Neutral Citation Number: [2023] EWCA Civ 222

Case No: **CA-2022-000494**

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (KBD)
MRS JUSTICE COCKERILL
[2022] EWHC 245 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2023

Before:

THE LORD BURNETT OF MALDON, LORD CHIEF JUSTICE
SIR GEOFFREY VOS, MASTER OF THE ROLLS
and
LADY JUSTICE CARR

Between:

(1) KWOK HO WAN **(2) ACE DECADE HOLDINGS LIMITED**	**Claimants/ Respondents**
(3) DAWN STATE LIMITED	**Claimant**
- and –	
UBS AG (LONDON BRANCH)	**Defendant/ Appellant**

David Quest KC and Scott Ralston (instructed by **Herbert Smith Freehills LLP**) appeared on behalf of the **Defendant/Appellant** (UBS London)

Sa'ad Hossain KC, and Matthew Hoyle (instructed by **Harcus Parker Limited**) appeared on behalf of the **second Claimant/ second Respondent** (Ace Decade)

The **first Claimant/first Respondent and the third Claimant** (Mr Kwok and Dawn State respectively) did not appear and were not represented

Hearing date: 8 February 2023

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JUDGMENT

SIR GEOFFREY VOS, MASTER OF THE ROLLS:

1. This appeal raises two questions concerning the proper meaning of articles 5(3) and 5(5) of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters signed at Lugano on 30 October 2007 (Lugano II). The normal rule under article 2 of Lugano II is that persons domiciled in a state bound by it should be sued in that state. Here, the defendant is the London branch of UBS, which is a Swiss company domiciled in Switzerland. UBS contends that it can only be sued by two of the three claimants (Mr Kwok and Ace Decade) in Switzerland. Mr Kwok and Ace Decade rely on articles 5(3) and 5(5) of Lugano II (article 5(3) and article 5(5) respectively) to establish special jurisdiction for their claims here in England and Wales. Mrs Justice Cockerill (the judge) accepted their submissions and dismissed UBS's jurisdiction challenge. The question for this court is whether she was right.

2. It is common ground that Lugano II applies to this case because of the effect of regulations 82, 92 and 93 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, notwithstanding the United Kingdom's withdrawal from the European Union on 31 January 2020. The proceedings were issued on 28 May 2020, which was before the implementation period ended on 1 January 2021 (IP Completion Day).

3. Article 5(3) provides that a party such as UBS may be sued "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur". Article 5(5) provides that a party such as UBS may be sued "as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated".

4. The two central issues in the appeal are whether, in the circumstances of this case, the judge was right to say that: (a) London was "the place where the harmful event[s] occurred" to Mr Kwok and Ace Decade (the article 5(3) issue), and (b) the dispute with Mr Kwok and Ace Decade arose "out of the operations" of UBS London (the article 5(5) issue).

5. The factual background to the dispute is complex and is carefully explained in the judge's judgment at [8]-[24] to which reference should be made for the details. It is sufficient at this stage to set out a slightly amended version of UBS's own concise summary of the facts:

> Mr Kwok and Ace Decade [say] that they made a loss-making investment in reliance on negligent misstatements made (or advice given) by Mr Wong of UBS to Mr Kwok and Ace Decade in Hong Kong. The representations concerned how it was said UBS London would act in the event of a default. The investment was made by Ace Decade (funded by Mr Kwok) in China, by way of a co-investment agreement with Haixia Huifu Asset Investment and Fund Management Co Ltd (Haixia), a Chinese investment manager.
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> The investment was referable to shares (the H-shares) in Haitong Securities Co Ltd, a Chinese securities firm listed on the Hong Kong Stock Exchange. For regulatory reasons, Ace Decade did not want to acquire any direct interest in the shares. That was why the Co-Investment Agreement was entered into between (i) Ace Decade

(ii) Haixia and (iii) Dawn State, a BVI company that was then a subsidiary of a fund managed by Haixia. Under that agreement, Ace Decade made a "Monetary Contribution" of US$500m to Dawn State, Haixia earned fees, and Dawn State subscribed for the H-shares. Ace Decade's contractual rights included the right to share in distributions by Dawn State. Further, under a related Letter Agreement, Ace Decade had the right to call for the entire issued share capital of Dawn State, and agreed with Haixia that it would be solely responsible for any costs incurred in connection with the financing of the investment. Dawn State's subscription to the H-shares was (in addition to the funding received in the form of the Monetary Contribution) partly financed by a US$750m loan from UBS London pursuant to the terms of a Facility Agreement governed by English law and jurisdiction. The loan was secured by a charge over the H-shares pursuant to the terms of a Security Agreement governed by English law and jurisdiction.

