Neutral Citation Number: [2016] EWCA Civ 1261

Case No: A3/2015/3809

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr. Justice Blair
[2015] EWHC 2857

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 December 2016

Before :

LORD JUSTICE MOORE-BICK
Vice-President of the Court of Appeal, Civil Division
LORD JUSTICE TOMLINSON
and
MR. JUSTICE ARNOLD

- -

Between :

BARCLAYS BANK PLC	**Claimant/ Respondent**
- and -	
ENTE NAZIONALE DI PREVIDENZA ED ASSISTENZA DEI MEDICI E DEGLI ODONTOIATRI	**Defendant/ Appellant**

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Mr. Mark Hapgood Q.C. and Mr. Alan Roxburgh (instructed by **Trowers & Hamlins LLP**) for the **appellant**
Miss Sonia Tolaney Q.C. and Mr. Adam Sher (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **respondent**

Hearing date : 17th November 2016

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Approved Judgment

Lord Justice Moore-Bick :

1. This is an appeal from the order of Blair J. dismissing the appellant's application under CPR Part 11 and giving summary judgment in favour of the respondent on its claim for a declaration that the claims being made by the appellant in proceedings in Milan fall within the scope of agreements between the parties that the English courts are to have jurisdiction to determine their dispute.

2. On 21st September 2007 the appellant, Ente Nazionale di Previdenza ed Assistenza dei Medici e degli Odontoiatri ("ENPAM") entered into an agreement with the respondent, Barclays Bank Plc ("Barclays"), described as a "Conditional Asset Exchange Letter" ("the Letter Agreement") for the exchange of various financial assets, including certain Secured Limited Recourse Credit-Linked Notes ("the Notes"). In October 2007 the parties entered into two supplemental agreements, but nothing directly turns on them. Some months later, on 31st March 2008 the parties entered into a Professional Client Agreement ("PCA") containing the terms by which all existing and future business between them should be governed. The Letter Agreement and the PCA each contained an English jurisdiction clause and an indemnity clause under which ENPAM agreed to indemnify Barclays against the consequences of any breach of the agreement.

3. ENPAM is an Italian body which manages a fund for the benefit and welfare of doctors and orthodontists. It says that the transaction covered by the Letter Agreement was not one that was appropriate for a body of its kind and that the Notes in particular were an unsuitable form of investment. It claims that it was misled into entering into the agreement by two members of Barclays' staff who were acting in contravention of Italian law relating to the selling of financial products and that it has suffered a serious loss as a result.

4. On 12th June 2014 ENPAM, without any warning, commenced proceedings against Barclays in Milan. There were two heads of claim. The main claim was for damages for breach of the duty of good faith and failure to comply with Italian financial regulations in connection with the negotiation and execution of the Letter Agreement contrary to articles 1337 and 2043 of the Italian Civil Code. It was common ground that it would be characterised by English law as a claim in tort and consistently with that formulation of its claim ENPAM relied on article 5(3) of the Judgments Regulation (Regulation (EC) No. 44/2001) as giving the court in Milan jurisdiction. The secondary claim was for a declaration that as a result of Barclays' misconduct the Letter Agreement and the subsequent agreements between the parties should be declared null and void or should be cancelled for fraud or mistake. The court is said to have jurisdiction over the secondary claim as a result of its right to assert jurisdiction over the primary claim. In its statement of claim in Milan ENPAM asserted that the jurisdiction clause in the Letter Agreement was invalid, but it made no express reference to the PCA or the jurisdiction clause which it contained and the PCA was not included in the index of relevant documents attached to the statement of claim.

5. On 15th September 2014 Barclays commenced proceedings against ENPAM in the Commercial Court seeking damages for breach of the jurisdiction clauses in the Letter Agreement and the PCA. On 20th April 2015 ENPAM responded by applying under CPR Part 11 for a declaration that the court should not exercise its jurisdiction to hear the action and for an order staying the proceedings pursuant to articles 27 or 28 of the Judgments Regulation. On 18th May 2015 Barclays issued an application for summary

judgment on its claim. On 31st July 2015 Flaux J. directed that that application be heard at the same time as ENPAM's application, subject to the directions of the judge hearing the applications.

