Neutral Citation Number: [2018] EWHC 389 (Admlty)

Claim No AD-2017-000036

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ADMIRALTY COURT (QBD)
ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 01/03/18

Before:

THE HONOURABLE MR JUSTICE BRYAN

B E T W E E N:

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THE OWNERS OF THE SHIP "AL KHATTIYA"

Claimants

-and-

THE OWNERS AND/OR DEMISE CHARTERERS OF THE SHIP "JAG LAADKI"

Defendants

Admiralty action *in rem* against the ship "JAG POOJA"

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Christopher Hancock QC and Thomas Macey-Dare
(instructed by **Reed Smith LLP**) for the **Claimants**
Robert Thomas QC and Benjamin Coffer
(instructed by **Ince & Co LLP**) for the **Defendants**

Hearing date: 22 February 2018

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Judgment Approved

THE HONOURABLE MR JUSTICE BRYAN

1. The parties appear before the Court on the hearing of the Defendants' application (i) to set aside an antisuit injunction granted by Knowles J on 25 April 2017, and (ii) to stay the Claimants' claim in this action (the "Claim") on *forum non conveniens* grounds.

2. The Claim arises from a collision (or allision) on 23 February 2017, in which the Defendants' VLCC "JAG LAADKI", collided with the Claimants' LNG carrier "AL KHATTIYA" at high speed, in a designated anchorage off Fujairah, while the "AL KHATTIYA" was lying stationary at anchor taking on supplies. The collision caused substantial damage to the "AL KHATIYYA". She proceeded to the N-Kom repair

yard in Ras Laffan, Qatar where that damage was repaired. Those repairs have now been completed and the "AL KHATIYYA" is back in service.

3. As will appear, the Defendants now accept that they are 100% to blame for the collision (as would appear to have been inevitable at all times given the facts identified above). In consequence this considerably limits the issues that can arise in relation to this dispute, specifically the only matters that can arise in relation to the Claim are matters of quantum, a point of significance in the context of the application for a stay on *forum non conveniens* grounds. In the light of the admission of liability, and should I dismiss the Defendants' application for a stay, I am invited to direct that judgment be entered against the Defendants, with damages to be assessed by the Admiralty Registrar in the usual way.

4. The Claimants are a Marshall Islands company operated in Qatar and wholly owned by Qatari interests. The Defendants are an Indian company with a large fleet of tankers trading worldwide, and in consequence they are, in that sense, present in almost all countries in the world. The Claimants founded jurisdiction for their claim against the Defendants in England as of right by serving the *in rem* Claim Form on the "JAG POOJA", a sister ship of the "JAG LAADKI", at Milford Haven on 22 March 2017. The right to found jurisdiction in this manner by serving on a vessel is a well-known and important feature of maritime law, which is applied around the world and is embodied in Article 1 of the 1952 Collision Jurisdiction Convention. As will appear, the fact that the Claimants have founded jurisdiction in this Court as of right has important consequences in the context of the application of the principles in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 476 ("*Spiliada"*), and the burden of proof in the context of the question of *forum non conveniens*.

B. Limitation

5. The Claimants' claim is for around US$ 30 million. It is apparent that the Defendants will seek to contest the quantum of the damages recoverable from them (which in large part consist of the costs of the repair and loss associated with the loss of use of the "AL KHATTIYA" during the time the repairs were being carried out).

6. Part of the backdrop to the action, and the proceedings that the Defendants have commenced in Fujairah (as addressed below), is the respective tonnage limitation regimes in the UK and the UAE. The UK is a party to the 1976 Limitation Convention as amended by the 1996 Protocol. Based on the tonnage of the "JAG LAADKI", the applicable limit in the UK at the present time is around US$ 53.5 million, well in excess of the Claimants' claim. The UAE is a party to the unamended 1976 Limitation Convention. Under that Convention, the applicable limit is around US$ 14.7 million. The UAE also applies a domestic limitation regime, in Article 141 of UAE Federal Maritime Law No. 26 of 1981, under which the applicable limit is around US$ 5.4 million.

7. It is accordingly self-evident that the tonnage limitation regime in the UK is more favourable to the Claimant, whereas that in the U.A.E. is more favourable to the Defendants.

8. In this regard on or about 4 April 2017 the Defendants issued two petitions (effectively urgent applications) before the Fujairah Court (the "UAE Petitions"),

seeking to constitute a limitation fund under the 1976 Convention. After a number of hearings the Fujairah Court ultimately held that it could not determine the issues concerning the establishment of the limitation fund by way of a petition. The Defendants then commenced two sets of substantive proceedings:-

i) In case number 395/2017 (the "UAE Fund Action"), registered on 21 May 2017, the Defendants sought to constitute a limitation fund. If the Defendants were to be successful, they could then attempt to use the machinery in Article 13 of the 1976 Convention to prevent the Claimants from enforcing any judgment they obtained in this action in any 1976 State Party, otherwise than against that limitation fund.

ii) In case number 370/2017 (the "UAE Limitation Action"), commenced on 11 May 2017, the Defendants sought to limit their liability in respect of the collision to the amount provided for by the 1976 Convention and to determine the amount of their liability, if any, up to those limits. If they were to succeed, they could then attempt to rely upon the Fujairan judgment by way of *res judicata* in this action or in any other proceedings which the Claimants brought to enforce an English judgment elsewhere.

9. Judgment at first instance was given in both cases on 11 December 2017. The Fujairah Court rejected both cases on the basis that the provisions of UAE law which give effect to the 1976 Convention do not apply to claims arising out of collisions. In the UAE Fund Action, the Court also held that a limitation fund could not be established because of the lack of any formal rules or regulations to govern the establishment of such a fund in the UAE. The Defendants' claims were accordingly dismissed in each of these cases. Accordingly, subject to any successful appeal, there will be no extant proceedings in the UAE going forward.

10. The Defendant is, however, appealing against the judgments in both claims. The Defendants submit that the first instance judgments are wrong asserting that collision damage falls within the category of "damage to property" which is expressly covered in the 1976 Convention and the enacting provisions of UAE law, and asserting the absence of regulations does not prevent the establishment of a fund. The evidence before me is that the appeals are expected to be finally determined by the end of September 2018.

11. The Claimants do not dispute that the Defendants are entitled to attempt to establish a limitation fund in Fujairah. However on 4 April 2017, shortly after the Claimants had founded jurisdiction in England as of right, the Defendants commenced an action in Fujairah claiming damages from the Claimants and their commercial managers (and beneficial owners) QGTC, and a declaration of non-liability, arising from the collision ("the UAE Liability Action").

12. The Claimants submit that that claim was hopeless, and that it was not properly arguable that the Defendants were entitled to the relief which they claimed in the UAE Liability Action and submit that the Defendants must have been aware of that at the time. Put simply it must have been obvious from the start, and before the UAE Liability Action was commenced, that the Defendants as owners of the "JAG LAADKI" were 100% to blame for the collision on the facts as I have already identified – with the "JAG LAADKI" colliding with a stationary vessel at a

designated anchorage. As Andrew Baker J put it in his judgment on an earlier disclosure application, the "JAG LAADKI" "crashed into" the "AL KHATTIYA" that was, as it were, minding its own business, lying stationary at a designated anchorage, taking on supplies. I consider the Claimants to be right in these submissions.

13. The Claimants have identified two possible explanations for why the Defendants might have brought the UAE Liability Claim in Fujairah:

    i) To improve their chances of obtaining a stay of the English proceedings on *forum non conveniens* grounds, by creating the appearance of a genuine dispute on the issues of liability and apportionment, for which Fujairah would arguably be the more appropriate forum.

    ii) To improve their prospects of establishing a limitation fund in Fujairah, by satisfying a precondition which the Fujairah court might impose, depending on how it construed Article 11.1 of the 1976 Convention – either that legal proceedings should have been brought **against** the Defendants in Fujairah by a party with a claim which is subject to limitation, or that the Defendants should **themselves** have brought proceedings in Fujairah, seeking a declaration that they are not liable for such a claim.

