



Neutral Citation Number: [2020] EWHC 133 (Comm)

Case No: CL-2019-000058

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**COMMERCIAL COURT (QBD)**

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

Date: 30 January 2020

**Before :**

**CHRISTOPHER HANCOCK QC**  
**(sitting as a Judge of the High Court)**

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**Between :**

**SCOR SE**  
**- and -**

**Claimant**

**BARCLAYS BANK PLC**

**Defendant**

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**SONIA TOLANEY Q.C. and NEHALI SHAH** (instructed by **Freshfields Bruckhaus  
Deringer LLP**) for the **Applicant**

**DANIEL JOWELL Q.C. and FRED HOBSON** (instructed by **Enyo Law LLP**) for the  
**Respondent**

Hearing dates: 21,22 October 2019  
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**Approved Judgment**

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

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**DEPUTY JUDGE CHRISTOPHER HANCOCK QC**

## CHRISTOPHER HANCOCK QC:

### Introduction.

1. This is the Defendant's ("**Barclays**") application for a stay pending the outcome of related proceedings in France, under Article 30 of Regulation (EU) 1215/2012 (the "**Recast Regulation**") or pursuant to the Court's inherent jurisdiction/case management powers.

### The essential facts.

2. The essential facts are not in dispute. I take the account principally from the Defendant's skeleton argument.

- (1) The Claimant ("**SCOR**") is a reinsurance company incorporated in France. Mr Thierry Derez was one of its directors. Mr Derez was also the chairman and CEO of Covéa SGAM and chairman of Covéa Coopérations SA (together, "**Covéa**"), a mutual insurance business with its principal place of business in France.

- (2) On 24 August 2018, Covéa, a shareholder of SCOR, made an unsolicited offer to acquire a controlling shareholding in SCOR (the "**Offer**"). Barclays was one of Covéa's financial advisors and prospective lenders in relation to the Offer.

- (3) These proceedings, and related French proceedings, all concern French law claims brought by SCOR against Mr Derez, Covéa, and Barclays in connection with the Offer. It is alleged by SCOR that Mr Derez disclosed to Covéa and to its advisors, including Barclays, confidential information, which he obtained in breach of duties he owed to SCOR, and that the information was misused in relation to the Offer. SCOR's claims are denied by the defendant.

- (4) Specifically, SCOR has commenced three sets of proceedings:

- a. On 29 January 2019, SCOR issued proceedings in France (the "**French Criminal Court Proceedings**") by way of a direct prosecution (Citation Directe) before the Criminal Court of Paris against (i) Mr Derez for breach of trust under Article 314-1 of the French Criminal Code and; (ii) Covéa for concealment of breach of trust under Article 321-1 of the French Criminal Code. SCOR asks the court to find the defendant guilty of those criminal offences, and also claims compensatory damages from the defendant pursuant to Article 2 of the French Criminal Code. The offence alleged against Mr Derez is punishable by up to 3 years' imprisonment and a fine of €375,000 and additional sanctions, and the offences alleged against Covéa are punishable by a fine of €1,875,000 and additional sanctions. In the French Criminal Court Proceedings, SCOR seeks compensation of €300,000 from Mr Derez and €600,000 from Covéa. Both Mr Derez and Covéa have publicly denied the allegations and indicated their intention to defend the claims.

- b. Later that same day, on 29 January 2019, SCOR commenced these proceedings (the "**English Proceedings**") against Barclays. SCOR's claim is that: (i) in connection with the Offer, Mr Derez allegedly disclosed to

Barclays confidential information which (it is said) he used and disclosed in breach of duties of confidence and loyalty owed to SCOR; and (ii) Barclays received the confidential information in circumstances where it allegedly knew or ought reasonably to have known that it was obtained and disclosed by Mr Derez in breach of confidence and SCOR's trade secrets, and misused and disclosed the information. As originally pleaded in the Particulars of Claim served on 29 January 2019, SCOR's claims in the English Proceedings were that Barclays:

- i. Participated and/or assisted in a breach by Mr Derez of his obligations of loyalty and confidentiality, pursuant to Articles 1200 and 1240 of the French Civil Code.
    - ii. Unlawfully acquired, used or disclosed trade secrets of SCOR in circumstances where it knew or ought to have known that it obtained the trade secrets from Mr Derez, who had himself used or disclosed them unlawfully, such that Barclays is liable pursuant to Article L 151-6 of the French Commercial Code.
    - iii. Concealed a breach of trust committed by Mr Derez pursuant to Article 314-1 of the French Criminal Code, which was said to give rise to a civil action under French tort law. This last claim has since been deleted by consent.
    - iv. On the above grounds SCOR sought an injunction, delivery up, an inquiry, declaratory relief, and damages for diversion of management time and protective steps.
    - v. Barclays denies any wrongdoing, including on the basis that the identified information is not confidential.
  - c. On 6 February 2019, SCOR issued a writ of summons initiating proceedings in the Commercial Court of Paris against Mr Derez and Covéa (the "**French Commercial Court Proceedings**"). SCOR's claims against Covéa in the French Commercial Court Proceedings are, broadly speaking, for knowing receipt, the use of allegedly confidential information and allegedly unlawful use and/or disclosure of trade secrets. The claims in the French Commercial Court Proceedings are also based upon the same underlying alleged breaches of duty by Mr Derez. SCOR claims damages of €810,000 from Mr Derez and €17,200,000 from Covéa.
3. Following the hearing before me, I was told that an application to stay the French Commercial Court proceedings, which had been made by the Claimant, had been dismissed, and I was provided with a copy of that judgment and submissions were made by the parties in relation to the relevance of that decision and the fact that those proceedings would now be ongoing. I was also informed that the next stage in these proceedings would be a collegiate hearing in March 2020, at which point a date for the final hearing would be set, which is likely to be between April and June 2020 depending on how many judges are to sit on that hearing.

4. I address the specific allegations made against Mr Derez further below, in the context of my consideration of whether the proceedings are related or not.

### **Article 30 of the Recast Regulation**

5. Article 30 of the Recast Regulation provides:

“(1) Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

(2) Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

(3) For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”.

6. The parties were agreed that, under this head, there were essentially two questions that I had to answer. The first was whether the French criminal proceedings, which were first in time, were related to the English Commercial Court action before me. The second was whether I, as the Court second seised, should stay these proceedings, it being accepted that I had the power to do so under Article 30. The parties were also agreed that, although the civil proceedings which formed part of the criminal action were an “adjunct” to the criminal part of the proceedings, they were nonetheless civil and commercial proceedings within the meaning of the Regulation.

### **Are the actions related?**

7. This Article has been considered in a number of authorities, and I was referred to a number of cases in this regard. I consider each in turn.
8. The first in time was the decision of the ECJ in *The Tatry* (Case C-406/92) [1999] QB 515. In that case the ECJ said this:

“53. In order to achieve proper administration of justice, that interpretation must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive.