6. On 14th September 2015 the applications came on for hearing before Blair J. In the course of the proceedings Barclays agreed not to pursue its claim under the indemnity clause in the Letter Agreement and to amend its claim form and particulars of claim accordingly. On that basis the judge held that the proceedings in London and Milan did not involve the same cause of action within the meaning of article 27, which was therefore not engaged. It was common ground that the proceedings were "related" within the meaning of article 28, but the judge declined to stay the English proceedings because he did not think that the common issues were substantial, because he was satisfied that the English jurisdiction clauses applied to the disputes between the parties and because the proceedings in Milan had been deliberately based on a claim in tort which enabled the court there to assume jurisdiction under article 5(3) of the Judgments Regulation. He also held that it was appropriate to give summary judgment for Barclays on its claim for a declaration that in bringing the claims in Milan ENPAM was in breach of the jurisdiction clauses in the Letter Agreement and the PCA.

Subsequent developments in Milan

7. Blair J. delivered his judgment on 9th October 2015. In the course of it he pointed out that in the Milan proceedings ENPAM had not expressly alleged that the PCA or the jurisdiction clause which it contained were affected by Barclays' alleged illegal conduct and had not sought any relief in relation to the jurisdiction clause in the Letter Agreement. On 18th December 2015 ENPAM served a document in the Milan proceedings described as a "Brief" pursuant to Article 183 of the Italian Code of Civil Procedure. The precise nature of this document was the subject of some debate, but it appears to combine what in England would be a reply with further development and elucidation of the original claim. Since the sixth paragraph of Article 183, under which the document is said to be served, makes provision for filing pleadings modifying claims previously filed and for time to reply to any new claims, it appears that the document can be used to raise a new claim.

8. In its brief ENPAM expanded its case on jurisdiction to include a specific averment that the PCA itself and the jurisdiction clauses in both that agreement and the Letter Agreement were invalid and of no effect and a prayer for a declaration that the jurisdiction clauses were null and void. Armed with that amendment ENPAM sought permission to adduce it as fresh evidence in support of its case on this appeal, it being said that under Italian procedural law it took effect as from the date of the original claim. By this means ENPAM sought to make good retrospectively the defects which the judge had identified in its claim in Milan.

9. In support of his application to adduce this material Mr. Hapgood submitted that ENPAM could not have relied on it before the judge because the document did not then exist. He also submitted that the document did no more than clarify the statement of claim to remove any doubt that the reference to "other agreements" had been intended to include the PCA. This latter submission is in my view untenable, given the precision with which the documents that are relied on are identified in the original pleading. As to the former, it is true, of course, that the brief had not come into existence when the matter was before the judge, but that is only because it is a thinly disguised attempt to

make good defects identified in the judgment. An attempt of this kind to rely on a doctrine of relation back under Italian law seems to me to raise a number of difficulties, not least in relation to the date when the court in Milan was seised of the new claims for the purposes of article 27. If the question were simply one of exercising our discretion, I would not be in favour of allowing ENPAM to rely on this opportunistic manoeuvre to plug the gaps which the judge identified in its case. Clearly, the new allegations in the brief could have been included in the original pleading and could have been put before the judge. Strictly speaking, if it wishes to rely on the brief ENPAM needs the court's permission to file additional evidence exhibiting it and for the reasons I have given I would refuse it on the grounds that it comes too late.

10. However, I do not think that the issue can be disposed of in that simple and straightforward way, because, if ENPAM is right in saying that under Italian procedural law the allegations in the brief relate back to the date of the statement of claim, it is necessary to consider whether we are bound to stay the English proceedings under Article 27 of the Judgments Regulation, whatever may have been the position before the judge. I do not think it would be right, therefore, for us simply to refuse permission to adduce the brief in evidence, since that would amount to shutting our eyes to developments which, for better or worse, have now taken place in Milan. Those developments raise questions concerning the date at which the application of Article 27 is to be determined and the time when the court in Milan was seised of the new claims for the purpose of that article. They are to be determined by reference to European law rather than domestic Italian law.

