Neutral Citation Number: [2020] EWHC 1889 (Ch)

Appeal CH 2019 000169

IN THE HIGH COURT OF JUSTICE
BUSINESS & POPERTY COURTS
CHANCERY DIVISION (SITTNG AS AN APPELLATE COURT)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, PROPERTY, TRUSTS & PROBATE LIST (CH D)
(PT 2019 000087 DEPUTY MASTER BARTLETT 6 June 2019)

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL
Date: 14 July 2020

Before:
ANDREW LENON Q.C. (sitting as a Deputy Judge of the Chancery Division)

BETWEEN:

STEPHENSON HARWOOD LLP

Claimant

And

(1) MEDIEN PATENTVERWALTUNG AG

Appellant

(2) MICHAEL KAGAN (as administrator of the estate of Irving Kagan)

Respondent

APPROVED JUDGMENT

Ali Reza Sinai (instructed by OGR Stock Denton LLP) for the Appellant
George Spalton (instructed by Griffin Law Limited) for the Respondent

Hearing date: 12 May 2020

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 14.00 on 14 July 2020.

Introduction

1. The central question raised by this appeal is as to the correct procedure to be followed by a respondent to a stakeholder application who wishes to dispute the Court's jurisdiction to determine issues raised in that application.

2. In a stakeholder application made pursuant to CPR Part 86, the stakeholder, faced with competing claims to an asset in which it claims no interest itself, applies to the Court for directions as to whom the disputed asset should be paid or transferred. The application for directions is served on the competing claimants who, after acknowledging service, must serve a witness statement on the stakeholder setting out the grounds of their claim. The Court then makes directions as to how the stakeholder application is to be resolved, including directions as to what issues should be tried and who should be claimant and defendant. The stakeholder would not normally take any further active part in the proceedings.

3. Under CPR Part 11, a party wishing to dispute the jurisdiction of the Court to try a claim must make an application within 14 days after acknowledging service or else be treated as having accepted that the Court has jurisdiction to try the claim. In this case, the First Respondent ("MPV") did not make a Part 11 application in response to the claim made by the claimant stakeholder ("Stephenson Harwood") for directions, on the basis that this claim did not raise any substantive issues. MPV wishes, however, to dispute the Court's jurisdiction to determine the substantive issues raised by the claim of the Second Respondent ("Mr Kagan") in the stakeholder application.

4. Deputy Master Bartlett held that MPV was not entitled to do so; its failure to make a Part 11 application meant that it was to be treated as having accepted the Court's jurisdiction to determine all issues arising in the stakeholder application, including the issues raised by Mr Kagan.

5. On this appeal, MPV contends that the Deputy Master's decision was based on a misreading of CPR Part 11, that MPV did not have to make a Part 11 application in order to dispute the Court's jurisdiction to determine issues raised by Mr Kagan and that the Court should order the monies which are the subject of the stakeholder application to be paid out to it. In response, Mr Kagan contends that the Deputy Master's interpretation of CPR Part 11 was correct, that MPV has submitted to the Court's jurisdiction and that, even if there had been no submission, the Court would have jurisdiction to determine the issues raised by Mr Kagan in any event.

Mr Kagan

6. Before setting out the background to the appeal, it is necessary to record that sadly Mr Irving Kagan, who was the original Second Respondent, died on 12 January 2020. On 3 February 2020, limited letters of administration were granted by the New York Surrogate Court to Mr Kagan's son, Mr Michael Kagan whom the Court substitutes as the Respondent to the appeal pursuant to CPR r.19.8(2)(a). In this judgment, references to Mr Kagan are to the late Mr Irving Kagan.

The background

7. In 2015 MPV, a Swiss company, brought patent infringement proceedings in the High Court against various parties. Stephenson Harwood were the solicitors on the record. Mr Kagan was a US Attorney practising and residing in New York. Mr Kagan had a consultancy business called Kagan Consultants. Mr Kagan had previously worked with MPV and assisted MPV with the patent infringement proceedings.

8. The patent proceedings in the UK were funded by a litigation funding company which paid Stephenson Harwood's fees, the disbursements and a US$5,000 monthly fee to Kagan Consultants or Mr Kagan personally. The patent proceedings were settled, alongside concurrent German litigation, in late 2018 for a global costs-inclusive payment of US$6.5m which was to be paid to Stephenson Harwood.

