Neutral Citation Number: [2019] EWCA Civ 1708

Case No: A3/2018/3110

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
MR JUSTICE FANCOURT
[2018] EWHC 3308 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 October 2019

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE FLAUX
and
LORD JUSTICE NEWEY

- -

Between:

JSC COMMERCIAL BANK PRIVATBANK	**Appellant**
- and -	
(1) IGOR VALERYEVICH KOLOMOISKY	**Respondents**
(2) GENNADIY BORISOVICH BOGOLYUBOV	
(3) TEAMTREND LIMITED	
(4) TRADE POINT AGRO LIMITED	
(5) COLLYER LIMITED	
(6) ROSSYN INVESTING CORP	
(7) MILBERT VENTURES INC	
(8) ZAO UKRTRANSITSERVICE LTD	

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Lord Pannick QC, Andrew Hunter QC, Tim Akkouh, Christopher Lloyd and **Adam Al-Attar** (instructed by **Hogan Lovells International LLP**) for the **Appellant**
Mark Howard QC, Michael Bools QC, Alec Haydon QC and **Ben Woolgar** (instructed by **Fieldfisher LLP**) for the **First Respondent**
Daniel Jowell QC, Matthew Parker and **Richard Eschwege** (instructed by **Enyo Law LLP**) for the **Second Respondent**
Sonia Tolaney QC, Thomas Plewman QC and **Marc Delehanty** (instructed by **Pinsent Masons LLP**) for the **Third to Eighth Respondents**

Hearing dates: 22-25 July 2019

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Approved Judgment

Lord Justice David Richards, Lord Justice Flaux and Lord Justice Newey:

Preliminary

Introduction

1. This is the judgment of the Court to which each member of the Court has contributed.

2. PJSC Commercial Bank Privatbank (the Bank) appeals against the order of Fancourt J dated 4 December 2018 whereby he declared that the court had no jurisdiction to try the claim brought by the Bank in these proceedings against the first, second and sixth to eighth defendants, stayed the proceedings against the third to fifth defendants and set aside service of the claim form and particulars of claim on the sixth to eighth defendants, and (subject to appeal) discharged a worldwide freezing order earlier granted against all the defendants restraining each of them from disposing of assets with a value of up to US$2.6 billion.

3. The appeal raises a number of issues. The first is whether article 6(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 2007 (the Lugano Convention) is subject to a requirement that a claim brought against a defendant in the courts of that defendant's domicile must not be brought for the sole object of joining a defendant domiciled in another Convention state and, if so, whether the present proceedings were brought against the third to fifth defendants with the sole object of joining the first and second defendants. The second is whether, assuming the answer to one of the questions under the first issue is in the negative, the court has jurisdiction to stay proceedings brought against defendants in accordance with the Lugano Convention and the Recast Brussels Regulation on grounds of *lis alibi pendens* in favour of proceedings in a non-Convention state (a third state) and, if so, whether the judge was wrong to hold that, if it had arisen, he would have exercised his discretion to stay the proceedings. The third is whether the judge was wrong to stay the proceedings against the sixth to eighth defendants on grounds of *forum non conveniens* and to set aside service of the proceedings on them. This largely turns on the first and second issues.

4. The judge decided all these issues against the Bank and gave permission to appeal on those issues. We refer to them respectively as Grounds 1 to 3.

5. The Bank seeks permission to appeal on three further issues. They arise only if the judge was wrong on all or some of Grounds 1 to 3. The further issues concern (i) the quantum of the worldwide freezing order, (ii) whether there was material non-disclosure of relevant matters to the court on the initial, without notice, application for the worldwide freezing order and, if so, whether the judge was wrong to hold that he would on this ground have discharged the order and refused to re-grant it and (iii) whether the judge failed to give sufficient reasons for his decisions on certain points. The judge refused permission to appeal on these issues, which we refer to respectively as Grounds 4 to 6. On the Bank's renewed application to this Court for permission to appeal, Patten LJ adjourned consideration of the application to the hearing of the appeal of Grounds 1 to 3. Lord Pannick QC, on behalf of the Bank, told us that the points arising under Ground 6 were sufficiently dealt with under Grounds 4 and 5 and

that Ground 6 would not therefore be separately pursued. We have heard full argument on Grounds 4 and 5.

6. We are agreed that the Bank's appeal should be allowed. We are also agreed on all the issues raised by the appeal, save in one respect. On the issue of principle arising under Ground 1 (see paragraph [3] above), the majority (David Richards and Flaux LJJ) are agreed that article 6(1) is not subject to a sole object condition, for the reasons set out in this judgment. Newey LJ takes a different view, which he sets out in a separate judgment. This difference has no effect on the outcome of the appeal, because we are all agreed that the judge's finding that the present proceedings were brought with the sole object of joining the first and second defendants to these English proceedings cannot stand.