The Judgments Regulation

11. The material parts of Articles 27 and 28 of the Judgments Regulation provide as follows:

> "Article 27
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> 1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.
>
> Article 28
>
> 1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
>
> . . .
>
> 3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient

> to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

12. Miss Tolaney Q.C. submitted, correctly in my view, that the question whether proceedings involving the same cause of action between the same parties have been brought in the courts of different Member States so as to engage Article 27 is to be determined at the date of commencement of proceedings in the court second seised. In *Gantner Electronic G.m.b.H. v Basch Exploitatie Maatschappij BV* (Case C-111/01) [2003] E.C.R. I-4207 the European Court of Justice held that Article 21 of the Brussels Convention (the predecessor of Article 27):

> "30. . . . adopts a simple method to determine, at the outset of proceedings, which of the courts seised will ultimately hear and determine the dispute. The court second seised is required, of its own motion, to stay its proceedings until the jurisdiction of the court first seised is established. Once that has been established, it must decline jurisdiction in favour of the court first seised. The purpose of Article 21 of the Convention would be frustrated if the content and nature of the claims could be modified by arguments necessarily submitted at a later date by the defendant. Apart from delays and expense, such a solution could have the result that a court initially designated as having jurisdiction under that article would subsequently have to decline to hear the case."

13. I have no doubt that the same principles apply to Article 27 of the Judgments Regulation, so the question is whether, at the time the proceedings in London were commenced, the court in Milan was seised, or must be deemed to have been seised, of the claims which ENPAM seeks to introduce for the first time in its brief.

14. The time at which a court becomes seised is governed by Article 30 of the Judgments Regulation, the material parts of which provide as follows:

> "Article 30
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> For the purposes of this Section, a court shall be deemed to be seised:
>
> 1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, . . . , or
>
> 2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service . . . ."

15. In *FKI Engineering Ltd v Stribog Ltd* [2011] 1 W.L.R. 3264 the court had to consider when the German and English courts had become seised of the respective actions for the purposes of Article 28. The proceedings in Germany had been issued first and the English proceedings some months later, but after the English proceedings had been issued an amendment was made in the German proceedings to contest the validity of

an assignment that had been pleaded and relied on in the English action. As a result, the two actions became "related" within the meaning of Article 28(1) and a question arose whether the English or German court had been first seised.

16. Article 28 is concerned with related *proceedings*, so it is perhaps not surprising that the court held that the court first seised was that in which proceedings had first been issued, in that case the German court. Article 27, on the other hand, is concerned with proceedings involving the same cause of action and the same parties and therefore requires one to focus on *causes of action* rather than proceedings. In his judgment Rix L.J. compared Articles 27 and 28 and contrasted the issues to which the question of seisin is directed. Having observed that the court had been directed to authorities relating to the identification of the court first seised for the purposes of Article 27 he said:

> "83. . . . there have been authorities which discuss what is said to be the connected issue of how one identifies the court first seised of two actions involving "the same cause of action and between the same parties" within article 27. It is established that the "same cause of action" involves the double concept of "cause" and "objet". It is no longer suggested that the German and the English actions come within this concept.
>
> 84. The essence of those cases is that where the "same cause of action" or "the same parties" are introduced only by way of service, or amendment, the relevant proceedings are only "brought" at the time of such service or amendment, not at the time of the institution of the original, unamended, proceedings."

17. Without taking us to the underlying authorities Miss Tolaney relied on that observation as containing a correct statement of the law and I did not understand Mr. Hapgood to challenge it. She also relied on the following passage from *Dicey, Morris & Collins on The Conflict of Laws*, 15th ed. paragraph 12-069:

> "As it is difficult to see how a court can be said to be seised of a claim which has not been made and does not appear in the claim form, it cannot be correct that as long as a claim form has been issued and served, the court already has temporal priority over an issue which may later be added by amendment."

18. In response to Miss Tolaney's submissions Mr. Hapgood drew attention to a passage in Lord Clarke's judgment in *Starlight Shipping Co. v Allianz Marine & Aviation Versicherungs A.G. (The 'Alexandros T')* [2013] UKSC 70, [2014] 1 All E.R. 590, in which he stated that he did not regard it as acte clair that a court became seised of a cause of action introduced by amendment only from the date of the amendment (paragraph 72). Lord Clarke had earlier referred with apparent approval to the passage in the judgment of Rix L.J. in *FKI Engineering v Stribog* to which I have referred and also to the passage in *Dicey* mentioned earlier, although not to the judgment in *Gantner Electronic v Basch*. The purpose of Article 27 is to avoid the risk of inconsistent judgments and it achieves that by ensuring that the court first seised has

the opportunity to determine its jurisdiction free of competition from other courts in which the same cause of action arises between the same parties. It would be surprising, therefore, if the court second seised of a particular cause of action should be entitled to be treated as first seised on the grounds that the cause of action had been introduced by amendment into proceedings issued first.