14. For its part the Defendants do not accept that those were the explanations for why they brought the UAE Liability Claim. However the Claimants say that the Defendants have never offered any sensible justification as to why the Defendants brought the UAE Liability Claim. Whatever the reason for the Defendants commencing the UAE Liability Claim, I am satisfied (as I address in due course below in relation to the application to set aside the anti-suit injunction) that the claim was without any merit, and indeed was vexatious and oppressive.

15. The Claimants say that they have not entered an appearance in any of the proceedings which the Defendants have commenced in Fujairah. Their position is that the proceedings have not been properly served on them under Fujairah law, and that the Fujairah court is not a court of competent jurisdiction under English law because the Claimants were and are not present in Fujairah. For its part the Defendants submit that the Claimants have been properly served and have taken part. Nothing turns on this dispute between the parties in the context of the applications before me.

16. On 27 April 2017 the Claimants applied on short notice to Knowles J for an interim antisuit injunction in the present Claim, requiring the Defendants to discontinue the UAE Liability Action and preventing them from commencing further proceedings in Fujairah seeking substantially the same relief, until the final determination of the Defendants' jurisdictional challenge or further order. The grounds for that application were that the UAE Liability Action was vexatious and oppressive, and that the English court had sufficient interest in or connection with that action to justify granting the injunction. The Defendants' solicitors submitted written arguments opposing the application but did not appear at the hearing. Knowles J granted the injunction.

17. The Defendants duly withdrew the UAE Liability Action in Fujairah. They subsequently issued the current application seeking to set aside the antisuit injunction,

and to stay this Claim on *forum non conveniens* grounds. The antisuit injunction is, by its own terms, due to lapse upon final determination of the Defendants' jurisdictional challenge, and both parties in their submissions before me have addressed the stay application first, before addressing the question of whether the anti-suit injunction should be set aside.

B. Applicable Principles: *Forum Non Conveniens*

B1. *Spiliada*

18. The Court's power to grant a stay on *forum non conveniens* grounds is discretionary. The applicable principles in relation to the granting of a stay *on forum non conveniens* grounds are well established and were common ground between the parties. The leading case remains *Spiliada Maritime Corp v Cansulex Ltd*, *supra*. As the Claimants have founded jurisdiction as of right in England, the principles governing the exercise of that discretion in the present case are as set out by Lord Goff in *Spiliada* at pages 476C and following. There are a number of important aspects to the principles, and they should not be lost sight of. They are worth quoting at length (my emphasis):

> "(a) **The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.**
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> (b) As Lord Kinnear's formulation of the principle indicates, in general **the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay** (see, e.g., the *Société du Gaz* case, 1926 S.C.(H.L.) 13 , 21, per Lord Sumner; and Anton, Private International Law (1967) p. 150). It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below).
>
> (c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established…
>
> …

A more neutral position was adopted by Lord Sumner in the Société du Gaz case, 1926 S.C.(H.L.) 13 , 21, where he said:

> "All that has been arrived at so far is that the burden of proof is upon the defender to maintain that plea. I cannot see that there is any presumption in favour of the pursuer."

context of a case where jurisdiction had been founded by the pursuer by invoking the Scottish principle that, in actions in personam, exceptionally jurisdiction may be founded by arrest of the defender's goods within the Scottish jurisdiction. Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions (see, e.g., *European Asian Bank A.G. v. Punjab and Sind Bank* [1982] 2 Lloyd's Rep. 356), or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum - in *The Atlantic Star* [1974] A.C. 436 (Belgium); in *MacShannon's case* [1978] A.C. 795 (Scotland); in *Trendtex* [1982] A.C. 679 (Switzerland); and in the *Abidin Daver* [1984] A.C. 398 (Turkey). **In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right** (*see MacShannon's* case [1978] A.C. 795, per Lord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in *MacShannon's* case [1978] A.C. 795 , 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the *Société du Gaz* case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in *The Abidin Daver* [1984] A.C. 398 , 415, when he referred to **the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting**

convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Crédit Chimique v. James Scott Engineering Group Ltd.*, 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

(e) **If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay**; see, e.g., the decision of the Court of Appeal in *European Asian Bank A.G. v. Punjab and Sind Bank* [1982] 2 Lloyd's Rep. 356 . It is difficult to imagine circumstances where, in such a case, a stay may be granted.

(f) **If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.** In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see *The Abidin Daver* [1984] A.C. 398, 411, per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff."

(emphasis added)

19. Accordingly:

(1) The legal burden is on the Defendants to persuade the Court to exercise its discretion in favour of granting a stay.

(2) The basic principle is that a stay will only be granted where the Court is satisfied that there is some other available forum, having competent jurisdiction, in which the Claimants' claim against the Defendants may be tried more suitably for the private interests of all the parties and the ends of justice in the particular case.

20. A two-stage test applies.

(1) Stage 1: The Defendants bear the burden of satisfying the Court that the Fujairan court is an available forum with competent jurisdiction to determine the Claimants' claim which is clearly or distinctly a more appropriate forum than England for the trial of the issues which remain to be determined in that claim, namely, quantum and limitation. If the Defendants fail to satisfy the Court of these matters, a stay will be refused.

When considering the question of appropriate forum, the Court will examine the factors connecting the claim to England, and to Fujairah, in order to

identify the forum (if any) with which the Claimants' claim has its most real and substantial connection (the "natural forum").

(2) **Stage 2**: If the Court determines that the Fujairah court is *prima facie* more appropriate, it must nevertheless refuse to grant a stay if the Claimants demonstrate that, in all the circumstances of the case, it would be unjust for them to be deprived of the right to trial in England.

The fact that the UAE applies lower limits is not a relevant consideration at stage – see *The Herceg Novi* [1998] 2 Lloyd's Rep 454 (CA) and *The Western Regent* [2005] EWCA Civ 985, per Clarke LJ at [51] and Rix LJ at [66].

21. The ultimate question is whether there is another forum where the claim can be tried more suitably than in England, for the interests of the parties and the ends of justice, such as would justify depriving the Claimants of their right to trial in England (see *Cherney v Deripaska* [2009] EWCA Civ 849 per Waller LJ at [19]).

22. The Claimants accordingly submit that I should be astute to take into account only those connecting factors which are likely to have a real and substantial effect on how the interests of these parties, and the ends of justice, will be served in this case; and to disregard those factors which are unlikely to have such an effect.

B2. Jurisdiction as of right and the burden of proof

23. During the course of the Defendants' oral submissions Mr Robert Thomas QC, on behalf of the Defendants, sought to emphasise what he characterised as the fortuity of jurisdiction having been established in England in the context of his submissions as to connecting factors with the respective jurisdictions. I do not consider that this gives proper recognition to the fact that jurisdiction was established as of right in England by serving the *in rem* Claim Form on the "JAG POOJA", a sister ship of the "JAG LAADKI", at Milford Haven on 22 March 2017, and the consequences of the same when applying the principles in *Spiliada*. The right to found jurisdiction in this manner by serving on a vessel is a well-known and important feature of maritime law, which is applied around the world and is embodied in Article 1 of the 1952 Collision Jurisdiction Convention. The Defendants trade their vessels around the world, including to the UK, and as such they are present in jurisdiction, and jurisdiction may be established as of right against them.

24. The fact that jurisdiction was served as of right has an important consequence as identified by Lord Goff in *Spiliada*, namely (in contrast to permission to serve out cases) to place the burden of proof upon the Defendant, and as Lord Goff emphasised (at page 477E):

> "the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right."

25. This principle is, and remains, the relevant principle to be applied in collision cases where jurisdiction has been founded, as of right, in this jurisdiction – see *The Po* [1990] 1 Lloyd's Rep. 418, 423.

26. The burden is accordingly upon the Defendants not just to show that England is not the natural or appropriate forum for the trial (if they can show that), but to establish that the UAE is another available forum which is clearly or distinctly more appropriate than the English forum. If they fail to do so their application stands to be dismissed.

27. Whilst on the question of burden of proof, Lord Goff also made clear that although the legal burden rests on a defendant at stage one, if a claimant seeks to establish the existence of particular facts or matters to assist it in persuading the Court not to stay the proceedings the claimant will bear the burden of proving those facts or matters (see *Spiliada* at page 476D-E).

