Neutral Citation Number: [2018] EWCA Civ 1660

Case No: A3/2017/3297

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, COMMERCIAL COURT
HIS HONOUR JUDGE WAKSMAN QC, (sitting as a Judge of the High Court)
CL-2016-000527

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13th July 2018

Before :

LORD JUSTICE GROSS
LORD JUSTICE LEWISON
and
LORD JUSTICE LEGGATT

- -

Between :

OREXIM TRADING LIMITED	**Appellant**
- and -	
(1) MAHAVIR PORT AND TERMINAL PRIVATE LIMITED (formerly known as FOURCEE PORT AND TERMINAL PRIVATE LIMITED)	**Respondent**
(2) ZEN SHIPPING AND PORTS INDIA PRIVATE LIMITED	

MR STUART ADAIR (instructed by **Druces LLP**) for the **Appellant**
MR LUKE PEARCE (instructed by **Holman Fenwick Willan LLP**) for the **1st Respondent**
MR JEFFREY GRUDER QC (instructed by **Addleshaw Goddard LLP**) for the **2nd Respondent**

Hearing date : 3rd July 2018

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Approved Judgment

Lord Justice Lewison:

Introduction

1. The issues on this appeal are:

    i) Whether the "gateway" in paragraph 3.1 (20) of PD 6B gives the court power to permit service outside England and Wales of a claim to set aside a transaction under section 423 of the Insolvency Act 1986; and

    ii) If it has that power, whether it should exercise it on the facts of this case.

2. HHJ Waksman QC answered the first question "No" on the authority of the decision of this court in *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72. In reaching that conclusion he held that Flaux J was wrong to have arrived at the contrary conclusion in *Erste Group Bank AG (London) v JSC (VMZ Red October)* [2013] EWHC 2926 (Comm), [2014] BPIR 81. However, he went on to hold that if he had had power, he would have exercised it in favour of the grant of permission. His judgment is at [2017] EWHC 2663 (Comm); [2018] Bus LR 470.

3. In view of the conflict of authority at first instance, I granted permission to appeal.

The facts

4. The claim is brought by Orexim Trading Ltd ("Orexim"), a Maltese company. The objective of the claim under section 423 is to set aside a sale of the vessel Bon Vent by Mahavir Port and Terminal Private Ltd ("MPT") to Singmalloyd Marine (S) Pte Ltd ("Singmalloyd") and a sale on by Singmalloyd to Zen Shipping and Ports India Private Ltd ("Zen"). MPT is an Indian company; Singmalloyd is a Singaporean company; and Zen is also an Indian company. The vessel is an Indian flagged vessel, having previously been Mongolian flagged.

5. The claim arises out of a dispute between Orexim and MPT. The background to that dispute is lucidly described by the judge from whose careful judgment I take the relevant facts. On or about 19 December 2013 Orexim agreed to sell and Atlantis ME FZE ("Atlantis") agreed to buy approximately 10,000MT of Ukrainian sunflower seed oil at US$913 per metric ton plus freight. Atlantis required Orexim to charter a ship from MPT for this purpose. Orexim accordingly entered into a charterparty with MPT dated 19 December 2013 for the charter of the vessel "Bon Vent". At that stage, the charterparty provided for the discharge port to be either Bandar Abbas or Bandar Imam Khomenei ("BIK"). Under the charterparty disputes were to be arbitrated in India.

6. There was in fact a sub-purchaser of the goods from Atlantis called Global International Imex Private Ltd ("Global") pursuant to a contract dated 25 November 2013 ("the Atlantis-Global Sale Contract"). Another company, Zarrin Persia ("Zarrin") was the sub- purchaser of the goods from Global.

7. On or about 31 January 2014 Atlantis provided revised instructions with the port of discharge now to be Bandar Abbas and new bills of lading were produced. The vessel

sailed from Nikolaev in the Ukraine on 1 February 2014. When MPT raised an invoice against Orexim for US$573,300 in respect of freight, Orexim paid US$80,000 and the balance was paid later, on 12 March 2014.

8. On or about 3 February 2014, Orexim issued its invoice to Atlantis for the balance of the purchase price being some US$7,694,700 and this was presented for payment together with shipping documents on 10 February 2014. However, that invoice was not paid then or at any time later, save for a sum of US$466,364.80.

9. In the meantime, there were various disputes between Orexim and MPT. MPT said that Orexim was late in paying freight and load port demurrage and that it had not provided clear instructions as to the discharge port. For its part, Orexim said that it was clear that the vessel should discharge at Bandar Abbas and that MPT was not providing regular ETA messages. And because Orexim had still not been paid the balance owing on the goods, it told MPT not to discharge the goods at any port. Finally, the vessel anchored off Fujairah apparently on the instructions of Mr Yigit Caliskan, the finance director of Atlantis.

