



Neutral Citation Number: [2011] EWHC 111 (QB)

Case No: HQ08X04736

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2011

Before:

THE HONOURABLE MR JUSTICE EDER

Between:

KATSOURIS BROTHERS LIMITED

**Claimant/
Respondent**

- and -

HAITOGLOU BROS S.A.

**Defendant/
Applicant**

AND

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Claim No 2009-1547

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2011

Before :

THE HONOURABLE MR JUSTICE EDER

Between :

1. KATSOURIS FRESH FOODS LIMITED
2. BAKKAVOR FOODS LIMITED

Claimants

- and -

KATSOURIS BROTHERS LIMITED

**Defendant/
Respondent**

-and-

HAITOGLOU BROTHERS S.A

**Third Party/
Applicant**

Mr Alexander Layton QC (instructed by **Berrymans Lace Mawer**) for **Katsouris Brothers Limited**

Mr Tim Lord QC and Mr Richard Eschwege (instructed by **Watmores Solicitors**) for **Haitoglou Bros S.A.**

Hearing dates: 13-14TH JANUARY 2011

Approved Judgment

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

.....

Approved Judgment

Mr Justice Eder:

Introduction

1. This case concerns the supply in 2006 of tahini, alleged to be contaminated with salmonella, by Haitoglou Brothers SA (“HB”) in Greece to Katsouris Brothers Limited (“KBL”) in England, who then supplied it unaltered to Katsouris Fresh Foods Limited and/or Bakkavor Foods Limited (together “KFF”). KFF used the tahini in the manufacture of houmous which was then onsold to various retailers including Marks & Spencer, J Sainsbury and Waitrose. It is alleged by KBL that discovery of the contamination of the houmous led to a product re-call.
2. Disputes have arisen between KFF, KBL and HB in relation to these matters. As referred to below, the claim by KFF against KBL is now the subject-matter of proceedings in the Commercial Court in England. KBL accepts that any claim it may have against HB in contract must be brought in the courts of Greece. The focus of the present dispute is whether KBL’s claims against HB in tort and/or by way of contribution under the Civil Liability Contribution Act 1978 (the “1978 Act”) should be determined in England or in Greece. In essence, KBL says England; HB says Greece. That is the essential issue which I have to determine.
3. There are four sets of relevant proceedings (in chronological order):
 - (1) KBL v HB, commenced in the Queen’s Bench Division of the High Court by a Claim Form on 28th November 2008 and served on 30th April 2009 (the “Queen’s Bench action”);
 - (2) KFF v KBL, commenced in the Commercial Court by a Claim Form issued on 27th November 2009 (the “KFF action”);
 - (3) HB v KBL, a negative declaratory relief action commenced in Greece on 30th December 2009 and served in England on 13th January 2010 (the “Greek Proceedings”); and
 - (4) KBL v HB, Part 20 Proceedings commenced on 24th September 2010 in the KFF action by leave of Mr Justice Flaux given on 6th September 2010 (the “Part 20 Claim”).
4. There are 4 applications before the Court:
 - (1) KBL’s application for an extension of time for service of its Particulars of Claim in the Queen’s Bench action;
 - (2) HB’s application disputing the Court’s jurisdiction in the Queen’s Bench action;
 - (3) HB’s application disputing the Court’s jurisdiction in relation to the Part 20 Claim in the KFF action; and

Approved Judgment

- (4) KBL's application to transfer the Queen's Bench action to the Commercial Court and for consequential directions.
5. I heard oral argument from Counsel on behalf of KBL and HB in relation to these applications on 13th -14th January 2011. KFF did not appear although I was told that representatives of KFF were present in Court during the hearing. In light of imminent hearings in both Greece and England (as referred to below) and at the request of KBL (which request was not objected to by HB), I informed the parties at the end of that hearing on 14th January of my decision in relation to these applications. Thereafter, an Order was drawn up. This Judgment sets out the reasons for that decision and Order.

Background Facts

6. For present purposes, the relevant background facts can be summarised as follows.
7. HB is a Greek company based in Thessaloniki: it makes and supplies foodstuffs, including tahini paste. Tahini paste is an ingredient in houmous and is produced from the roasting and grinding of sesame seeds.
8. Pursuant to an "ex – works" contract, HB supplied KBL with certain batches of tahini paste on 30th November 2006, 12th December 2006 and 14th December 2006 and delivered them to KBL in Thessaloniki. KBL arranged for the tahini paste to be shipped to England and sold the tahini paste to KFF. KFF used the tahini paste to make houmous for sale in the United Kingdom.
9. KBL alleges that the batches of tahini paste were contaminated with salmonella and that the source of the salmonella was the heat exchanger pipework in HB's premises in Greece. HB disputes all KBL's allegations.
10. On 28th November 2008, KBL issued the Claim Form in the Queen's Bench action against HB. It stated as follows:
- “[KBL] brings a claim against [HB] for breach of contract, for negligence and breach of statute due to the supply of food products by [HB] to [KBL] from 30th November 2006 onwards that were contaminated with salmonella. As a result [KBL] claims from [HB] damages and/or indemnity and/or a contribution in respect of any sum, damages or costs that it is required to pay to its customers, and in particular Bakkavor Foods Limited/Katsouris Fresh Foods, in respect of the supply of the contaminated food products, together with any further losses sustained by [KBL] to be quantified. ”
11. On 24th April 2009, with the Claim Form still not served, KBL invited HB to agree to an extension of time for service of the Particulars of Claim. No such agreement was forthcoming from HB.
12. On 30th April 2009, KBL finally served the Claim Form on HB in Greece. The Claim Form said that Particulars of Claim were to follow. Similarly, KBL's solicitors, Berrymans, said that they would follow in "due course".

Approved Judgment

13. That same day KBL made an *ex parte* application before Master Roberts to extend the time for service of the Particulars of Claim. An order was granted for service of the Particulars of the Claim to be effected:

“28 days after the proposed meeting between the parties, which is due to take place shortly.”