Background facts

7. The Bank is incorporated under the laws of Ukraine and has its head office and principal operations in Ukraine. It was founded in 1992 by, among others, the first and second defendants, Igor Kolomoisky and Gennadiy Bogolyubov. They became, if they were not already, the majority shareholders, with direct and indirect holdings varying between 80% and almost 100% between 2006 and 2016. They sat on the Bank's supervisory board until 2016 and it is the Bank's case, which for present purposes is not denied, that as regards the key decisions relevant to these proceedings they controlled the Bank. The Bank grew to become one of Ukraine's largest banks. By 2016, it had 30 regional offices and 2,445 high street branches in Ukraine, and a branch in Cyprus. It provided services to more than 20 million customers, just under half the population of Ukraine.

8. The Bank was nationalised in December 2016, following a declaration that it was insolvent by the National Bank of Ukraine. Mr Kolomoisky and Mr Bogolyubov, and the other members of the supervisory board, were dismissed and replaced by a new management team.

9. It is common ground that, for the purposes of the Lugano Convention, Mr Kolomoisky and Mr Bogolyubov are, and were at the date of the commencement of these proceedings, domiciled in Switzerland.

10. The third to fifth defendants are companies incorporated in England (the English Defendants). The sixth to eight defendants are companies incorporated in the British Virgin Islands (the BVI Defendants). All the defendants accept, for the purposes of the applications before the judge and this appeal, that there is a good arguable case that the English and BVI Defendants were at all material times owned and/or controlled by Mr Kolomoisky and Mr Bogolyubov.

The proceedings

11. On 19 December 2017, at the conclusion of a full day's hearing and after a day's pre-reading, Nugee J granted a worldwide freezing order (the WFO) against the defendants for up to US$2.6 billion on a without notice application. The application was supported by a very substantial affidavit (Lewis (1)) sworn by Richard Lewis, a partner in the Bank's solicitors.

12. The claim form was issued on 21 December 2017 and subsequently served, together with particulars of claim, on the English Defendants and the BVI Defendants.

13. The WFO was continued, with amendments not material to this appeal, without prejudice to the right of the defendants to apply to the court to challenge the court's jurisdiction and to vary or discharge the WFO. The defendants issued such applications, which were heard by Fancourt J over five days in July 2018 with subsequent written submissions and some further evidence, leading to the order under appeal.

The Bank's claim

14. It will be necessary to look in detail at the claim as formulated by the Bank in its particulars of claim and in the evidence filed on the applications below.

15. In general terms, the Bank alleges that Mr Kolomoisky and Mr Bogolyubov orchestrated the fraudulent misappropriation of over US$1.9 billion from the Bank. The precise amount is alleged to be US$1,911,877,385, but for convenience we will refer to it as US$1.9 billion. The Bank believes that the total amount misappropriated by or at the behest of Mr Kolomoisky and Mr Bogolyubov is likely to run to many billions of US dollars, but the claim in the present proceedings is confined to US$1.9 billion.

16. The Bank alleges that this misappropriation was achieved through loans by the Bank (the Relevant Loans) to some 46 companies (the Borrowers), all incorporated in Ukraine and controlled by Mr Kolomoisky and Mr Bogolyubov. The Relevant Loans were made over a period of 17 months between April 2013 and August 2014 in either US dollars or Ukrainian Hryvnias. For convenience, we will refer to all payments in US dollars. The terms of each loan provided that it was advanced for the purpose of financing the Borrower's "current activities" and that it would be secured by a "Pledge Agreement".

17. The Borrowers entered into supply agreements with some 35 companies (the Suppliers), all of them incorporated outside Ukraine and most of them in offshore jurisdictions. The Bank alleges that the Suppliers were controlled by Mr Kolomoisky and Mr Bogolyubov and that the supply agreements were bogus. They were for the supply of wholly unrealistic quantities of commodities and industrial equipment and were never intended to be performed. Their terms were uncommercial, and in particular provided for the pre-payment of the entire purchase price before the time for delivery of the commodities or equipment in question.

18. Until May 2014, the pre-payments were re-cycled between the Borrowers and the Suppliers. Funds were lent by the Bank to the Borrowers in Ukraine. The Borrowers transferred the funds to accounts with the Bank's branch in Cyprus and then to accounts of the Suppliers with the same branch. In order to comply with Ukraine's exchange control regulations, the funds were re-transferred to the credit of the Borrower in Ukraine before being used again for the apparent pre-payment of sums due under further supply agreements.

19. The Bank alleges that pre-payments totalling US$1.9 billion made under supply agreements dated between May and August 2014 (the Relevant Supply Agreements)

were not repaid to the Borrowers (the Unreturned Pre-payments). These agreements purport to be made with the English Defendants, to which approximately US$1.8 billion was paid, and with the BVI Defendants, to which approximately US$100 million was paid.