10. MPT brought a claim against Orexim in the Bombay High Court for unpaid freight and demurrage and obtained an order permitting it to discharge the sunflower oil into tanks at BIK together with a lien over the goods for the sums due, and it appointed Mr Raj Nachania as sole arbitrator on its claim.

11. For its part, Orexim gave Atlantis a notice of arbitration in London and appointed an arbitrator. Much later, on 17 March 2015 the arbitrator awarded to Orexim the balance of the purchase price of the goods in the sum of US$7.228m as against Atlantis. It remains largely unpaid.

12. Although Orexim had instructed MPT not to discharge at BIK it did so on the basis of the order from the Bombay High Court. On 30 April 2014 Orexim commenced the first of three different sets of proceedings against MPT in Ukraine after the vessel had sailed to the port of Yuzhny. On each occasion Orexim procured the arrest of the vessel only for the arrest to be subsequently discharged by the Court. The final discharge was on 11 June 2014.

13. Meanwhile, on 8 May 2014 bills of lading had been produced to the agents Pars Parine ("PP") at BIK with instructions to deliver the goods from the discharge tanks to Zarrin. MPT accepts that they were forged. Zarrin duly obtained the goods and subsequently paid Global for them but Global never paid Atlantis. Accordingly, by this stage, Orexim no longer had the goods and had not been paid for them.

14. Orexim, Atlantis and MPT entered into a written settlement agreement dated 15 May 2014 ("the settlement agreement"). By paragraph 2(i), it was agreed that MPT "shall cause Global… to deposit on behalf of Atlantis as part of monies payable by Global to Atlantis, an amount of US$7,391,600… with the Bombay High Court within… 10 business days from the date of the signing date of this Settlement Agreement". By paragraph 2(v), on the deposit of those monies Orexim would release the vessel from arrest and withdraw all criminal proceedings against MPT. Paragraph 2(vi) then entitled Orexim to withdraw the total amount deposited. Paragraph 7 provided that the settlement agreement was subject to English law and that any dispute "arising out of

or in connection with" the settlement agreement would be referred to the High Court in England and Wales.

15. Global subsequently paid US$466,364.80 to Orexim but no more. Accordingly, MPT did not cause the balance of the US$7.39m to be paid into the Bombay High Court and so the provisions of the Settlement Agreement remain unfulfilled.

16. Orexim learned that MPT had purported to transfer the vessel to Singmalloyd and Singmalloyd transferred it to Zen, along with another vessel the MT Bon Chem. This gave rise to a concern that MPT had at the same time been disposing of its, or some of its, assets, so as to prejudice claims made against it by, among others, Orexim. By a memorandum of sale dated 4 June 2013 MPT agreed to sell it to Singmalloyd for US$6m with delivery by 30 September 2013. This was later extended to 25 February 2014. Then by another memorandum of sale Singmalloyd agreed to sell it to Zen for US$7.4m with delivery by no later than 30 April 2014. By a further agreement effective 5 December 2013, Singmalloyd agreed to pay to MPT a further US$3.47m at that point in addition to the initial deposit of US$1.225m making a total payment of around US$4.7m. Zen's purchase of the vessel was financed by Srei Infrastructure Finance Limited ("Srei"), an Indian finance company which lent US$7.4m to Zen secured by a mortgage over the vessel. It is these transactions that Orexim wishes to impugn.

17. It will be noted that the memorandum of sale between MPT and Singmalloyd was entered into on 4 June 2013, more than six months before the charterparty between Orexim and MPT; and nearly a year before the settlement agreement. All the other impugned transactions also took place before the settlement agreement.

Section 423

18. Section 423 of the Insolvency Act 1986 relates to "transactions entered into at an undervalue." These are defined to include gifts or transactions where the other party provides no consideration or where the consideration is significantly less than the value of the consideration provided by the transferor. If the Court is satisfied that such a transaction was entered into by the transferor for the purpose of putting assets beyond the reach of a person who is claiming against him or otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make, then the court has wide powers under section 425 to undo the transaction. However, section 425 (2) provides that an order must not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances.

19. An application for an order under section 423 may be made either by a relevant office holder, or by a victim of the transaction: section 424 (1).

Jurisdiction

20. The word "jurisdiction" is a slippery one. The first of the issues I have identified above could be more conventionally formulated as asking "whether the court has jurisdiction to permit service of the claim out of the jurisdiction". Posing the question in that way reveals immediately that the word "jurisdiction" is being used in two quite different senses. In the second use of the word it is describing a territory: namely

England and Wales. In the first use of the word it may be describing one of two things: whether the court has power to permit service outside England and Wales, or whether, assuming that it does have power, there are settled principles on which that power is exercised. The point was made by Pickford LJ in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 563. He said:

> "The first and, in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e. that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances."

