Neutral Citation Number: [2018] EWCA Civ 1742

Case No: A2 2016 3771

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Edis
[2016] EWHC 2207 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2018

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE GROSS
and
LORD JUSTICE FLOYD

- -

Between :

EURASIA SPORTS LIMITED	**Claimant/ Respondent**
- and –	
OMAR MAHCHI AGUAD	**11th Defendant/ Appellant**

- -
- -

Alexander Gunning QC (instructed by **Hogan Lovells International LLP**) for the **Appellant**
Antony White QC (instructed by **Reed Smith LLP**) for the **Respondent**

Hearing date: 12 July 2018

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Approved Judgment

Lord Justice Floyd:

1. The eleventh defendant and sole appellant, Omar Mahchi Aguad, challenges the jurisdiction of the court to try the proceedings brought against him by the claimant, Eurasia Sports Limited. His challenge, which was originally made together with the third and sixth defendants, Messrs Letts and Nieri, was rejected by the order of Edis J of 8 September 2016. He now appeals, with the permission of Henderson LJ, granted at an oral hearing. Messrs Letts and Nieri, whose jurisdiction challenge was also rejected by the judge, have now served a joint defence on the merits.

The facts

2. The claimant is a company incorporated in Alderney which operates a betting agency. It alleges that all of the defendants, who were resident in Peru at the time of the relevant events, conspired to defraud it. There are claims against each of the defendants for sums due under the terms of individual gambling accounts opened with the claimant in the name of each of them. Claims are also made against some defendants, but not Mr Mahchi Aguad, for fraudulent misrepresentation. So far as Mr Mahchi Aguad is concerned, in addition to the claim based on the indebtedness on his betting account, it is alleged that he was involved in the conspiracy to defraud because he has revealed his close links with the first defendant.

3. The claimant's business is operated in the following way. It identifies new betting customers and procures accounts for them with Triplebet Limited, which trades as Matchbook, an online betting exchange, located at www.matchbook.com. At the material time Triplebet was a part of the same corporate group as Matchbook. The claimant itself operates through employees of Xanadu, a company incorporated in Ireland. Those employees include Mr Osei-Amoaten and Mr Paul McGuinness, both of whom are based wholly or partly in London and are said to work for the claimant on a consultancy basis.

4. Mr McGuinness and a Mr Pantling (a director of Triplebet) visited Peru in early September 2014 and met Mr Mahchi Aguad, who is the owner of a casino called Atlantic City in Lima. As a result of that meeting, Mr Mahchi Aguad became a client of the claimant. Mr Pantling had initially been prepared to offer Mr Mahchi Aguad $1m in credit against a $500,000 deposit, but at the meeting the requirement for a deposit was removed. By the end of 4 September 2014 Mr Mahchi Aguad had bet and lost nearly the entire $1m. Further credits were arranged and some payments were made on Mr Mahchi Aguad's behalf. Nevertheless, by the end of September, an unsecured sum in excess of $2m was owing on his account.

5. Mr Osei-Amoaten also set up betting accounts for the first and second defendants. They were to provide security of $1m. It is alleged that the first and second defendants represented that they were wiring or had wired sums to provide for this security inter alia by sending photographs of purported wire transfers, but, although US$500,000 was received, the balancenever arrived as promised.

6. The first and second defendants suggested that they would be able to introduce clients to the claimant who would use the claimant's services. Thereafter Mr Osei-Amoaten travelled to Peru. An agency agreement was mapped out under which the first defendant would introduce clients to the claimant. The third and sixth defendants

were also involved at this stage. That agreement was concluded in Peru in October 2014. $10m was to be provided as security, by cheque. The cheque was to be payable to the claimant and sent to the claimant's bank in Malta.

7. On the same trip to Peru Messrs Osei-Amoaten and Mr McGuinness also met Mr Mahchi Aguad in the presence of the sixth defendant. Mr Mahchi Aguad agreed to pay his outstanding debt, but said that he would have to sell some shares to do so. He now claims that he paid this debt to the first defendant. The claimant disputes this and also disputes that payment to the first defendant would discharge the debt. No evidence of a payment to the first defendant has been produced.