20. The rights to receive goods under the supply agreements were pledged as security for the Bank's loans to the Borrowers. It is the Bank's case that, by virtue of their uncommercial terms and because in truth they were sham agreements, they were without value as security. Further purported supply agreements bearing dates between December 2013 and October 2015, which provided for payment to be made after the delivery of the goods under the agreements, were apparently made by at least 36 of the Borrowers (Loan File Supply Agreements). Apart from the payment terms, the Bank alleges that in all other respects these agreements were as uncommercial as the other supply agreements and that they too were shams. It alleges that the only purpose of the Loan File Supply Agreements was to provide security which would have a more plausible appearance, in order to mislead auditors and regulators.

21. The defendants, including Mr Kolomoisky and Mr Bogolyubov, accept, for the purposes of this appeal, that there is a good arguable case that the Bank lost approximately US$515 million through these transactions and that they were orchestrated by Mr Kolomoisky and Mr Bogolyubov, using the Borrowers and Suppliers in the manner generally alleged by the Bank. Mr Kolomoisky and Mr Bogolyubov have not themselves to date proffered any explanation for the transactions in question or sought to explain their commercial rationale, if any.

22. The judge observed in his judgment at [25] that there was no difficulty with the Bank proving a good arguable case of a fraudulent scheme. The evidence was "strongly indicative of an elaborate fraud perpetrated by someone, allied to an attempt to conceal from any auditor or regulator the existence of bad debts on the Bank's books, and money laundering on a vast scale". The Borrowers had no commercial track record or any substantial assets. The documentary evidence clearly demonstrated that the supply agreements were shams, and "were used as a deceptive basis on which to justify very large sums of money flowing out of the Bank". The artificial complexity of the re-cycling of funds was "itself indicative of a fraudulent scheme". At [104], the judge noted that Mr Kolomoisky and Mr Bogolyubov had admitted "a good arguable case of fraud on an epic scale".

23. As will become apparent, the applications of the defendants and their submissions before the judge and before us are based to a significant extent on a close analysis of the Bank's claim made in these proceedings. This is particularly true in relation to the issues of the quantum of the freezing order and of non-disclosure, but it is relevant also to the application of the "sole object" test, if one exists as a matter of law under article 6 of the Lugano Convention.

24. It is therefore convenient at this stage to give some indication of the competing positions of the parties on the nature of the case advanced by the Bank in these proceedings.

25. This centres on the role of the English and BVI Defendants. The defendants submit that the Bank's case hinges on the funds advanced by the Bank under the Relevant Loans having been paid to those Defendants without any subsequent repayment to the

Bank. The defendants accept that there is a good arguable case that a net amount of US$1.9 billion was paid to the English and BVI Defendants under the Relevant Supply Agreements and that it was not repaid to the Bank. They accept that there is a good arguable case that the Borrowers and the English and BVI Defendants were knowing participants in the fraudulent scheme, that they were controlled by Mr Kolomoisky and Mr Bogolyubov and that the Bank suffered a loss of approximately US$515 million as a result.

26. However, they submit that the amount arguably derived from the Relevant Loans was not US$1.9 billion but was, at most, US$514 million. Moreover, evidence which they adduced, and which the Bank accepts, shows that all amounts received by the English and BVI Defendants were immediately on receipt paid on to other companies with accounts at the Cyprus branch of the Bank.

27. The defendants submit that the Bank's pleaded case, and the case that it put forward to the court on the without notice application for the freezing order, is restricted to a claim based on the English and BVI Defendants having received a net amount of US$1.9 billion derived specifically from the Relevant Loans. In this way, the Bank presented the English and BVI Defendants as central to its claim, because they had knowingly received the very funds said to have been misappropriated by means of the Relevant Loans.

28. The Bank asserts that this is indeed part of its case. However, there is a fundamental difference between the parties as to how it is to be determined whether the English and BVI Defendants received funds derived from the Relevant Loans. The Bank relies on its pleaded case of Ukrainian law which, it submits, does not require the sort of tracing exercise on which the defendants' case is based.

29. The Bank further asserts that its claim against the English and BVI Defendants is also based on the Ukrainian equivalent of the tort of conspiracy. It alleges that those defendants assisted in the misappropriation of US$1.9 billion, through their participation in the Relevant Supply Agreements and associated sham transactions, and that it can establish their liability for that amount without any need to show that they received funds derived from the Relevant Loans themselves.