B3. Available Forum

28. In the present case the Defendants submit that there is another available forum, Fujairah, which they submit is clearly or distinctly more appropriate than England for the resolution of the dispute. For their part, whilst the Claimants accept that the Fujairan court is an available forum with competent jurisdiction, in the sense that it would be open to the Claimants to institute a claim for damages there against the Defendants, the Claimants submit:-

    i) On a careful analysis of the facts it is not a forum which is clearly or distinctly more appropriate than England for the resolution of the dispute. Indeed the Claimants say that in circumstances where liability for the collision is admitted there are really very few connecting factors with Fujairah that are relevant in the context of a claim centred on quantum, and

    ii) In any event, the Claimants do not accept that the Fujairan court is available to them in practice in circumstances where Qatar and the UAE are currently engaged in a serious and protracted diplomatic dispute. As a consequence, the UAE has imposed various political and economic sanctions on Qatar, and on Qataris, including travel restrictions; and it has implemented laws and policies which punish criticism of its stance towards Qatar and expressions of sympathy with Qatar. The Claimants submit that the effect of these measures would be substantially to prevent the Claimants (whose ownership, management and control are in Qatar) from obtaining justice in the Fujairan courts in this case.

29. In relation to the second of these submissions, there is conflicting authority as to whether availability in practice of the alternative forum goes to Stage 1 of the two-stage test in *Spiliada*, or whether it is only relevant to Stage 2. In *Mohammed v Bank of Kuwait & the Middle East KSC* [1996] 1 WLR 1483 the Court of Appeal held that it went to both stages. In *Askin v Absa Bank Ltd* [1999] I L Pr 471 a differently constituted Court of Appeal acknowledged *obiter* that there might be substance to academic criticisms of *Mohammed*, that it impermissibly elided the two stages of the test. The court observed, however, that this would only matter if the case turned on the legal onus of proof; and it noted that the claimant in any event bore the evidential

burden of showing that the alternative court was not available. The Claimants submit that *Mohammed* remains binding on this Court.

30. The Claimants also rely on the Qatar factor in relation to whether Fujairah is the more appropriate forum, and in relation to injustice (Stage 2). Insofar as this factor is also relevant to the availability of Fujairah, the Claimants submit that they have discharged their evidential burden, and that the Defendants have failed to discharge their legal burden of showing that the Fujairah court is available in practice.

B4. The place where the tort was committed

31. The present case concerns a collision. In a collision in international waters there will often be no natural forum for the claim (a point recognised by Lord Goff in *Spiliada* at page 477, as already quoted above). In the present case the collision took place in Fujairan waters within the territorial limits of the UAE. This is described by the Defendants at paragraph 18 of their Skeleton Argument as "by far the most significant factor in determining the natural forum".

32. In this regard the Defendants seek to rely on the principle articulated in *Cordoba Shipping Co Ltd v National State Bank, The Albaforth* [1984] 2 Lloyd's Rep 91, that "the jurisdiction in which a tort has been committed is *prima facie* the natural forum for the determination of the dispute" (per Ackner LJ at p. 94 RHC) (applying the decision of the Privy Council in *Distillers Co. (Biochemicals) Ltd. v. Laura Ann Thompson* [1971] A.C. 458, 467F and 468D).

33. In the *Distillers* case, the Privy Council was concerned was concerned with the question of where a cause of action arose in the context of a claim against the English manufacturers of the drug thalidomide in the Supreme Court of New South Wales by a person affected by the use of the drug during pregnancy. It was not, therefore a *forum conveniens* case. In giving the opinion of the Privy Council Lord Pearson stated, at pages 467-468:

> "The Defendant has no major grievance if he is sued in the country where most of the ingredients of the cause of action took place... But when the question in which country's courts should have jurisdiction to try the action, the approach should be different: the search is for the most appropriate court to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor … It is manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did wrong"

34. These passages from the opinion of Lord Pearson were quoted by Ackner LJ in *The Albaforth* (a leave to serve out case) who stated (at page 94) that, "*These quotations make it clear that the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of the dispute*." Goff LJ also referred to the opinion of Lord Pearson, identifying the three possible theories in that case as to whether there was a cause of action which arose within the jurisdiction, and again quoted Lord Pearson's statement that, "*It is manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did wrong*". He stated at page 96:

> "where it is held that a Court has jurisdiction on the basis that an alleged tort has been committed within the jurisdiction of the Court, the test which has been satisfied in order to reach that conclusion is one founded on the basis that the Court, so having jurisdiction, is the most appropriate Court to try the claim, where it is manifestly just and reasonable that the defendant should answer for his wrongdoing. This being so, it must usually be difficult in any particular case to resist the conclusion that a Court which has jurisdiction on that basis must also be the natural forum for the trial of the action. If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum. Certainly, in the present case, I can see no factors which could displace that conclusion".

35. In *Berezovsky v Michaels* [2000] 1 WLR 1004, Lord Steyn (with whom the other two members of the majority agreed) described the *Albaforth* line of authority as "*well established, tried and tested, and unobjectionable in principle*" (p. 1014) he also referred to the fact that, *"Counsel accepted that he could not object to a proposition that the place where in substance the tort arises is a weighty factor pointing to that jurisdiction being the appropriate one*" (the reference to a "weighty factor" was also made by Lord Clarke in *VTB Capital plc v. Nutritek International Corp* [2013] 2 AC 337 at [217]). Lord Hope (dissenting), echoed what had been said by Ackner LJ in *The Albaforth*, stating (at page 1032) that, *"The principle that Ackner LJ articulated in The Albaforth ...provides the starting point, but no more than the starting point, for a correct application of the Spiliada principles."*

36. Before me, Mr Thomas submitted that the place where a tort was committed is always of itself a "weighty factor" regardless of whether, in fact, there are any connecting factors with a jurisdiction other than the fact that the tort was committed there. Mr Christopher Hancock QC, on behalf of the Claimants fundamentally disagreed. He submitted that fact:

> "… is of little or no relevance, in and of itself, in determining the most appropriate forum. On its own, it is incapable of having a real and substantial effect on the way that the interests of the parties and the ends of justice will be served. It is only relevant to the extent that it gives rise to other connecting factors, which themselves have such an effect."

37. I consider that the correct analysis is that of Lord Mance JSC in *VTB Capital plc v. Nutritek International Corp* [2013] 2 AC 337 in which the Supreme Court applied the *Albaforth* line of cases. Lord Mance JSC stated as follows at paragraphs [18] and [51]:

> "18 The *Albaforth* line of authority is no doubt a useful rule of thumb or a prima facie starting point, which may in many cases also prove to give a final answer on the question whether jurisdiction should appropriately be exercised. But the variety of circumstances is infinite, and the *Albaforth* principle cannot obviate the need to have regard to all of them in any particular case. The ultimate over-arching principle is that stated in *The Spiliada*…

> 51 The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a *prima facie* basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors."

38. The *Albaforth* line of authority is thus "*a useful rule of thumb or a prima facie starting point",* but in the context of a collision action (an international maritime tort), as with international transactions, it is likely to be over-simplistic to view the place of commission in isolation or by itself when considering where the appropriate forum for the resolution of any dispute is, and it is perfectly possible that the significance attaching to the place of commission may be dwarfed by other countervailing factors.

39. The *Albaforth* principle itself reflects the expectation that, in a typical tort case, the relevant connecting factors will tend to point towards the courts for the place where the tort occurred. This explains why English and other common law courts have often held that, on the particular facts of the collision cases before them, the place of the collision is also the most appropriate forum (the witnesses may be there, there may have been an investigation there, fixed property such as a jetty may have been damaged there or there may be other similar connecting factors). However what ultimately matters in the application of the *Spiliada* principles is a consideration of all the relevant connecting factors, and how they affect the interests of the parties and the ends of justice. That is why Lord Hope in *Berezovsky* stated that the *Albaforth* principle "*provides the starting point, but no more than the starting point, for a correct application of the Spiliada principles*" and Lord Mance in *VTB* recognised that the significance attaching to the place of commission may be dwarfed by other countervailing factors.

