

Neutral Citation Number: [2024] EWHC 1662 (KB)

Case No: QB-2021-000470

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 28/06/2024

**Before:**

**GERAINT WEBB KC**  
**Sitting as a Deputy High Court Judge**

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**Between :**

<b>STUART LUNN</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>ANTARCTIC LOGISTICS CENTRE INTERNATIONAL (PTY) LIMITED</b>	<b><u>Defendant</u></b>
<b>(A company registered in the Republic of South Africa)</b>	

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**Christopher Loxton** (instructed by Fieldfisher LLP) for the Claimant  
**Sarah Crowther KC** (instructed by Hunters Law LLP) for the Defendant

Hearing date: 29 April 2024  
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**JUDGMENT**

**Introduction**

1. This judgment concerns the Defendant's application pursuant to Part 11 of the Civil Procedure Rules challenging the jurisdiction of the courts of England and Wales to determine the claim for personal injuries brought by the Claimant, Mr Stuart Lunn.
2. The claim concerns injuries sustained by Mr Lunn on 12 February 2018 whilst working as a self-employed aircraft engineer for a Malta-based company called Jet Magic Limited ("**Jet Magic**"). At the time of the accident he was in the process of carrying out checks on a Boeing 757 aircraft ("**the B757**") operated by Jet Magic, which was stationary on the blue ice airstrip of the Novolazarevskaya Air Base, also known as the Novo Air Base, Schirmacher Oasis, Queen Maud Land, Antarctica, ("**the Novo Airstrip**"). According to the Particulars of Claim, Mr Lunn is a British citizen and was resident in the UK at the material time.
3. The Defendant, Antarctic Logistics Centre International (Pty) Limited, is a company incorporated under the law of South Africa. At the material time it was the occupier and

operator of the Novo Airstrip pursuant to an agreement with the Russian Federation. The Defendant chartered the B757 aircraft to transport scientists and workers to and from research stations in Antarctica.

4. Mr Lunn claims that he stepped from the B757 onto a set of mobile stairs next to the aircraft and that then the stairs started to move on the ice as a result of the thrust of the jet engines from an I1-76 Ilyushin aircraft (“**the Ilyushin aircraft**”) which was taxiing directly in front. The stairs toppled over, causing Mr Lunn to fall to the ice suffering personal injury. In summary, the central allegation is that the Defendant was negligent in failing to manage the air traffic control on the Novo Airstrip so as to ensure that the taxiing Ilyushin aircraft was kept a safe distance from the B757 aircraft in circumstances in which there was a foreseeable risk of injury, including in respect of the use of the mobile stairs, if the Ilyushin aircraft was not kept at a safe distance.
5. Following the accident Mr Lunn was flown to a hospital in Cape Town, South Africa, where he remained for 5 weeks until he was transferred to a hospital in the UK for a further two weeks before being discharged to the care of his elderly mother in the UK.
6. The Defendant seeks to set aside the Order of Master Thornett dated 29 July 2021 permitting the Claimant to serve proceedings on the Defendant in South Africa and seeks a declaration that the court has no jurisdiction to try the claim or alternatively that it should not exercise any jurisdiction which it may have to try to the claim.

### **Procedural history**

7. The Claim Form was issued on 10 February 2021 and originally named five Defendants, including Jet Magic and two entities domiciled in Russia and associated with the Ilyushin aircraft; the Claimant has elected to proceed against the Defendant alone.
8. On 15 July 2021 the Claimant issued a without notice application for permission to serve the Claim Form out of the jurisdiction on the Defendant and sought an extension of time for service of the Claim Form. The application for permission to serve out was made under the jurisdictional gateway provided by CPR PD 6B para 3.1(9) on the basis that damage was sustained, or will be sustained, within the jurisdiction. The application was supported by a witness statement of Keith Barrett of Fieldfisher LLP, the Claimant’s solicitors.
9. By an Order dated 29 July 2021, sealed on 3<sup>rd</sup> August 2021, Master Thornett gave permission for the Claim Form to be served on the Defendant at its address in Cape Town, South Africa and for time for service to be extended to 29 January 2023.
10. The Claim Form and Particulars of Claim were served on the Defendant in South Africa on 24 August 2022. The Defendant acknowledged service on 1 February 2023. On 14 February 2023 the Defendant issued its application challenging jurisdiction pursuant to CPR Part 11.
11. There were then two hearings before Master Thornett, on 18 October 2023 and 11 January 2024, resulting in two reserved judgments. The first judgment, *Lunn v Antarctic Logistics Centre International (Pty) Ltd* [2023] EWHC 2856 (KB), concerned a number of procedural issues, including an unsuccessful challenge by the Defendant as to the validity of the Claim Form at the time of the application to extend time for service. No appeal was made against that decision.

12. The second reserved judgment, *Lunn v Antarctic Logistics Centre International (Pty) Ltd, Judgment No.2* [2024] EWHC 169 (KB), dealt with a further challenge in respect of the extension of time for the service of the Claim Form and various allegations by the Defendant that there had been material non-disclosure on the part of the Claimant in respect of the July 2021 application (see further [110] below). The Master determined, at [13], that there had been no material non-disclosure and that the Claimant had taken reasonable steps before requesting an extension of time. Having dealt with the various procedural issues, the Master noted that “the Defendant’s Application now proceeds on the sole remaining issue whether England and Wales is the proper place to bring the claim against the Defendant”. That issue now falls to be determined.
13. The Master’s Order dated 27 February 2024 dismissed that part of the Defendant’s Application seeking to set aside the Order sealed on 3 August 2021 on the basis that the extension of time to serve the Claim Form should not have been granted, permitted the parties to rely upon certain witness statements and provided directions for this hearing, listed for half a day on 29 April 2024. The Order refused permission for the Defendant to appeal the decision.
14. On 22 April 2024 the Defendant issued an application seeking permission from a High Court Judge to appeal the Order of 27 February 2024. The Claimant contends that this application was served out of time. In any event, the application was made too late for it to be listed to be dealt with at the hearing on 29 April 2024. No application was made to adjourn the hearing before me; no doubt the parties appreciated that this matter has already had a long procedural history and that it was appropriate to proceed with the substantive hearing without further delay.

### **The issues**

15. The requirements to be satisfied on an application for permission to serve a foreign defendant out of the jurisdiction were summarised by Lord Collins of Mapesbury JSC in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 (“*Altimo*”), at [71]:

“...the claimant ... has to satisfy three requirements: *Seaconsar Far East Ltd v Bank Markazi Jomhourī Islami Iran* [1994] 1AC 438,453-457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, ie a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success... Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context good arguable case connotes that one side has a much better argument than the other: see *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555-557, per Waller LJ affirmed [2002] 1 AC 1; *Bols Distilleries BV v Superior Yacht Services (trading as Bols Royal Distilleries)* [2007] 1 WLR 12, paras 26-28. Third, the claimant must satisfy the court that in all the circumstances [the relevant forum] ... is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.”

16. As to the jurisdictional gateway, the Claimant relies upon the first limb of the gateway provided by CPR PD6B, para 3.1(9), namely that a claim is made in tort where damage was sustained, or will be sustained within the jurisdiction. In *Brownlie v FS Cairo (Nile Paza) LLC* [2021] UKSC 45, [2022] AC 995 (“*Brownlie II*”) it was held that in

order to satisfy this limb there had to be some, not negligible, damage in England and Wales; see, in particular, [81] to [83].

17. The Defendant concedes that the Claimant's evidence of continuing symptoms from his injuries whilst in England is sufficient to establish an arguable case that the tort gateway is met.
18. The issues between the parties that fall for determination are, therefore, as follows:
  - a. The merits test: has the Claimant established that his pleaded case has a reasonable prospect of success / there is a serious issue to be tried on the merits (CPR 6.37(1)(b))?
  - b. Forum conveniens and discretion: has the Claimant established that England and Wales is the proper place to try the claim and, if so, in all the circumstances, ought the court to exercise its jurisdiction to permit service out of the jurisdiction (CPR 6.37(3))?
19. There is also a dispute between the parties as to the applicable law. The applicable law is relevant both to the determination of whether the Claimant's case has real prospects of success and to the determination of the forum issue.
20. In addition, the Defendant has advanced some further allegations, additional to those determined by Master Thornett, that the Claimant failed to give full and frank disclosure when seeking permission to serve out of the jurisdiction.