30. We look at this issue in detail later in this judgment but at this stage we do no more than state our conclusions. We consider that the Bank's pleaded case includes a claim based on assistance as well as a claim based on receipt of funds derived from the Relevant Loans. We are satisfied that, on the without notice application before Nugee J for the WFO, the claim was advanced to a significant extent, but not exclusively, on the basis that the English and BVI Defendants had themselves received funds derived from the Relevant Loans. The claim was put forward on both bases before Fancourt J, although it may be that the submissions focused more on the receipt-based claim.

Ground 1

Is article 6(1) of the Lugano Convention subject to a sole object test?

31. Article 6 of the Lugano Convention provides:

> "A person domiciled in a State bound by this Convention may also be sued:
>
> 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings;
>
> 2. as a third party in an action on a warranty or guarantee, or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;
>
> 3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;
>
> 4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, in the court of the State bound by the Convention in which the property is situated."

32. It is common ground that Mr Kolomoisky and Mr Bogolyubov were at the commencement of the present proceedings domiciled in Switzerland and that the English Defendants are, by virtue of having their registered offices in England, domiciled in England (see article 60 of the Lugano Convention).

33. The issue raised before the judge and on this appeal is whether, in addition to the express qualification in article 6(1) that the claims against the defendants are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, article 6(1) is subject to a further qualification that it may not be invoked if the proceedings in question are instituted with the sole object of removing a defendant from the jurisdiction of his domicile or from another appropriate jurisdiction (the sole object test).

34. Not only is this not an express qualification to article 6(1), but it is an express qualification to article 6(2). As will be seen, this is a relevant but not of itself a determinative factor.

35. The Lugano Convention has in this, as in many other respects, closely followed the EU instruments on jurisdiction in civil and commercial matters. The link is made clear in the recitals to the Lugano Convention. The original Lugano Convention of 16 September 1988 extended the application of the rules of the original EU instrument, the Brussels Convention of 27 September 1968 (the Brussels Convention), to certain members of the European Free Trade Association. The Brussels Convention was replaced by Council Regulation (EC) No 44/2001 of 22 December 2000 (Brussels 1) and its provisions were largely reproduced in the current Lugano Convention.

Brussels 1 was replaced, with amendments, by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 (the Recast Brussels Regulation). The amendments made by the Recast Brussels Regulation have not been introduced into the Lugano Convention. This has no impact on the issue arising under Ground 1 but it is of significance to the issue of *lis alibi pendens* that arises under Ground 2.

36. For present purposes, the purpose of the EU instruments and both versions of the Lugano Convention has been to allocate jurisdiction in civil and commercial matters among the member states of the EU and among the parties to the Lugano Convention, with the overarching principle that a party is to be sued in the state of that party's domicile, subject to express exceptions.

37. Article 2 of the Lugano Convention states the primary position, giving priority to a defendant's jurisdiction of domicile:

> "1. Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State.
>
> 2. Persons who are not nationals of the State bound by this Convention in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State."

Articles 2 of the Brussels Convention and of Brussels 1 are in materially the same terms, as is article 4 of the Recast Brussels Regulation.

38. The existence of exceptions, and their limited effect, is made clear by article 3(1) of the Lugano Convention (and, in materially the same terms by articles 3 of the Brussels Convention and of Brussels 1 and by article 5 of the Recast Brussels Regulation):

> "Persons domiciled in a State bound by this Convention may be sued in the courts of another State bound by this Convention only by virtue of the rules set out in sections 2 and 7 of this Title."

39. The only exception relevant to this appeal is that contained in article 6 of the Lugano Convention, quoted above. It appears in Section 2, headed "Special jurisdiction", with equivalent provisions in article 6 of Brussels 1 and article 8 of the Recast Brussels Regulation.

40. Article 6(1) of Brussels 1 made a significant amendment to its equivalent in the Brussels Convention, article 6, which had provided:

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

3. on a counterclaim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending."

The significant change was to introduce into article 6(1) the qualification of a close connection between the claims brought against the defendants. The same change was made when the Lugano Convention replaced the original Lugano Convention in 2007. The background to this change, and the reasons for it, are significant for the purposes of this appeal.

41. There can be no dispute that the issue of whether a sole object test is applicable to article 6(1) involves some conflicts of principle. On the one hand, the primacy of allocating jurisdiction to the state of domicile of the defendant leads to a strict interpretation of the express exceptions. Given that primacy, the commencement of proceedings in one jurisdiction for the sole object of removing a defendant from the jurisdiction of his domicile can be seen as contrary to the scheme of the Lugano Convention and the Regulations. On the other hand, it is a primary aim of the Lugano Convention and the EU instruments to promote certainty and predictability in the allocation of jurisdiction, which is achieved by the express terms of article 6(1) but could be put at risk by the imposition of a sole object test.

42. It is common ground that there is no decision either of the Court of Justice of the European Union (or, as it was previously called, the European Court of Justice) (the CJEU) or of any UK domestic court which provides an answer binding on us.