54. The cargo owners and the Commission contend that the adjective “irreconcilable,” which is used both in the third paragraph of article 22 and in article 27(3) of the Convention, must be used in the same sense in both provisions, meaning that the decisions must have mutually exclusive legal consequences,

as was held in *Hoffmann v. Krieg (Case 145/86) [1988] E.C.R. 645*, 668, para. 22. They point out that the court there held, at p. 669, para. 25, that a foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his conjugal obligations to support her is irreconcilable, within the meaning of article 27(3) of the Convention, with a national judgment pronouncing the divorce of the spouses.

55. That argument cannot be accepted. The objectives of the two provisions are different. Article 27(3) of the Convention enables a court, by way of derogation from the principles and objectives of the Convention, to refuse to recognise a foreign judgment. Consequently the term "irreconcilable . . . judgment" there referred to must be interpreted by reference to that objective. The objective of the third paragraph of article 22 of the Convention, however, is, as the Advocate General noted in his opinion (paragraph 28), to improve co-ordination of the exercise of judicial functions within the Community and to avoid conflicting and contradictory decisions, even where the separate enforcement of each of them is not precluded.

56. That interpretation is supported by the fact that the German and Italian versions of the Convention use different terms in the third paragraph of article 22 and in article 27(3).

57. The conclusion is therefore inescapable that the term "irreconcilable" used in the third paragraph of article 22 of the Convention has a different meaning from the same term used by article 27(3) of the Convention.

58. Consequently the answer to the fourth question is that, on a proper construction of article 22 of the Convention, it is sufficient, in order to establish the necessary relationship between, on the one hand, an action brought in a contracting state by one group of cargo owners against a shipowner seeking damages for harm caused to part of the cargo carried in bulk under separate but identical contracts, and, on the other, an action in damages brought in another contracting state against the same shipowner by the owners of another part of the cargo shipped under the same conditions and under contracts which are separate from but identical to those between the first group and the shipowner, that separate trial and judgment would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences."

9. The House of Lords then had to consider the Article in the case of *Sarrio SA v Kuwait Investment Authority* [1991] 1 AC 32. In that case the Court of Appeal had said that it was only where the primary facts in the two cases (ie those facts which were necessary in establishing the cause of action) might be found differently, that the Article came into play. That approach was rejected by the House of Lords, and in view of the importance

placed by both parties on this case, I will set out the relevant passages at length. Lord Saville, who gave the leading judgment in the House of Lords, said this:

“I cannot accept that article 22 should be interpreted or applied in this way. (sc. in the way the Court of Appeal had interpreted it).

In the first place, I can find nothing in the opinion of the Advocate General or the judgment of the European Court in *The Maciej Rataj* which lends support to the suggestion that a distinction should be drawn between those facts necessary to establish a cause of action and other facts and matters on which conflicting decisions might arise. On the contrary it seems to me that the case leads to the opposite conclusion.

Both the Advocate General and the European Court were at pains to emphasise that the objective of article 22 is to improve co-ordination of the exercise of judicial functions within the Community and to avoid conflicting and contradictory decisions, thus facilitating the proper administration of justice in the Community: see the opinion of the Advocate General *[1994] E.C.R. I-5439*, 5457-5458, para. 28 and the judgment, at pp. 5473, 5478 and 5479, paras. 32, 52 and 55. On this basis the court rejected the argument that the phrase "irreconcilable judgments" should be interpreted so as to confine it to cases where the decisions would have mutually exclusive legal consequences, as *Hoffmann v. Krieg (Case 145/86) [1988] E.C.R. 645* had decided was the case under article 27(3). As the court pointed out, at p. 5479, the objective of article 27(3) is different from the objective of article 22. Thus the court concluded, at pp. 5478, para. 53:

"In order to achieve proper administration of justice, that interpretation must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive."

This reasoning does not suggest that the phrase "irreconcilable judgments" in article 22 should be given a limited meaning. Indeed, to limit the application of article 22 to cases where there is a potential conflict between so-called "primary" issues, so far from giving the article a broad interpretation, comes dangerously close to the argument rejected in *The Maciej Rataj*. If there are only to be irreconcilable judgments where one or more of "the facts which are necessary to establish a cause of action" are potentially in conflict, then at least in cases where the parties are the same, the article will be likely to be confined to situations where there is a risk that the legal consequences will be legally exclusive.

In the second place, it seems to me that the words of the article itself militate against the suggested limitation. The actions, to be related, must be "so closely connected that it is expedient to hear and determine them together" to avoid the risk of irreconcilable judgments resulting from separate proceedings. To my mind these wide words are designed to cover a range of circumstances, from cases where the matters before the courts are virtually identical (though not falling within the provisions of article 21 ) to cases where although this is not the position, the connection is close enough to make it expedient for them to be heard and determined together to avoid the risk in question. These words are required if "irreconcilable judgments" extends beyond "primary" or "essential" issues, so as to exclude actions which, though theoretically capable of giving rise to conflict, are not sufficiently closely connected to make it expedient for them to be heard and determined together. The words would hardly be necessary at all if the article was to be confined as suggested. Indeed, in that event, it seems to me that quite different words would have been used.

In the third place, it seems to me that to adopt the suggested limitation would in truth be to give the phrase "related actions" a special "English" meaning, which would be contrary to what the court decided in *The Maciej Rataj* , where it was pointed out, at p. 5478, para. 52, that since that phrase did not have the same meaning in all the member states, it was necessary to give it an independent interpretation. Evans L.J. defined "primary" issues as those necessary to establish a "cause of action," and, it would seem, distinguished what he described as "secondary" or "non-essential" issues by reference to the principles of issue estoppel to be found in our common law. However, those who framed article 22 can hardly be suggested to have had in mind our English concepts of "cause of action" or "issue estoppel" when using the phrase "irreconcilable judgments" any more than courts in other Community countries faced with interpreting or applying article 22.

In the fourth place, I take the view that to attempt to analyse actions so as to distinguish between different kinds of issues would be likely to add to the complexity of applications under article 22 and thus to the expense and delay in dealing with them. Instead of simply considering whether the actions were so closely connected that it was expedient that they should be heard and determined together to avoid the risk of conflicting decisions, the parties and the court would have to embark upon a sophisticated and difficult exercise of legal analysis, made more complicated by the fact that the court would be dealing not with actual judgments, but with what judgments yet to be given would be likely to contain. It must be borne in mind that article 22 is concerned not with the substantive rights and obligations

of the parties, but with the ancillary and procedural question as to where in the Community those rights and obligations should be heard and determined. There is nothing in the Convention that suggests that it is in the interests of the Community that litigation on this question should be made more expensive and time-consuming than is necessary. If, for example, the difficulties encountered by our courts in trying to apply our sophisticated law of issue estoppel are anything to go by, and such concepts are used for the purpose of article 22 applications, this would in my view be calculated to make such applications a peculiarly complicated kind of what Lord Bingham of Cornhill C.J. has described as "satellite litigation," for what in my view would be no good reason.

Finally, it is noteworthy that Evans L.J. *[1997] 1 Lloyd's Rep. 113*, 120-121 drew attention to the fact that in *The Maciej Rataj [1994] E.C.R. I-5439* the Advocate General said in his opinion, at pp. 5457-5458, para. 28:

"The court second seised should therefore be able to have recourse to the machinery envisaged by [article 22] whenever it considers that the reasoning adopted by the court hearing the earlier proceedings may concern issues likely to be relevant to its own decision."