8. The cheque for $10m payable to the claimant was presented but not paid. The bank on which it was drawn informed the claimant on 10 December 2014 that there were insufficient funds in the account and the account was closed. The total of the amounts due and owing on the accounts of the first to eleventh defendants was in excess of $12.5m.

9. Thus the claimant alleges that all the defendants conspired together to injure the claimant by unlawful means by procuring the claimant to provide online gambling services without security by falsely representing that money had been or was about to be transferred to the claimant or alternatively that the online gambling services had been secured by the third defendant's cheque for $10m.

10. Paragraph 67 of the particulars of claim alleges that, by reason of the conspiracy:

> "the claimant has suffered loss and damage in the sum of US$12,642,982.90, being the total of the amounts due and owing to the Claimant on the accounts of the First to Eleventh Defendants with the Claimant."

The issues on this appeal

11. In order to establish jurisdiction it was necessary for the claimant to establish (a) that there was a serious issue to be tried against Mr Mahchi Aguad in respect of the causes of action alleged; (b) that it has a good arguable case that its claims fall within one of the jurisdictional gateways; (c) that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute: see *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 at [71] as explained in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80; [2018] 1 WLR 192 at [7]. Each of those requirements remains in issue between the claimant and Mr Mahchi Aguad on this appeal.

The jurisdictional gateways

12. The following four jurisdictional gateways in CPR PD 6B are relevant. I will, so far as possible, use the indicated shorthand for each gateway rather than paragraph numbers.

> Paragraph 3.1(3) ("the necessary or proper party gateway"):

> A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.
>
> Paragraph 3.1(4A) ("the 4A gateway"):
>
> (4A) A claim is made against the defendant in reliance on one or more of paragraphs (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts.
>
> Paragraph 3.1(6): ("the contract gateway")
>
> (6) A claim is made in respect of a contract where the contract –
>
> (a) was made within the jurisdiction;…
>
> Paragraph 3.1(9)(a) ("the tort gateway"):
>
> A claim is made in tort where –
>
> (a) damage was sustained, or will be sustained, within the jurisdiction;
>
> …

13. The 4A gateway is relatively new, having been added on the recommendation of the Lord Chancellor's Advisory Committee on Private International Law, chaired by Lord Mance JSC. It came into effect from 1 October 2015.

The conclusions reached by the judge

14. On the first of the issues, the judge held that the tortious conspiracy claim against Mr Mahchi Aguad raised a serious question to be tried. It was common ground that the indebtedness claim against him satisfied that test as well. On the second issue, the judge held that the conspiracy claim fell within the tort gateway because the damage was sustained in London. As the contract with Mr Mahchi Aguad was made in Peru, it did not fall within the contract gateway, although the contract claims against certain other defendants did (see further below). Next, he held that the claim in debt was so closely bound up with the action against him and others in conspiracy that Mr Mahchi Aguad was a necessary or proper party to that action. Finally he held that, in the light of the admissibility of the tort claim, the indebtedness claim fell within the 4A gateway. On the third issue, the judge held that England was clearly or distinctly the appropriate forum for the trial of the claims.

The first issue: serious issue to be tried

15. At the stage of seeking permission to appeal, Mr Mahchi Aguad's skeleton argument challenged the judge's conclusion that there was a serious question to be tried as to whether he was a participant in the alleged conspiracy. Although Mr Mahchi Aguad was given permission to argue that point by Henderson LJ, a replacement skeleton argument served on his behalf thereafter contains no trace of this point. Instead, the replacement skeleton advances two different points on the issue of whether there is a serious question to be tried, only one of which is now pressed on the appeal. The surviving point is that the loss pleaded as flowing from the conspiracy, namely the sum of the indebtedness accrued by the defendants on their betting accounts which remains due, does not represent a loss in law. Rather, the several debts are assets which, but for the conspiracy, the claimant would not have acquired. However worthless they are as debts, they do not represent a loss. Mr Gunning QC, who appeared for Mr Mahchi Aguad on this appeal (but not below) submitted that this manner of pleading the loss rendered the alleged conspiracy incoherent, so that the court should hold, in respect of all the defendants, that there was no serious issue to be tried.