43. It is necessary to trace the development of the CJEU case law on the application of article 6(1). None of the cases concerned the Lugano Convention, but this is not significant because courts applying and interpreting the Convention must "pay due account to the principles laid down by any relevant decisions" on the EU instruments: Article 1 of Protocol 2 to the Lugano Convention.

44. The unqualified terms of article 6(1) of the Brussels Convention were a cause of concern, which led to a largely unanimous view among academic lawyers and national courts that it was necessary for there to be a connection between actions brought against different defendants: see the opinion of Advocate General Darmon in *Kalfelis v Bankhaus Schröder (case 189/87)* [1988] ECR 5565, [1989] ECC 407 (*Kalfelis*) at p.409. This was the position taken in the *Jenard Report* on the Brussels Convention published in 1979 in its comments on article 6(1):

> "In order for this rule to be applicable there must be a connection between the claims made against each of the defendants, as for example in the case of joint debtors. It follows that action cannot be brought solely with the object of ousting the jurisdiction of the courts of the State in which the defendant is domiciled."

45. The existence and extent of any limitation arose for decision by the CJEU in *Kalfelis*. The Court was asked whether article 6(1) of the Brussels Convention should be

interpreted as requiring a connection between the actions against the various defendants and, if so, whether the necessary connection existed if the actions were essentially the same in law and fact or only if it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The Court's answer was that there must exist between the various actions brought by the same plaintiff against different defendants a link such that it was expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

46. In its judgment, the Court noted at [8] the principle laid down by the Convention that the courts of the state in which the defendant is domiciled have jurisdiction and that article 6(1) constituted an exception to this principle, so that it followed "that such an exception must be treated in such a way that it cannot call into question the very existence of the principle". The Court continued:

> "[9] That might be the case if a plaintiff were free to bring an action against several defendants for the sole purpose of removing one of them from the courts of the State where he is domiciled. As pointed out by the report of the committee of experts who drew up the text of the Convention, any such possibility must be excluded. For this purpose it is necessary for a connection to exist between the actions against each defendant.
>
> [10] It appears that, to ensure so far as possible the equality and uniformity of the rights and obligations which flow from the Convention for Contracting States and persons concerned, it is necessary to determine the nature of the connection independently.
>
> [11] On this point it should be noted that the abovementioned report by the committee of experts expressly justifies Article 6(1) by the concern to avoid the delivery of decisions in Contracting States which would be incompatible as between themselves. That is, moreover, a concern which has been embodied in the Convention itself in Article 22, which governs cases where related actions are brought in the courts of different Contracting States.
>
> [12] Therefore the rule laid down by Article 6(1) applies where actions against different defendants are connected at a time when they are commenced, that is to say, when it is expedient to hear and determine them together to avoid judgments which might be irreconcilable if the actions were determined separately. It is for the national court to ascertain whether this condition is satisfied in each particular case."

47. In his opinion, the Advocate General referred to the unanimous view of academic lawyers and national case law that it was necessary for there to be a connection between the actions. He said that the reason for this requirement was "to uphold the principle laid down by the rule *actor sequitur forum rei* so as to 'prevent [article 6(1)]

from being used solely for the purpose of removing a party from the court of his domicile'". The quotation in that passage is from an academic commentary on the Convention.

48. The Advocate General further stated:

> "It would be difficult to apply a subjective criterion which would necessitate asking whether the plaintiff did or did not intend to remove one of the defendants from the court which would normally have jurisdiction.
>
> Whatever the circumstances, it must be possible to deduce which court has jurisdiction from objective rules. Legal certainty would hardly be compatible with an examination of the plaintiff's intentions, which would be both difficult and uncertain."

49. He concluded that the right approach was to adopt a requirement of a close connection to avoid the risk of irreconcilable judgments resulting from separate proceedings, being the test expressly applied by article 22(3) of the Convention, adding that "[t]he prevention of irreconcilable judgments is the *ratio legis* of both Article 6(1) and Article 22(3)".

50. To similar effect was the decision of the CJEU in *Réunion Européenne SA v Spliethoff's Bevrachtingskantoor BV (Case C-51/97)* [2000] QB 690 (*Réunion*). At [16], the Court noted that it was settled case law that the general principle was that a defendant's state of domicile determines the court with jurisdiction over him and that it is only by way of derogation from that principle that the Brussels Convention provided for cases "which are exhaustively listed" in which a defendant may be sued in the courts of another contracting state. At [46] the Court observed that the Convention pursued "the objective of legal certainty" and then said:

> "47. In any event, the exception provided for in article 6(1) of the Convention, derogating from the principle that the courts of the state in which the defendant is domiciled are to have jurisdiction, must be construed in such a way that there is no possibility of the very existence of that principle being called in question, in particular by allowing the plaintiff to make a claim against a number of defendants with the sole purpose of ousting the jurisdiction of the courts of the state where one of those defendants is domiciled: *Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst & Co.* (Case 189/87)[1988] E.C.R. 5565, 5583, paras. 8 and 9.
>
> 48. Accordingly, after pointing out that the purpose of article 6(1) of the Convention, and of article 22, is to ensure that judgments which are incompatible with each other are not given in the contracting states, the court held in *Kalfelis* that, for article 6(1) of the Convention to apply, there must exist between the various actions brought by the same plaintiff against different defendants a connection of such a kind that it

> is expedient to determine the actions altogether in order to avoid the risk of irreconcilable judgments resulting from separate proceedings."

51. Although article 6(1) of Brussels 1 was drafted in a manner that reflected and gave effect to the decisions in *Kalfelis* and *Réunion*, they are cases that have continued to be cited by the CJEU. Mr Mark Howard QC, on behalf of all the defendants on this issue, submitted that they demonstrate the existence of a general principle to which article 6(1) is subject, that it cannot be relied on for the sole object of subjecting a defendant domiciled in one member or contracting state (a foreign defendant) to the jurisdiction of the courts of another member or contracting state. In other words, a foreign defendant may not be named as a defendant in proceedings in another state where the proceedings against a defendant domiciled in that state (an anchor defendant) are commenced with that sole object.

52. Lord Pannick QC submitted on behalf of the Bank that the decisions demonstrate that the vice posed by proceedings commenced with that sole object was met by the requirement laid down by the Court that there must exist a connection between the various claims against the defendants of such a kind that it was expedient to determine the claims together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. Lord Pannick drew attention to the passage in the *Jenard Report* quoted above where it is said to follow from the requirement for a connection that proceedings cannot be brought for the sole object of ousting the jurisdiction of the courts of a defendant's domicile. He relied also on the view of the Advocate General in *Kalfelis* that "it must be possible to deduce which court has jurisdiction from objective rules. Legal certainty would hardly be compatible with an examination of the plaintiff's intentions, which would be both difficult and uncertain". The Advocate General may have had in mind a subjective criterion when making this remark, whereas, as discussed below, all parties are agreed that any such criterion, if it exists, is to be judged objectively. Nonetheless, Lord Pannick submitted, it would introduce a lack of legal certainty, requiring an examination of the circumstances in which the claims were brought going beyond the test of a sufficient connection.

53. As mentioned above, the wording of article 6(1) of Brussels 1, carried forward unaltered to the Recast Brussels Regulation, reflected the decisions in *Kalfelis* and *Réunion*, by requiring "the claims to be so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

54. It is significant to note that in developing the draft that was to become Brussels 1 and, in due course, the Lugano Convention of 2007, the EU Commission proposed that article 6(1) should read as follows:

> "A person habitually resident in a Contracting State may also be sued in another Contracting State:
>
> 1. Where he is one of a number of defendants, in the courts for the place where any one of them is habitually resident, unless the action has been brought solely in order to cause the co-defendants to appear in a court other than their own court."

55. This was not adopted and the *Pocar Report* on the Lugano Convention, published in 2009, explains at paragraphs 69-70 that the *ad hoc* working party of experts composed of representatives of EU and EFTA states, established by the Council of the EU in December 1997 to examine amendments to the Brussels and original Lugano Conventions, considered it advisable to codify the case-law that required a connection between claims but:

> "did not believe it necessary to codify the other principle stated in the Jenard report, according to which jurisdiction is justified only if the claim does not have the exclusive purpose of removing one of the defendants from their proper court. It felt that the close relation that must exist between claims, together with the requirement that the court before which the matter was brought be the court of the domicile of one of the defendants, was sufficient to avoid the misuse of the rule (fn 8); this was not the case with an action on a warranty or guarantee or other third party proceedings regulated by Article 6(2), where the principle was expressly referred to in order to prevent a third party from being sued in an unsuitable court."

56. The apparent clarity of this explanation is muddied somewhat by Professor Pocar's footnote 8 which states: "This consideration is not meant to imply that Article 6(1) may be interpreted in such a way that it would allow a plaintiff to bring an action against a plurality of defendants in the court competent for one of them with the sole purpose of removing the other defendants from their proper court", followed by reference to two subsequent decisions of the CJEU (*Reisch Montage* and *Freeport*) to which we later refer. Given the references, this would appear to be Professor Pocar's own view, rather than a statement of the position of the *ad hoc* committee.

57. In any event, the member states refused to include in article 6(1) the sole object limitation that appears in article 6(2), taking the view that the general condition that the claims be connected was more objective: see the judgment of the CJEU in *Freeport plc v Arnoldsson (Case C-98/06)* [2008] QB 634 (*Freeport*) at [51].