14. However, no date for any such meeting had been fixed at that time. Without service of the Particulars of Claim, HB was under no obligation under the CPR to make an acknowledgement of service or otherwise contest the jurisdiction of the English Court. Under the CPR, it would have been open to HB to dispute jurisdiction at this stage but, as I have stated, HB was under no obligation to do so.
15. Meanwhile, on 3rd July 2009, KFF sent a letter before action to KBL. No letter was sent by KFF to HB.
16. On 7th September 2009 KBL and HB did meet but did not reach any settlement.
17. After the 7th September 2009 meeting, contrary to the order of Master Roberts, KBL did not serve the Particulars of Claim. On the contrary, on 22nd October 2009, Berrymans wrote to HB’s solicitors, Watmores, as follows:

“As we explained, we have not served those proceedings and have allowed them to lapse because following further advice from our client’s counsel, we are satisfied that English law will apply to the contract between [KBL] and [HB].

...we have, course, maintained throughout this matter that English law will apply to the dispute between our clients.

We also consider that there can be no dispute that English law will apply to the tortious claim that our client would bring against your client given that the harmful event/ damage occurred in England

...Given that KFF shortly intend to issue proceedings against our client in England, we will seek to join your client at those proceedings in England and English law will apply”.

18. On 27th November 2009, KFF issued proceedings against KBL in the Commercial Court in London in the KFF Action. HB was not informed by KBL that the KFF Action had been issued against it, KBL. Nor, contrary to what it had said in its letter of 22nd October 2009, did KBL thereupon take any steps to join HB as a Part 20 Defendant.
19. On 2nd December 2009, the Claim Form in the KFF Action was served by KFF on KBL.
20. On 30th December 2009, HB, unaware of the KFF Action, commenced the Greek Proceedings against KBL in the Court of First Instance in Thessaloniki. An English translation of the formal document commencing those Greek Proceedings has been exhibited to the first witness statement of Mr Turner. I shall refer to it as the “Greek

Approved Judgment

Claim Form”. This is an important document which bears close reading. Its salient features may be summarised as follows: -

- (1) The heading states that it is a “negative declaratory action” and refers to Article 70 of the Code of Civil Procedure.
- (2) There then follows an introductory section followed by what is headed a “History of Dispute”. Included within that section is paragraph 2.8 which refers to a letter from Berrymans to HB dated 28.11.2008 stating that HB was going to face an action by KFF for the restoration of the damages suffered by KFF as a consequence of the withdrawal of quantities of the houmous produced by it from the market in February 2007 and that KBL renders HB responsible for any compensation that it may be compelled to pay to KFF from “the aforementioned cause”.
- (3) After referring to further events and correspondence, paragraph 2.16 refers to and sets out at some length the contents of the Claim Form issued by KBL against HB in the Queen’s Bench action quoting the relief sought in that action including “damages and/or indemnity and/or contribution in respect of any sums, damages or costs that it [KBL] is required to pay to its customers and in particular to Katsouris Fresh Foods/ Bakkavor Foods Limited in respect of the supply of the contaminated food products.”
- (4) Section 3 then sets out the “Grounds and Motions of our Claim” followed by Section 4: “Ancillary Grounds and Motions of our Action for Declaratory Judgement”.
- (5) The document ends by setting out various declarations and orders sought, in particular declarations that:

“A....

1. Our company is under no contractual obligation against the respondent arising from the cause reported in our present action, for the reason that contamination of the humus product reported in our present action and produced by the third British company by the name “KATSOURIS FRESH FOODS/BAKKAVOR Ltd” did not originate, under any circumstances, from the quantity of sesame pulp (tahini paste) which the respondent had purchased from our company and that all the contrary allegations of the respondent, as these are cited in detail in paragraphs 3.2, 3.3 and 3.4 (p. 10-12) of this present action are unfounded.

2. Our company does not have any non-contractual – tort liability against the respondent arising from the same aforementioned cause reported in our present action, since, in any case, no negligence devolves upon our company, in order

Approved Judgment

for the claim of the respondent to be also founded on tort behaviour.

B. OTHERWISE AND ANCILLARY, should our previous principal requests be rejected and it is accepted that the contested contamination originated from our company to be declared that:

3. The claims by the respondent against our company from the contract for the sale of sesame pulp (tahini paste) reported in our action have succumbed to the two year limitation period of article 554 of the Civil Code, for the reasons that we explained in our action and specifically in paragraph 4.1 therein (p. 18)

4. The respondent:

a) has forfeited, in compliance with article 39 para.1 of the Convention for the intentional sale of goods, its right to invoke the defect reported in the action, as reason for its compensation, since the respondent did not observe its own obligation, arising from article 38 of the aforementioned Convention and article 39 par.1 thereof, for the reasons we explained in our action and, more specifically, in paragraphs 4.2.

b) otherwise and ancillary, the possible compensation which the respondent may in the future be compelled to pay to KFF must burden our company only by half (50%), for the reason that the respondent neglected to take the necessary, in these circumstances, appropriate measures to mitigate the damage (article 77 of the Convention for the international sale of goods in combination with the supplementary applicable rule of article 300 of the Civil Code), for the reasons laid out in our action, and specifically in paragraph 4.2 therein (p.20)".

21. On 14th January 2010, the Greek Proceedings were served by HB on KBL. I was told that those proceedings would come on for trial on 8th February 2011 although there was some dispute before me as to what will or might happen at such hearing.
22. Meanwhile on 7th May 2010, there was a case management conference in the KFF action. At that stage, of course, HB was not a party to that action. HB was not informed of that case management conference but it appears that the possible involvement of HB in that action was discussed in its absence at that hearing which

Approved Judgment

took place before Burton J. There is no transcript or contemporaneous written note of that hearing although it is said that counsel for KFF indicated that it would not be opposed to a short adjournment if required to ensure that all issues (including those concerning HB) were dealt with at one hearing. In any event HB was not informed of any such discussion nor was it given any note of the hearing.

23. There was then some delay. Eventually, on 30th July 2010, again without notice to HB, KBL made an application to bring the Part 20 Claim in the KFF action against HB. This was 8 months after the KFF action was commenced and 6 months since KBL had been served with the Greek Proceedings. In the Part 20 Claim, KBL seeks an indemnity or contribution under the 1978 Act. KBL accepts that it cannot issue Part 20 Proceedings against HB in respect of any claim in contract or in tort; and any such claims are expressly disavowed in paragraph 34 of the Part 20 Claim. In particular, it is there stated:

“... [KBL] does not seek damages for breach of duty in tort in this action because [HB] has issued proceedings in Greece for a negative declaration of non-liability in respect of tortious and contractual claims made by [KBL] against [HB] and [KBL] accepts that the Greek court was first seised in respect of such claim for the purposes of Article 27 of Council Regulation (EC) 44/2001.”