The Co-Investment Agreement and the Letter Agreement were made in China and governed by Hong Kong law. There is no evidence from the claimants as to the location from which the Monetary Contribution was paid by Ace Decade to Dawn State, but it is not said to be England.

The price of the H-shares fell sharply during July 2015. As a result, UBS London exercised its rights under the Financing and Security Agreements to demand repayment of the loan from Dawn State and, when no payment was received, to sell the H-shares. The sale price was such that, after repayment of the loan, less than US$5m remained.

6. The parties were agreed in relation to the article 5(3) issue that the Court of Justice of the European Union (the CJEU) had held in *Handelskwekerij GJ Bier BV v. Mines de Potasse d'Alsace SA* Case 21/76, [1978] QB 708 (*Bier*) at [19] that the words "the place of the harmful event" gave a claimant an option to commence proceedings either "at the place where the damage occurred" or at "the place of the event giving rise to" that damage. It was the place where the damage occurred that was relevant to this case.

7. The judge analysed the authorities in detail and concluded at [90] (as remains common ground) that "the concept of damage cannot be answered simply by reference to the place where a party's assets are located or where it generally "feels" the economic effect". She held at [111] that the leading CJEU cases demonstrated that it was the manifestation of damage that was relevant, not the transaction that ultimately led to such loss, and that the manifestation was more likely to be associated with crystallisation of the damage than the origins of the transaction in cases where there was a difference.

8. UBS contended that this was wrong in principle, and that the authorities demonstrated instead that, where a claimant complained that it had suffered financial loss by entering into a transaction in reliance on a misstatement, the correct test for locating the place of damage under article 5(3) was (a) as a general rule, the place at which the claimant entered into or committed to the transaction (place of commitment), but (b) as an exception, the location (if different) of the bank account from which the funds were applied to the transaction (place of payment), provided that the claimant could demonstrate that additional special factors were present. Ace Decade broadly supported the judge's conclusion.

9. In relation to the article 5(5) issue, it was common ground that the court had to determine whether the claim arose out of the operations of UBS London by reference to the recent CJEU decision in *flyLAL Lithuania* Case C-27/17, [2019] 1 WLR 669 (*flyLAL*) at [58]-[66].

10. The judge decided at [138]-[139] that it was "sufficient nexus" that mattered, and that the test was a factual one. Despite the fact that the CJEU had said at [63] and [66] of *flyLAL* that article 5(5) covered an action that sought compensation for damage where the branch office actually and significantly participated in the tort alleged, the judge said at [140] that she did "not regard the authorities as justifying the submission that sufficiently significant connection requires involvement in the tortious acts". In this case, the judge held at [141]-[146] that the natural answer to the question of whether the claim arose out of the operations of UBS London was "yes". The claim could not have occurred and the story could not be told without UBS London. There was sufficient nexus with England and Wales, because Mr Kwok had sought reassurance about UBS London's policies, and the alleged misstatements were about UBS London's policies. UBS London had been identified as the relevant contractual counterparty from 12 December 2014 at the latest. It was UBS London's conduct which created the actionable loss claimed.

11. UBS submitted that the judge was wrong to conclude at [149] that UBS London had sufficiently and significantly participated in several elements of the causes of action. It had not. Ace Decade did not allege that anyone at UBS London either made the alleged misstatements or acted negligently. Moreover, properly analysed, the claimants' losses occurred when the Co-Investment Agreement was entered into. Again, Ace Decade supported the judge's conclusions.

12. I have concluded for the reasons given below that the appeal should be dismissed on all grounds.

13. As regards article 5(3), put simply, the harmful event for which compensation is claimed did not occur in this case until UBS London sold the H-shares. That was decided upon in London. Until that time, the wrongs alleged had not given rise to the primary damage claimed. The damage caused to Ace Decade and Mr Kwok occurred in London when the H-shares, in which they had an indirect investment, were sold by UBS London, even if they may have felt the effects of that damage elsewhere.