21. The House of Lords approved this passage in *Fourie v Le Roux* [2007] UKHL 1, [2007] 1 WLR 320 at [25]. Although I think that we are probably concerned with the alternative sense, I will try to avoid the word as much as possible.

The principle of territoriality

22. The general principle of international law is that each sovereign state makes laws which apply to its own territory and to no other. One legislature does not have power to make laws for a territory outside its jurisdiction in such a way that what it enacts becomes the law of that external territory. (There is of course an exception in the case of EU law, although the EU is not a sovereign territory in the ordinary sense of the phrase). There is, therefore, a presumption that Parliament will not seek to intervene in matters that are legitimately the concern of another country. Countries respect one another's sovereignty and the right of each country to legislate for matters within their own boundaries. However, a legislature does have power to make legislation that attaches significance to matters occurring outside the territory for which it is law. This is, in broad terms, what we mean by the principle of territoriality.

23. The extent to which a law passed by Parliament attaches significance to matters occurring outside its own territory is a question of construction of the particular legislation. Sometimes Parliament will make it explicit that the reach of legislation extends beyond our shores, particularly if what is in issue are the rights or obligations of British subjects. Section 1 (1) of the Aviation Security Act 1982, for example, provides that:

> "A person on board an aircraft in flight who unlawfully, by the use of force or by threats of any kind, seizes the aircraft or exercises control of it commits the offence of hijacking, whatever his nationality, whatever the State in which the aircraft is registered and whether the aircraft is in the United Kingdom or elsewhere…"

24. But few statutes are as explicit as this. In *Lawson v Serco Ltd* [2006] UKHL 3, [2006] ICR 250 the question was whether persons employed and working abroad were entitled to the benefit of the Employment Rights Act 1996. That was a question of interpretation of the Act, which did not make any explicit provision. The House of

Lords held that employees working within Great Britain at the time of their dismissal were entitled to protection; but that in the case of peripatetic employees the question depended on where the employee was based. On the other hand, in *Ex p Blain. In re Sawyers* (1879) 12 Ch D 522 it was held that an English court had no power to make a bankruptcy order against a partner in a firm trading in England and which had contracted debts in England, where that partner was both resident and domiciled abroad, and had never set foot in England. (The actual result of that case has been partially reversed by section 265 of the Insolvency Act 1986).

25. The courts have considered the territorial reach of section 423 on a number of occasions. It was first considered by this court in *Re Paramount Airways Ltd* [1993] Ch 223 together with similar provisions in section 238 of the Act. Having summarised the legislation Sir Donald Nicholls V-C said at 235:

> "It will have been seen from the above summary that, *on its face*, the legislation is of unlimited territorial scope." (Emphasis added)

26. He considered the policy underlying the court's powers at 239:

> "Trade takes place increasingly on an international basis. So does fraud. Money is transferred quickly and easily. To meet these changing conditions English courts are more prepared than formerly to grant injunctions in suitable cases against non-residents or foreign nationals in respect of overseas activities. As I see it, the considerations set out above and taken as a whole lead irresistibly to the conclusion that, when considering the expression "any person" in the sections, it is impossible to identify any particular limitation which can be said, with any degree of confidence, to represent the presumed intention of Parliament. What can be seen is that Parliament cannot have intended an implied limitation along the lines of *Ex parte Blain*, 12 Ch D 522. The expression therefore must be left to bear its literal, and natural, meaning: any person."

27. In *Bilta UK Ltd v Nazir (No 2)* [2015] UKSC 23, [2016] AC 1 at [110] these considerations were said to be "unanswerable".

28. However, as Nicholls V-C went on to point out, the court has a discretion whether or not to make an order under section 425; and it might refuse to exercise that discretion if the defendant has insufficient connection with England and Wales. He added at 240:

> "in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question, whether the defendant

> acted in good faith, and whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections."

29. The extra-territorial effect of section 423 was confirmed in *HMRC v Begum* [2010] EWHC 1799 (Ch), [2011] BPIR 59.

30. The effect of the legislation, therefore, is that it confers on the court power to make orders against persons or property outside England and Wales, subject to the court being satisfied that there is a close enough connection with England and Wales.

Service outside England and Wales

31. In some cases a claimant is entitled to serve proceedings outside England and Wales as of right. It is not suggested that this is one of those cases. In other cases, a claimant must obtain the permission of the court before service. CPR part 6. 36 provides that a claimant may serve proceedings outside England and Wales, with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply. These grounds are usually referred to as "gateways". However, there are two additional requirements:

    i) The claimant must satisfy the court that that the claim has a reasonable prospect of success (CPR Part 6.37 (1)); and

    ii) The court must be satisfied that England and Wales is "the proper place" to bring the claim (CPR Part 6.37 (3)).