19. I think that the expression "proceedings involving the same cause of action and between the same parties" in Article 27 is to be read as a whole and that such proceedings do not come into existence, and the court is not seised of the relevant claim, until the cause of action has been raised in proceedings before the court, whether originally or by amendment. In my view the right course for us to take in this case is to follow the expressions of opinion by judges and commentators, which seem to me accurately to reflect the principles underlying Article 27. For these reasons I am of the opinion that insofar as the amendment to ENPAM's claim in Milan gives rise to the same cause of action as is raised in the proceedings in London, the court in Milan became seised of it only when the brief was filed. As a result the development came too late to affect the issues in the appeal.

Article 27

20. The main dispute between the parties concerns the question whether the proceedings in Milan and London involve the same cause of action within the meaning of Article 27. On behalf of ENPAM Mr. Hapgood Q.C. submitted that they do, because, although ENPAM's primary claim lies outside the Letter Agreement and is for what in England would be characterised as a tort, it is alleged that one consequence of Barclays' unlawful conduct was to render that agreement and all subsequent agreements between the parties, including the PCA, null and void. The validity of the jurisdiction clause is therefore in issue, which is the same question as that which arises in the English proceedings, in which Barclays is seeking to rely on the jurisdiction clauses as the foundation of its claim.

21. Miss Tolaney Q.C. submitted on behalf of Barclays, however, that the fact that the two sets of proceedings raise common issues is not sufficient to bring the case within the scope of Article 27(1). European jurisprudence establishes that in order to come within that article the proceedings must have the same factual and legal basis (*la même cause*) and be aimed at obtaining the same relief (*le même objet*). That test is not satisfied in the present case, because the proceedings are based on different causes of action and seek different relief. That is made even clearer by the fact that a jurisdiction agreement, like an arbitration agreement, is regarded as an independent contract, separable from the principal contract of which it forms part and unaffected by factors that undermine the validity of the principal contract, such as fraud, mistake or illegality. It follows that an assertion that the principal contract was void for failure to comply with the requirements of Italian law does not carry with it an assertion that the jurisdiction agreement is unenforceable. The principle of separability is well established in European and domestic law and its existence was not in dispute before us.

22. The leading authority on article 27 is *The 'Alexandros T'*. The case arose out of a dispute between owners of the vessel *'Alexandros T'* and their hull insurers who had declined to indemnify the owners against the loss of the vessel on the grounds that it had been unseaworthy with the privity of the insured. The owners made various

allegations of impropriety and misconduct against the insurers. Two policies of insurance had been issued, one by insurers in the companies market and one by insurers in the Lloyd's market. Each policy contained an English exclusive jurisdiction clause. In due course the owners brought proceedings against the insurers in London, which were settled under two agreements, each of which also contained an English exclusive jurisdiction clause. The proceedings were stayed under a Tomlin Order. Subsequently the owners brought proceedings against the insurers in Greece claiming damages for their failure to pay under the policies. In response the insurers made an application in the English proceedings for a declaration that the Greek claims fell within the scope of the jurisdiction clauses in the settlement agreements. The question arose whether the English court was bound to stay the proceedings before it under article 27 and, if not, whether it should exercise its discretion to stay them under article 28.

23. The first question for decision was whether the English proceedings and the Greek proceedings involved the same cause of action. In paragraph 28 of his judgment Lord Clarke, with whom Lord Sumption and Lord Hughes (and in this respect Lord Neuberger and Lord Mance) agreed, summarised the relevant principles as follows (omitting reference to supporting authority):

> (i) the phrase "same cause of action" in Article 27 has an independent and autonomous meaning as a matter of European law; it is therefore not to be interpreted according to the criteria of national law;
>
> (ii) in order for proceedings to involve the same cause of action they must have "*le même objet et la même cause*";
>
> (iii) identity of *cause* means that the proceedings in each jurisdiction must have the same facts and rules of law relied upon as the basis for the action;
>
> (iv) identity of *objet* means that the proceedings in each jurisdiction must have the same end in view;
>
> (v) the assessment of identity of *cause* and identity of *object* is to be made by reference only to the claims in each action and not to the defences to those claims;
>
> (vi) it follows that Article 27 is not engaged merely by virtue of the fact that common issues might arise in both sets of proceedings.

