of whether the share deprivation claim is properly arguable ("issue 8").

The *Ladd v Marshall* application

29. At the start of the hearing Sana made an application under CPR 52.11(2) and (5) seeking permission to rely on new evidence in support of her appeal. Some of the new evidence was factual material relating, for example, to the date of the transfer of the CCG shares to HH and to certain allegedly unethical business practices on the part of the defendants. The application included as an annex to the skeleton argument a draft Re-Amended Particulars of Claim, although the application did not include an application for permission to amend. The purpose of the new pleading was to re-formulate Sana's claim by linking the facts relied on for the asset deprivation claim and those relating to the share deprivation claim as part of a continuing conspiracy rather than two separate alleged acts of intentional wrongdoing.

30. We considered that the application was made far too late (coming more than 2 years after Carr J's judgment) and that it was largely based on a pleaded case which the judge was not asked to consider and which has yet to be introduced by way of amendment. The application, if otherwise justifiable, was also likely to necessitate an adjournment of the appeal at considerable expense in terms of time and resources both for the parties and the Court. We therefore refused the application save in respect of two items comprising CCG's tax returns for 2008 and 2009 and the evidence relating to the progress of the Lebanese arbitration. We will come to the significance of these items later in this judgment.

The jurisdiction issues

Issue 1: What is the jurisdictional test under Article 6(1)?

Issue 4: if the judge was right to strike out the share deprivation claim against Wael on the grounds she gave, is that a further reason why (independently of issue 1) the conditions of Article 6(1) were not satisfied in respect of that claim?

31. As stated above, in relation to issue 1 the members of the Court disagree. Accordingly, paragraphs 32 to 72 below set out only the majority conclusions of Patten and Beatson LJJ in relation to this issue.

32. Decisions as to jurisdiction are made at an early stage in a dispute and the decisions as to what must be shown at that stage reflect this. As Lord Neuberger stated in *VTB Capital plc v Nutritek International Corp.* [2013] UKSC 5, [2013] 2 AC 337 at [82] when dealing with disputed applications about jurisdiction:

> "[t]here is little point in going into much detail: when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial".

In *Cherney v Deripaska (No 2)* [2009] EWCA Civ 849; [2010] 2 All E.R. (Comm) 456 at [6], Waller LJ stated that "disputes as to forum should not become state trials", and see also the reference at paragraph 94 below to *Standard Bank plc v Via Mat International Ltd* [2013] EWCA Civ 490. The question is whether in the context of Article 6 the law has moved from the traditional position where the court asks whether a claim against an anchor defendant raises a serious issue to be tried in the sense of excluding summarily cases that are fanciful or bound to fail. Sana's primary case now is that, unless the sole object of bringing the claim against the anchor defendant is to oust the co-defendants from the jurisdiction in which they are domiciled, the strength of the claim against the anchor defendant is irrelevant.

33. On Sana's behalf, Mr Rabinowitz QC submitted that the judge was wrong to consider the merits of her claim against Wael, as the anchor defendant, for the purpose of establishing jurisdiction under Article 6(1) of the Brussels Regulation. He relied on the decision of this Court (Laws and Aikens LJJ, and Mann J) in *Aeroflot* about non-domiciled co-defendants, and what is said to be the logic underpinning it, and on several decisions of the CJEU between 2006 and 2015, in particular *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH (Case C-103/05)* [2006] ECR 1-6827. He also relied on the statement of Briggs, *Civil Jurisdiction and Judgments* (6th ed 2015) at §2.228, that the weakness of the claim against the anchor defendant does not affect the existence of the risk of irreconcilable judgments but "just makes it possible to say summarily which party will prevail in the English proceedings". He maintained that if the claim against Wael as the anchor defendant is struck out, this does not prevent the requirements of Article 6(1) being met.

34. The defendants' position is that, according to the jurisprudence of the CJEU on the co-defendant rule, it must be "expedient" for the claim against the anchor defendant to be heard together with the claims against the foreign co-defendants. That, they

submit, necessarily involves considering whether the claim against the "anchor" defendant raises serious issues to be tried. If it does not, it cannot be expedient to hear and determine it together with claims against the foreign defendants. They maintain that Sana's argument misreads the observations of the Court of Appeal in *Aeroflot* and is unsupported by the other authorities referred to.

35. Since we conclude in the next part of this judgment that for the purposes of Article 6(1) Sana does have a real prospect of establishing the share deprivation claim against Wael as the anchor defendant and that the judge erred by conducting a mini-trial, it is not necessary to decide this point.

36. The rival submissions must be examined in the light of the aim of the Brussels Regulation and the general rule contained in Article 2(1) that defendants should be sued in the courts of the member state where they are domiciled irrespective of their nationality. Recital 11 to the Regulation states:

> "The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking 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."

37. In *AMT Futures Limited v Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft mbH* [2017] UKSC 13, a decision of the Supreme Court since the hearing of this appeal which concerned Article 5(3)'s derogation from the general rule, Lord Hodge encapsulated the aim of the Regulation and the approach to exceptions to the general rule succinctly.

38. The aim of the Brussels Regulation is well known. Lord Hodge stated (at [11]) that it is:

> "to prevent parallel proceedings between courts of different member states and thereby avoid or limit irreconcilable judgments and non-recognition of judgments".

He also stated that "the compulsory system of jurisdiction which the … Regulation creates is underpinned by the principle of mutual trust between the courts of the member states". He cited *Overseas Union Insurance Ltd v New Hampshire Insurance Co (Case C-351/89)* [1992] QB 434, at [17]; *Erich Gasser GmbH v MISAT Srl (Case C-116/02)* [2005] QB 1, at [41] and [72]; and *Turner v Grovit (Case C-159/02)* [2005] 1 AC 101, at [24] and [28].

39. As to the general rule, Lord Hodge stated (at [12], [13] and [40]) that "the general principle is that civil actions are to be brought against individuals and companies in the courts of the place where they are domiciled" and "the derogations from the general rule which confers jurisdiction on the courts of the defendant's domicile … must be restrictively interpreted" in order to achieve the aims of the Regulation. He

cited *Kronhofer v Maier (Case C-168/02)* [2004] 2 All ER (Comm) 759, at [12] – [14]; *Coty Germany GmbH v First Note Perfumes NV (Case C-360/12)* [2014] Bus LR 1294, at [43]-[45] and *Kolassa v Barclays Bank Plc (Case C-375/13)* [2015] ILPr 14, at [43]. See also *Kalfelis v Bankhaus Schroder (Case C-198/97)* [1988] ECR 5565, at [19] and *Freeport plc v Arnoldsson (Case C-98/06)* [2008] QB 634 where it was stated (at [35]) that it is settled law that the special rules on jurisdiction must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by the Regulation.

40. Article 6(1) creates an exception to the rule in Article 2(1). It does so in the case of multiple defendants with different domiciles, but only where the claims 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". As a derogation from the general rule, Article 6(1) is to be construed restrictively. Before considering the decision of this court in *Aeroflot,* it is convenient to examine the decisions of the CJEU and to do so chronologically.

41. The first decision is *Reisch Montage v Kiesel Baumaschinen Handels GmbH (Case C-103/05)* [2006] ECR 1-6827, [2007] ILPr 10. It was a reference to the CJEU by the Supreme Court in Austria. The question referred was whether a claimant could rely on Article 6(1):

> "when bringing a claim against a person domiciled in the forum state and against a person resident in another Member State, but where the claim against the person domiciled in the forum state is already inadmissible by the time the claim is brought because bankruptcy proceedings have been commenced against him, which under national law results in a procedural bar?".

The CJEU stated (at [32]) that Article 6(1):

> "… cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled"

It then held (at [33]) that Article 6(1):

> ".. may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant in another Member State even when that action is regarded under a national provision as inadmissible from the time when it is brought in relation to the first defendant".

It is submitted on behalf of Sana that the holding shows "that Article 6(1) applies even if the claim against the local defendant is bound to be dismissed".

42. It is to be noted that *Reisch Montage* concerned a procedural bar against the anchor defendant rather than weakness in the substantive merits of the claim. It was on that ground that Flaux J in *Bord Na Mona Horticulture Limited v British Polythene Industries plc* [2012] EWHC 3346 (Comm) at [83] stated that, had he not found there

was a fully arguable claim against the anchor defendant, he would have distinguished the case before him from *Reisch Montage*.

43. We consider that a distinction between a procedural bar and lack of merits is sustainable because the purpose of Article 6(1) is to avoid a risk of irreconcilable judgments. Where there is a procedural bar against a claim in one Member State, there remains a risk of irreconcilable judgments, since that bar may not apply in another Member State. Where, however, there is no serious issue to be tried because a claim is wholly unarguable on the merits, that risk is unlikely to arise. This is because "even if the proceedings could be and were brought elsewhere, the outcome would be the same, if there is no seriously arguable claim": see Hamblen J in *Brown v Innovatorone Plc* [2010] EWHC 2281 (Comm), [2011] ILPr 118 at [25].

44. It is also to be noted that the CJEU in *Reisch Montage* did not elaborate what it meant by the "sole purpose" or "sole object" exception it identified at [32]. This was understandable because it was not relevant on the facts of the case: there was no suggestion that the claim was not serious or genuine. The consequence, however, is that there is no indication in the judgment that the claim has to be made fraudulently or in bad faith for this exception to apply. Moreover, the proviso to Article 6(1) clearly requires it to be "expedient" to hear and determine the claims together to avoid the risk of irreconcilable judgments. As Hamblen and Flaux JJ observed in *Brown v Innovatorone* and *Bord Na Mona Horticulture* cases, it is difficult to see how that requirement can ever be satisfied if the claim against the anchor defendant is totally without merit and has been struck out.

45. The next decision is *Freeport plc v Arnoldsson (Case C-98/06)* [2008] QB 634. The CJEU was asked by the Swedish Supreme Court (Högsta domstolen) to determine whether it had jurisdiction under Article 6(1) over an English company who was sued in contract when the claim against the Swedish domiciled co-defendant was in tort or quasi-tort. It was held (at [38] ff) that Article 6(1) could apply against a non-domiciled defendant where the actions had different legal bases provided they had a connection that made it expedient to determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. It was (see [41]) for the national court:

> "to take account of all the necessary factors in the case file, which may, if appropriate yet without its being necessary for the assessment, lead it to take into consideration the legal bases of the actions brought before that court."

46. Advocate General Mengozzi had considered whether the limitation in Article 6(2) precluding the jurisdictional linking factor for which it provides in claims on warranties, guarantees or third party proceedings where it was used solely with the object of removing the defendant from the jurisdiction of the court which would be competent in his case applied to Article 6(1). He considered (see AG [62]) that the Regulation is generally limited by "fraud relating to the jurisdiction of the courts" which occurs where the rules have been applied as a result of manipulation on the part of the claimant designed to oust the jurisdiction of the courts of a particular member state over a dispute or to have the case heard by the courts of a member state which would not have had jurisdiction but for the manipulation. He also stated (see AG [63]) that the question whether there is a general prohibition on the abuse of the right to

choose the court is "more delicate", but (at AG [64] – [65]) that he saw no reason that would prevent the approach to cases under Article 6(2) "from applying to the cases regulated by Article 6(1) as well" and that extending the prohibition by analogy had been approved by implication in the *Reisch Montage* case, but that the *Freeport* case did not display any of those features.

47. The Advocate General also considered (at [70]) that assessment of the risk of irreconcilable judgments "may also include an evaluation of the likelihood that the claim brought against the defendant who is domiciled in the forum member state will succeed" but recognised (at [71]) that this may be difficult to reconcile with *Reisch Montage*. We observe that, if *Reisch Montage* is interpreted and applied narrowly because, in the case of an anchor defendant, its effect is to take co-defendant(s) domiciled in other Member States from the jurisdiction of the courts of those states, and derogations from that position are to be construed restrictively as applying to procedural bars, there would be no inconsistency with the Advocate General's statement.

48. The CJEU took a different approach to the Advocate General. It had been suggested that the suggestion that the "sole purpose"/"sole object" observation was a pre-condition or additional hurdle to relying on Article 6(1), but the Court stated (at [54]) that Article 6(1) can be applied:

> "without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the member state where one of the defendants is domiciled".

49. In view of its finding that Article 6(1) could apply against a non-domiciled defendant where the actions had a different legal basis from the action against the domiciled defendant provided they had the requisite connection, the CJEU (see [56] – [57]) stated there was no need to answer the question whether the likelihood of success of an action against a party before the courts of the state where he is domiciled is relevant in the determination of whether there is a risk of irreconcilable judgments for the purposes of Article 6(1). It therefore did not address whether, as the Advocate General had stated (at AG [66]), the exception only applies where the action brought against the defendant domiciled in the forum member state appears, at the time when it was lodged, to be manifestly unfounded, or whether it suffices that it appears to be unfounded.

50. It was submitted on behalf of Sana that the question before us was left unanswered in the *Freeport* case but that the indications from that case, and what was said by the CJEU and in *Cartel Damage Claims SA v Akzo Nobel NV,* its most recent decision on this matter, shows that the test for "abuse", whether as part of the autonomous consideration of the risk of irreconcilable judgments, or as part of the "sole object" exception, is "exceptionally high". But the passage from [41] of the CJEU's judgment (which is set out at paragraph 45 above) which states it may be appropriate for the national court to consider the legal bases of the actions brought before it, suggests that consideration of the substantive merits of the claim against the anchor defendant may be necessary, rather than prohibited.

51. The two most recent decisions of the CJEU, *Kolassa v Barclays Bank (Case C-375/13)* [2015] I.L.Pr 14 and *Cartel Damage Claims SA v Akzo Nobel NV (Case C-352/13)* [2015] QB 906, were respectively decided on 28 January and 21 May 2015, after the decision of the judge in this case. The same judges of the CJEU, in its Fourth Chamber, sat in both cases.

52. *Kolassa v Barclays Bank* was a decision on the derogation in Article 5(3) from the general rule in Article 2(1). The CJEU held that the Austrian courts had jurisdiction to hear a non-contractual action against an English bank in respect of a prospectus issued because the loss occurred directly in the claimant's account in a bank established in Austria.

53. Sana relied on the clear statements (at [61] and [63]) about the need to ensure legal certainty and to avoid prejudicing the assessment of the substance of a claim by demanding a comprehensive assessment of the evidence at an early stage. But the CJEU also stated (at [64]) that:

> "Although the national court seised is not, therefore, obliged, if the defendant contests the applicant's allegations, to conduct a comprehensive taking of evidence at the stage of determining jurisdiction, it must be pointed out that both the objective of the sound administration of justice, which underlies Regulation 44/2001, and respect for the independence of the national court in the exercise of its functions require the national court seised to be able to examine its international jurisdiction in the light of all the information available to it, including, where appropriate, the defendant's allegations."

54. Accordingly, all that *Kolassa* expressly precludes is "a full review of the evidence", the sort of mini-trial that is precluded by the traditional English approach. The decision does not provide positive support for the proposition that there is no need for any assessment of the merits of the dispute. That proposition, moreover, appears inconsistent with what the CJEU said in the concluding part of [64] about "respect for the independence of the national court" and the reference to a "requirement" that the national court "examine its international jurisdiction in the light of all the information available to it, including, where appropriate, the defendant's allegations".

55. While it is important to ensure that there is legal certainty, and it is inappropriate to conduct a full review of the evidence, it does not follow from this decision that there is no need for an assessment of the merits of the dispute or that national courts are not able to look at the strength of the claim against the defendants to determine whether they have jurisdiction.

56. The question in *Cartel Damage Claims SA v Akzo Nobel NV* concerned whether there was an abuse of Article 6(1) in circumstances where a claim brought in Germany against a German domiciled anchor defendant and co-defendants that were not domiciled in Germany was settled against the anchor defendant. Could Article 6(1) be relied upon when the applicant appeared to have artificially prolonged the settlement proceedings in order to bring the claim in Germany? After referring to the need to construe derogations from the general rule strictly, and stating that, on the facts of the case, it was expedient to determine the claims against the various defendants together, the CJEU turned to the extent to which the applicant's withdrawal of its action against

the sole co-defendant domiciled in the same member state as the court seised was capable of rendering the rule of jurisdiction in Article 6(1) inapplicable.