40. In a typical collision case (including all of the cases referred to by the Defendants which I identify below), there are likely to be a number of relevant factors capable of connecting the case to the place where the collision occurred such as e.g. the nationality of the ships and crews involved, the location of relevant witnesses and documents, or the fact that the local authority may have conducted a preliminary investigation into the collision. This reflects the fact that, in the typical case, liability and apportionment are in dispute (as was the case in all the cases referred to at paragraph 20 of the Defendants' skeleton argument save the *Caltex* case) and the evidence relevant to those issues tends to be more readily available at the place of the collision.

41. As an example of the application of *The Albaforth* principle and *forum non conveniens* in a collision context, the Claimants refer to the decision of the Hong Kong Court of Appeal in *The Peng Yan* [2009] 1 HKLRD 144. In that case the court upheld a refusal to stay a collision action on *forum non conveniens* grounds in favour of the Ningbo Maritime Court, PRC, notwithstanding that the collision had occurred

in PRC territorial waters. After referring to Robert Goff J's statement of principle in *The Albaforth*, Ma CKHC continued:

> "25. No doubt this is correct as far as it goes. However, as confirmed by this court in *Esquel Enterprises v Tal Apparel Ltd* [2006] HKCA 34; [2006] 2 HKC 384, this is but a starting point. The basic principle or test is that stated by Lord Goff of Chieveley and Hunter JA in *Spiliada* and *Adhiguna Meranti* (see paragraph 22 above). The decision of *The Albaforth*, of course, predated *Spiliada*.
>
> 26. I believe the underlying reason for *The Albaforth* principle is that, often in tortious claims, there are one or more elements that have a real connection with the place of the commission of the alleged tort. Thus, for example, where the extent of loss and damage (a requisite element to be proved in all tortious claims) in a particular location is an important issue, the place of the tort must be an important factor in determining the appropriateness of any given forum. *Distillers Co. (Biochemicals) Ltd. V Laura Ann Thompson* [1971] AC 458, an authority referred in *The Albaforth,* was a case involving the use of Thalidomide in Australia. Delivering the judgment of the Privy Council, Lord Pearson said at 468D :
>
> > "The defendant has no major grievance if he is sued in the country where most of the ingredients of the cause of action against him took place.
>
> 27. Other examples where the location of the tort is important from the point of view of the trial of the action include misrepresentation claims where the alleged misrepresentation is acted upon in a particular country: see *The Albaforth* itself; *Diamond v Bank of London and Montreal Ltd* [1979] QB 333.
>
> 28. It is therefore important when applying *The Albaforth* principle in the context of forum non conveniens applications, to examine just how close a connection there really exists with any given forum. In some cases, the place of the commission of the tort may be decisive; in others, perhaps not weighty at all. The underlying principle to be firmly borne in mind is the basic test in *The Spiliada* and *The Adhiguna Meranti*. The place of the commission of the tort may in some cases be quite fortuitous and may provide no more than a convenient starting point or prima facie position. The court is required to look into more substantial factors in the application of the basic test."

42. Paragraph 28 of the judgment of Ma CJHC was cited with approval by Belinda Ang Saw Ean J in the High Court of Singapore in The Reecon Wolf [2012] SGHC 22 at [49]. I consider that the sentiments expressed at paragraph 28 of the judgment (which is the paragraph dealing with *forum non conveniens*) are entirely consistent with what was said by Lord Mance in VTB, and the fact that one must have regard to all connecting factors when applying the Spiliada principles.

43. The Defendants refer to a series of first instance decisions in which the court has ultimately found that, on the facts of those cases, the natural forum was the location of the collision:

i) *The Atlantic Star* [1974] AC 436 in which the House of Lords stayed English proceedings arising out of a collision in Belgian waters between a Dutch container vessel and Dutch-owned barge in favour of the Belgian courts.

ii) *The Wellamo* [1980] 2 Lloyd's Rep 229, in which Sheen J held that Sweden was the natural forum for a claim arising out of a collision in Swedish territorial waters between a Finnish ship manned by a Finnish crew and carrying a Finnish pilot, and a Belgian ship in the care of a Swedish pilot.

iii) *The Abidin Daver* [1984] AC 398, in which the House of Lords upheld the decision of Sheen J to grant a stay of English proceedings arising out of a collision between a Cuban ship and a Turkish ship in Turkish territorial waters.

iv) *The Sidi Bishr* [1987] 1 Lloyd's Rep 42, in which Sheen J held that Egypt was the natural forum for an action arising out of a collision in Alexandria harbour between an Egyptian ship and a Moroccan ship (although he refused to grant a stay on other grounds).

v) *The Vishva Ajay* [1989] 2 Lloyd's Rep 558, in which Sheen J held that India was the natural forum for a claim arising out of a collision at an Indian port between one Indian and one foreign ship (while declining to grant a stay on other grounds).

vi) *The Xin Yang* [1996] 2 Lloyd's Rep 217, in which Clarke J stayed English proceedings arising out of a collision at a Dutch port in favour of the Dutch Court on the basis (inter alia) that Holland was the place of the collision.

vii) *Caltex Singapore v BP Shipping (The British Skill)* [1996] 1 Lloyd's Rep 286 which concerned an allision between the English defendant's ship and the plaintiffs' jetty, in Singapore. Granting a stay of the English proceedings, Clarke J held that "*the fact that the tort and the damage occurred in Singapore is in my judgment a significant factor*" in favour of Singapore as the natural forum (see page 289 RHC).

viii) *The Herceg Novi and The Ming Galaxy* [1998] 1 Lloyd's Rep 167 in which Clarke J held that the fact that the collision had occurred within Singaporean territorial waters was "*a significant factor*" pointing towards Singapore as the appropriate forum.

ix) *The Kapitan Shvetsov* [1998] 1 Lloyd's Rep 199 in which the Hong Kong Court of Appeal held Thailand to be the natural forum for a claim arising out of a collision between a Russian ship and a Singaporean ship in a Thai river.

x) *The Reecon Wolf* [2012] SGHC 22 in which the Singapore High Court held that Malaysia was the natural forum for the resolution of disputes arising out of a collision Malaysian territorial waters.

44. In three of those cases, reference was made to the *Albaforth* principle - *The Herceg Novi* (p. 178 LHC), *The Xin Yang* (p. 223 LHC) and *Caltex Singapore v BP Shipping* (p. 290 RHC).

45. The Defendants acknowledge that in all of these cases the Court's decision to stay the proceedings has turned on a number of factors, the location of the collision being only one. In all of the cases relied upon by the Defendants, save *Caltex,* liability was in issue. In *Caltex* the defendant shipowner in that case had admitted liability for damaging the claimant's jetty. Clarke J held that "*the fact that* ***the tort and the damage*** *occurred in Singapore is in my judgment a significant factor*" (emphasis added). That conclusion reflected the fact that the applicable law was Singaporean law and that, as the learned judge went on to hold (at p 290), most if not all evidence relating to *quantum* was in Singapore. As will be seen, the same is not true in relation to quantum evidence in the present case.

46. For its part, the Claimants refer to the decision of Sheen J in *The Po*, supra, in which he concluded that, on the evidence before him, the place of the collision (Brazil) was not a more appropriate forum than England. Sheen J was the judge in many of the cases relied upon by the Defendants, and as such he was familiar with the relevant principles in relation to *forum non conveniens* in collision cases. His decision was upheld on appeal ([1991] 2 Lloyd's Rep 206).

47. Lloyd LJ, giving the leading judgment, accepted that the judge had *"had the relevant principles in mind"*, and was *"not persuaded that [any of the] connecting factors are sufficiently strong that the Judge ought to have granted a stay"* (p 214 LHC), whilst Nourse LJ, agreeing, was *"unable to detect any error of principle in Mr. Justice Sheen's approach*" (p 215 LHC). Ralph Gibson LJ, dissenting, concluded that the judge had erred in principle (p 218 LHC – 219 LHC), by not treating as relevant the fact that the local authorities had conducted an inquiry into the collision, and by having regard to the fact that the defendants had separately applied to stay the proceedings in favour of a different place (Italy). Exercising his discretion afresh, he held "*with diffidence*" that the defendant had shown that Brazil was clearly the more appropriate forum on the basis that, according to the evidence, relevant witness evidence would be more readily obtainable in Brazil, and the crew of one of the vessels was Brazilian (p 219 RHC - 220).