## **The applicable law**

### ***Rome II***

21. It is common ground between the parties that the issue of applicable law in relation to this claim falls to be determined by the rules of private international law contained in Parliament and Council Regulation (EC) 864/2007 ("***Rome II***").
22. Relevant recitals to Rome II include:

“(14) The requirement of legal certainty and the need for justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an ‘escape clause’ which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally it enables the court seised to treat individual cases in an appropriate manner.

...

(16) Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

(17) The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

(18) The general rule in this Regulation should be the *lex loci damni* provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an ‘escape clause’ from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.”

23. Article 4 of the Rome II Regulation provides as follows:

- “(1) Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
- (2) However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
- (3) Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.”

24. Article 23, habitual residence, provides that:

- “(1) For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.  
Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
- (2) For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.”

### ***Overview of the parties’ position on applicable law***

25. The Particulars of Claim contend that English law applies by virtue of Article 4(3) of Rome II on the basis that the jurisdiction of England and Wales has a manifestly closer connection to the claim than that of any other country. No particulars are pleaded as to that contention.

26. The main focus of Mr Loxton's submissions, on behalf of the Claimant, however, were that English law should be applied at this stage of the proceedings pursuant to the "default rule" or, alternatively, on the basis of the "presumption of similarity", namely that English law is substantially similar to any relevant foreign applicable law in relation to the core tortious principles arising in this case. He submits that English law should be applied unless and until the Defendant pleads a Defence in due course which alleges the application of foreign law and establishes its case in that regard.
27. The Defendant's application notice and the witness statement of Ms Kruger in support of the application contends that Russian law is the applicable law pursuant to Article 4(1) of Rome II on the basis that the Novo Airstrip is said to be located in an area which is subject to Russian jurisdiction and law. There is a disagreement between the parties as to whether the Novo Airstrip is in an area of Antarctica claimed by Norway or by Russia or both and, accordingly, as to what the "law of the country" should be deemed to be pursuant to Article 4(1) of Rome II in respect of damage occurring on the Novo Airstrip.
28. Ms Crowther KC, for the Defendant, also advances two further contentions in relation to the applicable law:
  - a. First, South African law is said to be the applicable law pursuant to Article 4(2) of Rome II on the basis that, pursuant to Article 23(2) of Rome II, the principal place of the Claimant's business should be deemed to be South Africa. It is said that as a self-employed engineer working on the B757 aircraft the Claimant's principal place of business was wherever the aircraft was located from time to time. It is contended that the aircraft was based in Cape Town, South Africa at the material time. It is submitted that this is relevant to the merits test as the Claimant has adduced no evidence of South African law, as well as to issues of forum.
  - b. Second, it is said that it is clear that English law does not apply to this case and that South African or Russian (or, potentially Norwegian) law applies and that "as there is no pleaded case of Russian, South African or Norwegian law, the case does not disclose any arguable case" and so the Claimant cannot succeed on the merits test.
29. Neither party seeks a determination of the law applicable under Article 4(1) for reasons explained at paragraph [38] below. In the circumstances, the primary dispute between the parties on applicable law for present purposes is whether English law should be deemed to apply at this stage of the proceedings pursuant to the default rule or the presumption of similarity, as Mr Loxton submits, or whether South African law is the applicable law pursuant to Article 4(2) of Rome II, as Ms Crowther submits.

#### ***Consideration of the potential application of Article 4(1) of Rome II***

30. The first witness statement of Mr Keith Barrett, solicitor for the Claimant, in support of the application for permission to serve out of the jurisdiction explains that, according to Wikipedia, Queen Maud Land, in which the Novo Airstrip is located, is a region of Antarctica claimed as a dependent territory by Norway and that the UK and Norway have apparently recognised each other's territorial claims, suggesting that the UK recognises Queen Maud Land as being part of Norway. He says that some of the activities on Antarctica are governed by the Antarctic Treaty of 1959, signed by the UK and eleven other nation states, but that the Treaty does not appear to apply in the circumstances of this case. Mr Barrett confirms that he had made enquiries with the

Foreign, Commonwealth and Development Office (“*FCDO*”) in an attempt to gain greater clarity. In his third statement he says that enquiries have also been made with the Russian Embassy in London about the ownership and control of the Novo Airstrip, that he had received an acknowledgement, but that no substantive response has been obtained. Mr Loxton confirmed orally that the Claimant’s enquiries, including in respect of the FCDO and National Archives, had not yielded any further clarification.

31. Ms Mirella Kruger, a Director of the Defendant, has provided a witness statement in which she says that the Defendant manages flights between Cape Town and Novo Airstrip under a co-operation agreement with the Russian Antarctic Expedition. I have not seen a copy of that agreement. She says that the Novo Airstrip is Russian owned and is part of a Russian Antarctic research station. The work of the Defendant is said to be part of the Dronning Maud Land Air Network Project which coordinates logistics as may be required by eleven countries with bases in Antarctica, including the UK, Norway, Russia and South Africa.
32. Ms Kruger notes that the Antarctic Treaty signed by Russia, South Africa and the UK, amongst others, set up a structure whereby all claims to sovereignty were frozen, not rejected or recognised. She says that pursuant to the Treaty acts and omissions in Antarctica of observers and scientific personnel and their staff are subject to the jurisdiction of the Contracting Party of which they were nationals. However, she says that the aircraft crew are not scientists or observers or support staff and so suggests that there is a lacuna in the treaty in respect of the Claimant. She says that the Defendant’s solicitors have contacted the FCDO to understand their interpretation of the Antarctic Treaty, but they have not heard back. She also notes that “the Antarctic Treaty suggests that where questions of jurisdiction arise then the relevant member states should discuss the issue to establish their views” and suggests that the application might need to be stayed pending discussions between South Africa, the UK and Russia.
33. Mr Stiebel, the Defendant’s solicitor, has provided a statement which exhibits certain documents. The only relevant document for present purposes is an Environmental Impact Assessment 2001 for the construction of the Novo Airstrip which states that the Russian Federation has ratified, at Federal Law Level, the Madrid Protocol on Environmental Protection to the Antarctic Treaty. The document does not set out any claims of sovereignty.
34. Mr Loxton relies on Mr Barrett’s statement as indicating that even if the Novo Airstrip is owned and controlled by Russia, it is located in an area which appears to be claimed by Norway and the UK appears to recognise the claims of Norway.
35. The Defendant’s position, as set out at in Ms Crowther’s skeleton argument, is that the applicable law is Russian law under Article 4(1) of Rome II on the basis that the Novo Airstrip is owned and operated by Russia. It is said to be a matter of “public record” that the Novo Airstrip is considered by the Russian Federation to fall within its territory and reference is made to the Environmental Impact Assessment (see [51] above) in support of this assertion.
36. In many, perhaps most, cases there will be little difficulty in establishing “the law of the country in which the damage occurs” within the meaning of Article 4(1). The potential difficulties which arise under Article 4(1) in relation to damage occurring in Antarctica, however, are clear.
37. In the context of a consideration of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (“**Rome I**”), Dicey, Morris & Collins on the Conflict of Laws

16 Ed, at 33-293, provides Antarctica as an example of a place which “is not a “country”...” and notes that where a person works in Antarctica it may not be possible to identify the law “of the country” in which that person habitually carries out his work for the purposes of Article 8(2) of Rome I. In such a case the authors note that Article 8(3) may apply, which provides that where the law applicable cannot be determined pursuant to Article 8(2), the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated. In the context of Rome II, the authors also note, at 35-035, the difficulties which may arise where damage occurs on a vessel while it is on the high seas, assuming Rome II applies at all to such cases.