Evans L.J. considered that since the opinion referred to issues which arise in the earlier proceedings the word "reasoning" should be read accordingly; and then seems to have relied on this when drawing the distinction between "primary" and other issues to which I have already referred. In the Italian in which the opinion was actually written, however, the word used is "questioni" and though "issues" is doubtless a perfectly acceptable translation, it would not appear that the Advocate General was using the words he did in any special legally technical sense.

For these reasons, I am of the view that there should be a broad commonsense approach to the question whether the actions in question are related, bearing in mind the objective of the article, applying the simple wide test set out in article 22 and refraining from an over-sophisticated analysis of the matter. It seems to me that this was the approach adopted by Mance J. *[1996] 1 Lloyd's Rep. 650*, who concluded that the allegations (common to both proceedings) in relation to whether the negotiations leading to the sale were conducted by or on behalf of the defendant, as well as the circumstances of the Grupo Torras group in Spain and the defendant's relationship with it, raised a risk of irreconcilable judgments in circumstances where the two actions were so closely related that it was expedient that they should be heard and determined together to avoid that risk. In particular Mance J. drew attention to the fact that one of the persons alleged in



Spain to have been acting on behalf of the defendant in the negotiations and otherwise was the same individual who is alleged in the English action to have made the misrepresentations on behalf of the defendant in the same negotiations, in circumstances where these allegations are hotly denied in both sets of proceedings.”

10. The nature of the comparative exercise was then considered by the Court of Appeal in *Research in Motion UK v Visto* [2008] 2 All ER (Comm) 560, who said:

“30. It should be observed that what the House of Lords was considering in *Sario* were two *claims*, the first Spanish, the second English, each by the same plaintiff. What had to be considered is whether, if those two claims went forward in parallel there was a risk of inconsistent judgments. Here things are different. The comparison we are invited to make is between *Visto's defence* in the English action and its claim in the Italian action. The defence came after the Italian proceeding — indeed relies on the taking of the Italian proceedings as part of the reason why it is said a declaration should be refused here.

31. So we have the topsy-turvy proposition that the English court is said to be “first seised” of a “related action” by reason of the later, Italian, action.

32. The position is rendered even more topsy-turvy by Mr Carr's acceptance that the English court (which he claims is first seised of the Art.96 claim) could not proceed to decide that claim (and the defence) until the Italian court had first dismissed the Italian claim. It is a condition precedent to an Art.96 claim that there should be a “losing party.” So it is Mr Carr's submission that the Italian court, assuming it got the point of dismissing the “torpedo” claims, could not on go on decide the Art.96 claim although it would obviously be best placed to do so. It would get to the very brink, but have to stop there and let the English court take over.

33. Yet another absurdity if Mr Carr is right is that it would be for the English Court to decide whether there had been abuse of process — “bad faith or gross negligence” — in Italy.

34. It is tolerably clear that one of the objects of the Regulation was to lay down rules for deciding which, of two or more courts, should decide a claim. Broadly the thrust is that the first seised does that, and then its judgment is to be recognised by the others. Standing back, it would at first sight seem that whole purpose would be subverted if *Visto* are right. The link is said to be the Italian action. The Italian courts have to be seised of their own action before the link can arise, so how can it be said as soon as it is started, the *English* court becomes first seised?

35. One answer to that potential oddity might be that it is built into the scheme of the Regulation itself. The Regulation relies on mechanical tests — the mechanical test of the court first seised, and the further largely mechanical test in Article 30 as to how one ascertains which court is first seised. In determining these matters what is important is the action, not the claim. The trouble with mechanical tests is that they are sometimes prone to yield results which do not coincide with the clear merits or even common sense.

36. Happily that is not the result here. The reason for that lies in the operation of Article 28. That Article deals with related actions; contrast Article 27 which deals with actions involving the same cause of action. Those two concepts are different. Article 27 involves a comparison of claim documents to see if causes of action in two documents are the same — see Lawrence Collins LJ in Kolden Holdings v Rodette Commerce Ltd [2008] EWCA Civ 10 at para 93. Article 28 involves a different concept, tested by reference to the matters referred to in Article 28(3). The exercise of seeing whether actions are related may well require one to look beyond the claim documents and into the defences. In the present case it is this feature which potentially raises the topsy-turvy situation identified above. If one can look at the Defence, and if the Defence relies on post-claim matters, then there is scope for the relationship between actions to come from post-claim matters. Where the post-claim matter is in fact the commencement of the second proceedings, then one begins to travel towards the oddity already identified. That possibility arises because of the mechanical test of first seisin.

37. However, that is not the result of the application of Article 28 in the present matter because its effect is not entirely mechanical. It requires an assessment of the degree of connection, and then a value judgment as to the expediency of hearing the two actions together (assuming they could be so heard) in order to avoid the risk of inconsistent judgments. It does not say that any possibility of inconsistent judgments means that they are inevitably related. It seems to us that the Article leaves it open to a court to acknowledge a connection, or a risk of inconsistent judgments, but to say that the connection is not sufficiently close, or the risk is not sufficiently great, to make the actions related for the purposes of the Article. Mechanics do not, for once, provide a complete answer.

38. The relevant parts of the Defence in the present case are set out above. From that the following things can be seen. (It must be remembered that for these purposes the Counterclaim, which is conceded to be a separate action for these purposes and to come second, is not relevant at this point in the argument). First,

the Italian proceedings are said to be “spurious”. It does not matter whether that amounts to an allegation that they are an abuse; we assume (in favour of the Visto) that it does, though the Defence does not go further and plead Article 96 . Second, commencement of those proceedings is but one item in a wider field of misconduct which is said to disentitle the claimant to the declaration it seeks. It is not the only item; it is not even the main item. It is one of the things which are thrown into the melting pot. Third, if one looks at them, and compares them with the Italian action, it does not appear at all expedient that the claims should be tried together. The English claim is differently based. The English Defence raises matters said to go to whether an English court should grant a declaration in relation to that different claim, and raises matters not raised in the Italian proceedings. It does not seem to us to be at all expedient that those actions can be heard together, not least because we do not see how they can be, whether here or in Italy. Furthermore, if one is entitled to form a value judgment of the closeness of the relationship, then it is not particularly close at all. The substance of the English proceedings is declaration about an English patent and a particular product. The substance of the Italian proceedings is other designations, but not focusing on the same product. The abuse of Italian process is a link between them, but it is the only link; it is only in relation to that point that there is a risk of inconsistent judgments. It does not seem to us that Article 28(3) requires one to find that any possibility, no matter how small the point, requires the conclusion that the actions are related. One still has to consider expediency. We consider that the area of potential conflict is not sufficiently great to lead to the conclusion that expediency would require one trial even if it were theoretically possible.