48. The Claimants submit that the *Albaforth* principle does not assist the Defendants on the facts of the present case, liability having been admitted, and there being (says the Claimants) a dearth of relevant factors capable of connecting the case to the place where the collision occurred. In consequence whilst the place of the collision is the starting point, the mere fact that the collision took place in Fujairah waters does not render it the appropriate forum for the trial of the action, and when all factors are taken into consideration Fujairah is not the appropriate forum and the Defendants have not discharged the burden upon them that it is the forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

49. The Claimants also submit that there are two further reasons why the *Albaforth* principle does not assist the Defendants.

50. First, the principle is most often invoked by a claimant who has commenced proceedings in the place where the alleged tort occurred, in order to obtain permission

to serve out of the jurisdiction or to resist a stay on *forum non conveniens* grounds. Most of the reported cases of any description in which the principle has been invoked, including *The Albaforth* itself, and *Berezovsky* and *VTB***,** are permission to serve out cases. All, save for the first-instance collision cases referred to above and two other cases (the pre-*Spiliada* case of *The Forum Craftsman* [1985] 1 Lloyd's Rep 291 and *BMG Trading v McKay* [1998] I L Pr 691), are cases in which the party invoking the principle was the claimant.

51. It is submitted that the justification for the principle in such cases is that *"it is manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did the wrong"* per Lord Pearson in *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 478, cited with approval in *The Albaforth cit.* by Ackner LJ at p 94 and by Goff LJ at p 96, and that such reasoning does not apply where the defendant seeks to remove the case from the claimant's chosen jurisdiction to the place where the tort was committed, as in the present case. It is not "*manifestly just and reasonable*" that a claimant should have to pursue his claim in the country where the defendant committed the wrong.

52. I am not convinced that this would be a valid reason to ignore *The Albaforth* principle (or at least to ignore the relevance of the place of commission of the tort). Ultimately the question is whether there is another forum where the claim can be tried more suitably than in England for the interest of the parties (that is both parties) and the ends of justice, such as would justify depriving a claimant of its right to trial in England. The place where the tort occurred is one of the factors to be considered in that regard. The Claimants' interests (having established jurisdiction as of right in England) are protected by the burden of proof being upon the Defendants to show not just that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum.

53. Secondly, it is said that the *Albaforth* principle is especially weak, even as a rule of thumb or *prima facie* starting point, where the connection between the party seeking to rely upon it and the place where the tort was committed is itself tenuous. I agree that this consideration becomes weaker where the connection between the party seeking to rely upon it and the place where the tort was committed is itself tenuous. See, in this regard, the judgment of the Court of Appeal in *Lewis v King* [2004] EWCA Civ 1329 at [27]:

> "Thus the starting-point for the ascertainment of what is clearly the most appropriate forum is to identify the place where the tort has been committed…But – and here is our second proposition from the cases – the more tenuous the claimant's connection with this jurisdiction …the weaker this consideration becomes."

54. That statement was made in the context of a defamation case, but I agree with the Claimants that the same will, in many cases, be true in relation to maritime torts where, as here, the defendant's vessel is only temporarily present in the place where the tort is committed, though it all depends on whether the collision gives rise to a tenuous or more substantial connection, which will depend on the facts of the case in question.

55. In this regard the Claimants draw my attention to the case of *The Forum Craftsman* [1985] 1 Lloyd's Rep 291 at p 297, where Ackner LJ commented on the *Albaforth* principle as follows:

> "We have no doubt that Lord Justice Robert Goff did not have in mind torts committed other than on dry land. He had no reason in the context of that case to contemplate the situation where a tort was committed by a member of a crew on board a ship as it passed through territorial waters, when neither the member of the crew nor the ship had any connection at all with the country whose territorial waters was then being navigated. Nor do we imagine that he had in mind the somewhat analogous situation of a tort being committed by a member of the crew of or a passenger on board an aeroplane flying through the airspace of a country which had no connection with either the aeroplane or the tortfeasor. While we accept that the jurisdiction in which a tort has been committed is *prima facie* the natural forum for the determination of the dispute, that assumption is easily displaced in a case like the present one where, although the vessel was still moored to the wharf, loading of the vehicles which were ultimately damaged had already been completed and no doubt but for the accident the vessel would shortly have left Japanese territorial waters on her voyage to Luanda. …"

56. Ackner LJ gave the leading judgment in *The Albaforth*, with which Goff LJ agreed. *The Forum Craftsman* appears not to have been cited in any of the first-instance collision cases in which the *Albaforth* principle has since been invoked. I bear in mind, however, that in many cases where a collision takes place in territorial waters connecting factors with that jurisdiction will arise – though the Claimants submit that that is not so in this case, on its facts, and liability having been admitted.

C. Appropriate forum

57. The Defendants bear the burden of proving that Fujairah is clearly and distinctly the more appropriate forum for the determination of the issues between the Claimants are the Defendants. Those issues are quantum and limitation. Mr Dwyer (at paragraph 78 of his first statement) identifies the factors relied upon. Not all of them remain applicable given that the "AL KHATTIYA" has now been repaired (and so, for example, any role of the Fujairah court in seeking to facilitate orders from the Qatar court for inspection of the "AL KHATIYA" are no longer relevant).

58. The Defendants essentially rely upon three factors in their skeleton argument, whilst also addressing other factors (location of the parties and location and language of the factual witnesses and experts). The three factors relied upon are:-

i) Location of the collision: Fujairah

ii) Applicable law: the law of UAE

iii) Multiplicity of proceedings.

C1. Location of the collision: Fujairah

59. The Defendants' skeleton argument identifies this as "*by far the most significant factor*" on which they rely. I do not consider that to be a propitious start to their submissions on appropriate forum. Whilst the location of the collision will be a significant factor in many collisions cases where the collision gives rise to a number of connecting factors, that is not this case. On analysis and on the facts of the present case, with liability having been admitted, it only gives rise to only one potentially relevant connecting factor with Fujairah, namely, that the claim is likely to be governed by UAE law.

60. The Defendants place great reliance upon the *The Albaforth* principle that "*the jurisdiction in which a tort has been committed is* prima facie *the natural forum for the determination of the dispute*" (per Ackner LJ at p. 94 RHC), however as the House of Lords confirmed in *Berezovsky v Forbes Inc (No.1),* supra, the *Albaforth* principle "*provides the starting point, but no more than the starting point, for a correct application of the* Spiliada *principles*" (per Lord Hope at p 1032) and as Lord Mance said in *VTB*, the *Albaforth* line of authority "*is no doubt a useful rule of thumb or a prima facie starting point*" (and I confirm that it is also my starting point and I have had regard to it) but, "*the variety of circumstances is infinite, and the* Albaforth *principle cannot obviate the need to have regard to all of them in any particular case. The ultimate over-arching principle is that stated in* The Spiliada" (para 18).

61. The fact that the collision took place in Fujairan waters is a useful starting point, which I take, but that of itself does not make Fujairah the appropriate forum. It is necessary for me to consider, as I have done, all the relevant factors having regard to what the issues are that arise in this action, liability having been admitted, and the only remaining issues that remain being issues of quantum. In the present case, the mere fact of the collision in the territorial waters of Fujairah, in of itself, does not have a real and substantial effect on the way that the interests of the parties and the ends of justice will be served.

62. As I have already noted, in a typical collision case there are likely to be a number of relevant factors capable of connecting the case to the place where the collision occurred such as e.g. the nationality of the ships and crews involved, the location of relevant witnesses and documents, or the fact that the local authority may have conducted a preliminary investigation into the collision. This reflects the fact that, in the typical case, liability and apportionment are in dispute and the evidence relevant to those issues tends to be more readily available at the place of the collision.