38. It is generally appropriate for a court to grapple with, and determine, issues of law at a jurisdiction stage where such issues can be decided summarily: see *Tulip Trading Ltd (a Seychelles company) v Bitcoin association for BSV and others* [2023] EWCA Civ 83; [2023] 4 W.L.R. 16 (“*Tulip Trading*”) at [15], drawing upon *Altimo* at [84] and [86]. However, in the present case both Mr Loxton and Ms Crowther confirmed that they were not seeking a determination, at this stage of the proceedings, as to the application of Article 4(1). This is in circumstances in which both parties have been attempting to liaise with the FCDO and are still attempting to collate evidence as to the potential application of Article 4(1) to cases concerning damage which occurs in Antarctica. Thus, although the factual witness evidence adduced by both parties have made reference to the Antarctic Treaty and have suggested that the Treaty is not applicable to the facts of this case, neither party has considered it appropriate (and this is not a criticism) to address me on the detail of the provisions of the Treaty and I have not been provided with a copy of the text of the Treaty, nor associated documents, in the authorities bundle. I shall therefore refrain from venturing into a consideration of the impact, if any, of the Treaty on the issues of jurisdiction and applicable law.
39. Accordingly, all that can be said at the present time is that if Rome II applies at all to this claim (and the parties have, to date, proceeded on the basis that it does apply) then on the evidence currently before me, I am not in a position to determine whether Russian or Norwegian law, if either, applies pursuant to Article 4(1) of Rome II. As Mr Loxton correctly submits, the possibility of either Russian or Norwegian law applying is in any event irrelevant to the issue of forum (as opposed to the merits test) because no party is asserting that the claim should be heard in either Russia or Norway.

#### ***Consideration of the potential application of Article 4(2) of Rome II***

40. Ms Crowther KC’s primary contention in respect of applicable law is that Mr Lunn’s principal place of business at the material time was South Africa, that the Defendant is domiciled in South Africa and that South African law therefore applies pursuant to Article 4(2) of Rome II.
41. Ms Crowther drew my attention to the judgment of Jeremy Cooke J in *Wrigley v Wood* [2014] EWHC 3684 (Comm). In that case the claimant yacht captain sought permission to serve proceedings out of the jurisdiction on defendants based in Florida in respect of the recovery of a commission concerning the sale of a yacht. The claimant, relying on Article 4(2) of Rome I, contended that the contract was governed by English law as his principal place of business was situated in England. Article 19(1) of Rome I provides that the habitual residence of a natural person acting in the course of his business activity shall be his principal place of business. Although he resided in England, he spent 47 weeks of the year on his employer’s yacht which was based largely in the Mediterranean but also in the Caribbean and the USA. Jeremy Cooke J noted, at paragraph 20, that there was something artificial about seeking to ascribe a place in



relation to the claimant's business because of its itinerant nature. Any presumption based on the principal place of business would be weak and fall to be disregarded if the relevant contract were more closely connected with some other country. Further, in that case the terms of the relevant contract provided for payment to be to an account in Monaco and the terms of the claimant's employment showed that he had a bank account in Jersey. The evidence was that the claimant was not subject to tax in the UK. The judge concluded that, on the evidence, "I cannot see how he has any place of business worthy of the name, but certainly not one within this country". He concluded that the contract was most closely connected with Florida.

42. In his fourth statement Mr Barrett says that "the Claimant is an individual. He does not have a principal place of business. At the time of the material incident he was permanently resident in Rochdale, England. He lived in Spain from 2003 to 2015 but has never been habitually resident in South Africa. At the time of the material incident, the Claimant declared all his personal income to HMRC." Mr Lunn confirms that evidence in his witness statement of 17 October 2023.
43. Ms Crowther's submissions included the following:
  - a. The Defendant's business involved providing an international link from South Africa to Antarctica. It contracted with Jet Magic as a carrier and the charter of the B757 was "for several return trips over the course of many weeks";
  - b. The B757 was based "for a period of about 6 to 8 weeks in Cape Town" and the Claimant has "probably been living in Cape Town for the purposes of fulfilling his obligations to Jet Magic under the services contract";
  - c. Mr Lunn had elected not to inform the court as to the terms of the contract of services which he was fulfilling at the time of the accident and so "the only inference which can be drawn is that the contract points away from England and Wales in terms of the obligations";
  - d. The fact that Mr Lunn was in hospital for five weeks in Cape Town is consistent with him not needing to be repatriated to any other country of habitual residence;
  - e. The Claimant has returned to his self-employment with Jet Magic and so continues to be peripatetic and does not appear to have had consistent physical location in England and Wales as at the time proceedings were issued or since;
  - f. No documentary evidence has been provided to support Mr Lunn's statements as to his permanent residence or as to what tax he paid in the UK at the relevant time. Further, his tax position is said, in any event, to be irrelevant.
44. Mr Loxton rightly cautions that not all of those submissions are supported by the evidence. As to (a), details of the length of the charter of the B757 or of the number of trips have not been provided. As to point (b) there is no evidence to support the assertion that the B757 was based in in Cape Town for 6-8 weeks at the material time, and the assertion that the Claimant was probably living in Cape Town is mere assertion and is contrary to the evidence of Mr Lunn that he resided in England at all material times. As to (c), Mr Loxton stated that the relevant one-page contract between the Claimant and Jet Magic has previously been disclosed and that it does not have a jurisdiction or choice of law clause and does not specify any location for performance of the services. As to (d), I do not have evidence as to whether it would have been appropriate for Mr Lunn to have been repatriated to England any earlier having regard to the injuries he sustained. In respect of (e) there is no evidence as to the Claimant's current employment circumstances, even assuming that his current employment is relevant to the issues to be determined.

45. As to (f), it is correct that I have not seen documentary evidence to support Mr Lunn's statements as to his permanent residence or in respect of his tax. For present purposes, however, it is appropriate, in my view, to proceed on the basis of the witness evidence before me.
46. The Defendant's skeleton argument criticises Mr Lunn for making a "bare assertion that his principal place of business at the time of the tort was England". However, it is the Defendant, not the Claimant, who seeks to advance a positive case based on Mr Lunn's principal place of business. As noted at [42] above, Mr Barrett, for the Claimant, states in his fourth statement that Mr Lunn does not claim to have a "principal place of business" as such; he is a self-employed professional working where the work takes him.
47. Having regard to the totality of the somewhat limited evidence before me, I do not accept the Defendant's contention that Mr Lunn's principal place of business should be deemed to be South Africa for the purposes of Articles 23 of Rome II. The evidence before me is that (a) Mr Lunn is a British citizen, (b) he was permanently resident in Rochdale, England at the time of the accident, (c) he has never lived in South Africa, and (d) he declared his personal income to HMRC at the relevant time. His work on the B757 took him to South Africa and to Antarctica, but there is no evidence before me (as opposed to assertions as to the inferences I should draw) to suggest that he spent considerable periods of time based in South Africa or that he primarily worked out of South Africa. Rather, he supplied his professional services on what he considered to be a self-employed basis to Jet Magic whilst remaining permanently resident in the UK. I therefore am satisfied that the Claimant's habitual residence for the purposes of Article 4(2) was not the same country as the habitual residence of the Defendant and therefore South African law is not the applicable law pursuant to Article 4(2).
48. I share the concern expressed by Jeremy Cooke J in *Wrigley v Wood* (see [41] above) that there is something artificial about seeking to place weight for jurisdiction purposes on the location of a place of business which is itinerant or peripatetic in nature. If and insofar as Mr Lunn can be said to have had a principal place of business at the material time, I consider that the weight of the evidence currently before me points, albeit somewhat weakly given the artificiality of applying the test to an itinerant business, to his principal place of business being England.