24. In my view a comparison between the claims in the proceedings in Milan and London in this case demonstrates clearly that the *cause* in Milan is not the same as the *cause* in London. As far as the factual basis of the claims is concerned, in Milan both of ENPAM's claims are based on the conduct of Barclays' representatives leading up to the making of the Letter Agreement, whereas in London Barclays' claim is based on the commencement of proceedings by ENPAM in Milan. As far as the juridical basis of the claims is concerned, ENPAM's main claim in Milan is a claim in tort for breach of Italian law. As such it provides the basis for its assertion that the court has

jurisdiction under article 5(3) of the Judgments Regulation. The challenge to the validity of the jurisdiction clause in the Letter Agreement is simply a means of fortifying the contention that the court in Milan has jurisdiction to entertain the claim. ENPAM's secondary claim for a declaration that the Letter Agreement is null and void and for restitution of sums paid under it is based on Barclays' failure to comply with certain provisions of Italian law. Barclays' claim in London, by contrast, is for damages for breach of the jurisdiction agreements.

25. Mr. Hapgood submitted that, by asserting in paragraph 11.1 of its statement of claim in the Milan proceedings that the Letter Agreement would not be an effective method of excluding the court's jurisdiction and by seeking a declaration that the Letter Agreement "and the subsequent agreements between the parties and therefore the entire deal" is a nullity, ENPAM made it clear that it was challenging the validity of the Letter Agreement, the PCA and the jurisdiction clauses they contained. I am unable to accept that submission. The challenge to the Letter Agreement seems to me to be directed to the substance of that agreement and to the question whether it was an appropriate or effective vehicle for modifying the effect of article 5(3) of the Judgments Regulation. Moreover, the prayer is squarely directed to the substance of the Letter Agreement and given that there were two supplementary agreements to the Letter Agreement, I do not think that the general reference to "the subsequent agreements between the parties" and "the entire deal" can properly be read as extending to the PCA and the separable jurisdiction clauses.

26. For these reasons I do not think that the proceedings involved the same *cause*.

27. Nor do I think that they involved the same *objet*. The aim of the proceedings in Milan is to recover damages for "pre-contractual and extra-contractual liability" or restitution of sums paid under the agreement. The aim of the proceedings in London is to recover damages for breach of the jurisdiction clauses. It is true that the validity of the jurisdiction clauses (as opposed to the substantive agreements) is an issue that will or may arise in both sets of proceedings, but as Lord Clarke pointed out, that is not sufficient to bring article 27 into play.

28. Since there is in my view no identity of *cause* or *objet* in this case, I do not think that the court was bound to stay the proceedings pursuant to article 27 of the Judgments Regulation. This is not a case in which the claims in Milan and London are mirror images of each other and thus legally irreconcilable (see per Lord Clarke in *The 'Alexandros T'* at paragraph 30). Whether Barclays acted unlawfully in connection with the Letter Agreement and whether that agreement is void as a result had no bearing on the validity of the jurisdiction agreement in that agreement and a fortiori on the jurisdiction agreement in the PCA.

Article 28

29. As noted earlier, it was common ground before the judge and before us that the proceedings in Milan and the proceedings in London are related. The only question for decision, therefore, is whether the judge was wrong in exercising his discretion not to stay the proceedings in London.

30. In its skeleton argument for the appeal ENPAM submitted that, if the two sets of proceedings are held to involve the same cause of action as far as the Letter

Agreement is concerned, so that they must to that extent be stayed under article 27, it would be sensible to stay the proceedings relating to the PCA to enable those also to be decided in Milan, because the issues are so closely related. If I had come to the conclusion that it was necessary to stay part of the proceedings under article 27, that point might have had some force, but since I have come to the contrary conclusion, it falls away.

31. The judge identified three main factors militating against a stay: (1) the existence of the jurisdiction clauses which had been agreed before the dispute arose, (2) the speed at which the English courts could dispose of the issue and (3) the fact that the proceedings in Milan had been deliberately structured in a way that would enable that court to assume jurisdiction even though the main claim did not contain a challenge to the validity of the agreements. He considered that the last point tended to undermine any suggestion that the court should defer to Milan as the court first seised as a fundamental principle independent of article 27. These all seem to me to be proper factors for the judge to have taken into account and indeed Mr. Hapgood made it clear that he did not challenge the judge's exercise of his discretion on any grounds other than those mentioned earlier. It follows, therefore, that there is no basis on which we could set aside his decision. I should, perhaps, for completeness add that the fact that the filing of ENPAM's brief in the Milan proceedings had resulted in a closer relationship between the proceedings than existed previously, is not, I think, sufficient to outweigh the factors on which the judge relied in declining to stay the proceedings in London.