32. Given the extent of the court's powers under section 423, I would *a priori* expect procedural rules to exist to enable the court to exercise those powers. The "gateway" upon which Orexim relies is that specified in paragraph 3.1 (20) (a) of PD 6B which permits service of claim with the permission of the court where the claim is made:

> "under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph."

33. I think it must be implicit in this paragraph that the enactment in question must allow proceedings to be brought against persons not within England and Wales, otherwise it would be of extraordinary width. But it is not easy to see any other limitation from the words of the paragraph itself. In construing the words of the paragraph it is also worth bearing in mind a change in judicial attitude towards the service of proceedings outside England and Wales. In days gone by the assertion of extra-territorial jurisdiction was described as "exorbitant". But following the globalisation (and digitalisation) of the world economy that attitude can now be seen as out of date. In

Abela v Bardarini [2013] UKSC 44, [2013] 1 WLR 2043, for example, Lord Sumption (with whom the other justices agreed on this point) said at [53]

> "This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation. … Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries…. It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum."

34. As he pointed out in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192 at [31]:

> "The jurisdictional gateways and the discretion as to forum conveniens serve completely different purposes. The gateways identify relevant connections with England, which define the maximum extent of the jurisdiction which the English court is permitted to exercise. Their ambit is a question of law. The discretion as to forum conveniens authorises the court to decline a jurisdiction which it possesses as a matter of law, because the dispute, although sufficiently connected with England to permit the exercise of jurisdiction, could be more appropriately resolved elsewhere. The main determining factor in the exercise of the discretion on forum conveniens grounds is not the relationship between the cause of action and England but the practicalities of litigation. The purpose of the discretion is to limit the exercise of the court's jurisdiction, not to enlarge it and certainly not to displace the criteria in the gateways. English law has never in the past and does not now accept jurisdiction simply on the basis that the English courts are a convenient or appropriate forum if the subject matter has no relevant jurisdictional connection with England. In *Abela v Baadarani*, I protested against the importation of an artificial presumption against service out as being inherently "exorbitant", into what ought to be a neutral question of construction or discretion. I had not proposed to substitute an alternative, and equally objectionable, presumption in favour of the widest possible interpretation of the gateways simply because jurisdiction thus conferred by law could be declined as a matter of discretion."

35. The key point, for present purposes, is that the question of construction is a "neutral" one. Untrammelled by authority, it seems to me that the natural construction of

"gateway" 3(20)(a) is that if, as a matter of construction, the enactment in question allows proceedings to be brought against persons not within England and Wales, then the court has power to allow those proceedings to be served abroad. Whether it should exercise that power is a different question.

36. The judge considered that the question was concluded by the decision of this court in the *Harrods* case. That was a case decided on the wording of the Rules of the Supreme Court rather than the CPR. The rules governing service out of the jurisdiction were contained in RSC Order 11. RSC Order 11 rule 1 permitted service out of the jurisdiction, with the leave of the court, in 21 different categories of claim. One category of claim was a claim for an injunction ordering the defendant to do or refrain from doing anything within the jurisdiction. These categories also included claims under a number of enactments: The Nuclear Installations Act 1965, the Drug Trafficking Offences Act 1986, the Financial Services Act 1986, the Banking Act 1987, Part VI of the Criminal Justice Act 1988 and the Immigration (Carriers' Liability) Act 1987. Claims relating to injunctions are now in "gateway" (2) in PD 6B in the same terms; but the list of particular Acts of Parliament listed in RSC Order 11 rule 1 has no counterpart in PD 6B.

37. There were also cases in which the leave of the court was not required. These included, by RSC Order 11 rule 1 (2) (b):

> "a claim by which by virtue of any other enactment the High Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction."

38. It was those rules that the court was called upon to construe in the *Harrods* case. The claim was one of unfair prejudice in the management of a company incorporated in England, but whose business was conducted in Argentina. The petitioner and the respondent were Swiss corporations. The argument thus centred on the question whether service of the petition could be effected without the leave of the court either under the Insolvency Rules then in force or under RSC Order 11 rule 1 (2) (b). At 116 Dillon LJ said:

> "But in my judgment to be within Ord. 11, r. 1(2)(b) an enactment must, if it does not use the precise wording in the rule, at least indicate on its face that it is expressly contemplating proceedings against persons who are not within the jurisdiction of the court or where the wrongful act, neglect or default giving rise to the claim did not take place within the jurisdiction. It is not enough, in my judgment, that the enactment, like the Companies Act 1985, gives a remedy in general cases - against "other members of the company" - without any express contemplation of a foreign element. Indeed if the judge's reasoning on this point were right it would seem that any proceedings to claim an injunction could be brought, without leave under Order 11, against a person who is not within the jurisdiction of the court and could proceed to trial

> without any such leave because under an enactment, section 37 of the Supreme Court Act 1981, the High Court has power by order (whether interlocutory or final) to grant an injunction in all cases in which it appears to the court to be just and convenient to do so."

