JUDGMENT : John L. Powell Q.C. sitting as a Deputy High Court Judge. Chancery. 31st July 2008

THE CLAIM AND THE ISSUE FOR DETERMINATION

1. The Claimant ("**Mrs Sharab**") is a Jordanian national. The Defendant ("**the Prince**") is a Saudi Arabian national. Mrs Sharab's claim is for unpaid commission of US$10m allegedly payable by the Prince for her services as agent in relation to the sale of an Airbus 340 aircraft for US $120m to Colonel Muammar Gaddafi, the President of Libya ("**the President**"). Mrs Sharab contends that she was engaged as agent pursuant to an oral contract made between her and the Prince's agent, Mr Fouad Alaeddin ("**Mr Alaeddin**"), at a restaurant in London in August 2001 ("**the alleged contract**"). She further contends that the contract was varied, again orally, at a meeting in April 2003 between her and the Prince in the latter's Boeing aircraft when parked at an airport in Libya ("**the alleged contract as varied**"). She advances her claim on the basis of the alleged contract as varied, alternatively on a *quantum meruit* basis. The Prince disputes that any such contract or variation was made and that he is in any way liable.

2. Mrs Sharab applied *ex parte* for permission to serve her claim form out of the jurisdiction upon the Prince. Permission was granted. By his acknowledgment of service, the Prince disputes jurisdiction.

3. The issue for determination is whether the Prince is entitled to an order under CPR Part 11 declaring that the court has no jurisdiction to hear this claim, alternatively should decline to exercise any jurisdiction it may have. It is the Prince's case that the appropriate forum for the determination of any commission claim by Mrs Sharab is Libya.

THE PROCEEDINGS TO DATE

4. Proceedings were issued on 23 November 2007. At the same time, an application notice was issued seeking permission pursuant to CPR 6.20 to serve the Prince out of the jurisdiction in Saudi Arabia, supported by two witness statements, one from Mrs Sharab and the other from Mr Neil Meakin, a partner of Mrs Sharab's solicitors ("**Mr Meakin**").

5. The application for permission came before Lindsay J. *ex parte* on 21 December 2007. He ordered that Mrs Sharab be granted the permission sought and that the Prince should have 24 days from service of the claim form on him to respond, including by filing and serving an acknowledgment of service.

6. Solicitors acting on behalf of the Prince filed an Acknowledgement of Service dated 25 February 2008, stating the Prince's intention to contest this court's jurisdiction. On 10 March 2008, the same solicitors issued an application notice under CPR Part 11, seeking an order declaring that the court had no jurisdiction to try the claim because it was not the appropriate forum to try it. That application was supported by the first witness statement of Mr Rodney Baker, a partner of the Prince's solicitors ("**Mr Baker**"). Mr Baker contends that the appropriate forum to try the claim is Libya. Norris J. gave directions on 9 March 2008 for service of further evidence and for adjournment of the application for a one day hearing, which in the event took place on 3 July 2008.

7. Further statements were served by Mr Baker and Mr Meakin attaching letters from experts as to issues of Libyan law and court practice. Dr Mohammad Tumi, the managing partner of Tumi Law Firm of Tripoli, Libya, ("**Dr Tumi**") was instructed on behalf of the Prince. His opinion as to relevant issues is contained in letters dated 6 March 2008, 21 May 2008 and 1 July 2008. Dr D. Ben Abderrahmane of Ben Abderrahmane & Partners, also of Tripoli, Libya, ("**Dr Abderrahmane**") was instructed on behalf of Mrs Sharab. His opinion as to relevant issues is contained in letters dated 23 April 2008 and 24 June 2008.

8. Substantial skeleton arguments supported by several authorities were provided by counsel for both parties, Mr Ken Craig for Mrs Sharab and Mr Christopher Pymont QC for the Prince. The hearing was followed by salvoes of further written submissions and authorities. The further submissions pertained in part to the judgment of Christopher Clarke J. in ***Cherney v. Deripaska*** [2008] EWHC 1530 (Comm) which was handed down on 3 July 2008, the day of the hearing in the present matter. I record my gratitude to both counsel for their submissions.

THE FACTS

9. Mrs Sharab gives her account of events in a long statement. This and an attached bundle of documents run to some 275 pages, although many documents are English translations of documents written in Arabic. Mr Baker gives a short account (some 8 pages) of his understanding of relevant events in his first statement. His account is drawn principally from Mr Alaeddin's comments on Mrs Sharab's statement. These comments were obtained by a senior assistant solicitor of Mr Baker's firm at a meeting with Mr Alaeddin. Mr Baker's first statement also reflects unspecified subsequent communications. Mr Baker deals with the position of Mr Alaeddin, the alleged contract at the restaurant in September 2001 and the Prince's case as to why the claim does not satisfy criteria for service out of the jurisdiction. Neither Mr Alaeddin nor the Prince has himself provided a witness statement.

Mrs Sharab

10. According to her statement, Mrs Sharab has, over the years, had links with Saudi Arabia, Jordan, London and Libya. She was born in 1961 in Saudi Arabia where she lived for 18 years before moving to Jordan. She divides her time between London, Jordan and Libya. Since 1988 she has "*lived in London*" for at least 3 months annually except between 1995 and 1998 when she again lived in Saudi Arabia. She has an apartment in London, which is held on a long leasehold interest in the name of an offshore company. She also has a house in Amman, Jordan, "*where I live when I am not away working in Libya, staying in London or travelling*". She has a teenage daughter who lives and attends school in Jordan. Owing to extensive business commitments, she is only able to spend entire days with her daughter for about 3 months a year, 2 of which are spent in London during summer. She travels regularly to Libya where she has extensive business interests.

