Neutral Citation Number: [2018] EWHC 1081 (QB)

Case No: HQ17M01583

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2018

Before :

MR JUSTICE NICOL

- -

Between :

(1) Euroeco Fuels (Poland) Ltd **(2) Alphaco Ltd** **(3) Edward Allen Timpany** **(4) Robert David Harper**	**Claimants**
- and -	
(1) Szczecin and Swinoujscie Seaports Authority SA **(2) Aleksander Milewski** **(3) Dariusz Slaboszewski**	**Defendants**

- -
- -

William McCormick QC (instructed by **B.P.Collins LLP**) for the **Defendants**
Adrienne Page QC and Alexandra Marzec (instructed by **Mishcon de Reya**) for the **Claimants**

Hearing date: 26th February 2018

- -

Judgment Approved

Mr Justice Nicol :

Introduction

1. This is an application by the Defendants challenging the Court's jurisdiction to hear and determine these claims for libel and malicious falsehood or arguing that any such jurisdiction as exists should not be exercised or that the present proceedings should be stayed. The origins of the claims are words spoken by the 2nd Defendant at a press conference in Poland (referred to in the Particulars of Claim as 'the Words') and a press release said to have been issued by the Defendants (in the Particulars of Claim 'the Press Release') also issued in Poland to the press and other media. These events took place at the end of March 2017. The reach of some of those Polish media included England and Wales. The Claimants rely on what are said to be republications of the Words and the Press Release which took place in England and Wales by means of internet articles being read here and Polish broadcasts available here, again on the internet ('the Republications').

2. The Claim Form was issued on 9th May 2017. It was to be served on the Defendants in Poland but leave to serve out of the jurisdiction was said not to be necessary because the claim was one which the Court had power to determine under the Civil Jurisdiction and Judgments Act 1982 and no proceedings between the parties concerning the same claim were pending in the courts of any other part of the UK or another Contracting State and the Defendants were domiciled in (in this case) a Convention territory.

3. Particulars of Claim dated 23rd May 2017 followed. They were drafted by Adrienne Page QC, who also appeared before me on behalf of the Claimants.

4. CPR Part 11 provides the procedure for disputing the Court's jurisdiction. An application must be made within 14 days of acknowledging service and must be supported by evidence. Such an application was issued on 24th July 2017 and was supported by the witness statement of Steven Baker of Dentons UKMEA LLP who were then the Defendants' solicitors. It is fair to say that Mr McCormick QC, who appeared for the Defendants, relied only selectively on the grounds advanced by Mr Baker. In due course, the Defendants instructed B.P.Collins LLP who continued to act for them at the time of the hearing. They issued an amended application notice (dated 31st January 2018) on 15th February 2018. There is an issue between the parties as to whether it is open to the Defendants to rely on that amended notice and/or for Mr McCormick to be able to rely on all of the submissions which he argued in his skeleton argument dated 23rd February 2018. I will return to these matters in due course.

The Parties

5. The 1st Claimant is a Polish company. It is the leaseholder of a site in the Baltic port of Szczecin in Poland. It operates an industrial scale alternative petrochemical production plant recycling used tyres into carbon and oil products. This is the 'EEF Plant'.

6. The 2nd Claimant is an English company. It is said to operate the EEF plant, along with the 1st Claimant. It owns 87.5% of the shares of the 1st Claimant. It owns the intellectual property on which the EEF Plant relies.

7. The 3rd Claimant is the Chief Executive Officer of the 2nd Claimant. He owns the majority of its shares. He is a member of the senior management of the EEF Plant.

8. The 4th Claimant is a member of the senior management of the 2nd Claimant. He is said to be the Chief Executive of the EEF Plant and the President of the Management Board of the 1st Claimant (the equivalent of the company's CEO). The 3rd and 4th Claimants are said to be publicly associated (especially in the UK) with the day to day operation of the EEF Plant and to have invested time and money in its establishment and operation and the development of the 'clean' alternative energy which it deploys.

9. The 1st Defendant is the 1st Claimant's landlord and the administrator of the ports of Szczecin and Swinoujscie. The 2nd Defendant is the 1st Defendant's Director of Port Infrastructure and Maintenance. The 3rd Defendant is President of the 1st Defendant. The 1st Defendant is said to be vicariously responsible for the other two.

The English claims

10. As I have said, the Claimants rely exclusively on Republications by the media within the jurisdiction. However, since those are said to derive from the Words (spoken by the 2nd Defendant) and Press Release which were spoken and issued in Poland, the Particulars of Claim understandably sets these out. They (and indeed all of the Republications) were in Polish, but the Particulars provide the original language and English translations. For obvious reasons, the submissions before me concerned the latter.

11. In essence it is pleaded that the Defendants were saying in the Words and Press Release that the EEF Plant was emitting excessive levels of benzene and that in some cases they were being exceeded by several hundred per cent.

12. These remarks were said to have been picked up by the Polish media, television, radio, and internet news distributors. Nine particular Republications are pleaded whose reach is said to have included England and Wales. Again, all were in Polish. Unsurprisingly, their precise words vary. They are all said to be still accessible. The Defendants are said to be liable for the Republications because the 2nd Defendant knew and intended from what he said to reporters that his words or words to the same effect would be republished. The 2nd Defendant reported to the 3rd Defendant and had his authority to say what he did. Furthermore, it is said that the Defendants did foresee, or should reasonably have foreseen, that the Republications would include an audience in England where the owners, investors and potential investors in the EEF Plant or their agents and advisors were mainly situated.

13. Although the Claimants were not all named in the Republications, it is pleaded that they would all have been identified with the EEF Plant or EuroEco Fuels of which the Republications did speak.

14. Libel pleadings must include the meaning or meanings said to have been defamatory of the claimants. Ms Page did not attribute a meaning to each of the Republications separately. Instead she has pleaded that the Words, the Press Release and the Republications (all referred to in omnibus fashion) had the following meanings:

> ‘(1) that the Claimants and each of them are guilty of conducting or of involvement in the management of an industrial operation at the EEF Plant which is in gross violation of the pollution standards imposed by Poland’s environmental laws for the protection of the health and safety of the public by emitting toxic benzene at levels that are several hundred per cent above legally permitted (i.e. safe) levels.
>
> (2) That in pursuit of their own business and commercial interests, the 3rd and 4th Claimants are content to see put at grave risk of serious physical harm their own employees at the EEF Plant as well as the public who live and work in the vicinity of the EEF Plant by a gross and criminal disregard for Poland’s environmental laws, put in place for the protection of the public’s health and safety.’

15. The Claimants also plead that the Court should infer that all or most of those who read the Republications would know that human exposure to benzene above certain levels is associated with acute health disorders.

16. The Defamation Act 2013 s. 1 now provides:

> '(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
>
> (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.'

17. The 1st and 2nd Claimants are bodies that trade for profit. Accordingly, so far as they are concerned, each Republication will only be actionable in libel if it caused or was likely to cause that Claimant serious financial loss. None of the four Claimants can succeed in libel in respect of each Republication unless that Republication caused or was likely to cause serious harm to the reputation of the Claimant in question.

18. Alive to these requirements Ms Page's Particulars of Claim indeed allege in paragraph 20 that the Republications (as well as the Words and Press Release) have caused and are likely to cause serious harm to the reputations of all of the Claimants and that the 1st and 2nd Claimants have been caused serious financial loss and will in the future be likely to suffer further serious financial loss. Particulars are also pleaded which include (where available) the estimated circulation in the UK (I add as a minor aside that it would be wrong to equate the UK with England and Wales, but I assume the Claimants would wish the Court to infer that a substantial part of the UK circulation or audience would be in England and Wales). The Claimants also plead that a major source of investment is England and Wales and potential investors are likely to conduct a due diligence search of online materials which would, in turn, be likely to lead to the Republications. In paragraph 20.10 specific examples are given of individuals who are said to have accessed the Republications in England. These individuals are not named (with the exception of two Foreign and Commonwealth Office officials), but whose names, it is said, were set out in a Confidential Annex. It is pleaded that the Annex would be given to the Defendants on appropriate undertakings. By the time of the hearing before me, the Defendants had not given the requested undertakings and had not received the Confidential Annex. Ms Page did not press the Claimants' entitlement to rely on the Confidential Annex. I made clear at the hearing that I had not seen it and would decide the application without reference to it.