57. The CJEU stated [at 29]) that the court seised of the case can find that the rule of jurisdiction laid down in Article 6(1) "has potentially been circumvented only where there is firm evidence to support the conclusion that the applicant artificially fulfilled, or prolonged the fulfilment of, that provision's applicability". It also stated (at [31]) that "at the time that proceedings were instituted", the parties concerned "had colluded to artificially fulfil, or prolong the fulfilment of" the applicability of Article 6(1). It was argued on behalf of Sana that there is nothing artificial in bringing a claim which ultimately fails and that what is required to avoid the ability to rely on Article 6(1) on grounds of abuse is proof of collusion.

58. The fact that there was no consideration of the substantive merits of the claim, and what was said (in particular the passage from [29] set out above) must be seen in context. There was no suggestion that the claim itself against the German anchor defendant was unmeritorious or hopeless and the CJEU did not directly address whether, when applying Article 6(1), Member States may take account of the merits of the claim. The case was about whether the settlement proceedings had been artificially prolonged and whether there had been collusion. The statement that "firm evidence" was required where this is alleged is understandable because, as the CJEU recognised (at [32]) "simply holding negotiations with a view to concluding an out-of-court settlement does not in itself prove such collusion". [32]. The Court was clearly concerned to ensure that, in the context of withdrawing an action against the sole co-defendant domiciled in the same state as the court seised, there was sufficient evidence to suggest that this was fraudulent.

59. We now turn to the *Aeroflot* case, and its assessment of the impact of the jurisprudence of the CJEU. The judgment was given by Aikens LJ. As we have stated, it was a case about the position of non-domiciled co-defendants rather than the anchor defendant. The judgment of Aikens LJ considered *Freeport* but not *Reisch Montage,* and it predates the CJEU's decisions in *Kolassa* and *Cartel Damage Claims.*

60. The judgment at [107] and [109] provides strong support for Sana's position in the present case. At [109], Aikens LJ stated:

> "I think that a straightforward requirement that, in an Article 6(1) case, the claimant must establish a "good arguable case" or "serious issue to be tried" against the non-domiciled defendant is inconsistent with the "autonomous" construction of Article 6(1) taken by the ECJ in *Freeport plc v Arnoldsson.* Insofar as the Forus argument might be that Aeroflot has joined Holding so as to establish English jurisdiction and to avoid the Luxembourg court having jurisdiction in any dispute against Holdings, that consideration is impermissible, as *Freeport plc v Arnoldsson* makes plain."

61. He had previously stated (at [107]) that the CJEU in the *Freeport* case held that:

> "the national court should not concern itself with the question of whether the claim against the non-resident defendant was brought in those proceedings with the sole object of ousting the jurisdiction of the

> court of the Member State where that defendant is domiciled. The ECJ therefore specifically rejected the proposition that the national court should consider and decide whether other possible motives for bringing that defendant into the proceedings should be taken into account."

He concluded that:

> "The whole approach of the ECJ seems to me to be consistent with the principle that the Judgments Regulation is only concerned with the basis for establishing jurisdiction and has nothing to do with assessing the merits of the claims against the various defendants".

62. Aikens LJ's statement at [109] that "a straightforward requirement" that the claimant must establish a "good arguable case" or "serious issue to be tried" against the non-domiciled defendant, is inconsistent with *Freeport plc v Arnoldsson* is problematic. So is his statement at [107] that the national court is precluded from considering whether a claim was brought with the sole object of ousting the jurisdiction of the court of the member state where that defendant is domiciled.

63. The second statement appears to be inconsistent with *Reisch Montage* at [32], which is set out at paragraph 41 above. The first statement overlooks the fact that in *Freeport's* case, the CJEU held that to determine the single question of whether there is a risk of irreconcilable judgments, the court must "take account of all the necessary factors in the case file", which may require it to take into consideration also the legal bases of the actions brought before the court. Although the court declined to answer the question whether the likelihood of success is relevant in the determination of whether there is a risk of irreconcilable judgments for the purposes of Article 6(1), it seems inconsistent to recognise that the national court must take account of all the necessary factors in the case file, which may require it to take into consideration also the legal bases of the actions brought before the court, but then to say that the merits of the claims are necessarily irrelevant. Moreover, the fact that the court declined to opine on whether likelihood of success is relevant puts into question Aikens LJ's statement that *Freeport* makes it plain that the Brussels Regulation is not only concerned with assessing the merits of the claims against the various defendants.

64. There is no support in the decisions of the CJEU considered above for any relaxation of the principle that derogations from the rule conferring jurisdiction on a defendant's domicile must be restrictively interpreted. The analysis of the judgments in those cases shows that in each the court was answering a limited question and the specific issue of the relevance of merits did not arise. There was, for the reasons discussed above, a particular reason for requiring "firm evidence" in *Cartel Damage Claims*. For the reasons given, we consider it is wrong to conclude that the CJEU jurisprudence precludes consideration of the substantive merits of the claims brought against an anchor defendant.

65. Additionally, although there are three references in the judgment in *Aeroflot* to the "anchor claim" and the "anchor forum", the focus of the key paragraphs on this issue is on the merits of the claim against the "non-domiciled defendant": see [107] and [109]. The reference in [107] to "the various defendants" does not indicate that Aikens LJ considered the specific position of an anchor defendant, let alone that he had it in mind to include such a defendant. All these factors mean that caution is

needed before accepting the argument that, even though *Aeroflot* did not concern an anchor defendant, "the logic" underpinning Aikens LJ's judgment means that it should be applied to such a defendant.

66. As to the "logic", we consider that there is a significant distinction between the anchor defendant and the foreign co-defendants. The claim against the anchor defendant is fundamental to establishing jurisdiction over claims against the foreign co-defendants in the jurisdiction in which the proceedings have been issued and away from the courts of the state(s) in which they are domiciled. If the claims against one or more foreign co-defendants fall away, there would be no effect upon the claim against the anchor defendant or the claims against other foreign co-defendants. In contrast, without a legitimate claim against the anchor defendant, there is no reason for the foreign co-defendants to be ousted from their jurisdiction of domicile. For the reasons given at paragraph 43 above, in such a case, the risk of irreconcilable judgments is unlikely to arise. Accordingly, how can it be expedient to determine a claim against an anchor defendant that is not seriously arguable together with a claim against a foreign co-defendant over whom there would be no jurisdiction under Article 6 apart from the link to the anchor defendant?

67. If there is a general requirement of evidence of abuse or fraudulent intention above and beyond evidence relevant to whether the claimant has "artificially fulfilled" the requirement of connection under Article 6(1) this would be very difficult to meet. Setting the threshold at requiring proof that the sole object of bringing the claim against the anchor defendant is to oust the co-defendants from the jurisdiction in which they are domiciled would make it far more difficult to ensure that claimants are not forum shopping. The purpose of the "sole object" exception is to ensure that Article 6(1) is not wrongfully invoked. We consider that it would be wrong to invoke Article 6(1) by bringing a claim against an anchor defendant which raises no serious issue to be tried because that would allow claimants to remove foreign defendants from the jurisdiction of the courts of the Member State in which they are domiciled, in a way deprecated by the CJEU.

68. In our view, a claim against an anchor defendant that is hopeless or presents no serious issue to be tried should fall within the "sole purpose" or "sole object" exception it identified in [32] of the judgment in *Reisch Montage.* This is particularly because taking jurisdiction is a derogation from the general rule which confers jurisdiction on the courts of the defendant's domicile, and such derogations must be restrictively interpreted. In bringing an unsustainable claim against an anchor defendant, it can be inferred that the purpose of making the claim is to remove the co-defendant(s) domiciled in other Member States from the jurisdiction of the courts of those states.

69. It is important, and the CJEU is clearly concerned to ensure, that Article 6(1) is not misused. In our judgment, it would be a misuse of Article 6(1) to allow hopeless claims to oust the jurisdiction of domicile of foreign co-defendants. To allow the claim to proceed in the present appeal would undermine the principle that a defendant may be sued only before the courts for the place where he is domiciled. It is said that the merit of an approach which eschews any examination of the merits of the claim absent evidence of abuse or fraudulent intention to artificially fulfil the requirement of connection under Article 6(1) is that it avoids the risk of irreconcilable judgments and protracted disputes about the substance of a claim at the jurisdiction stage. But it does

so by a bright line binary rule which does not address the fact that derogations from the general principle that civil actions are to be bought against defendants in the courts of the place where they are domiciled must be restrictively interpreted. It is open to question whether this is justified or whether this is the true import of the decisions of the CJEU which have not directly addressed the question that is before us. It is also said that defendants may, subsequently, if they wish, attempt to strike out the claims. That, however, would simply shift to strike out and summary judgment applications what is said to be undesirable and impermissible in the context of jurisdiction.

70. Finally, we turn to the argument that even if the claim against the anchor defendant is later struck out, this does not affect the jurisdiction that was established at the time when proceedings were instituted. In our view, it is irrelevant that Article 6(1) applies at the time when proceedings were instituted (see *Linuzs v Latmar Holdings Corp* [2013] EWCA Civ 4 at [30]). The question is not whether or not the claim is or has been struck out procedurally. The emphasis is on whether there is a serious claim to be tried. The latter question can be assessed as at the date proceedings were instituted, even if the claim is only later struck out. The test proposed by the defendants, and applied by the English courts, does not depend on the strike out. A claim could be struck out for various reasons, including procedural bars which are unrelated to the merits of the appeal. The question here is whether there is a serious issue to be tried against the anchor defendant.

71. Mr Rabinowitz argued that "there is nothing artificial in bringing a claim which ultimately fails". That, however, is not the test applied by the English courts which the defendants submit should be applied here. It is certainly not artificial to bring a claim which ultimately fails, but it may be artificial to bring a claim which is hopeless, though not abusive.

72. It follows that, for these reasons, had it been necessary to decide the case on this point, we would have rejected Sana's submission that, for the purpose of establishing jurisdiction under Article 6(1) of the Brussels Regulation, there is no need to consider the merits of the claim against Wael as the anchor defendant. Accordingly, on our view, issue 4 does not arise.

The merits issues

Issue 2: Does the share deprivation claim have a real prospect of success against Wael?

Issue 3: Was Sana, having signed the 1995 and/or 1998 agreements, in any event precluded by contractual estoppel or its equivalent under Lebanese law from asserting an entitlement to such shares (if any) in CCG as Hassib may have owned at his death?

73. The remainder of this judgment, from paragraphs 74 to 165 is the unanimous judgment of all members of the constitution.

74. On the basis of the majority's conclusion that it is necessary to demonstrate that the share deprivation claim does have a real prospect of success against Wael as the anchor defendant in order to establish jurisdiction against the non-anchor defendants under Article 6(1) of the Brussels Regulation and the Lugano Convention, various issues have to be resolved. Sana must show that there is a real prospect of establishing

at trial that Hassib owned the 399,915 shares in CCG at his death; that Wael was aware of this and was therefore engaged in intentional wrongdoing in relation to the transfer of the shares to HH after Hassib's death; and that she is not estopped as a matter of Lebanese law from asserting a claim to the shares as a result of being party to the 1995 and the 1998 agreements.

75. When it was established in 1984, CCG adopted Articles of Incorporation ("the 1984 Articles") which required any transfer of shares to be approved by a two-thirds majority of its directors; for the relevant share certificates to be replaced by the issue of new shares; and for the new shares to be registered in the company's share register. The material provisions of the 1984 Articles were as follows:

> "Article 9) – Form of Stocks :
>
> A) All the shares of the company are nominal shares.
>
> B) The shares are to be recorded on certificates to be cut from logbook papers bearing counterfeit protection, and the serial numbers and stamps of the company shall be placed on them, along with the signature of two members of the board of directors appointed for this purpose, one of whom shall be the chairman."
>
> Article 10) – Divestment from Stocks :
>
> A) Any divestment from ownership of any stocks among living individuals in return for compensation or without compensation on the interests of natural or legal persons who are not shareholders in the company must be approved by the board of directors with a two thirds majority of its members. The same shall apply for any divestiture from the right of ownership or the right of usage of any shares. The Board of Directors is not obliged to provide a justification for its decision, which in this regard shall be final and non-contestable through any means.
>
> However this approval is not required when transferring the shares through inheritance.
>
> …
>
> C) The divestiture processes done in accordance with the law and these articles of incorporation shall take legal effect, and shall not be able to be used as evidence toward other parties, toward the shareholders, and toward the company, until after the original share certificates have been handed over to the company in order for them to be replaced by new shares to be issued by the company, and after they have been properly registered in the shareholders' registry with

the company. This registry must contain the following information:

- Certificate number
- Numbers of the shares
- The name of the shareholder, and his real or selected address where he can be reached at any time
- The date of purchase of the shares

The contents of this registry must always be kept in accordance with the actual situation, and be signed off by the chairman, as well as one of the members of the board of administration."

Article 11) – Rights and Obligations of the Shareholders :

…

No dividing of the shares shall be accepted, nor shall the company recognize more than a single owner per single share. If a single share ends up being owned by several people through inheritance or other circumstances, these persons will have to appoint one person to represent them before the company. This latter person shall be considered the sole owner of the share towards the company.

However, the shareholder shall have the right to divest from the right of ownership or the right of usage to shares, with the divestiture document to specify the rights and obligations of the right of ownership and the right of usage holder. The document shall be conveyed to the issuing company and recorded in the registry of shareholders mentioned above.

Article 13) – The Board of Directors and Duration of its Term :

A Board of Directors consisting of at least three members and at most twelve members to be elected by the regular general shareholders assembly from among the shareholders shall manage the affairs of the company. Among them shall be at least two natural persons who are Lebanese citizens…"

76. The 1984 Articles therefore prescribe the formalities necessary for the transfer of legal ownership of the shares but also recognise (in Article 11) the right of the registered shareholder to hold the share for the benefit of others and to separate legal ownership from a usufruct of the shares subject to recording the arrangements in the share register. The 1984 Articles were replaced by new Articles of Incorporation ("the 1997 Articles") which contained materially identical provisions governing the transfer and registration of shares. Both sets of Articles also included arbitration provisions in

relation to certain types of dispute between shareholders which we will come to when considering the appeal relating to the judge's refusal of a stay.

77. Sana's claim that her father still owned 399,915 shares in CCG at his death as opposed to merely having retained a usufruct over those shares depends, as noted earlier, on the legal effect of the agreements between 1993 and 1998 and on whether the formalities prescribed by the articles of CCG had been complied with. The judge began her consideration of these issues by accepting the defendants' submission that the share deprivation claim was, as she put it, profoundly unattractive given that Sana had in 1998 sold back to Hassib the entirety of her shareholding in CCG which necessarily included the shares she had received under the 1993 and 1995 share transfer agreements whose effectiveness she is now seeking to impugn. The payment of the US$50m was, the judge held, received in return even if not strictly consideration for the sale.

78. The judge said that the 1998 transfer agreement is relevant to the credibility of the share deprivation claim in the sense that it is difficult for Sana to allege that the defendants were carrying out an unlawful conspiracy if all that they were doing was to give effect to the arrangements stemming from the 1993 agreements. But that is to mischaracterise the claim. Sana now accepts (even if she did not before) that the agreements made between 1993 and 1998 took effect according to their terms under Lebanese law. She disputes that the agreements took effect as sales of the shares rather than gifts, but her ultimate position is that the share transfer formalities prescribed by the Articles were not complied with so that, at his death, Hassib retained ownership of the shares (and any accretions to the holding) which he transferred to Sana and her brothers in 1993. It is common ground that until 1993 the ownership of CCG was split between Hassib and Said and that all the shares owned by Samir and Suheil (and before 1998 by Sana) were derived from the 1993 transfers.