11. Mrs Sharab is a business woman of some personal wealth and substance. She runs her own consultancy company, the Trans Arab World for Commercial Mediation ("**TAWCO**"), based in Jordan. She is a director and the chairman of the company and owns 65% of its equity, the balance being owned by her father. The company has offices and around 20 employees in Jordan and retained profits amounting to 20m Jordanian Dinar (approximately £14m) and annual fee income of between 1m and 5m Jordanian Dinar. She conducts most of her business on behalf of TAWCO from Jordan and some from London. A major part of TAWCO's business is effecting introductions for clients in Libya. She gives examples of clients including enterprises of international repute.

The Prince

12. Mrs Sharab describes the Prince as a member of the Saudi Royal Family, being a grandson of the first king of Saudi Arabia and one of the world's richest men with extensive and substantial interests throughout the world. This does not appear to be in dispute, despite the lack of specific comment by Mr Baker.

Mr Alaeddin

13. In their statements, Mrs Sharab and Mr Baker describe Mr Alaeddin as an accountant and managing partner of Arthur Andersen Middle East and latterly of Ernst & Young Middle East which he joined, according to Mr Baker, in July 2002 (and thus after the alleged contract). He adds that Arthur Andersen Middle East was a completely separate partnership from Arthur Andersen in London, that Mr Alaeddin was not a partner of the latter firm and that he only rarely visited its offices during his regular trips to London. According to Mrs Sharab, Mr Alaeddin is a family friend from Jordan, whom she has known for a long time.

14. As to Mr Alaeddin's relations with the Prince, Mr Baker describes Mr Alaeddin as having known the Prince for over 20 years as a client. In his capacity as a partner of first Arthur Andersen Middle East and then Ernst & Young, Mr Alaeddin provided and continues to provide professional services, ranging from accountancy to business advisory and corporate finance services, under a retainer to the Prince and his companies. Mrs Sharab gives evidence to like effect.

15. Mrs Sharab alleges that it was a matter of common knowledge that Mr Alaeddin was the Prince's personal representative. Mr Baker records Mr Alaeddin's categorical denial of this allegation and his assertion that he has never been an agent or personal representative of the Prince with authority to enter into contracts on his behalf, nor has he held himself out as having such authority.

Background history: Mrs Sharab and Libya

16. Mrs Sharab relates that she first met the President in about March 1988 at a conference in Tripoli, after which she was encouraged to introduce clients to the Libyan Arab Foreign Investment Office ("**LAFICO**"). She describes several large transactions in relation to which she acted as introducing agent on behalf of clients dealing with LAFICO and the President. These included transactions involving the purchase by LAFICO of interests in hotel companies, including companies owning hotels in London and Jordan. Another series of transactions involving LAFICO was the subject of a successful claim in this jurisdiction by Mrs Sharab against Mr Usama Salfiti for payment on a *quantum meruit* basis for services rendered by her. Ferris J.'s judgment in her favour was the subject of an unsuccessful appeal to the Court of Appeal: ***Sharab v. Salfiti*** (12.12.96 unreported). In his judgment Ferris J. described Mrs Sharab as "*clearly a woman of considerable ambition, business ability and determination*". He also referred to her introduction to the President and to representatives of LAFICO in March 1988, following a conference in Tripoli.

Background history: Mrs Sharab and the Prince

17. According to Mrs Sharab, when living in Saudi Arabia between 1995 and 1998, she was "*introduced to the Prince's affairs*" by Mr Alaeddin in his capacity (disputed by him) as the Prince's representative. She then goes on to describe a series of tasks which she maintains she was asked by Mr Alaeddin to carry out on behalf of the Prince. The first task was to carry out feasibility studies for a bank then owned by the Prince, which she carried out without payment when still living in Saudi Arabia.

18. She next describes the circumstances of the Prince's first meeting with the President on 29 September 1999 at the latter's tent inland from Sert, Libya, and her first meeting with the Prince the following day in Tripoli. Mr Alaeddin asked her to arrange for the Prince to meet the President in order to explore what business opportunities were available in Libya for him to invest in. She accompanied the Prince on his visits to potential tourism projects in Tripoli and to the remains of the President's residence (bombed by the United States in 1986) and then in the Prince's private plane to visit another potential tourist area in Al-Baida, near Benghazi, Libya. Mr Alaeddin accompanied them on the same flight. She states that during the journey the Prince discussed the projects with her and asked for her assistance in Libya. He also expressed his gratitude for arranging the meeting with the President. She attaches to her statement a newspaper report of the Prince's visit.