39. For those reasons, therefore, we do not consider that the English and the Italian proceedings are “related” within the meaning of the Regulation.”<sup>1</sup>

11. Finally, the Claimant pointed out that there had been a debate in the authorities as to what was meant by “expedient” in the Article, with some authorities taking the line that this meant possible or capable, and others suggesting that the relevant synonym was “desirable”. At the hearing before me, both parties were agreed that this debate has now been resolved by the Court of Appeal in *Privatbank v Kolomoisky* [2019] EWCA Civ 1709, where the Court of Appeal said, at paragraph 191:

“191. We agree with Ms Tolaney QC that the approach of Rix J in *Centro Internationale* and of Eder J in *Nomura* is to be preferred to that of Mr Buxton QC, Neuberger J and Cooke J. Both Rix J and Eder J correctly focus on the language of article

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<sup>1</sup> See also *Nordea Bank v Unicredit* [2011] EWHC 30 at paras 77-79 and *Marme v RBS* [2016] EWHC 1570 at paras 61- 62.

28/article 34. The word "expedient" is more akin to "desirable", as Rix J put it, that the actions "should" be heard together, than to "practicable" or "possible", that the actions "can" be heard together. We also consider that there is force in Ms Tolaney's point that, if what had been intended was that actions would only be "related" if they could be consolidated in one jurisdiction, then the Convention would have made express reference to the requirement of consolidation, as was the case in article 30(2) of the Recast Brussels Regulation .”

12. However, following the hearing, my attention was drawn to the more recent Court of Appeal decision in *Euroeco Fuels (Poland) Limited and others v Szczecin and Swinoujscie Seaports and others* [2019] EWCA Civ 1932. In that case, the Court of Appeal referred, without apparent disapproval, to the decision in *Privatbank*. However the Court went on to hold that, on the facts of that case, the fact that the English action in issue could not be tried together in the same court by the same judge meant that the first instance judge in England had had no jurisdiction either to decline jurisdiction or to stay jurisdiction. As Bean LJ, who delivered the leading judgment, put it:

“52. If the judge's decision to decline jurisdiction is upheld or even if the English claim for libel and malicious falsehood is stayed the Claimants could, of course, start similar proceedings in Poland. But on the material before us there appears to be no real possibility of such a claim and the existing claim for nuisance brought by the Defendants being "heard and determined together".

53. In these circumstances I consider that the judge had no discretion to decline jurisdiction nor to order a stay under Article 30 of the RBR , and that the appeal must be allowed....”.

13. It was suggested by the Claimant that this case was authority for the proposition that if the two claims could not be heard and determined together in the same Court, then they could not be related. Accordingly, the suggestion was that this later Court of Appeal decision had reverted to the proposition that in order to be related actions, it must actually be possible for the actions to be heard and determined together, and that, in the event that this is not so, the English Court has no jurisdiction either to decline jurisdiction or to stay its own proceedings. The Claimant suggested various bases on which the later judgment could be read as consistent with the earlier one, even though it was accepted that each of these was not made explicit.
14. The Defendant, for its part, submitted that the Court of Appeal in *Euroeco* could not be regarded as disapproving *Privatbank*, since it referred to the earlier decision without any disapproval and indeed relied on it as setting out the relevant principle. Alternatively, the Defendant submits that if the later case is inconsistent with the earlier, it was decided *per incuriam* and is wrong.
15. I derive the following principles from the above authorities:

- a. The question of whether two actions are related for the purposes of the Article is to be approached on a broad commonsense basis: see *Sarrío*.
- b. Whether the actions will be treated as related will depend on whether they are sufficiently closely connected that it is expedient to hear them together in order to avoid potentially inconsistent findings: see *Research in Motion*.
- c. It is uncertain whether expediency in this context is to be treated as meaning desirability, or whether it is a jurisdictional requirement of the grant of a stay that the two cases can in fact be heard together: see *Privatbank* and cases cited therein, on the one hand, but compare the *Euroeco* decision on the other. I do not need to decide this question in this case, since my decision would be the same whichever test is applied, and I propose to consider the matter by reference to the test as set out in *Privatbank*.

*The application of these principles to the facts.*

*The parties' submissions.*

16. The Defendant submits as follows:

- (1) It is unnecessary for there to be a legal overlap between the proceedings; a factual overlap is sufficient: see *Sarrío*. Here the factual overlap between the proceedings is clear. Thus, the summary of facts and misconduct alleged against Mr Derez in the RAPOC are the same or substantially overlapping to the facts alleged in the Citation Directe. The evidence on which SCOR relies in both sets of proceedings is largely the same. The conduct of Mr Derez, and the fundamental issue of whether he misused SCOR's confidential information, is at the heart of both sets of proceedings.
- (2) Whilst a legal overlap is not necessary, in the present case, there is in fact a clear legal overlap between the English Proceedings and the French Criminal Court Proceedings:
  - a. The claim for civil damages in France that may arise as a consequence of any finding of criminal liability will be determined by applying French tort law principles, in accordance with case-law under Article 1240 of the French Civil Code. The same cause of action is relied on by SCOR in these proceedings.
  - b. There is a fundamental overlap between the French Criminal Court Proceedings and the English Proceedings. The purpose of Article 1200 of the French Civil Code is to establish the liability of a third party who knowingly interferes in the contractual relationship of two parties, and under French law it is a civil tort to assist a third party in breach of its contractual duties. The same is true of the claim by SCOR against Barclays in these proceedings for violation of trade secrets under Article L 151-6 of the French Commercial Code. The question of whether the information is a trade secret depends upon the circumstances in which it was obtained and whether consent was granted, by its legitimate holder, to its provision, and in both sets of proceedings the allegation is the unlawful receipt and disclosure of documents confidential to SCOR.

- c. In order to determine liability, each court will need to determine the following questions: (i) were the documents and information in question confidential?; (ii) if so, what was the extent of the permitted use of the documents and what duties of confidentiality and loyalty did Mr Derez owe to SCOR?; and (iii) what use did Mr Derez make of the documents and information, and was that use in breach of any duty owed to SCOR?
      - d. A preliminary question that arises in both proceedings will be the status of the documents provided by SCOR, and the nature, in France, of Mr Derez's obligations to SCOR. SCOR relies upon the same French law obligations allegedly owed by Mr Derez to SCOR in both sets of proceedings to evidence the confidentiality of the information provided to him and the breach of his alleged obligations. The French Criminal Court could not determine the defendants' conduct without considering the contractual, corporate and fiduciary duties it is claimed Mr Derez breached.
      - e. Fundamentally, therefore, the English Proceedings and the French Criminal Court Proceedings are inextricably linked; the misconduct alleged against Mr Derez is a "*necessary prerequisite*" to any liability on the part of Barclays.
17. The Claimant, for its part, submitted that there were two overarching reasons why these actions could not be regarded as related.
  - (1) The first was the fact that the French proceedings were criminal.
  - (2) The second was that the risk of inconsistent judgments is remote.
18. As to the first of these points, the Claimant submitted as follows:
  - (1) The Brussels Regulation applies to these proceedings because they include an adjunct civil claim for moral damages but there can be no doubt but that the first set of proceedings on which Barclays seek to rely are essentially criminal proceedings. The inclusion of the adjunct claim for moral damages does not alter the fundamentally criminal character of the French proceedings. In this regard, the Claimant relied on the decision of the Court of Appeal in *Haji-Ioannou v Frangos* [1999] 2 Lloyd's Rep. 337, in which Lord Bingham said that the fact that the foreign proceedings were "tacked on" to criminal proceedings made the application of Article 22 (the then equivalent to Article 30) "wholly inappropriate".
  - (2) It is common ground that the present proceedings cannot be consolidated with the French criminal proceedings. No allegation of criminal misconduct is pursued against Barclays that would justify the institution of criminal proceedings. Furthermore, SCOR could never have pursued in the French Criminal Proceedings most of the civil claims it pursues against Barclays in the English proceedings, and in particular the injunctive relief and

other non-monetary remedies claimed against Barclays in the English proceedings would not be available in the French Criminal Proceedings.