14. As regards article 5(5), again put simply, the claims undoubtedly arose out of UBS London's operations. UBS London significantly participated in the events which have given rise both to the claim and to the loss claimed as the judge found.

15. I shall now deal with (a) the approach that the court should adopt, (b) the nature of the case against UBS London, (c) the judge's judgment, and (d) the two main issues in the appeal.

<u>The approach that the court should adopt</u>

16. The general approach to Lugano II is common ground. I record one or two of the points made by the judge by way of introduction. Her judgment at [36]-[46] should be referred to for the details.

17. Lugano II is to be given an autonomous interpretation to ensure its uniform application (*JSC BTA Bank v. Khrapunov and Ablyazov (No 14)* [2018] UKSC 19, [2020] AC 727 (*Ablyazov*) per Lord Sumption and Lord Lloyd-Jones at [32]). The exceptions to the general rule that defendants are to be sued in their state of domicile are to be interpreted strictly (*Ablyazov* at [31]). The purpose of the article 5 exceptions is to confer special jurisdiction on courts having a particularly close connecting factor with the dispute (*Marinari v. Lloyd's Bank plc* Case C-364/93, [1996] QB 217 at [11] of the CJEU's judgment). The claimants have the burden of showing a good arguable case that the court has jurisdiction (*Alta Trading v. Bosworth* [2021] ICR 1358 at [30]).

18. Section 6(3) of the European Union (Withdrawal) Act 2018 requires this court to decide any question as to the meaning or effect of Lugano II in accordance with retained EU case law and retained general principles of EU law. Under section 6(2), however, the court needs only to "have regard" to CJEU decisions after IP Completion Day.

The nature of the case against UBS London

19. The case pleaded by Ace Decade and Mr Kwok against UBS London is summarised at [25]-[30] of the judgment. What follows is an abbreviated summary of those paragraphs. It is to be noted that Mr Kwok only claims in the alternative on the premise that UBS London successfully disputes its liability to Ace Decade.

20. Ace Decade and Mr Kwok's primary claims are that UBS, in breach of its duty of care, negligently made false representations to them about the nature of the financing supplied to Dawn State and how UBS London would act in relation to it. Ace Decade claims that it: (a) entered into the Co-Investment Agreement with Haixia, and did not withdraw from it, and (b) caused Dawn State to enter into the Facility Agreement and the Security Agreement, in reliance on those representations.

21. Mr Kwok expressed concerns about the inclusion of the mandatory prepayment provisions in clause 7.7 of the Facility Agreement ultimately entered into between Dawn State and UBS London. In response, Mr Wong of UBS allegedly:-

    i) Represented that UBS London had a policy which it intended to apply to Mr Kwok and Ace Decade (and by implication Dawn State) that: (a) it would not demand additional collateral or mandatory prepayment, and (b) even if it did make such a demand, it would give them additional time to make such payments.

    ii) Represented that UBS London had given such favourable treatment to another person, and would treat Mr Kwok and Ace Decade in the same way.

    iii) Advised that Mr Kwok and Ace Decade should not be concerned about the margin call or prepayment provisions.

22. Ace Decade and Mr Kwok allege that the decision-makers at UBS London had no such intentions or policies and there was no reasonable basis for the representations.

23. The following losses are pleaded by Ace Decade and Mr Kwok as having arisen from these events and from the actions taken by UBS London to enforce the Facility Agreement between 6 and 8 July 2015:

i) Some US$495 million caused by Ace Decade's entry into the transaction, calculated as the Monetary Contribution paid by Ace Decade under the Co-Investment Agreement less the amount recovered under the Co-Investment Agreement.

ii) The loss caused by Ace Decade's failure to withdraw from the transaction under the Co-Investment Agreement.

iii) Damages equating to the loss of returns that would have been achieved by Ace Decade had it invested in the H-shares by another method.

The judge's judgment

24. The judge expressed her main conclusions at [149] as follows:

> the English court has jurisdiction to try these claims, in particular: (i) [u]nder [article 5(3)], on the basis that London was the place where the harmful event occurred, and (ii) [u]nder [article 5(5)], on the basis that UBS London sufficiently and significantly participated in several elements of the causes of action forming the [claims].