19. After the first meeting, Mrs Sharab relates that, on behalf of the Prince, she negotiated with LAFICO in relation to a new hotel development in Tripoli and that the Prince "*orally agreed with me, through Mr Alaeddin, that I personally would receive commission*" for making various arrangements including arranging meetings with LAFICO. She was paid commission of US$500,000. In support of her account, she attaches to her witness statement copies of correspondence between herself, the Prince, Mr Alaeddin, Mr Mohammed Al-Huweij ("**Mr Al-Huweij**") (the then chairman of LAFICO) and the President. She also attaches documentary evidence of payment of her commission. I note that by what seems to be a TAWCO fax cover sheet signed by Mrs Sharab dated 23 November 1999, she forwarded to Mr Al-Huweij a fax addressed to him dated 21 November 1999 and signed

by Mr Alaeddin. That fax is on Arthur Andersen headed paper, is entitled "*Sub, Middle East Hotels Company*" and refers to instructions given by the Prince. A letter or fax dated 29 January 2000 on LAFICO headed paper from Mr Al-Huweij to the Prince is entitled "*Joint Investments ..*" and refers to "*meetings and consultations held with your representative Mr Fouad Alaeddine*."

20. Mrs Sharab refers to work on three other matters for the Prince since 1999, although she does not mention any related commission agreement. She maintains that between 1999 and 2004 her work for the Prince took up about half her working time in Libya. From 2004 to 2006 the major part of her work consisted of resolving difficulties in relation to the sale of the Airbus aircraft.

The Cannes conversation

21. According to Mrs Sharab, at the beginning of August 2001, the Prince called her "*out of the blue*", apparently from Cannes. He stated that he had two aircraft, an Airbus and a Boeing, and wished to sell one of them. He requested her to meet him in Cannes and to arrange a meeting there with Mr Al-Huweij in order to discuss tourism investment issues and Project Toushca ("**Project Toushca**"). That was an agricultural investment project in Egypt run by one of the Prince's companies, the Kingdom Agricultural Development Company ("**KADCO**"). She met the Prince in Cannes on about 7 August 2001 when he reiterated his wish to sell one of his aircraft and suggested that the President was a potential buyer.

22. Her account of what I shall call "**the Cannes conversation**" continues in terms to which Mr Pymont QC invited close attention: "*During this conversation, the Prince told me that he would pay me commission for effecting an introduction to the President and arranging the deal, but we did not discuss how much commission I would be paid.*

The Prince instructed me not to start to negotiate the sale of the aircraft until the new plane was ready. That was likely to be a considerable period of time as he had a number of personal requirements and extra equipment to be added. He said he would send Mr Alaeddin to agree a contract with me. I left Cannes on or about 8 August 2001 and returned to London."

23. She next describes a meeting between the Prince and Mr Al-Huweij, which she arranged and also attended. The meeting took place on about 15 August 2001 on the Prince's yacht, off Cannes or Nice. She also refers to another meeting between the Prince and Egyptian and Tunisian delegates, which she arranged. This took place on about 22 August 2001. She met the delegates separately on the same day.

The alleged contract

24. Mrs Sharab then describes the circumstances in which the alleged contract was made:

"*On 25 August 2001, the Prince sent Mr Alaeddin after me to London to meet with me and discuss the proposed sale of one of the Prince's aircraft to Libya for the President, as the Prince had informed me he would do. We met in a London restaurant, Ayoush, James Street, London W1. The sole purpose of Mr Alaeddin's visit, so far as I was aware, was to discuss this deal and agree the terms on which I was to act. Mr Alaeddin told me that the Prince would pay me US$2 million commission if I could sell either one of the aircraft to Libya for the President and US$1 million commission if I could secure an investment in Project Toushca. No prices were discussed at this stage as to how much the Prince wanted for each aircraft as it was not yet known which one, (if at all), would be able to be sold. The Prince wanted to obtain an investment of US$20 million in Project Toushca. As Mr Alaeddin represented the Prince, I considered this to be a firm offer, which I accepted verbally. When I did so I was acting in a personal capacity and not through TAWCO, as indeed was the position in all of my dealings with the Prince. Nevertheless, I told Mr Alaeddin that I would still like to hear confirmation of this commission directly from the Prince.*"

25. According to Mr Baker's first statement, Mr Alaeddin's account is different. He acknowledges that he used to meet Mrs Sharab at the Ayoush restaurant when he was in London on business, generally in the summer months. He estimates that he met her there on approximately five occasions. At these meetings they discussed many issues concerning Libya, some related to the Prince's business and others not. Mr Baker's statement continues:

"*Mr Alaeddin said that he recalled discussing the possible sale of one of the Defendant's aircraft to Libya and the possible investment by Libya in the Toushca Project on one or more of these occasions, although he said that he did not think that he would have travelled to London specifically to meet the Claimant at the Defendant's request.*

Mr Alaeddin said that he did not recall putting any offer to the Claimant nor discussing specific commission amounts with the Claimant, in relation either to the proposed aircraft sale or the investment in Project Toushca, at those meetings. Mr Alaeddin said that he certainly had no recollection of the figures of US$2m and US$1m referred to by the Claimant at paragraph 51 of her Witness Statement."

Mr Alaeddin said that, in relation to the aircraft sale, he doubted that he and the Claimant would have discussed figures at such an early stage, when it had not even been decided which of the Defendant's two aircraft was to be sold.

Project Toushca was an agricultural project in Egypt which was being undertaken by one of the Defendant's companies. Mr Alaeddin said that, at the time, the Defendant had retained Arthur Andersen Middle East to find investors for the Project and that Libya was a potential investor because it had set up an agricultural investment holding company in Egypt. Mr Alaeddin said that he and the Claimant may have discussed the possibility that Libya might invest in the project and the Claimant's possible help in that process.