39. First, it seems to me to be clear from this passage that Dillon LJ was focussing on the particular words of the rule beginning with "notwithstanding". Second, what was of concern was that a claim falling within rule 1 (2)(b) could be brought without the leave of the court. That is why Dillon LJ instanced the case of an injunction; not least because certain claims for injunctions could be served outside England and Wales, but with the leave of the court. It would plainly have been wrong to interpret rule 1 (2) (b) as allowing a wider class of claim to be brought *without* the leave of the court than the class of claim permitted to be brought *with* the leave of the court. Third, at the date of the decision in the *Harrods* case *Paramount Airways* had not been decided.

40. In *In re Banco Nacional de Cuba* [2001] 1 WLR 2039 Lightman J was considering what was then CPR Part 6.19 (2) which also permitted service outside England and Wales without the permission of the court. That rule provided:

> "(2) A claim form may be served on a defendant out of the jurisdiction where each claim included in the claim form made against the defendant to be served is a claim which, under any other enactment, the court has power to determine, although–
>
> (a) the person against whom the claim is made is not within the jurisdiction; or
>
> (b) the facts giving rise to the claim did not occur within the jurisdiction."

41. Since CPR Part 6.19 (2) was in much the same form as RSC Order 11 rule 1 (2) (b), Lightman J followed the *Harrods* case. In so doing, he refused to follow the decision of Evans-Lombe J in *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* [2000] BCC 16 (another decision on the RSC). The rules in force at that time also permitted service of a claim outside England and Wales with the permission of the court in a number of cases specified in CPR Part 6.20. One of the "gateways" specified in that rule applied to a claim made under an enactment, but only where the enactment was specified in a practice direction. Eight such enactments were specified in the practice direction but again the Insolvency Act 1986 was not among them. The reason for this may well be that service outside England and Wales in insolvency cases generally is governed by the Insolvency Rules rather than the CPR; but section 423, although contained in the Insolvency Act 1986, can be invoked whether or not there is an insolvency. In fact Lightman J held that another "gateway" was available, although in the result he held that the connection between the claim and England and Wales was too tenuous to justify permission to serve abroad.

42. The rules about service were revised in 2008 by the Civil Procedure (Amendment) Rules 2008. This iteration includes CPR Part 6.33 (3), which permits service outside England and Wales without the permission of the court, which is in much the same terms as CPR Part 6.19 (2) as considered by Lightman J. It provides:

> "The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine other than under the 1982 Act, the Lugano Convention, the 2005 Hague Convention, or the Judgments Regulation, notwithstanding that—
>
> (a) the person against whom the claim is made is not within the jurisdiction; or
>
> (b) the facts giving rise to the claim did not occur within the jurisdiction."

43. This wording is very similar to that considered in the *Harrods* case; although the power of the court under the current rule is not limited to claims brought under an enactment. It seems unlikely that that omission was intended to change the scope of the rule: see Dicey, Morris & Collins on The Conflict of Laws (15th ed.) para 11-136. However, instead of the various "gateways" being set out in the rules, CPR Part 6.36 provided that a claim could be served out of the jurisdiction, with the permission of the court, if any of the grounds specified in a practice direction applied. Thus the role of delimiting the grounds was moved from the rules themselves to a practice direction. Originally specific Acts were listed in the practice direction. In 2008 there were thirteen of them. Once again, the Insolvency Act 1986 was not among them. Interestingly, however, one of the listed Acts was the Inheritance (Provision for Family and Dependents) Act 1975 which applies to claims against the estate of a person who died domiciled in England and Wales. A person who died domiciled in England and Wales may nevertheless have been resident abroad and have had all his assets abroad at the date of his death. That Act does not contain wording along the lines that the *Harrods* case suggested was essential to bring a claim within the old RSC Order 11 rule 1 (2) (b). That, to my mind, is a strong indication that wording along those lines was not seen as essential in a case where the permission of the court is required.

44. As from October 2009 the practice direction no longer specifies particular enactments, but is in general terms. That is still the current regime. It is also worth noting that, largely at the instigation of the Lord Chancellor's Advisory Committee on Private International Law, further "gateways" have been added to the list from time to time, with the consequence that the court's power to permit service abroad has been steadily enlarged.