Article 5(3)

25. The judge first dealt at [62] with the suggestion that Ace Decade had not pleaded that the enforcement gave rise to the loss claimed, but that Ace Decade would have entered into a different transaction if it had known that the representations were false (see [23(iii) above]). She held that that was just one of the ways the claim was put and that it was, in effect, part of a pleading of reliance.

26. She then summarised all the main EU and domestic authorities, as well as relevant academic commentary, at [66]-[110]. I do not propose to repeat that comprehensive exposition.

27. At [98], the judge held that *Universal Music International BV v. Schilling* Case C-12/15 [2016] QB 967 (*UMI*) appeared to demonstrate that "the location where damage manifests is identified from some objectively ascertainable step or act which crystallises the loss and connects the two parties together". Then, at [111], the judge concluded that "certain points are established and provide critical guidance": (i) the CJEU had held that it is the manifestation of damage that is relevant, not the transaction that ultimately led to such loss, (ii) manifestation is more likely to be associated with crystallisation of the damage than the origins of the transaction in cases where there is a difference, (iii) caution was required when damage may or may not occur, to distinguish between the last thing that happened to bring the loss home to the claimant and the point where the loss itself becomes clear; *Kronhofer v. Maier* C-168/02 [2004] I L Pr 27 (*Kronhofer*) and *UMI* were cases where the claimants were exposed to risk from the moment of their investment, (iv) the defendant's ability to foresee that it might be sued in the suggested jurisdiction and the sound administration of justice cannot provide an independent basis for jurisdiction, but may be used as a cross-check on the court's conclusion (as may the

time when the loss became "fixed", "certain" or an irreversible burden on the claimant's assets (see [111(ii)] and [116])).

28. At [112]-[118], the judge held that it could not be said either that the damage actually manifested itself when Mr Kwok and Ace Decade relied on the representations, or at the last point when they actually felt the loss. The loss manifested itself in the secured account in London where the H-shares they invested in, albeit indirectly, were held, when the H-shares were liquidated. The special circumstances, by way of cross-check, also pointed to London. The parties had agreed that the H-shares would be held in the secured account in London; UBS London's contractual documentation (albeit at one remove from Ace Decade) was in English and governed by English law, and it was foreseeable that the parties might sue or be sued in relation to the investment in London.

Article 5(5)

29. The judge started her analysis at [135]-[137] by rejecting the notions that: (i) it had to be established either that UBS London was standing in for UBS or that the relationship of the claim to England and Wales was "specially close", and (ii) there could be no jurisdiction in London if there was also jurisdiction in Hong Kong on the basis of the actions of UBS Hong Kong.

30. She then held at [138]-[140] that what mattered was "sufficient nexus", that the test was a fact sensitive one and, as I have already said at [10] above, that the authorities did not show that a "sufficiently significant connection" (or presumably sufficient nexus) required involvement in the tortious acts.

31. As also summarised at [10] above, the judge then held that the claims did arise out of the operations of UBS London. There was sufficient nexus, because UBS was a critical part of the deal structure from the outset, the misstatements were about UBS London's policies, and UBS London's conduct created the loss claimed.

<u>The article 5(3) issue: Was the judge right to find that London was the place where the harmful events occurred?</u>

32. UBS London's main submission was that the damage limb of the test under section 5(3) was that, as an exception, the location of the bank account from which the funds were applied to the transaction might be the place of damage, provided that the claimant could demonstrate that additional special factors were present. The judge, it is submitted, did not explain how that test was satisfied in this case. In addition, UBS London argued that the test that the judge applied: (a) contravened authority, (b) was based on a misreading of *Kronhofer* and *UMI*, (c) clashed with the core principles of Lugano II scheme, and (d) was vague and indeterminate. In any event, even if she applied the right test, she applied it wrongly, because it could not properly be said that Ace Decade and Mr Kwok suffered a harmful event in London, when they were not party to any agreement with UBS London, and when they had deliberately structured the transaction so as to invest in the H-shares indirectly through the Co-Investment Agreement that had nothing to do with England and Wales.