Mr Alaeddin said that he did not recall offering, or entering into, any sort of agreement with the Claimant, for the figures alleged in her Witness Statement or otherwise, at the meeting. Mr Alaeddin said that he simply did not have authority to enter into contracts on behalf of the Defendant and that it was not his job to do so."

26. Later in his statement, Mr Baker states that he had been informed that Mr Alaeddin said that he could not have entered into such an agreement, as he had never been an agent or personal representative of the Prince with authority to enter into agreements on the Prince's behalf, nor had he ever held himself out as such. Mr Baker states that he telephoned the Prince and was told by him that Mr Alaeddin was never his agent or personal representative and that he had never given authority to Mr Alaeddin to enter into contracts on his behalf. He said that he dealt with Mr Alaeddin in his capacity as, at the time, a partner of Arthur Andersen Middle East.

The August 2002 call

27. According to Mrs Sharab, a year elapsed before relevant events resumed. Then, at the end of August 2002 when she was in London, the Prince called her and told her to proceed with negotiations for "*the plane*". It is submitted on her behalf that the Prince thereby ratified the alleged contract. This call (presumably by telephone) is not the subject of any denial or comment by or on behalf of the Prince.

The alleged variation in April 2003

28. Mrs Sharab states that she was unable to arrange a meeting with the President until about 21 January 2003. She then went to Libya and talked to the President who asked to see both aircraft. She conveyed his request directly to the Prince. On about 10 April 2003 the Prince went to Libya with both the Boeing and the Airbus aircraft to show the President. According to her account, Mrs Sharab was present at a meeting between the Prince and the President. The latter stated his preference for the Airbus and the Prince left it in Libya while the sale price was negotiated.

29. Mrs Sharab then describes the circumstances in which the alleged contract was varied. While the Prince's luggage and other belongings were being transferred from the Airbus to the Boeing, she sat with the Prince in his Boeing for two hours. She attaches to her statement a photograph taken of them on the aircraft. She continues:

"*The Prince told me that the aircraft actually cost him US$90,000,000 (although in a letter from the Prince to the President, he subsequently stated that it cost him US$135,000,000). I wanted to improve the terms which we had agreed, because I knew how much money I would be making for the Prince if I could broker this sale, especially bearing in mind the use the Prince had already had from the aircraft, and so I requested that the contract between us be varied so that I would receive a margin of the sale price in the proposed transaction. The Prince told me that, if I could sell the aircraft for between US$100 million and US$110 million he would pay me the US$2 million commission (which had been agreed previously) but that if I was able to negotiate a sale at above US$110 million, I could keep anything above that US$110 million. He also confirmed that if I could persuade Libya to invest US$20 million in Project Toushca my commission would in respect of this investment would be the US$1 million (which, as I have already stated, had been agreed previously).*

I suspect that the Prince thought that the most that would ever be agreed for the plane was US$110 million and that it would be very difficult for me to achieve more than this; consequently he offered such sum as I could obtain in excess of this as a way of incentivising me to get the full US$110 million for him. I asked for written confirmation of the commission but the Prince insisted that his word should be enough and I did not press the matter as I had not had problems with receiving commission from the Prince previously and Mr Alaeddin had also assured me that the payment would be made when we had met in London."

Mr Baker does not comment in terms on the alleged circumstances of the variation. However, it is the Prince's position that he was not party to any relevant contract with Mrs Sharab.

The July 2003 telephone conversation

30. Mrs Sharab states that, after a sale of the aircraft for US$120m, the Prince reiterated his agreement to pay her commission as agreed, in the event US$10m, in a telephone conversation with Mr Alaeddin in the presence of Mrs Sharab in Tripoli and then (she having been handed the telephone by Mr Alaeddin) with Mrs Sharab.

The August 2003 telephone conversation

31. According to Mrs Sharab, when she was in London in August 2003 she was telephoned by the Prince, apparently from Paris. He told her that he had received US$70m. She asked him to pay her 50% of her commission, but he refuse to do so but promised he would pay her commission in full after he had received US$120m. She continues, "*We then went on to discuss where my full commission would be paid and I informed the Prince that the money should be paid into one of my bank accounts held in London. By this time, I had decided that I wanted this money to be paid into [the account of the offshore company which owns her London apartment] in London in order to ensure my daughter's future, for the reasons I have already set out above. The Prince said I should send him details of the account once he had received the remainder of the purchase price.*"

32. This alleged telephone conversation is not addressed by Mr Baker. He asserts, however, that on Mrs Sharab's own evidence, the Prince did not at any stage agree to Mrs Sharab's request that she be paid through her London bank account and that a mere request is not sufficient to establish the court's jurisdiction. He goes on to note that Mrs Sharab sent faxes to the Prince requesting payment on four occasions in 2007. These requests were sent from Jordan, but did not give bank account details in London nor elsewhere for the purposes of payment.

Involvement in negotiations

33. According to Mrs Sharab's account, she was the principal negotiator in negotiations for the sale of the Airbus aircraft and she made several visits to Libya, including approximately six visits between January and July 2003. She describes some of these.