9. In November 2018, prior to the receipt of the settlement monies, Stephenson Harwood was notified of the existence of a claim by Mr Kagan against MPV. Essentially, Mr Kagan asserted that he was entitled to a success fee for services provided in connection with the patent proceedings. The quantum of the success fee was estimated to be around US$570,000. It was further asserted by Mr Kagan that he had a proprietary claim to this sum when received by Stephenson Harwood as part of the settlement monies, preventing it from being released to MPV in Switzerland.

10. In response to Mr Kagan's claim, MPV denied that it had any contractual relationship with Mr Kagan personally. It contended that its relationship was with Kagan Consulting to whom nothing further was due.

11. On 8 January 2019 Stephenson Harwood received a tranche of the settlement monies on behalf of MPV. In view of the competing claims made in correspondence on behalf of Mr Kagan and MPV, it decided to set aside and retain the sum of $570,000 which remains in Stephenson Harwood's client account pending the outcome of these proceedings ("the Monies").

12. Further correspondence ensued in the course of which both MPV and Mr Kagan demanded that Stephenson Harwood pay the Monies to them and threatened legal action if their demands were not met. In these circumstances, Stephenson Harwood decided to make a stakeholder application to the court for directions.

The proceedings

13. The Part 8 Claim Form was issued on 30 January 2019 with Stephenson Harwood named as claimant and MPV and Mr Kagan as respondents. The details of the claim were set out in the Claim Form as follows:

> "The Claimant seeks relief by way of a stakeholder claim under CPR 86.2 for directions as to the payment of monies currently held in the Claimant's client account (in the sum of US$570,000) for provision to be made for the Claimant's costs and for such other relief as the court thinks fit to grant."

14. In the supporting witness statement, Richard Gywnne, a partner in Stephenson Harwood, set out the background and confirmed that Stephenson Harwood claimed no interest in the Monies, did not collude with any of the parties and was willing to pay the Monies into court or dispose of them as the Court directed.

15. On 14 February 2019 MPV and Mr Kagan filed acknowledgements of service. MPV's solicitors completed the acknowledgment of service form by ticking the box in Section B indicating that MPV intended to contest the claim and added the following details of the remedy they were seeking:

> "The First Defendant claims that the monies currently held in the Claimant's client account in the sum of US$570,000 should immediately be paid to the First Defendant together with accrued interest".

16. MPV's solicitors did not tick the box in Section C to indicate that MPV intended to dispute the Court's jurisdiction. Under Section E they stated that it had been agreed by Mr Kagan and MPV that they would exchange written evidence by 27 February 2019.

17. On 27 February 2019 the parties exchanged witness statements. MPV served a statement from Gerhard Lehmann, MPV's chief executive officer, in support of its claim that the Monies should be immediately released to MPV together with accrued interest. Mr Lehmann addressed the facts surrounding Mr Kagan's claim to a success fee, which he denied. He stated that he did not believe that the English court was the appropriate forum to determine the terms of the agreement between MPV and Mr Kagan or to determine what was agreed at a mediation which had taken place between the parties and that it should not try to do so in the stakeholder application. He confirmed that MPV had sufficient assets to pay any judgment obtained by Mr Kagan in the "the appropriate jurisdiction, which is likely to be a Court outside of the UK." He concluded by asking the court to make an order that Stephenson Harwood pay the Monies to MPV forthwith together with accrued interest.

18. This witness statement was the first occasion on which MPV had indicated that it might dispute the jurisdiction of the English court to resolve issues raised in the stakeholder application. The witness statement did not specify where the alternative appropriate jurisdiction might be.