19. For the claims in malicious falsehood, the Claimants must plead and prove that the words were false. Paragraph 21 pleads that the Words and the Press Release were false in material ways. Those expressions have been carefully defined by Ms Page and they are distinguished from the Republications. There is not, therefore, in terms, a pleading that each of the Republications was false. Mr McCormick did not take this point. I assume that was because he read the plea of falsity as extending by inference to the Republications as well.

20. The Words and Press Release are said to have been false for a number of reasons which include in summary the following:

i) The tests on which the Defendants apparently relied were conducted by a non-accredited laboratory.

ii) Those tests, such as they were, did not show that the EEF Plant had ever emitted benzene at levels above the legally permitted levels or that they were hundreds of times in excess of those levels.

iii) Those tests did not conduct proper tests for annual levels but took snapshots which were inadequate for annual levels properly to be extrapolated.

iv) Those tests did not establish any risk of benzene poisoning or other adverse effects on those who worked in or lived nearby the EEF Plant.

v) Those tests did not distinguish between the contribution of the EEF Plant to such benzene levels as were emitted as opposed to a nearby road and rail freight line.

vi) Those tests were no more detailed than benzene emission tests by a Provincial Inspectorate of Environmental protection (known as WIOS).

vii) The EEF Plant was fully compliant with the law on emissions standards for industrial facilities.

21. A further requirement for the tort of malicious falsehood is that the words must have been published maliciously. The Claimants seek to show that by pleading that the 2nd and 3rd Defendants authorised and published the Words and the Press Release for the dominant and improper motive of causing damage to the business operating at the EEF Plant to the point where it has to be sold, allowing its site to be let by the 1st Defendant to other businesses more appealing to the current management. It is said that the Defendants no longer consider it to be in their interests to enable the Claimants to expand the EEF Plant. Furthermore, it is said that the Defendants knew, before the Words were spoken or the Press Release was published, that they were false and misleading or they lacked an honest belief in their truth or were indifferent to their truth or falsity. Further particulars of those pleas are given.

22. At common law an action in malicious falsehood could only be maintained if it caused special damage. By Defamation Act 1952 s.3(1), that is not necessary if the words were in writing or other permanent form and 'are calculated to cause pecuniary damage to the plaintiff.' That requires the claimant to show that the words were more likely than not to cause him pecuniary damage. Paragraph 27 of the Particulars of Claim pleads that 'The Words, the Press Release and the Republications were calculated to cause pecuniary damage to the Claimants and each of them.' Since the publications relied on by the Claimants are exclusively the Republications, the references to the effect of the Words and the Press Release are superfluous, but it is pleaded that the Republications did have that effect, if one assumes that Ms Page intended the paragraph to read, 'The Words, the Press Release and the Republications *and each of them* were calculated to cause pecuniary damage to the Claimants and each of them.'

23. There is then a plea of general damages. Special damages are not claimed. Among other things, it is said that at least two third party potential investors in the EEF Plant

have decided against pursuing their interest and the future of the Claimants' investment has been put in serious jeopardy.

Regulation (EU) No. 1215/2012 of the European Parliament and of the Council

24. This Regulation is sometimes known as 'the Recast Brussels Regulation'. The parties were agreed that it was the primary legislative source for the determination of the Defendants' application.

25. The Recast Brussels Regulation was adopted in December 2012. It applies to legal proceedings instituted after 10th January 2015 (see Article 66). It replaced the Brussels Convention of 1968 which had been given the force of law in the UK by the Civil Jurisdiction and Judgments Act 1982, as supplemented and amended from time to time. As an EU regulation, it necessarily takes precedence over any conflicting domestic legislation.

26. One of the purposes of the Brussels Convention and of the Recast Brussels Regulation was to provide for a clear and predictable set of rules for determining which Member State should have jurisdiction to decide contested litigation. The Recast Brussels Regulation Article 4 sets out the basic rule,

> 'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

27. Each of the three Defendants in this case is domiciled in Poland. Accordingly, (unless some other provision of the Regulation permits) it is in Poland that they should be sued in accordance with Article 4. By Article 5, persons domiciled in a Member State may be sued in another Member State only to the extent permitted by Sections 2-7 of the Regulation (i.e. Articles 4-26).

28. Article 7 is part of Section 2 of the Recast Brussels Regulation which is entitled 'Special Jurisdiction'. Relevant to the present case is Article 7(2) which says,

> 'A person domiciled in a Member State may be sued in another Member State….
>
> (2) in matters relating to tort, delict or quasi-delict, in courts for the place where the harmful event occurred or may occur.'

29. In *Shevill v Presse Alliance SA*, the Defendant was the publisher of the French daily newspaper *France Soir* and was domiciled in France. The Plaintiff (more accurately one of the Plaintiffs) was domiciled in Yorkshire, England. She claimed that an article in one issue of *France Soir* defamed her. She brought her claim in the English courts. Initially her claim concerned both English and foreign publications, but by an amendment she confined her action to publications which had taken place in England and Wales. While about 237,000 copies of the paper were sold in France, she said that some 230 were sold in England and Wales (5 of which were sold in Yorkshire). As a matter of English law, each separate 'publication' in the sense of each occasion that the defamatory words were made known to a reader gave rise to a separate cause of action. She alleged that those publications in England and Wales were sufficient to mean that (as regards them) the 'harmful event' had occurred in the jurisdiction of the English courts and her action here should therefore be allowed to continue. At the

time the Brussels Convention was still in force, but Article 5(3) was in the same terms as Article 7(2) of the Recast Brussels Regulation. The Defendant's application disputing the jurisdiction of the English court was dismissed by the High Court and an appeal to the Court of Appeal was unsuccessful. When the case reached the House of Lords, it referred questions to the Court of Justice of the European Communities (Case 68/93). That Court ruled (at [1995] 2 AC 18 [33]) that,

> 'the victim of a libel by a newspaper article distributed in several contracting states may bring an action for damages against the publisher either before the courts of the contracting state of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each contracting state in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of harm caused in the state of the court seised.'

30. At [38]-[39] the Court said that it was for the national courts to specify the circumstances in which the event giving rise to the harm may be considered harmful to the victim (although the effectiveness of the Convention must not thereby be impaired).

31. When the matter returned to the House of Lords, the Defendant argued that it was insufficient for the Plaintiff to rely on the presumption of damage in the English law of libel. That was rejected – see [1996] AC 959, 982-3. The Court of Justice had left to the national court, applying its own substantive law, to determine what constituted a harmful event, and the Plaintiff was entitled to rely on the presumption that publication of a defamatory statement was harmful.

32. In a subsequent decision, *E-Date Advertising gmbh v X, Martinez v MGN* [2012] EMLR 12 the Grand Chamber of the Court of Justice allowed a claimant who claimed that he or she (or it) had been defamed in a newspaper published in several different Member States a further alternative. In the courts of the state where the claimant had the centre of his, her or its interests a claim could be brought for all of the damage caused. Both the actions in *E-Date* concerned internet publications. Both claims again involved the Brussels Convention, but again neither party before me has suggested that any different result would follow under the Recast Brussels Regulation.

33. In consequence the parties agree that where a claimant believes himself or herself to have been defamed in a newspaper or internet publication in more than one Member State by a defendant domiciled in a Member State, s/he has three choices:

i) s/he can sue for all of the loss in the courts of the defendant's domicile;

ii) s/he can sue for all of the loss in the courts of the Member State in which s/he has his or her centre of interests; or

iii) s/he can sue in the courts of the Member State where (according to the national law of that Member State) the harmful event occurred, but in those circumstances s/he is limited to the harm which occurred in that Member State. This last alternative is sometimes referred to as the 'mosaic alternative'

> because, to recover for all of the loss suffered, claims must be brought in more than one state.