58. The first case before the CJEU on article 6(1) of Brussels 1 was *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH (Case C-103/05)* [2007] I.L.Pr. 10 (*Reisch Montage*). The claimant brought an action to recover a debt in Austria against the debtor, an individual who was domiciled in Austria, and the guarantor, a company which was domiciled in Germany. At the commencement of the action, the debtor had already been made bankrupt in Austria, and under Austrian law he could not be made a defendant in such proceedings while he remained bankrupt. The referring Austrian court made clear in its judgment (reported at [2005] I.L.Pr. 44) that it had not been established, and it could not without more be assumed, that the claimant knew that the debtor was bankrupt when it commenced the action.

59. The question referred to the CJEU was whether a claimant could rely on article 6(1) "where the claim against the person domiciled in the forum state is already inadmissible by the time the claim is brought, because bankruptcy proceedings have been commenced against him, which, under national law, results in a procedural bar".

60. The answer given by the CJEU was that article 6(1) "must be interpreted as meaning that, in a situation such as that in the main proceedings, that provision may be relied on ... even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant".

61. In its judgment, the Court referred to the general principle stated in article 2, that the courts of the state where a defendant is domiciled are to have jurisdiction over him, and the need to interpret strictly the exceptions which are exhaustively listed in Brussels 1: see [22]-[23]. At [24], the Court said that the exceptions must be interpreted "having regard for the principle of legal certainty, which is one of the objectives" of Brussels 1, as it was of the Brussels Convention. At [25], it stated that the principle of legal certainty required the exceptions to "be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the state in which he is domiciled, he may be sued".

62. The decision of the Court on the issue before it appears to have turned on the inapplicability of domestic rules to the operation of article 6(1): see [26]-[31], the conclusion being stated at [31] in these terms:

> "In those circumstances, Art. 6(1) of Regulation 44/2001 may be relied on in the context of an action brought in a Member State against a defendant domiciled in that state and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant."

63. The significance of the Court's decision in *Reisch Montage* lies in what it said at [32]:

> "However, the special rule on jurisdiction provided for in Art. 6(1) of Regulation 44/2001 cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled (see, in relation to the Brussels Convention [*Kalfelis*] at [8] & [9] and [*Réunion*] at [47]). However, this does not seem to be the case in the main proceedings."

While not entirely clear, it seems likely that in the last sentence of [32], the Court was referring to the fact, as stated by the Austrian court, that it had not been established and could not be assumed that the claimant knew of the Austrian debtor's bankruptcy and hence that the action was inadmissible against him under Austrian bankruptcy law. It may be for this reason that its answer, quoted above, is qualified by the words "in a situation such as that in the main proceedings".

64. This paragraph naturally features large in Mr Howard's submissions, and it was a significant part of the judge's reasons for his decision that article 6(1) is subject to a sole object test. It is striking that the Court repeated this principle, notwithstanding that article 6(1) of Brussels 1 had been drafted to include the close connection test but not the sole object test. However, Lord Pannick pointed out that the authorities cited

are *Kalfelis* and *Réunion*, both of which identified the answer to the possible abuse of article 6(1) as being the adoption of the close connection test.

65. Mr Howard referred us to the Opinion of Advocate General Colomer, who said at [AG28]:

> "There are two reasons for the connection requirement. On the one hand, it reduces the risk of diverging judgments; on the other hand, it avoids the unwarranted removal of one of the defendants from the courts of the state where he is domiciled."

Mr Howard also drew attention to the footnote to this paragraph where the Advocate General states:

> "Although this second reason is mentioned in article 6(2)....it is not mentioned in para (1); but it can be deduced from the spirit and purpose of the provision, as a corollary to the connecting link (Jenard Report) or in an autonomous manner (Droz...considers that it is due to an involuntary omission rather than a voluntary silence)."

The suggestion that the absence in article 6(1) of any reference to the removal of a defendant from the courts of his state of domicile was "an involuntary omission rather than a voluntary silence" is inherently improbable and cannot stand with the drafting history described by Professor Pocar and by the CJEU in *Freeport*, to which we have referred. It should be noted that the Court did not adopt the answer and analysis proposed by the Advocate General.

66. The significance of paragraph [32] of the judgment in *Reisch Montage* needs to be assessed in the light of later developments.

67. The next case before the CJEU was *Freeport*. The claimant commenced proceedings in Sweden against a Swedish company and its English parent company. The English company challenged the jurisdiction of the Swedish court on the grounds, among others, that the claim against the Swedish company had been brought with the sole object of suing the English company in Sweden. The relevant question posed by the Swedish court to the CJEU was:

> "is it a precondition for jurisdiction under article 6(1), in addition to the conditions expressly laid down therein, that the action against a defendant before the courts of the state where he is domiciled was not brought solely in order to have a claim against another defendant heard by a court other than that which would otherwise have had jurisdiction to hear the case?"