24. On 6th September 2010, KBL was granted permission by Flaux J to add HB as a Part 20 defendant. After some further delay, that order and a copy of the Part 20 Claim was served on HB on 18th October 2010.
25. On 29th October 2010, KBL issued its application to extend time for service of the Particulars of Claim in the Queen’s Bench action.
26. On 9th November 2010, HB acknowledged service of the Part 20 Claim Form and indicated that it would contest jurisdiction of the Part 20 Claim and apply to set aside the Part 20 Claim.
27. On 23rd November 2010, HB made an application under CPR Part 11 acknowledging service of the Part 20 Proceedings and indicating its intention to contest jurisdiction. On the same day, KBL finally sealed and served HB with its application in the Queen’s Bench action to extend time for service of the Particulars of Claim. On 2nd December 2010, HB issued its application in the Part 20 Claim to contest jurisdiction.
28. As at the date when this hearing commenced before me i.e. on 13th January 2011, the trial between KFF and KBL in the KFF action was scheduled to commence on 7th February 2011. Meanwhile, I was told that the position in Greece was that both parties (i.e. KBL and HB) were required to submit pleadings to the Greek Court in the Greek Proceedings on 18th January 2011 and that the Greek trial was scheduled for 8th February 2011.

Approved JudgmentThe Principles of the Judgments Regulation

29. The question of the English Court's jurisdiction over the Queen's Bench action and Part 20 Claim is determined by Council Regulation (EC) 44/2001 (the "Judgments Regulation"). Its underlying principles are that:
- (1) The rules of jurisdiction must be "*highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile*": see Recital 11.
 - (2) It is necessary to minimise the possibility of concurrent proceedings. There must be a "*clear and effective mechanism*" for "*obviating problems flowing from national differences as to the determination of the times when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously*": Recital 15. This recital is particularly significant: *Secret Hotels 2 Ltd v. EA Traveller Ltd* [2010] EWHC 1023 (Ch.) at [29]
30. In the light of the above, the purposes of the Judgments Regulation are, as far as possible, to ensure the efficient and just disposal of cases within the Member States and to avoid identical actions proceeding in differing jurisdictions with the potential difficulties which arise: *Secret Hotels* at [61].

HB is domiciled in Greece

31. It is important to note at the outset that HB is domiciled in Greece. Accordingly, the general basis for asserting jurisdiction over a defendant under the Judgments Regulation, Article 2, does not confer any jurisdiction on the English Court in relation to the Queen's Bench action or the Part 20 Claim.
32. Moreover, there is no English jurisdiction clause in the contract between KBL and HB, so Article 23 is not applicable.
33. KBL must, therefore, persuade the English Court that the "*special jurisdiction*" provisions under Articles 5 and/or 6 give the English Court jurisdiction.

The Queen's Bench Action

34. Although KBL originally made a claim for breach of contract in the Queen's Bench action, KBL now accepts that there is no jurisdiction in the English Court for such a claim; that any claim it may have in contract against HB must be brought in Greece not England; and that therefore it cannot pursue any claim in contract against HB in the Queen's Bench action. This is because, the tahini was delivered ex works in Greece so that, under the Judgments Regulation, the place of delivery would not found jurisdiction under Article 5(1) in England. At the time when the Queen's Bench action was commenced (which KBL accepts is the time at which the Court's jurisdiction is to be determined) KFF had not yet started its action against KBL, so jurisdiction could not be founded on Article 6(2) either.

Approved Judgment

35. That leaves KBL's claim against HB under two heads viz KBL's claim in tort and its claim in contribution under the 1978 Act. These two claims overlap to a certain extent but it is convenient to consider each in turn.

KBL's tort claim in the Queen's Bench action

36. So far as its tort claim is concerned, KBL relies upon Article 5(3) of the Judgments Regulation. KBL contends that (i) Greek law is the applicable law of the tort; (ii) Greek law provides a remedy in tort in the circumstances of the claim; (iii) the European concept of a "tort, delict or quasi-delict" in Article 5(3) embraces the Greek cause of action; and (iv) the "harmful event" within the meaning of that Article occurred in England. For present purposes, I assume that KBL has a good arguable case in respect of each of (i), (ii) and (iii). The main area of debate before me focussed on the place of the relevant "harmful event".
37. In support of its case under Article 5(3), KBL asserted that it was well established that either (a) the wrongful act or omission or (b) the damage caused thereby can be the "harmful event" for the purpose of that Article; and that the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended is the place of the harmful event relying upon a number of authorities including *Handelswekerij GJ Bier BV v Mines de Potasse d'Alsace SA*, case 21/76 [1976] ECR 1735 ("*Bier*"); *Dumez France v Hessische Landesbank (Helaba)*, case C-220/88, [1990] ECR I-49 ("*Dumez*"); *Zuid Chemie BV v Phiulippo's Mineralenfabriek NV/SA*, case C-189/08, [2010] Bus.L.R 1026; [2009] ECR I-6917.
38. In particular, KBL relied on the damage which it said it suffered in England. That is the place where KBL delivered or supplied the alleged contaminated tahini to KFF and, as asserted by KBL, thereby incurred its liability to KFF. It followed, so KBL submitted, that the "harmful event" occurred in England. In response, HB made two main points.
39. First, HB advanced a broad submission that the "harmful event" occurred in Greece not in England. In support of that submission, HB relied upon a number of authorities including *Bier*, *Dumez*, *Marinari v Lloyd's Bank* [1995] ECR I-2719, [1996] QB 217; *London Helicopters Ltd v Heliportugal Lda-INAC* [2006] EWHC 108 (QB), [2006] 1 All ER (Comm.) 595; *Reunion Europeene S.A v Spliethoffs BV* [1998] E.C.R. I-2719, [2000] 1 QB 690; *Sunderland Marine Mutual Insurance Co. v Wiseman* [2007] EWHC 1460 (Comm.), [2007] 2 All E.R. 937; and *Dolphin Maritime v Swedish Club* [2009] EWHC 716 (Comm), [2010] 1 All E.R (Comm.) 473. In particular, on the basis of these authorities, it was HB's submission that (i) the jurisdictionally significant damage caused to KBL occurred on receipt of the allegedly contaminated tahini paste which occurred in Greece not in England; (ii) that although KBL's financial loss on account of its liability to KFF may have arisen in England, such loss should not be conflated with damage; (iii) that Article 5(3) does not include the place where the party claims to have suffered financial damage consequential upon initial damage arising and suffered in another Member State; and (iv) that the Court must be astute not to interpret Article 5(3) so as to confer jurisdiction on the court of a Claimant's domicile which it would not otherwise have and HB's right to be sued in Greece must not be emasculated by an interpretation of the place where the harmful event occurs which ignores the close connecting factors between the alleged contamination in Greece.