33. Both parties relied on 5 main authorities decided by the CJEU. The judge said that they were not entirely clear and UBS London, at least, agreed. In my judgment, any lack of clarity is caused by the quite different factual circumstances giving rise to the cases,

and the mistaken attempt to construe them as one might a statute. The CJEU has actually given quite clear guidance, but has not sought to lay down immutable rules applicable to every type of case. With that in mind, I will deal briefly in chronological order with *Kronhofer*, *Kolassa v. Barclays Bank plc* C-375/13, [2016] 1 All ER (Comm) 733 (*Kolassa*), *UMI, Löber v. Barclays Bank plc* Case C-304/17, [2019] 4 WLR 5 (*Löber*), and *Vereniging Van Effectenbezitters v. BP plc* C-709/19, [2021] ILPr 23 (*VEB*).

The main CJEU cases

34. *Kronhofer* was a simple investment case, in which an Austrian investor (Mr Kronhofer) had been persuaded on the telephone by a German firm to invest in risky call options in London. The claim was based on the German firm's failure to warn Mr Kronhofer of the risks involved. The investment account was opened and sustained loss in Germany.

35. UBS London criticised the judge for saying at [111(iii)] that Mr Kronhofer had been exposed to risk from the moment he invested, but that it had not been suggested that the damage occurred at that time. The CJEU decided the case at [17]-[21] on the straightforward basis that there was no justification to confer jurisdiction under article 5(3) on the courts of a state other than one where the "event which resulted in the damage occurred and the damage was sustained, that is to say all of the elements which give rise to liability", which was Germany. The "place where the harmful event occurred" could not "encompass any place where the adverse consequences" would be felt of an event which had already caused damage elsewhere – i.e. in Germany. The CJEU had made no comment on whether the Mr Kronhofer was or was not exposed to risk from the start – but the judge was right to say that the case was entirely based on the findings that the bad investment took place and the loss was sustained in Germany. Only Mr Kronhofer's lost assets were concentrated in Austria and that was not enough. *Kronhofer* is of assistance in so far as it shows that one can look under article 5(3) at the place where the loss claimed actually occurred.

36. *Kolassa* was the first case on which UBS London relied as supporting the "location of the bank account plus supporting factors" approach. The claimant, Mr Kolassa, an Austrian consumer invested in X1 Global EUR Index Certificates issued by Barclays Bank plc, through an Austrian internet bank. Crucially, at the time of the issue of the certificates, Barclays distributed a base prospectus which, at its request, was also distributed in Austria (see [11]-[15] and [56] of the CJEU's judgment). Mr Kolassa sued Barclays in Austria for the losses he sustained when the value of the certificates collapsed, alleging breaches of the prospectus rules.

37. The CJEU held that Mr Kolassa's loss had occurred in Austria, referring at [48]-[49] to *Kronhofer*. It relied strongly at [51] and [54] on the facts that (i) the certificates' loss of value was due, not to the vagaries of the market, but to the management of the underlying funds, and (ii) Barclays' acts and omissions had taken place "before the investment made by Mr Kolassa and were, in his view, decisive for that investment". In those circumstances, the loss occurred "in the place where the investor suffered it". At [56]-[57], the CJEU made clear that it was important in this kind of case that the defendant might reasonably foresee the court in which it might be sued (see *Kronhofer* at [20]), and that "the issuer of a certificate who does not comply with his legal obligations in respect of the prospectus must, when he decides to notify the prospectus"

in other countries, anticipate that those domiciled there "might invest in that certificate and suffer loss". It does not seem to me that the CJEU thought that it was applying different principles in *Kolassa* from those applied in *Kronhofer*. It was simply that the facts were different.

38. In *UMI,* a Dutch company, sued its Czech lawyers in the Netherlands for negligently drafting the terms of a share option agreement. UMI relied on the damages limb of article 5(3) arguing that the harmful event occurred in the Netherlands because payment of an arbitration award had been made from UMI's Dutch bank account. The CJEU noted at [12] that the claim was based on the fact that an amendment to the contract that the defendants had drafted suggested by UMI's legal department: "was not fully reproduced by Mr Broz [the draftsperson] which led to a fivefold increase in the sale price [of the 30% of the company being purchased under the option] compared with the price originally intended". It was in that context that the CJEU rejected the application of article 5(3) and held at [30]-[32]:

> 30. It is clear from the request for a preliminary ruling that the [option contract] was negotiated and signed in the Czech Republic. … the obligation for Universal Music to pay a greater amount than originally provided for the remaining 30% of shares [was established there]. …
>
> 31. The damage for [UMI] resulting from the difference between the intended sale price and the price mentioned in that contract became certain in the course of the settlement agreed between the parties before the arbitration board, in the Czech Republic, on 31 January 2005, the date on which the actual sale price was fixed. Therefore, the obligation to pay placed an irreversible burden on [UMI's] assets.
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> 32. Accordingly, the loss of some assets happened in the Czech Republic, the damage having occurred there. The mere fact that, to implement the settlement agreed before the arbitration board, in the Czech Republic, [UMI] paid the financial settlement by a transfer from a bank account it held in The Netherlands, is not such as to invalidate that finding.

