Neutral Citation Number: [2013] EWHC 4087 (Comm)

Case No: 2012 Folio No. 213

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 20/12/2013

Before :

MR JUSTICE FIELD

- -

Between :

B.A.T. Industries plc	**Claimant**
- and -	
(1) Windward Prospects Limited	**1st Defendant**
(2) Appleton Papers Inc	**2nd Defendant**

- -
- -

Gavin Kealey QC, Ben Griffiths and Tim Jenns (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Simon Atrill (instructed by **CMS Cameron McKenna LLP**) for the **1st Defendant**
Michael Swainston QC and Richard Blakeley (instructed by **DLA Piper UK LLP**) for the **2nd Defendant**

Hearing dates: 2nd and 3rd October 2013

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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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MR JUSTICE FIELD

Mr Justice Field:

Introduction

1. This is an application to set aside the order of Christopher Clarke J dated 12 June 2012 granting permission to the Claimant ("BAT") to serve an Amended Claim Form and Particulars of Claim on the 2nd Defendant ("API") in Appleton, Wisconsin, USA. The application is made on the sole ground that England is not the proper place for BAT to bring its claims against API and therefore the court should not exercise jurisdiction over those claims. In the submission of API, the proper forum for the trial of BAT's claims is the US District Court for the Southern District of New York ("the New York Court"), a federal court.[1]

2. BAT is a company incorporated and carrying on business in England. The 1st Defendant ("Windward") is a company incorporated in England and Wales. Its headquarters were formerly in Basingstoke, England, and are presently in London. API is a corporation incorporated in Delaware, USA. Its headquarters are in Appleton, Wisconsin.

BAT's claims against Windward and API

3. In brief summary, BAT claims: (1) a declaration that each of Windward and API is liable under three separate agreements made respectively in 1990, 1995 and 1999 to indemnify BAT against all costs, losses and liabilities which may be incurred by BAT in connection with a liability it is alleged to owe to NCR Corporation ("NCR") under a 1998 Settlement Agreement and/or a 2005 Arbitration Award including claims made against BAT pursuant to that settlement agreement and arbitration award in connection with the pollution of the Fox River in Wisconsin USA and the Kalamazoo River in Michigan USA; (2) alternatively, a declaration that Windward and API are estopped from denying that they are liable so to indemnify BAT; and (3) a declaration that pursuant to New York law it is entitled, by reason of being subrogated to NCR's rights against API, to be reimbursed by API in respect of the total sum BAT pays to NCR under the 1998 Settlement Agreement and/or the 2005 Arbitration Award.

The Background

A. The 1978 Purchase Agreement

4. Pursuant to an agreement made in 1978 ("the 1978 Purchase Agreement") API, which at the time was a subsidiary of BAT, purchased from NCR Corporation ("NCR") "the assets, properties and business as a going concern of a Division of NCR, Appleton Papers Division ["APD"]". APD's business was the manufacture of pulp and paper in the course of which it used two plants: (i) a plant at Combined Locks, Wisconsin ("the

[1] BAT's expert on New York law, Mr Milonas, is of the view that a New York state court, rather than a Federal Court, is the only court that would potentially have jurisdiction over BAT's claims against both Windward and API because no ground for federal jurisdiction exists. This opinion has not been expressly contradicted by API's New York Law expert, Mr Pratt, but API contended in its reply submissions that Mr Pratt's evidence was geared to the amenability of the prospective parties to a New York federal court. In the circumstances, and since I think that nothing significant turns on which court would have jurisdiction if personal jurisdiction over API were established, I shall assume that if personal jurisdiction under New York law can be established over API, BAT's claim against API could proceed in a federal, as opposed to a state court in New York.

CPM plant") acquired by NCR when it purchased Combined Paper Mills ("CPM") in 1969; and (ii) a paper mill adjacent to the Fox River in Appleton, Wisconsin ("the Appleton Mill") acquired by NCR when it purchased Appleton Coated Paper Company ("ACPC") in 1970.

5. Under section 1.4 of the 1978 Purchase Agreement, API agreed, inter alia, to pay, defend and discharge a wide range of NCR's liabilities with respect to: (i) the compliance of assets, properties and business purchased with all governmental laws, ordinances, regulations, rules and standards (section 1.4.3); (ii) any state of facts, matter, event or disclosure set forth in Schedule A (section 1.4.4); (iii) any threatened suit, action, claim, investigation by any governmental body, or legal, administrative or arbitration proceeding set forth in Schedule A (section 1.4.5); (iv) compliance of the Property (as defined) or the products or the operations of APD with all applicable federal, state and local and other governmental environmental and pollution control laws, ordinances, regulations, rules and standards (section 1.4.9).

6. It is provided in section 1.4.7 that "the Purchaser [API] shall not assume, and shall not be liable for, any liability or obligation of the Seller [NCR] which is not provided for in this Section 1.4 and in Sections 1.2.1.2 and 1.2.2.3".

7. The liabilities within (i), (ii) and (iii) were those that related to the period after the Closing Date and the liabilities within (iv) were those arising from transactions, events or conditions occurring prior to or after the Closing Date.

8. API's above-stated obligations were repeated in an Assumption Agreement ("the 1978 Assumption Agreement") entered into in connection with the 1978 Purchase Agreement. The 1978 Assumption Agreement contains no express choice of law provision but since it is provided for within the 1978 Purchase Agreement, the likelihood is that its governing law is the law of New York.

9. By section 9.2 of the 1978 Purchase Agreement, BAT agreed to indemnify and hold harmless NCR from and against any losses it incurred as a result of any failure of API to perform its obligations in respect of the debts, obligations, contracts and liabilities of NCR assumed by API pursuant to, inter alia, section 1.4 of the 1978 Purchase Agreement and the 1978 Assumption Agreement.

10. By section 10.11, the 1978 Purchase Agreement is governed by the law of New York.

B. The Demerger of Windward and API from the BAT Group

11. In 1990 API and Windward and a number of other non-core BAT subsidiaries became independent of the BAT Group, with API becoming an indirect subsidiary of Windward. The demerger was achieved in part by a Demerger Agreement dated 10 May 1990 ("the 1990 Demerger Agreement") which contained, inter alia, provisions designed to pass on BAT's liability to NCR under Section 9.2 of the 1978 Purchase Agreement to the demerged companies ("the New Group"), including Windward and API. The provisions in question are:

Clause 11.1.1

> The relevant members of the New Group agree with BAT … to indemnify and hold harmless BAT and other members of the Retained Group and each of their directors, officers, employees or agents (together "the Indemnified Persons") … from and against any and all losses, claims, proceedings, damages, actions, demands, and liabilities whatsoever and all reasonably necessary costs associated therewith, which are suffered or incurred by or instituted or alleged against, any of the Indemnified Persons by any person whomsoever … in any jurisdiction to the extent that they relate to or arise out of any neglect or default in the business and operations carried on by the New Group prior to the Effective Date …
>
> *Clause 7.2*
>
> Save as disclosed in a letter of even date from [Windward] to BAT, [Windward] represents and warrants that it is not at the date hereof aware of any guarantee or other obligation by any member of the Retained Group in respect of the obligations of any member of the New Group and undertakes that, in any event, [Windward] will use its best endeavours to procure the release of each of the members of the Retained Group from its obligations (if any) as guarantor of the obligations of the New Group and the relevant members of the New Group will as from the Effective Date indemnify each member of the Retained Group against all losses suffered by it arising from any breach of the obligations of any of the New Group in respect of such obligations whether before or after the Effective Date.

12. Clause 11.1.2 of the 1990 Demerger Agreement provided that Windward would have the option, subject to giving BAT Industries such indemnities and security as BAT Industries may reasonably require, to assume the defence of any claim or proceeding within the scope of Clause 11.1.1, including the instruction of legal advisers reasonably satisfactory to BAT Industries to represent BAT Industries, and that Windward should pay the fees and disbursements of such legal advisers related to such proceedings.

13. By Clause 9.2, the 1990 Demerger Agreement is expressly governed by English law.

C. NCR is notified that it is a potentially responsible party in respect of the pollution of the Fox River

14. In September 1994, NCR was notified by the Wisconsin Department of Justice under the Federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") that it was likely to be named as a "potentially responsible party" ("PRP") in respect of the pollution of the Fox River located near Appleton ("the Fox River Site"). (It will be recalled that the Appleton paper mill purchased by API under the 1978 Purchase Agreement was adjacent to the Fox River.) BAT alleges that API was also so notified at the same time, but this is disputed by API.

D. The contamination of the Fox River by PCBs

15. The Fox River had become contaminated with polychlorinated biphenyls ("PCBs") which are now known to be toxic and persistent in the environment. PCBs had been used in an emulsion developed by NCR and employed by ACPC in the manufacture of carbonless copy paper ("CCP") for NCR to sell under the NCR brand. Writing on a sheet of paper treated with the emulsion appeared on that sheet and was copied onto an underlying sheet without the need to use carbon paper.

16. It appears that PCBs got into the Lower Fox River in two ways: (i) PCBs lost in the course of manufacture were sluiced away into publically owned sewage-treatment plants and thence into the river; (ii) scraps of CCP left over from the manufacturing process ("broke") were sold to secondary manufacturers who cleaned it and discharged the resulting effluent into the river. Manufacture of CCP using emulsion containing PCBs at the Appleton Mill ceased in 1971.

E. NCR's disputed claim against API and BAT to an indemnity under the 1978 Purchase Agreement – the New York Proceedings

17. Following the September 1994 PRP notification to NCR, a dispute developed between NCR on the one hand and API/BAT on the other as to their respective rights and obligations under the indemnity provisions of the 1978 Purchase Agreement. On 20 June 1995, NCR filed a Complaint against API and BAT Industries ("the New York Proceedings") in the US District Court for the Southern District of New York seeking a declaration that API and BAT were obliged to indemnify it under sections 1.4 and 9.2 of the 1978 Purchase Agreement in respect of claims arising out of the Fox River site (and also, following an amendment to the Complaint, a much smaller site called Marina Cliffs).

18. In the New York Proceedings NCR contended that: (i) API's obligations to NCR under section 1.4 of the 1978 Purchase Agreement included an obligation to assume, pay, perform, defend and discharge, if and when due, the obligations and liabilities of NCR in relation to the contamination with PCBs of the Fox River site; and (ii) BAT was liable under section 9.2 of the 1978 Purchase Agreement to indemnify and hold NCR harmless from and against any and all losses and liabilities (amongst other things) which NCR might incur as a result of a failure by API to perform its obligations under section 1.4 of the 1978 Purchase Agreement.

F. The 1995 Agreement between BAT, Windward and API

19. BAT contends that as a result of: (i) a letter from BAT to Windward dated 30 June 1995 ("the 30 June 1995 Letter"); (ii) a telephone conference held on 7 July 1995 ("the 7 July telephone conference"); and (iii) a subsequent letter sent to BAT on 10 July 1995 ("the 10 July 1995 Letter") by Mr Robin Davies of the legal department of Windward, an agreement was entered into between BAT, Windward and API ("the 1995 Agreement") under which Windward and API agreed that, if the latter two parties did not notify BAT to the contrary within 60 days, they would assume BAT's defence to the New York Proceedings in accordance with Clause 11.1.2 of the 1990 Demerger Agreement and bound themselves to accept that they were each obliged under Clauses 11.1.1 and/or 7.2 of the 1990 Demerger Agreement to indemnify BAT

in respect of all losses suffered or incurred by BAT in connection with the subject matter of the New York Proceedings (including any settlement).

20. In the 30 June 1995 Letter sent by BAT to Windward at its address in Basingstoke, England, BAT referred to Clauses 11.1.1 and 7.2 of the 1990 Demerger Agreement and went on to ask whether Windward wished to exercise the option contained in Clause 11.1.2 of assuming the defence of the New York Proceedings.

21. In respect of the 7 July 1995 telephone conference, BAT alleges that: (i) the participants were Mr Alan Porter of BAT (in London), Mr Albert Dungate, General Counsel of Windward (in Basingstoke) and Mr Edwin Bush, General Counsel of API in Wisconsin; (ii) Mr Porter and Mr Dungate stated that they considered that, as between Windward/API and BAT, Windward and API were prima facie liable in respect of the subject matter of the New York Proceedings (and implicitly any settlement thereof), although they could not at that stage be categorical as to the position; (ii) Mr Dungate and Mr Bush offered on behalf of Windward and API: (a) to treat the letter of 30 June 1995 as a formal tender of the defence of the New York Proceedings; (b) to undertake BAT's defence unless within 60 days Windward and API wrote informing BAT of some reason for them to contend that they were not liable to indemnify BAT Industries in respect of the subject matter of the New York Proceedings (and implicitly any settlement thereof), on the basis that, if they did not, it was agreed and admitted that they were each obliged to indemnify BAT Industries in respect of all losses suffered or incurred by BAT Industries in connection with the subject matter of the New York Proceedings (including any settlement), and/or that the subject matter of the New York Proceedings fell within Clauses 11.1.1 and/or 7.2 of the 1990 Demerger Agreement; and (c) that Simpson Thacher & Bartlett, New York attorneys ("Simpson Thacher"), be retained to defend the New York Proceedings on behalf of both API and BAT instead of BAT's retained lawyers, Paul Weiss; and (iii) Mr Porter in London agreed on behalf of BAT Industries to accept that offer.

22. The 10 July 1995 Letter was sent by Mr Robin Davies of the legal department of Windward in Basingstoke on behalf of Windward and/or API to Mr Porter of BAT in London in response to the 30 June 1995 Letter. BAT alleges that in the former letter Mr Davies confirmed the discussions at the 7 July 1995 Telephone Conference and stated on behalf of Windward and/or API that:

> It is our preliminary view that as between AWA [i.e. [Windward] and B.A.T, [Windward] is probably required to indemnify B.A.T in respect of the above matter. Nevertheless, we are unable, at this early stage, to concede that the provisions of the Demerger Agreement cited in your letter definitely have the effect of shifting any liability that B.A.T may have in this matter to [Windward]. Accordingly, it was agreed, during the telephone discussion, that [Windward] would undertake the defence of B.A.T with respect to the action on the following basis. That is, that our undertaking to defend B.A.T will cease to have effect if within sixty (60) days of this letter (i.e. on or before 7th September 1995), [Windward] notifies you of any basis it believes it has for challenging your view that it is obliged to indemnify you under the terms of the Demerger

> Agreement. I understand that this arrangement is satisfactory to B.A.T.

23. The 10 July 1995 Letter was copied to, inter alios, Mr Robert Bourque of Simpson Thacher in New York and Mr Ben Mieliulis of API in Wisconsin.

24. The 60 day period expired without any notification from Windward or API and thereafter BAT relinquished conduct of its defence in the New York Proceedings which was taken over by Simpson Thacher appointed by API and Windward.

G. The 1995 Estoppel

25. BAT further contends that an estoppel arose out of the same facts relied on for the 1995 Agreement and/or as a result of Windward's and API's representations in their communications and by their conduct by, at the latest, 7 September 1995 ("the 1995 Estoppel"). As to this estoppel, BAT pleads that: (i) there was a common assumption and/or understanding that Windward and API were liable to indemnify and hold harmless BAT from and against all losses suffered or incurred by BAT in connection with the subject matter of the New York Proceedings (including any settlement) and/or that the 1990 Demerger Agreement should be so construed; (ii) BAT relied on the common assumption and understanding and on Windward's and API's representations in that: (a) it allowed the New York Proceedings to continue and be conducted without any active involvement on its part; (b) it did not seek any legal advice of its own; (c) it did not seek to make any claim against Windward or API for an indemnity under the 1978 Purchase Agreement or the 1990 Demerger Agreement; and (d) it permitted Windward and API and Simpson Thacher to conduct a mediation in February 1998 and settlement negotiations on its behalf which culminated in a settlement agreement in 1998 ("the 1998 Settlement Agreement").

H. The 1998 Settlement Agreement

26. The mediation and subsequent 1998 Settlement Agreement came about in the wake of: (i) the New York Court's denial in January 1997 on the ground that the 1978 Purchase Agreement was ambiguous of both sides' motions for summary judgement; and (ii) an EPA notification in July 1997 that NCR and API was each a PRP for remediation of the PCBs deposited in the sediment of the Lower Fox River.

27. The 1998 Settlement Agreement is governed by New York law and provides that: (1) all "Damages" and "Group Defense Costs", which terms included all the potential CERCLA liabilities of NCR (and API/BAT) up to a total of US$75 million allocated or assessed to, imposed upon, or incurred by NCR or API/BAT, either singly or collectively, relating to (amongst other matters) the Fox River sites and 'Future Sites', would be borne, as to 55%, by API and BAT jointly and severally and, as to 45%, by NCR; (2) NCR and API and BAT would participate in discovery and a compulsory binding arbitration to allocate between them all "Claims", "Damages" and "Group Defense Costs" (as those terms were defined in the 1998 Settlement Agreement) in excess of US$75 million, relating to the Fox River sites and 'Future Sites' pursuant to the terms of a Subsequent Allocation Arbitration Agreement dated 12 February 1998 ("the Subsequent Allocation Arbitration Agreement"); (3) API and BAT Industries were jointly and severally liable to NCR for the 55% share of the initial US$75 million allocable to API/BAT Industries and for the share allocated to API/BAT

Industries in the Subsequent Allocation Arbitration and (4) the settlement did not affect or vary any of the contractual arrangements or indemnities previously entered into between API and BAT Industries relating to the Claims, Damages and Group Defense Costs that were to be allocated under the agreement.

28. BAT claims that it entered into the 1998 Settlement Agreement under pressure from the other parties thereto and that as a result of the steps it took in reliance on the 1995 Estoppel it suffered detriment in that: (a) it lost the opportunity to advance its own arguments in the New York Proceedings as to the true construction of sections 1.4 and 9.2 of the 1978 Purchase Agreement[2]; (b) it lost the opportunity to represent its own interests in the mediation and subsequent settlement negotiations; (c) it was placed in a position where the only realistic alternative to executing the proposed settlement was risky and unattractive; (d) the 1998 Settlement Agreement materially enlarged the scope of BAT's obligations since, inter alia, under the 1978 Purchase Agreement its obligation under section 9.2 was of a secondary nature whereas under the 1998 Settlement Agreement it has a joint several liability with API and it lost the opportunity to seek a decision of the courts as to the parties' respective rights and liabilities under the 1978 Purchase Agreement but instead submitted to binding arbitration; (e) it executed the 1998 Settlement Agreement without appreciating the extent that agreement enlarged the scope of its obligations; and (f) was deprived of obtaining more advantageous terms of settlement or of a substantial chance of doing so.

29. BAT pleads that the legal effect of the 1995 Estoppel is that Windward and API are each estopped by convention and/or representation from denying that it is obliged to indemnify and hold harmless BAT from all losses suffered in connection with the subject matter of the New York Proceedings (including any settlement thereof) and/or from denying that the 1990 Demerger Agreement is to be so construed.

I. The 1999 Agreement

30. BAT further claims that it agreed to execute the 1998 Settlement Agreement in 1999 in reliance on contractual promises and representations made by Windward and API which constitute an agreement ("the 1999 Agreement") between BAT of the one part and Windward and API of the other, the meaning and effect of which is that Windward and API agreed for the purposes of any indemnity claim by BAT Industries against them under Clause 7.2 of the 1990 Demerger Agreement that, if BAT executed the 1998 Settlement Agreement, Windward and/or API would be bound to accept, and not to deny, that Windward and/or API were liable to indemnify and hold harmless BAT in respect of any sum it was obliged to pay NCR in accordance with the 1998 Settlement Agreement (in place of its original obligation to pay NCR only in the event that API failed to perform its own obligation to do so) on the basis that it amounted to or fell to be treated as an indemnifiable loss under Clause 7.2.

31. BAT pleads that the 1999 Agreement and/or Clause 13 of the 1998 Settlement Agreement are to be construed in the circumstances in which they were entered into, including, inter alia: (a) the obligations of Windward and API under Clause 7.2 of the

[2] Such as an argument that API was not liable to NCR under section 1.4.9 to the extent that NCR's liabilities arose not from "the products or operations of APD" but from those of ACPC and/or CPM.

Demerger Agreement; (b) NCR's contentions in the New York Proceedings as to BAT's liabilities under section 9.2 of the 1978 Purchase Agreement and API's obligations to NCR under 1.4 of that agreement; (c) BAT's right of indemnity against Windward and API if BAT were liable to NCR under Clause 7.2 of the Demerger Agreement; (d) BAT's and API's liabilities to NCR under the 1978 Purchase Agreement were compromised and/or replaced by their liabilities to NCR and it was agreed under Clause 13 of the 1998 Settlement Agreement that that agreement did not affect any indemnity previously entered into relating to "Claims", "Damages" and "Group Defense Costs" as defined therein.

32. The immediate context of the 1999 Agreement and the contractual promises and representations from which that agreement is claimed to arise are set out in BAT's Skeleton Argument as follows:

> 38.1 Following the mediation and subsequent further negotiations between Windward and API (acting for themselves and on behalf of BAT Industries) and NCR regarding proposed terms of settlement on or about 19 November 1998, a copy of the proposed settlement agreement in final draft form was sent to BAT Industries in England for execution by it.
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> 38.2 In that context, by a fax dated 3 March 1999 from David Williams (of BAT Industries) in London to Mr Dungate (still then Windward's General Counsel) in Basingstoke, BAT Industries sought confirmation that Windward and API accepted that under the 1990 Demerger Agreement they were obliged to indemnify BAT Industries from and against all losses suffered or incurred by BAT Industries in connection with the subject matter of the New York Proceedings.
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> 38.3 By a fax in response dated 15 March 1999 from Mr Dungate in Basingstoke to Mr Williams in London ("the 15 March 1999 Fax"), Mr Dungate stated on behalf of Windward and API that (i) it was unnecessary at that stage to reach a final conclusion on the proper interpretation of the 1990 Demerger Agreement; (ii) Windward and API were however happy to confirm to BAT Industries that its signature of the proposed settlement agreement with NCR would not be taken as adversely affecting any entitlement to an indemnity that BAT Industries would otherwise have had under the 1990 Demerger Agreement or the continued payment by Windward of the fees of Simpson Thacher for representing BAT Industries together with API in connection with the New York Proceedings; and (iii) in light of this confirmation Windward and API hoped that BAT Industries would feel able to sign the proposed settlement agreement.
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> 38.4 By (amongst other communications) further faxes dated 12, 19 and 26 April, 19 and 24 May and 4 June 1999 from Mr

> Dungate in Basingstoke to Mr Williams in London, Mr Dungate acting on behalf of Windward and API repeatedly requested and urged BAT Industries to sign and execute the proposed settlement agreement with NCR on the basis proposed in the 15 March 1999 Fax.
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> 38.5 By the 15 March 1999 Fax and the communications referred to in paragraph 38.4 above, Windward and API made an offer to BAT Industries that, if it executed the 1998 Settlement Agreement, Windward and API agreed, admitted and accepted that BAT Industries' position in relation to any indemnity given to it by Windward and/or API pursuant to the 1990 Demerger Agreement or otherwise would not thereby be prejudiced.
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> 38.6 By a further fax of 7 June 1999 in response from Mr Williams in London to Mr Dungate in Basingstoke, BAT Industries accepted Windward's and API's offer by confirming that it was prepared to sign the Settlement Agreement and in or about July 1999, and on that basis, BAT Industries duly executed the 1998 Settlement Agreement.

J. The 1999 Estoppel

33. BAT further pleads that as a result of the facts and matters relied on in support of the 1999 Agreement there was a common assumption and/or understanding between Windward, API and BAT Industries, and/or Windward (acting on behalf of itself and API) in the nature of an estoppel ("the 1999 Estoppel") that the execution of the 1998 Settlement Agreement by BAT would not prejudice its position in relation to any indemnity given by Windward and/or API pursuant to the 1990 Demerger Agreement and that BAT relied thereon in entering into the 1998 Settlement Agreement.

34. BAT contends that it was a necessary consequence of this common assumption/understanding that, if BAT executed the 1998 Settlement Agreement, Windward and/or API would be bound to indemnify and hold harmless BAT in respect of any sum it was obliged to pay under the 1998 Settlement Agreement regardless of whether, in respect of the subject matter of the New York Proceedings, BAT had been liable to NCR under section 9.2 of the 1978 Purchase Agreement or API had been liable to NCR under section 1.4 of the 1978 Purchase Agreement.

35. BAT pleads that it entered into the 1998 Settlement Agreement in reasonable reliance on the pleaded common understanding and/or representation and thereby suffered the detriment referred to in (d) – (f) in paragraph 28 above.

K. The 2005 Arbitration Proceedings

36. In the course of 2005 there were arbitration proceedings brought by NCR against BAT and API pursuant to Clause 4 of the 1998 Settlement Agreement and the Subsequent Allocation Arbitration Agreement to determine how "Claims",

"Damages" and "Group Defense Costs" in excess of US$75 million were to be allocated. By an award dated 28 November 2005 ("the 2005 Arbitration Award"), the arbitral tribunal determined that the cost of these liabilities should be borne by BAT and API as to 60% and NCR as to 40%.

L. The NCR Liability

37. NCR claims that as a consequence of the 1998 Settlement Agreement and 2005 Arbitration Award, BAT is liable jointly and severally with API to indemnify NCR in respect of 60% of all "Claims", "Damages" and "Group Defense Costs" in excess of US$75 million, subject to the terms of the 1998 Settlement Agreement. This liability to NCR is called "the NCR Liability" in BAT's pleadings and I shall follow suit in this judgement.

M. The 2005 Estoppel

38. BAT also pleads a further estoppel ("the 2005 Estoppel") which it claims it relied on in executing the 1998 Settlement Agreement and which it alleges arises out of communications between BAT on the one side and Windward and API on the other in the period 2003 to 2007 which resulted in there being a common assumption or understanding that Windward and API would indemnify BAT against all losses suffered or incurred in connection with the NCR Liability and/or that the 1990 Demerger Agreement was to be so construed. The principal representations relied on for this estoppel are: (i) words spoken by Mr Christopher Gower as Windward's Director of Legal Affairs speaking from France on the telephone to Mr Porter of BAT (in London) during a telephone conference on 19 September 2003 ("the 19 September 2003 Telephone Conference") during which Mr Gower said that Windward had assumed BAT's responsibilities in respect of the claims which had been made by NCR in the New York Proceedings and sought confirmation that BAT was content for BAT and Windward/API to continue to be represented in the Arbitration Proceedings commenced pursuant to Clause 4 of the 1998 Settlement Agreement and the Subsequent Allocation Arbitration Agreement by the same law firm; (ii) an email from Mr Gower of Windward to Mr Porter dated 22 September 2003, confirming the substance of 19 September 2003 Telephone Conference, in which he stated they had discussed the fact that Windward had assumed the defendants' responsibilities in the New York Proceedings ("the 22 September 2003 E-mail"); (iii) a voicemail message ("the 28 January 2005 Voicemail") from Mr Gower and Mr Ronald Ragatz of DeWitt Ross & Stevens (US attorneys then acting for Windward and based in Wisconsin) for Mr Foradas (in Chicago) of Kirkland & Ellis (US attorneys acting for BAT) in which Mr Gower said that he would like to discuss how to respond to declaratory proceedings which had been commenced by the insurers of Batus Inc (a US subsidiary of BAT) in the Wisconsin State Courts against BATUS, Windward and API and stated that BAT's liability in relation to the Fox River had shifted under the 1990 Demerger Agreement to Windward and asked whether BAT Industries wanted Windward to handle the litigation on BAT Industries' behalf in this case; (iv) a statement made by Mr Gower at a meeting with Mr Martyn Gilbey of BAT on about 1 March 2005 ("the 1 March 2005 Conference") to the effect that Windward was aware and accepted that it was liable to indemnify BAT against losses in respect of the Fox River site; (v) a statement by Mr Gower during telephone conference with Mr Gilbey on 10 May 2005 ("the 10 May 2005 Telephone Conference") that a notice to BAT in respect of the arbitration proceedings would be merely a formality and BAT would

not be expected to do anything in the course of the arbitration proceedings; (vi) a statement made by Mr Gower at a meeting at the offices of Kirkland & Ellis in New York on 1 July 2005[3] ("the 1 July 2005 Conference") confirming that there was no argument that Windward and API were liable to indemnify BAT Industries in respect of the costs associated with the Fox River clean up notwithstanding the fact that a query as to this had been raised in the past by Windward and API's previous General Counsel; (vii) a statement by Mr Gower in an email dated 2 December 2005 ("the December 2005 E-mail") that "API's share ha[d] increased as a result of [the arbitral tribunal's] decision to 60% of the combined share"; (viii) a statement by Mr Gower at a meeting in London on 10 May 2007 ("the 10 May 2007 Conference") that, as between NCR, on the one hand, and BAT Industries and API, on the other, liability for the Fox River clean-up costs had been apportioned 40:60 respectively but BAT Industries had the benefit of an indemnity from API in relation to those costs, and that that indemnity was supported by an insurance policy providing cover of up to US$250 million.

39. BAT further pleads that in reliance on the 2005 Estoppel: (a) it did not participate in the Arbitration Proceedings but agreed instead to be represented therein by the same counsel who represented Windward and API and thereby lost the opportunity to advance its own arguments in those proceedings; (b) did not participate in the Fox River clean up and thereby lost the opportunity to influence the clean up. BAT pleads that such reliance was in itself detrimental to BAT and further avers that if it had participated in the Arbitration Proceedings and the clean up it would have been able to obtain more advantageous outcomes in each of these matters.

N. API ceases to pay for cleaning up the Fox River

40. NCR and API began cleaning up the River Fox under the direction of the EPA in September 1994.

41. In November 2007, the EPA issued a Unilateral Administrative Order directing NCR and API to carry out further remediation works which they did through the instrumentality of a special purpose vehicle owned as to 60% by API and as to 40% by NCR. However, API has now ceased to make any payments in respect of the Fox River clean up costs following two decisions of the US District Court Eastern District of Wisconsin (Judge William C Griesbach) in April[4] and July 2012[5] holding respectively that API had no direct CERCLA liability as a "successor" or as an "arranger". In the former decision, Judge Griesbach said that there was:

> "no clear language [in the 1978 Purchase Agreement] indicating that API's [sic] successor agreed to assume liability to the government for any CERCLA claims. At most, as the arbitrators found, API agreed to indemnify NCR for a portion of such liability. The contract's silence on the point is enough to support a finding that API did not agree to assume direct CERCLA liability."

[3] The 1 July 2005 Conference had originally been proposed to be held in Chicago but in the event took place in New York for the convenience to Mr Gilbey who was travelling at the time.
[4] *USA v NCR Corporation and Appleton Papers Inc* (Case No. 10-C-910)
[5] *Appleton Papers Inc and NCR Corporation v George A Whiting Paper Co et al* (Case no. 08-C-16)

O. The 2013 Arbitration

42. On 29 March 2013, NCR filed a Demand for Arbitration against API pursuant to Clause 10 of the 1998 Settlement Agreement ("the 2013 Arbitration") seeking a declaration that API was bound to contribute to the clean up costs in accordance with the 1998 Settlement Agreement and damages. In its Response API denied that it has any liability to NCR under the 1998 Settlement Agreement and applied to have BAT joined into the arbitration. By Order No. 2, the arbitral panel denied API's application to join BAT into the arbitration.

P. The employee buy-out of API

43. In July 2001, there was an employee buy-out of API, since when Windward has had no interest in API's share capital. Amongst the agreements concluded in connection with this buy-out were two indemnity agreements each dated 9 November 2001, the Fox River AWA Environmental Indemnity Agreement ("the AWA Agreement") and the Fox River PDC Environmental Indemnity Agreement ("the PDC Agreement"). By virtue of these agreements, Windward is liable to indemnify API indirectly in respect of any amounts paid or payable by way of "Damages" or "Group Defence Costs", save for a US$25 million "slice" of such section "Damages" or "Group Defence Costs" in excess of US$75 million

44. By section 5.2.2 of the AWA Agreement, Windward has the exclusive right to carry out or direct in the name of and on behalf of API the defence of all claims and proceedings that could potentially give rise to a claim by API for indemnification pursuant to the PDC Agreement ("Claims") and to carry out or direct all claims for Recoveries in connection therewith. Section 5.2.2 further provides that: (i) Windward shall have the exclusive right to select counsel to conduct the defence of all such Claims and to pursue all such Recoveries at Windward's expense and, subject to Section 5.2.4, to direct the conduct and settlement of all such Claims and Recoveries; (ii) API should cooperate fully with Windward or its designee or its counsel, including by granting all necessary powers of attorney; (iii) Windward should have the right to require API to do any of the foregoing in accordance with Windward's instructions; (iv) API is not permitted to take any action, or make any statement, regarding Claims or Recoveries unless directed to do so by Windward or otherwise as consistent with the strategies and policies previously approved by Windward; (v) API will not take or fail to take any actions in contravention of written directives of Windward or in contravention of, or inconsistent with, strategies or policies previously established with Windward which in any such case could have the effect of (a) incurring or increasing the aggregate amount of Excess Costs, or (b) diminishing potential Recoveries, or (c) resulting in or expanding liabilities of API which could become Excess Costs under the PDC Agreement.

Q. BAT's claims in respect of the NCR Liability.

45. At this point I think it is helpful to draw a good many threads together and to summarise BAT's claims against Windward and API in respect of the NCR Liability.

46. Mr Kealey QC for BAT informed the Court that BAT regards its claim to a contractual indemnity under Clauses 11.1.1 and/or 7.2 of the 1990 Demerger Agreement as its principal claim.

Clause 11.1.1

47. BAT claims that Windward and API were both members of the "New Group" within the meaning of Clause 1(j) of the 1990 Demerger Agreement and that any liability it has in respect of the NCR liability relates to and/or arose from, and/or was alleged to relate to neglect in the business operations carried on by API prior to 1 June 1990 (the effective date) in that the "business and operations" carried on by API prior to that date included the manufacture of CCP at Appleton Mill and the CPM Plant and the claims made by NCR against BAT (and API) in the New York Proceedings related to such business and operations.

Clause 7.2

48. In advancing its claim under Clause 7.2 of the 1990 Demerger Agreement, BAT does not allege (and contends that it does not have to prove) that API's obligations to NCR under section 1.4 of the 1978 Purchase Agreement included an obligation in respect of liabilities of NCR in relation to the PCB contamination of the Fox River site and other sites or that API was in breach of its obligations and liabilities to NCR under section 1.4. In other words, BAT does not allege that 1978 Purchase Agreement and the Assumption Agreement imposed on API any CERCLA liability to NCR.

49. However, in a letter dated 19 September 2013, BAT's solicitors state that BAT may depart from its present position to plead that API's obligations to NCR included an obligation to pay NCR's contamination liabilities depending on the outcome of an appeal in *NCR Corporation et al v George A Whiting Paper Company et al* to be heard in February 2014.

50. BAT's claim under Clause 7.2 proceeds thus: (i) API's obligations to NCR under section 1.4 of the 1978 Purchase Agreement were at all material times and are the subject of a guarantee, alternatively a "guarantee or other obligation" by BAT within Clause 7.2; (ii) NCR's claim for an indemnity against BAT under section 9.2 of the 1978 Purchase Agreement in the New York Proceedings proceeded on the same basis as alleged in (i); (iii) NCR's claim against BAT gave rise to a triable issue in the New York Proceedings; (iv) by reason of the 1999 Agreement and/or the 1999 Estoppel, Windward and API agreed and accepted and/or are bound to accept that: (a) API's obligations to NCR under section 1.4 of the 1978 Purchase Agreement included an obligation to discharge the obligations of NCR in relation to the contamination with PCBs of the Fox River site; (b) API was in breach of its obligations to NCR under section 1.4 in relation to NCR's obligations in relation to such contamination; (c) any sums paid by BAT under the 1998 Settlement Agreement and any subsequent arbitration thereunder amount to a loss suffered by BAT for the purposes of Clause 7.2 of the 1990 Demerger Agreement; alternatively (v) by Clause 13 of the 1998 Settlement Agreement API agreed and is bound to accept the matters set out (iii).

The 1995 Agreement and 1995 Estoppel

51. BAT contends that by the 1995 Agreement, Windward and API agreed that they were liable to indemnify BAT in respect of all losses suffered or incurred by BAT Industries in connection with the subject matter of the New York Proceedings (including the settlement thereof) and agreed to conduct the defence of those proceedings under the 1990 Demerger Agreement. In the alternative, BAT claims that an estoppel by convention and/or representation arose out of the same communications (the 1995 Estoppel), with the result that Windward and API are estopped from denying that they are obliged to indemnify BAT against all losses suffered or incurred by BAT in connection with the subject matter of the New York Proceedings.

The 2005 Estoppel

52. BAT claims on the basis of the pleaded communications between representatives of BAT, Windward and API (and their respective lawyers) between 2003 and 2007 (particularly in the period leading up to and including July 2005) that Windward and API are estopped from denying that they are obliged to indemnify BAT Industries against all losses suffered or incurred by BAT Industries in connection with the NCR Liability and/or from denying that the 1990 Demerger Agreement is to be so construed.

The claim against API in restitution and/or subrogation under New York law

53. BAT claims that API is liable in restitution and/or subrogation under New York law on the basis that pursuant to their respective obligations to NCR under the 1978 Purchase Agreement and the 1998 Settlement Agreement, API is a "principal obligor" and BAT is a "secondary obligor".

T. API's Defences

54. Relying on the decision in *USA v NCR and Appleton Papers Inc* and the 2005 Arbitration Award, API maintains that its liability to NCR under the 1978 Purchase Agreement does not include any CERCLA liability, with the consequence that neither API nor BAT is liable to indemnify NCR in respect of any such liability under that agreement.

55. API further contends that since it was not liable to NCR in respect of any CERCLA liability, then neither it nor BAT has any ongoing liability to NCR under the 1998 Settlement Agreement since API had no liability to NCR in respect of the subject matter of the New York Proceedings. API also claims that any liability assumed by it and BAT under the 1998 Settlement Agreement has long-since been satisfied and it is not liable for any remaining costs of cleaning up the Fox River as was held in *USA v NCR and Appleton Papers Inc.*

56. So far as concerns BAT's claims under the 1990 Demerger Agreement, API claims that Windward had no authority to enter into that agreement on BAT's behalf. This is a somewhat surprising contention. It is expressly stated in the 1990 Demerger Agreement that Windward contracted "for itself and, in respect of Clauses 7, 8, and 11 as agent and trustee for each member of the New Group" and at no time prior to these proceedings has it been alleged that API is not bound by the 1990 Demerger Agreement. On the contrary in its mediation paper for the 1998 Mediation API stated

that it had "agreed to indemnify BAT Industries for various liabilities including all liabilities at issue in [the New York Proceedings]".

57. In response, in addition to asserting that Windward did have actual authority to contract on behalf of API, BAT relies in the alternative on Windward's apparent authority to contract on behalf of API.

58. On the basis that API is bound by the 1990 Demerger Agreement, API's case will be that :

> (i) in respect of Clause 11.1.1, NCR's claims against BAT do not arise out of any "neglect or default" since the pollution alleged by the EPA in its claim against NCR all occurred before API acquired the assets, properties and business of APD under the 1978 Purchase Agreement and there is no pleaded allegation that API is to be deemed to stand in the shoes of any putative predecessor of API who was guilty of neglect or default in respect of the pollution of the Fox River by PCBs;
>
> (ii) the obligations of BAT under Clause 9.2 of the 1978 Purchase Agreement do not constitute a "guarantee or other obligation" in respect of any obligation of API for the purposes of Clause 7.2 of the 1990 Demerger Agreement; rather, BAT's obligations under Clause 9.2 were joint and several with API's own obligations under Clause 9.2 and were not secondary obligations and thus BAT's obligations under Clause 9.2 cannot be construed as a guarantee or any similar obligation, in respect of API's obligations under the 1978 Purchase Agreement (whether under Clauses 1.4 or 9.2).
>
> (iii) API did not assume CERCLA liability under Clause 1.4 of the 1978 Purchase Agreement in any event. Accordingly, BAT could not have given a guarantee or any similar obligation in respect of API's CERCLA liability.
>
> (iv) even if API had originally been obliged to make payments (on behalf of BAT) to NCR under the 1978 Purchase Agreement, any such obligations would have fallen away and been replaced by those set out in and agreed upon by the parties under the 1998 Settlement Agreement pursuant to which BAT's liability was joint and several with that of API.

59. Counsel for API, Mr Swainston QC, accepted that API might want to support Windward's pleaded contention that since the indemnity given in Clause 11.1.1 must arise out of neglect and the 1990 Demerger Agreement was concerned with the acquisition of shares, the indemnity given in Clause 11.1.1 is void under s. 152 (1) (a) (ii) of the Companies Act 1985 since it constitutes "financial assistance".

60. As to BAT's claims based on or assisted by the alleged 1995 Agreement, the 1995 Estoppel, the 1999 Agreement, the 1999 Estoppel and the 2005 Estoppel, none of these claims is admitted by API and I proceed on the basis that API will put BAT to proof of the all the allegations of fact averred by BAT, including the detrimental reliance pleaded by BAT in support of the alleged estoppels.

61. In my judgement, on whatever basis BAT advances its claims, the question of API's liability to NCR under the 1978 Purchase Agreement in respect of the contamination of the Fox River will or may arise. Thus the claim under Clause 11.1.1 of the 1990 Demerger Agreement is predicated on API having a CERCLA liability to NCR under Section 1.4 of the 1978 Purchase Agreement and, even though BAT's presently pleaded case under Clause 7.2 of 1990 Demerger is on the basis that BAT does not need to prove API was liable to NCR in respect of the Fox River contamination, I think the scope of those indemnities may nonetheless be in issue. I also bear in mind that BAT has given notice that it may plead that API was liable to NCR in respect of the Fox River contamination depending on the outcome of the appeal in *NCR Corporation et al v George A Whiting Paper Company et al*. As to BAT's restitution and/or subrogation claim under New York law, whether BAT's liability under the 1978 Purchase Agreement was as a secondary obligor whilst API's liability thereunder was as a principal obligor may involve having to demonstrate such liability by reference to CERCLA liability.

The applicable legal principles

62. This being a service out case, the burden is on BAT to satisfy the court that in all the circumstances, England is clearly and distinctly the appropriate forum for the trial of its claim against API and the court ought to exercise its jurisdiction to permit service of the proceedings out of the jurisdiction; see *AK Investment CJSC v Kyrgyz Mobile* [2012] 1 W.L.R. 1804 at [71], [78]; *VTB Capital Plc v Nutritek International Corporation* [2013] 2 WLR 398 [13], [44], [80], [190]. The task of the court is to identify the forum in which the case can be most suitably tried for the interests of the parties and for the ends of justice and since this is a service out case, the correct approach is not to consider first whether there is a natural forum and if there is not, to ask whether England is nonetheless the appropriate forum for other reasons, but instead to answer one overall question: has it been clearly and distinctly shown that England is the appropriate forum: *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 at pp. 480 and 481 per Lord Goff; *VTB Capital Plc v Nutritek International Corporation* [2012] 2 Lloyd's Rep 313 [101], [164] (CA); *VTB Capital Plc v Nutritek International Corporation* [2013] 2 WLR 398, [44], [190] (SC).

63. The conventional approach involves considering the factors by reference to the issues in the case that connect the proceedings to the competing *fora* championed by the parties, and I propose to adopt this course because connecting factors are always relevant in answering the question before the court. However, it must be remembered that the forum most suitable for the interests of the parties and the ends of justice is not necessarily the forum with the closest connection to the dispute, as would be the case for example where one of the parties would not obtain a fair hearing in the more closely connected forum; see Dicey, Morris & Collins *The Conflict of Laws* (15th ed) at 12-055. Thus, in the instant case, BAT argues that England is the only forum in which its claims against Windward and API can be determined together and for this reason England is the appropriate forum for the trial of BAT's claim against API since otherwise BAT will be faced with the serious inconvenience and cost of bringing two heavy and very expensive actions covering the same ground in two different jurisdictions with the consequent risk of inconsistent decisions.

64. Mr Swainston submitted that in so far as BAT opposes API's case that it should sue API in New York because of the risk of inconsistent outcomes and the multiplication

of its own costs, these are matters entirely of BAT's own making. I disagree. In my judgement, it was an entirely proper and reasonable decision for BAT to start proceedings against Windward as well as against API and to bring both sets of proceedings in England. The evidence clearly suggests that there are serious doubts as to the financial strength of API. Thus API's "10Q" consolidated financial statements to the 3 months ending 30 June 2013 show that as at that date API was balance sheet insolvent to the tune of (US$377,066,000). On the other hand, Windward had net assets of US$72.3 million and cash in hand and at bank totalling US$1 million as at 31 October 2012. Further, Windward has claims to recover dividends totalling US$800.7 million paid to its former parent company, Sequana SA, and its current directors, which Hamblen J held on 21 November 2013 had a real prospect of success when ordering absent an appropriate undertaking from Windward, the appointment of a receiver over those claims on BAT's application ([2013] EWHC 3612 (Comm)).

65. It is also the case that by reason of the AWA Agreement and the PDC Agreement (see paragraph 44 above) Windward is the ultimate paymaster in relation to any liability that API has to BAT and has the contractual right to control the litigation brought not only by NCR but also BAT.

66. Further, it is plain that England is the natural and appropriate forum for a claim by BAT against Windward. Windward is domiciled here and by virtue of Article 2 of the Judgments Regulation, the English court unquestionably has jurisdiction to determine such a claim.

67. The court was informed by Mr Attrill that Windward supported API's jurisdiction challenge but would not itself voluntarily submit to the jurisdiction of the New York Court, although if jurisdiction were established it would defend the claim. It is therefore seriously questionable whether a judgement against Windward in New York proceedings would be enforceable in England, assuming that the New York Court would assert jurisdiction over the claim; see *Dicey, Morris & Collins* at [14R-020] (Rule 42) and [14R -054] (Rule 43).

68. There is also a real doubt whether the New York Court would indeed assert jurisdiction over a claim by BAT against Windward for an indemnity. It is common ground between the experts on New York law, Mr Milonas for BAT and Mr Pratt for API, that the New York Court would only have personal jurisdiction over Windward if the requirements of s. 302 (a) (1) of the Civil Practice Law and Rules were fulfilled, namely, that BAT's cause of action arises out of Windward having transacted business in New York or having contracted to supply goods or services in New York. The experts also agree that a mere agreement to indemnify does not suffice, but they disagree on the issue whether the quality of Windward's contacts with New York would constitute "transaction of business" in New York. Relying on *Licci v Lebanese Canadian Bank SAL*, 20 N.Y. 3d 327, a decision of the New York Court of Appeals not referred to by Mr Milonas in his first statement, Mr Pratt is of the view that: (i) Windward's retention of counsel in the New York proceedings and the subsequent Mediation; (ii) negotiating and concluding the 1998 Settlement Agreement and the AWA Agreement; (iii) conducting the 2005 Arbitration; and (iv) meeting in New York in 2005 as part of Windward's management of the New York proceedings, show Windward's "purposeful availment" of New York law. In Mr Milonas's view[6]: (i)

[6] As expressed in his second Witness Statement

Licci (which was not an indemnity case) should be limited to its specific facts; and (ii) the matters relied on by Mr Pratt do not establish personal jurisdiction over Windward in New York since they simply "restate the fact that Windward agreed to indemnify BAT".

69. BAT does not have to show on the balance of probabilities that the NewYork Court would find that it did not have jurisdiction over a claim against Windward, merely that there is a real risk of that happening; see *Cecil and Others v Bayat and Others* [2010] EWHC 641 [28], per Hamblen J citing *Cherney v Deripaska* [2009] EWCA Civ 849 [29]. In my judgment, Mr Milonas' evidence is sufficiently cogent to support the conclusion that there is a real risk that the New York Court would find that it did not have jurisdiction over a claim brought by BAT against Windward for indemnity, and I so hold.

70. The fact that all possible related claims can be tried in one of the competing *fora* but not another carries great weight in deciding where the claims can best be tried in the interests of the parties and the interests of justice . In *Donohue v Armo Inc et al* [2002] 1 Lloyd's Rep 425 (where the issue was whether effect should be given to an exclusive jurisdiction clause) Lord Bingham said:

> It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice. (Para 34)

71. To like effect are these observations of Rix LJ in *Konkola Copper Mines plc v Coromin* [2006] 1 All ER (Comm) 437 (CA):

> ...the attitude of the English courts is, if possible, to avoid fragmentation of disputes between different jurisdictions where such fragmentation raises the twin dangers of waste of resources and of inconsistent decisions.

72. In *JSC BTA Bank v Granton Trade Limited* [2011] 2 All ER (Comm) 542, the first two defendants were sued as of right in England and (as here) jurisdiction was asserted against the other foreign defendants on the basis that they were necessary and proper parties. The claim against all of the defendants was that they had conspired to defraud the claimant bank by obtaining large payments under letters of credit said to be in connection with bona fide contracts with arms-length third parties, when this was not the case. The chief architects of the fraud were the first two defendants who maintained that there was no rule of law in Kazakhstan and the claims were politically motivated. There were many factors that connected the case to Kazakhstan. The claimant was incorporated and carried on business in Kazakhstan; most of the documentation alleged to have effected the fraudulent scheme was in Russian; the letters of credit were payable in Kazakhstan; and breaches of Kazakhstan law were alleged. Eight of the necessary and proper party defendants applied to have the order giving permission for service out of the jurisdiction set aside. Christopher Clarke J

rejected the challenge made to the court's jurisdiction, holding that the fact that it was in the English court rather than a Kazakhstan court that all the issues could be tried against all the defendants outweighed the considerable links the case had with Kazakhstan.

73. The same approach was taken in the recent cases of *Erste Group Bank AG v JSC "VMZ Red October"* et al [2013] EWHC 2926 (Comm) (Flaux J) and *OJSC VTB Bank v Parline Limited et al* [2013] EWHC 3538 (Comm) (Leggatt J).

The English connecting factors

74. I turn to consider the connecting factors to England, New York, and other states of the US, beginning with the English connecting factors.

(1) BAT and Windward are both incorporated and have their headquarters in England.

(2) The 1990 Demerger Agreement was concluded in England and was to be performed in England.

(3) The 1990 Demerger Agreement, which is the foundation of BAT's principal claim, is governed by English law in accordance with which all issues of construction and interpretation of Clauses 11.1.1 and 7.2 will be determined, including in particular whether the indemnified losses "relate to or arise, or are alleged to relate to or arise, out of any neglect or default in the business and operations carried on by the New Group prior to the Effective Date…" (Clause 11.1.1) and whether API is in breach of obligations which are the subject of a "guarantee or other obligation" (Clause 7.2).

(4) The applicability of sections 151 and 152 of the English Companies Act 1985 (the financial assistance provisions) to the construction of Clauses 11.1.1 and 7.2 of the 1990 Demerger Agreement.

(5) English law governs the issue of Windward's apparent authority to enter into the 1990 Demerger Agreement on API's behalf (see Dicey, Morris & Collins at [33R-432] and [33-436]), although this may lead back to a question of Delaware law as to whether Windward had actual authority to make the representation(s) relied on for apparent authority.

(6) BAT has the better of the argument as to where the 1995 Agreement was made, contending that it was made in England on the basis that it was concluded pursuant to the 30 June 1995 Letter and the offer made on 7 July 1995 by Mr Dungate and Mr Bush which was accepted by Mr Porter in London, which acceptance was communicated to Mr Dungate in Basingstoke. Alternatively, if the agreement was made on receipt of the 10 July 1995 Letter, that letter was sent from Basingstoke and received in London.

(7) I am also of the opinion that BAT has the better of the argument as to the governing law of the 1995 Agreement, which BAT contends is English law this being the law chosen by the parties pursuant to Article 3 (1) of the Rome Convention since the 1995 Agreement is a successor to and/or parasitic upon the 1990 Demerger Agreement, which is expressly governed by English law. Alternatively, English law applies pursuant to Article 4 (1) and/or 4 (5) and/or is the law of the country with

which the agreement is most closely connected pursuant to Articles 4 (1) and/or 4 (5). The fact that under this alleged agreement the New York proceedings were to be conducted by Windward/API does not mean in my view that New York law or Wisconsin law was the governing law, since Windward and API had a right to conduct the defence of the New York proceedings under Clause 11.1.2 of the 1990 Demerger Agreement and such right was contingent on BAT's right to be indemnified under Clause 11.1.1 thereof.

(8) The evidence as to whether the 1995 Agreement was entered into between BAT on the one hand and Windward and API on the other and as to the terms thereof is mainly in England. The fact that Mr Mieliulis of API in Wisconsin and Mr Bourque of Simpson Thacher in New York were copied into the 10 July 1995 Letter is of limited significance since the likelihood is that the letter was copied to them to inform them as to how the New York Proceedings were henceforth to be conducted and not because they had had a role in the negotiation of the 1995 Agreement. It is to be noted that the 30 June 1995 Letter was not copied to either of them.

(9) BAT has the better of the argument as to the law that governs the 1999 Agreement. It submits that the governing law is English law on the basis that the parties chose English law pursuant to Article 3 (1) of the Rome Convention since the agreement was concerned with the scope of the 1990 Demerger Agreement on which the later agreement was parasitic. Alternatively, English law is the law of the country with which the 1999 Agreement is most closely connected pursuant to Articles 4 (1) and/or 4 (5). In my view, the 1999 Agreement is not more closely connected with the 1998 Settlement Agreement than the 1990 Demerger Agreement. BAT, Windward and API were all stated to be parties to the latter agreement, whereas the parties to the former agreement were NCR, BAT and API.

(10) The communications alleged to give rise to the 1999 Estoppel occurred in England and the evidence in respect thereof is mainly in England.

(11) As to the 2005 Estoppel, its existence and scope is connected to England. All but one of the recipients of Mr Gower's communications were and are resident in the UK; the eighth recipient is resident in Chicago. The fact that the meeting on 1 July 2005 took place in New York is of little significance because the meeting was only held there rather than in Chicago for reasons of logistical convenience.

(12) The decisions taken by BAT which are pleaded as reliance on the representations and common assumptions contended for were taken largely, if not entirely in England.

The New York connecting factors

75. (1) The 1978 Purchase Agreement and 1978 Assumption Agreement are governed by New York law and are both an important part of the background to the 1999 Demerger Agreement. These agreements are also relevant to API's contention that it has no liability to NCR under the 1978 Purchase Agreement and accordingly has no liability to BAT under the Demerger Agreement.

(3) The New York Proceedings, including the claims and defences made therein, the dismissal of the summary judgment motions and the part played by Simpson Thacher are all relevant as background to the 1998 Settlement Agreement and in light of BAT's pleaded detrimental reliance.

(4) New York law governs the 1998 Settlement Agreement which was negotiated in New York.

(5) Evidence as to events in New York is going to have be prepared in response to BAT's pleading that: (i) in reliance on the 1999 Estoppel it gave up the opportunity to participate in the Mediation and the negotiations of the 1998 Settlement Agreement and that it signed the 1998 Settlement Agreement under pressure without a full understanding of the history and without fully understanding the enlarged scope of its obligations under that agreement; and (ii) if it had participated in the negotiations BAT would have obtained a better settlement than was achieved.

(6) Evidence as to the 2005 Arbitration, the subsequent and the ongoing 2013 Arbitration is going to have to be prepared to be given by witnesses from New York, including the relevant New York attorneys.

(7) New York law governs BAT's restitution/subrogation claim.

The non-New York American connecting factors

(1) The scope and operation of CERCLA and the decisions thereon including *USA v NCR Corporation and Appleton Papers Inc* and *Appleton Papers Inc and NCR Corporation v George A Whiting Paper Co et al*, will have to be investigated and analysed since matters go to the nature of the liability asserted against NCR and API by the EPA and thereby to API's contention that it is not liable to BAT under the 1990 Demerger Agreement in respect of the Fox River contamination.

(2) The Wisconsin commercial background to the 1978 Purchase Agreement, including the nature and activities of the businesses sold to API is relevant to the construction of that agreement and of the Demerger Agreement.

(3) The Wisconsin factual background to the claims made against NCR and API by the EPA is relevant, inter alia, to the issue whether there was neglect or default on the part of API.

(4) The law of Delaware is likely to govern the issue as to whether Windward had actual authority to enter into the 1990 Demerger Agreement on API's behalf. Delaware law may also be relevant to the question of apparent authority to the extent that it is necessary to show that any representations relied on to establish apparent authority were made with actual authority: see *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 506.

(5) BAT's averment that if it had not relied on the 2005 Estoppel it would have participated in the Fox River clean up operations and would have obtained a more advantageous outcome therein will require: (i) a wide ranging factual enquiry considering many documents and consulting numbers of individuals engaged in the

clear up work in Wisconsin; and (ii) (probably) expert evidence as to the professionalism of those who carried out the clean up.

Weighing the competing connecting factors

76. In my judgement, the non-New York American factors loom somewhat larger than the New York factors. Mr Kealey urged the court to guard against lumping them together with the New York factors. He proclaimed that the USA is not a competing forum in this case any more than is the European Union: mere geographical proximity is not a basis for treating separate legal jurisdictions as mere extensions of each other: see *Hindocha v Gheewala* [2004] 1 CLC 502 (PC) at [17] per Lord Walker.

77. Mr Swainston argued that it was more straightforward to collect evidence as to the Non-York American factors in New York than in London because the witnesses could be deposed in New York, as opposed to interviewing them, and it would be easier for them to travel there to give evidence than to London. I think he had a point so far as travel is concerned, but it is not one of much weight. As to his suggestion that deposing witnesses is an easier way of gathering evidence than by interviewing them, this was unsupported by evidence and I find that I am quite unable to decide whether the one method of evidence gathering is more effective in terms of time and cost than the other. Mr Swainston also submitted that it would be easier to collate the Wisconsin evidence in New York than in London since there were teams of New York lawyers who had covered much of the relevant ground in the 2005 and 2013 Arbitrations. However, that is to look at matters only from API's perspective. BAT is not a party to the 2013 Arbitration and it is inconceivable that the attorneys that represented the API/Windward/BAT in the 2005 Arbitration would or could act for BAT in New York proceedings against API.

78. Mr Swainston further submitted that whether the proceedings were in a New York state court or a federal court, the judge would have at least a broad familiarity with the workings of CERCLA and with Delaware company law, which a judge in the London Commercial Court would not. This submission too was unsupported by any evidence, but I think in this instance I can fairly conclude on the basis of judicial experience and common sense that Mr Swainston's submission is a good one, so far as it goes. Mr Swainston also made the point that the courts of New York are well used to deciding issues on the basis of foreign law proved by experts and maintained that the unlawful assistance case based on s s.152 (1) (a) (ii) of the UK Companies Act 1985 did not involve any esoteric law and would be easily understood by a New York court.

79. Mr Kealey made a similar submission in favour of London, contending that the Commercial Court was well used to applying foreign law determined on expert evidence and suggesting that an English judge would readily understand the New York law of restitution and subrogation pleaded by BAT. He also placed great emphasis on the fact that the agreements and related estoppels sought to be enforced by BAT were governed by English law.

What is the appropriate order in the interests of the parties and in the interests of justice?

80. Mr Swainston did not shrink from submitting that there was an "avalanche" of New York and non-New York American factors that clearly outweighed the English connecting factors. He further submitted (correctly) that there was no inflexible rule

that it could never be in the interests of the parties or in the interests of justice for identical proceedings to be brought against one defendant or group of defendants in one jurisdiction, and against another defendant or group of defendants in another jurisdiction. In the circumstances of this case, what justice and fairness to the parties and considerations of comity required was, at the very least, that the English proceedings should be stayed to allow the New York courts to decide whether to exercise jurisdiction over Windward. If the decision is in favour of asserting jurisdiction, the English proceedings can be permanently stayed. If the decision is to the contrary, the English proceedings can be revived.

81. To say that there is an avalanche of New York and non-New York American connecting factors in this case is an exaggeration. Nonetheless, I conclude that looking only at the connecting factors and ignoring for the moment the issue of bifurcation of proceedings, there is a clear preponderance in favour of New York over London.

82. Does the prospect of BAT having to bring substantially identical actions in two jurisdictions, in London against Windward and in New York against API, with the risk of inconsistent decisions, decisively tip the scales in favour of London being the appropriate forum for the claim against API? In my judgement it does. The claims brought by BAT involve very heavy and very expensive litigation and the risk of inconsistent decisions is pregnant with disaster. As I have already found, BAT acted entirely properly and reasonably in starting proceedings against Windward as well as against API and in bringing both sets of proceedings in England. As the party with considerably greater assets to meet a judgement and as the ultimate paymaster with the right to control the litigation, Windward is the main protagonist and ought to be sued in England which is manifestly the appropriate forum and where effective execution measures are available. It is also not clear on the evidence that if a claim were made against Windward in New York, the court would assert jurisdiction over the claim. No doubt it would be more convenient for API to be sued in New York, but in my view the hardship for API in being sued in London is clearly and decisively out-weighed by the hardship to BAT in not being able to sue both defendants in London.

83. I am accordingly satisfied that BAT has established that England is clearly and distinctly the appropriate forum for the trial of its claim against API.

Conclusion

84. API's application to set aside the order of Christopher Clarke J dated 12 June 2012 is dismissed.