Approved Judgment

40. Second, HB submitted that as a matter of analysis, KBL's tort and contribution claims fell within Article 5(1) i.e. they were matters "...relating to a contract..."; that "...the place of performance of the obligation in question..." was Greece; that there was what HB described as a "bright line" or a "fork in the road" between Article 5(1) and 5(3) i.e. they were, in effect, mutually exclusive such that where a claim may be based alternatively in contract or in tort, the claim will be regarded as being contractual in nature; that accordingly Article 5(3) will not be available as a head of jurisdiction; and that therefore, in the present case, KBL could not rely on Article 5(3). In support of these submissions, I was referred to numerous authorities including *Kalfelis v. Schroder* [1988] ECR 5565 at [17]; *Source Ltd v. TUV Rhineland Holding AG* [1998] Q.B. 54 at 63; *Hough v. P & O Containers* [1999] Q.B. 835 at 842; Case C – 51/97 *Reunion Européenne S.A. v. Spliethofs BV* [1998] ECR. I-2719, 2000 Q.B 690 at [15] – [17]; *Mazur Media v. Mazur Media GmbH* [2004] EWHC 1566 (Ch.), [2004] 1 WLR. 2966 at [23], [30]. *Burke v Uvex Sports GmbH* [2005] ILPR 348 at [31]; and *Hewden Tower Cranes v. Wolffkran GmbH* [2007] EWHC 857 (TCC), [2007] 2 Lloyd's Rep, 138 at [30].
41. The arguments in relation to these submissions ranged far and wide and involved a detailed analysis of the cases cited above and other authorities relied on by KBL including *Kleinwort Benson Ltd v. Glasgow City Council* [1999] 1 A.C. 153; *RZB v. NBG* [1999] 1 Lloyd's rep. 408; and case C27/02 *Petra Engles v. James Versand GmbH*. However, it is unnecessary, in my view, to reach any determination on these applications in relation to them and I decline to do so. My tentative view is that the "harmful event" occurred in Greece not in England and, for that reason, KBL cannot rely on Article 5(3). However, that is not the basis of my decision and, for present purposes, I am prepared to assume (contrary the tentative view I have expressed) that KBL would prima facie be entitled to rely on upon Article 5(3) in support of its tort claims against HB.

KBL's contribution claim in the Queen's Bench action

42. So far, I have focussed on KBL's tort claim against HB in the Queen's Bench action. A separate issue arises with regard to the contribution claim in that action. A threshold question arose as to whether the Claim Form in the Queen's Bench action actually included a contribution claim. HB asserted that such a claim did not fall within the first sentence of the section of the Claim Form that I have quoted above i.e. it was not a claim for "...breach of contract, negligence and breach of statute..." I agree. However, the second sentence refers expressly to claims for "...damages and/or an indemnity and/or a contribution..." The formulation is perhaps infelicitous but it seems to me probably sufficient to include a contribution claim; and, for present purposes, I proceed on that basis.
43. My tentative view is that such claim for contribution is to be treated in the same way as the claim in tort i.e. KBL cannot rely on Article 5(3). Notwithstanding, for present purposes, I am prepared to assume again in KBL's favour that, contrary to my tentative view, KBL would prima facie be entitled to rely upon Article 5(3) in support of its contribution claim against HB. However, again, that is not the basis of my decision.

Approved JudgmentKBL's application for an extension of time to serve Particulars of Claim in the Queen's Bench action

44. As stated above, for present purposes, I assume that KBL was prima facie entitled under the Judgments Regulation to commence proceedings against HB in England in tort and/or for a contribution under the 1978 Act and that such proceedings were duly commenced by issuance and service of the Claim Form in the Queen's Bench action.
45. However, KBL did not serve any Particulars of Claim as it was required to under the CPR. Pursuant to CPR 7.4, these should have been served within 14 days after service of the Claim Form i.e. by 14th May 2009.
46. This failure by KBL to serve the Particulars of Claim gave rise to a number of intricate and difficult issues as to the formal status of the Queen's Bench action in particular having regard not merely to the delay of about 18 months between 14th May 2009 and the date when KBL eventually issued its application for an extension of time (i.e. 29th October 2010) or served that application (i.e. 23rd November 2010) but also to the letter dated 22nd October 2009 where Berrymans (on behalf of KBL) expressly stated that they had allowed those proceedings to "*to lapse*" for the reasons stated therein.
47. In particular, it was HB's case that the Queen's Bench action had "lapsed" or were "no longer extant" or had become "defunct" or had "died" such that the English Court could no longer be said to be "seised" at the latest by 14th January 2010 (i.e. the date of service of the Greek Proceedings) or (if relevant) the date of the hearing before me; that, in the circumstances, the Court had no power to or at least should not resuscitate the Queen's Bench action by granting an extension of time to serve Particulars of Claim; that the English Court should not sanction an abuse of its procedures; and that dealing with the case justly required that the Queen's Bench action be now struck out.
48. Broken down to its constituent parts, HB's case had, as I understood, a number of prongs.
49. HB's primary case was that the Queen's Bench action had "lapsed" and was therefore simply "defunct" i.e. it no longer had any existence at all. I do not agree. As Mr Layton QC submitted on behalf of HB, at no stage did KBL give formal notice of discontinuance of the Queen's Bench action under CPR Part 38; nor was that action ever formally dismissed, stayed or otherwise struck out. In the absence of any such procedure or other order of the Court, it seems to me that Mr Layton QC was probably correct to say that the Queen's Bench action continued to exist. At the very least, I am content to proceed on that basis.
50. In the alternative, it was HB's case that the English Court was no longer seised within the meaning of that term under the Judgments Regulation i.e. the English Court had ceased to be seised by the time of issuance and/or service of the Greek Proceedings. In support of that alternative case, HB emphasised that in the Judgments Regulation a uniform rule to determine the date of seisin is found in Article 30 which provides in material part as follows:

"For the purposes of this section, a court shall be deemed seised:

Approved Judgment

(1) At the time when the document instituting the proceedings or an equivalent document is lodged with the Court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, 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, provided that the plaintiff has not subsequently failed to take steps he was required to take to have the document lodged with the court”.