16. Mr Gunning accepts that this was not a point which was taken before Edis J by counsel then appearing for Mr Mahchi Aguad, and that he requires the permission of this court to raise it. He submits that it raises a pure point of law of which the respondents have now had adequate notice. He concedes, however, that had the point been taken below it might have been open to the claimant to modify the way in which it characterised its loss. If that is so it would also have been open to the claimant to adduce evidence in support of such a modified claim.

17. Both sides referred to *Pittalis v Grant* [1989] QB 605 (relied on post CPR by this court in *Glatt v Sinclair* [2013] EWCA Civ 241) on the approach to allowing an appellant to take a new point on an appeal. In *Pittalis*, at p.611 C-F, Nourse LJ, giving the judgment of the court, said this:

> "The stance which an appellate court should take towards a point not raised at the trial is in general well settled: see *Macdougall v Knight* (1889) 14 App. Cas. 194 and *The Tasmania* (1890) 15 App. Cas. 223. It is perhaps best stated in *Ex parte Firth, In re Cowburn* (1882) 19 ChD 419, 429, per Sir George Jessel M.R.:
>
> > "the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence."
>
> Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he

> can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it."

18. I accept that these observations do not apply with such force when there has not been a trial on the merits. Nevertheless, I would not give permission to raise the new point on this appeal. I think it is entirely possible that evidence could have been adduced below which would have prevented the point from succeeding. The point is the narrow one that the *pleaded* loss is not a consequence of the conspiracy, because the defendants' unsecured indebtedness to the claimants cannot be described as loss. To render the alleged conspiracy "incoherent", however, the court would have to reach the conclusion that the conspiracy caused *no* loss. Had the point been taken below, the claimant's advisers could have addressed their minds to it and considered how they proposed to react. Mr White QC, who appeared for the claimant as he did below, submitted that the claimant could have reacted by formulating the claimed loss caused by the conspiracy in an alternative way, and adducing evidence in support. In paragraph 18 of his skeleton argument he explains that the claimant could have put in evidence explaining the nature and operation of the online betting exchange provided by Matchbook and the consequences of unsecured losing punters defaulting, including the claimant's obligations to other companies involved. Other ways of formulating the claimant's loss were ventilated in argument. There is no need to consider them in any detail, because I am concerned only with the possibility that such a strategy would have been open to the claimant as I think it was. On the face of it, it would be extremely surprising if a conspiracy to cause the claimant to accept betting on the basis of pretended security had caused the claimant no loss at all.

19. No doubt it was considerations such as these which led to the point not being taken below. It would be unjust to allow it to be taken now.

Issue 2: good arguable case on the gateways

20. I consider the tort gateway first, because it is common ground that if the claimant can bring its claim against the eleventh defendant through the tort gateway, then the appeal falls to be dismissed.

Tort gateway

21. To pass through this gateway England and Wales must be the place where the damage was sustained. That place is not simply where the claimant sustains financial loss. It is where the event giving rise to the damage directly produces its harmful effects on the person who is the victim of the act: see by analogy the EU case *Dumez France v Hessische Landesbank (Helaba)* Case C-220/88 [1990] ECR I-49 at [20].

22. In *ABCI v Banque Franco-Tunisienne* and others [2003] EWCA Civ 205; [2003] 2 Lloyd's Rep 146 Mance LJ, giving the judgment of a court which included Tuckey LJ and Black J, said this at [44] in relation to the former O.11 rule 1(1)(f) of the Rules of the Supreme Court:

> "In our judgment clause (f) is looking to the direct damage sounding in monetary terms which the wrongful act produced upon the claimant … In the present case that means the loss sustained by actually investing in an (allegedly worthless) company, not the entry into of any prior contractual commitment which might or might not have been followed by the making of such an investment before discovery of the inaccuracy of the accounts."

23. In *Dolphin Maritime & Aviation Services v Sveriges Anfartygs Assurans Forening* [2009] EWHC] 716 (Comm); [2009] 2 Lloyd's Rep 123 Dolphin, a marine recovery agent, traded on terms which required any recovery to be paid direct to its bank account which was in London. It sued the defendant P&I club for the tort of inducing breach of contract by paying Dolphin's clients, the underwriters, directly to its bank account in Turkey. Christopher Clarke J (as he then was) held that the place where the harm occurred was London, because that was where the money should have been paid (see [58] to [59]). At [60] he added:

> "I do not ignore the danger of conflating the place where the damage occurred with the place where the loss was suffered. There is, however, a difference between a case in which the claimant complains that he has lost his money or goods … and a case in which the claimant complains that he has not received a sum which he should have received. In the former case the harm may be regarded as occurring in the place where the goods were lost … or the place from or to which the monies were paid… although the loss may be said to have been suffered in the claimant's domicile. In the latter case the harm lies in the non receipt of the money at the place where it ought to have been received, and the damage to him is likely to have occurred in the place where he should have received it. That place may well be the place of his domicile and, therefore, also the place where he has suffered loss. An analogy may be drawn with the non delivery of cargo at the destination port…".