***Consideration of the potential application of Article 4(3), the "default rule" and any "presumption" of similarity***

49. Whilst the Claimant's pleaded position is that English law should be held to apply pursuant to Article 4(3), Mr Loxton relied, at this stage of the proceedings, on the application of English law pursuant to the "default rule", or, alternatively, on the basis of a presumption of similarity.
50. Recital (18) of Rome II describes Article 4(3) as an "escape clause" from Article 4(1) and 4(2) where it is clear from all the circumstances of the case that the "tort/delict" is manifestly more closely connected with another country. If, unusually, no foreign law can be established as being the applicable law under Article 4(1) or 4(2) then, I can see an argument that, in such circumstances, the "high hurdle" that must usually be met in respect of Article 4(3) might be deemed to be set somewhat lower. In such unusual circumstances it might be appropriate to consider whether the court should have regard, under Article 4(3), to factors such as the habitual residence of the parties and to the place where indirect damage and/or consequential losses arose, which factors are excluded from consideration under Article 4(1): see, for example, the discussion of

related considerations in *Winrow v Hemphill* [2014] EWHC 3164 (QB) at [43] to [50]. No doubt the Defendant might contend, in such circumstances, that a range of other factors should also be taken into account on a similar basis. In the event, in circumstances in which Mr Loxton placed reliance on the default rule and/or the presumption of similarity, I did not hear detailed submissions from either party as to the arguments which might ultimately be advanced in relation to the application of Article 4(3) and I say no more about those potential arguments.

51. In respect of the “default rule” and the “presumption of similarity”, both parties relied on the analysis and guidance provided by the Supreme Court in *Brownlie II*. In that case, the claimant brought claims in tort pursuant to Egyptian law, but no particulars of Egyptian law were pleaded and the claimant adduced little evidence as to the content of Egyptian law. Permission was granted to serve the claim form on the defendant out of the jurisdiction and the Court of Appeal dismissed the defendant’s appeal against that decision. The defendant contended on appeal that where foreign law applies pursuant to mandatory choice of law rules, it is wrong in principle to apply English law or any presumption that the applicable foreign law is similar to English law. The claimant relied on the proposition stated in rule 25(2) in *Dicey, Morris & Collins on the Conflict of Laws*, 15<sup>th</sup> ed (2012), para 9R-001 that, in a case where foreign law applies, “in the absence of satisfactory evidence of foreign law, the court will apply English law”.
52. Having noted the elision of the concepts of “a default rule” and of a “presumption” in *Dicey* and in certain judicial decisions, Lord Leggatt JSC, with whom Lord Reed PSC, Lord Lloyd-Jones, Lord Briggs and Lord Burrows JJSC agreed on this issue, said, at [112]:

“For my part, I think it is preferable in the interests of clarity not to treat the terms “presumption” and “default rule” as interchangeable and to recognise that they are two different rules which are conceptually distinct. So too are their respective rationales. The presumption of similarity is a rule of evidence concerned with what the content of foreign law should be taken to be. By contrast, the “default rule” (as I shall use that term) is not concerned with establishing the content of foreign law but treats English law as applicable in its own right where foreign law is not pleaded.”

53. As to the default rule, Lord Leggatt summarised the position as follows:

“113. The obvious objection to the default rule is that, where the relevant rules of English private international law provide that the law applicable to an obligation is the law of another country, it is the duty of the court to apply that system of law and not English law to the obligation. The answer given to that objection by those who defend the default rule is that, in an adversarial system such as that in England and Wales, if a party does not rely on a particular rule of law even though it would be entitled to do so, it is not generally for the court to apply the rule of its own motion. The issues in proceedings are defined by the parties’ statement of case. Thus, it is for each party to choose whether to plead a case that a foreign system of law is applicable to the claim; but neither party is obliged to do so and, if neither party does, the court will apply its own law to the issues in dispute.

114. I think this justification for applying English law by default is valid so far as it goes. Article 1(3) of each of the Rome I and Rome II Regulations provides that (with immaterial exceptions) the Regulation “shall not apply to evidence and procedure”. The rule that ... the court is not obliged to

decide a case in accordance with a rule of law on which neither party chooses to rely is a rule of English civil procedure.... In accordance with this procedural rule, the English court is not obliged to apply the choice of law rules contained in the Rome I and Rome II regulations if neither party chooses to assert in its statement of case that foreign law is applicable. That is so even if the case is one to which a foreign system of law would clearly have to be applied if either party chose to rely on that fact...

...  
116 The rationale for applying English law by default, however, depends upon neither party choosing to advance a case that foreign law is applicable. If either party pleads that under the relevant rules of English private international law foreign law is applicable to an obligation, and that case is well founded, it is the duty of the court to apply foreign law. To apply English domestic law in that situation would *ex hypothesi* be unlawful. In accordance with general principle, the burden is on the party who is making or defending a claim, as the case may be, to prove that it has a legally valid claim or defence. Where the law applicable to the claim or defence is a foreign system of law, this will require the party to show that it has a good claim or defence under that law.”

54. As to the presumption that foreign law is the same as English law, Lord Leggatt noted, at [119], that English courts have historically applied domestic law in cases where foreign law is recognised to be applicable, but the content of the foreign law has not been proved. Again, this presumption is part of the law of evidence and so is not affected by the Rome II Regulation. The application of that presumption, where it applies, is justified by a combination of three factors as set out at [123] - [125]; in summary: (a) there will often be similarities between the laws of different countries, particularly where the laws have a common origin; (b) unless there is a real likelihood that any differences between the applicable foreign law and English law on an issue may lead to a different outcome, there is no good reason to put a party to the trouble and expense of adducing evidence of foreign law; (c) the presumption of similarity does not itself determine any legal issue as it only operates unless and until evidence of foreign law is adduced; where the presumption applies, it merely places the burden of adducing evidence on a party who wishes to displace it and it is always open to a party to adduce evidence of the applicable foreign law showing that it is in fact materially different from English law on the point in issue.

55. At [126], Lord Leggatt emphasised the limits of the presumption:

“These factors provide good and pragmatic reasons for applying the presumption in a range of cases, but also determine its proper limits. There is no warrant for applying the presumption of similarity unless it is a fair and reasonable assumption to make in the particular case. The question is one of fact: in the circumstances is it reasonable to expect that the applicable foreign law is likely to be materially similar to English law on the matter in issue (meaning that any difference between the two systems are unlikely to lead to a different substantive outcome)”.

56. Guidance as to the application of the presumption was provided at [143] to [153], which I shall not repeat but to which I have had regard. For present purposes, I note in particular the first and fourth points of guidance. The first point, at [144], is that the presumption is more likely to be appropriate where the applicable foreign law is another common law system rather than a system based on Roman law, but that “[t]here are, however, ‘great and broad’ principles of law which are likely to impose an

obligation in all developed legal systems”. The fourth point of guidance, at [147], is as follows:

“Fourth, the procedural context in which the presumption is relied on matters. Self-evidently, there is more scope for relying on the presumption of similarity at an early stage of proceedings when all that a party needs to show in order to be allowed to pursue a claim or defence is that it has a real prospect of success. By contrast, to rely solely on the presumption to seek to prove a case based on foreign law at trial may be a much more precarious course.”