19. By a letter dated 21 March 2019 to Mr Kagan's solicitors, MPV's solicitors said: "we do not consider it appropriate for the Master to determine the underlying claim pursued by Mr Kagan by way of a trial within the stakeholder claim. This is not the

jurisdiction in which to determine the claim." By a letter dated 28 March 2019, Mr Kagan's solicitors asked MPV's solicitors to say what the correct jurisdiction would be for Mr Kagan's contractual claim as they had refused to do so on the telephone. In a letter the following day, MPV's solicitors said that Mr Kagan was claiming the Monies on the basis of the disputed terms of his retainer and that this dispute could not be determined in England and must be determined in Switzerland. On 1 April 2019 MPV's solicitors wrote to the court to say that MPV would seek to treat the forthcoming hearing as a disposal hearing and ask for the immediate release of the Monies.

20. On 3 April 2019 MPV served a second witness statement from Mr Lehman rebutting points in Mr Kagan's first witness statement concerning the arrangements for payment of his fees.

21. At the hearing before the Deputy Master on 6 June 2019, it was argued on behalf of MPV that the Court had no jurisdiction to try the merits of the claim between itself and Mr Kagan, alternatively that it should not exercise that jurisdiction as a matter of discretion and it should either order the money to be paid or it should retain the money for a limited period in order to give Mr Kagan an opportunity to commence a claim in whatever jurisdiction he considered proper to recover the money. It was argued on behalf of Mr Kagan that, as MPV had not challenged jurisdiction in accordance with the provisions of CPR Part 11, it was now not open to it to do so and alternatively that MPV had by its conduct waived any objections to jurisdiction.

22. In his *ex tempore* judgment the Deputy Master held that CPR Part 11 applied to the stakeholder application and that, as MPV had failed to make a Part 11 application disputing the Court's jurisdiction, it was to treated as having accepted that the Court had jurisdiction to try Mr Kagan's claim.

23. The Deputy Master made directions requiring Mr Kagan to file and serve Points of Claim setting out his case to the beneficial entitlement to the Monies and for MPV to serve Points of Defence. On 15 July 2019 Mr Kagan served Points of Claim. The proceedings were then stayed pending the outcome of this appeal, for which permission was granted by Morgan J.

Stakeholder applications

24. A stakeholder is a person under a liability in respect of a debt, money, goods or chattels and competing claims are expected to be made against that person in respect of that debt, money, or those goods or chattels by two or more persons (CPR Part 86 r.1).

25. The stakeholder may apply to the court for directions as to whom the stakeholder should pay a debt or money or give any goods or chattels (CPR r.86.1(1) and (2)).

Unless made otherwise in an existing claim (in which case it must be made by application notice in accordance with CPR Part 23) the application must be made by a Part 8 claim form (CPR r.86.2(3)). The claim form must be accompanied by a witness statement stating that the stakeholder claims no interest in the subject matter in dispute other than for charges or costs, does not collude with any of the claimants and is willing to pay or transfer the subject matter as the court directs. The claim form must be served on all other persons who, so far as the stakeholder is aware, asserts a claim to the subject-matter in dispute CPR Part 86.

26. Within 14 days of being served with the claim form, a respondent must file and serve on the stakeholder and the respondents an acknowledgment of service stating whether the respondent contests the claim and, if the respondent seeks a different remedy from that set out in the claim form, what that remedy is (CPR r.8.3). The acknowledgement of service form (N9) directs the respondents to tick the appropriate box indicating whether they intend to defend the claim or contest jurisdiction.

27. A respondent must also, within 14 days of being served with the claim form, file and serve on the stakeholder a witness statement specifying any money and describing any goods and chattels claimed and setting out the grounds upon which such claim is based; CPR r.8.5 (3) and (4) and CPR r.86.2(6)).

28. On the hearing of a stakeholder application, the court may, amongst other things, order that an issue between the parties be stated and tried and may direct which of the parties is to be claimant and which defendant and give all necessary directions for trial (CPR r.86.4).

Disputing the court's jurisdiction

29. The procedure for disputing the court's jurisdiction is to be found in CPR Part 11 which includes the following provisions:

11 (1) A defendant who wishes to –

(a) dispute the court's jurisdiction to try the claim; or
(b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction o should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

(4) An application under this rule must –

(a) be made within 14 days after filing an acknowledgment of service; and
(b) be supported by evidence.

(5) If the defendant –

(a) files an acknowledgment of service; and
(b) does not make such an application within the period specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim.