34. It is this third alternative which the present Claimants have chosen to pursue.

35. It is, of course, now commonplace for internet postings to be published in many different countries and, indeed, for those publications to be simultaneous or nearly so. Section 9(2) of the Defamation Act 2013 partially attempts to address this phenomenon by directing the court to consider whether, of all the places in which the statement has been published, England and Wales is clearly the most appropriate place to bring the action. That provision however is of no relevance in relation to the present claim for two reasons: (a) by s.9(1) it only applies where the defendant is *not* domiciled in the UK, or another Member State and, as I have said, the Defendants are all domiciled in Poland; and (b) it applies to claims in defamation and so would, for that additional reason, not apply to the Claimants' claim for malicious falsehood.

36. A further part of the Recast Brussels Regulation which is important for Mr McCormick's argument is Article 30. This provides,

> '(1) Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
>
> (2) Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
>
> (3) For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

37. Article 30 is said to be germane because, before the English action began, the 1st Defendant had taken proceedings in Poland against the 1st Claimant alleging, in essence, that the EEF Plant was causing a nuisance because of the odours it emitted. Part of the evidence and statement of case relied upon by the 1st Defendant in the Polish proceedings relates to the emission of benzene from the EEF Plant and the 1st Claimant has submitted evidence in response and referred to it in its statement of case..

38. Both the original application notice and its amended form had also relied on Article 29 of the Recast Brussels Regulation. That is confined to situations where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States. Mr McCormick accepted that Article 29 did not apply and, as a result, I need say little more about it.

39. It is sensible and logical to consider the competing submissions regarding Article 7(2) before turning, if necessary, to those concerning Article 30.

Article 7(2) of the Recast Brussels Regulation

40. The parties were agreed that, although this is the Defendants' application, it was for the Claimants to show that the Court had jurisdiction under Article 7(2). That must be right. As a matter of general principle, a party who seeks relief from the court, must, if challenged, be ready to establish that the court does in fact have jurisdiction or power to grant that relief and that position is supported by the authorities (see for instance *Canada Trust Co. v Stolzenberg (No.2)* [1998] 1 WLR 547, 553C-D).

41. What is now Part 11 of the Civil Procedure Rules derives in part from the Rules of the Supreme Court Order 11. In that context the House of Lords had laid down that the appropriate standard which the Plaintiff must satisfy was that there was a 'good arguable case' as to why the English court had jurisdiction – see for example *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869. *Bols Distilleries v Superior Yacht Services Ltd* [2006] UKPC 45 was a decision of the Privy Council in relation to whether a Dutch company and a Polish company could be sued in the courts of Gibraltar for breach of a contract said to have been made with a Gibraltar company. Lord Rodger gave the decision of the Board. He quoted from the decision of Waller LJ in *Canada Trust v Stolzenberg (No.2)* (above) in which it was said that the phrase 'good arguable case' meant that 'one side has a much better argument on the material available'. In *Canada Trust* the House of Lords had endorsed Waller LJ's judgment – see [2002] 1 AC 1 at 13 and in *Bols* the Privy Council added its own endorsement – see *Bols* at [28].

42. There were further recent observations made in the case of *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 SC in which Lord Sumption, with whom Lord Hughes agreed at [7] was not attracted to the word 'much' in Waller LJ's formulation since it suggested a 'superior standard of conviction that is both uncertain and unwarranted in this context'. To some extent the majority (Lady Hale, Lord Wilson and Lord Clarke) differed. Lady Hale at [33] noted that

> 'everything which we say about jurisdiction is obiter dicta and should be treated with appropriate caution. For what it is worth, I agree (1) that the correct test is a "good arguable case" and glosses should be avoided; I do not read Lord Sumption JSC's explication in para 7 as glossing the test…'

43. Notwithstanding Lady Hale's comments, I take the following to be established by the authorities in elaboration of the phrase 'a good arguable case':

i) The claimant does not have to prove that the Court has jurisdiction on the balance of probabilities, the civil burden of proof.

ii) Some of the factors relevant to jurisdiction may be issues in an eventual trial of the action, and in relation to such issues no concluded view must be expressed on the merits but, whether such issues are involved or not, the 'good arguable case' test applies.

iii) If jurisdiction is challenged, the Court will have to weigh the competing arguments, but that does not mean there is to be a trial.

iv) The Court must concentrate on whether it is satisfied as far as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction.

44. I add this. This challenge falls to be determined at a very early stage in the action. There is no defence. There is not, so far, any request for further particulars of the Claimants' claims. The Claimants have been dependent on the content of the Application Notice (in its original and amended forms) and the witness statements served on behalf of the Defendants to be alerted to the nature of the challenges which the Defendants make.

45. The original application notice said that the Court either lacked jurisdiction or should not exercise it because,

> '1. The 1st, 2nd and 3rd Defendants are domiciled out of the jurisdiction in Poland;
>
> 2. The 1st Claimant is also domiciled out of the jurisdiction in Poland;
>
> 3. The statements that are the subject of the claim were spoken in Poland and disseminated to Polish regional television and Polish websites;
>
> 4. The statements that are the subject of the claim specifically relate to Polish public health and would be of particular interest to Polish citizens;
>
> 5. The centre of gravity of the dispute is in Poland; and
>
> 6. England and Wales is not the proper place in which to bring the claim.'

46. Mr Baker's witness statement commented that insufficient information was given of there being Republication in the jurisdiction. Reliance was placed on the Polish proceedings which I have mentioned. Reference was made to the *Shevill* and *E-Date* cases, but Mr McCormick accepts that Mr Baker's reference to the effect of the later case was mistaken. Mr Baker did allege that the Claimants could not show any damage arising in England and Wales and it was said, there was insufficient information about the potential investors here. Mr Baker relied further on the Rome II Regulation (EC) 864/2007 which Mr McCormick has accepted is not relevant.

47. The amended application notice relied on the original application but said in addition the relief sought should be granted because,

> '1. When read in conjunction with the Defamation Act 2013, s.1 there has been no "harmful event" within England and Wales in respect of each of the Claimants;
>
> 2. [reliance on Article 29 of the recast Brussels Regulation which, as I have said, Mr McCormick did not pursue];
>
> 3. In respect of all four Claimants, the present proceedings were issued at a time when the Courts in Poland were seized with proceedings that are "related" for the purposes of the Recast Brussels 1, Art 30 and jurisdiction should be declined or stayed on the following non-inclusive grounds:
>
> a. there is a substantial risk of irreconcilable judgements;
>
> b. Poland is the more appropriate place for the issues concerning the nature and extent of the emissions from the plant to be adjudicated upon;

> c. to the extent that the any of the Claimants has suffered in his/its reputation because of the words complained of, the greatest damage will have been suffered in Poland;
>
> d. to the extent that the Claimants wish investors to be reassured that the words (in the meanings complained of) were false an adjudication in Poland is evidently more useful than an adjudication in England and Wales;
>
> e. the Courts of Poland could (if asked) hear an action for libel and malicious falsehood on the part of the Claimants with the extant proceedings.'

48. The amended application notice was supported in the first place by witness statements from Michal Stankiewicz, a Polish lawyer acting for the 1st Defendant in the Polish claim regarding the EEF Plant, and by a statement from Michal Dudkowiak, an independent Polish lawyer. Both of these were relevant to paragraph 3 of the amended notice i.e. the argument based on Article 30 of the Recast Brussels Regulation and I will return to their evidence when I come to consider that part of the application.