79. The share deprivation claim is based on an alleged conspiracy which post-dates Hassib's death in 2010 and was given effect to by the transfer of the 399,915 shares by Samir and Suheil to HH. It therefore focuses on the ownership of those shares as at Hassib's death and in particular on whether they had by then become the property of Sana's two brothers by virtue of the various share transfer agreements executed between 1993 and 1998. It is not alleged that these agreements were procured by deception or some other unlawful means. Sana's case is and has to be that title to the shares remained with Hassib at his death as confirmed by the entry in the Beirut Commercial Registry and that the defendants were aware of this when they contrived to transfer the 399,915 shares to HH in 2010. Knowledge of Hassib's continued ownership of the shares is pleaded by reference to the fact that the request to the Commercial Registry for the names of the shareholders in CCG was made on 13 January 2010 (the day after Hassib's death) by CCG itself; that on 21 April 2010 the Civil Magistrate in Beirut (at Sana's request) made a declaration that Samir, Suheil and Sana were Hassib's legal heirs; and that in a subsequent tax filing by CCG made on 27 December 2011 Hassib was listed as the registered owner of the 399,915 shares as at 21 December 2010.

80. Sana alleges that knowledge of Hassib's shareholding in CCG is to be imputed to the defendants (in the sense of it being inferred that they had actual knowledge of these facts) by reason of their control of CCG or the close co-operation and relationship between the Khoury and Sabbagh families in relation to the affairs of CCG. She also

relies on the appointment of Wahbe on 19 February 2010 by her and her brothers to act in the identification and gathering in of the assets of Hassib following his death. If, as alleged, the defendants knew that the 399,915 shares belonged to Hassib at his death and that she as one of his heirs was therefore entitled to a third of them, it must follow, she alleges, that their subsequent transfer to HH was unlawful. She was not informed of the proposed transfer or asked to consent to it and did not discover it had taken place until 2012.

81. In relation to Hassib's continued ownership of the 399,915 shares, the first issue considered by the judge was whether the formalities prescribed by Article 10 had been complied with in relation to the transfers of the shares. At the time of the 1993, 1995 and 1998 agreements, Hassib and Said were the directors of CCG. When Hassib entered into the 1993 agreements he had already (in March 1992) transferred to Said his 50% interest in Consolidated Investment Company SARL ("CIC") which owned 60 shares in CCG. Until then Hassib and Said each held 199,970 shares in CCG so that the transfer to Said of the ownership of CIC gave him control of CCG, although only indirectly via his interest in CIC.

82. The 1993 Agreements (each in materially identical terms) gave Sana and her brothers bare ownership of the shares transferred whilst preserving a usufruct in favour of Hassib for his life. Although not relevant to the issue of whether the necessary formalities for the completion of the transfers were complied with, it is convenient if we set out at this stage the material parts of those agreements using the agreement that was entered into by Sana:

> "AGREEMENT FOR THE TRANSFER OF BARE OWNERSHIP RIGHTS ON SHARES
>
> This Agreement is made by and between :
>
> Hasib … ("the First Party") and …
>
> Sana … ("the Second Party") …
>
> WHEREAS, the First Party is a shareholder in [CCG] ("the Company")
>
> …..
>
> WHEREAS, the First Party desires to sell to the Second Party, and the Second Party desires to purchase from the First Party, the bare ownership rights relating to some of the CCG Shares provided that the First Party shall retain the usufruct rights to such shares during his lifetime.
>
> NOW, THEREFORE, it is agreed as follows:
>
> ARTICLE 1: The above preamble constitutes an integral part of this Agreement.
>
> ARTICLE 2:

(a) The First Party hereby sells, assigns and transfers to the Second Party, who accepts such sale, assignment and transfer, all of the First Party's right, title and interest, including ownership, in and to 20,000 … shares of the Company ("the Transferred Shares"), subject only to the First Party's rights pursuant to Article 3 hereof, for a total purchase price of US$1,333.333 …

b) The First Party hereby acknowledges that he has received full payment of the purchase price from the Second Party and that the purchase price constitutes consideration for future transfers of shares from the First Party to the Second Party pursuant to this Article.

.….

ARTICLE 3:

The First Party shall retain during his lifetime the usufruct rights to … the Transferred Shares and to any other shares conveyed to the Second Party hereunder. After the unfortunate passing away of the First Party, the usufruct rights retained hereunder by the First Party shall automatically and without limitation whatsoever be transferred to the Second Party.

ARTICLE 4:

As per Article 11 of the Articles of Association of the Company whereby a shareholder may sell the usufruct right or the bare ownership right on part or all of the shares in the Company …. the Parties agree that after the unfortunate passing away of the First Party, the Second Party shall be the full, sole, legal and beneficial owner of the Transferred Shares and to any other shares conveyed to the Second Party hereunder, including all rights and obligations attaching thereto. During the lifetime of the First Party, such rights and obligations shall be determined as follows:

(a) The First Party … shall be exclusively entitled to attend all ordinary and extraordinary general meetings and to vote thereat on all resolutions and on all items of the agenda thereof…;

(b) The First Party shall be exclusively entitled to receive all dividends approved for distribution by the General Meetings in proportion to the First Party's usufruct right or full ownership of the shares of the Company;

(c) Preemptive rights and the rights to purchase shares offered for sale by a shareholder of the Company… attaching to the Transferred Shares and other shares of the

> Company covered hereby shall belong to, and be exercisable by the Second Party.
>
> .….
>
> ARTICLE 5:
>
> The First Party hereby represents, warrants and agrees with the Second Party that (a) all shares transferred or to be transferred to the Second Party hereunder … have been (or as the case may be, shall be) sold or transferred to the Second Party free and clear of all liens, claims and encumbrances … and (b) the First Party shall not sell, assign or encumber his usufruct rights hereunder in any manner without the written consent of the Second Party.
>
> .….
>
> ARTICLE 7:
>
> Any dispute, controversy or question of interpretation arising under, out of, or in connection with this Agreement, or any breach or default hereunder shall be submitted to, and determined and settled by, arbitration in accordance with the following procedures.
>
> .….
>
> (c) The parties agree that Article XLV of the Articles of Incorporation of the Company shall not apply to any dispute hereunder and expressly waive application of such Article. The parties acknowledge that any dispute or controversy arising hereunder is outside the scope of the disputes contemplated or covered by Article XLV.
>
> ARTICLE 8:
>
> This Agreement embodies the entire agreement and understanding between the parties hereto with respect to the Transferred Shares, and supersedes all prior agreements and understandings with respect thereto.…"

83. Each of the 1993 Agreements was signed by the contracting parties and initialled on each page. They were also signed by Said. The 1995 agreements (all of which involved the transfer of the bare ownership of shares to Sana by Hassib, Samir and Suheil) were in a similar form and were also signed by Said as well as being executed by the contracting parties. The evidence also includes an undated declaration by Hassib as follows:

> "... The sale and transfer of the bare ownership right of [CCG] o[f] 14997 shares by my son Suheil Sabbagh and o[f] 14996 shares by my son Samir Sabbagh in favour of

> my daughter Sana Sabbagh were executed, done and implemented upon my direct instructions. Further, Mr Said T. Khoury's approval thereon and Mr Said T. Khoury's signature on the sale deeds evidencing such sale and transfer on behalf of [CCG] in his capacity as President of [CCG] were executed, undertaken and achieved upon my recommendation, request and perseverance even though Mr Said. T. Khoury personally did not approve such sale and transfer."

84. The 1998 agreements under which Sana (on 9 April) transferred her bare ownership of 100,000 shares to Hassib and Hassib (on 14 April) transferred bare ownership of the same shares to CIC for US$10m were also signed by Said. In the Preamble to the 9 April agreement Sana acknowledges that she owns the bare ownership of the 100,000 shares referred to and declares (in Article 5) that "*the shares sold by virtue of this agreement are free and not encumbered by any encumbrance or pledge or seizure or any other right and she had already delivered the original share certificate to the Second Party*". The 1998 agreements are not directly relevant to the issue of whether Hassib continued to own the 399,915 shares at his death because the claim relates to the shares acquired by Samir and Suheil under the 1993 agreements which they proceeded to transfer to HH after Hassib's death. The terms of the 1998 agreements are, however, relied on by the defendants for their case that Sana is estopped from now seeking to deny the effectiveness of the 1993 transfers to Samir and Suheil out of which Sana acquired part of the holding of 100,000 shares which she agreed to transfer to Hassib in 1998. The judge also treated them as having some evidential relevance to whether the 1993 transfers were legally effective.

85. The judge regarded the signature by both Hassib and Said of the 1993-1998 agreements as evidence that the transfers were approved by the board of directors of CCG with a two-thirds majority of its members as required under Article 10A of the 1984 Articles. She noted that there was no primary evidence of board approval (in the form of minutes) or of the re-issue of the shares in accordance with Article 10C apart from the reference to specific share numbers in the 1998 agreements. (We interpose that board minutes approving various share transfers have now been disclosed, a point which we deal with below.) But she accepted the evidence of Mr Ahmad Ladiki, the Secretary of CCG, that he was satisfied that the transfers had been properly effected in accordance with Lebanese law and the company's Articles of Incorporation.

86. Mr Ladiki's involvement with the CCC group began only in 2005 when he was a legal counsel working in the corporate secretarial department of CCG. He was appointed company secretary in 2013. In his first witness statement Mr Ladiki explains how details of each shareholder's shareholdings are recorded on pages of the register dedicated to that shareholder and that the register records both full ownership of the shares and bare ownership or a usufruct where applicable. Each entry is signed by the Chairman of CCG and a director and then stamped with the corporate seal. Some pages extracted from the register are exhibited to the witness statement.

87. In [18]-[27] of his witness statement Mr Ladiki sets out the details of the shares transferred under the various agreements which we summarised earlier. He makes the point (which is not in dispute) that if the agreements took effect as transfers which were then completed in accordance with the formalities stipulated by the articles,

Hassib held only a usufruct in respect of the 399,915 shares at his death in 2010. He says that the Commercial Registry in Beirut operates to provide information in the form of a certificate the purpose of which is to verify the identity of the persons who are properly authorised to act on behalf of a particular company. The information is publicly available on request on payment of a fee and CCG and other companies will routinely obtain certificates relating to themselves for use in their commercial dealings.

88. The request by CCG of 13 January 2010 which is relied on to support the share deprivation claim was made, according to Mr Ladiki, in connection with the opening of two new bank accounts. The timing in relation to Hassib's death was coincidental. The information contained in the certificate from the Registry was, Mr Ladiki says, based on an attendance sheet of 30 May 2009 and refers to the usufruct in the 399,915 shares to which Hassib was entitled up to his death.

89. The other piece of evidence which Mr Ladiki deals with is the tax filing by CCG which is relied on by Sana in the particulars of claim in support of the allegation that the defendants knew that Hassib was the registered owner of the 399,915 shares as at 21 December 2010: see paragraph 79 above. Mr Ladiki exhibits a copy of the filing (which is dated 27 December 2011, not 2012) which covers the period from 1 January to 31 December 2010. The filing is, he says, clearly incorrect insofar as it suggests that Hassib continued to own the 399,915 shares in CCG for the whole of 2010. This was corrected in the filing for the following year. He repeats that the reference to the 399,915 shares was in any event a reference to Hassib's usufruct in those shares. In his third witness statement Mr Ladiki returns to the tax filing for 2010 to confirm that the return was intended to state the position as at the end of 2010 and so was clearly inaccurate in stating that Hassib's usufruct rights were still in existence. This was, he said, an error on the part of the employee who compiled the return.

90. The judge attached no real significance to either the certificate from the Commercial Registry or the 2010 tax filing. She accepted Mr Ladiki's evidence that the report of 16 January 2010 merely confirmed the position as at 30 May 2009 and must be interpreted as referring to Hassib's usufruct in relation to the 399,915 shares which subsisted until his death. It did not, she held, establish that Hassib held any shares in CCG as at 16 January 2010. She also accepted Mr Ladiki's suggestion that the tax filing must have been compiled in error insofar as it related to any period after 12 January 2010 but that even as of that date the reference to Hassib holding shares in CCG was accurate if interpreted as referring to his usufruct. The position was, she said, corrected in the return filed for the following year which did not show Hassib as a shareholder. What the judge did not have were copies of the returns for the previous two years which we allowed to be adduced in evidence for the purpose of the appeal. These are in the same form as the return for 2010 and on their face refer to Hassib as the holder of the 399,915 shares. The claimant made the obvious forensic point that what might have been an error in one year is less likely to be an error if repeated over a period of three years. On the other hand, if the maker of the return drew no distinction for tax purposes between the holder of the shares and a usufructary (both were entitled to the dividends) then the repetition of the entry over three years may not add very much.

91. Carr J concluded that there was no more than a purely speculative case that the necessary board approval and re-issue of the shares did not take place. The general

impression to be gleaned from the available documentation was, she said, that the parties intended to comply with the requisite formalities. Said and Hassib signed each of the transfer agreements; the 1998 agreements refer to specific share numbers which are indicative of the new share certificates being issued following the 1993 and 1995 transfers; and the 1998 agreement between Sana and Hassib expressly records in Article 7 that:

> "Both parties declare that they have obtained the agreement of the Board of Directors of the issuer company according to the principles provided for in Article 10 of the Articles of Incorporation and therefore they have agreed to notify the issuer company, a copy of this agreement to be registered in the register of shareholders and consequently to transfer the bare ownership of the sold shares in the name of the Second Party."

92. On the issue of whether the transfers had been recorded in the share register, the judge only had Mr Ladiki's evidence to go on. Mr Noureddin, who was CCG's company secretary in 1993, did not give evidence. The judge said that all of the transfers involving Hassib or Sana appeared to have been recorded on their pages in the share register and that there was no reason to disbelieve Mr Ladiki's evidence about the authenticity of the register. A challenge by Sana to the authenticity of the entries on her own pages was described by the judge as preposterous given the terms of the 1998 agreement and her acceptance that they and the 1993 and 1995 agreements were valid and effective. There was also the difficulty that the allegedly false entries on Hassib's pages corresponded to those on her genuine pages.

93. As to Sana's complaint that the original pages of the register had not been produced for her inspection in London, the judge said:

> "… the entire original register has been offered to Sana's English or Lebanese advisers for inspection in Beirut, where the register is, in Arabic. Such offer was made in March 2014 and repeated in June 2014. Sana could readily have instructed her Lebanese lawyers or other experts (as she did in 2012) to inspect in Beirut, which might be thought to be the most effective and reliable method of inspection in any event. No explanation was advanced as to why such inspection has not taken place, save that Sana wished to have her London advisers carry out the inspection in London. Mention is also made for Sana that the register pages for Suheil and Samir have not been made available. But this is because they had not been requested by Sana. Nor is there any reason to think that they would be at odds with the pages for Hassib and Sana. And, as already indicated, the entire original register has been offered for inspection. There is the additional forensic point that, given the sequential nature of the entries on the register and the lack of challenge to the transfers in 1995 and 1998, the forgerer would have had to have the foresight to leave a perfect gap for the 1993 transfers when making the entries for 1995 and 1998 - an implausible scenario. I do not consider there to be a real

> prospect of successful challenge to the authenticity of CCG's share register."

94. In considering whether the claimant has established a real prospect of success in relation to the share deprivation claim, the judge cautioned herself at the outset against conducting some form of mini-trial on the merits of the claim. The principles are not in dispute. The purpose of the real prospect test is to exclude summarily cases that are fanciful or bound to fail: not to conduct an abbreviated form of trial on the basis of incomplete evidence: see *Standard Bank plc v Via Mat International Ltd* [2013] EWCA Civ 490 per Moore-Bick LJ at [17].