45. In *Erste Group Bank AG (London) v JSC (VMZ Red October)* [2013] EWHC 2926 (Comm), [2014] BPIR 81 Flaux J held that a claim under section 423 fell within the "gateway" in para 3.1 (20) of PD 6B. In a case falling within that "gateway" the permission of the court was required. The judge in our case pointed out that Flaux J does not appear to have been referred either to the *Harrods* case or to the *Banco Nacional de Cuba* case. When that case reached this court ([2015] EWCA Civ 379; [2015] 1 CLC 706) Flaux J was reversed, not on the question of the applicability of the "gateway;" but on his exercise of discretion to permit the case to proceed despite its tenuous connection with England and Wales. The judge was right to say that the jurisdictional threshold was not argued in this court. However, the joint judgment of

this court was prepared by Gloster and Briggs LJJ. Mr Michael Briggs had been the unsuccessful counsel in the *Harrods* case, and I think it unlikely that he would have forgotten about it. Moreover, the *Banco Nacional de Cuba* case was mentioned in the judgment, and that in turn refers to the *Harrods* case. In the joint judgment, under the heading "Paragraph 3.1(20) of PD6B" the court said at [116]

> "It is clear that section 423 may be given extra-territorial effect: see *re Paramount Airways Limited (No.2)* [1993] Ch 223, where service out of the jurisdiction had been effected pursuant to the provisions for service in the Insolvency Rules 1986, and *re Banco Nacional de Cuba* [2001] 1 WLR 2039, where Lightman J recognised a discretion to permit service out under what was then CPR rule 6.20(10). But both those cases recognised that for the court to exercise this jurisdiction extra-territorially, a sufficient connection with this jurisdiction must be shown. As Sir Donald Nicholls VC (as he then was) put it in the *Paramount Airways* case (at page 239H), the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element."

46. The court went on to hold that the degree of connection between the claim and England and Wales should be considered at the stage of considering whether to permit service out of the jurisdiction, rather than left to trial. On the facts, they considered that the connection was too tenuous. They concluded, therefore, that permission should not have been given under "gateway" (20). If there had been no *power* to grant permission under that "gateway", the court's conclusion on this point would have been very short.

47. In my judgment the time has now come to say that the court *does* have power under "gateway" (20) to permit service of a claim under section 423 outside England and Wales. I do not accept the argument advanced by Mr Pearce that "gateway" (20) is a partial successor to RSC Order 11 rule 1 (2) (b). First, the words that the court construed in the *Harrods* case do not appear in the "gateway". Second, the consequences of a claim coming within the "gateway" are radically different. Under the rules as they now are, the consequence of a claim coming within "gateway" (20) will not necessarily result in service outside England and Wales. The court must still consider whether to grant permission. That is a strong pointer against implying any restrictions into the ordinary meaning of the "gateway": *Tasarruff Meduati Sigorta Fonu v Demirel* [2007] EWCA Civ 799, [2007] 1 WLR 2508 at [25]. The scope of the "gateway" is to be construed in a neutral way. Third, this two-stage approach precisely mirrors the way in which this court interpreted section 423 in *Paramount Airways*. Fourth, in *Paramount Airways* Sir Donald Nicholls said in terms that "on its face" the section was not territorially confined. Fifth, the court is less cautious than before in contemplating service outside England and Wales. Sixth, CPR Part 6.33 (3) contains wording similar to that considered in the *Harrods* case. Since CPR Part 6.33 (3) sits alongside "gateway" (20), the obvious inference is that "gateway" (20) was intended to mean something different and broader, otherwise there would be little point in it. Seventh, CPR Part 6.37 (3) states that the court will not give permission

unless satisfied that England and Wales is "the proper place" to bring the claim. This is another protection for potential defendants, which was not available under the rule considered in the *Harrods* case. I would therefore hold that the *Harrods* case does not govern the interpretation of "gateway" (20). It follows, in my judgment, that the judge was wrong on this point. I should, in fairness, say that Mr Gruder QC told us that no one drew the judge's attention to the terms of CPR Part 6.33 (3) which I consider to be the successor to RSC Order 11 rule 1 (2)(b).

48. Mr Gruder, supported by Mr Pearce, argued that in order to come within the "gateway" the enactment in question must expressly authorise the bringing of proceedings against persons outside England and Wales. That, he said, was the consequence of the words "which allows proceedings to be brought". Moreover, if there were any doubt about the meaning of those words, the doubts should be resolved against the claimant and in favour of the defendant. I do not accept this argument. First, it will be a rare statute that explicitly authorises proceedings to be brought against persons outside England and Wales. Second, as noted, "gateway" (20) sits alongside CPR Part 6.33 (3) and if Mr Gruder's argument is right the scope of "gateway" (20) is entirely subsumed by that rule. Third, I do not accept that there is a significant difference for these purposes between a statute which explicitly provides for proceedings to be brought against persons outside England and Wales, and one which on its true construction does that. Fourth, in the case of section 423, *Paramount Airways* holds that section 423 "on its face" does allow such proceedings to be brought, subject to the safeguards to which Nicholls V-C referred.