The parties' contentions

30. Counsel for MPV submitted, in summary, as follows:

30.1 The purpose of a Part 11 application is to dispute the court's jurisdiction to try the claim set out in the claim form. The only claim in the claim form was Stephenson Harwood's application for directions. MPV did not dispute the jurisdiction of the Court to determine that application. It would only be at the hearing of the stakeholder application that the application would become a contested matter, the issues for determination between the respondents would be identified and the Court would decide which party was to be claimant and which defendant. It is only at that stage that questions of jurisdiction should be considered.

30.2 It was therefore not necessary for MPV to make a Part 11 application in response to Stephenson Harwood's claim. By not doing so, MPV was not to be treated as having accepted that the Court had jurisdiction to determine the separate claim made by Mr Kagan in the stakeholder application.

30.3 Moreover, it was wrong to require MPV to make a Part 11 application at a time when Mr Kagan had not identified the grounds of his entitlement to the Monies or the issues he wanted determined at a trial.

30.4 MPV has not by its conduct submitted to the jurisdiction as it has at all times made clear that it was not submitting to the Court's jurisdiction for any trial directions.

30.5 The Court does not have jurisdiction to determine the issues raised by Mr Kagan. It should order the Monies to be paid out to MPV.

30.6 The Master erred in the exercise of his discretion when giving directions for the trial of the issues requested by Mr Kagan.

31. Counsel for Mr Kagan submitted, in summary, as follows:

31.1 The CPR rules are clear and straightforward. A defendant who failed to dispute the Court's jurisdiction within 14 days of filing the acknowledgment of service as required by Part 11 is to be treated as having accepted that the Court has jurisdiction to try the claim.

31.2 In the context of stakeholder proceedings, "the claim" referred to in CPR Part 11 means the stakeholder claim brought by Stephenson Harwood and all related issues. The Deputy Master was therefore right to consider that MPV had, by failing to make a Part 11 application, unequivocally submitted to the jurisdiction of the court to determine issues raised by Mr Kagan in his claim.

31.3 By failing to make an application under Part 11, MPV had accepted or voluntarily submitted to the Court's jurisdiction. Where a party submits to the jurisdiction for one purpose he must be taken to have submitted to the jurisdiction for all purposes incidental to and connected with that action including, in this case, all issues raised by Mr Kagan's claim.

31.4 Alternatively MPV had submitted to the jurisdiction by its conduct in, amongst other things, actively engaging with the merits of Mr Kagan's claim and asking for the Monies to be paid out.

31.5 The Court had jurisdiction to determine Mr Kagan's claim in any event.

31.6 There were no grounds for interfering with the Deputy Master's exercise of discretion in giving directions.

The issues

32. The main issues raised by these contentions are as follows:

32.1 Does CPR Part 11 apply to a stakeholder application and, if so, what was the effect of MPV's failure to make a Part 11 application?

32.2 Did MPV by its conduct in engaging with the merits submit to the Court's jurisdiction?

32.3 If there was no submission by MPV, does the Court have jurisdiction to determine the issues raised by Mr Kagan's claim in any event?

32.4 Should the Court interfere with the Deputy Master's exercise of discretion in making directions?

Issue 1: Does CPR Part 11 apply to a stakeholder application and, if so, what was the effect of MPV's failure to serve a Part 11 application?

33. As noted above, CPR Part 11 requires a defendant who wishes to dispute the court's jurisdiction to "try the claim" to apply to the court within 14 days of filing its acknowledgment of service.

34. There is not usually any difficulty in identifying the scope of the "claim" referred to in CPR r.11.1, namely the claim for relief set out in the claim form. In the context of a stakeholder application brought under Part 8, the position is less straightforward. A stakeholder application (or an application of interpleader relief, as it was called before the introduction of CPR Part 86)) is the means by which a court compels competing claimants to the subject matter of the application to put forward their claims and have them adjudicated on, thereby enabling the stakeholder to drop out of the picture.

35. In *Glencore International A.V. v Shell International Trading Ltd* [1999] 2 Lloyd's Rep 692 Rix J described the claim for interpleader relief as follows:

> "It follows that the claim for interpleader relief (1) is an application to be released from proceedings, not a claim for any substantive right; (2) is conditional on at least the threat of adverse claims to the same subject-matter; (3) is further conditional on the applicant disclaiming any interest in that subject-matter; (4) typically results in the release of that applicant from any pending proceedings and (5) leads to the stating of an issue or issues between the claimants themselves (hence 'interpleader')."