95. Mr Wardell QC for Sana submitted that the judge's starting point was wrong. She was in no position to assess the attractiveness or otherwise of the claim without a trial and her view that the claim was unattractive was based upon a false assumption that the alleged conspiracy necessarily involved treating the taking of steps contemplated by the 1993 and subsequent agreements as steps in the conspiracy. Sana's evidence was that she believes Hassib had never intended to give outright ownership of the shares transferred under the 1993 agreements to Samir and Suheil. She contends that the transfers were purposefully not registered by Hassib prior to his stroke because he had made no final decision about the eventual disposal of his shares. Subsequent changes in the value of his assets would also have necessitated adjustments to ensure that each of his three children obtained equal shares in his estate. In short, the non-registration of the transfers was deliberate. Mr Wardell also challenges the judge's treatment of the payment of US$50m as related to her 1998 transfer of her shares back to her father. The payment, he says, was made to resolve a separate dispute about the articles of association of CCG: not as consideration for the sale of her shares.

96. More particularly, in relation to the question whether Hassib retained ownership of the 399,915 shares at his death, Mr Wardell emphasises that the judge had little or no direct evidence as to whether the requirements for board approval, the re-issue of the shares and the registration of the transfers had been complied with. Mr Ladiki's involvement with CCG post-dates the relevant events and the judge was left to rely on statements in the 1998 agreements that board approval had been given to those transfers as confirmation that it had been given to the earlier transfer in 1993.

97. Mr Wardell submits that Mr Ladiki's professed belief that the entries in the share register were authentic was not a sound or adequate basis for a determination of that issue on a summary basis. As an existing employee of CCG, he is not an independent witness and no board minutes, for example, were initially produced to substantiate board approval of the 1993 transfers. The judge felt able to overcome this difficulty, in part, by relying on evidence from one of the defendants' Lebanese lawyers, Mr Abirached, that there was compliance with the requirement for board approval under Article 10 if all those entitled to attend and vote at the board meeting had approved the transfer. But even if this is correct as a matter of Lebanese law, the factual question of whether such consent was actually given remains. Although Said signed the various agreements, there is no reference in the agreements, says Mr Wardell, to consent being given by CIC and the evidence is that the shareholders in CIC included not only Said but also Toufic and Samer. No-one suggests that they were ever consulted. Finally, whilst board minutes approving various share transfers, including the 1993 and 1995 agreements, have now been disclosed, the claimant challenged the authenticity of those minutes.

98. Similar points are made about the re-issue of the shares. The defendants produced no direct evidence that new share certificates had been issued in respect of the 1993 transfers. Again the judge relied on Mr Ladiki's opinion that the necessary steps had been taken or could be presumed. Part of the defendants' case on this issue was based on a pledge of shares by Suheil in 1998 to Arab Bank (Switzerland) Limited which the judge refers to in [116] of her judgment. There is a letter from the bank to Suheil dated 6 April 1998 which refers to the receipt of share certificates numbers 198 to 200152. Mr Wardell says that Sana was not given a proper opportunity to deal with this evidence which was relied on by the defendants only in reply before Carr J but that the documents produced are in fact inconsistent with each other. In one letter dated 3 April 1998 Mr Noureddin refers to Suheil having pledged 199,955 of his shares in CCG but in a letter from the bank to Suheil of 6 April refers to the share certificates mentioned above being credited to his account. The share register extract produced by the defendants also refers to bare ownership of shares nos. 150,083 to 240,062 having been transferred in 1993 to Samir rather than to Suheil. The judge, to be fair, seems to have placed very little weight on these documents but the inconsistencies, says Mr Wardell, make them inherently unreliable as the basis for any finding that new certificates had been issued.

99. Sana challenges the authenticity of the relevant entries in the share register. It is common ground that this formality has to be complied with and cannot be satisfied simply by demonstrating the consent of all interested parties as in the case of board approval. Mr Wardell submits that there is a real prospect of showing that the entry in relation to the transfers dated 18 August 1993 is not genuine and that it was made after Hassib's death. As mentioned earlier, the judge effectively discounted the evidence of the entry in the Commercial Registry as probative of the ownership of the 399,915 shares by Hassib at the time of his death treating it instead as consistent with his continued enjoyment of a usufruct. But Mr Wardell contends that this conclusion was not open to the judge at an interlocutory stage and that the Commercial Registry information was important evidence which tended to suggest that the entries in the share register had been falsified. He points to the fact that the Registry certificate of the entry was produced in response to a request from Mr Noureddin for details of the "names of the shareholders with their shares" and that there was nothing in the request to limit it to details of usufruct interests. The certificate produced refers in terms to CCG having a share capital of US$100m "divided into one million shares of 100 USD each distributed according to the attendance sheet added to the General Assembly held on 30 May 2009 as follows: Hassib Sabbagh 399,915 shares …". The same point can be made in relation to the attendance sheet which records Hassib's entry in the column headed "Number of Shares".

100. Mr Wardell also refers to other material which he says casts doubt on the reliability of the share register. Hassib's page in the register for 20 May 1998 refers incorrectly to the transfer of a usufruct rather than the bare ownership of the shares. The register also refers to the transfer to Sana in 1995 of numbered shares which appear to belong to Said rather than Hassib. More generally, the judge was wrong, he says, to have criticised Sana's advisors for not travelling to CCG's offices in Beirut to inspect the register. There was evidence of the security risks involved which made the requirement to inspect the register in loco unacceptable. It was open to the defendants to bring the register to London for inspection and expert examination but they chose not to do so.

101. Of more direct relevance to the claim that relevant entries may have been forged is the evidence before the judge that cast into doubt the authenticity of other documents. The judge herself noted that in relation to a 2004 power of attorney purportedly signed by Hassib after his stroke there were concerns about the circumstances surrounding its execution. There is also a serious issue about the agreement under which Samir and Suheil transferred their shares to HH. The document is dated 16 July 2006. But this is inconsistent with the 2011 tax filing referred to earlier which refers to Hassib owing 399,915 shares in 2010. The defendants have changed their position on when the 399,915 shares were transferred to HH. The original position of the defendants in 2013 was that the brothers retained bare ownership of the shares up to Hassib's death and that the shares were transferred to HH in July 2010. But in response to a request for information in 2014 their solicitors stated on instructions that HH had obtained bare ownership of the shares in 2006. The defendants' position is that the original information was erroneous but the judge dismissed the discrepancy as irrelevant to the share deprivation claim because Hassib was not a party to the 2006 agreement and received no shares under it. Mr Wardell says that this misses the point. If there is at least an arguable case that the 2006 agreement was backdated in 2010 to before Hassib's death this demonstrates a propensity on the part of the defendants to manipulate documents for their own purposes and supports Sana's case that the share entries in the register may similarly have been falsified. We were also referred to the minutes of a meeting of the board of CCIC held on 25 October 2002 which Hassib is recorded as having attended. The meeting took place at the company's offices. Mr Wardell submitted that this was after Hassib's stroke and that it was most unlikely that he would have been able to attend. There is also a power of attorney which purports to have been executed and then registered by Hassib before a notary at the Jordanian Embassy in Athens. Mr Wardell submits that Hassib could not have travelled to Athens in 2004 given his state of health and that both these documents carry with them a strong suspicion that the details they purport to record were false. If so, this supports Sana's case that the defendants have a propensity to produce false minutes and other documents when it suits them.

102. For these reasons, Sana contends that she does have a realistic claim to challenge the authenticity of the share register and that the judge was wrong to attempt to resolve the issues on the documents against her on a summary basis. To establish liability on the part of Wael, she of course needs to show that he had the requisite knowledge that Hassib had retained ownership of the 399,915 shares as at his death. The pleaded claim relies on all of the defendants having become aware of the situation at or shortly after Hassib's death on 12 January 2010. In part this is based on the timing of the request to the Beirut Commercial Registry by CCG which was made on 13 January. The judge said that this was hopeless because the request was prompted by the opening of the two bank accounts referred to in Mr Ladiki's evidence and its proximity to Hassib's death was therefore fortuitous. The claimant's reliance more generally on Wael's connection with the other defendants through CCG and what is referred to in the judgment as the Masri litigation provided no basis, she said, for inferring knowledge on the part of Wael of Hassib's ownership of the shares.

103. Mr Wardell's response to this is that the judge approached this question too narrowly. What the judge should have asked herself, he says, was whether Wael is likely to have been informed once the problem of non-registration had been discovered. The records show that he had been a member of the board of CCG in 2002 and subsequent years

and had attended shareholders meetings in 2010. The overwhelming likelihood is that he would have been informed of the position and become involved in the steps taken to deal with the transfer and registration of the shares in the name of HH.

104. Although referred to as the tort of conspiracy in these proceedings, Wael and the other defendants are being sued for what under Lebanese law or Greek law amounts to intentional wrongdoing. Sana must establish that Wael and the others were aware that the requisite corporate formalities (including registration of the shares in the names of Samir and Suheil) had not been completed and that steps were taken by them to back-date the requisite entries in the share register. This is of course an allegation of dishonesty but Mr Wardell does not shrink from that. He says that a significant failing by the judge was not to import into her consideration of these issues the conclusions which she had reached in relation to the asset misappropriation claim. The defendants had conceded that there were triable issues on Hassib's capacity following his stroke to authorise the transactions complained of and as to the use of a power of attorney to carry out the transactions. But they continued to dispute the merits of the claim on the basis that knowledge of and involvement in the alleged misappropriations of Hassib's property could not be attributed to Wael. The judge held that there was a real issue to be tried that Wael was complicit in the alleged wrongdoing.

105. The judge said that her conclusions about Wael's knowledge in relation to the asset misappropriation claim and those in relation to the share deprivation claim were not inconsistent because the nature of the alleged wrongdoing in each case was different. The impropriety in the impugned transactions would have been apparent to Wael whereas the failure by Hassib and others to complete the formalities for the transfer of the shares was not. Mr Wardell submits that this misses the point. Wael's involvement with the defendants and the affairs of CCG means that there was an equal likelihood that once the fact of non-registration had been discovered, with its consequences for Samir and Suheil, these matters would have been brought to his attention. His arguable willingness to endorse the misappropriation of Hassib's own property is a strong indicator that he would have had no difficulty in accepting or participating in the retrospective alteration of the share register in order to defeat Sana's claim. The imputation of such conduct to Wael cannot be excluded in the light of all the other material.

106. Mr Hunter QC provided us with a detailed riposte to a number of these arguments. He emphasised that Sana does not dispute the validity of the 1993-1998 agreements and that the transfers of shares with which we are concerned were all provided for under those agreements. In particular, her concession that the agreements in 1995 and 1998 were valid and effective necessarily involved an acceptance that by 1995 Samir and Suheil were the owners of the shares acquired under the 1993 agreements. The 1995 agreements contained recitals which confirmed in terms that the transferor "now owns" the shares to be transferred to Sana. Mr Hunter accepts that Sana might in signing the agreements have assumed that the necessary formalities were complied with. But Samir and Suheil would have known what the true position was because they were required to sign the relevant pages of the share register. As the judge observed, the 1998 agreements give the numbers of the shares to be transferred which indicate that the formalities must have been complied with. They correspond to the numbers on the share registers and many of the shares transferred by Sana to her father were derived from the shares previously held by her brothers after the 1993

agreements. Sana, Mr Hunter says, has always made clear that the only agreements she challenges for non-compliance with the requisite formalities are those in favour of her brothers. But the shares she transferred to Hassib allegedly in return for the US$50m were originally part of those holdings. (We should interpose that, leaving aside whether the position had previously been obscure, on appeal Mr Wardell was clear that Sana's submission was that the formalities were also unfulfilled in relation to the 1993 agreement with her and that *all* the share entries were inauthentic.)

107. In relation to the share register, Mr Hunter says that all of the 1993 to 1998 transfers are recorded in the register and that Hassib and Sana's pages have been produced. The entries are signed by Hassib and Said and are stamped. Inspection of the entire register was offered in Beirut. There is, he says, no expressly pleaded allegation of forgery although that claim is made in one of the witness statements and at the hearing before the judge Lord Grabiner QC (for Sana) said that the authenticity of the register is disputed. But if Sana's page is accurate and effective then so is Hassib's which has corresponding entries. Put simply, there is no basis, says Mr Hunter, for suggesting that the whole of the register has been re-created which is what the judge would had have to find in order to meet the point made by her in [120] of her judgment that given the sequential nature of the entries and the lack of any challenge to the transfers in 1993-1998 a person intending to forge only the 1993 entries would have had to have left a gap when making the subsequent entries. Inaccuracies in board minutes and other documents are not sufficient in themselves to prove the alleged conspiracy.

108. Despite the force and attractiveness of these submissions, we remain of the view that the judge did conduct a mini-trial in respect of the allegations of non-compliance with the corporate formalities in respect of the 1993 share transfers and in respect of the allegations of forgery and knowledge which form a necessary part of the claim against the anchor defendant. Although the claim may not, on the material currently available, appear to be a strong one, the judge was in our view over-ambitious in attempting to resolve these issues simply as questions of fact having found that there were triable issues both in respect of whether the 1993 agreements took effect as gifts as opposed to sales and in relation to the issue of whether Sana is estopped by the 1998 agreement from challenging her brothers' (and therefore HH's) title to the shares.

109. The claims that the formalities of board approval, the issue of new shares and registration were not completed in respect of the 1993 transfers are not precluded factually by the form and contents of the later agreements. Nor are they excluded by Sana's concession that the agreements were valid and effective according to their terms. If arguably gifts the agreements were not effective to transfer title unless the requisite formalities had been completed by Hassib's death. The bulk of the shares were unaffected by the 1995 and 1998 agreements. We are concerned with the shares which Hassib transferred to his sons under the 1993 agreements and the transfer of title depends upon an examination of the share register and the other original documentation full disclosure of which has yet to occur. The judge relied upon the evidence of Mr Ladiki to fill many of these admitted gaps but that is not in our view a satisfactory basis for the determination and striking out of the share deprivation claim on a summary basis.

110. We accept that forensic points can be made: on one view, the later share transfer agreements only make sense if the earlier agreements were fully performed (for

example, if Sana is correct that Hassib deliberately retained ownership of the shares throughout, there was simply no need for the 1998 agreement to transfer those same shares 'back' to Hassib); the fact that the 1995 agreements contain share numbers in respect of shares derived from the brothers' original 1993 holdings; and that the entries in the Beirut Commercial Register is at best secondary evidence about the true state of the share register. But these points require in our view to be resolved at trial or at the very least after full disclosure and inspection and are simply not suitable for the detailed forensic examination to which the judge submitted them on an interlocutory application.

111. We consider that the specific issue about Wael's knowledge is, if anything, even more obviously a triable issue in the light of the judge's findings about his arguable participation in the misappropriation of Hassib's property during his lifetime. Although the share deprivation claim arises in respect of a later period in time, it seems to us that there is a real prospect (based on the judge's earlier findings) of establishing that if the shares had not yet been registered in the brothers' names by the time of Hassib's death this would have come to Wael's attention given his close involvement in the affairs of CCG and that he may well have been prepared to support the brothers' efforts to secure what they regarded as their own even if that involved being complicit in a falsification of the register and possibly other documents. We make it clear that we are not making any such findings. But the judge was wrong to treat the allegation as unarguable.

112. In these circumstances we consider that there is a real prospect of establishing the share deprivation claim against Wael as the anchor defendant if this is required in order to exercise jurisdiction under Article 6(1). We do not propose to deal at any length with the two issues which the judge decided in the claimant's favour (whether the 1993 agreements arguably took effect as gifts and whether Sana is estopped by virtue of the 1995 and/or 1998 agreement) because we consider that the judge was right for the reasons which she gave to find that neither was capable of determination on a summary basis.

113. The first of these issues requires the Court to consider Sana's argument that, although expressed in terms as sales agreements, the 1993 agreements operated as gifts and ceased to have effect on Hassib's death. This is a question of Lebanese law and the judge had evidence from a Lebanese expert (Professor Bacache) that in Lebanon contracts between father and son are presumed to be gifts unless the contrary is proved and cease to have effect on the donor's death. The defendants have provided expert evidence to the contrary including evidence from a Professor Najm that the re-characterisation of a sale agreement as a gift depends upon an order being made by the court and that no application for such an order has yet been made. The judge was attracted by this point but considered that it was at least arguable that an application for re-characterisation could still be made. We can see nothing wrong in her treatment of that as a triable issue.