57. In the present case, for the reasons set out at [38] to [39] above, it has not been established that either Russian or Norwegian law is applicable under Article 4(1); nor can I be satisfied, on the present evidence, that there is a well-founded case (to adopt the words used by Lord Leggatt in *Brownlie II* at [116]) that Russian law applies, nor that Norwegian law applies, pursuant to Article 4(1). For the reasons set out at [47] above it has not been established (and nor do I believe there to be a well-founded case for arguing) that South African law is applicable under Article 4(2) of Rome II. It has also not been established that any foreign law is applicable under Article 4(3). In such circumstances it is appropriate, in my judgment, for the court to apply English law on the default basis at this jurisdictional stage.
58. In reaching that conclusion, I am mindful of the needs of both proportionality and practicality at the jurisdiction stage. Whilst the parties can, no doubt, expend further resources on trying to establish how Article 4(1) of Rome II should be applied on the facts of this case, whether such investment is warranted is, in large part, a matter for the parties. If the matter proceeds in this jurisdiction, then the Defendant will have the option of pleading, and attempting to establish, that foreign law applies, whether Norwegian, Russian or South African. It is, of course, possible that neither party elects to establish that any foreign law is applicable in such circumstances or that, if applicable, there are any material differences between that alleged applicable law and English law for the purposes of this claim.
59. If I am wrong on the above conclusion, then Mr Loxton’s fallback position of reliance on the presumption of similarity remains. Neither party has sought to adduce evidence to show that Norwegian law, Russian law or South African law is similar, or is dissimilar, to English law in respect of the key elements of tort with which this claim is concerned. This is, however, a case which has been pleaded very simply in respect of an alleged duty of care on the part of the Defendant as the alleged occupier and operator of the Novo Airstrip to take appropriate measures in respect of the health and safety of the Claimant working on the B757 aircraft on the airstrip. The Claimant contends that the Novo Airstrip is operated in accordance with international requirements. It is reasonable, in my view, to assume for present purposes, and in the absence of evidence to the contrary, that the relevant legal principles in respect of tort/delict are likely to be broadly similar to those under English law. The first point of guidance set out by Lord Leggatt in *Brownlie II* at [144] and [147] (see [56] above) is of relevance here: the “great and broad” tortious duties on the Defendant to take reasonable care which are alleged to be owed in this case might well be anticipated to have a counterpart in other developed legal systems. Further, the Claimant merely has to show that he has a real prospect of success at this early stage of the proceedings and so, again, it is appropriate, in my judgment, for the Claimant to rely on the presumption of similarity for present purposes in accordance with the fourth principle set out by Lord Leggatt at [147] (see [56] above).

60. In the circumstances, if I am wrong to conclude that English law should be applied on the default basis, then, I am satisfied that it is appropriate to proceed on the basis of a presumption of similarity in respect of any potentially relevant applicable law, whether Norwegian, Russian or South African for present purposes. Again, it will be open to the Defendant, if the claim proceeds in this jurisdiction, to plead and prove its case as to applicable foreign law and to adduce evidence, subject to the permission of the court, in respect of the alleged differences of any foreign law which is established to be applicable.

### The merits test

#### *Relevant legal principles*

61. The relevant principles have been considered in a number of authorities. I have had my attention drawn, in particular, to the helpful summaries provided by Lewison J in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and, more recently, by Birss LJ in *Tulip Trading* at [12], to which I have regard.
62. The merits test requires the court to determine whether there is a serious issue to be tried, which is the same as there being a real prospect of success; the test is the same as that for summary judgment under CPR Part 24 (see *Altimo*, at [71], set out at [15] above) and [82] and *Lungowe v Vedanta Resources plc* [2019] UKSC 20; [2020] AC 1045, at [42]). The court will not conduct a mini-trial, but may carry out a critical examination of the evidence.
63. As to the alleged factual basis of the claim, in *Okpabi v Royal Dutch Shell* [2021] UKSC 3; [2021] 1 W.L.R. 1294 at [22] Lord Hamblen JSC emphasised, in the context of proportionality, that:
- “...the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupported, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue.”
64. The court may have regard to evidence that can reasonably be expected to be available at trial, but will not proceed on the basis that “something might turn up”. As Lord Briggs JSC stated in *Vedanta*, at [45], “the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add or alter the evidence relevant to the issue”.
65. In addition, I was taken to the following helpful summary provided by Peter MacDonald Eggers KC (sitting as a Deputy Judge of the High Court) in *Boettcher v Xio (UK) LLP (in liquidation) and Others* [2023] EWHC 801 (Comm) at [41]:
- “It is worth noting that insofar as a good arguable case must be established, the meaning of good arguable case has been clarified by the Supreme Court in *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80; [2018] 1 WLR 192, para. 7 and by the Court of Appeal in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10; [2019] 1 WLR 3514, para. 72-80, and entails the following requirements:
- (1) The claimant must supply a plausible evidential basis for his or her position.

- (2) If there is a dispute of fact about or some other reason for doubting the claimant's position, the Court must take a view on the material available if it can reliably do so.
- (3) However, if the nature of the issue and limitations of an interlocutory application are such that no reliable assessment can be made, the good arguable case threshold is met by the plausible evidential basis even if it is contested. In this respect, where evidence is provided at an interlocutory hearing in the form of witness statements, such evidence generally should not be disbelieved unless it is incontrovertibly or manifestly wrong (*Kireeva v Bedzhamov* [2022] EWCA Civ 35; [2022] 3 WLR 1253, para. 34). Where, therefore, there is conflicting evidence provided by different witnesses, either that evidence is to be reconciled or, if it cannot be reconciled, the claimant's evidence is to be accepted for the purposes of the determination to be made at the interlocutory hearing, assuming it is plausible."

66. The Claimant's pleaded case is that when he stepped onto the set of mobile stairs placed next to the B757, the stairs began to move because of the thrust of the jet engines from the I1-76 Ilyushin aircraft and the stairs toppled over. He claims that the Defendant was negligent in failing to keep the Ilyushin aircraft at a safe distance from the B757. It is also alleged that the Defendant permitted or allowed the Claimant to use the mobile stairs when its employees or agents knew or ought to have known of the arrival and proximity of the Ilyushin aircraft.
67. Ms Kruger's statement reports a conversation that she says she has had with a Mr Vasily Kaliazin, the director of the Defendant. According to the Ms Kruger, Mr Kaliazin says that the crew of the B757 had had breakfast in the mess room on the airfield, but had not radioed for permission to enter the apron of the airfield and so the Defendant did not know that the Claimant or the other B757 crew were on the airfield. She says that "entry to the airfield or apron is prohibited and permission of the [Communication Centre] is required via radio". No written policies or procedures setting out the prohibition or the procedure to be followed to obtain such permission have been exhibited. Ms Kruger also states that "the airfield does not have a control tower and the [Communication Centre] is not elevated and visibility at the time of the incident was extremely poor and the weather was bad". The implication is that those staffing the Communication Centre would not have been able to see the Claimant on the airstrip or the apron. It is not clear from Ms Kruger's evidence whether Mr Kaliazin witnessed any of the relevant events and no statement has been provided from him or any other member of staff present in the Communication Centre on the day. Her statement also exhibits a one page statement (without a statement of truth) from a Mr Korygin dated 2 March 2018 who says he was working on the Novo Airstrip at the time, refers to decreased visibility, and which mainly describes events after the accident.
68. Mr Lunn has provided a witness statement responding to Ms Kruger's assertions. He says that the Defendant's representatives collected the B757 crew and delivered them "directly to the aircraft". Further, he says that visibility was good with little cloud cover. He exhibits what he says are film captures and photographs from his mobile phone from the morning of the accident showing good weather conditions. I have not seen the metadata to confirm the date or time of the photographs. He says that the exhibited film (I have not seen the digital footage) shows the Defendant's staff situated close to him at the bottom of the steps leading to the aircraft and that Ms Kruger is plainly wrong to say that the Defendant's staff did not know that the B757 crew were on the aircraft at the time. It is evident that there are issues of fact which, in due course,

will need to be determined in respect of the circumstances pertaining on the day of the accident.