34. She states that she and Mr Alaeddin negotiated and drafted two agreements for payment for the aircraft and that these were signed on 19 July 2003. Attached to her statement is a copy of the first agreement made between the Prince and LAFICO. It provides for the sale of Airbus aircraft for US$70m. The second agreement is not attached to her statement. She describes it as an agreement between KADCO and the Libyan Agricultural Investment Company ("**LAICO**") "*in the sum of [US$70.7m]*." She states that, of this sum, US$20.7m was to be invested directly in Project Toushca and US$50m was to be paid to the Prince, being the balance of the price agreed (US$120m) for the sale of the aircraft.

35. Mrs Sharab attaches to her statement other documents relating to the negotiations. These include a photograph of her with the Prince taken, according to her, in his Boeing aircraft in Libya on 10 April 2003, and a group photograph taken sometime in 2003 on the occasion of an official visit to the President. Shown in that photograph are the President and, as she explains, others including herself, Mr Alaeddin and the Prince.

36. Mrs Sharab relates, at length, difficulties which emerged in August 2003 in relation to the payment of the balance of US$50m owed for the aircraft and her role in resolving them. Between August and December 2003 various letters seeking payment were written to the President by the Prince and Mr Alaeddin. She states that she delivered them by hand and also wrote to the President herself. She attaches to her statement copies of these letters.

37. She describes her own and others' efforts in 2004 and 2005 to secure payment of the balance owed. These included several trips to Libya and letters to the President written by her or by the Prince and conveyed by her. She also communicated with the Prince and met him in relation to the matter. In March 2004 the Prince retrieved the Airbus aircraft from Libya, which resulted in the souring of relations between him and the President. Matters were eventually resolved after a visit to Libya by the Prince, Mr Alaeddin and Mrs Sharab in September 2005. During the visit they met with the President. As a result of that meeting and a further meeting attended by Mr Alaeddin, Mrs Sharab and representatives of the President, a settlement agreement was reached ("**the Settlement Agreement**"). The parties to that agreement are the Prince, KADCO, LAFICO and an Egyptian company. It provides for payment to the Prince of a balance of US$50m for the aircraft. It contains a choice of law clause in favour of English law. The same clause provides for arbitration of disputes in accordance with ICC "*principles*" in London and for English to be the language of the arbitration.

38. In support of her account as to the events of 2004 and 2005, Mrs Sharab attaches to her statement copies of various documents. These include two letters dated 10 March 2004 and 7 April 2004 to the President seeking to persuade him to pay the balance, the first written by Mrs Sharab and the second by the Prince. Also attached are three photographs taken on the occasion of her visit to Libya in September 2005. She describes two as showing her and her daughter with the President (one with Mr Alaeddin also) and the third as showing her daughter with the Prince.

39. Further difficulties arose. Mrs Sharab describes her role in resolving them. Eventually, in August 2006 the Airbus aircraft was transferred to Libya and the balance owing of US$50m was paid. Nevertheless, despite repeated requests, Mrs Sharab has not been paid any commission. She attaches to her statement copy documentation in support of her account of those events. One document, a letter dated 19 October 2006 from the Prince's solicitors to Mrs Sharab's solicitors, records his denial of any agreement to pay commission and contains the assertion, "*We also understand your client played no part in the ultimate sale of the aircraft in question, and there is no basis for any sum to be due to her.*"

THE EXPERT EVIDENCE

Jurisdiction based on contract

40. Both Dr Tumi and Dr Abderrahmane agree that, under Article 3(2) of the Libyan Civil and Commercial Procedures Code ("**the Libyan Civil Code"**), a Libyan court has a *discretionary* jurisdiction to try an action brought against a foreigner resulting from an agreement concluded or performed or to be performed in Libya. Dr Abderrahmane expressly notes that the "*intermediation*" or commission contract is independent of the contract for sale of the aircraft and "*The conclusion for the contract for sale is only the event that gives rise to the obligation to pay the commission anticipated by the … commission contract*". He goes on to state that the jurisdiction of a Libyan court would depend on the answer to the question whether the commission contract was made or performed in Libya. If that was not so, a Libyan court would have no jurisdiction. Dr Tumi appears to be of the same view.

41. Dr Abderrahmane poses the possibility that a Libyan court might assume jurisdiction under Article 3(2) of the Libyan Civil Code in respect of an action for commission brought by Mrs Sharab in Libya on the basis that the action could be said to result from the contract for sale. However, he concludes that it could not be reasonably said in advance that the court hearing the case would accept that interpretation in the absence of any established precedents (he does state that there are any). Dr Tumi does not address this possibility.

Sum claimed/Damages

42. Both Dr Tumi and Dr Abderrahmane refer to provisions of the Libyan Civil Code relevant to recovery of a sum claimed under a contract. As I understand from Dr Tumi's letter dated 6 March 2008, such a sum is recoverable pursuant to a contract or as damages under Article 159 of the code. In his letter dated 23 April 2008, Dr Abderrahmane appears to proceed on the basis of the claim being one for damages. He refers (as does Dr Tumi) to Article 224 of the same code, which deals with the kind of damages recoverable, being "material damages" corresponding to the creditor's foreseeable loss. He suggests the possibility that, in the instant case, a Libyan judge, bearing in mind that the average monthly wage in Libya is 150 euros, could rule that an award of

damages of US$10m is excessive or punitive. In his letter dated 21 May 2008, Dr Tumi refers to Article 226 which provides that the parties may fix in advance the amount of damages in the contract and also to Article 227 which provides that the judge may reduce the amount of damages if the debtor establishes the amount fixed was "*grossly exaggerated*" or there has been partial performance of the principal obligation. He also refers to Article 219 as giving power to the judge to reduce the amount of damages if the creditor participated in causing the damages or increasing its amount.