114. The estoppel argument is only effective to bind Sana against the other parties to the relevant agreement relied on. Since the share deprivation claim is principally directed at the position of her brothers, the focus of the argument has to be on the acknowledgments of title in the 1995 agreements. The point was raised in the defendants' opening submissions to the judge and she decided that it was not

appropriate to hear argument on the point in circumstances where Sana had not had the opportunity of adducing expert evidence on Lebanese law to meet the point.

115. Mr Hunter has submitted that the position would be clear under English law and that, in the absence of evidence to the contrary, the Court should assume that the position would be the same under Lebanese law. The judge declined to take this course and there has been no application by the defendants to adduce any additional expert evidence for the purposes of the appeal. Instead Mr Hunter referred us to the same material served in the Lebanese arbitration which touches on this issue. But in our view this is not a satisfactory way of deciding a point of foreign law. We consider that the judge made a case management decision which was not wrong in principle and that there is no basis on which we can properly interfere with her refusal to entertain this argument in support of the defendants' application. It is not therefore necessary to deal with Mr Wardell's other argument that the 1995 agreements on their true construction do not contain an acknowledgement of title sufficient to raise the alleged estoppel.

116. It follows that for the purposes of Article 6(1) Sana does in our view have a real prospect of establishing the share deprivation claim against Wael as the anchor defendant. Accordingly, issue 4 does not arise for determination.

The arbitration issues

Issue 6: was the judge right to hold that the asset misappropriation claim was not based on CCG's articles of association so that neither Sana (nor, if he were still alive, Hassib) would be bound to submit the claim to arbitration under Article 45 in relation to the asset misappropriation claim?

Issue 7: whether the share deprivation claim should also be stayed for arbitration under Article 45 or, in the alternative, under the 1993 Agreements.

<u>The submissions of the parties</u>

117. As we have said, the defendants submitted that both the asset misappropriation claim and (if we found it to be arguable) the share deprivation claim must be stayed for arbitration. On appeal we were concerned only with the question of whether a mandatory stay must be granted in respect of all or part of the two claims, under section 9 of the Arbitration Act 1996. It was agreed that any question of a discretionary stay over the balance of any issues which were not mandatorily stayed would be remitted to the Commercial Court.

118. The basis for the defendants' submission that the asset misappropriation claim, or key parts thereof, had to be stayed was Article 45 of CCG's articles of association. Strictly there are two different versions of this arbitration clause, under the 1984 and 1997 articles of association. However, they are substantially identical and it is sufficient to quote only the former:

> "Disputes
>
> Every dispute arising during the course of the existence of the company or during its liquidation, whether between

> shareholders themselves or between shareholders and the company itself, shall be solved through mediation or else through arbitration according to the regulation put in place by the First Board of Directors [for this purpose], provided that the general shareholders assembly has approved it.
>
> Disputes are divided into two kinds:
>
> A) Individual disputes in which the aggrieved party has the right to file a claim according to the directives of Article 166 of the Trade Act against the company, and which the shareholders are not permitted to halt through the balloting process via the general shareholders assembly for the purpose of releasing from responsibility the members of the Board of Directors
>
> B) Disputes involving the general interests of the company; these cannot be directed against the Board of Directors or against one of its members except in the name of and on behalf of a group of shareholders, and in accordance with a decision from the regular general shareholders assembly."

119. In relation to the share deprivation claim, the defendants argued that it must (at least in large part) be stayed under Article 45 or, alternatively, under Article 7 of the 1993 Agreements, which provided:

> "Any dispute, controversy or question of interpretation arising under, out of, or in connection with this Agreement, or any breach or default hereunder shall be submitted to, and determined and settled by, arbitration in accordance with the following procedures".

120. It is therefore convenient to consider in turn the potential application of:

    i) Article 45 to the asset misappropriation claim;

    ii) Article 45 to the share deprivation claim; and

    iii) the 1993 Agreements to the share deprivation claim.

121. Each of these possible instances of a mandatory stay give rise to two questions: first, is Sana bound by the arbitration clause under Lebanese law; and, second, is the claim within the scope of that clause? Both Mr Edey QC, on behalf of the defendants, and Mr Rabinowitz, for the claimant, approached the matter on this basis, as indeed had the judge at [233].

Article 45: asset misappropriation claim

122. It was common ground that the only way by which the claimant could be bound by Article 45, in relation to the asset misappropriation claim, was in her capacity as Hassib's heir. Sana was not, and nor did she claim an entitlement to have been, a shareholder in CCG at any time relevant to this claim.

123. Moreover, as the judge recorded at [246]-[248], the parties' experts on Lebanese law were in effect agreed that Sana would only be bound insofar as the asset misappropriation claim was based on the contract containing the arbitration clause; that is, the articles of association. Therefore, regardless of the scope of Article 45, the claimant would only be bound by it if the asset misappropriation claim was based on CCG's articles of association.

124. In our view the asset misappropriation claim is not based on CCG's articles of association, either when made by Sana in her own right or when brought in her capacity as Hassib's heir. Accordingly, Sana is not bound by Article 45 and questions of the scope of the clause fall away. As the judge found, the proper characterisation of the asset misappropriation claim, evaluated as a matter of substance and not form, is a claim based on the general Lebanese law concerning an alleged conspiracy to deprive Sana of what is said to have been Hassib's property. The claim is not concerned with breaches of the articles of association, and is essentially no different from a (hypothetical) claim that the defendants conspired to take other property from Hassib which Sana would otherwise have inherited. This is not merely due to the fact that the claim is framed in non-contractual terms, nor is it a matter of clever pleading. The claim is in substance different from a claim based on the articles of association.

125. For these reasons, we also agree with the judge that the claim is not an accounting claim in relation to Hassib's "shareholder account", and that it is not appropriate to siphon off a part of this claim for a mandatory stay. To the extent that there is an accounting exercise, it relates to a quantification of the claim based on the general law. Nor, similarly, is the claimant asserting a right to receive dividends qua shareholder: rather, the claim is that dividends which were declared were improperly diverted away from Hassib (and thus Sana).

126. Finally, in relation to why Sana is not bound by Article 45, it is no answer for the defendants to suggest that the judge overlooked or failed to apply the evidence of Professor Slim to the effect that the asset misappropriation claim could only have been brought as a claim in contract in Lebanon. The obvious and dispositive reason is that the defendants did not challenge on appeal the judge's conclusion that the asset misappropriation claim, as framed as a non-contractual claim, was arguable. This contention therefore simply goes to the merits of the asset misappropriation claim as a matter of Lebanese law. Secondarily, it follows from our conclusion above concerning characterisation that, in fact, the asset misappropriation claim could not have been brought as a contract claim based on rights derived from the articles of association.

127. It follows that it is not necessary to consider whether the asset misappropriation claim falls within the scope of Article 45. However, our view is that, even if the claimant had been bound by the arbitration clause, the asset misappropriation claim would not have been within its scope. This is because the scope of Article 45 is limited by Article 762 of the Lebanese Code of Commerce, which prescribes that arbitration clauses are only valid insofar as they relate the interpretation, enforcement or performance of the contract in question. Moreover, Article 45 is expressly confined to the two kinds of disputes identified as 'A' and 'B', and the asset misappropriation claim does not fall into either category.

Article 45: share deprivation claim

128. The claimant could only be bound by Article 45 if the share deprivation claim was brought as Hassib's heir or if Sana was claiming to be entitled to be recognised as a shareholder.

129. In our view, Sana is again not bound by Article 45. It is clear that she is not claiming as heir: the claim was in no sense inherited from Hassib, and indeed Hassib could not have brought the claim which the claimant does bring. The claim is not based on the articles of association, but on the general law. Similarly, we are inclined to accept that Sana is not claiming an entitlement to be recognised as a shareholder, but rather is claiming that the defendants have deprived her of this entitlement. The relationship is tripartite: whilst Hassib would have been bound to arbitrate an assertion that he was entitled to be recognised as shareholder, as against the defendants, this cannot bind *Sana* to arbitrate her claim even if her claim depends in part on the question of Hassib's ownership, since she does not claim on Hassib's behalf.

130. In any event we would also accept that the share deprivation claim is, like the asset misappropriation claim, outside the scope of Article 45 since the arbitration clause is confined to the two specified kinds of disputes.

1993 Agreements: share deprivation claim

131. Once again, in our view Sana is not bound by the arbitration clauses in question since she was not a party to the agreement, and nor does Sana seek to enforce or defend claims on the contract as Hassib's heir. We would also reject the argument that Sana must necessarily bring the claim as heir in order to be able to contend that the 1993 Agreements are properly characterised as gifts. On the very limited expert evidence bearing on this point, it appears that this is a procedural requirement of Lebanese law which does not affect the proper characterisation of the claim.

132. Further, and finally, the share deprivation claim would fall outside the scope of the arbitration clauses in the 1993 Agreements, since the claim does not relate to the interpretation, enforcement or performance of the contract in question, which are the only proper subjects of the clause under Article 762 of the Lebanese Code of Commerce.

Conclusion in relation to the arbitration issues

133. For the above reasons, which reflect those of the judge, we decide issues 6 and 7 in Sana's favour and refuse to grant a mandatory stay of the proceedings.

The succession issue

Issue 5: is the subject matter of the claim succession within the meaning of Article 1(2)(a) of the Brussels Regulation?

134. As a separate challenge to being joined under Article 6(1) of the Brussels Regulation and the Lugano Convention the defendants submit that the principal subject matter of both the share deprivation claim and the asset deprivation claim is succession. If so, the claims fall outside the Regulation and Convention by virtue of Article 1(2)(a). Logically this is a preliminary issue about jurisdiction which should be decided at the

outset. But we have decided to deal with the issues in the order in which they were argued.

135. The judge rejected the argument that either of the claims fell within the concept of succession as set out in Article 1(2). She said:

> "272. Put simply, Sana's claims are for tortious conspiracy (or the Lebanese or Greek law equivalents) on the part of the Defendants to deprive her father and/or herself of valuable assets. The root of her entitlement (and an essential element of her claims) may be her position as heir and her inheritance but that status is not the principal subject matter. There is in fact no dispute that as Hassib's daughter she is entitled to bring the asset misappropriation claim as Hassib's heir or her own claim on the asset misappropriation claim to a one third share of Hassib's assets on his death or on the share deprivation claim. No relevant issue of Lebanese succession law arises in these claims, and I was not taken to any expert evidence in this regard.
>
> 273. As already indicated, I do not accept the Defendants' central submission that the claim for conspiracy is merely a "*bolt-on*". It is a substantive claim which carries with it significant additional hurdles on the merits on which the Defendants heavily rely elsewhere in their attacks on the claims (for example as to knowledge). The Defendants cannot seek to reap the benefit of that but then seek to escape its burden. If the focus is to be on the nature of the rights being litigated, the rights sought to be protected are the personal rights of Hassib, through Sana as his heir, and of Sana herself not to be defrauded. I do not accept that those rights are purely incidental to the question of ownership. They are central. Nor do I accept that the fact that Sana may claim by way of remedy on the alleged conspiracy delivery up of shares in, for example, S & K (to the extent that she still does, since she withdrew her claim for delivery up of shares in CCG), or an account, alters the fact that the focus of the proceedings is the alleged conspiracy."

136. Mr Layton QC for the defendants submits that the judge has failed in her analysis of the subject matter of the claims to identify their substance rather than their form and has misunderstood the correct principles of EU law which govern the characterisation of the claims.

137. The relevant provisions of the Brussels Regulation and the Lugano Convention are identical and, for convenience, we shall concentrate on the Regulation. Article 1 provides:

> "1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

> 2. The Regulation shall not apply to :
>
> a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; …"

138. There is no definition of succession in the Regulation but by way of background we were referred to the Jenard Report which was the explanatory report provided to the governments of the member states in relation to the Brussels Convention which was signed in September 1968. The report was prepared by the Committee who drafted the Convention and takes the form of a commentary on its terms. In the section on succession the report notes the views of some consultees that a regulation for the recognition and enforcement of judgments on matters relating to succession would in due course become increasingly necessary within the EC but that it would be necessary first to unify the relevant conflict rules of the member states. The Committee also drew attention to the differences between member states in the laws governing succession.

139. In support of the submission that the Court in applying the Regulation should look to the substance rather than the form of the claim, Mr Layton referred us to the well-known decision of the ECJ in *Marc Rich & Co. A.G. v Societa Italiana Impianti P.A.* [1991] ECR I-3855; [1992] 1 Lloyd's Rep 342 in which the issue was whether English proceedings commenced to enforce an arbitration agreement in a contract were excluded from the Convention by Article 1(4). One of the issues was whether the exclusion of "arbitration" from the Convention extended to proceedings in which the existence or validity of the arbitration agreement was also in issue. The Court said:

> "26. Those interpretations cannot be accepted. In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.
>
> 27. It would also be contrary to the principle of legal certainty, which is one of the objectives pursued by the Convention (see judgment in Case 38/81 *Effer v Kantner* [1982] ECR 825, paragraph 6) for the applicability of the exclusion laid down in Article 1(4) of the Convention to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties.
>
> 28. It follows that, in the case before the Court, the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator.

> 29. Consequently, the reply must be that Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation."

140. *West Tankers Inc v Allianz SpA*: Case C-185/07; [2009] 1 AC 1138 concerned the ability of the English Court to grant an anti-suit injunction restraining the continuation of Italian proceedings on the ground that they were commenced in breach of an arbitration agreement which required all disputes to be determined by arbitration in London. The House of Lords referred the case to the ECJ for a preliminary ruling as to whether the claim for an anti-suit injunction was compatible with the Brussels Regulation. The argument for the claimant was that such proceedings were excluded from the scope of the Regulation because they fell to be treated as "arbitration" under Article 1(2)(d).

141. The ECJ held that the injunction proceedings were incompatible with the Regulation because they prevented the Italian Court which was seized of the proceedings between the parties from exercising its jurisdiction in order to determine whether the claimant's objection to these proceedings was well founded under Article 1(2)(d). But for our purposes the decision is relevant for its re-affirmation of the jurisdictional test in *Marc Rich*:

> "21. Both the claimant and the United Kingdom Government submit that such an injunction is not incompatible with Regulation No 44/2001 because article 1(2)(d) thereof excludes arbitration from its scope of application.
>
> 22. In that regard it must be borne in mind that, in order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject matter of the proceedings: the *Marc Rich case [1991] ECR I-3855*, para 26. More specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect: the *Van Uden case [1999] QB 1225*, para 33.
>
> 23. Proceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No 44/2001."

142. The next case we were referred to was *Lechouritou & Others v Dimosio tis Omospondiakis Dimokratias tis Germanias* (Case C-292/05) [2007] 2 All ER (Comm) 57 in which the claimants sought compensation from Germany for loss arising from a massacre carried out by German soldiers in 1943 during the occupation of Greece. The ECJ was asked for a ruling on whether the action fell within the scope of "civil matters" referred to in Article 1 of the Brussels Convention. The established jurisprudence of the Court is that acts carried out by a public authority in the exercise of its public powers fall outside the ambit of the Convention even if compensation

arising from those acts is sought by means of a civil action. Such proceedings are not within the objectives and scheme of the Convention:

> "39. Having regard to the case law recalled in paragraph 30 of this judgment, a legal action such as that brought before the referring court therefore does not fall within the scope *ratione materiae* of the Brussels Convention as defined in the first sentence of the first paragraph of Article 1 thereof.
>
> 40. Such an interpretation cannot be affected by the line of argument, set out in greater detail by the plaintiffs in the main proceedings, that, first, the action brought by them before the Greek courts against the Federal Republic of Germany is to be regarded as constituting proceedings to establish liability that are of a civil nature and, moreover, covered by Article 5(3) and (4) of the Brussels Convention, and second, that acts carried out *iure imperii* do not include illegal or wrongful actions.
>
> 41. First of all, the Court has already held that the fact that the plaintiff acts on the basis of a claim which arises from an act in the exercise of public powers is sufficient for his action, whatever the nature of the proceedings afforded by national law for that purpose, to be treated as being outside the scope of the Brussels Convention (see *Rüffer's* case (paras 13, 15). The fact that the proceedings brought before the referring court are presented as being of a civil nature in so far as they seek financial compensation for the material loss and non-material damage caused to the plaintiffs in the main proceedings is consequently entirely irrelevant."