69. Ms Crowther KC submits that there are no pleaded particulars in respect of the control which it is alleged that the Defendant had in respect of the Claimant's presence on the Novo Airstrip at the material time and that the Claimant knew that he ought not to enter the airstrip without permission or outside permitted times. It is said that there is no pleaded case that the Claimant was given permission to be on the airstrip at the material time or that the Defendant was aware that the Claimant was on the airstrip. Ms Crowther KC submits that it is not enough to show that had the Defendant been reasonably vigilant it would have known of the presence of the Claimant and therefore of the danger; she contends that it must be shown that the Defendant had actual knowledge of the facts that would lead a reasonable person to conclude that the Claimant was present.
70. I note that the short report of the incident by Fernando Isla, Base Commander, is silent on whether the B757 crew were or were not known to be working on the B757 at the time of the incident. No statement has been provided from Mr Isla at this stage.
71. Whilst it is correct that the Particulars of Claim do not allege, in terms, that the Defendant's staff knew, or should have known, that the B757 crew were on the B757 at the time of the incident, my reading of the pleading is that it proceeds on an assumption that the Defendant's staff knew of that fact.
72. It seems to me that, if and insofar as there is a factual dispute about whether the Defendant knew or should have known that the Claimant and other members of the B757 crew were on the airfield at the relevant time, then that is an issue which it is a matter for the Defendant to raise by way of its Defence. It is not a complete answer to the claim merely to allege that the Defendant did not have actual knowledge that the Claimant or other members of the B757 crew were on the airfield. If the Defendant's case is that the Communication Centre had no knowledge that the Claimant was present on the B757 at the material time then, of course, such a plea might raise consequential issues concerning the adequacy of the measures which the Defendant had in place to control access to the airstrip.
73. Ms Crowther KC also raises an issue as to the apparent inconsistencies in the Claimant's pleaded case and the available evidence as to who positioned the mobile steps next to the B757 and whether this was the crew of the B757 or the Defendant's employees. She rightly points out that the Particulars of Claim allege that the steps were positioned by the Defendant's staff, but that in a witness statement dated 14 July 2021 Mr Lunn says that the steps had been put in place by Jet Magic's staff. However he also says "shortly before the accident, members of the Defendant's staff attended to the mobile set of stairs". Mr Isla's report merely refers to the crew of the B757 positioning "the ladder" (i.e. the steps) by themselves. In my view, the Claimant's pleaded case does not stand or fall on the issue of who positioned the steps; the central allegations concern the Defendant's allegedly negligent operation of the Novo Airstrip in allowing the Ilyushin aircraft too close to the B757.
74. I am satisfied, on the evidence before me, that the Claimant has established that the cause of action asserted in the Particulars of Claim as to alleged negligence on the part of the Defendant in respect of the operation of the Novo Airstrip has a real prospect of success. The core allegation that the Defendant was negligent in failing to keep the Ilyushin aircraft at a safe distance from the B757 aircraft must, in my view, be taken to satisfy the relevant test of having a real prospect of success/raising a serious issue to be



tried on the merits. Disputed evidence about the precise sequence of events on the morning in relation to the positioning of the mobile stairs, the weather conditions and whether the staff in the Communication Centre knew or should have known about the presence of the Claimant on the B757 at the material time are all matters for determination at trial.

***Is England the proper place in which to bring the claim?***

***Relevant law***

75. The court will not give permission for service of proceedings out of the jurisdiction unless satisfied that England and Wales is the proper place in which to bring the claim (CPR 6.37(3)).

76. The applicable principles and the task of the court were explained, in *Altimo*, by Lord Collins of Mapesbury JSC, at [88], as follows:

“The principles governing the exercise of discretion set out by Lord Goff of Chieveley in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 475-484, are familiar, and it is only necessary to restate these points: first, in both stay cases and in service out of the jurisdiction cases, the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; second, in service out of the jurisdiction cases the burden is on the claimant to persuade the court that England .... is clearly the appropriate forum; third, where the claim is time-barred in the foreign jurisdiction and the claimant’s claim would undoubtedly be defeated if it were brought there, practical justice should be done, so that if the claimant acted reasonable in commencing proceedings in England, and did not act unreasonably in not commencing proceedings in the foreign country, it may not be just to deprive the claimant of the benefit of the English proceedings.”

77. In *Vedanta* Lord Briggs JSC, at [66], provided the further following guidance by reference to the above passage as follows:

“The best known fleshed-out description of the concept is to be found in Lord Goff of Chieveley’s famous speech in the *Spiliada* case [*Spiliada Maritime Corp v Cansulex Ltd*] [1987] AC 460, 475-484, summarised much more recently by Lord Collins in the *Altimo* case [2012] 1 WLR 1804, para 88 as follows: ‘The task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice ...’ That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred.”

78. Lord Lloyd-Jones JSC in *Brownlie II*, at [78-79], noted that whilst practical issues can feature large in the exercise of the discretion, the discretion is not limited to practical issues; the Latin tag of *forum non conveniens* is therefore something of a misnomer. It is not a question of “convenience”, but of establishing the appropriate forum; further, at [79]:

“The discretionary test of forum non conveniens, well established in our law, is an appropriate and effective mechanism which can be trusted to prevent the acceptance of jurisdiction in situations where there is merely a casual or adventitious link between the claim and England. Where a claim passes through a qualifying gateway, there remains a burden on the claimant to persuade the court that England and Wales is the proper place in which to bring the claim. Unless that is established, permission to serve out of the jurisdiction will be refused (CPR r 6.37(3)). In addition – and this is a point to which I attach particular importance – the forum non conveniens principle is not a mere general discretion, the application of which may vary according to the differing subjective view of different judges creating a danger of legal uncertainty. On the contrary, the principle applies a structured discretion, the details of which have been refined in the decided cases, in a readily predictable manner”.

79. I note, in passing, that in the following paragraph, at [80], Lord Lloyd-Jones observed that at first instance Nicol J had given weight to the fact that, to a significant extent, the claimant’s losses had been experienced in England: [2019] EWHC 2533 (QB) at [139 (viii)].
80. In addition, I was taken to the following helpful summary provided by Peter MacDonald Eggers KC (sitting as a Deputy Judge of the High Court) in *Boettcher v Xio (UK) LLP (in liquidation) and Others* [2023] EWHC 801 (Comm), at [88], albeit in the context of a challenge on *forum non conveniens* grounds:

“88. Having regard to the authorities and commentaries (which include *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 477-478, 481-482; *Konkola Copper Mines plc v Coromin* [2006] EWCA Civ 5; [2006] 1 All ER (Comm) 437, para. 27 ; *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5; [2013] 2 AC 337, para. 10 ; *Tugushev v Orlov* [2019] EWHC 645 (Comm), para. 263-264 ; *Lungowe v Vedanta Resources Plc* [2019] UKSC 20; [2020] AC 1045, para. 66, 75, 82-84; Briggs, *Civil Jurisdiction and Judgments* (7th ed.), para. 22.12-22.15; *Dicey, Morris & Collins on the Conflict of Laws* (16th ed.), para. 12.034-12.035), the factors which the Court can take into account in determining the question whether England is the more appropriate forum or another jurisdiction is the more appropriate include, but are by no means limited to:

- (1) The connection between the factual elements of the dispute to the competing jurisdictions.
- (2) The law governing the transaction.
- (3) The location of the parties to the dispute both at the time of the events giving rise to the dispute and also during the course of the proceedings.
- (4) Whether proceedings relating to the dispute between the applicant and the respondent would be fragmented by any order for or against a stay which the Court might make, and whether there would be concurrent proceedings in more than one jurisdiction, with the risk of inconsistent judgments being obtained in those jurisdictions.
- (5) The location and availability of documentary evidence (although whether this is a material practical consideration depends on the ease with which such documents can be digitally copied and transferred and whether there are caches of documents which require review only at particular locations).

(6) The location and availability of witnesses (bearing in mind that this last consideration may be mitigated if evidence can or is to be given remotely consistent with the requirement of a just and fair proceeding).

89. A consideration of the relevant factors will assist the Court in deciding where the warp in the litigation fabric leads to the location of the weight of the dispute, but the review of each of these factors should also be evaluated by a holistic view of the matter (*Erste Group Bank AG (London) v JSC 'VMZ Red October'* [2015] EWCA Civ 379; [2015] 1 CLC 706, para. 149; Briggs, *Civil Jurisdiction and Judgments* (7th ed.), para. 22.17)."