- (3) What is more, the claims in the two actions fall to be decided by reference to different standards of proof. The claim in the French action will be decided on the criminal standard. The claim in the English action, comprising a purely civil claim, will be determined on the balance of probabilities. It would be unworkable, or at the very least difficult, for a court simultaneously to make factual findings on differing standards of proof.
19. Turning to the Claimant's second point, SCOR does not contend that the actions are unconnected. It is plain that both arise out of a shared factual background. However, the degree of connection cannot be said to be more than modest and they are certainly, it submits, not so closely connected that it would be expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings (the test as stated in *Nomura* at §45).
- (1) As already noted, the actions involve different parties, the French action is criminal and the English action civil and the main remedies sought in England are not available in the French action. However, the differences do not end there. The legal basis underlying the two actions is entirely distinct: the French action is concerned with breaches of the French Criminal Code and the English action is concerned with breaches of the French Civil and Commercial Codes. In particular, the claim in the English action is based on duties owed by Barclays under articles 1200 and 1240 of the French Civil Code and article L.151 of the French Commercial Code. These duties are not so much as referred to in the complaint in the French Criminal Proceedings. Conversely, the complaints in the French Criminal Proceedings are based on articles 314 and 321 of the French Criminal Code, but no allegations based on these provisions are advanced in the English proceedings.
- (2) Whilst Mr Derez's conduct is obviously in issue in the French Criminal Proceedings, the degree of connection is modest:
- a. Different tests are being applied in the two actions in relation to Mr Derez's conduct. In the French action, the question is whether Mr Derez acted in breach of trust under article 314 of the French Criminal Code. That involves a different inquiry from whether Mr Derez acted in breach of his civil law obligations which is the issue in the English action. In particular, there is a *mens rea* requirement under the criminal test which requires Mr Derez to have known that he was acting in breach of duty. The two actions are not dealing with one and the same duty. Rather, the two actions involve distinct duties and distinct tests.
  - b. His conduct is in any event being assessed by reference to different standards of proof. If he is acquitted in the criminal proceedings on the criminal standard, that logically cannot be probative of whether he is liable for breach of civil duties assessed on the civil standard.

- c. The limited overlap between the two actions relates essentially to two points: (i) whether the information was confidential and (ii) whether Mr Derez owed a duty of confidence to SCOR. However, whilst there may be a debate as to whether the relevant information remained confidential a year later, it is fanciful to suggest that that information was not confidential at the time. If in theory Mr Derez were to be acquitted in the French Criminal Proceedings, the strong likelihood is that he would be acquitted on the basis of findings that would not in any way affect the resolution of the English civil claim, e.g. because the *mens rea* requirement was not met or the evidence did not satisfy the criminal standard of proof.
- d. Whilst there is some debate between the experts as to whether in principle findings made in French criminal proceedings could bind different parties in subsequent civil proceedings in France, it is highly unlikely that this would affect the outcome of subsequent civil proceedings, substantially for the reasons set out above. In this connection, the Claimant also relied on the decision of the French Commercial Court not to stay its proceedings, a decision itself based in part on a conclusion by that Court that findings made in the criminal proceedings would not bind the Civil Court.
- e. There is a suggestion that compensation in the civil adjunct proceedings will be assessed in accordance with normal French law civil principles as set out in Article 1240 of the Civil Code and that this is relevant. However, in so far as the case-law under Article 1240 might be relevant in assessing compensation under the French Criminal Code, this is beside the point and it certainly does not make the actions related, for the reasons already stated.
- f. In so far as there is any overlap between the two actions, findings made in the French proceedings relating to Mr Derez will not be capable of binding the parties in the English action. No issue estoppel arises since Barclays is not party to the French action. Indeed, not only are the findings in the French Criminal Proceedings not binding on the parties in the English proceedings, but the findings would be inadmissible in the English proceedings as evidence of the facts so found. That is on the basis of the principle in *Hollington v Hewthorn* [1943] KB 587, namely that the judgment of another court cannot be relied upon as evidence of the truth of the decision or its grounds in later proceedings involving different parties. Accordingly, whichever way the French criminal judgment goes, the English court will need to determine afresh whether Mr Derez acted in breach of duty and resolve for itself all sub-issues relevant to that determination.
- g. Nor, finally, could it be said to amount to an abuse of process on grounds of collateral attack for SCOR to allege in the English proceedings that Mr Derez



had acted in breach of his duties of confidence, in the event that Mr Derez is acquitted by the French criminal court. To the extent that any common factual issues arise between the two actions, those factual issues would be determined according to different standards of proof. Therefore, if Mr Derez were acquitted, the English action would not involve impugning the outcome of the French Criminal Proceedings (just as a defendant in criminal proceedings may be acquitted on the criminal standard and then face a separate civil claim for damages).

*My conclusions.*

20. For the reasons set out above, there is now potentially a dispute of law about whether proceedings can be related if the claims cannot in fact be tried together even if it would be desirable to do so. For the purposes of this judgment, I am prepared to assume that the correct test is that set out in *Privatbank*. Accordingly, if it would be desirable to try the claims together, then the proceedings will be treated as related even if they cannot in fact be tried together (although this latter factor will be a powerful factor against the grant of a stay at the stage of the exercise of discretion).
21. I accept also the Claimant's submission that the relevant comparison for these purposes is between the French criminal proceedings and the English proceedings, because the French criminal court was first seised of the matter, and because that action included a claim which is civil and commercial as well as purely criminal claims. I return to the relevance of the French civil claims below.
22. Thirdly, it is, as I understand it, common ground that, as a matter of fact, the proceedings cannot be tried together. I would in any event have accepted the Claimant submission to this effect.
23. The question then becomes whether, hypothetically, it would be desirable to try the two actions together in order to avoid the risk of inconsistent judgments. In this regard, and as regards the two points made by the Claimant:
  - a. I accept the Defendant submission that the risk of inconsistent findings of fact is sufficient for these purposes. In my judgment, applying the commonsense approach advocated in the *Sarrjo* case, and bearing in mind the underlying purpose of Article 30 (to encourage sensible case management as between the various parties to the Regulation), it is clearly sensible to try to ensure that inconsistencies of factual as well as legal conclusion should be avoided.
  - b. I do not think that the fact that one set of proceedings is criminal, but with a civil claim attached to the criminal claim, whilst the other set is purely civil, means that it would not be desirable to try the two sets of proceedings together. I consider that the various points made under this head are best addressed under the heading of discretion, and I do not read the decision in the *Haji-Ioannou* case as inconsistent with this approach.
  - c. Nor do I think that on the facts of this case there can be said to be no risk of irreconcilable findings. Thus, the French Court may hold that there was no breach of duty, quite apart from issues of *mens rea*, by Mr Derez, whilst the

English Court held the opposite. This might be explicable by reference to different standards of proof; but it might not.