I bear in mind that the concept of “first seised” under the Judgments Regulation has an autonomous meaning: *FKI Engineering Ltd v Stribog* [2010] EWHC 1160 (Comm.), [2010] 2 All E.R. (Comm.) 906 at [35].

51. There was much debate before me as to the scope and effect of Article 30 and its application to the facts of the present case. In particular, Mr Tim Lord QC, on behalf of HB, relied upon the approach to be found in *Slavia Praha-Fotbal AS v Debt Collect London Ltd* [2010] EWCA Civ. 1250 at [15], [43] and also at [46] where the Court stated as follows:

“...the question whether a court is seised of proceedings does not have to be answered unless or until another court is (or may be) also seised of relevant proceedings – whether for the same cause of action within article 27 or for a related cause of action within the meaning of article 28. Once there are competing proceedings, it becomes necessary to decide which court was first seised. In order to do that, one must look at each set of proceedings on its own and decide when each of the relevant courts has become seised of the proceedings, and whether it continued to be seised at all material times...The fact that [a court] had been seised at an earlier stage is not relevant, if it was not seised at that time as a result of the operation of the proviso.”

Relying upon this passage, Mr Lord QC submitted that the English Court was no longer seised as at 30th December 2009, when HB issued the Greek Proceedings and served them on KBL on 14th January 2010 on account of (i) KBL’s deliberate failure to serve Particulars of Claim after the expiry of the time permitted by the order of Master Roberts; and (ii) KBL’s conscious decision in October 2009 to allow the Queen’s Bench action to “lapse” and expressly to confirm that “we have not served these proceedings”.

52. In support of that submission (i.e. that the English Court was no longer seised as that term is understood under the Judgments Regulation) or in the further alternative, Mr Lord QC advanced a number of submissions as a matter of English domestic law i.e. that the effect of KBL’s actions was a *de facto* discontinuance or abandonment of the Queen’s Bench action; that to allow KBL now to resurrect those proceedings was tantamount to an “abuse of process”; and/or that KBL had in effect waived any right to continue those proceedings or is otherwise estopped from so doing. In that context,

Approved Judgment

HB relied upon a number of authorities including *Ernst and Young v Butte Mining Plc* [1996] 1 W.L.R. 1605 at 1610; *Price v Price* [2003] EWCA Civ 888, [2003] 3 All E.R. 911 at [42]; *Nomura International v Granada Group* [2007] EWHC 642 (Comm.), [2007] 2 All E.R. (Comm.) 878 at [50]; *Sheltam Rail Co (Proprietary) Ltd v Mirambo Holdings Ltd* [2008] EWHC 829 (Comm.), [2009] 1 All E.R. (Comm.); *Icebird Ltd v Winegardner* [2009] UKPC 24 following *Grovit v Doctor* [1997] 1 W.L.R. 640; *Spencer Bower, Estoppel by Representation* (4th Ed., 2004) para XIII.2.37.

53. Both in relation to the question of seisin under the Judgments Regulation and the position under English domestic law, these submissions also gave rise to some intricate and difficult issues. But it seems to me unnecessary to determine them and I decline to do so. For present purposes, I am prepared to assume in favour of KBL that I have power to extend the time for service of the Particulars of Claim under CPR Part 3.10. By its terms, the power under CPR Part 3.10 only arises in circumstances where there has been an “error of procedure”. In the circumstances of the present case and in particular in light of the terms of the letter dated 22nd October 2009, I have grave doubts whether KBL’s conduct in failing to serve the Particulars of Claim can properly be described as a mere “error of procedure”. But, as I have stated, I assume for present purposes that the power under CPR Part 3.10 is available.
54. I therefore turn to the question whether to grant KBL an extension of time to serve the Particulars of Claim. As Mr Layton QC on behalf of KBL submitted, an extension of time in these circumstances will fall to be decided by the Court in the exercise of its discretion in the light of the considerations in that rule having regard to all the circumstances of the case including those set out in CPR Part 3.9.
55. In broad terms, it was Mr Layton QC’s submission that the reason why KBL did not pursue the Queen’s Bench action in the first place was because of its desire for procedural economy by pursuing its claim over against HB in Part 20 Proceedings in the action which was threatened by KFF; that the Queen’s Bench action was issued to protect the limitation period which KBL understood to be about to expire in Greece; that KBL’s approach was both responsible and conciliatory in sharp contrast to that of HB which disputed the jurisdiction of the English Court, refused to agree an extension of time for service of the Particulars of Claim and, most strikingly, took advantage of the notice they had been given of KBL’s intentions by issuing their negative declaratory relief proceedings in Greece. The issuance of those proceedings was, said Mr Layton QC, as egregious an example of pre-emptive forum-shopping as it is possible to find. As to the specific considerations referred to in CPR Part 3.9, Mr Layton QC relied upon the various matters set out at paragraphs 25-37 of the statement of Mr Michael Harvey which I address below.