Summary judgment

32. In the court below ENPAM advanced five reasons why the judge should not give summary judgment in favour of Barclays on its claims. Before us, however, it pursued only one of those arguments, namely, that Barclays would be likely to rely on that judgment as giving rise to a binding decision which would pre-empt, and thus interfere with, the jurisdiction of the court in Milan to determine the meaning and effect of the jurisdiction clauses. He submitted that that would infringe the European Union principle of mutual trust between the courts of Member States exemplified by the decisions in cases such as *Turner v Grovit* [2005] 1 A.C. 101 and *West Tankers Inc. v Allianz S.p.A.* [2009] 1 A.C. 1138, in which the European Court of Justice held that the courts of one Member State cannot by injunction restrain a party to proceedings in another Member State from pursuing them.

33. The judge rejected that argument. He held that it was not seriously open to doubt that the claims in the Milan proceedings fell within the scope of the jurisdiction clauses and that he was bound by a decision of this court in *The 'Alexandros T'* [2014] 2 Lloyd's Rep 544 that giving summary judgment would not infringe the principle of mutual trust between the courts of Member States. He also rejected the submission that the principle of mutual trust applies independently of articles 27 and 28.

34. Mr. Hapgood submitted that the present case could be distinguished from *The 'Alexandros T'* on the grounds that there was in that case no need for the Greek court to resolve issues concerning the validity, scope or effect of the relevant jurisdiction clauses. On the basis of a dictum of Christopher Clarke J. in *Banco de Honduras S.A. v East West Insurance Co. Ltd* [1996] L.R.L.R. 74 at pages 84-85 to the effect that the right to insist on being sued only in the contractually agreed forum is not absolute, he

argued that a party to a jurisdiction clause is not entitled to sue for breach of the clause where to do so would infringe the principle of trust between the courts of Member States.

35. In my view this proposition is not only unsupported by authority, it is impossible to reconcile with the decision of this court in *The 'Alexandros T'*. As the judge noted, the suggested analogy between ordering summary judgment and granting an anti-suit injunction was specifically considered and rejected by Longmore L.J. in paragraphs 15-16 of his judgment. I am unable to accept that there is any material distinction between the present case and *The 'Alexandros T'* and in those circumstances it seems to me that we are bound to take the same view and hold that the judge was not precluded from granting summary judgment by considerations of that kind.

36. In support of his submission that ENPAM had an arguable defence on the merits to Barclays' claim Mr. Hapgood invited us to consider certain exchanges between the Bench and counsel in an appeal currently pending before the Supreme Court, *AMT Futures Ltd v Marzillier, Dr. Meier & Dr. Gunter Rechtanswaltsgesellschaft m.b.H.* [2015] EWCA Civ 143, [2015] Q.B. 699. The burden of his submission was that, because the Supreme Court had indicated that it was minded to refer to the Court of Justice of the European Union the question whether the courts of one Member State should refuse to entertain a claim for damages for bringing proceedings in the courts of another Member State in breach of an exclusive jurisdiction clause, the issue was sufficiently arguable to give rise to a real prospect of success at trial.

37. In my view it would be wrong in principle for us to have regard to statements of judicial opinion by other judges in the course of argument in other proceedings. The court must decide for itself on the basis of the evidence before it and existing authority whether the defendant has any real prospect of defending the claim. This is not a case in which the facts giving rise to the claim need to be investigated at trial. In the present case the only ground of defence on which ENPAM continued to rely was that to give summary judgment would infringe the principle of mutual trust between the courts of Member States. That is a question of law, which the court can and should decide on the application. Existing authority in the shape of *The 'Alexandros T'* requires us to hold that giving judgment on a claim of this kind is not impermissible under European law, and since there was no other challenge to this part of the judge's decision, the appeal against this part of the order below must also fail.

Conclusion

38. For all these reasons I have reached the conclusion that the appeal should be dismissed.

Lord Justice Tomlinson :

39. I agree.

Mr. Justice Arnold :

40. I also agree.