143. The judgment in *Lechouritou* is relied on by Mr Layton to re-inforce his submission that the proper characterisation of the claim depends upon the identification of the underlying right which the proceedings seek to enforce. The judge, he says, was wrong to accept Sana's formulation of her claim as one in tort as being determinative of this issue. The rights which she is seeking to vindicate are her rights as an heir to her father's property: not her right not to be the victim of the defendants' allegedly tortious behaviour. The fact that she has chosen for jurisdictional reasons to seek to enforce those rights by way of a claim in damages for conspiracy cannot be used to mask the true nature of the rights which she seeks to vindicate.

144. Similar statements of principle can be found in *Realchemie Nederland BV v Bayer CropScience AG* (Case C-406/09); [2012] Bus LR 1825 (where committal proceedings for the breach of an injunction not to infringe a patent which resulted in a fine were treated as within the scope of "civil and commercial matters" because they were merely ancillary to the enforcement and protection of private intellectual property rights) and in *Gazdasági Versenyhivatal v Siemens* (Case C-102/15): [2016] 5 CMLR 14 (where by contrast a dispute between Siemens and the Hungarian competition authority about the recovery of interest paid on a fine imposed for anti-competitive behaviour was held to involve the exercise of public or administrative powers and therefore to fall outside the Regulation. The fact that the authority sought to recover the interest by civil action was irrelevant).

145. A case relied on by Sana is *The Commissioners for Her Majesty's Revenue & Customs v Sunico* (Case C-49/12); [2014] QB 391 which concerned an alleged carousel fraud designed to evade output VAT. The defendants who had obtained the benefit of the fraud were all domiciled in Denmark and were not subject to VAT in the UK. The Commissioners therefore sought to recover the fraudulently evaded tax by suing them for damages for conspiracy to defraud. They also commenced parallel proceedings against the defendants in Denmark and obtained attachment orders from the Danish Court in respect of assets of the defendants within that jurisdiction. The defendants contended that since the purpose of the proceedings was the recovery of tax they fell outside the definition of a civil matter in the Regulation.

146. The ECJ held that the legal relationship involved in the claim for damages was not based on public law or the exercise of powers by a public authority because the Revenue had no such powers which they could exercise against the defendants. The claim was based on the tortious conspiracy to defraud. The Court said:

> ".. The claim for damages in question does not accrue to the State in its capacity as an organ of sovereign power. On the contrary, it is based on an alleged infringement of a legally-protected right by the defendants and hence from an act whose victim can in principle be anyone, since suffering an infringement of a legally-protected right is precisely not a genuine sovereign act.
>
> 49. A connection with public powers might, however, arise from the fact that, behind the damages arising, there ultimately lies a tax claim and hence a sovereign relationship that is crucial to the amount of the claim being enforced. The claim for damages corresponds, in terms of its amount, to the value added tax lost. However, in assessing the question whether it is a civil and commercial matter, only the actual subject matter of the dispute must be taken into account, and not its background: see *Préservatrice Foncière TIARD SA v Staat de Nederlanden* (Case C-266/01) [2003] ECR I-4867, para 42."

147. Although these authorities are relied on as identifying the correct approach for the Court to take in characterising a claim for the purposes of Article 1 of the Regulation, there is no European authority which has attempted to define the content of the word "succession". As anticipated by the Jenard Report, there is now a regulation (No. 650/2012) governing succession from which the United Kingdom has opted out. But we were taken to it by Mr Layton for the assistance which he says it provides in determining the scope of the Article 1(2) exclusion.

148. Recitals (9) and (11) set out the intended scope of the regulation:

> "(9) The scope of this Regulation should include all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a

voluntary transfer under a disposition of property upon death or a transfer through intestate succession.

…..

(11) This Regulation should not apply to areas of civil law other than succession. For reasons of clarity, a number of questions which could be seen as having a link with matters of succession should be explicitly excluded from the scope of this Regulation."

149. Succession is then defined in Article 3(1):

"1. For the purposes of this Regulation:

(a) 'succession' means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession;

(b) 'agreement as to succession' means an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement;"

150. Article 21(1) states that the general rule is that the law applicable to the succession as a whole shall be the law of the state where the deceased was habitually resident. Article 23(2) provides that:

"2. That law shall govern in particular:

(a) the causes, time and place of the opening of the succession;

(b) the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner;

(c) the capacity to inherit;

(d) disinheritance and disqualification by conduct;

(e) the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy;

(f) the powers of the heirs, the executors of the wills and other administrators of the estate, in particular as regards the sale of property and the payment of creditors, without prejudice to the powers referred to in Article 29(2) and (3);

(g) liability for the debts under the succession;

(h) the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs;

(i) any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries; and

(j) the sharing-out of the estate."

151. None of these provisions is at all surprising. The elaboration in Article 23(2) of the type of succession issues to which the general rule will apply comprises what one would naturally expect to see in terms of the composition of the estate; the rights of the heirs or beneficiaries under a will or intestacy; and the administration of the estate. But none of the various items is obviously descriptive of a claim by an heir to recover compensation against third parties for the loss which he or she has suffered by the unlawful disposition of the property of the deceased. Nor does the list include, at least expressly, a claim by the deceased's personal representatives or in default by one of his heirs to recover such assets on behalf of the estate. The list is largely restricted to what might be described as technical issues of succession including the distribution of the estate.

152. On the basis that these provisions can be treated as setting the parameters of the succession exception in Article 1 of the Regulation, Mr Layton submitted that they could be applied, at least analogously, to Sana's claims in the present proceedings. Applying the test described earlier, the rights which the action seeks to protect are, he says, those which she possesses as heir and the critical question in the proceedings is what Hassib stood possessed of at his death. Questions about the composition of the estate and the entitlement of Hassib's heirs are all issues of succession under the Succession Regulation. At the very least, he submits they concern the sharing out of the estate: see Article 23(2)(j).

153. A recent decision which touches on some of these issues is that of Henry Carr J in *Winkler & Anor v Shamoon & Ors* [2016] EWHC 217 (Ch); [2016] WLR(D) 101. It concerned a claim against the estate of an Israeli businessman for shares which the claimant alleged had been promised to him by the deceased. The claimant commenced proceedings in England against the deceased's residuary legatees seeking a declaration that he was entitled to the shares and an order for their transfer. The defendants objected to the Court's jurisdiction on a number of grounds including that the claim was in respect of wills and succession and therefore outside the scope of the Brussels Regulation. Henry Carr J held that the exclusion of "succession" from the Brussels Regulation had to be given a meaning that was consistent with the

Succession Regulation and which therefore ensured a uniform application of EU law. The subject matter of the claim was succession because the claimant was in substance seeking to establish his entitlement to succeed to part of the estate. It therefore fell within the definition of succession in Article 3.1(a) of the Succession Regulation and the sub-categories of succession claims specified in Article 23(2)(h), (i) and (j). The claim related to the sharing out of the estate and it mattered not that the claimant had chosen to bring the claim against the beneficiaries rather than the administrator of the estate.

154. Mr Layton submits that in the present case the dispute between Sana and the defendants relates to what assets were in Hassib's ownership at death and whether Sana is entitled to a portion of those shares and other assets. There is no disagreement between the experts as to the relevant principles of Lebanese law which govern title to the deceased's property on death. Unlike English law, there is no concept of an estate which continues after death and until the completion of administration. The deceased's property passes directly to the heirs thus giving them a title to the assets which they can assert in their own right.

155. Sana's claim was originally formulated as what would amount in English terms to a proprietary claim to the shares and the missing assets. But she has now limited her claim (Mr Layton says for jurisdictional reasons) to a personal claim for damages for the loss of the property to which she would otherwise be entitled. There is now no claim against HH, for example, for the delivery up of the CCG shares. The judge, in the paragraphs quoted above, accepted that a claim for damages for tortious conspiracy was not a matter of "succession" because Sana's entitlement to the shares (if part of her father's estate) was not in dispute. The focus of the action is on the fraud of the defendants who have deprived her of her inheritance. Mr Layton says that this misses the point. The core issue is what assets remained Hassib's property at death. Sana is asserting title to those assets against the defendants. The underlying rights which are being protected are her rights as an heir.

156. A significant aspect of the succession issue is whether the judge was right to place the emphasis she did on the fact that there is no challenge by the defendants to Sana's status as one of Hassib's heirs. It is said that the judge was wrong to regard the existence of a dispute about entitlement as critical to a determination of whether the subject matter of the claim is succession. A dispute as to whether certain assets formed part of the estate was sufficient to bring the claim within the succession exception.

157. The judge refers in her judgment to various decisions about the exclusion of bankruptcy from the Regulation. In *Gourdain v Nadler* (Case 133/78) [1979] ECR 733 the ECJ at [4] said:

> "If decisions relating to bankruptcy and winding-up are to be excluded from the scope of the convention, they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for the "liquidation des biens" or the "reglement judiciaire".

158. In *Re Hayward* [1997] 1 Ch. 45 Rattee J had to consider whether a claim by a trustee-in-bankruptcy to a half share in a property which belonged to the bankrupt was excluded from the Brussels Convention. He said:

> "The only connection between these proceedings and bankruptcy, it seems to me, is that the title sought to be established by the trustee depends, as a first step, on the fact that, as trustee in bankruptcy under the English statute, the trustee is entitled to whatever property was vested in Mr Hulse at the date of the bankruptcy. That does not, in my judgment, make bankruptcy the principal subject-matter of the proceedings…"

159. It seems to us that the central question is whether the subject matter of the dispute is to be regarded as being whether the CCG shares and the other assets formed part of Hassib's estate at death or whether the claim to recover the value of those assets from the defendants is a claim for damages in tort. In one sense the answer is that it is both in that the damages claim (particularly the share deprivation claim) depends upon the Court making a finding that the shares and other assets remained Hassib's property at his death. To succeed however in the action, Sana must establish that there was intentional wrongdoing on the part of one or more of the defendants so as to make them liable for the value of the relevant assets.

160. We can see the force of the argument that proceedings which seek to establish no more than whether particular assets do or do not form part of an estate can be regarded as a matter of "succession" within the Brussels Regulation just as the claim that was made to the shares in *Winkler v Shamoon*. But this is not a claim against the estate and if the claim is brought in tort or deceit to recover the value of assets to which Sana as heir has title then it becomes more difficult to see why that should be treated as a matter of succession simply because the claimant's title derives from the Lebanese law on heirship as opposed to being based on a contractual purchase or inter-vivos gift. By the same token, it would be difficult to characterise a claim by an heir to recover property stolen from her by an unconnected third party as succession simply because she had inherited it. The same would apply to a claim by an estate to recover the property of the deceased which a third party had misappropriated. The nature of the rights being protected by the action is the ownership by the heir or administrator of the relevant asset: not their right to succeed to or administer the estate. Why, one asks, should the analysis be any different merely because the alleged misappropriation has been carried out by defendants who include the other heirs or beneficiaries?

161. If one applies the test of identifying the nature of the rights which the proceedings serve to protect, it seems to us that this is undeniably Sana's ownership of any shares or other assets which Hassib held at his death. The fact that in order to determine the scope of the claim it is necessary first to decide whether specific assets such as the shares were still owned by Hassib when he died is not sufficient in itself to characterise the subject matter of the claim as succession. That much is clear from the judgment in *Marc Rich*. Nor do we accept Mr Layton's submission that the fact that Sana's rights derive from her position as one of her father's heirs is sufficient in itself to designate the claim as a matter of succession. The source of the ownership is irrelevant to the nature of the claim. In terms of legal effect, it is no different from the

title of the trustee-in-bankruptcy in *Re Hayward*. The subject matter of the dispute is not whether Sana is an heir, but whether the defendants have misappropriated her property.

162. If one looks to the Succession Regulation for assistance as to the scope of the succession exception this, in our view, merely serves to confirm the result of applying the jurisdictional test. We do not accept that Sana's claim can be described as the determination of the disposable part of the estate or its sharing out. It seems to us that those sub-categories are descriptive, as we said earlier, of issues about entitlement and administration which are not in issue in these proceedings. For these reasons, we consider that the judge was right to reject the objections to jurisdiction based on the claim being a matter of "succession".

HH

Issue 8: should the joinder of HH under CPR 6.37 as a "necessary or proper party" be allowed to stand now that Sana no longer seeks an order for the re-transfer of the CCG shares

163. The judge indicated that she would have upheld the order for service out on HH on the basis that it is alleged to have been a party to the conspiracy to deprive Sana of her share of her father's property and that not to join the company as a defendant to the English proceedings would create the risk of inconsistent judgments in different jurisdictions. The defendants say that the judge left out of account a critical factor which is Sana's decision no longer to seek the re-transfer of the shares. The fact that HH may also be a relevant source of disclosure is not enough in itself, it is said, to justify it remaining a defendant to the claim.

164. We are not persuaded that this is a proper issue for us to determine as part of this appeal. The judge did not have to decide the question whether HH was properly joined and it is common ground that any residual issues about forum should be remitted for determination in the Commercial Court. If it is now being said that Flaux J's *ex parte* order should be set aside because of the change in the nature of Sana's case or for any other reason, that is an argument which should take place at the same hearing.

Disposition

165. For the above reasons we allow this appeal.

Lady Justice Gloster:

166. Paragraphs 167 – 220 below set out my minority view in relation to issues 1 and 4, namely the requirements of Article 6(1).

The parties' submissions in relation to issues 1 and 4

167. As already stated above, Sana's basic submission on this issue is that it was not necessary to show that the claim against the anchor defendant was arguable in order to comply with the requirements of Article 6(1), and thereby to establish jurisdiction in relation to the non-anchor defendants. I refer to this putative requirement as a "merits test".

168. I also emphasise that that, whilst the defendants submitted that there was a need to show an arguable claim against the anchor defendant, they did not seek to argue that there was an additional need to show that the claims against the non-anchor defendants were also arguable.

169. Mr Rabinowitz QC, on behalf of the claimant, did not shy away from the fact that the existence of a merits test in relation to the claim against the anchor defendant represented the "well-established practice of the English courts", as the judge had described it at [98] of her judgment. The arguments which he advanced as to why, nevertheless, a merits test did not form a part of Article 6(1) may be summarised as follows:

i) There was clear and binding CJEU authority that the merits of the claim against the anchor defendant were irrelevant to the application of Article 6(1). The cumulative effect of the CJEU decisions was that a claimant could use Article 6(1) to establish jurisdiction against the non-anchor defendants, even if the claim against the anchor defendant was, for any reason, not going to proceed. So long as the requirement specified by Article 6(1) was met, the only qualification was that it could not be invoked where the sole purpose of bringing a claim against the anchor defendant was to remove the non-anchor defendants from the courts of their member state(s) of domicile. (I refer to this situation, by way of shorthand, as "fraudulent abuse" of Article 6(1).)

ii) The merits of the claim against the anchor defendant were irrelevant to the requirement of Article 6(1) that the claims against the non-anchor defendants were so closely connected to the claim against the anchor defendant that it was expedient to determine them together to avoid the risk of irreconcilable judgments. Accordingly, that requirement could be satisfied even where the claim against the anchor defendant would not proceed due to a lack of merit. In the discussion below I refer to this as the requirement of a close connection.

iii) Fraudulent abuse of Article 6(1) did not encompass the situation where the claim against an anchor defendant was found to be unarguable, without there having been any contrivance in suing the anchor defendant. Thus, a claimant could rely on Article 6(1) in that situation.

iv) *Aeroflot* held that consideration of the merits of the claims against non-anchor defendants formed no part of the Article 6(1) test, and this analysis also transposed to the merits of the claim against the anchor defendant.