68. The Court's answer was:

> "Article 6(1) of Regulation No 44/2001 applies where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of

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

69. In his Opinion, Advocate General Mengozzi said at [47] that in essence the Swedish court was asking whether article 6(1) "applies only provided it is established that the action against a defendant domiciled in the member state of the court seised has not been brought solely with the object of removing another defendant from the jurisdiction of the court which could be competent in the case". He observed at [48] that the question raised "the sensitive issue of the limits on the fraudulent or wrongful use of the bases for jurisdiction which Regulation 44/2001 lays down". At [53], he said that "the system of rules also establishes certain mechanisms which make it possible to curtail the opportunities for using it in a fraudulent or wrongful manner". He noted the express limitation of close connection in article 6(1) and the express limitation in article 6(2) as regards sole object and said at [57] that the Swedish court was asking whether the limitation in article 6(2) also applied to article 6(1), even though it did not specifically provide for it.

70. The EU Commission proposed that this question should be answered in the negative, taking the view that article 6(1) must be interpreted as meaning that if the claims are sufficiently connected, there can be no questioning of the objectives the claimant is pursuing. The Commission submitted that this was supported by the Court's judgment in *Kalfelis*.

71. The Advocate General rejected the Commission's approach. First, he interpreted the decisions in *Kalfelis* and *Réunion* as establishing a *presumption* that there was neither fraud nor abuse if the specific connection required by article 6(1) existed. He further regarded *Reisch Montage* as showing that the presumption could be rebutted if the circumstances made it possible to establish the fraudulent or wrongful use of the close connection under article 6(1). Further, the Commission's submission, while respecting the express requirement of article 6(1) "does not preclude the possibility of the claimant using the basis for jurisdiction under article 6(1) with the sole object of ousting the jurisdiction of the court for the place of domicile of one of the defendants and, consequently, does not eliminate the risk of fraud or abuse". He then gave the example of proceedings being brought against a fictitious co-defendant, and expressed the view that the claimant in *Reisch Montage* would not have been entitled to rely on article 6(1) if it had been established that it was acting in bad faith. In his opinion, the rules in Brussels 1 were limited by "fraud relating to the jurisdiction of the courts" and fraud of that nature occurred if the rules are applied "as a result of manipulation on the part of the claimant which is designed to oust and has the effect of ousting the jurisdiction of the courts of a particular member state".

72. At [63] the Advocate General considered the question whether it is possible to identify a general prohibition on the abuse of the right to choose the court as more delicate. His view was that the express limitation in article 6(2) applied also to cases within article 6(1) and that the Court should answer the Swedish court's question accordingly.

73. We have set out at some length the Advocate General's reasoning because it clearly expounds the case for the application of a sole object test to article 6(1).

74. The Court did not accept the recommendation of the Advocate General as to the answer to be given. In giving its reasons, the Court stated:

> "52 It should be recalled that, after mentioning the possibility that a plaintiff could bring a claim against a number of defendants with the sole object of ousting the jurisdiction of the courts of the member state where one of the defendants was domiciled, the court ruled, in *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst & Co.* (Case 189/87) [1988] E.C.R. 5565, that it was necessary, in order to exclude such a possibility, for there to be a connection between the claims brought against each of the defendants. It held that the rule laid down in article 6(1) of the Brussels Convention applies where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.
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> 53. Thus, that requirement of a connection did not derive from the wording of article 6(1) of the Brussels Convention but was inferred from that provision by the Court of Justice in order to prevent the exception to the principle that jurisdiction is vested in the courts of the state of the defendant's domicile laid down in article 6(1) from calling into question the very existence of that principle: the *Kalfelis* case, para 8. That requirement, subsequently confirmed by the judgment in *Réunion Européenne SA v Spliethoff's Bevrachtingskantoor BV* (Case C-51/97) [2000] QB 690, para 48, was expressly enshrined in the drafting of article 6(1) of Regulation No 44/2001, the successor to the Brussels Convention : *Roche Nederland BV v Primus* (Case C-539/03) [2006] ECR I-6535, para 21.
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> 54 In those circumstances, the answer to the question referred must be that article 6(1) of Regulation No 44/2001 applies where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the member state where one of the defendants is domiciled."

75. This appears to us to provide a clear, negative answer to the question of whether article 6(1) is subject to an implicit sole object test. However, in the present case the judge held at [90] that, while not wholly clear, it appeared to be a decision that a claimant need only prove the close connection and expediency explicitly referred to in article 6(1) and need not also disprove that the claim was brought with the sole object