43. Dr Abderrahmane in his letter dated 24 June 2008 refers to Article 1 of the Libyan Civil Code as providing for the application of Islamic law on a "subsidiary" basis and expresses the view that a Libyan judge might invoke the theory of equivalence of mutual benefits under that law to award Mrs Sharab less than the contract price. He explains that according to that theory, the contract must strike a just balance between the mutual benefits of the parties to a contract. Dr Tumi disagrees that there is room for application of the theory, as apparent from his letter dated 1 July 2008. He quotes relevant provisions of Article 1 to show that a judge is permitted to apply principles of Islamic law only "*in absence of applicable legal provisions*". In his view, in the instant case there are very clear applicable provisions which are contained in the Libyan Civil Code.

Quantum meruit

44. Dr Abderrahmane opines that the concept of *quantum meruit* does not exist as such under the Libyan Civil Code. However, he identifies provisions in the code, including Article 182, which appear to provide for entitlement to payment on a like basis. He adds, however, that it is "*quite likely*" that a Libyan judge would allow only a small amount of by way of recovery, given the average monthly wage in Libya of 150 euros. Dr Tumi states that a Libyan court may accept jurisdiction of a non-contractual *quantum meruit* claim or other restitutionary claim under Article 182

Procedures

45. According to Dr Tumi, procedures to bring a lawsuit to trial in Libya are not unduly complicated. There is no dissent by Dr Abderrahmane from this.

Female claimant

46. According to Dr Tumi, there are no hurdles in practice for a female claimant to bring a claim before a Libyan court and he has no concerns that she would suffer any prejudice or would not receive a fair hearing. Dr Abderrahmane expresses a like opinion.

Interest

47. Both experts address the issue of a claim for interest. Dr Tumi initially addresses the issue in the context of an intention to enforce a Libyan court judgment against assets in Saudi Arabia. He opines that, to the best of his knowledge, given that would entail applying Islamic law, interest would not be recoverable and, accordingly, a claimant should not ask a Libyan court for interest. Dr Abderrahmane refers to article 229 of the Libyan Civil Code which provides for the recovery of interest at the rate of 4% in "*civil matters*" and 5% in "*commercial matters*". According to Dr Tumi, that article is inapplicable to dealings between individuals by virtue of article 3 of Law no. 74/1972

Enforcement of a Libyan judgment abroad

48. As to enforcement of a Libyan judgment abroad, Dr Abderrahmane states that he is unable to give an opinion on the recognition and enforcement of Libyan judgments in Saudi Arabia. He mentions that Libya is a party to the Riyadh convention relating to mutual judicial support signed at Riyadh in 1983, but the convention is not in operation. He adds that Libya is not party to conventions which provide for enforcement of Libyan judgments in Europe. Dr Tumi comments on the issue of enforcement of a Libyan judgment abroad only in relation to Saudi Arabia and a claim for interest, as described in the previous paragraph.

Libyan courts

49. The experts express opinions as to Libyan courts. Dr Abderrahmane's view is that given "*the economic and political environment which prevailed from 1970 to about 2005*", "*the Libyan Courts have little experience of international contracts, in particular contracts similar to the one in question. The Libyan Courts mainly dealt with internal cases involving relative small amount of money. Therefore, the way in which the Libyan Courts might find in the event of litigation relating to the intermediary contract might not match the reasonable expectations of the parties, because they do not have sufficient experience to give consistent rulings in matters concerning international dealings.*" He also opines that given such lack of experience, it is likely that a Libyan judge would award an amount less than the contract price "*based on enquiry and its own perception of the case.*" Dr Tumi disagrees. In his view, "*Libyan judges are very efficient and they have adjudged lawsuit the value of which is more than the value of our case.*"

THE LAW

General

50. It is contended for Mrs Sharab, but disputed on behalf of the Prince, that her claim satisfies criteria for the grant of permission for service out of the jurisdiction of England and Wales. On the facts of this case, the criteria are contained in CPR 6.20 and CPR 6.21. The rules are similar to those contained in the predecessor RSC Order 11, itself of long lineage. A trilogy of House of Lords authorities are recognised as stating the modern law in this area: ***Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.*** [1984] A.C. 50 ("***Amin Rasheed***"), ***Spiliada Maritime Corp. v. Cansulex Ltd.*** [1987] 1 A.C. 460 ("***Spiliada***")and ***Seaconsar Far East Ltd. v. Bank Markazi Iran*** [1994] 1 A.C.

438 ("***Seaconsar***"). I was also taken to relevant commentary in *Dicey, Morris and Collins on The Conflict of Laws* (14th ed., 2006) ("***Dicey***").

51. The burden is on Mrs Sharab to establish the following on the available evidence:
    a. as to types of claim listed under CPR 6.20, there is a good arguable case that the claim falls within one or more of them;
    b. as to the intrinsic merits of each cause of action, there is a reasonable prospect of success;
    c. as to the appropriate forum for the trial of her claim, it is clearly England and Wales.
    d. as to the court's general discretion, it should exercise it in favour of serving the claim form out of the jurisdiction.