170. Mr Hunter QC, on behalf of the defendants, essentially contended for the inverse of each of those four submissions. The arguments which he advanced as to why a merits test did indeed form a part of Article 6(1) may be summarised as follows:

i) There was no CJEU authority prescribing that Article 6(1) could be used to establish jurisdiction against the non-anchor defendants even where the claim against the anchor defendant would not proceed due to lack of merit. The CJEU authorities only established that Article 6(1) could be invoked where the reason why the claim against the anchor defendant would not proceed was a procedural bar, and that Article 6(1) could not be fraudulently abused (in the sense identified above).

ii) Accordingly, it was permissible for English courts to take the view that the requirement of a close connection was not satisfied if the claim against the anchor defendant would not proceed due to lack of merit. I interpose to comment that Mr Hunter accepted that a merits test was not *mandated* by Article 6(1) but, rather, submitted that it was open to the English courts to incorporate a merits test when verifying whether the specified requirement of a close connection was satisfied.

iii) Bringing a hopeless claim against the anchor defendant was tantamount to fraudulent abuse of Article 6(1).

iv) The decision in *Aeroflot* did not affect the established approach to apply a merits test in relation to the claim against the anchor defendant.

Discussion and determination of issues 1 and 4

171. There are therefore four sub-issues arising in the determination of issues 1 and 4, which I will address in turn. As the scope of argument makes clear, the overarching question is whether there is any principle of EU law which precludes the well-established practice of the English courts to consider the merits of the claim against the anchor defendant. This was the cornerstone of Mr Rabinowitz's submissions that the court should not follow the existing authorities which supported the existence of a merits test. These included several Court of Appeal authorities which had proceeded on the basis that Article 6(1) incorporated a merits test, albeit always in the absence of argument, such as *The Rewia* [1991] 2 Lloyds Rep 325 at [24], [31], [36] in the context of the Brussels Convention. In addition, there is at least one Commercial Court decision to that effect, following argument: *Bord Na Mona* at [83]. Mr Hunter submitted that we should follow these authorities, whether or not they were strictly binding on us.

Sub-issue (i): EU authority

172. Nothing in the language of Article 6(1) itself, or the Brussels Regulation more generally, provides any direct indication as to whether it is permissible to incorporate a merits test within Article 6(1). However, the parties referred to or relied upon a number of CJEU decisions, which it is convenient to consider chronologically.

173. The first important decision is *Reisch Montage v Kiesel Baumaschinen Handels GmbH* (Case C-103/05) [2006] ECR I-6827, [2007] ILPr 10. It was a reference to the CJEU by the Supreme Court in Austria. The question referred was whether a claimant could rely on Article 6(1)

> "when bringing a claim against a person domiciled in the forum state and against a person resident in another Member State, but where the claim against the person domiciled in the forum state is already inadmissible by the time the claim is brought because bankruptcy proceedings have been commenced against him, which under national law results in a procedural bar?".

174. The CJEU held that, despite the fact that the claim against the anchor defendant would not proceed, the claimant could nonetheless use Article 6(1) to establish jurisdiction against the non-anchor defendants. The court's reasoning was expressed at [27]-[30]:

> "27 In that regard, it must be found, first, that [Article 6(1)] does not include any express reference to the application of domestic rules or any requirement that an action brought against a number of defendants should be admissible, by the time it is brought, in relation to each of those defendants under national law.
>
> 28 Second, independently of that first finding, the question referred seeks to determine whether a national rule introducing an objection of lack of jurisdiction may stand in the way of the application of Article 6(1) of Regulation No 44/2001.
>
> 29 It is settled case-law that the provisions of the regulation must be interpreted independently, by reference to its scheme and purpose …… .
>
> 30 Consequently, since it is not one of the provisions, such as Article 59 of Regulation No 44/2001, for example, which provide expressly for the application of domestic rules and thus serve as a legal basis therefor, Article 6(1) of the Regulation cannot be interpreted in such a way as to make its application dependent on the effects of domestic rules.
>
> 31 In those circumstances, Article 6(1) of Regulation No 44/2001 may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant."

Whilst noting that it was not relevant in that case, the CJEU identified at [32] the qualification that Article 6(1) could not be fraudulently abused:

> "[T]he special rule on jurisdiction provided for in Article 6(1) of Regulation No 44/2001 cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled (see, in relation to the Brussels Convention, Case 189/87 *Kalfelis* [1988] ECR 5565, paragraphs 8 and 9, and *Réunion européenne and Others*, paragraph 47). However, this does not seem to be the case in the main proceedings."

The CJEU concluded at [33] that, in light of these considerations, it must be possible to invoke Article 6(1) even where the claim against the anchor defendant "is regarded under a national provision as inadmissible from the time it is brought". It said:

> "In the light of all of the above considerations, the answer to the question referred must be that Article 6(1) of Regulation No 44/2001 must be interpreted as meaning that, in a situation such as that in the main proceedings, that provision may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State **even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant." (My emphasis.)**

175. I do not accept the defendants' argument that *Reisch Montage* only prohibited procedural rules from preventing the application of Article 6(1), whilst permitting national rules which concerned the merits of the claim against the anchor defendant to do so. I find such an argument counter-intuitive for four reasons.

176. First, the court's reasoning in *Reisch Montage* is expressed in general terms which were not contingent on the fact that the bar to the claim against the anchor defendant was procedural. On the contrary, the emphasis was to preclude *any* domestic impediments to the autonomous application of the Brussels Regulation, which was subject only to a qualification concerning fraudulent abuse.

177. Second, there is no sensible rationale for a distinction between procedural rules and rules relating to the merits of the claim against the anchor defendant. Mr Hunter submitted that there was no risk of irreconcilable judgments when the claim against the anchor defendant would not proceed due to a lack of merit. The same point was made by Flaux J (as he then was) in *Bord Na Mona Horticulture Limited v British Polythene Industries plc* [2012] EWHC 3346 (Comm), at [79]-[83], when suggesting that *Reisch Montage* could be confined to procedural bars.

178. I do not agree. The operation of a merits test within Article 6(1) does give rise to risk of irreconcilable judgments, which can be demonstrated by reference to the present facts. There is currently an English judgment that the share deprivation claim against Wael fails on the basis of various factual findings. For example: the judge found that the relevant formalities prescribed by the 1993 Agreements were fulfilled and that the share register extracts were genuine, with the result that Hassib did not own the shares at the time of his death. Yet it would, theoretically, be open to the claimant to bring an identical claim against the non-anchor defendants in Greece and (at least in theory) to obtain a judgment which contradicted the findings of the English judgment. A Greek judgment of this kind would plainly be irreconcilable with the existing English judgment in the sense articulated by the CJEU authorities. Mr Hunter expressly accepted that this could occur and did not, for example, seek to suggest that the Greek court would be required to recognise the English judgment or abide by it. In fact, this risk arises precisely because the English court has not exercised jurisdiction over the non-anchor defendants. If the non-anchor defendants were subject to English jurisdiction, an English judgment could not be circumvented by new proceedings in other member states, and the risk of irreconcilable judgments would be eliminated.

179. I accept the observation in *Brown v Innovatorone Plc* [2010] EWHC 2281 (Comm), [2011] ILPr 118 at [25], by Hamblen J (as he then was), that this risk may be unlikely to materialise because the Greek court might be expected to arrive at the same factual findings as the English judgment – but not necessarily. However, the overwhelming tenor of the CJEU authorities is to emphasise the fundamental aim of eliminating, rather than simply reducing, a risk of irreconcilable judgments. This aim is achieved if Article 6(1) does not incorporate a merits test and is undermined if it does do so.

180. Third, the CJEU in *Reisch Montage* must be read as rejecting this latent risk of irreconcilable judgments since, even on the defendants' case, the CJEU held that a procedural bar could not impede Article 6(1); yet in my view a procedural bar necessarily gives rise to a less acute risk of irreconcilable judgments. If the claim against the anchor defendant will not proceed purely due to a procedural bar, the operative finding of the court is that the claim, however meritorious, cannot proceed in that member state. The court has not made a finding that relates in any way to the claim against the non-anchor defendants. There is no strict irreconcilability with a judgment in another member state that the claim against the non-anchor defendants can proceed or succeed there. Yet the CJEU in *Reisch Montage* accepted that Article 6(1) could apply where the risk of irreconcilability was between a judgment that the claimant could not proceed against the anchor defendant in Austria, for a procedural reason, but could proceed in Germany.

181. Fourth, not only is a distinction between procedural rules and rules relating to the merits unsustainable, given the reasoning in *Reisch Montage*, but it is not immediately apparent where that line is supposed to be drawn. For example, if an English court struck out a claim in contract against the anchor defendant on the basis that the contract lacked a requisite formality, this could be understood as a procedural rule or a rule relating to the merits of the claim. Yet, either way, it would give rise to a risk of inconsistency if the English court declined jurisdiction over non-anchor defendants who were party to the same alleged contract, with the result that it was open to another member state court to hear the claims against them. At least in theory, that court could then find that the relevant formality was fulfilled. More generally, a domestic rule that claims against non-anchor defendants cannot proceed if the claim against the *anchor* defendant is unmeritorious could itself be described as procedural: such a rule has nothing to do with the merits of the claim against the non-anchor defendants.

182. The next case was *Freeport plc v Arnoldsson* (Case C-98/06) [2008] QB 634. The CJEU was asked by the Swedish Supreme Court (Högsta Domstolen) to determine whether it had jurisdiction under Article 6(1) over an English company which was sued in contract when the claim against the Swedish domiciled co-defendant was in tort, delict or quasi- delict. The *first* question, as reformulated by the CJEU, was whether these claims could satisfy the requirement of being closely connected despite having differing legal bases. The *second* question was whether Article 6(1) was subject to a precondition that it was not being fraudulently abused, in the sense articulated by *Reisch Montage*. The *third* question was whether the likelihood of success of the claims was relevant to the application of Article 6(1).

183. Before considering the CJEU decision, I note that the opinion of Advocate General Mengozzi on the second and third questions supported the view that *Reisch Montage* precluded any domestic rules, whether procedural or relating to merits, from impeding

the application of Article 6(1). The Advocate General considered at [62] that the decision established, first, that Article 6(1) could not be relied on if the claim against the anchor defendant was fraudulently abusive in the sense of involving

> "manipulation on the part of the claimant which is designed to oust and has the effect of ousting the jurisdiction of the courts [of other member states]".

184. At [65], the Advocate General added that whether this was the "sole object" of the claim against the anchor defendant "will be for the court hearing the case to determine". Further, this was a high threshold: it was not sufficient that the claim

> "*appears to be unfounded*, since that action must, at the time when it was lodged appear to be *manifestly* unfounded in all respects – to the point of proving to be contrived – or devoid of any real interest for the claimant". [Emphasis original.]

185. At [70]-[71] the Advocate General considered that, second, *Reisch Montage* "seems to contradict" the view that Article 6(1)

> "may also include an evaluation of the likelihood that the claim brought against the [anchor] defendant …… will succeed".

Indeed, whilst the Advocate General himself inclined to the view that Article 6(1) could involve an analysis of the merits of the claim against the anchor defendant, such analysis was only relevant in his view insofar as it related to the qualification about fraudulent abuse:

> "[T]hat evaluation will be of real practical relevance for the purpose of excluding the risk of irreconcilable judgments only if that claim proves to be manifestly inadmissible or unfounded in all respects."

186. However, the CJEU itself took a different approach. In relation to the second question (viz. whether Article 6(1) was subject to a precondition that it was not being fraudulently abused), the CJEU, despite *Reisch Montage* and the Advocate General's opinion, appeared to express the view at [54] that it was not a requirement of Article 6(1) for a claimant to demonstrate that it was not fraudulently abusing the jurisdiction afforded by Article 6. The court stated:

> "[A]rticle 6(1) …… applies where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, **without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the member state where one of the defendants is domiciled.**" [My emphasis.]

187. The CJEU did not consider it necessary to answer the third question (viz. whether the likelihood of success of the claims was relevant to the application of Article 6(1), in light of its answer to the first question (which I consider below). So it is certainly the case that *Freeport* does not directly address the question of whether a merits test is, or can be, a precondition to the founding of jurisdiction. However, the fact that the CJEU did not think that there was "any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction", strongly suggests, in my judgment, that its view was that the merits of the claim against the anchor defendant were irrelevant for the purposes of founding jurisdiction under Article 6(1). In order for the sole object of a claim against the anchor defendant to be to oust other member states' jurisdiction, a claim necessarily could not have merit. Thus if Article 6(1) can be relied upon even where it is fraudulently abused, which entails a lack of merit, it would be perverse if it could not be invoked where the claim against the anchor defendant lacked merit but was not fraudulently abusive.

188. It is also important to clarify why, in my view, the answer to the first question (viz. whether relevant claims could satisfy the requirement of being closely connected despite having differing legal bases) does not support the defendants' interpretation of *Reisch Montage*. The CJEU in *Freeport* held at [38] that Article 6(1) could apply even where the claim against the anchor defendant and the claim against the non-anchor defendant had different legal bases, provided those claims were closely connected:

> "38 It is not apparent from the wording of article 6(1) that the conditions laid down for application of that provision include a requirement that the actions brought against different defendants should have identical legal bases.
>
> 39 As the court has already held, for article 6(1) of the Brussels Convention to apply, it must be ascertained whether, between various claims brought by the same plaintiff against different defendants, there is a connection of such a kind that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings: *Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* (Case 189/87) [1988] ECR 5565, para 13."

189. The CJEU further explained at [41]:

> "It is for the national court to assess whether there is a connection between the different claims brought before it, that is to say, a risk of irreconcilable judgments if those claims were determined separately and, in that regard, to take account of all the necessary factors in the case file, which may, if appropriate yet without its being necessary for the assessment, lead it to take into consideration the legal bases of the actions brought before that court."

190. The CJEU therefore accepted that a national court could (though it need not) take into account the legal bases of the actions when verifying whether the requirement specified by Article 6(1) was satisfied. However, this was because the CJEU accepted

that the legal bases of the actions were relevant to an assessment of the criterion of close connection. The CJEU effectively rejected, at [38], that one could insert into Article 6(1) a discrete requirement that the claims had identical legal bases. Thus, in order for the merits of the claim against the anchor defendant to have any role in the application of Article 6(1), it too would have to be relevant to the requirement of a close connection. But the CJEU in *Freeport* did not suggest that the merits of the claim against the anchor defendant were relevant to this requirement. Moreover, for the reasons given below on the second issue, I do not accept that the merits of the claim can be relevant to the requirement in Article 6(1) of a close connection.

191. The two most recent decisions of the CJEU, *Kolassa v Barclays Bank* (Case C-375/13) [2015] I.L.Pr 14 and *Cartel Damage Claims SA v Akzo Nobel NV* (Case C-352/13) [2015] QB 906, were respectively decided on 28 January and 21 May 2015, after the decision of the judge in this case. The same judges of the CJEU, in its Fourth Chamber, sat in both cases.

192. *Kolassa v Barclays Bank* did not directly concern Article 6(1). The claimant submitted that the Austrian courts had jurisdiction on the basis, inter alia, that the claim was one in tort, delict or quasi-delict so as to satisfy Article 5(3). The defendant submitted that the claim did not fall into any of those categories since a number of the claimant's factual assertions were false, with the consequence that there was no non-contractual claim. The fourth question referred to the CJEU was whether it was necessary for a national court, when determining jurisdiction, to conduct a comprehensive taking of evidence in relation to disputed facts (which were relevant to both jurisdiction and the merits of the claim) or whether the allegations should be assumed to be true.

193. The CJEU's answer, at [64], was that:

> "Although the national court seised is not, therefore, obliged, if the defendant contests the [claimant]'s allegations, to conduct a comprehensive taking of evidence at the stage of determining jurisdiction, it must be pointed out that both the objective of the sound administration of justice, which underlies Regulation 44/2001, and respect for the independence of the national court in the exercise of its functions require the national court seised to be able to examine its international jurisdiction in the light of all the information available to it, including, where appropriate, the defendant's allegations."