49. The safeguards are important. In most cases which fall within one of the "gateways" the claimant is asserting that a legal right of his has been infringed. In very general terms, where a legal right has been infringed it is the function of the legal system to provide a remedy. But section 423 does not create a legal right on the part of a creditor. The person against whom the claim is made owed no legal obligation not to do what he is alleged to have done. Rather, the section enables a victim to ask the court to exercise a discretion. The likelihood or otherwise of the court's exercise of discretion is thus one of the important safeguards to which Nicholls V-C referred.

50. In my judgment those safeguards fall for consideration at the stage of considering whether to grant permission to serve proceedings outside England and Wales. I agree with Mr Pearce that they do double duty: both in considering whether the claim has a real prospect of success; and again in considering whether England and Wales is "the proper place" to bring the claim.

Does the claim have a reasonable prospect of success?

51. In order to get the claim off the ground Orexim must show that MPT entered into a transaction at an undervalue; and that it did so for the purpose of putting assets beyond the reach of a person who may at some time make a claim against it. Mr Adair emphasised that in order to fall within the scope of section 423 it is not necessary that the purpose of the transaction was to put assets beyond the reach of an identified creditor. That was undoubtedly the case under the statutory predecessors of section 423, under which it has been held that the court may set aside a settlement created as part of the preparations for embarking on a risky business venture: *Mackay v Douglas* (1872) LR 14 Eq 106; *Ex p. Russell. In re Butterworth* (1882) 19 Ch D 588. As Jessel MR put it in the latter case:

> "…a man is not entitled to go into a hazardous business, and immediately before doing so settle all his property voluntarily, the object being this: "If I succeed in business, I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss."'

52. There is no reason to suppose that section 423 is any narrower in its potential scope.

53. The judge conducted a review of the evidence and concluded that Orexim had a real prospect of success in establishing these two elements of the statutory cause of action. Both Mr Gruder and Mr Pearce sought to persuade us that the judge's conclusion was unjustified. But in my judgment that is just the sort of evaluation which an appeal court should respect. In my judgment the judge was entitled to come to the conclusion he did on this part of the case.

54. However, as Nicholls V-C explained in *Paramount Airways*, in the case of a claim under section 423 with a foreign element, that is not the end of the inquiry. There must, in addition, be a sufficient connection between the defendant and England and Wales. This is a particular feature of such claims, and does not apply generally.

Is there a sufficient connection between the defendants and England and Wales?

55. That leads to the question whether there is a sufficient connection between the claim under section 423 and England and Wales. The breadth of the potential scope of section 423 makes it all the more important that in a case with a foreign element the court is scrupulous to ensure that the safeguards are rigorously applied. In view of his decision on the "gateway" the judge did not have to decide this question. In his brief consideration of the issue he said that it was not "clear" that there was no sufficient connection, but that there was a serious issue to be tried. What he said at [61] was this:

> "If a gateway did apply so that prima facie the additional claims would be litigated here alongside the Damages Claim the position is not so straightforward. In the case of MPT it would be hard then to argue no sufficient connection at the end of the trial to avoid any remedy being imposed on it when the Court was otherwise hearing the Damages Claim. In the case of Zen, the hypothesis would be that it was a necessary and proper party and/or para. 3.1 (20) applied and again, in those circumstances it is not clear that there could be no sufficient connection. Accordingly, in those somewhat hypothetical circumstances I would have been prepared to accept for present purposes that there was also a serious issue to be tried on this question."

56. In *Erste Group* this court held at [119]:

> "Of course there will be cases where the question whether a sufficient connection with this jurisdiction can be shown can only be resolved at trial and where, at the stage of considering service out of the jurisdiction, the claimant may demonstrate a

> serious issue to be tried in relation to the question of sufficient connection. But that cannot, in our view, mean that the court will in no circumstances address that question (albeit only on a 'serious issue to be tried' basis) at the stage of considering whether to grant, or to set aside, service out of the jurisdiction."

57. In *Paramount Airways* Nicholls V-C said:

> "Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question, whether the defendant acted in good faith, and whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections."

58. The judge's discussion of the degree of connection did not advert to these factors. In my judgment his omission to do so vitiates his value judgment. Moreover, none of the facts which bear on the question of sufficient connection (with one exception) are in dispute, so it is difficult to see what issue the judge thought could only be resolved at trial.

59. Contrary to the tentative view expressed by the judge, I consider that there is insufficient connection with England and Wales for the court to give permission to serve the claim out of the jurisdiction; and that it does not need a trial to resolve that question. None of the protagonists are incorporated in England and Wales. None of them carry on business here. There is no evidence that any of the defendants has any assets here. Nor is there evidence that Orexim has any assets here; or that any loss would be suffered in England and Wales. The vessel has never been flagged in this jurisdiction. There is no evidence that she has ever entered territorial waters. The impugned transactions all took place outside the jurisdiction, between foreign corporations. Zen's purchase of the vessel was financed by an Indian finance house. All the impugned transactions were governed by the law of Singapore. They took place before the making of the settlement agreement, which is the foundation of Orexim's assertion that there is sufficient connection with England and Wales. It is not suggested that those dates were manufactured. Although it is true to say that section 423 can apply even if there is no particular creditor in contemplation, the timing of the transactions fatally undermines Mr Adair's argument that the purpose of the transactions was to frustrate a judgment of an English court. At the time when the transactions took place there was no connection with England and Wales at all. None of the human actors in the story are resident or domiciled in England and Wales.