24. I would add that damage may be sustained in the place where a claimant is induced to provide services for no payment. That cannot be taken too far, however. The mere fact that some decision or act is taken in a jurisdiction as a result of the tortious act does not necessarily found jurisdiction there.

25. Christopher Clarke J's reference in *Dolphin* to the place of domicile of the claimant reflects the need to scrutinise carefully the suggestion that loss occurred there. It is well established that the fact that a corporation's loss is felt where its books are made up does not mean that that is the place where the damage occurred. If that were so a corporation would in most economic loss cases be able to sue in the courts of its own domicile, where it is likely to hold its bank account. As *Dolphin* shows, however, it by no means follows that a proper application of the gateway cannot yield the result that the damage occurred where the claimant's bank account is located, even if it is also its place of domicile.

26. In *AMT Futures Ltd v Marzillier, Dr Meier & Dr Gunter Rechtsanwaltgesellschaft mbH* [2017] UKSC 13; [2017] 2 WLR 853, AMT sued a German law firm for inducing its former clients to bring proceedings against them in Germany in breach of exclusive jurisdiction clauses in their agreements with AMT. At [26] Lord Hodge distinguished *Dolphin* but did not disapprove of its reasoning. On the facts of *AMT* the harm occurred in Germany, where AMT expended costs on engaging in legal proceedings, not in England.

27. The judge dealt with the tort gateway in the following way:

> "It seems to me that it is important to appreciate that the obligation on the conspirators was not simply to make payments, but to do so in order to provide security and to thus persuade Mr. Osei-Amoaten to arrange credit to be allowed on betting accounts. The object of the payments was not simply to swell a bank account in Malta but to procure a particular result. To summarise, the aim of the conspiracy was to persuade the claimant to arrange for the conspirators to be able to bet with the claimant's money, rather than their own. They would take any winnings, and the claimant would stand any losses. It is likely that this resulted in a very complex arrangement, given the nature of online betting, and the ramifications have probably been felt by various parties in various places. As I have said, the relationship between the claimant and Matchbook is not fully explained in the evidence and if there are further parties beyond Matchbook I know nothing about who they are. The question is where was the damage to the claimant caused. That, it seems to me, occurred in the place where the claimant allowed bets to be placed by the conspirators in the belief that the risk was less than it truly was because the various offers of security were worth less than they were said to be worth. That act would result in accounting entries being made by Xanadu on behalf of the claimant in London and in Cork and money not being received as promised in Malta and no doubt in arrangements between the claimant and Matchbook and perhaps between Matchbook and other parties beyond. However, the act of allowing the betting to take place happened in London. Mr. Osei-Amoaten was the instrument through which the claimant took the relevant decisions and put them into effect by giving instructions and issuing communications. He did this in London."

28. Mr Gunning QC submitted that the judge fell into error in this passage by having regard to matters which were merely prefatory to sustaining damage. The decision to allow the defendants to have credit was merely prefatory to damage, which only occurred when the defendants failed to provide money or security. That damage was felt in Malta, not in London. Alternatively, if the harm was to be characterised as being induced to provide betting services without payment or security, then that harm occurred in Alderney where the claimant was incorporated, and where its affairs are regulated by the Alderney Gambling Control Commission.