39. This led the CJEU to the following conclusions at [38]-[40]:

> 38. Consequently, purely financial damage which occurs directly in the applicant's bank account cannot, in itself, be qualified as a "relevant connecting factor", pursuant to [article 5(3)]. In that respect, it should also be noted that a company such as [UMI] may have had the choice of several bank accounts from which to pay the settlement amount, so that the place where that account is situated does not necessarily constitute a reliable connecting factor.
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> 39. It is only where the other circumstances specific to the case also contribute to attributing jurisdiction to the courts for the place where a purely financial damage occurred, that such damage could, justifiably, entitle the applicant to bring the proceedings before the courts for that place.
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> 40. In the light of the foregoing considerations, the answer to the first question is that [article 5(3)] must be interpreted as meaning that, in [this situation], the "place where the harmful event occurred" may not be construed as being, failing any other connecting factors, the place in a member state where the damage occurred, when

> that damage consists exclusively of financial damage which materialises directly in the bank account of the applicant and is the direct result of an unlawful act committed in another member state.

40. The CJEU in *UMI* rejected reliance on article 5(3) because the damage caused by the negligence had not occurred until the settlement was reached in the arbitration proceedings in the Czech Republic. Other factors were needed in addition to payment of the settlement amount to allow article 5(3) to operate in favour of Netherlands jurisdiction. There were no such factors in *UMI*.

41. In relation to those other factors, it is worth noting that the CJEU had first reiterated at [26] in *UMI* that "[a]ccording to settled case law, the rule of special jurisdiction laid down in article 5(3) … is based on the existence of a particularly close connecting factor between the dispute and the courts for the place where the harmful event occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings".

42. UBS London relied on *Löber* where the facts were, to all intents and purposes, the same as in *Kolassa*, as demonstrating that further connecting factors, beyond a payment account, were needed. UBS London also contended that [9] of the judgment demonstrated that the loss had not occurred, as the judge thought at [94], when the investment was made. Instead, the "money invested in the certificates was used in a pyramid fraud scheme" and had been lost when the certificates later become worthless.

43. I am not sure that the CJEU's judgment in *Löber* at [24]-[33] takes the matter beyond the earlier cases. It repeated that an attribution of jurisdiction to the claimant's place of domicile was justified if that place was also the place "the events giving rise to the damage took place or the damage occurred". So far as place of damage was concerned: "[it followed] from the court's case law that such a place [was] that where the alleged damage actually [manifested] itself" (see *CDC Hydrogen Peroxide* C-352/13, [2015] QB 906 at [52]). The CJEU repeated its conclusions in *UMI* (recorded at [39] above), before saying that "taken as a whole, the specific circumstances of the present case contribute to attributing jurisdiction to the Austrian courts": Ms Löber signed her contract in Austria, made the payments in Austria, dealt only with Austrian banks and acquired the certificates on the Austrian secondary market, and the prospectus was notified to the Austrian supervisory bank.

44. *VEB* was a post IP Completion Day case to which we are only obliged to have regard – we are not bound by it. It was, however, another corporate misrepresentation case, where Dutch claimants tried unsuccessfully to sue BP plc in the Netherlands in respect of investments in BP shares made through Dutch investment firms, relying on reporting misrepresentations related to the Deepwater Horizon oil spill. The CJEU at [24]-[37] once again repeated the points made in the earlier cases. It referred specifically at [31] to what it had said in *Löber* at [27] to the effect that the place where the damage occurred was "where the alleged damage actually manifests itself". At [33]-[35], the CJEU referred to the need for foreseeability of suit, concluding that, for claims against listed companies based on breaches of reporting obligations, the place where the damage occurred could only be the place where the company complied with its statutory reporting obligations. The facts of *VEB* are obviously quite different from the facts of *Kolassa* and *Löber*.