49. The Defendants' solicitors sent the Claimants' solicitors a draft of the amended application on 31st January 2018 and asked whether the Claimants objected. At that stage there was no evidence in support of the proposed amendment and Mishcon de Reya, the Claimants' solicitors, said on 2nd February 2018 that they would need to see such evidence before taking a view on the proposed amendment. B.P. Collins replied on 5th February 2018 'The amendment to the notice is proposed only to clarify what your clients have always known, namely that under Article 30 the court has the discretion to order a stay as an alternative to dismissal.' On 8th February 2018 Mishcon said they would be willing to consent to the amendment on the basis that the Defendants relied only on the evidence of Mr Baker and Mr Stankiewcz (whose witness statement had by then been served). BP Collins refused to accept this condition because, they said, it would preclude them from relying on any evidence in response to the Claimants. On 9th February 2018 Mishcon served the Claimants' evidence in response (see below) and, in a second letter said that, on the basis that the Defendants would only rely on further evidence in direct response to the Claimants' evidence, the Claimants would not oppose the application to amend their application notice and to rely on the evidence of Mr Stankiewicz and Mr Dudkowiak. So far as may be necessary, I give permission for the Defendants' application notice to be amended.

50. The Claimants' evidence included a witness statement from Ms Katarzyna Paczuska-Tokarska, the Polish lawyer for the 1st Claimant in the Polish proceedings, dated 8th February 2018. Her evidence is primarily relevant to the Article 30 issue and I will come to that in due course. The Claimants relied as well on the witness statements of Mr Timpany, the 3rd Claimant, and Mr Harper, the 4th Claimant, both dated 9th February 2018.

51. Mr Timpany gives evidence of the inter-relationship between the Claimants and the Republications to readers and audiences in England and Wales. He gives some further information about the anonymised individuals who were referred to by initials in the Particulars of Claim. Some, but not all, he says, were British and based in London. He says that 80-90% of his fundraising takes place in the UK. He continues that anyone

thinking of investing in the 1st or 2nd Claimants would conduct due diligence and that would involve an online media search. He says that reputation is critical in the renewable energy industry and the Defendants' defamatory allegations had been extremely damaging. The allegations by the 1st Defendant in the Polish proceedings were also damaging, but, Mr Timpany adds,

> 'It does not concern investors in renewable fuels to read that a party involved in industrial energy production (on an industrial site in an industrial area of Poland) is emitting odour – in fact it is entirely expected. It is totally different for them to read the (false) allegations that a reputable clean energy provider has been found by a credible laboratory to be emitting excessive levels of poisonous and potentially carcinogenic substances; that the EEF Plant is therefore in gross violation of local environmental laws; and that its operators are putting the safety and health of their employees and the general public in grave danger.'

52. He says that the defamatory allegations have made it hard to raise funds. He says that the allegations have also affected their relationship with the UK government. Dealing with that has taken up a lot of management time.

53. Mr Harper's witness statement said that in four or five months after the first appearance of the defamatory allegations, concerns were raised with him directly five to six times a month, but the issues are still raised with him by potential investors. A significant proportion of the people who have raised these concerns are British and/or based in the UK. He endorses Mr Timpany's comments about the harm caused by the publicity. He says 'We are tainted goods.' He says that there has also been an adverse impact on the willingness of suppliers to deal with them.

54. The 3rd Defendant provided a witness statement in reply dated 16th February 2018. Realistically he says he is unable to comment on the Claimants' claims that the statements were re-published and read in the UK. He takes issue with the alleged difficulties of the Claimants in raising investments and refers to articles and postings suggesting that they or associated companies have had recent success in this regard. Mr Timpany replied in his 2nd witness statement dated 21st February 2018. The 3rd Defendant made a second witness statement on 26th February 2018 (the day of the hearing) and which was served towards the end of the hearing. Ms Page did not accept that I should admit it in evidence. I will come to that later.

55. In his skeleton argument, Mr McCormick contended that the Claimants had not shown a good arguable case that they were able to rely on a harmful event in the jurisdiction.

56. So far as libel was concerned, he submitted (in summary):

    i) The Republications relied on by the Claimants have not been set out in full as they should have been. The pleading of two omnibus meanings for all of the Republications is improper although (for the purpose of the present application) he accepts (i) that each of the Republications bore the meaning that the 1st Claimant had breached Poland's environmental laws and (ii) such a meaning would be defamatory of the 1st Claimant. He also accepts for the purpose of the present application that it was foreseeable that the Words and

the Press Release would be republished by the Polish media so far as those republications constituted direct quotations.

ii) The 2nd and 3rd Claimants were not referred to in any of the Republications and the 4th Claimant was only referred to in one of them. An ordinary reader would not have understood any of the 2nd – 4th Claimants to be included in the allegations about the behaviour or performance of the 1st Claimant or attributed moral turpitude to them if they did for any failings by the 1st Claimant, nor would they do so even if they had the knowledge pleaded in the innuendo. Furthermore, neither the Words nor the Press Release had named the 4th Claimant and the Defendants could not be responsible for him being named in that one Republication.

iii) While serious harm can be inferred from evidence – see *Lachaux v Independent Print Ltd.* [2017] EWCA Civ 1327, [2018] EMLR 2 – the Claimants had not produced evidence from which such an inference would be proper.

iv) The 1st and 2nd Claimants have not satisfactorily shown that they have suffered serious financial loss as a result of the Republications. Mr McCormick argues, that while it may have been premature to expect such evidence in the immediate aftermath of the Republications, now some 10 months further on, there is no excuse and the absence of more concrete evidence is eloquent. Besides, a loss of equity is not to be equated to loss to the company, nor, without further elaboration is loss of debt.

57. In malicious falsehood,

i) Mr McCormick recognised that there was no single meaning rule – see *Ajinomoto Sweetners SAS v Asda Stores Ltd.* [2011] QB 497 CA – but even so the same objections were taken to the alleged meanings pleaded from the Republications and the same arguments were maintained in relation to the paucity of reference to any of the Claimants other than the 1st Claimant.

ii) Mr McCormick accepted that in principle the Claimants did not have to prove actual financial loss if such loss was calculated, or likely, to flow from the Republications, but the simple formulaic pleading to that effect was insufficient.

58. Ms Page takes two preliminary points.

59. First, she submits that the breadth of the Defendants' arguments under Article 7(2) was not foreshadowed in their original notice, the amended notice or the evidence in support. It first emerged in Mr McCormick's skeleton argument which was served on 23rd February 2018, the working day before the hearing.

60. Second, she submits that these arguments in reality are submissions that the claims (or parts of them) should be struck out as disclosing no reasonable cause of action or that summary judgment should be granted to the Defendants. However, relief of that kind could only be available if the Defendants accepted the jurisdiction of the English court and issued the appropriate application. She argued that, unlike *Bols* or *Canada*

Trust, this was not a case where essential facts were in dispute. It was not disputed that the 2nd Defendant had spoken the Words or that the Press Release had been issued. It was accepted that republication was foreseeable. It was not disputed that the words bore a defamatory meaning, at least of the 1st Claimant or that the 1st Claimant had suffered serious reputational damage.

61. Apart from these preliminary matters, she submitted that the Claimants had provided sufficient evidence to surmount the 'good arguable case' test. She argued that there was sufficient evidence of financial loss already incurred for the 1st and 2nd Claimants to satisfy s.1(2) of the 2013 Act. In any event, under that provision it was possible for a claimant who traded to show that such loss was likely to occur. Ms Page reminded me that part of the relief sought by the Claimants was an injunction to prevent repetition of the libels. Article 7(2) permitted a claim to be brought where the harmful event 'occurred or may occur' and so that also allowed for the possibility of an action to prevent future loss. She also argued that, contrary to Mr McCormick's submissions, the materials before the Court did show that the Claimants had surmounted the 'good arguable case' test.