52. The first, third and fourth requirements follow from CPR 6.21(A) which provides that the court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim. The second requirement follows from CPR 6.21(1)(b) which requires an application for permission to serve a claim form out of the jurisdiction to be accompanied by written evidence stating that the claimant believes that his claim has a reasonable prospect of success.

Essentially discretionary nature of jurisdiction

53. The jurisdiction of the court to grant permission to allow process to be served out of the jurisdiction is essentially discretionary (*Dicey,* paras. 11-147/8). I was reminded of key points made in the judgment of Farwell L.J. in *The* ***Hagen*** [1908] P. 189, 201 (CA) which have been reiterated in several authorities. In particular, the court needs to proceed with particular caution since the grant of permission involves not only the exercise of jurisdiction over a person not ordinarily within the jurisdiction of England and Wales, but also the service of a claim form in another law jurisdiction.

54. I further remind myself that an application such as the present is not the trial of the action, with all the evidence which may then be available. It involves making a decision based on arguments and evidence which have not been tested by the usual trial process. Moreover, the required decision is of limited scope, on the single issue of jurisdiction. It follows that the decision needs to be couched in terms that are no more than necessary for the determination of the limited issue. As far as the overall merits of Mrs Sharab's case are concerned, the decision on jurisdiction is substantively neutral.

RELEVANT CLAIM TYPES

Mrs Sharab's case

55. It is submitted for Mrs Sharab that her claim falls under each of four types of claim (sometimes referred to as "gateways") listed under the sub-title "*Claims in relation to contracts*" in CPR 6.20. The first three types each involve a claim made "*in respect of a contract*". The first type is where the contract was made within the jurisdiction (CPR 6.20(5)(a)). The second type is where the contract was made *"by or through"* an agent trading or residing within the jurisdiction (CPR 6.20(5)(b)). The third type is where the contract is governed by English law (CPR 6.20(5)(c)). The fourth type is a claim made *"in respect of a breach of contract committed within the jurisdiction*" (CPR 6.20(6)). It is submitted for the Prince that the claim does not fall within any of those types. I deal below with more particular aspects of each of these claim types.

The "good arguable case" criterion

56. Mrs Sharab needs to establish that her claim falls within the relevant types to the standard of a "*good arguable case*". In ***Canada Trust v. Stolzenburg (No 2)*** [1998] 1 WLR 547, Waller L.J. formulated what has become known as the "*Canada Trust* gloss": "*'Good arguable case reflects …that one side has a much better argument. It is the concept which the phrase reflects on which it is important to concentrate i.e. of the Court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the Court to take the jurisdiction* " (ibid. at 555). That and later cases were reviewed by Christopher Clarke J. in his judgment in ***Cherney v. Deripaska*** (at paras. 13-44) in the context of a contractual claim. Essentially he concluded by endorsing the *Canada Trust* gloss in the context of a permission application under CPR 6.20 and 6.21.

CLAIM TYPE (1): CONTRACT MADE WITHIN THE JURISDICTION - CPR 6.20(5)(a)

The law

57. Reliance on CPR 6.20(5)(a) entails a claimant establishing a good arguable case that (1) the claim is in respect of a contract, (2) there was a contract, and (3) the contract was made within the jurisdiction: ***Seaconsar*** at 454-5 per Lord Goff. The terms of CPR 6.20(5)(a) do not distinguish between a contract made by the defendant as principal or a contract made on his behalf by an agent. Its wording is apt to cover both situations. It may, therefore, cover a contract made by an agent on behalf of a foreign defendant, whether or not that agent is trading or residing within the jurisdiction.

58. In the case of a contract alleged to have been made by an agent on behalf of one of the parties, there may be as issue as to whether the agent had his principal's authority to make the contract.

59. An alternative case advanced for Mrs Sharab was that, even if there was no concluded contract between Mrs Sharab and the Prince, she has a *quantum meruit* claim for commission against him and that such a claim falls within CPR 6.20(5)(a). Reference was made to CPR 6.20(5)(a) in the White Book and the judgment of Lightman J. in ***Albon v. Naza Motor Trading*** [2007] 1 WLR 2489. The White Book note appears in paragraph 6.21.35: "*A quasi-contract or other similar obligation comes within the meaning of 'contract' in this rule, and in such a case the*

*word 'made' in this rule should be read as 'arising' ...**Rousou's (A Bankrupt) Trustee v Rousou** [1955] 2 All E.R. 169 affirming [1955] 1 W.L.R. 545*".

60. That note can no longer be taken as representing modern English law, for the reasons expressed by Lightman J. in ***Albon***: the view that a claim for money had and received or in pursuance of an ineffective contract gives rise to a (quasi) contractual obligation to repay, cannot survive the development of the law of restitution based on the principle of unjust enrichment (*ibid*. at 2500). Of analogous relevance in the present context is the majority decision of the House of Lords in ***Kleinwort Benson Ltd v. Glasgow City Council*** [1997] UKHL 43, [1999] AC 153 to the effect that a restitutionary claim for recovery of money paid under a void contract is not a claim "*relating to a contract*" within the meaning of that phrase in Article 5 of the Brussels Convention on Jurisdiction and Judgments of 1968, which is incorporated into UK domestic law by the Civil Jurisdiction and Judgments Act 1982.