(a) *The interests of the administration of justice.*

56. KBL says that if this application is allowed, it will enable one court to adjudicate on all the issues between all the three parties. This will avoid a risk of inconsistent findings. Where KBL is caught in the middle of a dispute between KFF and HB there is a particular risk of prejudice to KBL arising from inconsistent findings. KBL also relied upon the following: -

Approved Judgment

- (1) The merits of the case are all in KBL's favour since it is clear that HB was liable for the salmonella contamination.
 - (2) HB's action in issuing proceedings for a reverse declaration in Greece was a blatant attempt to avoid the jurisdiction of the English Court in respect of third party proceedings which it had been warned were imminent.
 - (3) If this application is allowed, it will permit a speedy and efficient resolution of all issues between the parties: the KFF action is listed to be tried in February 2011. HB may well be able to be ready in time failing which the matter might come on for trial after what was described as a "short adjournment" if necessary.
57. It does not seem to me that KBL's assertion that it is clear that HB was liable for the salmonella contamination is of any assistance. That is an issue for trial whether in England or Greece.
58. I accept that in the ordinary course there would be a very compelling argument in favour of all issues between all parties i.e. KFF, KBL and HB being dealt with in a single jurisdiction both on grounds of efficiency and to avoid a risk of inconsistent findings. However, KBL accepts that that is not (or at least may not be) possible here because the Greek Court has jurisdiction over its contractual claim against HB. If relevant, it follows that the Greek Proceedings were not a "*blatant attempt*" to avoid the jurisdiction of the English Court.
59. I also bear in mind that as a matter of principle a party should not be allowed to "warehouse" a claim, particularly where there are serious jurisdiction issues. In that context, HB submitted that KBL's use of the English Court in this case amounts to an abuse of process and is vexatious relying upon the decision of the Court of Appeal in *Habib v Jaffer*, The Times, 5th April 2000. Whether or not such conduct might be said to constitute an abuse of process or is otherwise vexatious, such conduct, is in my judgment relevant in the context of the exercise of discretion under CPR Part 3.10.
60. Moreover, in considering the interests of the administration of justice, it seems to me inevitable that I have to consider relevant events since the issuance and service of KBL's application to extend time for service of its Particulars of Claim and indeed the position as it exists today. KBL's application seeks an order to extend time for service of the Particulars of Claim until 7th February 2011, or at least some future date. As stated above, the trial of the Greek Proceedings is due to commence on 8th February 2011. The effect of KBL's application would be (or at least probably be) to derail the Greek trial and thereby to undermine the principles of the Judgments Regulation. To that extent it risks offending the principles of comity. It was submitted and not disputed (and there was evidence from Dr Meidanis) that if KBL failed in both applications (as it has), then it could only effect a recovery against HB by bringing its own Greek Proceedings (effectively a counterclaim in Greece). I accept that this would be or at least may have the effect of the Greek trial being put off but that is a matter for the Greek Court.

Approved Judgment*(b) Whether the application has been made promptly.*

61. KBL says that the application has been made promptly. In particular, KBL says that it kept HB fully informed of the position from the time of issue of the proceedings; that Master Roberts ordered an extension of time until 28 days after the meeting; that the meeting between the parties did not take place until 7th September 2009; that the KFF action was served on KBL on 2nd December 2009 and that the Greek Proceedings were not served on KBL until 14th January 2010. Since that time, KBL says it has had to consider how best to proceed. This has necessarily involved taking advice from Greek lawyers as to the merits of the Greek action, Greek procedure and the approach of the Greek Court to jurisdictional issues which, says KBL, has been a difficult and prolonged process. Moreover, KBL says that it has proved necessary to take advice from two sets of Greek lawyers and that KBL wished to ensure that the third party proceedings in the KFF action were served first because (given HB's approach to date) it appeared that HB would amend its Greek Proceedings to claim a reverse declaration in respect of a liability in contribution.

62. I do not accept that KBL's application was made promptly. On the contrary:

(1) KBL has persistently delayed taking any steps in the Queen's Bench action. The Claim Form was issued over two years ago. KBL failed to serve Particulars of Claim within the time stipulated in the CPR. KBL waited over five months to make its first application to extend time for the service the Particulars of Claim. On 22nd October 2009 it informed HB that the Queen's Bench action had lapsed. Its application to extend time for service of the Particulars of Claim was issued over a year later i.e. 29th October 2010. Even then, KBL did not act promptly: it did not properly serve the application on HB until 23rd November 2010.

(2) KBL was aware of the KFF action and the Greek Proceedings by mid-January 2010. It then waited until 29th October 2010 before issuing its application to extend time for service of its Particulars of Claim.

Against that background, KBL's excuses that it had to consider how best to proceed and that it had been a difficult and prolonged process are, in my judgment, of little, if any, merit.

(c) Whether the failure to comply was intentional.

63. KBL accepts that it did in fact intend not to serve the Particulars of Claim within the time originally permitted by the CPR but this was, says KBL, for good reason i.e. it was seeking to avoid a complicated and expensive dispute as to jurisdiction and seeking to ensure that all issues between all three parties could be adjudicated upon by the English Court. On this basis, KBL says that the failure to comply, although "intentional", was not reprehensible. In that context, Mr Layton QC draws attention to a number of so-called "errors" in Berryman's letter of 22nd October 2009. Be that as it may, it seems to be plain, as Mr Layton QC was bound to accept, that the decision not to serve Particulars of Claim was deliberate whatever the precise reasons for such decision might have been and regardless of whether those reasons were or were not correct.

(d) Whether there is a good explanation.

64. KBL says that it did not proceed with the Queen’s Bench action in 2008 for good reason – namely because HB indicated that it would dispute jurisdiction; that such dispute would have been an unnecessary and expensive complication given that KFF proposed issuing proceedings against KBL and HB could then be joined as third party; and that at no stage did HB indicate that it proposed issuing proceedings in Greece. In my view, this provides no or at least no good or sufficient explanation for not serving the Particulars of Claim, still less does it provide any assistance in support of KBL’s application now to extend the time for service of the Particulars of Claim. KBL suggests that it wanted to avoid a jurisdictional dispute and that HB could be joined as a Part 20 defendant in the KFF action. But KBL did not attempt to join HB in the Part 20 Proceedings until nearly a year after the commencement of the KFF action.

(e) The extent to which KBL has complied with other rules etc.

65. KBL says that it has complied with all relevant rules and has acted in a straightforward and open manner throughout. KBL also says that it has been assiduous in keeping HB informed of its intention and that HB took advantage of that by issuing the Greek action.