62. I do not accept either of Ms Page's preliminary objections.

63. I have some sympathy with her complaint of lack of earlier notice of this aspect of Mr McCormick's challenge. While the initial application did make clear that jurisdiction was in issue, its reasons for taking that stance were somewhat opaque. I accept Mr McCormick's submission that the Claimants agreed in Mishcon's letter of 9th February 2018 to not oppose the Claimants' application to amend the application notice. The amended notice did, appositely, give as its first reason that there had been no harmful event within England and Wales in respect of each of the Claimants. However, by coupling this with a reference to the Defamation Act 2013 s.1, the Claimants could be forgiven for thinking that this line of attack was confined to the claims in libel: the 2013 Act has no application to malicious falsehood. Such a reading of the first reason in the amended notice would be reinforced by BP Collins's letter of 30th January 2018 which had said,

> 'the grounds on which the order is sought include:
>
> > 1. that there has been no "harmful event" within England and Wales in respect of each of the Claimants, *given that such a "harmful event" must now be judged by reference to section 1 of the Defamation Act 2013.*' [emphasis added]

64. While all of that can be said, once jurisdiction is put in issue it is, as Ms Page accepted, for the Claimants to satisfy the Court that it does indeed have jurisdiction. Even without anything further from the Defendants, it was therefore for the Claimants to put before the Court such evidence as they considered necessary to discharge that burden. Ms Page did also have the weekend to consider Mr McCormick's skeleton argument and, while she might have welcomed a longer opportunity, for counsel of her experience that was sufficient for her to muster her arguments to meet it.

65. Nor do I accept her submission that the type of arguments presented by Mr McCormick could only be made in the course of an application to strike out all or part of the claim or for summary judgment. As Waller LJ said in *Canada Trust* at p.555,

> 'It is I believe important to recognise, as the language of their Lordships in *Korner*'s case [1951] AC 869 demonstrated, that what the court is endeavouring to do is to find a concept not capable of very precise definition which reflects that the plaintiff must properly satisfy the court that it is right for the court to take jurisdiction. That may involve in some cases considering matters which go both to jurisdiction and to the very matter to be argued at trial, e.g. the existence of a contract, but in other cases a matter which goes purely to jurisdiction e.g. the domicile of a defendant.'

66. The matters to which Mr McCormick alludes in this part of his argument will, if and so far as the matter proceeds, go to whether the Claimants have made out their causes of action, but they also go to whether they have suffered a 'harmful event' in England and Wales so as to give the Court jurisdiction pursuant to Article 7(2).

67. Thus, I must consider the merits of Mr McCormick's arguments in relation to Article 7(2). Yet, I am also conscious that what the Claimants have to establish is, not that they are more likely to succeed than not at trial, but that they have a good arguable case that their claims in libel and malicious falsehood will succeed. I also bear well in mind the stage at which these proceedings have reached. As has been repeatedly emphasised, the Court has to make its decision on the basis of written evidence and in advance of the disclosure which would precede a trial. I have the Particulars of Claim but, as I have already illustrated, they may need refinement and my decision has to be made in advance of amendment and / or the provision of further particulars which may be necessary in advance of a trial. The absence of a clear signal in the application notice, its amended version or the evidence in support that the jurisdictional challenge was to include deficiencies in the pleading is a further reason for taking this approach.

68. In my view, some of Mr McCormick's criticisms are likely to be capable of being addressed (if necessary) by amendment or particulars. Thus, for instance, if, as in my provisional view is the case, a separate meaning should be pleaded for each of the Republications, that could be done and would not, in itself, be a reason for deciding that no harmful event has occurred in relation to each Republication within the jurisdiction.

69. It is, of course, the case that a libel of a company is not necessarily defamatory of those connected with its management or a holding company, but it may be. The Claimants have provided sufficient evidence (at this stage) that each of them is associated with the 1st Claimant and the EEF Plant that the Republications which referred to those matters would be understood to be also referring to each of them, at least by readers with knowledge of the facts referred to in paragraphs 18.1-18.3 of the Particulars of Claim.

70. There is also sufficient evidence from the Claimants that each of them has a good arguable case that the common criterion for all libel claimants of serious harm from each of the Republications can be established. I was less impressed by Ms Page's argument that future harm would, in the circumstances of this case, be a sufficient alternative. In theory it may be, but where the publications relied upon are internet postings 10 months ago, I would need considerable persuasion that harm, which has not already occurred, may nonetheless be likely to occur in the future.

71. 'Serious financial harm' must be shown by the 1st and 2nd Claimants before they can be said to have suffered 'serious harm'. No special loss is pleaded, but Parliament has not confined the expression 'serious financial harm' to special loss and, as Ms Page observed, that contrasts with s.14(2) of the Defamation Act 2013 where, in a completely different context, the statute does refer to 'special damage'. Absent some clearer indication of Parliament's intention, I would not limit 'serious financial harm' to special damage. I also see no reason why 'serious financial loss' may not, like other forms of 'serious harm', be capable of inference from the evidence. Loss to investors is not automatically to be viewed as loss to the company, but it can make borrowing more expensive and the raising of equity more difficult. Here, there is also evidence of an adverse impact on suppliers and of management time made necessary by responding to the libels. At a trial there may be issues as to whether these consequences have flowed from the Republications within England and Wales (to which, since the Claimants have adopted the 'mosaic alternative' they are limited), rather than publications which were accessed abroad, but there is sufficient evidence at this stage that the source of the Claimant's investment is mainly in the UK. Additionally, Mr Harper says that UK suppliers of waste products no longer offer him such competitive rates, which is evidence of financial loss of a different kind. Again, I consider that the 1st and 2nd Claimants have a good arguable case that they will satisfy the test in s.1(2) of the Defamation Act 2013.

72. As for the claims in malicious falsehood, for the reasons already given, I accept that the Claimants again have a good arguable case. As for s.3 of the Defamation Act 1952, the pleading has been supplemented by the witness statements and for the same reasons that I have given in relation to s.1(2) of the 2013 Act, on the present evidence the Claimants have a good arguable case.

73. I have used the expression 'good arguable case'. So far as it means anything different, I would reach the same conclusions by reference to the phrase 'much the better argument on the evidence available'.

Article 30 of the Recast Brussels Regulation

74. In the circumstances set out in Article 30 the Court has two discretions: it may *decline jurisdiction* in accordance with Article 30(2); or it may *grant a stay* in accordance with Article 30(1).

75. The parties are agreed that it is for the Defendants to persuade me that the necessary pre-conditions exist and it is also for the Defendants to show why one or other of the discretions should be exercised.

76. Both powers are dependent on there being 'related proceedings' in the courts of different Member States. It is convenient to repeat Article 30(3) which says,

> 'For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

77. In relation to the Polish proceedings and Polish civil procedure I have from the Defendants the witness statements of Mr Stankiewicz of 5th February 2018, and Mr Dudkowiak of 8th February 2018, 15th February 2018 and 23rd February 2018. Those

are in addition to the statements of Mr Baker and the 3rd Defendant dated 20th July 2017 and 16th February 2018 respectively. From the Claimants I have the statements of Ms Paczuska-Tokarska of 8th February 2018 and 21st February 2018. The papers before me also included an opinion by another Polish lawyer, Marcin Kazmierski, dated 7th April 2017, which had been sent with the letter before claim.

78. Ms Page argued that, although proceedings were pending in courts of Poland and England, the English and Polish proceedings were not 'related' for the purposes of Article 30(3). She submitted:

i) The Polish proceedings did not, as such, involve the emission of benzene from the EEF Plant; rather they were concerned with whether that plant was giving off noxious odours. A conclusion adverse to the 1st Claimant in the Polish proceedings would not necessarily involve any finding in relation to benzene emissions.

ii) In any case, the Republications (or some of them) included allegations as to the scale of benzene emissions from the EEF Plant which was not justified by the evidence which the 1st Defendant had produced to the Polish court.

iii) In any case, it could not yet be said whether the truth of the allegations in the Republications would be in issue in the English proceedings. Mr McCormick's skeleton argument had said they would be, but that had not been supported by evidence until the 3rd Defendant's witness statement which was served in the middle of, and towards the end of, the hearing. That was far too late and should not be admitted. Besides, the statement was served only on behalf of the 1st and 3rd Defendants and not the 2nd. It said that those two defendants would defend the English claim on the basis that it was true that the EEF Plant emitted benzene at levels that were unsafe and/or in excess of permitted levels. But that was not sufficient to meet the meanings which the Republications bore. The Claimants had provided evidence of comments from which it could be inferred that the 2nd Defendant appeared to accept that the allegations of the scale of benzene emissions in the Words and the Press Release were untrue.

iv) The English proceedings would involve very many matters that had nothing to do with what was in issue in the Polish proceedings. Furthermore, the Polish proceedings only involved the 1st Defendant and the 1st Claimant, not the other parties.

v) Accordingly, there was no risk of 'irreconcilable judgments resulting from separate proceedings'.