29. Mr White drew our attention to the decision in *London Helicopters Ltd v Heliportugal LDA-INAC* [2006] EWHC 108 (QB); [2006] 1 All ER (Comm) 595, a decision of Simon J (as he was then). The defendant, a Portuguese company, issued an airworthiness certificate in respect of work it had carried out in Portugal on a helicopter engine which it then sold to an English buyer. The engine was sold on a number of times (on each occasion with the benefit of the certificate) until it was purchased by the claimant, who also sold it on to a purchaser who claimed it was unfit for purpose. The claimant settled with its purchaser and brought proceedings for negligent misstatement against the defendant. Simon J held that the place where the initial and direct damage occurred was England, because that was the place where damage was done to the immediate victim of the harmful act. At [25] he said that

> "…it is quite likely that in a case of negligent misstatement the damage will occur at the place where the misstatement is received and relied on".

30. I think Mr Gunning is right that the act of allowing the defendants credit is merely prefatory to the sustaining of damage and does not itself constitute damage for the purposes of the tort gateway. The act of allowing credit is broadly analogous to the prior contractual commitment in *ABCI* which might or might not have been followed by an investment. Here the provision of credit is no more than the offer of an overdraft facility. Damage is sustained when a defendant places a bet and loses. To put it another way, the provision of credit merely exposes the claimant to the risk of damage, but does not itself amount to damage. Even if some cases of conspiracy suggest that the place where the harmful event occurred is the place where the conspiracy was hatched (see *JSC BTA Bank v Ablyazov* (No.14) [2018] UKSC 19; [2018] 2 WLR 1125), that would not help the claimant here.

31. I do not think the observation of Simon J in *London Helicopters* at [25] helps the claimant either. It may often be the case that the damage caused by a negligent misstatement will occur where the misstatement is received. That is because that is the place where the recipient of the misstatement is likely to act on it to its detriment. That observation cannot be allowed to short circuit the essential enquiry, which is to ask where the damage was sustained.

32. If the damage is characterised as the impact of the failure of the defendants to meet their monetary obligations by providing security, then it seems to me that it is clear that that damage is felt in the place where the money was to be received, which was Malta. Although it is right that a conclusion that damage is felt where the claimant holds its bank account needs to be carefully scrutinised, it remains a possible conclusion. In this case, on the basis that that is how the damage should be characterised, I think it is the right conclusion.

33. The judge clearly considered that this was too simplistic a view of the harm which the claimant suffered, and that the activities and decision-making being carried on on the claimant's behalf in London justified a conclusion that harm was felt here. I would have been sympathetic to that conclusion if it was established to the necessary standard that the claimant was providing gambling services or facilities in London. Then it could be said that the harm caused by the conspiracy was felt by the claimant where it was induced to provide those services without payment. It is clear, however, that the judge did not go as far as to hold that the claimant was providing gambling

services or facilities in London, and there is no reason for us to infer that to be the case. Mr Gunning relied on a passage in Mr Osei-Amoaten's evidence where he said that the opening of an account or allocation of credit was:

> "a simple, mechanical data inputting exercise which could be done by staff anywhere".

34. It is not necessary to decide, therefore, where the claimant provides gambling services from, but there is no good arguable case that it is from London.

35. It follows that I think the judge fell into error in holding that the conspiracy claim passed the tort gateway on the basis that the harm was felt in London. Although prefatory steps were taken in London, the harm was not felt there. That conclusion does not determine the appeal in Mr Mahchi Aguad's favour, however, because the claimant also relies on other gateways to which I must now turn.

Other gateways: necessary and proper party and 4A

36. In approaching these gateways it is important to bear in mind that the judge found, in the case of the first, second, seventh and eighth defendants, that the contracts governing their betting accounts were made in England. The cases against them on their contracts therefore fell within the contract gateway. Although I have concluded that Mr Mahchi Aguad can successfully challenge the judge's conclusion in relation to the conspiracy claim, he has not challenged his conclusion in relation to the contract claims against those defendants.

37. In *Altimo Holdings* (above) the Privy Council warned (at [73]) that the necessary or proper party head of jurisdiction is anomalous in that, in contrast to other heads, it is not founded on any territorial connection between the subject matter of the relevant action and this jurisdiction. Lord Collins cited with approval the observation of Lloyd LJ in *The Goldean Mariner* [1990] 2 Lloyd's Rep 215 at 222:

> "I agree … that caution must always be exercised in bringing foreign defendants within our jurisdiction under O.11 r.1(1)(c). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction."