24. Overall, I have concluded, on the basis the application of the test in *Sarrío*, as interpreted in later cases including in particular *Privatbank*, that the French criminal proceedings and the English proceedings are related. I move on to consider the exercise of my discretion on this basis.
25. Of course, if the actual test is that which may be suggested by the *Euroeco* case, then the proceedings would not be related, and I would have no discretion to exercise.

*Discretion.*

26. I turn to the second of the issues posed on this application, namely whether, if the actions are related, I should exercise my discretion (it being common ground that this is a question of discretion) to stay the current proceedings.

*The relevant principles.*

27. Both parties were agreed as to the starting point, which was the decision of the ECJ in *Owens Bank v Bracco* [1994] QB 509, in which Advocate General Lenz set out the three non-exhaustive factors relevant to the exercise of the discretion: (1) the extent of the relatedness of the proceedings and the risk of mutually irreconcilable decisions; (2) the stage reached in each set of proceedings; and (3) the proximity of the courts to the subject matter of the case. However, the case law stresses that the factors are not exhaustive and that the circumstances of each case are of particular importance: *The Alexandros T* [2014] 1 All ER 590 at §92 and 97 per Lord Clarke.

Is there a presumption?

28. Barclays submits that where actions are related, there is a strong presumption for a stay in favour of the applicant or, at the very least, in cases of doubt the Court should grant a stay, relying on *Virgin Aviation Services Ltd v CAD Aviation Services* [1991] ILPr 79, which was in turn referred to by Advocate General Lenz in *Owens Bank v Bracco*, who said at [75]:

“It would therefore be appropriate in case of doubt for a national court to decide to stay its proceedings under Article 22: see in this regard the judgment of the High Court (Ognall J) of 31 January 1990 in *Virgin Aviation Services Ltd v CAD Aviation Services* [191] I L Pr 79, in which the court held that there was a strong presumption in favour of allowing an application for a stay....”.

29. However, as SCOR pointed out, this approach was not adopted by Rix J in *Centro Internationale Handelsbank AG v Morgan Grenfell* [1997] CLC 870 who said at 891-892 that “*I do not see why the normal rule should not apply, which is that the burden of proof or persuasion is on the applicant*”.

30. Barclays in their turn sought to rely on the words of Lord Clarke in The Alexandros T, *ref supra*, who said that “*In a case of doubt it would be appropriate to grant a stay. Indeed, he appears to have approved the proposition that there is a strong presumption in favour of a stay.....*”; but SCOR riposted by relying on the words of the Chancellor in Office Depot International BV v Holdham S.A. [2019] 7 WLUK 623, who said at [53]:

“Looking at Lord Clarke's decision in *Starlight* I do not think that he was saying that he thought there was a presumption in favour of a stay. He was simply recording... Advocate General Lenz's opinion that referred to Mr Justice Ognall's judgment in *Virgin Aviation*. The concept of there being a stay in the case of doubt is, I think, quite different from the concept of a broad presumption in favour of a stay. Both cannot be correct. Advocate General Lenz was undoubtedly advocating the former and Lord Clarke was following his approach.”

31. I have concluded that there is in fact no presumption at all of this type, for the following reasons:
- a. First, it seems to me that the burden of persuasion must at all times rest on the party seeking a stay. The existence of related proceedings is a precondition to the existence of a discretion, but cannot have a bearing on how that discretion is to be exercised.
  - b. Secondly, I agree with the approach of the Chancellor as set out above. In case of doubt, a stay may be appropriate, but this is not the same as there being a broad presumption in favour of a stay.
  - c. Thirdly, as the decision in *Privatbank* makes clear (at paras 209-210), where proceedings cannot be consolidated, this “will usually be a compelling reason to refuse a stay”. As already noted, the Court of Appeal held at §210 that “absent some strong countervailing factor, the fact that proceedings cannot be consolidated and heard together will be a compelling reason for refusing a stay.” It seems to me that this consideration means that, at least where proceedings cannot be consolidated, any presumption in favour of a stay must disappear because the inability to consolidate introduces an opposite (and stronger) presumption.

Must there be a compelling reason to grant a stay?

32. In my judgment, the answer to this question must be yes, in the light of the decision in *Privatbank*. Indeed, both parties were agreed at the hearing that this was the case.

Is there here a compelling reason to grant a stay?

33. In my judgment, this is the nub of the question that I have to decide.

*The parties' submissions.*

34. I set out *Barclays'* submissions in the following paragraphs.
35. The first factor identified by Advocate General Lenz in Owens Bank v Bracco is the extent of relatedness of the proceedings and the risk of mutually irreconcilable decisions. In the present case, there is a large degree of overlap between the two sets of proceedings and a significant risk of inconsistent decisions as explained above. Whilst it may be the case that, as a matter of English procedural law, the French Criminal Court Proceedings would not give rise to a *res judicata* or issue estoppel for the purposes of the English Proceedings (because Barclays is not party to the French Criminal Court Proceedings) this does not assist SCOR. In particular:
- (1) To the extent the French Criminal Court sets out the applicable French law the English Court is likely to follow such statement.
  - (2) Evidence of fact given in the French Criminal Court is likely to be admissible in these proceedings.
  - (3) A reasoned decision of the French Criminal Court going against SCOR may well influence SCOR and its advisors to accept some or all of its findings.
36. As for the stage reached in each set of proceedings, the second of the relevant factors:
- (1) The English Proceedings are not far advanced. All that has happened is that SCOR's Claim Form and Particulars of Claim (as re-amended) have been filed.
  - (2) In contrast, the trial in the French Criminal Court Proceedings has been listed for 5-6 May 2020. Judgment is likely to be delivered about 6-8 weeks later.
  - (3) Moreover, a hearing in the French Commercial Court proceedings may take place as early as April 2020.
  - (4) As for the position on appeal, in the criminal proceedings, the process for appeals in France may take some time. The public prosecutor, Mr Derez, and Covéa have an automatic right of appeal, whilst SCOR's right of appeal is limited to the question of damages. In the event of an appeal, the Court of Appeal would be expected to render a decision during 2021. A further appeal could automatically be made to the Cour de Cassation but only on points of law, and a decision could be rendered in 2023. Such a decision could lead to matters being remitted back to a lower court, with a further judgment being rendered in 2024 or 2025.<sup>2</sup>
  - (5) However, this is a situation of SCOR's making, having chosen to commence three sets of related proceedings regarding the same facts.
37. As for the third of Advocate General Lenz's factors (proximity of the courts to the subject matter of the case), it is obvious that the French court has a much greater proximity. In

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<sup>2</sup> I have no evidence before me as to any likely timescale for appeals in the civil proceedings.

particular: (i) SCOR's claims are governed by French law, and it would be more appropriate for the French court (rather than the English court) to determine matters of French law; (ii) the events in question took place in France; (iii) SCOR, Mr Derez and Covéa are all French; (iv) many of the witnesses are based in France and native French speakers; (v) contemporaneous documents are also likely predominantly to be in French; (vi) Barclays' engagement documentation with Covéa was executed by its Paris branch office, and the engagement agreement is in French, governed by French law and includes an exclusive jurisdiction clause in favour of the Paris Courts.