66. I do not agree. In my view KBL has persistently failed to obey the relevant rules, and not acted in accordance with the spirit of the CPR and failed to act in a straightforward manner. In particular:

- (1) It failed to serve Particulars of Claim as required by the CPR. Thereafter it obtained an order *ex parte* to extend time for service of the Particulars of Claim which it then did not serve.
- (2) It told HB that it had decided to let the Queen’s Bench action “lapse” and not to serve the Particulars of Claim but now seeks over a year later to resuscitate the position.
- (3) It did not inform HB of the proceedings in the KFF action at any stage despite apparently discussing HB (in its absence) at a CMC in May 2010. Thereafter, there was a further period of delay until 30th July 2010.
- (4) It obtained an order *ex parte* for service of the Part 20 Claim in the KFF action, relying upon a witness statement dated 30th July 2010 which wrongly informed the Court that there was a “pending application” for an extension of time for service of the Particulars of Claim in the Queen’s Bench action. This was not correct. There was no pending application at that stage and an application was not issued until some months later i.e. 29th October 2010. Although I have been given an explanation as to the submission made to the Court, it is unfortunate (to say the least) that this occurred.

(f) Whether the failure to comply was caused by the party or its legal representatives.

67. KBL says that all the relevant decisions were taken by KBL’s legal representatives or upon their advice. I accept that this was indeed the case. However, it does not seem to

Approved Judgment

me that this is of much, if any, assistance to KBL having regard to the fact that the failure to comply was not inadvertent.

(g) Whether the trial date can still be met if relief is granted.

68. KBL says that if the application is granted, the Queen's Bench action could be heard together with the KFF action in January 2011 or possibly a little later after a short adjournment. However, it seems to me that this is very unlikely indeed. As I have already stated, KBL's application is to serve on HB the Particulars of Claim on or at least by the first day of the trial of the KFF action. I was told by Mr Lord QC on behalf of HB that HB would deny both liability and quantum in any claim that KBL would make against it. In those circumstances, HB would need time to prepare a defence, make disclosure, gather together its factual and expert evidence, prepare witnesses statements and so forth. This will duplicate the preparations for the Greek Proceedings which will go ahead in February (at least) in respect of the question of contractual liability. In such circumstances, I consider that it is wholly unrealistic to think that, if this application is granted, the Queen's Bench action could be heard together with the KFF action in early February 2011 or even after a short adjournment. On the contrary, it seems to me that it is very unlikely that any such combined trial could properly take place before, at the very least, a delay of say six months or more. I canvassed with Mr Layton QC whether or not such delay would be acceptable to KFF and whether they would agree to any such adjournment. However, Mr Layton QC was unable to tell me what the position might be so far as KFF was concerned.

(h) The effect with which the failure to comply had on each party.

69. KBL says that this is not directly applicable. However, HB says, and I accept, that it was in express reliance on KBL's decision to let the Queen's Bench action lapse that HB commenced the Greek Proceedings and as stated above those proceedings are coming up for trial shortly.

(i) The effect which the granting of relief would have on each party.

70. KBL says that if this application is allowed it will be enabled to bring its third party action in England and this will avoid the risk of becoming embroiled in Greek Proceedings which may be prolonged and which may give rise to inconsistent decisions. KBL accepts that HB would have to deal with the action in England but, KBL says, HB already has English loss adjusters, solicitors and counsel. On this basis, KBL says that it cannot be argued that HB will be significantly prejudiced by defending the action in England rather than in Greece. KBL also says that assuming third party proceedings for contribution now proceed in the Commercial Court, HB will in any event have to deal with all the factual issues in the case in an English Court.
71. I do not accept the main thrust of these submissions. On the contrary, in my judgment, HB will be severely prejudiced if KBL is now, out of time, allowed in effect to revive the Queen's Bench action so as to seek to trump and thereby to undermine and to disrupt the Greek Proceedings. Equally, I reject the suggestion that I should assume that the third party proceedings for contribution will now proceed in the Commercial

Approved Judgment

Court. That is, at best, a bootstraps argument and, in any event, as appears below, I have concluded that the Part 20 Claim in the KFF action should be stayed.

72. For all these reasons, I have come to the conclusion that I should, in the exercise of my discretion, refuse KBL's application to extend the time for service of the Particulars of Claim in the Queen's Bench action. Mr Layton QC accepted before me that if I reached this conclusion, it would necessarily follow that the Queen's Bench action should be struck out.

The Part 20 Claim in the KFF action

73. I turn now to consider the Part 20 Claim in the KFF action by KBL against HB. As I have stated, Flaux J granted KBL the necessary permission to bring that claim by Order dated 6th September 2010. Paragraph 2 of that Order expressly granted HB the right to apply to set aside that order. That is the application which HB now make.
74. The starting point is to make plain that KBL accepts that such claim is – and must be – limited to one for contribution under the 1978 Act. This is because, as I have already noted, on the assumption that the Queen's Bench action is struck out, KBL accepts that the Greek Court was first seised in respect of KBL's tortious and contractual claims. However, KBL asserts that the Greek Court is not first seised in respect of its contribution claim under the 1978 Act.
75. For similar reasons as those relied upon by KBL in the context of the Queen's Bench action, KBL says that the English court has (or at least would have) jurisdiction under Article 5(3) of the Judgments Regulation in the Part 20 Proceedings in respect of the contribution claim. I have already addressed that substantive issue under Article 5(3) in the context of the Queen's Bench action. I need say no more than that I am prepared to assume in KBL's favour that this is indeed the case – although I make plain that I have not determined that issue and my decision does not rest on that basis.
76. Additionally, KBL also says that the English Court has jurisdiction over the contribution claim under Article 6(2) of the Judgments Regulation which provides in material part as follows:

“A person domiciled in a Member State may also be sued:

...

(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.”

77. There can, in my view, be no doubt that the Part 20 Claim is one which falls within Article 6(2). Notwithstanding, HB raises two main objections.