63. That is not this case. The collision occurred in Fujairan waters, but that collision was between an Indian owned vessel and a Qatari owned vessel, the crews were not Fujairan, the vessel was not repaired in Fujairah but rather in Qatar, any relevant witnesses and experts are not in Fujairah and are mainly English speakers and relevant documents will be in English, the working language for communications at the repair yard. Crucially, and though there was an initial investigation by the Fujairah port authority (concluding the inevitable that the Defendants were 100% to blame for the collision), liability is admitted which cuts across the very factor which will often make the country where the collision took place the appropriate forum due to the presence of relevant witnesses, associated investigations etc. All that remains is the determination of any issues in relation to quantum (which are considered in due course below).

64. In such circumstances, in the present case, the fact that the collision occurred in Fujairan waters gives rise to only one relevant connecting factor with Fujairah, namely, that the claim is likely to be governed by UAE law. This case is not one in which the location of the collision itself provides an answer, still less the final answer, nor does it, in of itself, amount to a factor to be given considerable weight in this case. I bear it well in mind as a factor, but as only one factor to be taken into account in the overall equation (as it was put in argument by the parties).

C2. Issues of Quantum and any relevance of UAE law

65. The Claimants accept for the purposes of the present application that law applicable to the claim is likely to be UAE law. The Defendants say there exist material differences between English and UAE law in relation to the assessment of damages, which they submit are most appropriately applied by a UAE judge. In this regard the Defendants rely upon a report from a Mohamed El Hawawy of Ince & Co Middle East LLP (Dubai Branch) dated 1 June 2017 ("MEH"/"MEH Report") as to principles of UAE law as to the assessment of damages, which I have had regard to in considering this factor.

66. The Defendants rely upon what was said by Lord Mance in *VTB* (at [46]), that "*it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum*" (see also what was said by Lord Clarke (dissenting) at paragraph 219).

67. However, once again, it is necessary to analyse rigorously, what the true issues actually are, whether the issues are straightforward or difficult, and what the differences truly are. The significance of this factor varies depending on the issues concerned. Thus as is said by the editors of *Dicey and Morris* at paragraph 12-034:

> "If the legal issues are straightforward, or if the competing fora have domestic laws which are substantially similar, the identity of the governing law will be a factor of rather little significance. But if the legal issues are complex, or the legal systems very different, the general principle that a court applies its own law more reliably than does a foreign court will help to point to the more appropriate forum, whether English or foreign."

68. Consistent with the burden of proof, it is accordingly for the Defendants to prove, first that UAE law is materially different from English law in ways which are likely to be material to the issues arising in this claim, and secondly that a Fujairan judge will be clearly and distinctly better placed to determine and apply that law. The Claimants submit that the Defendants have done neither.

69. However before considering what (if any) legal issues may arise on such quantum issues it is first necessary to identify what factual and expert issues remain and how they would be determined. All that remains in issue is quantum. That quantum consists of a claim for the cost of the repairs, and a claim for loss based on loss of use of the vessel. These will both be evidenced by documentation in English.

70. As to the former, if issues emerge as to what repairs were necessary, where they could or should have been carried out, and within what period of time, this will involve factual and expert evidence. In particular it appears it may be alleged that the vessel could have been repaired elsewhere and/or in less time and/or at less cost. These are familiar arguments that any court is well able to deal with. The "AL KHATTIYA" was not repaired in Fujairah, and Fujairah has no connection with the repairs (which were carried out at a yard in Qatar). There is also an issue as to whether the "AL KHATTIYA" was suffering a pre-existing design defect – the factual (and expert) aspect of that issue also has nothing to do with Fujairah either.

71. In terms of the witnesses themselves the Claimants' factual witnesses are from India, Egypt and Greece, and all speak English but only one speaks Arabic. The Claimants' experts are based in England and Dubai. The Defendants have appointed surveyors located in the UAE, London Offshore Consultants WLL. The individual surveyor is a French national who speaks limited English. In terms of documentation, the yard corresponds in English, and it seems likely that most documentation of relevance to the issues that are likely to be in dispute is English.

72. If the matter proceeded in Fujairah the proceedings would be in Arabic. All documentation would have to be translated into Arabic. It appears that oral evidence is not taken, but rather that matters proceed by way of written witness statements and expert reports, and written memoranda. The majority of the former would have to be translated into Arabic (at considerable expense) and there would be the obvious risk of a loss of nuance in such translations. In contrast, as the Claimant point out, there would be no such need for everything to be translated into Arabic, and all relevant witnesses could attend in London to give evidence if damages are assessed in England. I bear such points in mind, but equally, take care not to regard the features of any one legal system as preferable to those of another. I simply note what the consequences are (in terms of witnesses, documentation and translation costs) depending on the particular forum.

73. Those then are the factual issues in relation to which any legal issues may arise. Turning to any potential legal issues, the Defendants, at paragraph 34 of their Skeleton Argument, identify two alleged differences between English law and UAE law:-

    i) As a matter of UAE law, even unforeseeable losses are recoverable in tort if they are considered to be the natural (meaning direct) result of the tortious act; and,

    ii) UAE law does not have any concept of the duty to mitigate loss. Instead, Article 290 of the UAE Civil Code provides that the court can reduce the damages which would otherwise be payable if a claimant has brought about or aggravated his loss.

74. Assuming as I do, that as a matter of UAE law, even unforeseeable losses are recoverable if they are considered to be the direct result of the tortious act, this is hardly a difficult or complex point of law. Indeed the English courts are very familiar with question of foreseeability, and indeed very experienced in relation to this very point, as anyone with knowledge of the development of the law of tort in England will be well aware.

75. First, the consequence would be that whichever court was deciding the claim would not need to consider any defence of remoteness based on foreseeability – so, in a sense, this is simply a non-point. Secondly, if any question of foreseeability or remoteness did arise (which seems inherently unlikely given that the claim is one for costs of repair and loss of use of a vessel), the court would have to apply a test which was materially identical to that which English law applied to negligence claims before *The Wagon Mound (No.2)* [1967] 1 AC 617, and which it continues to apply to other types of tort claim.

76. As for the second point, the first point is that it is something of a misnomer to talk about a "duty" to mitigate under English law, so there would not appear to be any real or substantial difference between UAE law and English law in that regard. In any event what MEH states in the final sentence of paragraph 11 of his report seems identical to the position under English law. Secondly, the Defendants rely on evidence that where damage has been caused by a claimant's own fault the quantum of damages is reduced at the discretion of the judge, and a similar principle may apply where the loss is caused or contributed to by a third party. Such principles would appear to be similar, if not materially identical, in their effect to familiar principles of English law in relation to apportionment of liability / contributory negligence, mitigation of damage and causation. However even were that not so, and there was any point of difference, it would no doubt be a straightforward task for the experts to identify any relevant difference, and for an English court to apply the same.

77. It is said that the Claimants' witness, Mr Dodds, has not adduced any evidence of UAE law to support his assertions, and that there are "*generalisations in his statement* [which] *are wrong*" (see Dodds 2 and Dodds 7). However the Claimants accept, for present purposes, that UAE law is as described on behalf of the Defendants by MEH and Mr Dwyer. As so described UAE law is not materially different to English law. One issue is whether the Claimants have caused or contributed to the losses by unnecessarily increasing the cost and duration of the repairs. This is denied by the Claimants. Such question is likely to turn on the factual and expert evidence. Even if there is found to be any substance in this allegation, as stated above, there would not appear to be any material difference between UAE law and recognised English law principles such as apportionment of liability / contributory negligence, mitigation of damage and causation. However if it transpired that there were, experts could readily identify the same, and an English court could apply UAE law as found.

78. In Mr Dwyer's second statement (and whether or not as a consequence of what the Claimants submit is a successful rebuttal of the other points made by the Defendants), the Defendants developed a further point. This point arises from a provisional view of the Defendants' expert, M Brosseau, based on the inspection he conducted of the "AL KHATTIYA" at the N-KOM repair yard, and on his experience, that the vessel probably had a pre-existing defect in the bonding of a drainage channel within the tanks, which exacerbated the water damage which she suffered as a result of the collision. The Defendants contend that, under English law, this alleged pre-existing defect would not affect the Claimants' recovery, because of the rule that a tortfeasor takes his victim as he finds him. They contend that, under UAE law, the position might be different, and that a local judge might, in his discretion, decide to disallow some part of the Claimants' recovery.

79. The Claimants deny that there was any such defect and have served evidence in that regard. It would be neither possible nor appropriate for me to determine whether a defect exists on a jurisdiction challenge. It is likely to turn on factual and expert evidence. However if I assume that the defect did exist, there would remain the question of how likely it would be that it would have made any difference. As the Claimants point out, the factual premise underlying this allegation is that but for the alleged bonding defects, the drainage channels which ran around the bottom edges of the affected cargo tank (and which are just a few inches high and open at the top) would have successfully diverted a flood of water of some 1,000 litres, which rushed into the tank under pressure of a 10 metre head. They submit that this is inherently unlikely. In contrast, M Brosseau maintains that absent a defect such waterflow would have been contained. I cannot determine that dispute.

80. But if a court found itself in such a scenario, the issue that arises is not inherently complex. The position under UAE law could be proved. A judge, be that UAE or English, could then apply that law, and any principled discretion that exists. It is not suggested that there is any existing body of law in relation to such matters that would render it inherently preferable for a UAE judge to deal with such issue (in the event that it actually arose as a matter of fact). There would not appear to be any "*lifetime of experience*" of a UAE judge on this point, and this court is very familiar with civilian law systems, and with expert evidence based on translations of foreign law texts.

81. In Mr Dwyer's seventh statement it is suggested that if the alleged pre-existing defect was an effective cause of damage, the Claimants' recovery would be reduced under UAE law if they knew or should have known about the defect and failed to remedy it. Even assuming that this would be the principled position under UAE law, I agree with the Claimants' submission that any such proposition would appear to be materially identical to the English rules of contributory negligence (see, for example, cases such as *Froom v Butcher* [1976] QB 286).

82. The Defendants have also raised the suggestion that the Claimants do not have title to sue in respect of loss of hire because they have assigned their right to hire to their mortgagee banks and, under UAE law, a claimant cannot recover losses suffered by a third party (see Mr Dwyer's third and sixth witness statements). The short answer to this point would appear to be that the assignment was by way of charge only (see generally Mr Dodd's fourth witness statement paragraphs 49 to 59).

83. In the above circumstances I do not consider that the Defendants have established that UAE law is materially different from English law in any way that is likely to be material to the issues arising in the claim, or that a Fujairan judge would be clearly and distinctly better placed to determine and apply that law.

84. In so concluding I confirm that I have had regard to the following observation of Andrew Baker J (at paragraph 18 of his judgment) on 27 November 2017 in dismissing the Defendants' application for disclosure:

> "If anything, and as Mr Macey-Dare realistically accepted, the paucity of detailed information or evidence volunteered by the claimants serves to assist the defendants in the stay application. The claimants cannot criticise the defendants if their evidence as to UAE law for the stay application is by nature somewhat abstract. In particular, they cannot contend that any differences

between UAE law and English law identified by that evidence will not matter on the facts of this case whilst declining to give the defendants or the court any detailed information about those facts."

85. Ultimately, however, on the evidence before me, the Defendants have not established that UAE law is materially different from English law in any way that is likely to be material to the issues arising in the claim. Nor have they established that a Fujairan judge would be clearly and distinctly better placed to determine and apply UAE law.

86. Accordingly, and whilst I bear in mind the fact that the claim is governed by UAE law as a factor in the equation, I do not consider it to be factor of any real significance on the facts of this case.

C3. Multiplicity of proceedings

87. The Defendants submit that there would be sense in having the quantum of the Claimants' claim determined in the same proceedings as limitation as it would prevent unnecessary duplication of effort and expense in maintaining separate proceedings in England and in Fujairah, and prevent any "*rush to judgment*". The existence of limitation proceedings in another forum was considered by Clarke J in *The Xin Yang.* The judge said "*the sensible place for the quantum of the claims to be determined would be between the various claimants in the […] limitation proceedings*."

88. There is, however, a short answer to this point. All of the Defendants' claims in the UAE Limitation Action and UAE Fund Action have been dismissed. At present, and subject to any successful appeal, there are no limitation proceedings in Fujairah. There are, however, extant proceedings in England, namely this action. I do not consider the (speculative) possibility that at some uncertain point in the future (many months away), the Defendants might be successful in reviving the Fujairan limitation proceedings as a factor of any weight.

C4. Other connecting factors

89. I have already identified that if issues emerge as to what repairs were necessary, where they could or should have been carried out, and within what period of time, this will involve factual and expert evidence. In terms of the witnesses themselves the Claimants' factual witnesses are from India, Egypt and Greece, and all speak English but only one speaks Arabic. The Claimants' experts are based in England and Dubai. The Defendants have appointed surveyors located in the UAE, London Offshore Consultants WLL. Their main expert is a French national who speaks limited English. In terms of documentation, the yard corresponds in English, and it seems likely that most documentation of relevance to the issues that are likely to be in dispute is English.

90. If the action proceeds in England the vast majority of the witnesses that will need to be called will speak English and will be able to give evidence in English. This is not a dispute where there is a contest between the courts of two English speaking countries, but between England and a country where proceedings will be in Arabic, and all the

evidence would have to be translated into Arabic both documentary evidence (most of which is likely to be in English) and witness evidence (most of which will originate in English). There would be no relevant difficulties in any witnesses travelling to London to give evidence (or to them giving evidence by video-link if felt more appropriate).

91. In addition to such matters there are further connecting factors pointing towards England as the most appropriate forum. Specifically:

    i) Both parties are represented by English P&I Clubs, and by specialist London shipping solicitors and Counsel, who are already very familiar with the issues arising.

    ii) The Claimants' technical managers, STASCO, who prepared the repair specification for the AL KHATTIYA and managed the repair process, are based in London. Much of the relevant documentary evidence, and a number of the factual witnesses, in relation to quantum are in London.

92. I leave to one side, for the present, two further factors relied upon by the Claimants:-

    i) It is not possible for the Claimants' executives who are Qatari nationals to travel to the UAE. This would prevent them from observing any proceedings in Fujairah at first hand, and it would create difficulties and delays in taking advice and giving instructions in the course of the proceedings. They can travel freely to England.

    ii) The English Admiralty Court has far greater experience of dealing with collision claims than the Fujairah court. The Claimants submit that this is a relevant factor: see by analogy ***Dicey cit.*** at 12-035: "*if a court has acquired a special expertise in the resolution of a particularly complex species of dispute, so that it would be in the interests of justice to allow it to resolve the present case also, this may, in exceptional cases, affect the identification of the natural forum*." It is said that this does not involve the invidious type of broad comparison between the English and UAE systems deprecated by Brandon LJ in *The El Amria* [1981] 2 Lloyd's Rep 119 at 126 LHC and in *The Abidin Daver* [1984] AC 398.

C5. Conclusion

93. In the present case the Claimants have established jurisdiction as of right in England. As Lord Goff emphasised in *Spiliada* (at page 477E):

> "the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right."

94. In the circumstances I have identified above, I find that the Defendants have failed to establish that Fujairah is clearly or distinctly a more appropriate forum than England

for the trial of the issues of quantum and limitation, in the interest of all the parties and the ends of justice.

95. Indeed I would, and do, go further. In this regard I consider that the factors relied upon by the Defendants, specifically the location of the tort, UAE law and any potential multiplicity of proceedings are, in the particular circumstances of this case, far outweighed by the factors pointing to England as the appropriate forum for the determination of the quantum issues that remain, in relation to which I consider (and find) that England is the appropriate forum for the trial.

96. Accordingly, the Defendants' application for a stay of the action on *forum non conveniens* grounds is dismissed.

97. In the light of the Defendants' admission of liability, I also order that judgment be entered against the Defendants on the Claimants' claim, with damages to be assessed, with a reference to the Admiralty Registrar to assess quantum.

98. As for the factors that I put to one side, I would simply add, if relevant, that the fact that it is not possible for the Claimants' executives who are Qatari nationals to travel to the UAE, is also a factor weighing against Fujairah as an appropriate forum, albeit a factor of relatively limited weight given that any proceedings would be on the documents, and to date, no Qatari representatives have indicated any desire to do so (although the Claimants' stance is, in any event, that they have not, as yet, appeared in those proceedings). I did not have any need to have regard to this factor, given the weight of the other factors I have identified.

99. As for whether the English Admiralty Court has far greater experience of dealing with collision claims than the Fujairah court, this may well be so, but I do not consider this to be of relevance in the context of the issues of quantum that arise. The Admiralty Court, and I have no doubt the Fujairah court, would each have experience of addressing the sort of quantum issues that may arise, from their experience in dealing with commercial disputes generally. Accordingly this is not a factor that I took into account.

C.6 Stage 2

100. As I have concluded that Fujairah is not an available forum which is clearly more appropriate for the trial of the action, and have refused a stay, stage 2 does not arise. The point has, however, been fully argued before me and so I will address it.

101. Had I concluded that the Fujairah court was *prima facie* more appropriate, the Claimants' submission was that I should nevertheless refuse a stay as in all the circumstances of the case it would have been unjust for them to have been deprived of the right to trial in England.

102. The Claimants submit that the diplomatic dispute between the UAE and Qatar, and the economic and criminal sanctions which the UAE has imposed as a result, mean that it would be unjust for the Claimants, who are Qatari based, owned and managed, to be deprived of the right to trial in England. In addition to the logistical difficulties caused by the travel restrictions, it is alleged that the UAE has significantly curtailed the right to free speech, in a way which is not necessary in a democratic society or

otherwise permitted by Article 10 of the ECHR, and that it is capable of seriously affecting the Claimants' ability to prosecute their claim in Fujairah.

103. By way of example, the Claimants say that an important issue in the case will be whether the N-KOM yard (which is also majority Qatari owned) dragged its heels over the repairs to the "AL KHATTIYA" due to a shortage of work. The Claimants deny this but accept that, insofar as there was a downturn in work, that was due to the sanctions imposed by the UAE and its allies. It is said that simply making that point in Fujairan proceedings could expose the Claimants, their executives, witnesses and lawyers to a substantial fine and/or imprisonment, if that was construed as an expression of sympathy towards Qatar or as criticism of the position of the UAE.

104. It is submitted that the Court cannot be satisfied that the Claimants will obtain substantial justice in Fujairah, and that granting a stay would be inconsistent with their rights under Articles 6 and 10 of the ECHR. In saying this they make clear that they do not impugn, in any way, the independence and impartiality of the UAE judiciary. Nor, they say, is it a breach of comity for the English Court to take cognisance of the Claimants' evidence including, amongst other matters, alleged evidence of human rights violations committed by the UAE (referring to an Amnesty International report and a BBC news article appended to Mr Dodds' fourth witness statement).

105. I can deal with these allegations of the Claimants shortly. Such allegations must be supported by positive and cogent evidence (see the words of Lord Diplock in *The Abidin Daver,* supra, at page 411). I do not consider that the evidence relied upon by the Claimants is of such standard, and I am not satisfied that the Claimants would not receive a fair trial in Fujairah. I say no more about the arguments raised given that they are, in the event, academic.

D. The Application to set aside the anti-suit injunction

106. The Defendants submit that the anti-suit injunction should be set aside regardless of the jurisdictional challenge.

107. In *The Western Regent* [2005] 2 Lloyd's Rep 359 (CA), at [44-45], Clarke LJ identified the relevant principles. For present purposes the most relevant principles are the fifth and sixth:

> "(v) The court may conclude that a party is acting vexatiously or oppressively in pursuing foreign proceedings and that he should be ordered not to pursue them if (a) the English court is the natural forum for the trial of the dispute, and (b) justice does not require that the action should be allowed to proceed in the foreign court, and more specifically, that there is no advantage to the party sought to be restrained in pursuing the foreign proceedings of which he would be deprived and of which it would be unjust to deprive him […].
>
> (vi) In exercising its jurisdiction to grant an injunction, "regard must be had to comity and so the jurisdiction is one which must be exercised with caution": […]. Generally speaking in deciding whether or not to order that a party be restrained in the pursuit of foreign proceedings the court will be reluctant to

take upon itself the decision whether a foreign forum is an inappropriate one […]."

108. The Defendants contend that it is an essential condition for the grant of an anti-suit injunction on vexatious and oppressive grounds, that England should be the natural forum for the claim. In that regard, they rely on the judgment of Clarke LJ in *The Western Regent*, supra, at [45(v)], *Airbus v Patel* [1999] 1 AC 19, at 139 and *Aerospatiale v Lee Kui Jak* [1987] AC 871, at 895D and 896F-G.

109. The Claimants submit that none of those authorities supports that contention: they state that it is only so "*as a general rule*". They submit that the underlying requirement, that the court should have a sufficient interest in or connection with the matter in question, may be satisfied in other ways, including by showing that the foreign proceedings interfere with the due process of the English Court: *The Western Regent* [44(ii)] and *Shell International Petroleum Co v Coral Oil Co Ltd* [1999] 2 Lloyd's Rep 606 (Thomas J at pages 609 RHC, 610 RHC).

110. It is unnecessary for me to rule on the Defendants' contention as I have found that England is the natural forum for the determination of this Claim. However had it been necessary I would have rejected the Defendants' contention and for the reasons given by the Claimants. *Shell* is also authority for the proposition that, even if the English court is not the natural forum for the claim itself, it is sufficient if it is the natural forum for deciding whether the claim is vexatious: see p 610 LHC. That would have been the position here had I not found that England was the natural forum. The Defendants seek to distinguish *Shell* on the basis that the claimants in that case made a substantive claim for an antisuit injunction against a defendant domiciled in England; whereas in the present case the antisuit injunction is merely ancillary to the substantive damages claim. However, I consider that that is an irrelevant distinction. As in *Shell*, the Claimants in this case founded jurisdiction as of right. The fact that they did not seek an antisuit injunction as part of their substantive claim is simply a reflection of the fact that the Defendants only commenced the UAE Liability Action in response to the Claimants' Claim.

111. I am also satisfied that in commencing the UAE Liability Action the Defendants were acting vexatiously and oppressively. In that action the Defendants claimed damages from the Claimants and their commercial managers (and beneficial owners) QGTC, and a declaration of non-liability, arising from the collision. It was not properly arguable that the Defendants were entitled to the relief sought. From the time of the collision itself it would have been obvious to anyone, including the Defendants, that they were 100% to blame for the collision and that the Claimants were under no liability to them. They must have known that they were not entitled to the relief sought. At no stage have they advanced any legitimate justification for seeking the relief sought, and justice did not require that those proceedings be allowed to continue. I do not need to rule on motives for the Defendants' conduct that have been suggested by the Claimants. The fact is that the UAE Liability Action proceedings were self-evidently hopeless (as would any other such proceedings commenced then or now), and served no legitimate purpose. They were also separate from any attempt to limit which was the subject of a separate petition and subsequent separate proceedings.

112. It is also submitted that there was a failure, on the Claimants' part, to draw the attention of Knowles J to the *Albaforth*, or those collision cases that had referred to it in the context of collisions in territorial waters or more generally, on what was effectively an *ex parte* application (albeit that the Defendants were on notice, and did put a letter before the Court). I consider that there is nothing in this point in the circumstances of this case. First, Mr Dodds in his first statement had made clear that the tort was committed in Fujairan waters, and he addressed why Fujairah was nevertheless not the appropriate forum, and so the learned judge was alerted to any significance of the location of the tort. Secondly, as a Commercial Court judge, Knowles J would have been well aware of the potential significance of this factor. Thirdly, I do not consider that any failure to make specific reference to *The Albaforth* justifies criticism. Very many of the collision cases relied upon by the Defendants do not do so either – it is the location of the tort that is relevant. Fourthly, even had it been considered preferable to have referred to *The Albaforth,* I do not consider that the failure to do so amounted to a failure to make full and frank disclosure, or that in all the circumstances it would be appropriate to discharge the injunction on such basis.

113. I am satisfied that the antisuit injunction was properly granted in the above circumstances, and for the reasons set out by the Claimants in their skeleton argument. Accordingly, I dismiss the Defendants' application to set the antisuit injunction aside.

114. I trust the parties will be able to agree an Order consequential upon my judgment including as to costs which, *prima facie*, should follow the event.