36. Tomlinson J in C*ool Carriers AB and another v HSBC Bank USA and others* [2001] 2 Lloyd's Rep. 22 described the claim as follows:

> "…a claim to interpleader relief invokes two or more claims brought against the interpleading party. The decision made on an application by the interpleader is not the determination of the interpleader's substantive rights but, assuming interpleader relief is granted, the giving of procedural relief."

37. MPV contends that CPR Part 11 does not apply to a stakeholder's application for directions because the application is not a claim for substantive relief; MPV contends that the Court obviously has jurisdiction to give appropriate directions as permitted by CPR r.86.3 so that any application under CPR Part 11 would be futile. MPV further contends that CPR Part 11 is not applicable to claims brought by respondents within the stakeholder application because the respondents' claims have not been formally identified at the time when the claim form is served on the respondents and an acknowledgement of service required.

38. In my view, MPV's submission that the Court necessarily has jurisdiction to determine a stakeholder's application for directions, so that there is no point in disputing that jurisdiction, is misconceived. Although the stakeholder is claiming procedural relief in the form of directions rather than asserting a substantive right, a stakeholder application is nevertheless an *in personam* claim affecting the rights of the respondents. For example, if a respondent fails to respond to the application, the Court may summarily determine that the asset which is the subject matter of the application should be transferred to another respondent.

39. Issues of jurisdiction and enforcement of judgments between the UK and Switzerland are governed by the 2007 Lugano Convention ("the Convention"). By instituting proceedings against MPV, Stephenson Harwood is, in the terminology of the Convention, "suing" MPV; see *Canada Trust v Stolzenberg* [2002] AC 1. As MPV is being sued in a state other than the one in which it is domiciled (Switzerland), it would be necessary for Stephenson Harwood, in order to establish jurisdiction, to show a good arguable case that one of the special rules of jurisdiction in the Convention applied and that there was a serious issue of fact or law to be tried.

40. The need for a stakeholder to establish that a jurisdictional gateway applies to its claim is highlighted in the Schlosser report on the UK's accession to the Brussels Convention. This report has special status in the interpretation of the Brussels and Lugano Conventions (see paragraph 11.012 of *Dicey, Morris & Collins on the Conflict of Laws* (15th Edition)). In relation to Article 3 of the Brussels Convention which is in materially the same terms as Article 3 of the Lugano Convention and which provides that rules enabling jurisdiction to be founded on the presence within the United Kingdom of property belonging to the defendant are not applicable to person domiciled in a Contracting State, Professor Schlosser said as follows:

> "Interpleader actions (England and Wales) … are no longer permissible in the United Kingdom in respect of persons domiciled in another Member State of the Community, in so far as the international jurisdiction of the English or Scottish courts does not result from other provisions of the 1968 Convention. This applies for example, to actions brought by an auctioneer to establish whether ownership of an article sent to him for disposal belongs to his customer or a third party claiming the article."

41. It follows that it is open to a respondent to a stakeholder application, who is domiciled in a Convention State outside England and Wales, to challenge the jurisdiction of the Court to determine the application. In the event of a challenge, the stakeholder claimant would need to show a good arguable case that one of special rules of jurisdiction applied and that there was a serious issue of fact or law to be tried.

42. Where, as the present case, the stakeholder application is made under CPR Part 8, the procedural mechanism for challenging the Court's jurisdiction is CPR Part 11. The wording of Part 11 is apt to apply to the stakeholder application, being the claim which

the Court is being asked to try or determine. According to the editors of the White Book, CPR Part 11 "is available in all cases where the court's jurisdiction is challenged or its exercise opposed." There is, in my view, no valid reason for excluding a stakeholder application from the scope of CPR Part 11. I do not accept MPV's argument that, since CPR Part 11 would not apply to a stakeholder application made in the course of an existing claim, CPR Part 11 should not apply to a stakeholder application made by way of a new Part 8 claim. The two procedures are different.