### ***Summary of relevant evidence and submissions***

81. ***Domicile of the parties:*** As noted above, the evidence is that Mr Lunn is a British citizen who has lived in Rochdale since returning from Spain in 2015 and has never lived in South Africa. Mr Lunn was in hospital in South Africa for five weeks after the accident, before returning to England to continue his recovery in hospital for a further two weeks and then at home. The Defendant's registered office and centre of operations is South Africa.
82. ***Documentary evidence:*** The Claimant's position is that the vast amount of quantum documents will be located in England, that liability documents should be capable of being obtained by the parties' lawyers, and that the overwhelming majority of documents will be in English.
83. The Defendant notes that relevant documents would be located in South Africa, including in respect of the Claimant's medical records for the five weeks he spent in hospital following the accident. Relevant medical records following the Claimant's return to England will be located in England.
84. ***Witnesses:*** Mr Barrett's second witness statement set out the witnesses which he says that the Claimant intends to call to give evidence at trial. He names six witnesses in respect of liability, namely: the Claimant himself, based in England, a Mr Crumpton of Jet Magic, based in England, a Ms Coimbra of Jet Magic, based in France, a Ms Serafin of Jet Magic, based in Portugal, a Dr Heitland, passenger, based in Germany, and a Ms Grech of Jet Magic, the pilot, based in Qatar. It is said that the Claimant also proposes to call six quantum witnesses, all based in England. The evidence before me is that there are a total of eleven factual witnesses of which eight are based in England, three in Continental Europe, and one in Qatar; all can conveniently attend a trial in England.
85. In addition, Mr Barrett explains that the Claimant has instructed an Orthopaedic Surgeon, Mr Hodgkinson, who is said to have seen the Claimant twice and to have produced two CPR Part 35 medical reports. Mr Barrett says that the Claimant will seek permission to rely on a medical report from a psychiatrist who will also be based in England and that he has instructed and received a liability expert report from a named expert based in Scotland.
86. The evidence of the Defendant as to the witnesses it would intend to call is less clear as I have not been provided with any comparable list of the names and locations of intended witnesses. My understanding is that there is an intention to call Ms Kruger, who is based in South Africa and, possibly Mr Korygin, also apparently based in South Africa. There may also be an intention to call Mr Isla, who I am told is an Argentinian citizen. A witness statement from Mr Puglia, the Defendant's South African lawyer,

says that Ms Kruger is 70 years of age and is currently in a wheelchair and has restricted mobility; although the statement also says that she has had to travel to Antarctica and to Russia, suggesting that she is still travelling internationally. It is said by Mr Barrett that there is no difficulty from the Claimant's perspective in Ms Kruger giving evidence by video link if necessary; she was not a witness to the incident itself.

87. There is a suggestion made by Ms Kruger in a witness statement that "many witnesses to this matter are Russian and I understand that they cannot travel to the UK because of visa issues". It is also said in the Defendant's skeleton that the Russian state will not consent to video link evidence. However, the Defendant has not identified the name of any witness domiciled in Russia who it proposes to call to give evidence. Nor have I seen any evidence indicating that any potential Russian witness who might be unable to travel to England to give evidence would nevertheless be able to travel to South Africa to give evidence, nor that any Russian witness would be unable to give evidence by video link from another country.
88. It is suggested by Ms Kruger that the Defendant's witnesses are all likely to be available to travel to Cape Town for the hearing of this matter and that, conversely, the Defendant would have to "fly a large number of people to London at great expense and inconvenience and with a very weak Rand at the moment this makes the legal costs in London prohibitive". Again, I have seen no list of potential witnesses and nor have I seen any evidence as to the financial position of the Defendant (or any evidence of any lack of relevant insurance) to support the assertion that the costs of a trial in London would be "prohibitive".
89. The Defendant's position is that the Claimant and the witnesses he proposes to call all live an "international life" and so the location of the Claimant is neutral. It seems that, in general, the witnesses which the Defendant might call could probably also be described as having an "international life".
90. ***Familiarity of the South African Courts with conditions in Russian airfields in Antarctica:*** It is suggested on behalf of the Defendant that even if Russian law applies, the South African courts will be familiar in dealing with the relevant standards applicable to a Russian airfield in Antarctica given that Cape Town is the international link for flights from those airfields. This submission draws upon an argument which has sometimes been advanced to the effect that weight should be placed on the fact that a foreign court has specialist expertise of a particular issue, referred to as "the Cambridgeshire factor" in *Spiliada* at pp 484-486 after the ship which gave its name to earlier litigation. However, I have seen no evidence to support the contention that the South African courts have specialist expertise in dealing with any relevant claims relating to matters in Antarctica, let alone to accidents on airstrips in Antarctica.
91. ***Recognition of foreign judgments in South Africa:*** It was suggested on behalf of the Defendant that there is no certainty that any judgment obtained in England will be enforceable in South Africa, that the South African courts would not have to recognise any judgment or order and that there is a real prospect that the matter would need to be re-litigated if the claims were tried in England. I have not been provided with any evidence or detailed submissions to support that contention.

### ***Analysis of the forum issue***

92. As set out above, the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. The burden is on the Claimant to persuade the court that England is clearly the appropriate forum. In

this case, the Defendant contends that South Africa, not England, is the appropriate forum.

93. **Place of the commission of the tort:** The place of the commission of the tort may frequently provide the starting point when considering the appropriate forum for a tort claim; see, for example, *VTB Capital Plc v Nutritek International Corp* [2013] 2 AC 337 (“*VTB Capital*”), at [51]. In the present case, however, neither party is contending the claim can or should be tried where the accident occurred, namely Antarctica (nor in Russia or Norway), so both parties accept that the trial should take place in a jurisdiction which is remote to the place of the commission of the tort.
94. **Applicable law:** In many cases the applicable law may also be a relevant factor when considering forum because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies; see, for example, *VTB Capital* at [45].
95. Whilst, as set out above, there is a possible issue as to the application of either Russian or Norwegian law under Article 4(1) of Rome II, no party is seeking to suggest that the appropriate forum is Norway or Russia. The only basis on which South African law is contended to apply is pursuant to Article 4(2) of Rome II, which contention I have, on the evidence before me, rejected. The Claimant’s case is that the applicable law is English law and I have set out why, at this stage of the proceedings, I consider it appropriate to proceed on the basis that English law applies under the default rule. Accordingly, this is not a case in which it can be said that the issue of applicable law favours an alternative forum as the appropriate place to bring the claim. Similarly, given that I am proceeding for present purposes on the basis of English law applying by reason of the application of the default rule, or alternatively on the basis of a presumption of similarity, the issue of applicable law does not strongly favour the claim proceeding in the courts of England and Wales.
96. **Limitation:** Mr Loxton submitted that I should have regard to the likely position in respect of limitation if the claim had to be re-commenced in South Africa. In *Altimo* Lord Collins of Mapesbury JSC provided the following guidance, at [88], in respect of limitation issues:

“...where the claim is time-barred in the foreign jurisdiction and the claimant’s claim would undoubtedly be defeated if it were brought there, practical justice should be done, so that if the claimant acted reasonably in commencing proceedings in England, and did not act unreasonably in not commencing proceedings in the foreign country, it may not be just to deprive the claimant of the benefit of the English proceedings.”
97. I am told that it was submitted before Master Thornett that the time limit for personal injury claims in South Africa is three years. However, no evidence has been adduced on this issue before me, nor as to whether limitation is treated as a defence which can be waived under South African law, or as a matter of prescription which cannot be waived.
98. Mr Loxton invited me to have regard to the fact that the accident occurred in February 2018, over 6 years ago, that it was originally issued in February 2021 and has already taken over 3 years to reach this stage of the proceedings. The effect of the submission was that, notwithstanding the absence of evidence on limitation under South African law, it would be reasonable to assume that there must be a risk, at the very least, that the Claimant would be barred by limitation from pursuing the claim if it had to be

restarted in South Africa. The Defendant has not undertaken to waive any limitation defence insofar as it is able to do so.