194. This does not assist the defendants for the same reason that the answer to the first question in *Reisch Montage* does not assist. The CJEU in *Kolassa* accepted that national courts can take into account all available information in determining whether the requirements set out in the Brussels Regulation are fulfilled. But this simply begs the question of whether the merits of the claim against the anchor defendant are relevant to the criterion specified by Article 6(1). For the reasons given below, I answer this question in the negative.

195. In fact, there is a further reason why *Kolassa* does not support the defendants' view of Article 6(1). The decision was that the *defendants' allegations* could be taken into account in determining whether the claim against the anchor defendant was a non-

contractual claim for the purposes of Article 5(3). The CJEU did not hold that the merits of the claim were relevant to that question of characterisation, and nor would this necessarily transpose to the very different requirement of a close connection under Article 6(1).

196. The final CJEU decision is *CDC*. In that case the claim against the German-domiciled anchor defendant was settled shortly after the claim was brought. There was a suspicion that this settlement had been reached before the claim was issued but had been postponed, by collusion between the claimant and the anchor defendant, so as to enable the claimant to establish jurisdiction against various non-anchor defendants using Article 6(1).

197. In considering the relevance of the withdrawal of the claim, the CJEU reasserted that Article 6(1) could not be fraudulently abused and presented *Freeport* as a gloss on how this qualification operated. The CJEU considered that it was "settled case law" that Article 6(1) could not be fraudulently abused. The court then referred at [28] to *Freeport* at [54], which I have already quoted above. In the CJEU's view, at [29]-[32], it followed that in order for a national court to "exclude the applicability" of Article 6(1) there must be "firm evidence that, at the time that proceedings were instituted, the parties concerned had colluded to artificially fulfil, or prolong the fulfilment of, that provision's applicability". The court said:

> "28 The court has nevertheless stated that, where claims brought against various defendants are connected within the meaning of article 6(1) of Regulation No 44/2001 when the proceedings are instituted, the rule of jurisdiction laid down in that provision is applicable without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the member state where one of the defendants is domiciled: *Freeport plc v Arnoldsson* [2008] QB 634, para 54.
>
> 29 It follows that where, when proceedings are instituted, claims are connected within the meaning of article 6(1) of Regulation No 44/2001, the court seised of the case can only find that the rule of jurisdiction laid down in that provision has potentially been circumvented only where there is firm evidence to support the conclusion that the applicant artificially fulfilled, or prolonged the fulfilment of, that provision's applicability.
>
> 30 [The court referred to the allegations made by some of the defendants.]
>
> 31 In order to be able to exclude the applicability of the rule of jurisdiction laid down in article 6(1) of Regulation No 44/2001, an allegation of that nature must nevertheless be supported by firm evidence that, at the time that proceedings were instituted, the parties concerned had colluded to artificially fulfil, or prolong the fulfilment of, that provision's applicability.

> 32 Although it is for the court seised of the case to assess such evidence, it must nevertheless be made clear that simply holding negotiations with a view to concluding an out-of-court settlement does not in itself prove such collusion. However, it would be otherwise if it transpired that such a settlement had, in fact, been concluded, but that it had been concealed in order to create the impression that the conditions of application of article 6(1) of Regulation No 44/2001 had been fulfilled.

198. This represented a synthesis of *Reisch Montage* and *Freeport*: a claimant could not fraudulently abuse Article 6(1), but nor was it incumbent on them to show that the claim was genuine. The qualification would therefore only arise when the national court was satisfied that there was firm evidence to demonstrate fraudulent abuse.

199. The decision in *CDC* supports the claimant's case that the qualification concerning fraudulent abuse is the only restriction on the operation of Article 6(1). The court expressly stated, at [29], that a national court could find "that [Article 6(1)] has potentially been circumvented only where" the claim against the anchor defendant was fraudulent. There was no suggestion that the application of Article 6(1) was also restricted by reference to national rules concerning the merits of the claim against the anchor defendant.

200. Accordingly, in my judgment, looking at the CJEU decisions as a whole, I accept the claimant's submission on the first issue. There is clear CJEU authority that Article 6(1) can be used to establish jurisdiction against non-anchor defendants even if the claim against the anchor defendant will not proceed, unless the claimant is engaged in a fraudulent abuse of Article 6(1).

<u>Sub-issue (ii): the requirement of a close connection</u>

201. I now turn to the second sub-issue, namely whether it was permissible for the English courts to incorporate a merits test within the process of verifying that Article 6(1)'s requirement of a close connection was met. There were two strands to the defendants' submission that it was permissible, although only the second was pursued in oral argument.

    i) The first derived from the requirement of Article 6(1) that "the claim<u>s</u> are so closely connected". The defendants submitted that if the claim against the anchor defendants was struck out at a summary stage, there would not be "claim<u>s</u>" which could share any connection whatsoever. Without the claim against the anchor defendant, there was only the claim against the non-anchor defendants.

    ii) The second was that if the claim against the anchor defendant was struck out, the claims against the non-anchor defendants could be heard elsewhere without any risk of irreconcilable judgments. In the absence of such a risk, it was not expedient to hear the two claims together and thus the requirement of Article 6(1) was not met. I interpose that this is the rationale given by the modern cases as to why the English courts are entitled to assess the merits of the claim against the anchor defendant: see for example, *Brown* at [25]-[27] and *Bord Na Mona* at [79].

202. However, I do not accept that the English courts can incorporate a merits test in relation to the claim against the anchor defendant within the requirement of a close connection.

203. The CJEU authorities are inconsistent with the defendants' submission. As discussed above, *Reisch Montage*, *Freeport* and *CDC* establish that a domestic rule which has the effect that the claim against the anchor defendant will not proceed will not prevent the requirement imposed by Article 6(1) of a close connection from being satisfied.

204. Indeed, even on the defendants' interpretation of those authorities, it is difficult to see how the merits test could be incorporated within the requirement of a close connection. *Reisch Montage* demonstrates that, as a matter of EU law, claims can be so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments, even when the claim against the anchor defendant will not proceed. There is no reason why the position is any different where the claim will not proceed due to a lack of merit, rather than a procedural bar. I have already explained why there is at least as great a risk of irreconcilable judgments in the situation of a lack of merit. Thus the CJEU authorities refute the proposition that claims can be closely connected only if both claims are proceeding.

205. The CJEU decisions also disclose an emphasis on the connection between the *claims* as opposed to whether, as a matter of factual likelihood, there is a risk of irreconcilable judgments. For example, there are multiple CJEU authorities stating that the question of whether the claims are closely connected is to be evaluated as at the time the proceedings were instituted, such as *Reisch Montage* at [31] and [33], which is a complete answer to the first strand of the defendants' submission since the claims are extant at that time. No CJEU decision actively supported the evaluation of the merits of the claims, as at a later point in time, as part of the Article 6(1) requirement. The fact that a court can say at a summary stage which party is likely to prevail is simply irrelevant to the enquiry of whether the claims are closely connected for the purpose of Article 6(1).

206. Statements in *Freeport* and *Kolassa* that it was permissible for the national courts to use all available information to verify that there was a close connection do not alter the content of the requirement of a close connection. Therefore, whilst English courts may apply a commonsense approach in evaluating (for example) whether the claims arise from the same facts, they may not, in my judgment, introduce a new, additional condition that the claim against the anchor defendant is arguable. That would not be consistent with the wording of Article 6(1).

207. If the merits of the claim against the anchor defendant were relevant to the requirement of a close connection, it would be inconsistent for the merits of the claim against the non-anchor defendant to be ignored. This is, first and foremost, as a matter of principle. If the logic is that when one claim is going to fail there is no need to hear the claims together, this applies just as much to the claim against the non-anchor defendant as it does to the claim against the anchor defendant. Secondly, if it is unacceptable to bring a non-anchor defendant to England where the claim against the anchor defendant is hopeless, it should also be impermissible to exercise jurisdiction when the claim against them is hopeless.

208. Whilst it was not explored in argument, and accordingly I do not place particular emphasis on the point, if the defendants' submission were correct it would seem also inconsistent not to apply a merits test in the context of Article 28, too. Article 28 confers discretion on national courts to stay a claim over which they would otherwise have jurisdiction under the Brussels Regulation if, inter alia, it is related to a claim which is pending in another member state. Article 28(3) defines related claims in terms identical to the close connection test in Article 6(1). Yet it was not suggested that the English courts do or should decline to stay a claim on the basis that the claim brought in England will fail, so there ought not to be any risk of inconsistency with extant proceedings in other member states. Indeed the English courts seem to take the approach that the merits of the claims are not relevant to consideration of whether claims are related for Article 28: for example, *Casio Computer Co Ltd v Sayo* [2001] I.L.Pr. 43 at [38].

209. I do not accept the argument that the merits test is appropriate in order to restrict Article 6(1) on the basis that it is a special rule of jurisdiction which derogates from the general jurisdictional rule of Article 2. The CJEU authorities do of course state that special rules of jurisdiction are to be construed restrictively. However, the decisions also state that the Brussels Regulation is to be interpreted independently and that well-informed defendants should be able to anticipate which courts they may be brought before. For example: *Reisch Montage* at [25] and [29]-[30]; *Freeport* at [36]; and *CDC* at [16]. It is therefore just as important that courts do not unduly *restrict* the application of Article 6(1) through national rules, as it is that national courts do not unduly expand its application. As I have attempted to demonstrate, the incorporation of a merits test would be a restriction which the CJEU authorities do not permit. Moreover, a merits test fundamentally undermines the certainty, predictability and efficiency of the application of Article 6(1). The merits test produces protracted disputes in relation to the substance of the claim at the jurisdiction stage, of the sort seen here, which have been specifically deprecated by the CJEU - as indeed they have by English authorities in relation to what is now CPR 6.37: see for example Lord Templeman in *Spiliada Maritime Corp v Cansulex Limited* [1987] 1 AC 460 at 465G-H and Lord Neuberger in *VTB Capital plc v Nutritek International* [2013] UKSC 5 at [82]-[83].

Sub-issue (iii): tantamount to fraudulent abuse

210. The third point can be dealt with shortly. The defendants submitted that, in any event, bringing a claim against an anchor defendant which is liable to be struck out on a summary basis would amount to fraudulent abuse of Article 6(1).

211. I do not accept this argument. The CJEU in *CDC* emphasised the narrow scope of this qualification: there must be firm evidence that, at the time that proceedings were instituted, the claimant was artificially fulfilling Article 6(1). In this case, at [300] the judge specifically rejected the suggestion that the claimant had acted in "bad faith" in bringing the claims. Further, the judge clarified that the very reason she found that the share deprivation claim lacked merit was due to the emergence of evidence since the claim was issued. On the unchallenged findings, therefore, this was not a claim where the sole purpose was a fraudulent abuse of Article 6(1). There was, at least when issuing the claim, a legitimate purpose to the claim against the anchor defendant, beyond the fact that this would enable the claimant to rely on Article 6(1).

212. Moreover, the defendants' submission would produce a striking inconsistency with the decision in *Reisch Montage*. There the CJEU plainly did not think that it was a fraudulent abuse of Article 6(1) to bring a claim which was entirely inadmissible even at the time of issuing the claim. It would be perverse if, on the other hand, it was fraudulently abusive to bring a claim which, because of evidence submitted subsequently, turned out to be hopeless.

Sub-issue (iv): *Aeroflot*

213. The relevance of *Aeroflot* is as follows. The issue in that case was whether there was a merits test in relation to the claims against the *non-anchor defendant*, as opposed to the claim against the anchor defendant.

214. Aikens LJ, with whom Laws LJ and Mann J agreed, held that there was no merits test in relation to the claim against the non-anchor defendant for three reasons, stated at [106]-[109]. First, the sole question was whether the requirements set out by Article 6(1) were satisfied. It was "inappropriate simply to import into Judgment Regulation" the requirement for an arguable case against the non-anchor defendants prescribed by CPR 6.37 and PD6B para 3.1(3). Second, *Freeport* held that "the national court should not concern itself with the question of whether the claim against the non-domiciled defendant was brought in those proceedings with the sole object of ousting the jurisdiction of the court of the Member State where that defendant is domiciled". Third, Aikens LJ would have distinguished the English case said to mandate a merits test in relation to the non-anchor defendant.

215. *Aeroflot* must be approached with a degree of caution. Aikens LJ considered *Freeport* but not *Reisch Montage,* and the judgment predated the decisions in *Kolassa* and *CDC* (the latter of which is very relevant to an understanding of *Freeport*). Further, *Aeroflot* also did not consider *Brown*, which had held that there was a merits test in relation to the non-anchor defendants. Finally, it will be recalled that *Freeport* was in fact concerned with the question of whether the claim against the anchor defendant was brought fraudulently, not the claim against the non-anchor defendants.

216. Nonetheless, the decision in *Aeroflot* accords with the view of Article 6(1) and the CJEU authorities which I have expressed above and would be inconsistent with the contrary view. As I have stated, in the present case the defendants accepted the conclusion reached in *Aeroflot*, namely that there was not a further merits test in relation to the non-anchor defendants. The submission that, nonetheless, there was a merits test in relation to the claim against the anchor defendant therefore depends on it being possible to distinguish the two. For the reasons given, I do not see any distinction. *Aeroflot* illustrates that the common law regime is entirely separate to the Brussels Regulation, and there is no basis on which to incorporate within Article 6(1) the requirements under English law that the claims against the anchor and non-anchor defendants are arguable.

The consequence of my conclusion in relation to Article 6(1)

217. In my judgment a construction of Article 6(1) which precludes a challenge to the merits of the claim against the anchor defendant or of the claim against the non-anchor defendants will substantially reduce the number of long drawn-out jurisdictional disputes and thereby promote the overriding objective. This approach

will ensure that Article 6(1) will apply "in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued" (CJEU in *Reisch Montage* at [25]). More generally it will further the hope, to which I have already referred, that "the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument" (Lord Neuberger in *VTB* at [82]).

218. Applying the Brussels Regulation, the English court will have jurisdiction under Article 6(1) if the claims 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. In verifying whether this requirement is satisfied, the court will use all available information and take a common-sense approach. However, the court will not have regard to whether the claim against the anchor defendant or the claim against the non-anchor defendant will fail due to a procedural bar or due to a lack of merit. As a matter of EU law, whether a claim will succeed is irrelevant to the question of whether the claims are closely connected, because the function of Article 6(1) is to avoid a risk of irreconcilable judgments. If the requirement is fulfilled, the English court can only deny the application of Article 6(1) if the sole purpose of bringing a claim against the anchor defendant was to remove the non-anchor defendants from the courts of their member state(s) of domicile, in the sense articulated by *Reisch Montage*, *Freeport* and *CDC*.

219. Jurisdiction will thus have been established in line with the mandated principles of certainty, predictability and efficiency. It will not be possible significantly to prolong the determination of jurisdiction issues by raising a dispute about the merits of one claim or another. Assuming the claims are closely connected, the defendants may, subsequently, if they wish, attempt to strike out the claims. In any event, the risk of irreconcilable judgments is avoided. This will also avoid the peculiarity displayed in the present case, where the non-anchor defendants argued that the court should strike out the claim against the *anchor* defendant, in circumstances where the anchor defendant himself was not able do so without submitting to the jurisdiction of the English courts.

220. For the above reasons, I would also have allowed Sana's appeal on issue 1. I would also reject the defendants' arguments under issue 4. In my view the fact that a claim against an anchor defendant will not proceed due to being struck out is irrelevant to the application of Article 6(1): see paragraphs 203 to 205 above. Since whether Article 6(1) applies is determined notionally (albeit retrospectively) as at the date proceedings are issued, it cannot matter whether the claim against an anchor defendant is in fact struck out before the court determines whether it had/has jurisdiction, at the time it does so or (needless to say) after it has done so.