43. Nor do I accept MPV's contention that a claim by a respondent to the subject matter of the stakeholder application (in this case, Mr Kagan) constitutes a claim which is separate for jurisdictional purposes from the stakeholder application, entitling MPV to dispute the Court's jurisdiction to determine issues raised by Mr Kagan, even though it did not dispute the Court's jurisdiction to determine the stakeholder application. The dichotomy which MPV seeks to establish between the stakeholder application and Mr Kagan's claim is, in my view, unfounded. Mr Kagan's claim is part and parcel of the stakeholder application, not a fresh action. In making a claim to the Monies, Mr Kagan is not, for the purposes of the Convention, suing MPV.

44. The fact that MPV did not know, within 14 days of filing its Acknowledgement of Service, what grounds were being put forward by Mr Kagan in in support of his claim to the Monies would *prima facie* not be relevant to its decision whether or not to dispute the Court's jurisdiction to determine the stakeholder application. But if it were relevant, MPV could have applied for an extension of time for making its Part 11 application, prospectively or, as in *Sawyer v Atari* [2005] EWHC 2351, retrospectively.

45. In short, I agree with the Deputy Master's conclusion that, as MPV did not make a Part 11 application disputing the Court's jurisdiction within 14 days after filing its acknowledgment of service (or at all), MPV is to be treated, pursuant to CPR r.11(5), as having accepted that the court has jurisdiction to determine the stakeholder application, including the making of any directions and the determination of any issues arising in the stakeholder application as to whether MPV or Mr Kagan is entitled to the Monies.

Issue 2: Did MPV by its conduct submit to the jurisdiction of the Court to determine the issues raised by Mr Kagan in any event?

46. If, contrary to my conclusion above, MPV is not to be treated as having submitted to the jurisdiction of the Court to determine the issues raised by Mr Kagan by reason of its failure to make a Part 11 application, it would be necessary to consider whether MPV has submitted to the jurisdiction by its conduct in any event.

47. The relevant principles are, in summary, as follows:

47.1 A person who would not otherwise be subject to the jurisdiction of the court may preclude himself by his own conduct from objecting to the jurisdiction and thus give the court an authority over him which, but for its submission, it would not possess. This principle is expressed in Article 24 of the Lugano Convention:

> "Apart from jurisdiction derived from other provisions of this regulation, a court of a member state before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction ..."

47.2 Making submissions on the merits does not amount to entering an appearance provided that an objection to jurisdiction has been raised before or no later than the making is considered under national procedural law to be the first defence put to the court; Case C-150/80 *Elefanten Schuh GmbH v Pierre Jacqmain* [1981] ECR 1671 at [17]; *Harada Ltd (trading as Chequepoint UK) v Turner* [2003] EWCA Civ 1695 at [29].

47.3 Where a defendant has contested jurisdiction no later than when filing its first defence on the merits in accordance with the rules of the Court, taking steps that are consistent with the making of a jurisdictional challenge will not amount to entering an appearance. By contrast, the taking of voluntary steps which are not consistent with a continuing intention to challenge the jurisdiction but which deal with the merits of the claim will amount to the entering an appearance; *Winkler v Shamoon* [2016] EWHC 271 (Ch) at [34].

47.4 National law must not contain rules which compel a defendant to enter an appearance and thereby submit to the jurisdiction in order to protect its position on the merits as such rules would impair the operation of the Convention. It is necessary to look first to national procedural rules to determine whether an appearance has been entered. Once that question has been determined as a matter of national procedural law, it is necessary to ask whether the result is consistent with the effective operation of the Convention; *Deutsche Bank AG v Petromena* [2015] EWCA Civ 226 at [21] and [22].

48. In the present case, MPV completed the acknowledgment of service form indicating that it intended to contest Stephenson Harwood's claim, did not tick the box saying that it intended to dispute jurisdiction and set out its own claim for payment of the Monies which it intended to pursue in the stakeholder application and stating its intention to exchange evidence. It then served and filed two witness statements in support of that claim addressing the merits and rebutting Mr Kagan's claim. MPV continues to maintain its claim for payment of the Monies on this appeal.