Approved Judgment

78. First, HB says that it is important to note that Article 6(2) is permissive not mandatory; that it confers a discretion on the English Court as to whether it will accept jurisdiction over a foreign defendant and that the English Court should decline jurisdiction. In particular, HB says:-
- (1) It is not appropriate to override HB's right to be sued in the court of its domicile: *Knauf v British Gypsum* [2002] EWHC 739 (Comm.), [2002] 23 Lloyd's Rep 416 at 420. There is clearly an alternative forum in which a contribution could be sought- Greece – and one which will resolve the issues between KBL and HB in any event: cf *Kinnear v Falconfilms NV* [1996] 1 W.L.R. 920 at 928.
 - (2) The Part 20 Claim must not have been instituted by KBL solely with the object of removing HB from the jurisdiction of the court which would be competent in its case: *Burton v Golden Sun Holidays Ltd* [2007] EWHC 86 (QB) and there are, at the very least, questions as to KBL's purpose in and about these claims.
 - (3) This is an obvious case for the English Court not to accept jurisdiction on general grounds of forum non conveniens.
79. This argument gave rise to a number of difficult issues as to the scope and effect of Article 6(2). Again, it seems to me unnecessary to decide such issues and I decline to do so. For present purposes, I am content to assume in KBL's favour that the English Court cannot or at least should not decline jurisdiction in light of any one or more of these matters.
80. Second, HB relies upon Article 27 of the Judgments Regulation which provides in material part as follows:
- “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 on its own notion stay its proceedings until such time as the jurisdiction of the court first seised is established.”
81. So far as the Part 20 Claim is concerned, it is common ground that the Multimember Court of First Instance in Thessaloniki became seised by, at the latest, mid-January 2010 i.e. long before the commencement of the Part 20 Claim. It follows that that Court was first seised within the meaning of Article 27. It is also common ground that those Greek Proceedings are between the same parties as in the Part 20 Claim.
82. In this context, the main issue between the parties is whether the Greek Proceedings involve the “...*same cause of action*...” (i.e. a claim for a contribution) as the Part 20 Claim. HB says that it does – i.e. the Greek Proceedings involve a claim for negative declaratory relief in respect of a contribution claim by KBL.

Approved Judgment

83. In response, KBL says that the claim for negative declaratory relief in the Greek Proceedings does not encompass any potential claim in contribution under the 1978 Act. In that context, KBL draws attention to a number of matters. In particular:
- (1) First, there is no mention anywhere in the Greek Claim Form of the 1978 Act nor any specific claim under that particular Act.
 - (2) As a matter of English law, it is important to bear in mind in this context that the foundation of any such claim would be an assertion that the Defendant has a direct liability to the original claimant (i.e. KFF); and the Greek Claim Form does not, in terms, say anything at all expressly about any non-liability to KFF.
 - (3) Although the last part of the Greek Claim Form refers to a claim for a “contribution”, the language used is not consistent with a claim for contribution under the 1978 Act but in context is to be understood as limited to a claim for contribution by virtue of HB’s liability in tort to KBL.
84. In response, HB relied upon the approach adopted by Cooke J. in *JP Morgan Europe Ltd v. Primacom AG* [2005] EWHC 508 (Comm.), [2005] 2 Lloyd’s Rep. 665 in particular at [39] – [47], following earlier cases viz. *The Tetry Case* C-406/92 [1995] 1 Lloyd’s Rep. 302; [1994] ECR I-05439 at para 38; *Haji Ioannou v. Frangos* [1999] 2 Lloyd’s Rep. 337 at p.351 and *Glencore International AG v. Shell International Trading and shipping Co. Limited* [1999] 2 Lloyd’s Rep 692, per Rix J at p.694. As there stated, the term “cause of action” in Article 27 is an independent autonomous term which is not to be confused with the use of the same term in English legal jargon. Moreover, the French and other versions of Article 27 refer not simply to “the same cause of action” but to two concepts – “le même objet et la même cause”. The latter “comprises the facts and the rule of law relied on as the basis of the action” whilst the former means “the end the action has in view”. Rix J in the *Glencore* decision stated that the court’s task in identifying the “objet” of any action was to identify objectively the essential issue raised between the parties to that action. Cooke J concluded in paragraph 47 of his judgment as follows:
- “The way the claim is framed and the arguments in support of it may fall to be taken into account, but ultimately, the question must be seen broadly in terms of the judgment sought and not in terms of the issues raised on the way (see *The Happy Fellow* [1998] 1 Lloyd’s Rep 12 at pages 17-18 and, by way of example, *The Sennar* (No 2) [1985] 1 Lloyd’s rep 521).”
85. I respectfully agree with that approach and conclusion. In the present context, looking at the matter broadly, it seems to me that the judgment sought by HB in the Greek Proceedings is one which in effect declares that it has no liability in respect of any claim which KBL may seek to bring in respect of the relevant deliveries of tahini including any claim for indemnity or contribution in respect of any original claim by KFF. In my view, that is objectively the essential issue raised in the Greek Proceedings and therefore the “objet” of the Greek Proceedings. If that is right, it follows that the Greek Proceedings have at least in relevant respect “le même objet” as the Part 20 Claim. If necessary, I would also conclude that the Greek Proceedings involve “la même cause” as that contained in the Part 20 Claim even if the precise

Approved Judgment

issues raised on the way are expressed otherwise than in a form one might expect by a pleading in an English action seeking a claim for contribution under the 1978 Act.

86. I should record that HB advanced further alternative arguments that I should stay the Queen's Bench action and/or the Part 20 Claim on the basis of Article 28 of the Judgments Regulation. In the event, it is unnecessary for me to consider such arguments.

Conclusion

87. For these reasons, I have concluded as follows:
- (1) KBL's application to extend time for service of the Particulars of Claim in the Queen's Bench action should be dismissed and, accordingly, the Queen's Bench action should be struck out.
 - (2) The Part 20 Proceedings in the KFF action and the Greek Proceedings involve the same parties and the same cause of action within the meaning and for the purposes of Article 27 of the Judgments Regulation. Further the Greek Court is first seised of such matters.
 - (3) Since the Greek Court is first seised, the Part 20 Claim (in accordance with Article 27) should be stayed until such time as the jurisdiction of the Greek Court is established.
88. Orders in the Queen's Bench action and the Part 20 Proceedings in the KFF action reflecting the above have, as I understand, already been drawn up and entered reflecting the conclusions set out above. It remains to consider any other ancillary applications including any application for permission to appeal and costs which I will deal with as necessary after hearing further argument.