Although the settlement agreement between Orexim and MPT is governed by English law, neither Singmalloyd nor Zen, which is the real target as the current owner of the vessel, was party to that agreement. Although it is alleged (and hotly disputed) that MPT, Singmalloyd and Zen acted in bad faith, that is not enough in itself weighed against all the other factors. While the claim under section 423 may be motivated by a desire to enforce the claim under the settlement agreement (if that claim were to be successful), it has its own distinct factual and juridical basis. I cannot, therefore, regard the existence of the settlement agreement as providing the necessary connection between the claim under section 423 and England and Wales: compare *Erste Group* at [131].

60. Mr Adair relied on the decision of Tomlinson J in *Dornoch Ltd v Westminster International BV* [2009] EWHC 1782 (Admlty), [2009] 2 CLC 226. In that case the judge set aside the transfer of a ship registered in the Netherlands, but located in Thailand, to a Nigerian corporation. However, the impugned sale took place in the course of a dispute between the owners and underwriters which was already on foot. Indeed, the sale took place after the owners had been served with proceedings in England and had been notified of an application for an injunction to stop any disposal of the vessel (see *Dornoch* at [82] and [83]). The dispute itself arose under a policy of insurance governed by English law, placed in the London market with English underwriters. It also contained an exclusive jurisdiction clause. The facts of that case could well be viewed as an attempt to frustrate any award of an English court arising out of a dispute that was already before the court. The facts of this case are entirely different.

Is England and Wales the proper place to bring the claim?

61. The judge considered this question even more briefly. He said at [64]:

> "Again, this only arises if (contrary to my findings above) there are applicable gateways. In those hypothetical circumstances and essentially for the reasons given in relation to sufficient connection in paragraph 61 above I would have said that England was clearly the appropriate forum."

62. It will be recalled that at [61] the judge had gone no further than to say that he considered that there was a serious issue to be tried. It was common ground between counsel at the hearing of the appeal that this part of the judgment was inadequately reasoned. In considering whether England and Wales is "the proper place" to bring the claim, the threshold is higher than a serious issue to be tried.

63. It is clear from the decision of the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 480H – 481E that where a claimant seeks to persuade the court to grant permission to serve proceedings outside England and Wales:

i) The burden of proof rests on the claimant rather than the defendant (whereas the converse is true where the defendant seeks to stay proceedings on the ground that England and Wales is not the appropriate venue); and

ii) The burden is only discharged if the claimant persuades the court not merely that England and Wales is the appropriate forum but that "this is clearly so".

64. It is plain, then, that to conclude that there is a serious issue to be tried on this question is not enough. In addition to all the points that I have discussed on the question of "sufficient connection", any witnesses would have to come from abroad. There is no evidence that the documents that would be relevant to the section 423 claim are held in England and Wales. Moreover, the evidence served on the part of MPT asserted that either Singapore or India would be a more appropriate forum: India because that is the place of incorporation of the main defendants; Singapore because the ship transactions were subject to Singapore law. Orexim served no evidence in rebuttal of that assertion. India is also the seat of a connected arbitration between Orexim and MPT.

65. As the Cork Committee pointed out in their influential report on Insolvency Law and Practice (para 1200) most developed systems of law recognise the need to enable certain transactions between a debtor and other parties to be set aside in appropriate circumstances, so that assets may be recovered and made available to meet the claims of his creditors. The origins of such an action go back to Roman times when the Paulian Action was developed; and has been a feature of the law of England and Wales since the time of Elizabeth I. If the legal systems of Singapore or India do not make provision for such claims (which would be surprising) it was for Orexim to establish that. In addition, it would be necessary for Orexim to show that the differences (if any) between the legal system of England and Wales and that of an alternative legal system gave it a legitimate personal or juridical advantage: *Spiliada* at 482 – 484.

66. In short, in my judgment England and Wales has not been shown to be "the proper place" to bring the claim. It follows that I also consider that the judge was wrong on this point too.

Result

67. Ironically, however, my disagreement with the judge on these points has the consequence that I agree with the order that he made refusing permission to serve out, but for entirely different reasons.

68. I would dismiss the appeal.

Lord Justice Leggatt:

69. I agree.

Lord Justice Gross:

70. I also agree.