99. Whilst it is unsatisfactory that no evidence has been adduced in respect of the position on limitation under South African law, I consider that it is appropriate to recognise the possibility that the Claimant's claim might be limitation barred if he were required to commence a new claim in South Africa. Insofar as is relevant, I am satisfied that the Claimant acted reasonably in commencing proceedings in England and did not act unreasonably in not commencing proceedings in Norway, Russia or South Africa, particularly given that no party suggests that the claim should have been commenced in Norway or Russia and given that the Claimant is domiciled in England and was recovering from his injuries in this jurisdiction.
100. If I were to conclude that South Africa is the appropriate forum then it would be open to the court to stay the proceedings in this jurisdiction pending clarification of whether limitation issues arise in South Africa; see, for example, *Wrigley v Wood* at [35].
101. ***Factual focus of the litigation:*** The factual focus of the liability issues will be on the operation of the Novo Airstrip by the Defendant. The focus will therefore be on operations many thousands of miles away whether the litigation takes place in England or in South Africa.
102. ***Documentary evidence:*** There is no evidence before me to suggest that disclosure of relevant documents is likely to pose particular difficulties in either South Africa or England. This is not a case in which it is suggested that there are likely to be substantial quantities of relevant documents which are not in English.
103. ***Practical convenience and location of the witnesses:*** I have evidence that the Claimant intends to call six factual witnesses in respect of liability: two are based in England, three others in continental Europe and one in Qatar. If the trial is held in England, all can travel to England relatively easily.
104. Whilst I am somewhat sceptical as to whether all six witnesses identified by the Claimant in respect of issues of quantum would need to give evidence, I can see that some, at least, might give evidence and they are all based in the UK. In particular, it is apparent that the evidence of Mr Lunn himself will be of particular importance in respect of both liability and quantum and he resides in England even if he lives a somewhat peripatetic lifestyle in terms of his employment.
105. In general terms, I accept Ms Crowther's submission that the instruction of experts by a party, prior to permission being granted for expert evidence, is not a matter on which a court should place weight for the purpose of determining jurisdiction applications. However, in this case, it is entirely natural and reasonable that Mr Lunn, a British citizen, has been seen and assessed by medical experts in England in respect of his personal injury claim in circumstances in which he has been recuperating and residing in England following the accident. I note that the first report of Mr Hodgkinson, Consultant Orthopaedic Surgeon, is dated 15 August 2019 and so it is clear that he was instructed some time before the claim was issued and well before the application for permission to serve out of the jurisdiction. As Mr Lunn continues to reside in England (even if he travels abroad for work) it seems reasonable to anticipate that, in the future, any further medical assessments whether by experts instructed by the Claimant or by the Defendant may well take place conveniently in England.

106. In contrast, the evidence before me affords little clarity as to the witnesses who might be called by the Defendant. The two potential witnesses who are based in South Africa are Ms Kruger and Mr Korygin. As I understand the position, Ms Kruger did not witness the accident and it is not clear to what extent Mr Korygin can give direct evidence on issues of liability. There is no clear evidence before me to suggest that it will be unduly problematic for either Ms Kruger or Mr Korygin to fly to England to give evidence, but in any event, the Claimant has made clear that, as far as he is concerned, there would be no objection to Ms Kruger giving evidence by video-link if necessary. Mr Isla is said to be an Argentinian witness and I have no evidence before me to suggest that he can give evidence more easily in South Africa than in England.
107. Whilst assertions have been made on behalf of the Defendant that it would be necessary to fly “a large number of people to London” (see [88] above) if the claim proceeded here, I have seen no actual evidence, in terms of a list of proposed witnesses from the Defendant, to support such a contention.
108. In my judgment, having regard to all the circumstances, this is a case in which the real distinguishing features in favour of one forum rather than another are the practical considerations relating to the location of witnesses. The fact that the majority of the likely witnesses, insofar as they have been identified on the evidence before me, will be in England or can easily attend court in England, strongly favours England as the appropriate forum for the trial of this claim. Equally, the evidence before me does not support a conclusion that there are identified witnesses who are likely to be called to give evidence and who cannot attend a trial in England.
109. In those circumstances, I am satisfied that England is clearly and distinctly the appropriate forum for the trial of this dispute having regard to the interests of all the parties and the ends of justice.

***Alleged failures by the Claimant to comply with the requirements of full and frank disclosure***

110. Master Thornett’s second judgment (see [12] above), at [7], identified the points of alleged material non-disclosure relied upon by the Defendant at the hearing before him, namely: (a) failing to disclose the limitation period applicable to the claim; (b) failing to address the delay in making the application and to put relevant correspondence before the court; (c) failing to mention that the Claimant had previously indicated an intention to bring proceedings against the Defendant before the South African courts and (d) failing to mention that there had been correspondence on the possible application of Russian law. The Master found that there was no material non-disclosure. He clearly understood, as set out at [13], that the Defendant’s application would proceed on the remaining issue of whether England and Wales is the proper place to bring the claim.
111. Ms Crowther’s skeleton argument for the present hearing raises some further points of alleged non-disclosure, albeit those points were only touched upon briefly in her oral submissions. I shall deal with those new allegations below, which I understand not to have been raised before Master Thornett and which he has therefore not determined.
112. First, a point is taken in respect of the failure to deal with the law applicable to the Jet Magic contract and that “it seems unlikely it was an English law contract”. Mr Loxton’s response is that the employment contract has now been disclosed and it is silent on the issue of governing law or jurisdiction. In my view, if this issue was of any relevance at all to the matters to be determined by the court, it was of only peripheral relevance in

circumstances in which no claim was advanced against Jet Magic by the time of the application for permission to serve out.

113. Second, it is suggested by Ms Crowther that Mr Barrett's witness evidence in support of the application omitted to mention that the Novo Airstrip "was constructed by the RAE and falls within Russian territory and jurisdictional and legal competence or to make any reference to the Antarctic Treaty System which governs issues of sovereignty claims and rights in Antarctica". In my view, Mr Barrett's first statement does deal appropriately, if briefly, with the complexities in relation to competing claims over the Queen Maud Land at paragraphs 27 to 34 and, at paragraph 29, expressly mentions the Antarctic Treaty. It also mentions the attempts to gain greater clarity from the FCDO and National Archives. Furthermore, I note that the Defendant's evidence has not provided any significantly greater degree of clarity in respect of these issues.
114. Thirdly, it is suggested that Mr Barrett's first statement did not state where the Claimant's principal place of business was at the time of the accident. It is correct that Mr Barrett's statement is silent on the issue of the Claimant's principal place of business under Article 23 of Rome II, but it correctly summarises the relevant facts that Mr Lunn was a self-employed aircraft engineer contracted to Jet Magic, a Malta-based company, and was engineer in respect of a return charter flight from Cape Town to Novo Airstrip. I do not accept that the alleged failure to raise this possible line of argument in relation to Article 23 constituted a material non-disclosure and certainly not a deliberate or culpable non-disclosure.
115. In summary, insofar as these three additional points of alleged non-disclosure were pursued by the Defendant at all, I do not accept, on the facts before me, that they have any merit. I therefore do not propose to embark on a consideration of the relevant guidance, including that set out by Christopher Clarke J in *Re OJSC ANK Yugraneft v Sibr Energy plc* [2008] EWHC 2614 (Ch), at [102], as to the principles which govern the exercise of the court's discretion in the event of material non-disclosure.

### **Exercise of discretion and conclusion**

116. For the reasons set out above, the Claimant has, in my judgment, satisfied the burdens upon him to show (a) that the claim has a reasonable prospect of success, (b) that there is a good arguable case that the claim falls within the relevant jurisdictional gateway (a point rightly conceded by the Defendant), and (c) that England and Wales is the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice and is clearly and distinctly the proper place to bring the claim. In all the circumstances, I am satisfied that this is a case in which it is appropriate for the court to exercise its discretion to permit service of these proceedings out of the jurisdiction on the Defendant.
117. In those circumstances, the Defendant's CPR Part 11 application of 14 February 2023 seeking a declaration that the English court has no jurisdiction to try the claim or alternatively should not exercise any jurisdiction which it may have, and seeking to set aside the order of 3 August 2021 granting permission to serve proceedings on the Defendant out of the jurisdiction, is dismissed.
118. I am very grateful to both counsel for their very helpful written and oral submissions and for tailoring their oral submissions so as to enable the hearing to be dealt with in the allotted half day hearing.