38. At [87] Lord Collins explained the approach to "proper party":

> "… the question whether D2 is a proper party is answered by asking: "Supposing both parties had been within the jurisdiction would they both have been proper parties to the action?": *Massey v Heynes & Co* (1888) 21 QBD 330 at 338, per Lord Esher MR. D2 will be a proper party if the claims against D1 and D2 involve one investigation: *Massey v Heynes & Co* at 338, per Lindley LJ; applied in *Petroleo Brasiliero SA v Mellitus Shipping Inc (The Baltic Flame)* [2001] EWCA Civ 418, [2001] 1 Lloyd's Rep 203, at [33] and in *Carvill America Inc v Camperdown UK Ltd*[2005] EWCA Civ 645,

> [2005] 2 Lloyd's Rep 457, at [48], where Clarke LJ also used, or approved, in this connection the expressions "closely bound up" and "a common thread": at [46], [49] .”

39. The judge expressed his conclusion in relation to the necessary or proper party gateway in the following terms at [53]:

> “Applying the test from *Altimo* (above) at [87] it appears to me that all these claims involve one investigation. The relevant defendants have each advanced explanations for their conduct which have to be considered alongside those advanced by other defendants in determining not only their liability in tort but also, so far as it is different, in contract. Letts and Nieri are *a fortiori* cases on this proposition. If Aguad falls within it, so do they because the claims against them are very close to those in the extant action as I have attempted to show. In the conspiracy claim, Aguad has said, it seems, that he placed bets using the accounts of other conspirators and settled his losses with Martin Tsai. This will involve an investigation into the financial transactions at the material time between him and other conspirators and, in particular, with Martin Tsai. In relation to his own betting account, he will say, it seems, that he has discharged his liability to the claimant by paying Martin Tsai. The truth or falsehood of this contention will be revealed by the same investigation which is necessary in respect of the conspiracy. He will also have to explain why he believed that paying Tsai would discharge his debt to the claimant. This will involve consideration of his knowledge of the relationship between Martin Tsai and the claimant during the conspiracy period. That investigation will be relevant both to the claim against him and others in conspiracy and to his liability on his own account. It therefore appears to me that the claim against him on his personal account is closely bound up with the claim against him and others in conspiracy. This would be even more true were it to be alleged and proved that his motive in using the accounts of sub-account holder conspirators was to enable him to continue to bet after his own account became unviable because of the debt which had accrued and which was not discharged on 1st October 2014. On the face of it, that seems a perfectly reasonable subject for investigation in these proceedings.”

40. The judge therefore concluded that the relevant defendants (the third, sixth and eleventh defendants) were proper parties to the action against the others.

41. Mr Gunning submitted that if this court accepts, as it has, that the conspiracy claim is not properly brought in this jurisdiction (via the tort gateway) then the basis on which the judge has approached the necessary or proper party gateway is undermined. The question then becomes whether Mr Mahchi Aguad is a proper party to an action for what he contends are independent gambling debts, and whether it is reasonable to try

a separate conspiracy claim against him together with the debt claims against the other defendants.

42. Mr White's answer to this argument is based on a combination of the application of the 4A and the necessary or proper party gateways. Given the judge's finding that the claim in contract passes the contract gateway against the first, second, seventh and eighth defendants, the application of the 4A gateway allows through the claims in conspiracy against those defendants. The 4A gateway requires the further claim to arise out of the same or closely connected facts, which it plainly does for essentially the reasons given by the judge in paragraph [53] of his judgment. By this route the position is restored to that considered by the judge, namely that there are a number of defendants who can properly be served for both the tort and contract claims. Those are issues which it is reasonable for the court to try and the claimant should be entitled to serve the eleventh defendant as a necessary and proper party to that action.

43. In response Mr Gunning submitted that this is an unjustified broadening of what CPR PD6B permits, and is based on an incorrect construction of the paragraphs of the Practice Direction. When the necessary or proper party gateway says that "***a claim*** *has been made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph)"* the class of claims referred to excludes by implication a "further claim" which has been brought in under the 4A gateway. That construction was necessary in order to prevent the new 4A gateway from being used to expand the subject matter of the gateways beyond acceptable limits.

44. However, even if reliance on claims brought in by gateway 4A is permissible, Mr Gunning submitted that the inclusion of the contract claim against his client, which was incurred before the various elements of the conspiracy were said to have been put in place, was not.