49. MPV's case that it has not submitted to the jurisdiction depends on the Court accepting the premise that it is open to MPV to distinguish for jurisdictional purpose between Stephenson Harwood's claim (in relation to which MPV has raised no

jurisdictional dispute) and Mr Kagan's claim made as part of the stakeholder proceedings (in relation to which MPV does dispute jurisdiction). It is on this basis that MPV simultaneously asks the Court to order payment of the Monies to itself, as a disposal of the stakeholder application, while disputing the jurisdiction of the Court to determine Mr Kagan's claim to the Monies.

50. In my judgment, this is not a tenable positon for MPV to adopt. As pointed out above in relation to the first issue, Mr Kagan's claim is part and parcel of the stakeholder application. It is not open to MPV to submit to the Court's jurisdiction in relation to the stakeholder application, seeking a direction that the Monies be paid out to it, while disputing the Court's jurisdiction to determine the issues raised by Mr Kagan. I agree with the submission made on behalf of Mr Kagan that a party which invokes the Court's jurisdiction cannot adopt an inconsistent attitude with regard to a claim made against it in the same proceedings. As observed by Rix LJ in *Glencore International AG v Exter Shipping Ltd* [2003] EWCA Civ 528 by reference to a foreign claimant in this jurisdiction:

> "He cannot say: "I came here only for the purpose of my claim. I am not willing to accept this jurisdiction for the purpose of my defendant's counterclaim."

51. In my judgment, MPV entered an appearance for the purposes of Article 24 of the Convention when it served its first witness statement asking the Court to pay the Monies to it pursuant to its powers in the stakeholder application and addressing the merits of Mr Kagan's claim, notwithstanding that in the witness statement it took issue with the Court's jurisdiction to determine issues raised by Mr Kagan. Treating the service of the first witness statement as the entering of an appearance in the context of the stakeholder application does not impair the operation of the Convention as MPV could have made clear that it disputed the jurisdiction of the Court to make any directions in the stakeholder application but it did not do so.

52. I therefore consider that if, contrary to my conclusion that MPV's failure to make a Part 11 application means that it is to be treated as having accepted the Court's jurisdiction to determine the issues raised by Mr Kagan in the stakeholder application, MPV submitted to the jurisdiction by its conduct.

Issue 3: Would the Court have jurisdiction to determine the issues raised by Mr Kagan in any event?

53. It was contended on behalf of Mr Kagan that, even if MPV has not submitted to the Court's jurisdiction by reason of its failure to make a Part 11 application or by reason of its conduct, the Court has jurisdiction pursuant to the Convention to determine Mr Kagan's claim to the Monies in any event.

54. Both parties approached this by reference to the jurisdictional gateways provided for in the Convention that would be available to Mr Kagan as claimant against MPV as defendant. As discussed above, however, the party which has brought the proceedings against MPV is Stephenson Harwood as stakeholder. The claim made by Mr Kagan in response to the stakeholder application was a claim to the Monies, directed at Stephenson Harwood as stakeholder. It was not a claim against MPV as defendant. The status of a respondent as either claimant or defendant in the stakeholder application depends on the discretionary directions made in the course of the application.

55. It follows that the question whether, absent MPV's submission, the Court has jurisdiction to determine the issues in the stakeholder application would depend on whether one or more of the jurisdictional gateways in the Convention are applicable to Stephenson Harwood's claim as stakeholder, as confirmed by the extract from the Schlosser report cited above.

56. Because of the basis on which MPV disputed jurisdiction, the application of jurisdictional gateways to the stakeholder claim was not explored in the evidence or at the hearing before the Deputy Master or on this appeal. I am not in a position to decide whether jurisdiction could have been established and it is not necessary for me to do so. I would only observe that, had the Court's jurisdiction been successfully disputed, this would have been an unsatisfactory outcome in as much as Stephenson Harwood would have remained in possession of the Monies in which it claims no interest and facing the competing, unresolved claims of the respondents. As it is, those claims can now be satisfactorily adjudicated upon by this Court.

Issue 4: Should the Court interfere with the Deputy Master's directions?

57. Given my conclusions on the first and second issues, there are no grounds for interfering with the directions for trial made by the Deputy Master.

Conclusion

58. The appeal is dismissed.