38. Finally, the Defendant submits that there are a number of other factors which support their application:
  - a. First, SCOR itself sought a stay of the French Commercial Court Proceedings. This, among other points, demonstrates the lack of prejudice to SCOR if the English Proceedings were to be stayed.
  - b. Second, if the English Court reaches conclusions regarding the conduct of Mr Derez (who is not a party to the English Proceedings), this could prejudice his right to a fair trial and defence in the French Criminal Proceedings.
  - c. Third, Barclays, whose role (even on SCOR's own case) is secondary, does not have first-hand knowledge of many of the relevant facts relating to the dispute (as it was not involved in the key meetings or correspondence). Covéa and Mr Derez would be reluctant to provide evidence in these proceedings whilst the French Criminal Court and Commercial Court Proceedings are pending. Unless a stay is granted, therefore, Barclays' ability to defend the claim in the English Proceedings may be severely impeded.
39. I turn to **SCOR's** submissions on discretion.
40. Dealing first with the degree of relatedness, the Claimant contends that there is little connection between the French criminal proceedings and the current proceedings, for the reasons I have already outlined.
41. Secondly, as to the relative state of the proceedings:
  - a. A stay would cause substantial prejudice to SCOR, particularly bearing in mind the significant delay that the French action would likely occasion. The French criminal trial is listed for May 2020 with judgment likely in around July 2020. The parties have *automatic* rights of appeal to the Criminal Court of Appeals and then again to the Supreme Court. The appeal process could last until 2023 and any retrial would lead to still greater delay. If the English action were to be stayed pending the outcome of the French action, SCOR would face the prospect of its claim against Barclays not being heard for several years, which will cause significant prejudice as explained above.
  - b. As to the French civil claim, that may lead to a trial in April 2020. I have no evidence of rights of appeal.

- c. SCOR's claim for breach of confidence relates to highly sensitive commercial information. Both (i) the extent of the confidential information that Barclays holds and (ii) what use the bank has made of such information remain unknown. SCOR has a genuine and legitimate interest in obtaining an expeditious judicial determination to enable it to ascertain what confidential information Barclays has obtained from it and what use Barclays has made of that information; hence the remedies sought by SCOR include delivery up of the confidential information and an inquiry as to what information Barclays has received. By its very nature, this is a claim that calls for prompt determination so that SCOR can establish with certainty the extent of the misuse of its confidential information. This is a powerful factor against a stay.
- d. Barclays says that the situation is of SCOR's making since it has chosen to bring multiple sets of proceedings when it could have chosen to sue Barclays as part of the French Criminal Proceedings. However, the critical point which this overlooks is that the primary remedies that are sought in the English proceedings (i.e. injunctive and non-monetary relief) would not be available in the French Criminal Proceedings. SCOR can hardly be criticised in those circumstances for seeking relief in England when that relief would not be available in the French Criminal Proceedings. The suggestion that Barclays could and should have been sued under criminal law is denied, and the fact that such a claim was made and abandoned in these proceedings is irrelevant.
- e. The suggestion that has been made that SCOR should have sued Barclays in France ignores the fact that SCOR has the right to sue Barclays in its place of domicile.
- f. It is very difficult to understand what legitimate purpose a stay would serve to achieve. Barclays is not asking the court to decline jurisdiction over the English proceedings; it is instead asking for a *temporary stay* of the English proceedings pending the determination of the French Criminal Proceedings. Therefore, one has to proceed on the basis that, irrespective of the outcome of the French Criminal Proceedings, the English proceedings will in due course fall to be determined in England. In that event:
  - i. Findings made in the French proceedings will not bind the parties in the English action for the reasons explained above. It is therefore hard to see what the English court will gain from determinations made in the French criminal proceedings or, therefore, what legitimate end any stay would serve. At the very least, this weighs against the desirability of a stay. See, in this respect, *Dicey, Morris and Collins on the Conflicts of Laws* (15th ed.) at 12-076: "If the court orders a stay of proceedings, it will presumably be in the situation where judgment in the action in the court first seised appears in the eyes of the court seised second to be likely to render *res judicata* issues raised for determination by it, and therefore a stay should be imposed until the court seised first gives judgment."
  - ii. Therefore, in so far as there is any risk of inconsistent findings, that is an inherent and unavoidable risk that any stay would do nothing to alleviate. In this regard, the Court may be assisted by *Curtis v Lockheed*

*Martin UK Holdings* [2008] EWHC 260, a case concerning a stay sought on case management grounds. Teare J refused a stay and emphasised at §18-19 that because the claimants would not be bound by the decision of the foreign court, a stay would not prevent the risk of inconsistent decisions. The same is true in this case. A stay would serve no useful purpose in those circumstances. In particular, a stay would not further the objective of article 30 which is to avoid the risk of irreconcilable judgments.

- iii. Barclays nonetheless suggest that there may be risks inherent in allowing the French Court to proceed. Thus, it is suggested that that the French Criminal Court may set out applicable French law that the English court would likely follow. But this overlooks the fundamental point that the French Criminal Court is concerned with *criminal law* that is irrelevant to the English claim. Whatever pronouncements of French criminal law are made will be of no assistance to the English court. It is also suggested that evidence of fact given in the French proceedings is likely to be admissible. However, the issues in the two sets of proceedings are fundamentally different and as such the evidence will be directed to different issues. It is no more than speculative to say that evidence adduced in the French action may be relevant in the English action. Finally, it is suggested that SCOR might decide to accept certain findings in the French criminal proceedings upon a fully reasoned judgment. Again, this is unwarranted and implausible speculation.
- g. Barclays' counterargument, noted above, is that the allegedly confidential information is now stale, was never confidential, is no longer confidential (if ever was) and has no utility because the takeover attempt has been abandoned, and because SCOR itself accepts that Barclays will not misuse it. In particular, it says that the valuation referred to in the Strategic Committee Minutes is no longer confidential<sup>3</sup>. As to this:
  - i. In particular, the minutes set out the approach that SCOR adopts in assessing potential bids and identify the methodology used as the basis for valuation. All this was and remains highly confidential. Nor was it in the public domain in July 2018 that SCOR was at that time considering a potential combination with another reinsurer; the confidence attached to the fact that *SCOR itself* was discussing a potential combination at that time.
  - ii. In so far as it is suggested that any information has lost its confidential quality as a result of the passage of time, this is incorrect and, in any event, would be brought about principally by Barclays' own stay application. That delay cannot be used as a point against SCOR.
  - iii. Barclays' various points as to SCOR's conduct in not making applications for urgent relief in this jurisdiction are explained by the fact

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<sup>3</sup> In the interests of the continuation of any confidentiality that remains in the information, I have not set out a detailed account of that information. I have however considered fully the submissions made by the parties on the point.

that SCOR presently takes the view that, now that proceedings have been issued, Barclays is in practice unlikely to seek further to misuse the confidential information in the immediate term (but SCOR reserves its rights to apply should matters change).