45. Mr Gunning's construction of the necessary or proper party and 4A gateways is not, in my judgment, correct. As a matter of language, a claim does not cease to be a claim because it is a further claim. The introduction to the necessary or proper party gateway includes the bracketed words "(*otherwise than in reliance on this paragraph*)". The effect of the construction for which he contends could have been achieved by adding to the bracketed words "*or paragraph 4A*". If the draftsman intended to limit the other gateways which could be relied on, I think this is how he would have done it.

46. The two gateways with which this argument is concerned are complementary in their operation. The necessary or proper party gateway is concerned with adding additional parties to a given action, whereas the 4A gateway is concerned with adding additional claims to a claim against a given party. The common thread is that claims arising out of the same or closely related facts should be tried together, whether by adding defendants to an existing claim or adding claims to an action against an existing defendant. The effect of allowing the necessary or proper party to build on the 4A gateway does not cut across that common purpose. All the claims will remain bound together because they are based on closely related facts.

47. It is fair to say that the 4A gateway does not permit a claim made in reliance on the necessary or proper party gateway to be used to add a further claim against the same

defendant. That exclusion may be because it might be exorbitant for a party who is merely brought in as a necessary party, such as a party joined so that he is bound by the outcome, to become subject to other actions based on the facts which are the subject matter of the action. In my judgment, this point, whilst a fair one to make, does not begin to compel the construction for which Mr Gunning contends.

48. Of course, the concerns expressed in *Altimo* about the width of the necessary and proper party gateway apply with equal force when a party seeks to build gateway upon gateway as in the present case. That is not, in my judgment, a sufficient reason for giving the words a strained construction. The appropriate stage at which to give effect to those concerns is at the stage of considering whether, under CPR 6.37(3), England and Wales is the proper place in which to bring the claim.

49. Given that claims are properly brought against the first, second, seventh and eighth defendants in reliance on the contract gateway, (which is one of those specified in paragraph 4A), I agree with Mr White that the conspiracy claims against those defendants arise out of the same or closely related facts. I did not understand Mr Gunning to challenge that conclusion with any enthusiasm. I also agree with Mr White that, from that starting point, the addition of the eleventh defendant to the conspiracy claim so constituted is justified, on the basis that he is a proper party. If the conspiracy claim were brought in England, the eleventh defendant would obviously be a proper party to it. There is no basis for interfering with the judge's evaluation of this issue, albeit from the standpoint that all the other defendants were properly sued under the tort gateway.

50. I do not think that the contract claim against the eleventh defendant falls to be treated differently. In his skeleton argument, at paragraph 36, Mr Gunning accepted the judge's assessment in relation to the debt claim on the basis that Mr Mahchi Aguad was facing claims of conspiracy, describing that conclusion as "unsurprising". I agree, and am not persuaded that there is any basis for interfering with the judge's evaluation even on the alternative analysis of the gateways. I do not agree that the timing of the incurring of Mr Mahchi Aguad's debt makes a difference. The judge was alert to those differences. The incurring of his debts was closely linked in time and place with the conspiracy.

The third issue: is England & Wales the appropriate forum?

51. It is common ground that this court should not interfere with the judge's evaluation of the issue of appropriate forum unless he is shown to have erred in principle. The weight to be given to the various factors in the evaluation is a matter for the judge: *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 486C. That principle was recently re-emphasised in *VTB Capital plc v Nutritek International Corp* [2013] 2 AC 337 at [69], [93]-[94] [156], [191] and [229].

52. Mr Gunning argued, firstly, that because the judge had approached the case from the premise that damage from the tort occurred in England, his approach to the applicable law factor was skewed. Secondly, he submitted that the judge had been wrongly swayed by the fact that other defendants had submitted to the jurisdiction and that there was to be a trial here. He relied on what was said by Lord Sumner in the old case of *John Russell & Co Ltd v Cayzer, Irvine & Co Ltd* [1916] 2 AC 298 at 304:

> "Persons who are already defendants in the action, although they may submit to the jurisdiction and so preclude themselves from raising any objection, cannot by that procedure affect the rights of third parties".

53. Mr Gunning submitted that there was a qualitative difference between a case where the court was bound to resolve a dispute because there was no power to grant a stay in favour of some other jurisdiction, and one where the court was simply trying the dispute because a defendant had submitted to the jurisdiction. The present case was in the latter category and the judge had been wrong to attach weight to this factor.