Was the judge right in her conclusions on article 5(3)?

45. It seems clear to me that the judge was right to hold, as she did, that the place where the damage occurred for the purposes of article 5(3) has indeed been held by the CJEU to be "where the alleged damage actually manifests itself" (see *Löber* at [27] and *VEB* at [31]). The remaining guidance to be obtained from the CJEU cases is somewhat dependent on the facts of those cases. I am not certain that there is any rule that is universally applicable to financial loss cases as UBS London seeks to establish. The answer will depend on the facts of those cases as the contrast between the outcomes in *Kronhofer* and *VEB* on the one hand and *Kolassa* and *Löber* on the other hand, demonstrates.

46. It is, in my judgment, dangerous to seek to define the test for where damage occurs in a wide range of financial loss cases, because they are likely to be so fact dependent. There will of course, need to be factors connecting the dispute to the jurisdiction in question (see *Marinari* at [11], and *UMI* at [26]). But relevant factors will, of course, vary. It is also clear that loss must manifest itself in the jurisdiction in question.

47. The judge seems to me to have founded her decision on the indication that she found in *UMI* to the effect that damage manifested itself where it crystallised. In *UMI*, that was where the arbitration award identified what loss UMI had actually sustained, even though UMI had obviously sustained loss when it entered into the option agreement pursuant to the negligent drafting of the Czech lawyers.

48. I am not sure, however, that jurisdiction founded on damage under article 5(3) will always be where the loss actually crystallises and is made certain. In *VEB*, for example, the CJEU seems to have laid down a rule that applies to cases brought in respect of listed companies breaching reporting requirements. This is not such a case. Nor is this a case like *Kolassa* and *Löber*, where there were significant connecting factors with the claimant's domicile in that the investments were made in Austria and the losses manifested themselves there.

49. I regard it as of the first importance to give the words of article 5(3) and the damage limb established by [19] of *Bier* an autonomous construction. The same outcome ought to prevail on the same facts whatever law governs the tort or delict relied upon. I am conscious too of what the Supreme Court said in *Ablyazov* at [31] to the effect that:

> However, the requirement of an autonomous interpretation does not mean that the component elements of the cause of action in domestic law are irrelevant. On the contrary they have a vital role in defining the legally relevant conduct and thus identifying the acts which fall to be located for the purposes of article 5(3). In particular, whether an event is harmful is determined by national law. To take an example raised during the hearing of the appeal, if a firearm is manufactured in State A and fired in State B the place of the event giving rise to the damage within article 5(3) is likely to differ depending on whether the basis of the complaint in national law is negligent manufacture of the firearm, or its negligent handling by the gunman.

50. In this case, UBS London places central reliance, in effect, on the fact that Mr Kwok and Ace Decade sustained some loss when Ace Decade entered into the Co-Investment Agreement in Hong Kong. Accordingly, the tort of negligent misstatement was

complete at that stage and some loss had manifested itself immediately. UBS London points to the pleading of loss at that point.

51. In my judgment, that approach is over technical and not appropriate in this case. It puts form above substance, and places too much reliance on the shape of the pleadings. An autonomous approach to article 5(3) requires an answer to the pragmatic questions of where the damage claimed by Mr Kwok and Ace Decade actually manifested itself, and whether there are, in substance, factors connecting the dispute to England and Wales such as to allow the specific jurisdiction in article 5(3) to be invoked and to outweigh the general rule that, under Lugano II, parties are to be sued in the place of their domicile.

52. In my judgment, the judge was right to answer these questions in favour of the jurisdiction of England and Wales. First, the substantive damage claimed (US$495 million) did indeed only manifest itself when the H-shares were sold in London. Up to that point, there was never realistically going to have been a claim; the H-shares might have gone back up in value. Secondly, the fact that Mr Kwok and Ace Decade only had an indirect interest in Dawn State is of no consequence, because Ace Decade's loss really did manifest itself in London, howsoever the transaction was structured. Once the shares were sold, Ace Decade had lost whatever interest it had in the value of the H-shares. Moreover, it is not correct to contend, as UBS London did, that the Co-Investment Agreement was unrelated to the funding arrangements entered into by Dawn State. Under the Letter Agreement, Ace Decade had agreed that it would be solely responsible for any costs incurred in connection with the financing of the investment. Thirdly, from the start of the transaction it was entirely foreseeable to all the parties and to UBS London in particular that proceedings were likely to be brought in London if things went wrong. The H-shares were always to be held in London. The Facility and Security Agreements were founded in London, and any real loss to the H-shares was always likely to be suffered in London. Fourthly, the domicile of UBS has no connection whatever with the transaction, so this is the kind of case where it could always have been seen that article 5(3) might apply so as to displace the general rule under Lugano II. The possibility of jurisdiction in Hong Kong or China is irrelevant to this point.

53. For these reasons, I reject UBS London's suggestion that the outcome that the judge reached was inconsistent with the authorities, let alone *Kronhofer* and *UMI*. I also reject the argument that the judge's conclusion conflicts with the core principles of Lugano II. Indeed, the conclusion she reached was, I think, the only one that could sensibly have been reached applying those principles. Moreover, the result leads to predictability and certainty, not vagueness and uncertainty as UBS London seeks to suggest. As I said at [13] above, the harmful event for which compensation is claimed did not occur in this case until UBS London sold the H-shares.

54. In these circumstances, for the reasons I have explained, which are slightly different from those relied upon by the judge, I would hold that the judge was right to find that London was the place where the harmful events occurred, and dismiss the appeal on the article 5(3) grounds.

<u>The article 5(5) issue: Was the judge right to find that the dispute arose out of the operations of UBS London?</u>

55. I can deal with this issue more briefly. UBS London complains, in effect, that the judge misunderstood the CJEU's decision in *flyLAL* and that she was wrong (i) to decide that the test was "sufficient nexus", and (ii) that UBS London sufficiently and significantly participated in several elements of the causes of action.

56. Article 5(5) allows UBS London to be sued in England and Wales in relation to a dispute that arises "out of the operations of" the branch. The CJEU's decision in *flyLAL* has interpreted those words as meaning the following:

> 63. … in the case of actions based on tortious liability, in order for the dispute to be regarded as arising out of the operations of a branch, that branch must have actually participated in some of the actions constituting the tort. …
>
> 66 … the notion of a "dispute arising out of the operations of a branch" covers an action seeking compensation for damage allegedly caused by abuse of a dominant position consisting of the application of predatory pricing, where a branch of the undertaking which holds the dominant position actually and significantly participated in that abusive practice.

57. The judge in this case, therefore, had to decide whether UBS London actually participated in some of the actions constituting the tort of negligent misstatement alleged by Mr Kwok and Ace Decade. The judge asked herself whether there was a "sufficient nexus" between the dispute and the activities of UBS London, seemingly having taken those words from [135] of AG Bobek's opinion in *flyLAL* within a section headed "nexus with the dispute". For my part, I would prefer to follow the guidance of the CJEU in the paragraphs I have set out above without glossing what was said. For some reason, the judge said wrongly at [140] that she did not regard the authorities as saying that a "sufficiently significant connection" required involvement in the tortious acts. She then went on, correctly I think, to decide that (a) the claims by Mr Kwok and Ace Decade did arise out of the operations of UBS London and (b) UBS London sufficiently and significantly participated in several elements of the causes of action forming the claims.

58. UBS relied on the fact that the main elements of the tort had taken place in Hong Kong or China and that the tort had been complete when loss was sustained on completion of the Co-Investment Agreement. For the reasons I have already given at [52] in dealing with the article 5(3) issue, I agree with the judge that essential parts of the claims in this case arose out of the actions of UBS London. It was UBS London's conduct which created the actionable loss claimed. UBS London entered into the Facility Agreement and Security Agreement so that Mr Kwok and Ace Decade could acquire their indirect interests in the H-shares. The US$495 million claimed was only lost when the H-shares were sold by UBS London. The fact that other losses have also been pleaded does not affect the substance of the claim against UBS. Moreover, as the judge said, Mr Kwok had sought reassurance about UBS London's policies and the alleged misstatements were about UBS London's policies.

Conclusions

59. For the reasons I have tried to express briefly, I would dismiss this appeal.

Lady Justice Carr:

60. I agree.

The Lord Burnett of Maldon, Lord Chief Justice:

61. I also agree.