79. Mr McCormick argued:

i) Mr Baker's witness statement had referred to the Polish proceedings which were said to 'directly concern the allegations made by the Claimants against the Defendants in the Claim'. The amended notice of application (supported by a statement of truth) had expressly said that there was a substantial risk of irreconcilable judgments between the two sets of proceedings. Even in advance of his skeleton argument and the 3rd Defendant's statement of 26th February it was therefore clear that the Defendants asserted that there would be

this risk of conflict. The most recent statement of the 3rd Defendant had simply made that clearer. The statement had been served on behalf of the 1st and 3rd Defendants. Whether or not the 2nd Defendant joined in the defence, truth would be an issue in the libel proceedings.

ii) In *Sarrio S.A. v Kuwaiti Investment Authority* [1999] 1 AC 32 the House of Lords had been concerned with Article 22 of the Brussels Convention (in materially the same terms as Article 30 of the Recast Brussels Regulation). It had adopted a broad approach to the meaning of the phrase 'irreconcilable judgments'. It was wrong to seek to distinguish (as the Court of Appeal in that case had done) between primary or essential issues which would have to be decided in the proceedings in the other Member State and secondary or non-essential issues. Rather, Lord Saville (who gave the leading speech) said at p.41F, the Article required a

> 'broad common sense approach… bearing in mind the objective of the article, applying the simple wide test set out in article 22 and refraining from an over-sophisticated analysis of the matter.'

The 'objective of the article' had previously been described by Lord Saville at p. 39F-G as,

> 'to improve co-ordination of the exercise of judicial functions within the Community and to avoid conflicting and contradictory decisions, thus facilitating the proper administration of justice in the Community.'

iii) The Polish proceedings would not necessarily have to deal with the benzene issue because noxious odours could have other causes, but both sides in those proceedings had adduced evidence on the benzene matter. Thus the 1st Defendant's statement of claim in Poland had said[1],

> 'It is worth noting that in one of the measuring points there were 9 hours with the exceeding of the allowable reference values occurred within the 22 hours of the measurement time. In accordance with the regulation of the Minister of the Environment dated 26th January 2010 regarding the benchmark values for certain substances contained in the air, the obtained results represent 51.4% of the annual limit for exceedance (the annual limit for the year can equal 0.2% of the year).
>
> It should also be stressed that the obtained results show almost exceedance of seven times of the allowable reference value, averaged for one hour. The highest concentrations of benzene were found at the level of 203 +/- 28 kg/m3, with the limit allowed by the law of 30 kg/m3.
>
> It must be emphasised that benzene is a substance with a characteristic odour, toxic, proven to be carcinogenic to humans and has narcotic effects. Benzene poisoning is characterised by inter alia fatigue, headaches, nausea and vomiting.'

[1] The document is dated 19th February 2017 but the parties were agreed that that was an error and it should be read as 19th February 2016

In its defence the 1st Claimant had said,

> 'The defendant also denies that the company generates benzene in violation with the permitted standards in this respect. Also as for that, due to the applicable legal norms, the defendant conducted detailed examinations, the result of which confirms that the defendant does not emit an unacceptable amount of benzene into the air.'

The 1st Claimant had also taken issue with the quality of the evidence submitted by the 1st Defendant in the Polish proceedings and submitted evidence of its own on the subject of benzene emissions.

At the very least, Mr McCormick submitted, there was a risk that the Polish court in its reasoning would deal with that evidence. That in turn could lead to a conflict between the views adopted in those proceedings and by the English court, if the present proceedings continued.

80. In my view the English and Polish proceedings are 'related' for the purposes of Article 30. I recognise that the Polish proceedings do not involve all of the parties to the English proceedings, but that is not essential (contrast Article 29, which only applies if there are proceedings in different Member States for the same cause of action and between the same parties, but, when applicable, requires proceedings in subsequent Member States to be stayed). I recognise also that the 1st Defendant could succeed in the Polish proceedings by showing that, irrespective of any output of benzene, the EEF Plant emitted noxious odours. The issue of the truth of the allegations in the Republications *is* likely to be an issue in the English proceedings. Since the Claimants have relied on malicious falsehood as well as libel they will have the burden of positively showing that the Republications were false in the absence of an express admission to that effect (which there is not). In the libel claims the 1st and 3rd Defendants have said they will defend them as true. That was very late in the day, but, for the reasons given by Mr McCormick, their position was foreshadowed in the earlier documentation from the Defendants. The latest witness statement is not as precise as a pleading would have to be, but is, in my view, sufficient for me to draw that conclusion for the purposes of the present application. Whether or not the 2nd Defendant joins in a plea of truth is besides the point: that will be an issue in the English proceedings so far as I can make the assessment.

81. Ms Page argues that, even in relation to benzene emissions, there is a distinction between what is in issue in the Polish proceedings and what would (potentially) be in issue in the English proceedings in terms of the scale and persistence of the alleged pollution. Further, I bear in mind that the English proceedings are not yet at a stage where the Defendants are obliged to state with precision the meaning which they will defend as true. Even when they do so, the issue at trial for the purpose of the libel proceedings will be whether, in such meaning or meanings as the Court determines the words of the Republications bear, they are substantially true (Defamation Act 2013 s.2). Notwithstanding the points put forward by Ms Page, applying the common sense approach which Lord Saville mandated, there is, it seems to me, a risk of irreconcilable judgments between the Polish court and, if they continue, the present English proceedings.

82. The full phrase in Article 30(3) for determining whether actions are related is whether

> 'they are so closely connected that it is expedient to hear them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

The context of this provision is clear from Article 30(1): it is where actions are proceeding in more than one Member State. The purpose of the Article is to establish circumstances in which the actions proceeding in the courts of the Member State which was not the first seised may either be stopped or stayed.

83. That view is also supported by paragraph (21) of the preamble which says,

> 'In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given **in different member States**. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be determined autonomously.' [emphasis added].

84. I, therefore, take the word 'together' in Article 30(3) to mean together in the same Member State. Whether the claims are tried together in the same action or the same court or whether some other procedure is adopted to prevent or minimise the risk of irreconcilable judgments would then be a matter for the law of civil procedure of that Member State.

85. If, as I have held, there is a risk of irreconcilable judgments, it would seem that there is still a judgment to be made as to whether that risk makes it expedient for them to be heard together. While I recognise that such a judgment is necessary, it seems to me that it will involve very similar issues as to whether the discretionary decisions allowed by Article 30(1) and Article 30(2) should be taken.

Article 30(2)

86. The power to decline jurisdiction in Article 30(2) has two further conditions. The first is not problematic. In the courts first seised the action must be 'pending at first instance'. The Polish claim by the 1st Defendant is still in the trial court and this condition is therefore satisfied.

87. The second condition in Article 30(2) is that

> 'the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.'

88. 'Actions' is in the plural. However, no question has been raised as to the Polish court's jurisdiction over the current Polish proceedings. The Polish lawyers for both sides are agreed that Polish courts would also have jurisdiction over the claims for libel and malicious falsehood which have presently been brought in England, if such claims were to be brought in Poland. Furthermore, the Polish lawyers are also agreed that in principle such actions, if brought in Poland, could be consolidated with the existing Polish proceedings by virtue of Article 219 of the Polish Code of Civil Procedure. Thirdly, they are also agreed that, while such consolidation is in theory

possible, in practical terms consolidation is very unlikely because of the different nature of the two sets of proceedings.

89. In my judgment, the power to decline jurisdiction in Article 30(2) arises if the law of Poland, in this case, 'permits consolidation'. The likelihood or otherwise of that occurring is, at most, a relevant consideration as to whether the discretion which would then arise should be exercised. Since it is agreed that Polish civil procedure would 'permit consolidation' the second condition for the discretion in Article 30(2) is also fulfilled. I now turn to the question of whether I should exercise that discretion..

90. The arguments in favour of doing so, as advanced by Mr McCormick were, in summary:

i) The English claims concern things said about the performance of a factory in Poland and its compliance or otherwise with Polish environmental laws. Poland is the natural place for such disputes to be litigated.

ii) The 1st Claimant and all of the Defendants are domiciled and based in Poland.

iii) All of the publications relied on by the Claimants were in Polish.

iv) It may be thought that the vindication of a Polish court (if that is what the Claimants achieve) will carry greater weight with a Polish speaking audience than the views of the English court. It may be thought, that would also be the case for investors or suppliers concerned about the future course of the EEF Plant.

v) Claims brought in Poland could address the entirety of the loss suffered by the Claimants as a result of the internet postings and broadcasts. The complication of having to distinguish between loss flowing from the Republications in England and Wales on the one hand and publications in other jurisdictions on the other would not arise.

91. The factors against, put forward by Ms Page, were:

i) The claims have been limited to harm suffered in the UK. Article 7(2) as interpreted by the European Court in *Shevill* allows the Claimants to choose to proceed in this way. The UK is the most appropriate place to make the assessment of what that harm is and whether it is actionable.

ii) The Polish proceedings may not make any determination about emissions of benzene. They do not necessarily have to do so in order to decide whether the 1st Defendant (the claimant in the Polish proceedings) has or has not made out its case that the 1st Claimant has committed a nuisance by emitting noxious odours.

iii) Even if the Polish proceedings do address benzene emissions, they may do so in a manner which does not resolve whether the Claimants have made good their plea of falsity in the malicious falsehood claims or in a way which would resolve any defence of truth in the libel claims.

iv) The Defendants' Polish lawyers accept that it is very unlikely that there would be consolidation of the present proceedings for nuisance and any claims which the Claimants were to bring for libel and / or malicious falsehood. Unless those expectations are wrong, there will, in any case, be two sets of proceedings even if they are continuing in the same jurisdiction.

v) The Claimants would value the decision of an English court.

vi) If this Court declined jurisdiction, the Claimants could only seek redress and vindication by starting proceedings in Poland. That would lead to further delay. If the vindication of a person's reputation is going to be effective it has to be prompt.

92. Some guidance on how the Court should approach this discretionary decision was given by the Supreme Court in *Starlight Shipping Co v Allianz Marine and Aviation Verisherungs AG, In Re Alexandros T (Nos 1,2 and 3)* [2013] UKSC 70, [2014] Bus LR 873 at [92] where Lord Clarke said,

> 'In *Owens Bank Ltd v Bracco* (Case C-129/92) [1994] QB 509, paras 74-79, Advocate-General Lenz identified a number of factors which he thought relevant to the exercise of discretion. They can I think briefly be summarised in this way. The circumstances of each case are of particular importance but the aim of article 28[2] is to avoid parallel proceedings and conflicting decisions. In a case of doubt it would be appropriate to grant a stay[3]. Indeed, he appears to have approved the proposition that there is a strong presumption in favour of a stay. However, he identified three particular factors as being of importance: (1) the extent of the relatedness between the actions and the risk of mutually irreconcilable decisions; (2) the stage reached in each set of proceedings; and (3) the proximity of the courts to the subject matter of the case. In conclusion Advocate General Lenz said, at para 79, that it goes without saying that in the exercise of the discretion regard may be had to the question of which court is in the best position to decide a given question.'

93. Subsequently, in *Plaza BV v The Law Debenture Co* [2015] EWHC 43 (Ch) Proudman J. said that neither Advocate General Lenz, nor the Supreme Court had suggested that the three factors were exhaustive.

94. Ms Page submitted, without contradiction from Mr McCormick, that once jurisdiction is established under the Recast Brussels Regulation, the Court does not have a general discretion to decline to hear the case or to stay the proceedings on grounds of *forum non conveniens* – see *Owusu v Jackson* [2005] QB 801, a decision on the Brussels Convention but, which I accept, is still material to the Recast Brussels Regulation.

---

[2] At the time of the *Alexandros T* Regulation 44/2001 was in force, Article 28 of which was in materially the same terms as Article 30 of Regulation 1215/2012 – see [24] of Lord Clarke's judgment. At the time of A-G Lenz's opinion, the 1968 Brussels Convention was in force, the equivalent provision of which was Article 22. It is apparent from Lord Clarke's judgment that he did not regard any difference in wording between these provisions as material.

[3] Although Article 28 of Regulation 44/2001 also permitted the Court to decline jurisdiction as an alternative to granting a stay, there was no debate in the Supreme Court as to whether different considerations would have applied had this option been in issue. Advocate-General Lenz's views would appear to be equally applicable in either case.

While I accept that proposition, I also agree with Mr McCormick that some of the factors which in another context might feature in an argument as to which *forum* was *conveniens* may also be material as to whether to exercise a discretion which arises under Article 30.

95. I shall take first the three factors summarised by Lord Clarke.

i) *The extent of relatedness and the risk of mutually irreconcilable decisions*

As I have already accepted, the Polish proceedings will not necessarily lead to a judgment which bears on an issue in the English action. That is because the Polish proceedings might turn on odours from a cause other than the emission of benzene. It is also because, as Ms Page argued, such meaning as the Claimants must prove in England to establish the falsity of the Republications or which the Defendants (or such of them as rely on truth) must show to make good a defence of truth may not precisely match whatever findings the Polish court does make in relation to benzene or whatever reasoning it includes in its decision. To that degree, the extent of the risk of irreconcilable judgments is perhaps less than it may be in other cases where Article 30 is in issue. But the weight to be given to that consideration is muted because (a) the English proceedings are at a very early stage; (b) even with the assistance of the Polish lawyers from both sides, it is difficult to tell precisely how the Polish court will frame its reasoning and judgment.

ii) *The stage reached in each set of proceedings*

The English proceedings are at a very early stage. There are Particulars of Claim, but no Defence. As already explained, the Particulars of Claim which have already been served are likely to need amendment.

The Polish proceedings are well advanced, as Ms. Paczuscka-Tokarska says in her statement of 8th February 2018.

iii) *The proximity of the courts to the subject matter of the case*

On balance and for the reasons given by Mr McCormick, in my view the Polish courts have greater proximity to the subject matter of the case. I understand Ms Page's submissions as to the relevance of English investors and suppliers, but in the end the English proceedings concern the performance of a Polish industrial plant in Poland and the application of Polish environmental regulations. Although the English courts are well used to dealing with translations and interpreters, it is also of some relevance that the Republications relied upon by the Claimants were all in Polish. All of the Defendants and the 1st Claimant are domiciled in Poland. The other Claimants are not, but they rely for their claims on their association with the 1st Claimant and the EEF Plant.

iv) *Other matters*

a) I recognise that, if the Claimants are prevented from suing in the UK, there is likely to be some delay before proceedings for the same relief

can be brought to the equivalent stage in Poland. While that is a factor, it does not outweigh the other considerations which I have taken into account.

b) Although *Shevill* gives a claimant a choice as to how to proceed, the mosaic alternative has real disadvantages. Necessarily, any relief (assuming the Claimants to be successful) would be confined to harm suffered in England and Wales. The internet publications (in the colloquial sense) had a much wider reach. By contrast, if the claims were to be pursued in Poland (which is where all three Defendants are domiciled) the Court would not be so limited and could provide compensation for loss wherever it was suffered. Correspondingly, injunctive relief would not need to be limited to repeat publications in England and Wales.

c) I accept the evidence of both sides' Polish lawyers that consolidation of putative claims for libel and malicious falsehood with the present Polish proceedings in nuisance is unlikely. But, as I have already commented, the risk of irreconcilable judgments is very much reduced and can be more satisfactorily addressed if the two claims proceed in the same jurisdiction. Conversely, the risk of such judgments is very much more difficult to manage if the proceedings are carried on in separate Member States.

96. After the hearing I invited the parties' submissions on a decision of the European Court of Justice (Grand Chamber) which had not been cited - *Bolagsupplyningen Ou v Svensk Handel AB* [2018] EMLR 8. This said,

> '48. However, in the light of the ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal (see, to that effect, judgment of 25 October 2011, *eDate Advertising and Others (C-509/09) and (C-161/10) EU:C:2011:685* [46]), an application for the rectification of the former and the removal of the latter is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage pursuant to the case-law resulting from the judgments of 7 March 1995, *Shevill and Others (C-68/93) EU:C:1995:61* , [25], [26] and [32]), and of 25 October 2011, *eDate Advertising and Others (C-509/09) and (C-161/10) EU:C:2011:685* , [42] and [48]), and not before a court that does not have jurisdiction to do so.
>
> 49. In the light of the above, the answer to the first question is that art.7(2) of Regulation No.1215/2012 must be interpreted as meaning that a person who alleges that his personality rights have been infringed by the publication of incorrect information concerning him on the internet and by the failure to remove comments relating to him cannot bring an action for rectification of that information and removal of those comments before the courts of each Member State in which the information published on the internet is or was accessible.'

97. The parties responded in a joint submission that this case had not been cited by either of them because it was not considered by either of them to be relevant: the Claimants

were not seeking rectification or removal of material placed on the internet by a website publisher. They were seeking different relief, namely compensation and injunctive relief against the defendants in relation to England and Wales alone. I have made my decision on this basis, although I would set down a marker that in a future case, the correctness of that position may need to be examined more closely where the effect of an injunction would be to restrain internet publications whose reach to England Wales cannot be distinguished from elsewhere in the world.

98. The conclusion that I come to is this; the necessary conditions for declining jurisdiction under Article 30(2) are fulfilled and the discretion to do so should be exercised.

99. I have considered whether, instead of declining to exercise jurisdiction under Article 30(2), I should alternatively stay the proceedings pursuant to Article 30(1). (I accept that I am not obliged to decline jurisdiction or to stay the proceedings. I could do neither – see *Alexandros T* (above at [97]) but I am not inclined to take that course in view of all the circumstances of the case).

100. The conditions for staying the proceedings in Article 30(1) are not as onerous in that this discretionary power is not dependent on the requirement that 'the court first seised has jurisdiction over the action in question and its law permits the consolidated thereof.' It is still necessary that the actions be related, but I have held that they are. The related actions must still be pending, but they plainly are.

101. It may be said that staying the proceedings would be a less drastic alternative to declining jurisdiction. It would have the advantage of postponing a decision as to whether to allow the English proceedings to continue until more was known about:

    i) the nature of the Polish court's judgment and reasoning in the present proceedings for nuisance and whether it says anything about benzene emissions and, if so, what.

    ii) whether the Claimants begin proceedings in Poland and, if so, whether they were consolidated with the present proceedings by the 1st Defendant for nuisance.

102. I have, though, decided against that course. Ms Page positively argued against it. She said that the Claimants were concerned to obtain speedy vindication of their reputations. In her submission, a stay would be as good as denying them that opportunity in the English courts and, in practice be no different from declining jurisdiction. As to the second matter, she submitted that the evidence from the Polish lawyers was that consolidation was highly unlikely (as indeed I have accepted) and there was therefore no point in staying the English proceedings to see if that occurred.

103. In view of the Claimants' position, I have decided that staying the proceedings under Article 30(1) is not a course which I should adopt rather than declining jurisdiction under Article 30(2).

Overall conclusions

104. The Claimants have satisfied me that the Court has jurisdiction to entertain their claims in libel and malicious falsehood, confined, as they are, to harm suffered in England and Wales.

105. The Defendants have shown that the necessary conditions are fulfilled for the Court to decline jurisdiction pursuant to Article 30(2) or to stay the English proceedings pursuant to Article 30(1) and good reason why the Court should take one or other of those courses.

106. Had the Claimants been minded to advocate a stay rather than the Court declining jurisdiction (as the lesser of two unwelcome alternatives) I would have taken that course, but that is not their position.

107. I will decline jurisdiction to hear the Claimants' claims for libel and malicious falsehood.

108. I will give the parties the usual opportunity to agree the formal order that should follow from this judgment.

Postscript

109. This judgment (as is usual) was circulated in draft to the parties on 21st March 2018 with the date when I intended to hand it down. By an email of 22nd March 2018 to my clerk, Ms Page asked that the handing down of the judgment should be deferred and a transcript be obtained of the hearing on 26th February. Ms Page wrote,

> 'My request arises from paragraphs 102 and 106 of the draft judgment in which the Judge has attributed to me an argument that it would be preferable for the Judge to decline jurisdiction than grant a stay, if the relevant conditions were met. On our side, we do not recall that any exchanges took place in argument from which the Judge was correct to conclude that such was my client's position. '

110. I agreed to this course. A transcript was obtained and I set out a timetable for the exchange of submissions in relation to this matter. The transcript showed that, on the question of a stay, Ms Page submitted this,

> 'it will be clear from the evidence that these claimants regard the need for vindication and urgent vindication as imperative, that in numerous cases the courts of this jurisdiction emphasized that reputation needs to be vindicated promptly. People need to act promptly. The courts need to provide a speedy trial if vindication is warranted and to be obtained. A stay would be wholly (inaudible[4]). A stay contingent upon what? Contingent upon a consolidation which is highly unlikely to happen? A stay contingent upon a judgment of a Polish court on - on whether or not Benzene contributed to an odour nuisance, if that's the finding, in two years' time? Mr McCormick ended up saying that a stay doesn't deny jurisdiction. Well a stay would be as good as denying jurisdiction. It would deny the claimants speedy vindication – the opportunity for speedy vindication which they – they and their businesses urgently need.'

111. In the course of her post draft-judgment submissions, Ms Page wrote,

[4] The Defendants tell me that their contemporaneous note says the inaudible word was 'wrong' and I am prepared to accept that.

> 'At [102] of the draft judgment, therefore it is fair to summarise Ms Page's argument in the sentence that reads "In her submission a stay would be as good as denying them that opportunity in the English courts and in practice no different from declining jurisdiction", but that does not record the full story. What this paragraph of the draft judgment is missing is any reference to the availability to the Court of the third option, to decline both [declining jurisdiction and staying the English proceedings] and in the exercise of its discretion "do nothing"'.

112. However, I was aware of this third possibility, as I have said (and had said in the draft judgment) at [99]. I repeat that I have considered this alternative but decided that in all the circumstances this 'do nothing' option is not appropriate.

113. It is incumbent on a party to present all the arguments which they wish the Court to consider by the end of a hearing. Ms Page had clearly submitted that the necessary pre-conditions for a stay were not satisfied. She did submit that, because of the delays which would be entailed, a stay would be tantamount to declining jurisdiction. She did not then argue, as she has in her post-draft judgment submission, that a stay would, nonetheless, be a less unwelcome alternative. These were matters which I consider I was entitled to take into account in the exercise of my discretion. I accept Mr McCormick's argument that a Court must be very cautious of allowing a party, after a draft judgment has been distributed, to make a case different from that put forward at the hearing.

114. In the course of her post-draft judgment submissions, Ms Page also submitted that I had insufficiently summarized her arguments as to why the Polish proceedings were not 'related proceedings'. In short, she wished it to be noted that she had argued that the Polish proceedings *would not* involve a decision as to the lawfulness of any benzene emissions. Mr McCormick disputed whether that was *necessarily* so. I agree with him that it is not possible on the evidence to be so definite about the Polish judgment. In any event, as Mr McCormick also submits, it is material that the Particulars of Claim paragraph 19.1, in setting out the alleged defamatory meanings, draw an equivalence between what is legally permitted and what is safe. As I have noted above, what is material is whether there is a risk of irreconcilable judgments. Despite Ms Page's arguments, I consider that there is.