54. I am not at all persuaded by these arguments. The judge dealt with the law applicable to the claim in tort at [59]:

> "The fact that the proper law applicable to a most important part of the claim is the law of England is a "prima facie starting point", see Lord Mance in *VTB Capital* at [18] and [51]. It is no more than that, and could be dwarfed by other countervailing factors."

55. As Lord Mance also pointed out in *VTB* at [46], the governing law will be of particular force if issues of law are likely to be important or if there is evidence that there are relevant differences applicable to such issues in the relevant jurisdictions. There is no suggestion in the present case that issues of law, as opposed to fact, are likely to be important, or that there is any material difference in the laws of England and Peru on the tort of conspiracy. I do not think this is a case where the governing law of the tort had a material influence on the judge's evaluative task.

56. In relation to the second point, I do not accept that, as a general matter, it is inappropriate to place weight on the fact that proceedings will be continuing here in relation to other defendants. The relevance of that factor has been accepted in a series of cases at first instance to which we were referred in Mr White's written submissions, including *Luis Vicente Barros Mattos Junior v Macdaniels Ltd and others* [2003] EWHC 1173 (Ch) at [65]; *JSC BTA Bank v Granton Trade Ltd and others* [2010] EWHC 2577 (Comm); [2011] 2 All ER (Comm) 542 at [12] to [18]; *Credit Agricole Indosuez v Unicof Ltd and others* [2003] EWHC 2676 (Comm) at [19]; and *OJSC VTB Bank v Parline Ltd* [2013] EWHC 3538 (Comm) at [5]. Some of these cases were cited with approval in this court by Simon LJ in *Lungowe and others v Vedanta Resources plc and another* [2017] EWCA Civ 1528; [2017] Building LR 585 at [113] to [117]. It is clear that the passage cited by Mr Gunning from *John Russell v Cayzer* has not been allowed to create a principle of general application.

57. I would accept for the purposes of argument that the weight to be given to the fact that proceedings will continue in any event in this jurisdiction may be qualitatively different in cases where this court is compelled to accept jurisdiction on the basis of a defendant's domicile. Even where that is not the case, however, the fact that proceedings are very likely to continue here remains a factor which is entitled to weight. The amount of weight to be attached to it is a matter for the judge, always bearing in mind the caution it is necessary to exercise before bringing foreign defendants here on the ground that the only alternative requires more than one suit in more than one jurisdiction.

58. It is fair to point out that the judge regarded the fact that proceedings would continue here in any event as important, but that was not an error of principle on his part which would justify this court in interfering with his evaluation.

59. It follows that I would not disturb the judge's conclusion that England & Wales is clearly and distinctly the more appropriate forum.

Conclusion

60. For the reasons I have given, I have reached the same conclusion as the judge, albeit by a different route. I would therefore dismiss the appeal.

Lord Justice Gross:

61. I agree with both the judgment of Floyd LJ and the judgment of Longmore LJ.

Lord Justice Longmore:

62. I also agree with the judgment of Floyd LJ and only wish to add two comments.

63. First, this case may well be the first appellate case to have considered the new 4A gateway which came into effect on 1st October 2015. The intention of this new gateway must be that claims arising out of the same or closely connected facts should be tried together. That is eminently sensible and should be encouraged. The fact that some defendants may now be capable of being sued as necessary or proper parties to claims which now pass the 4A gateway should not give rise to any concern because it is also eminently sensible that relevant claims against all defendants should be tried together. Any legitimate concern that there is no sufficient connection with England and Wales should be dealt with under the head of the third issue in this case namely whether England and Wales is the appropriate forum.

64. Second, the caution to be exercised in bringing foreign defendants within the jurisdiction expressed by Lloyd LJ in The Goldean Mariner and approved by Lord Collins in Altimo Holdings as recited in paragraph 37 in my Lord's judgment and again referred to in paragraph 48 should now be read in the context of Lord Sumption's comment in paragraph 53 of Abela v Baadarani [2013] UKSC 44; [2013] 1 WLR 2043 to the effect that litigation between residents of different states is a routine incident of modern commercial life and any decision in relation to service out of the jurisdiction

> "is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum."