JUDGMENT : Mr Justice Aikens : Commercial Court. 4th July 2007

1. This is another battle between parties about the jurisdiction in which their disputes should be determined. The defendants in the present proceedings want all the disputes between themselves and the claimant (and some other related parties) to be determined by the Courts of Cyprus. The claimant in these proceedings wants the current action to proceed in the English courts, although, together with other related parties, it has also started proceedings in the Cyprus Courts. The defendants have applied to stay the current proceedings under either Article 27 or Article 28 of ***Council Regulation (EC) No. 44/2001*** on Jurisdiction and the Recognition and Enforcement of Judgments in Civil & Commercial matters ("the Regulation"). Counsel for the parties prepared very helpful outline submissions and they supplemented those with oral submissions on Friday, 8th June 2007. I reserved judgment.

A. The parties and the facts giving rise to the disputes

2. Russia Partners Company Limited ("Russia Partners") is a Delaware incorporated limited partnership. It is an investment fund which specialises in investments in Russia. Russia Partners incorporated companies in Cyprus to act as special purpose vehicles for its investments in Russia. The first three relevant companies are Amherst Capital Investments Limited, Hensher Enterprises Limited and Conway Holdings Limited, (respectively "Amherst", "Hensher" and "Conway"). There are two other associated companies that are relevant to the present proceedings. The first is Serpell Holdings Limited ("Serpell") and the second is Kolden Holdings Limited ("Kolden"). Russia Partners was at one stage the beneficial owners of all these companies.

3. Amherst, Hensher and Conway between them held 38.71% of the shares of a joint stock company incorporated under Russian law called OAO Maltsovsky Portlandcement ("Maltsovsky"). Kolden and Serpell are the owners of shares in another company incorporated in Russia, called OAO Eurocement ("Eurocement"). This company is also known and referred to as JSC Eurocement. It is one of the largest cement producing companies in Russia. In 2004 Russia Partners indirectly held a minority stake of 44.4% of the shareholding of Eurocement.

4. On 18th March 2004 Amherst, Hensher and Conway ("the seller companies") entered into four Agreements for the sale of their combined shareholding in Maltsovsky to the defendant companies (respectively "Rodette" and "Taplow"). Those latter companies are Cypriot companies also. All the contracts are in the form of a Securities Sale and Purchase Agreement (the "SPAs") and all are on the same terms. Each of the contracts specifically provides, by clause 9, that it shall be governed and construed in accordance with the laws of England. The same clause also provides: *"Any dispute arising under and in connection with this Agreement which cannot be mutually resolved shall be submitted to the non-exclusive jurisdiction of the Courts of England, or any other Court of competent jurisdiction."*

5. Each of the SPAs provides that the seller companies, as owners of an identified parcel of the Maltsovsky shares, will sell them to the two defendant companies, Rodette and Taplow. There are four SPAs because Hensher entered into one SPA to sell some shares to Rodette and another SPA to sell some shares to Taplow. The third SPA was between Amherst and Taplow and the fourth was between Conway and Rodette.

6. Clause 2.1 of each of the SPAs states that the purchaser will take all steps necessary for re-registration of the shares in the name of the purchaser or a nominee within one business day of the date of the SPA. Clause 6.2(d) of each of the SPAs provides:

> *"6.2 The purchaser hereby represents and warrants as of the date of this Agreement and on a continuing basis hereafter that: ……..*
>
> *(d) the purchaser is acquiring the securities in a private transaction for the purchasers' own account for purposes of further immediate distribution thereof to JSC "Eurocement" only ……"*

7. The name *"JSC Eurocement"* is a reference to Eurocement, as described above.

8. The total purchase price under the four SPAs was approximately US$ 3,350,000. That figure corresponded to the price that the seller companies had themselves paid to acquire the Maltsovsky shares in 2002. However it is alleged that this price was far below the market value of the Maltsovsky shares either in 2004 or now.

9. The purchasers of the Maltsovsky shares (i.e. Rodette and Taplow) allegedly did not transfer the shares to JV as clause 6.2(d) of the SPAs allegedly contemplated. Accordingly, on 13th July 2006 Amherst, Hensher and Conway issued proceedings in the Commercial Court: 2006 Folio 697 ("the English Action"). In these proceedings, those companies (who were, of course, the sellers of the Maltsovsky shares) sought a declaration against the purchasers, Rodette and Taplow. The declaration sought was that: *"…… On the true construction of [the SPAs] each of the first and second defendants was obliged immediately, alternatively as soon as reasonably practicable to transfer [the Maltsovsky shares] to [JV] ……".*

10. As an alternative, Amherst, Hensher and Conway sought rectification of clause 6.2(d) of each of the SPAs in the following terms: *"…… in order to carry out the common intention of the parties, so as to incorporate into each [SPA] an obligation on the relevant [purchaser] immediately or alternatively as soon as reasonably practicable, to transfer [Maltsovsky shares] to [JV]".*

11. For convenience, I will label these claims as "the contract causes of action". The reason for giving this label will become apparent shortly.

12. At the end of the brief details of claim there is a declaration in the usual form that the High Court of England & Wales has power under the Regulation to hear the claims against the first and second defendant. It is stated that this is because the parties had agreed to confer jurisdiction on the English court within the terms of Article 23 of the Regulation. The declaration also states that no proceedings are pending between the claimants within the UK or any other Regulation State, as defined by section 1 (3) of the Civil Jurisdiction & Judgments Act 1982.

13. On 3rd August 2006 Amherst, Hensher and Conway and three other claimants began an action in the Cyprus courts: Cyprus action no. 5166/2006 ("the Cyprus conspiracy action"). The other three claimants named are Kolden, Serpell and Russia Partners. In that action the claimants seek damages against Rodette, Taplow, OAO Eurocement Group and Mr Filaret Galchev. The endorsement on the claim form asserts that the claimants are entitled to "*compensation for conspiracy aiming at fraud*" and compensation for alleged inducement to commit a breach of the four SPAs by OAO Eurocement Group and Mr Galchev. I will call those claims "the conspiracy causes of action". Those proceedings were served on Rodette and Taplow on 8th August 2006.

14. On 15th November 2006, Amherst, Hensher and Conway, as assignors, concluded a Deed of Assignment ("the Assignment") with Kolden as assignee. This deed provides, effectively, for the assignment of rights in the SPAs and rights arising from them. The assignment clause provides: *"Assignors hereby unconditionally and absolutely assign to the Assignee any and all of their rights, claims and causes of action, whether vested in them jointly or individually without limitation existing or arising from the acquisition, ownership or alienation of the shares of OAO "Maltsovsky Portlandcement" ("Maltsovsky") and rights arising from any agreement with third parties associated with Maltsovsky ("the Rights"). For the avoidance of doubt the Rights include all rights, claims and causes of action whether arising directly or indirectly from the [four SPAs]."*

15. The Assignment also provides that the assignors would execute Notices of Assignment in a specified form and deliver those Notices to the counterparties to the four SPAs. The Assignment expressly states that it is governed by English law and that any dispute arising out of or in connection with the Deed of Assignment would be settled by arbitration before the London Court of International Arbitration in London.

16. Notices of Assignment were received at the registered office of Rodette and Taplow on 18th and 19th December 2006.

17. On 29th January 2007, Skadden, Arps, Slate, Meagher & Flom (UK) LLP ("Skadden Arps"), solicitors for Kolden, wrote to Steptoe and Johnson ("S&J"), solicitors for Rodette and Taplow, indicating that Skadden Arps had applied to the English court to substitute Kolden as sole claimant in the English Action in the place of Amherst, Hensher and Conway. The explanation given for this was that Amherst, Hensher and Conway had assigned to Kolden their rights as against Rodette and Taplow by virtue of the Assignment.

18. On 14th February 2007, Rodette and Taplow issued proceedings in the District Court of Nicosia, in Cyprus Action no 1067/2007 ("the Cyprus Action"). The defendants in that case are Amherst, Hensher, Conway and Kolden. The relief sought in that action is the mirror image of that sought by Amherst, Hensher and Conway in the English Action, 2006 Folio 697, ie. the contract cause of action. Thus, Rodette and Taplow claim a declaration that they, as purchasers of the Maltsovsky shares under the four SPAs were not at any time obliged to transfer those shares to JV.

19. Rodette and Taplow also claim, against all four defendants, a declaration that the assignments made by virtue of the Deed of Assignment are invalid and without legal effect. Two bases for this claim are set out in the endorsement. The first is that the express or implied effect of a confidentiality clause in the SPAs (clause 8) is that the parties to the SPAs have agreed that rights under those contracts are not assignable. The second basis is that the assignment is champertous or otherwise contrary to public policy and so is void.

20. On 16th February 2007, Tomlinson J gave permission, e*x parte*, to Kolden to be substituted as claimant in place of Amherst, Hensher and Conway in the English Action. On 20th February 2007 the Claim Form in the English Action, 2006 Folio 697, was re-issued with Kolden substituted as the sole claimant. On 2nd March 2007, Rodette and Taplow served a second acknowledgment of service following the re-service of the proceedings in the English Action. In that second acknowledgement both defendants indicated an intention to contest the court's jurisdiction on the basis which is now being pursued.

B. Council Regulation (EC) 44/2001

21. Both sides referred me to the preamble of the Regulation, in particular paragraph 15. This states:

"Whereas …….

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously …… ".

22. Both parties argued that this paragraph in the preamble not only provided the underlying rationale for Articles 27 and 28 of the Regulation, but also assisted in the proper construction of those Articles.

23. Articles 27, 28 and 30 of the Regulation provide as follows:

"*Article 27*

1. Where proceedings involving the same cause of motion and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own action stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 28

1. When 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 these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction overt 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 from separate proceedings. ……

Article 30

For the purpose of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or ……..."

24. In the Brussels Convention of 1968, which had formerly governed issues on jurisdiction and the enforcement of judgments in civil and commercial matters between States of what was then the EEC, the current Articles 27 and 28 had been Articles 21 and 22. The relevant wording of Article 21, which is now incorporated in paragraph 1 of Article 27, is the same, at least for the purposes of the present case. Article 27, paragraph 2 differs from the second paragraph of the old Article 21, but that is irrelevant for present purposes.

25. The wording of Article 22 of the Brussels Convention has been considerably amended to produce the present Article 28 of the Regulation. Moreover the problems raised by the concept of when a court was "seised" of an action for the purposes of the old Article 22, led to the new Article 30 being introduced. The new Article 30 sets out an authoritative definition, (for the purposes of Section Nine of the Regulation), of when a court is "deemed to be seised" of an action.

C. The arguments of the parties

26. Mr Eder QC, who appeared for the defendant applicants, was prepared to assume for present purposes that the assignment of the rights of Amherst, Hemsher and Conway to Kolden was arguably valid as a legal assignment in English law. However, he pointed out that when the claimants in the English Action obtained leave to amend the Claim Form, no attempt was made to amend the brief details of claim endorsed on it. Therefore, there is nothing in the brief details to indicate the status of Kolden as assignee of the rights of Amherst, Hensher and Conway. Mr Eder submits that this omission would be fatal to Kolden's claim in respect of the contract cause of action unless the omission is rectified. Nevertheless, as I understood it, Mr Eder was prepared to argue the application upon the basis that Kolden had an arguable case on the contract cause of action (as a legal assignee) against Rodette and Taplow for a declaration that they were in breach of the SPAs, alternatively a claim for rectification or damages for breach of contract.

27. I also understood Mr Eder to accept, indeed positively to assert, that the Cyprus action was the "mirror image" of the English contract cause of action in terms of the subject matter of the proceedings (cf. ***Gubisch Maschinenfabrik KG v Julio Palumbo)***[1]. Therefore Mr Eder submits that, for the purposes of Article 27 of the Regulation, the causes of action set out in the brief details of claim in the English Action constitute the same causes of action as those set out in the writ in the Cyprus Action.

28. Mr Eder also accepts that, at the date of the issue of the Cyprus Action, ie. 14 February 2007, the English court was the court "first seised" with the contract cause of action, at least between the claimants then identified in the English Action, viz. Amherst, Hensher and Conway on the one side and Rodette and Taplow on the other. However, Mr Eder makes the obvious point that the Kolden is a different legal entity from the three assignor companies. He submits that when the Cyprus Action was issued on 14 February 2007, then, as between Kolden and Rodette and Taplow, the Cyprus court was the court first seised of the contract cause of action between those particular entities and parties. Once Tomlinson J granted Amherst, Hensher and Conway leave to amend the English action to substitute Kolden as the sole claimant, (on 16 February 2007), then, he submits, the English court became the court "second seised" of the contract cause of action between Kolden on the one side and Rodette and Taplow on the other. Mr Eder submits that, for the purposes of Article 27, Kolden is not to be characterised as "the same party" as Amherst, Hensher and Conway.

29. In support of his argument that Kolden was not the "same party" as the assignor companies, Mr Eder relies on the analysis of what is meant by "the same party" in Article 21 of the Brussels Convention (ie. the predecessor of Article 27), as set out in the ECJ's decisions in ***The Tatry***[2] and ***Druout Assurance SA v Consolidated Metallurgical***

[1] *[1987] ECR 4861, paragraphs 15-19.*
[2] *[1994] ECR 1 – 5439; [1999] QB 515.*

Industries and other:[3] ("the ***Druout case"***). He also submits that it is relevant to look at national law to see whether there is a divergence of interests between the two legal entities concerned who are said to be "the same party". In this regard he reminded me that if rights under a contract are assigned, the assignee takes only the benefit of the contract, but not its burden. Mr Eder referred me to the Court of Appeal's analysis of the relative interests of an assignor and an equitable assignee in respect of making a claim and being bound by the result of a court decision in ***Three Rivers District Council v Governors and Company of the Bank of England ("the BCCI" case).***[4] Mr Eder submits that an equitable assignee and the assignor have different interests. In the present case, because the brief details of claim have not said whether Kolden claims as legal or equitable assignee, it is arguable that it claims as the latter. If so, it does not have an identity of interest with the assignor companies, so cannot be the "same party" as them for the purposes of Article 27.

30. Mr Eder also referred me to comments in ***Dicey, Morris and Collins, The Conflict of Laws,***[5] ***Briggs and Rees, Civil Jurisdiction and Judgments,***[6] and ***Layton & Mercer, European Civil Practice.***[7] He said these passages support the propositions that if a new party is brought into an existing action by amendment, then the new party may not be the "same party", and the court will only be seised of the cause of action in relation to that party when the new party is joined to the proceedings.

31. Mr Eder submitted that the consequence of this analysis is that Rodette and Taplow are entitled to a declaration that, as between them and Kolden and in respect of the contract cause of action, the Cyprus Court is the one first seised. Therefore, by virtue of the terms of Article 27 of the Regulation, the English Court, as the court "second seised", must stay its proceedings until such time as the jurisdiction of the Cyprus Court is established.

32. Mr Eder also sought to rely on Article 28. He submitted that the Cyprus conspiracy Action and the Cyprus Action (ie. the contract cause of action) are "related actions" to the currently constituted English Action for the purposes of Article 28. He submits that the District Court of Nicosia was first seised of the conspiracy cause of action and that Cyprus law permits the consolidation of the two actions in Cyprus. Therefore, the English court, as the court "second seised" of the contract cause of action (as now constituted) should stay the English Action under Article 28.

33. However, I find difficulty in seeing how Article 28 can be relevant in the present case, given Mr Eder's argument that the contract causes of action in the English and Cyprus Actions are the same for the purposes of Article 27. If, as he submits, for the purposes of Article 27 Kolden is ***not*** the *"same party"* as the assignor companies, (viz. Amherst, Hensher and Conway), then the Cyprus Court must be the court first seised of the contract cause of action between Kolden and Rodette and Taplow. Therefore, the English Action, as constituted after the substitution of Kolden for the assignor companies, must be the court second seised of the contract cause of action as between Kolden, Rodette and Taplow. Therefore the English court must stay the English Action under paragraph 1 of Article 27.

34. If, however, Kolden is the *same* party as the assignor companies for the purposes of Article 27, then (given Mr Eder's acceptance that both the English and Cyprus Actions involve the same cause of action), I think he has to concede that the English Court was and remains the court first seised of the contract cause of action as between Kolden, Rodette and Taplow. In which case Rodette and Taplow cannot succeed in obtaining a stay of the English Court proceedings under either Article 27 or 28. The latter Article only requests action from courts other than the court first seised.

35. On behalf of Kolden, Mr Howard QC submits that the English Court became seised of the contract cause of action on 13 July 2006 when the English Action was issued. The cause of action remains the same after the amendment to substitute Kolden; the only difference is that the legal assignee has been substituted as claimant for the assignor companies. That substitution has not altered the identity of the parties for the purposes of Article 27. Kolden is *"the same party"* as the assignor companies.

36. Mr Howard accepts that the phrase *"the same parties"* in Article 27 must be construed in an autonomous way under Regulation law, but he submits it is clear from the two decisions of the ECJ, viz. ***The Tatry*** and the ***Druout case,*** that it is possible for two legal entities to be "the same parties" for the purposes of Article 27. He submits that it is always necessary to consider both the facts and also the principles of the relevant national law to see whether, on the facts of a particular case, one entity is to be regarded as "the same party" as another for the purposes of Article 27.

37. Mr Howard further submits that an analysis of the relationship between Kolden and the assignor companies (in English law) shows that there is an identity of interest between them so that they must be regarded as *"the same parties"* for purposes of Article 27. Thus: (i) under English law Kolden is the legal assignee of the rights of the three assignor companies; (ii) any decision of the English court concerning the contract cause of action would bind not only Kolden but also the assignors, who must be regarded as having a privity of interest with Kolden; (iii) therefore there is a complete identity of interest between the assignor companies and Kolden with regard to the four SPAs and rights arising in respect of them. In this regard Mr Howard referred me to the judgment of Sir Robert Megarry V-C in ***Gleeson v J Wippell & Co Ltd*** [8] where he re-iterated the principle that if there is a

[3] [1998] ECR 1 – 3075; [1999] QB 497. Both cases were dealing with Article 21 of the Brussels Convention
[4] 1996] QB 292, at 298 – 303 per Staughton LJ; 305 – 316 per Peter Gibson LJ.
[5] 14th Ed. vol 1, para 12 – 061.
[6] 4th Ed. para 2.204.
[7] 2nd Ed. para 22.012 – 014.
[8] [1977] 1 WLR 510 at 515.

sufficient degree of identity between two parties, then a decision involving one will bind the other. The passage in the Vice – Chancellor's judgment was approved by the House of Lord's decision in ***Johnson v Gore Wood.***[9]

38. It is common ground that if this case falls within Article 27 and the English court is not the court "first seised" of the contract cause of action, then it must stay the English Action until the jurisdiction of the Cyprus court (as the court first seised) has been established. That is the clear effect of the wording of paragraph 1 of Article 27. For the purposes of Article 27, it is irrelevant that the SPAs all contain English law and jurisdiction clauses: ***Erich Gasser GmbH v MISAT Srl.***[10]

D. The Questions for Decision

39. In most cases concerning Article 27 (or its predecessor, Article 21 of the Brussels Convention), if there is an issue about whether two entities are "the same parties" it arises where entity A is a party in the first action in the court of one state and entity B is a party in the second action in the court of the second state. This case is slightly different. The English Action began (in July 2006) with the three assignor companies (Amherst, Hensher and Conway) as "entity A". The Cyprus Action began (on 14 February 2007) with Kolden, the legal assignee, as "entity B". Subsequently, "entity B" was substituted for "entity A" in the English proceedings.

40. The key question in the present case is whether, at the time the Cyprus proceedings were begun on 14 February 2007, there are then in existence two sets of proceedings involving the same cause of action and between "the same parties" within the meaning of Article 27 of the Regulation. That is the relevant date, because that is the date at which a situation of *lis pendens* comes into being. The importance of the *lis pendens* date is emphasised in the ECJ's decision in ***Gantner Electronic GmbH v Basch Exploitatie Maatschappij.***[11] If on 14 February 2007 there were two sets of proceedings involving the same cause of action and the same parties, then the subsequent substitution of Kolden for the three assignor companies in the English Action cannot matter. Equally, if there were not, then the subsequent substitution of Kolden will mean that, as between Kolden and Rodette and Taplow, the English court must be the court "second seised".

41. Both Mr Howard and Mr Eder accept that neither the ECJ nor the English courts have considered this particular issue.[12] To that extent, this case raises a novel question. It seems to me that the questions I have to consider are:

    (1) What are the principles of EC law for determining whether one legal entity is to be regarded as "the same party" as another legal entity for the purposes of Article 27 of the Regulation?

    (2) Is Kolden to be regarded as "the same party" as the three assignor companies for the purposes of Article 27 of the Regulation?

    (3) If so, then on the facts of this case, as at 14 February 2007, is the English court the court "first seised" of the contract cause of action between "the same parties"?

E. Issue One: What are the principles of EC law for determining whether one legal entity is to be regarded as "the same party" as another legal entity for the purposes of Article 27 of the Regulation?

42. The phrase *"the same parties"* is not defined in the Regulation; nor was it defined in the Brussels Convention. I was not referred to the Jenard report[13] on the Brussels Convention for any commentary on the meaning of *"the same parties"* in what was then Article 21 of the Convention. There are only two relevant cases in the ECJ which have considered in any detail the scope of the phrase *"the same parties"* in Article 27. These are ***The Tatry***[14] and the ***Druout*** case.[15] These cases need close analysis.

43. In ***The Tatry,*** a cargo of soya beans was contaminated on a voyage from South America to Europe in the vessel ***Tatry***. In November 1988 the shipowners brought an action in the Rotterdam District Court against two groups of cargo owners, claiming a declaration that they were not liable for the alleged contamination *("the shipowners' action")*. In October 1990 the shipowners brought proceedings in the Netherlands to limit their liability as against all the cargo interests. In the meantime, two groups (out of three) of the cargo owners brought two Admiralty actions *in rem* in the Admiralty Court, (*"the cargo actions"*) against a sister – ship of the ***Tatry,*** the ***Maciej Rataj.*** That action was begun on 15 September 1989, when the ***Maciej Rataj*** was arrested. The vessel was subsequently released from arrest against the provision of a guarantee. The claims in the Admiralty actions *in rem* were for damages for the contaminated cargo, ie. the same subject matter as the cause of action as in the shipowners' action.

44. The shipowners applied to the Admiralty Court to stay the cargo actions under Articles 21 or 22 of the Brussels Convention. The Admiralty Court refused the application under Article 21 on the ground that the cargo actions and the shipowners' action did not involve the same parties or subject matter. The Court of Appeal reversed this decision, but referred various questions to the ECJ for a preliminary ruling.[16] The first question effectively sought a ruling on the meaning of the phrase *"the same parties"* in Article 21 (of the Brussels Convention), when proceedings were brought in different contracting states which had the same subject matter and the same cause of action.

9 [2002] 2 AC 1 at 32 per Lord Bingham of Cornhill.

10 [2005] QB 1. (Decision of the ECJ).

11 [2003] ECR 1 – 4207 at para 27 of the judgment.

12 Both Mr Eder and Mr Howard drew my attention to two German decisions on this point, which went different ways. Both counsel accepted that there was no reasoning in the judgments on why the court had reached its decision and so neither was helpful in the present case.

13 The Expert Report that was prepared by Mr Jenard to accompany the text of the Brussels Convention to give background and explanation to the text: see section 3(3) of the Civil Jurisdiction and Judgments Act 1982. There was no equivalent when the Regulation was promulgated.

14 [1999] QB 515.

15 ***Druout Assurances SA v Consolidated Metallurgical Industries*** [1999] QB 497.

16 The Court of Appeal also referred questions under Article 22, but it is not necessary to deal with those points.

45. The ECJ dealt with the meaning of *"the same parties"* at paragraphs 29 to 36 of its judgment. It also reconfirmed three principles.[17] First, it confirmed that the meaning of all parts of Article 21 (now 27) was to be decided according to EC law, not national law: paragraph 30. Secondly, it confirmed that the question of whether the parties are the same does not depend on the procedural position of each of them in the two relevant proceedings: paragraph 31. Thirdly, the Court reiterated that the rules set out in Articles 21 and 22 (now 27 and 28) were designed to preclude, as far as possible, the possibility of the non – recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the state in which recognition was sought.[18]

46. The Court then stated, at paragraphs 33 and 34 of its judgment:

"33. *In the light of the wording of article 21 of the Convention and the objective set out above, that article must be understood as requiring, as a condition of the obligation of the second court seised to decline jurisdiction, that the parties to the two actions be identical.*

34. Consequently, where some of the parties are the same as the parties to an action which has already been started, article 21 requires the second court seised to decline jurisdiction only to the extent to which the parties to the proceedings pending before it are also parties to the action previously started before the court of another contracting state; it does not prevent the proceedings from continuing between the other parties".[19]

47. The court acknowledged that the consequence of this decision was that there could be a fragmentation of proceedings. But it considered that the effect of this was mitigated by the terms of Article 22 (now Article 28).

48. Although in ***The Tatry*** the ECJ stated that the parties must be "identical", it did not elaborate on what "identical" meant in practical terms. In that case there was no question of one legal entity claiming that, for the purposes of Article 21, it was to be regarded as "the same party" as another, distinct, legal entity.

49. In the ***Druout* case**, a barge sank in Netherlands waters. The hull insurer, Druout Assurances SA ("Druout"), acting on its own behalf, paid for the barge to be refloated. In December 1990 Druout brought proceedings in Paris *("the French proceedings")* against the cargo owner and cargo insurer for a contribution in general average. However, prior to that, on 31 August 1990 the owners of the cargo and the cargo insurers (together *"the cargo interests"*) had brought proceedings in the Rotterdam District Court ("the Dutch proceedings") against the owner of the barge. The cargo interests claimed a declaration that they were not liable to contribute in general average, on the ground that the vessel was unseaworthy at the start of her voyage because of overloading. In the French proceedings the cargo interests took a procedural objection to them, claiming a *lis alibi pendens* in the form of the Dutch proceedings.

50. The matter went, via the Cour d'appel of Paris, to the Cour de cassation. The Cour de cassation considered that the case raised a question on the scope of the phrase "the same parties" in Article 21 of the Brussels Convention and referred the matter to the ECJ. The issue referred was whether the owner of the barge, which was impleaded in the Dutch proceedings was, for the purposes of Article 21 and on the facts of this case, to be regarded as *"the same party"* as the hull insurers of the barge, viz. Druout, who were impleaded in the French proceedings.

51. An opinion was given by Mr Advocate General Fennelly. In his view, the wording of Article 21 and the ECJ's judgments in ***Gubisch*** and ***The Tatry*** required that a strict interpretation be given to the words "the same parties". He concluded, in paragraph 29 of his Opinion: *"My view, therefore, is that the concept of "same parties" is to be interpreted literally and strictly. The court has used the word "identical".*[20] *This means that not only just the parties to the two actions be the same in the literal sense of the same natural or legal person, but also that they must appear in the same right. In particular, a person suing in his own right and for his own benefit is obviously not to be equated with the same person suing or being sued in a purely representative capacity, for example, as the legal personal representative of a deceased person or a person under a disability, or in any of the wide range of cases where a person may, in law, be named to represent corporate bodies or their creditors in cases of insolvency"*

52. The Advocate General rejected the arguments for a more flexible approach. He concluded, therefore, that the barge owner and the hull insurers, Druout, were not the "same parties" in the French and Dutch proceedings for the purposes of Article 21. Accordingly, there could be no stay of the French proceedings.[21]

53. The ECJ took a different view. It reaffirmed its previously stated opinion that, *"the terms used in Article 21 of the Convention in order to determine whether a situation of* ***lis pendens*** *arises must be regarded as independent":* paragraph 16. The Court held that, with regard to the subject matter of the disputes in the two sets of proceedings concerned, there "*may be*[22] *such a degree of identity between the interests of an insurer and those of its insured that a judgment delivered against one of them would have the force of* ***res judicata*** *as against the other".* In such a situation "*…insurer and insured must be considered to be one and the same party for the purposes of the application of article 21 of the Convention":* paragraph 19.

54. That paragraph therefore appears to envisage that two separate legal entities may have a sufficient degree of identity in their interests in the subject matter of the two disputes in question that they can be regarded as "*one*

17 The ECJ's judgment effectively states that these matters were decided in ***Gubisch Maschinenfabrik KG v Palumbo*** [1987] ECR 4861.
18 Under what was Article 27(3) of the Brussels Convention; now Article 34(4) of the Regulation.
19 [1999] QB at 534D – E.
20 This must be a reference to the word used by the ECJ at para 33 of its judgment in ***The Tatry***.
21 Paragraphs 32 – 34 of the Advocate General's Opinion: [1999] QB at 510 – 511.
22 I think that the sense of this is "must be".

and the same party" for the purposes of Article 21 of the Convention. As Article 27 of the Regulation is in precisely the same words, the same reasoning must follow for Article 27 in the Regulation.

55. The ECJ stated that it is for the national court to decide whether the interests of one legal entity are to be considered "…*identical to and indissociable from…"* those of the other legal entity concerned: paragraph 23. That must depend on the facts of the case in hand. In the final paragraph of the judgment, paragraph 25, the Court reiterated the rule that two separate legal entities will not be regarded as "the same party" for the purposes of Article 21 of the Convention: "….*unless it is established that, with regard to the subject matter of the two disputes, the interests of the insurer of the hull of the vessel are identical to and indissociable from those if its insured, the owner and the charterer of that vessel".*

56. Although the ECJ was concerned in that case with the particular question of the relative interests of an insurer and its insured, I think it is clear that the Court intended to lay down principles of more general application. First, the judgment establishes, as a matter of the "independent" interpretation of Article 21 of the Convention, (and so now Article 27 of the Regulation), that two legal entities can be regarded as "the same party" for the purposes of what was Article 21 of the Convention and is now Article 27 of the Regulation. Secondly, whether that is so in any particular case will be a matter for the national court to decide. Thirdly, the national court must look at the facts of the case concerned and, in particular, "*the subject matter of the two disputes*" in the two relevant proceedings to see if the two legal entities are to be regarded as "the same party" for the purposes of Article 21/27. Fourthly, the test that the national court must apply is: are the interests of the two legal entities involved in the two disputes identical to and indissociable from one another in relation to the subject matter of the two disputes concerned? Fifthly, one way of demonstrating this identity of interest is by asking whether a judgment against one legal entity in respect of the subject matter of the two disputes would have the force of *res judicata* against the other legal entity.

57. Subsequent to the two ECJ cases I have considered, Mr Leslie Kosmin QC, sitting as a Deputy Judge of the Chancery Division, had to consider whether a liquidator of a company, appointed under the Insolvency Act 1986, could be regarded as "the same party" as the company for the purposes of Article 21 of the Convention: see ***In Re Cover Europe Ltd***.[23] That issue arose where a claimant brought an action (in England) against the liquidator under the Insolvency Act to require him to admit a claim as a proof of debt against the company. At the same time there was an Italian action by the company against the same claimant for a declaration that the claim for the debt was invalid. The Deputy Judge held that, in relation to the subject matter of those two proceedings, the liquidator and the company were to be regarded as "the same party" for the purposes of Article 21 of the Convention. He held that this issue must be "…*decided as a matter of substance, not form"* and that fine distinctions made in English insolvency law between the position of the company in liquidation and the liquidator should not apply to the question that arose under Article 21.[24] I respectfully agree with that approach.

F. Issue Two: Is Kolden to be regarded as "the same party" as the three assignor companies for the purposes of Article 27 of the Regulation?

58. The core "subject matter" of the English Action and the Cyprus Action is an allegation of breach of clause 6.2(d) of each of the SPAs by the two purchaser companies, Rodette and Taplow. In the English Action as originally constituted the seller/assignor companies alleged that the purchaser companies were in breach of contract. In the amended Claim Form the substance of the allegation by the legal assignee, Kolden, must be that that the buyer companies are in breach of contract. In the Cyprus Action the same facts and legal issue concerning the alleged breach of contract arises, as in the amended English proceedings. In neither of the two proceedings do the claims raise any issue concerning the "burden" of the SPAs on the assignor companies.

59. There is, of course, a further claim in the Cyprus Action. That is whether the Assignment of 15 November 2006 is valid. This issue is implicit in the amended English Action; if the Assignment of 15 November 2006 is not valid, then Kolden has no title to pursue its breach of contract claims.

60. As at 14 February 2007, in both the English and Cyprus Actions the "object" of the proceedings[25] is the same. It is to determine whether the seller companies are in breach of their obligation to sell on immediately the shares that were the subject of the SPAs. Admittedly the identity of the legal entity seeking that determination in the English Action has changed as a result of the amendment to substitute Kolden for the three assignor companies. But "the end in view" [26] of that Action as originally constituted and as the Action stood on 14 February 2007 is the same as the end in view in the Cyprus Action.

61. Obviously, Kolden is a different legal entity from the three assignor companies. It can only be regarded as "the same party" as them, for the purposes of Article 27 if, in the context of the subject matter of the English and Cyprus Actions, the interest of Kolden in those disputes is identical to and indissociable from that of the assignor companies. So I have to ask whether Kolden passes that test.

62. Mr Eder's arguments raise a preliminary question. Although Mr Eder accepted that Kolden had an arguable case that the Assignment was a valid legal assignment within section 136 of the Law of Property Act 1925, he stressed in argument that this might turn out not to be the case when the matter came to trial. He argued that it might turn

[23] [2002] EWHC 861; [2002] BCLC 61.
[24] At paragraph 20 of the judgment.
[25] See ***The Tatry***, para 37: [1999] QB at page 534 G.
[26] The phrase is used in ***The Tatry*** at para 41.

out that Kolden was only, at best, an equitable assignee. Mr Eder then relied on the statements in the ***BCCI case***[27] to demonstrate that an assignor and an equitable assignee do not or may not have the same interests.

63. This argument raises the question: for the purpose of this application for a court to stay proceedings under Article 27, how should I regard the status of Assignment of 15 November 2006? The general approach of the English courts to the question of the standard of proof in matters concerning jurisdiction under the Regulation, (in the absence of specific wording in a relevant Article), is that the party wishing to establish a particular state of affairs of fact or law must satisfy the court that it has a "good arguable case" on the point in question. Hence, in ***Canada Trust Co v Stolzenberg (No 2)***,[28] the Court of Appeal held that the issue of whether a defendant was domiciled in England for the purposes of Article 6 of the Lugano Convention had to be determined on a "good arguable case" basis. Although the standard of proof point was not argued in the House of Lords, Lord Steyn approved the judgment of Waller LJ on this point.[29] In ***Bols Distilleries BV v Superior Yacth Services Ltd***,[30] Lord Rodger of Earlsferry, giving the advice of the Privy Council, agreed with the view of Lord Steyn. In the ***Bols case*** the Privy Council stated that the same standard of "good arguable case" applied when a party had to demonstrate "clearly and precisely" that the parties had agreed to a clause conferring jurisdiction on a particular Court, for the purposes of Article 23 of the Regulation.[31]

64. Mr Eder did not advance any cogent reason why the same approach was inapposite in relation to Article 27. In my view and in line with the two cases referred to above, I should adopt that test. Although Mr Eder outlined the possible defences to the validity of the Assignment, (as already mentioned), I am satisfied that Kolden does have a good arguable case that the Assignment is valid as a legal assignment under section 136 of the Law of Property Act 1925.

65. That being so, the next question is whether the interests of the two legal entities concerned (ie. the assignor companies on the one hand and Kolden on the other) are identical to and indissociable from one another in relation to the subject matter of the English and Cyprus Actions?

66. It is established by the ECJ in ***Gantner Electronic GmbH v Basch Exploitatie Maatschappij*** [32] that when a court is considering whether "the same cause of action" involves the same subject – matter, the court must only examine the respective claims of the claimants in the two sets of proceedings. The court will not take account of the defences of defendants.[33] The ***Gantner case*** emphasises that the object of Article 21 (under the Brussels Convention) and now Article 27 of the Regulation[34] is to provide a simple method to determine, at the outset of proceedings and before defences are put in, which court is to hear and determine the dispute.[35] Therefore, it seems to me that the correct comparison in this case is between the interests of the three assignor companies at the start of the English Action on 13 July 2006 and the interest of Kolden, the legal assignee of the rights to the three assignor companies, at the start of the Cyprus Action on 14 February 2007.

67. The assignor companies had rights under the SPAs. Mr Eder did not challenge the proposition that, at the time the English Action was started, they had a good arguable case that, under clause 6.2(d) of the SPAs, the purchaser companies, Rodette and Taplow, had an obligation to transfer on the shares bought by them to JSC Eurocement. Nor did he challenge the proposition that if Rodette and Taplow are in breach of that obligation then the other parties to the SPAs, ie. the three assignor companies, would have a cause of action in respect of that breach and can claim both a declaration and damages for the breach.

68. Next I must consider the interest of Kolden. By the Assignment the Assignors: "*…unconditionally and absolutely assign to the Assignee any and all of their rights, claims and causes of action whether vested in them jointly or individually without limitation existing or arising from the acquisition ownership or alienation of the shares in …Maltsovsky and rights arising from any agreements with third parties associated with Maltsovsky ("the Rights")*….

    If, as I must assume for this purpose, there has been an effective legal assignment of the rights of the Assignor companies under the Assignment, then, as section 136(1) of the Law of Property Act 1925 states, the assignment is effective to transfer (from the date of notice to the "debtor", ie. Rodette and Taplow), the legal right in the thing in action transferred, all legal and other remedies for the thing in action and also "*..the power to give a good discharge for the same without the concurrence of the assignor".*

69. The effect of this is that the assignee becomes the owner of the thing in action. He can sue the "debtor" in his own name without joining the assignor: ***In re Westerton: Public Trustee v Gray***.[36] Furthermore, the assignor has no further interest in the right in action: see ***Compania Columbiana de Seguros v Pacific Steam Navigation Co***,[37] per Roskill J, who considered the authorities. The problems of an equitable assignment that were considered by the Court of

27 [1996] QB 292.
28 [1998] 1 WLR 547 in the Court of Appeal.
29 [2002] 1 AC 1 at page 13. The other Law Lords did not deal with the point.
30 [2007] 1 Lloyd's Rep 683.
31 Paragraph 28 of the Advice of the Privy Council, given by Lord Rodger of Earlsferry.
32 [2002] 2003] ECR 1 – 4207.
33 See paras 26, 31 and 32 of the judgment.
34 Although the Convention governed the issue in ***Gantner,*** the ECJ's judgment specifically refers to the Regulation and confirms that the same approach applies to the new Article 27.
35 Para 30 of the ***Gantner case.***
36 [1919] 2 Ch 104 at 111 – 113 per Sarjant J.
37 [1965] 1 QB 101 at 121. See also Snell's Equity, 31st Ed. page 33. A legal assignee always takes an assignment "subject to equities", but that does not affect the point at issue here.

Appeal in ***Three Rivers District Council v Governor and Company of the Bank of England,***[38] to which Mr Eder referred, are, in my view, irrelevant to the case of a legal assignee.

70. Therefore, on the assumption that the Assignment is a valid legal assignment, I must now ask: what is the position of Kolden in the Cyprus Action when it was begun on 14 February 2007? It seems to me that Kolden fulfils the tests for being regarded as "*the same party*" as the assignor companies for the purposes of Article 27 of the Regulation. From the moment Rodette and Taplow received notice of the Assignment, the legal transfer of the rights covered by the Assignment was complete. All rights passed to Kolden. Its interest in the SPAs and any rights of action arising out of them were identical to those formerly possessed by the assignor companies; neither greater nor smaller. The interests of Kolden, as legal assignee, were indissociable from those of the assignor companies because the rights of Kolden were only those of the assignors and no more and no less.

71. I appreciate, of course, that in the English proceedings as they stood on 14 February 2007, Rodette and Taplow might well have a good defence to any claim on the contract cause of action by the three assignor companies, viz. that they had divested themselves of their interest in the SPAs by virtue of the Assignment and subsequent notices to the "debtors". But, as I understand the ***Gantner case,*** that possible defence is not a relevant consideration when deciding whether the substantive conditions of Article 27 have been fulfilled.

72. The nature of the identity of the interests of the three assignor companies and Kolden can be tested by asking whether a judgment on the contract cause of action issue in an action involving the former would bind the latter. If, as I have concluded, they have an identity of interest, then a decision of a court of competent jurisdiction on the merits of the contract cause of action against the one must be *res judicata* as against the second.

G. Issue Three: On the facts of this case, is the English Court the court "first seised" of the contract cause of action "between the same parties" as at 14 February 2007?

73. I have concluded that, using the tests propounded by the ECJ decisions, the cause of action in the English Action and the cause of action in the Cyprus Actions are "the same cause of action" for the purposes of Article 27. I have also concluded that the interests of the assignor companies and Kolden in that cause of action are identical and indissociable.

74. If those conclusions are correct, then it must follow that, for the purposes of Article 27, when the Cyprus Action was started on 14 February 2007, the English court was the court *"first seised"* of the *"contract cause of action"* between *"the same parties"*. The English Court had been seised of that cause of action since 13th July 2006.

75. I have already noted[39] that Mr Eder relied on comments in various text books in support of his argument that if a new party is brought into an existing action by amendment, then the court is not seised of the claim by the new party until the amended proceedings have been re-served on all the other parties. That may be so, but it does not assist Mr Eder. The proper test is to compare the position of the two sets of proceedings at the time that the Cyprus proceedings were started, ie. when a situation of *lis pendens* arose, on 14 February 2007. If, as I have concluded, there are two sets of proceedings between the same parties and involving the same cause of action within the meaning of Article 27, then what happens thereafter is immaterial.

76. I should mention that in his Outline Argument, Mr Howard put forward an alternative submission, if I did not accept that the three assignor companies and Kolden are "the same parties". The gist of this argument was that on the correct interpretation of Article 30 of the Regulation, the English court became seised of the action by Kolden against Rodette and Taplow on 26 January 2007, which was the date when the Application Notice seeking to substitute Kolden as claimant was lodged with the court. However, Mr Howard said that he did not wish to pursue that argument.

H. Conclusion

77. For these reasons, I have concluded that, on the proper interpretation of Article 27 of the Regulation and on the facts of this case:
    (1) the English Court was seised of the contract cause of action on 13 July 2006;
    (2) the Cyprus Action involved the *"same cause of action"* as the English Action;
    (3) Amherst, Hensher and Conway are *"the same party"* as Kolden;
    (4) it is irrelevant to take into account any defences that Taplow and Rodette might have been able to advance against the claims of Amherst, Hensher and Conway on the contract cause of action as at 14 February 2007;
    (5) therefore, on 14 February 2007, when a situation of *lis pendens* arose, the English Court was the court first seised.
    (6) Accordingly, Taplow and Rodette's application for an order to stay the English Action pursuant to Article 27 of the Regulation must be dismissed.

78. As I have already indicated, given my conclusions that (i) Amherst, Hensher and Conway and Kolden are *"the same party"* for the purposes of Article 27, and (ii) that the English court is the court first seised, Article 28 cannot be relevant. It is only directed at courts other than the court first seised. Therefore, Rodette and Taplow's application that the English Action be stayed pursuant to Article 28 must also be dismissed.

Mr Mark Howard QC and Mr David Wolfson (instructed by Skadden, Arps, Slate, Meagher & Flom (UK) LLP, London) for the Claimant/Respondent
Mr Bernard Eder QC and Mr Jeremy Brier (instructed by Steptoe & Johnson, Solicitors, London) for the Defendant/Applicant

[38] [1996] 1 WLR 210.
[39] In paragraph 30 above.