- iv. It is in any event difficult to see why this point is relevant to the article 30 analysis at all. The court is not in a position to form a view of the merits on this application and the extent of the confidential information received by Barclays remains unknown at present. Even if were possible to form any view of the merits, that would be irrelevant to the question whether the actions are “related” or whether a stay should be ordered.

42. Finally, as to the issue of proximity of the courts to the subject matter of the case. The Claimant accepts that the centre of gravity of the dispute is more closely connected to France. That said, it contends that Barclays is domiciled in England and it is currently unknown by SCOR whether, or to what extent, confidential information was received and used by it in England. In any event, given that the stay sought is purely temporary in nature, this factor carries relatively little weight.

*My conclusions.*

43. I turn to my conclusions on the question of discretion, which are as follows:
  - a. The first point to note is that, as both parties accept, the fact that the two sets of proceedings cannot be tried together is a compelling reason not to grant a stay.
  - b. Secondly, as the Court of Appeal noted in the *Haji-Ioannou* case, the fact that the second case is a civil case whilst the first case is part of a criminal case makes it less appropriate for the second case to be stayed pending determination of the first. The Court of Appeal did not distinguish between the two stages of the enquiry in that case overtly, but as I read the judgment it is more consistent with a discretionary decision (and certainly not inconsistent with such).
  - c. Moving on to the three considerations identified by the ECJ in *Owens Bank*, in my judgment none of these militate strongly in favour of a stay, so as to amount to a compelling reason.
    - i. Although I have found that the actions are related, since some of the issues which will arise in each are common, I do not regard the degree of relatedness as great, largely for the reasons set out by SCOR. The relevant French proceedings are criminal; a different burden and standard of proof is applicable; and the legal issues are distinct, though they involve some common questions of fact. Accordingly, although it cannot be said that the proceedings are unrelated, it cannot also be said that they are closely related.
    - ii. It is likely that the French proceedings, at least at first instance, will come to a conclusion well before the English ones. This militates in favour of allowing those proceedings to continue. However, it does not necessarily suggest that the English proceedings should be stayed



pending the determination of the French proceedings, although it does, in my judgment, have a bearing on the case management of the English action, in that steps in the English action may be managed to enable the two actions to proceed as far as possible in tandem.

- iii. In this regard, it has been suggested that these proceedings are an abuse of process. I do not accept this.
  1. The proceedings were brought in England as of right, under the Regulation.
  2. There is, and can be, no suggestion that the proceedings are hopeless. No application has been made to strike out.
  3. Instead, the suggestion is that the proceedings are an attempt to obtain disclosure in aid of the French proceedings when direct disclosure proceedings could not have succeeded. Irrespective of the merits of this last suggestion, if the substantive proceedings are permissible (as in my judgment they are), then the motivation for taking them seems to me to be irrelevant.
- iv. Finally, it is clear that the action is far more proximate to France than England. However, this factor seems to me to be of little real relevance in circumstances in which the two actions cannot be heard and determined together.

44. Overall, I conclude that Barclays has not shown any compelling reason for a stay of these proceedings.

#### **Overall summary of conclusions.**

45. I can summarise my conclusions, overall, as follows:

- a. I have already concluded that the relevant proceedings, for these purposes, are the French criminal proceedings (being the Court first seised) and these proceedings (being the Court second seised).
- b. I have also concluded that it would, hypothetically, be desirable to try the two sets of proceedings together, to avoid the *risk* of inconsistent findings (my emphasis).
- c. However, it is common ground that the proceedings cannot in fact be consolidated and tried together, since the remedies sought in these proceedings would not be available in the French criminal proceedings.
- d. The proceedings are related proceedings, on the basis of the test as laid down in *Privatbank*, which is the test that I am applying for the purposes of this judgment. If the *Euroeco* case lays down a different test, then the actions would not be related, and I would have no discretion to exercise.

- e. Because I am applying the *Privatbank* test, then I have a discretion to stay the proceedings, to which I now turn.
- f. I have concluded that there is no presumption in favour of a stay. Indeed, since the actions cannot be consolidated, this is a compelling factor against a stay. A strong countervailing reason must be shown to justify the grant of a stay.
- g. The approach to the exercise of the discretion is, it is common ground, that laid down in *Owens Bank v Bracco*. I have thus to consider the degree of relatedness; the stage to which each action has progressed; and the proximity of each jurisdiction to the dispute.
- h. As to the degree of relatedness, I accept the Claimant's submission that there is limited relatedness between the two actions. Whilst there is a possibility of inconsistent findings, that possibility is relatively limited. In particular:
  - i. The common link is the behaviour of Mr Derez and the nature of the information that he had. His conduct in this regard will be judged by reference to the criminal standard, and that judgment will involve questions which go beyond the civil claim (in particular as to *mens rea*).
  - ii. That behaviour is only one part of the claim against Barclays.
  - iii. The French Court is likely to come to its conclusions well before the English Court. In circumstances in which it is unlikely that the English Court will be uninfluenced by the French Court's determination, then the risk of inconsistent judgments will be reduced.
- i. Turning to the stage to which proceedings have progressed, then these current proceedings are not at all far advanced. Conversely:
  - i. The French criminal proceedings are due for a hearing in May 2020 with judgment due in July 2020. This is long before a hearing in the Commercial Court could realistically be anticipated.
  - ii. There will in my judgment be substantial prejudice to SCOR if these proceedings are stayed, whilst the prejudice to Barclays will be limited if they are not.
    - 1. As regards Barclays, the only prejudice is that they will be required to make disclosure, and in due course produce witness statements. In reality, it is likely that it is only disclosure that will take place prior to the next stages of the French litigation (civil or criminal). It is indeed likely that the next French hearings will take place before the next English procedural hearings.
    - 2. As regards SCOR, then they will be deprived by a stay of disclosure and potentially witness evidence which will enable

them to determine the extent of any breach of confidence by Barclays and, more importantly, by M. Derez.

- iii. Barclays submits that these proceedings are, in effect, an abuse of process since they are an attempt to obtain disclosure. I do not accept this submission. No attempt has been made to strike out the claim. SCOR was entitled, on the face of things, to sue Barclays in the UK under the Regulation. Part of this entitlement is an entitlement to disclosure. In these circumstances, I cannot accept that SCOR's right to sue Barclays should be stayed because, so it is said, SCOR wish to use this right for a collateral purpose.
  - j. Finally, I accept that the action is most proximate to France. However, this is in my judgment a matter of limited relevance, since there are clear connections to this jurisdiction.
46. Overall, I conclude that, in the exercise of my discretion, and on the assumption that I have such a discretion despite the possible suggestion, based on the *Euroeco* case, that such a discretion only arises where cases can in fact be tried together, I should not stay these current English proceedings.