61. On the facts in ***Albon,*** it was held that the claim did fall within CPR 6.20(5)(a) and (c), because although the basis of the claim was restitution and not contract, the claim was related to or connected with an existing contract and that sufficed to make it a claim "*in respect of*" a contract. On the present facts, the alternative *quantum meruit* claim is advanced on the alternative hypothesis that there was no contract concluded between Mrs Sharab and the Prince. There is no contract to which that claim can be said to have been "*in respect of*". The same would apply even if the alternative claim had been advanced specifically on a restitutionary basis. A claim for restitution is a type of claim for which permission may be granted for service out of the jurisdiction: CPR 6.20(15). Mrs Sharab does not rely on that provision.

62. In the same paragraph in the White Book (para. 6.21.35) reference is made to ***BP Exploration (Libya) Ltd. v Hunt*** [1976] 1 W.L.R. 788 which has relevance on the present facts. One of the issues which arose was as to the position under predecessor provisions (RSC Order 11 r. 1(f)(i) and (iii)) to CPR 6.20(5)(a) and (c), where a contract was made in one country but amended (i.e. varied) in other. Kerr J. concluded (at 798) that the correct analysis was that the contract was still to be taken as made in the first country, at least if the contract was substantially made there, but the position would be different if the effect of the amendment was to discharge the original contract and substitute it with a fresh contract.

Conclusion

63. The core submission for Mrs Sharab is that she has a good arguable case that the alleged contract was made between her and Mr Alaeddin acting as agent on behalf of the Prince at a London restaurant on 25 August 2001 as described by her (see para. 24 above). It follows that it is also necessary for her to have a good arguable case that Mr Alaeddin had the Prince's actual or apparent authority to make the alleged contract on his behalf, alternatively that the Prince later ratified Mr Alaeddin's previously unauthorised act in purportedly making the contract on the Prince's behalf.

64. The determination of the existence and terms of the alleged contract as well as the existence of Mr Alaeddin's authority, will turn on the oral evidence of Mrs Sharab, Mr Alaeddin and the Prince. At this stage there has been no oral evidence. It is nevertheless submitted for Mrs Sharab that her case is supported by the documents attached to her statement. For the Prince it submitted that her case falls far short of being a good arguable case. Mr Pymont QC referred not only to Mr Aladdein's and the Prince's denial of any commission arrangement and Mr Alaeddin's authority to make any such arrangement, but also submitted that Mrs Sharab's evidence is tainted with weaknesses.

65. I am satisfied, on the material before me, that Mrs Sharab has a good arguable case that Mr Alaeddin had the Prince's actual authority to make the alleged contract and also that the alleged contract was made and varied, as maintained by her. I am also satisfied that she has a good arguable case that she had a telephone call from the Prince in August 2002 as described by her (see para. 27 above) and that it can be taken as a ratification by the Prince of Mr Alaeddin's authority to make the alleged contract. Of course, I cannot and do not make any determination on these issues and I recognise that the Prince may prevail at trial. Nevertheless, at present her case on these issues seems stronger than the Prince's case to the contrary. I so conclude for the following reasons.

66. First, Mrs Sharab's description of prior dealings between her and the Prince and related documents attached to her statement (see paras. 17-21 above) amount to circumstantial evidence which provide credence to her case, albeit not of direct relevance. They evidence prior dealings between her, the Prince and Mr Alaeddin in relation to Libya and her engagement as an agent by the Prince and the payment to her of commission on a prior occasion.

67. Secondly, as to the Cannes conversation (see paras. 21-23 above), there is only Mrs Sharab's account in her statement as to this. Nevertheless, if accepted by the court at trial, it amounts to evidence of Mr Alaeddin having the Prince's actual authority to conclude the alleged contract on his behalf. The Cannes conversation is not addressed in Mr Baker's statement in support of the Prince's case. It was submitted for the Prince that Mrs Sharab's account of the Cannes conversation indicates that, on her evidence, the original commission contract was then made. It follows from that submission that the alleged contract made in London and the alleged variation in Libya amounted at most to a variation of a contract made in France. I am unpersuaded, however, that Mrs Sharab's account of the Cannes conversation is, of itself, sufficient to indicate that a contract was then concluded or that it is otherwise such as to preclude her having a good arguable case that the alleged contract was originally made later in London. She does not refer to having accepted the Prince's "*instructions*". Moreover, she states that the Prince said he would send Mr Alaeddin to agree a contract with her, which is consistent with a contract not having then been made. I recognise that at trial the evidence, including that obtained on cross-examination of Mrs Sharab, may indicate that a contact was then made between her and the Prince.

68. Thirdly, as to the circumstances in which the alleged contract was made, several points emerge from Mr Alaeddin's comments as recorded in Mr Baker's first statement (see para. 25 above). He accepts that he often met with Mrs Sharab at the Ayoush restaurant in London. He accepts that he then discussed many issues concerning Libya, including some related to the Prince's business. He further recalls discussing the possible sale of one of the Prince's aircraft to Libya on one or more of those occasions, as well as Project Toushca. He does not categorically deny having put any commission offer to Mrs Sharab. Rather he states that he "*did not recall*" putting any such offer. The acceptance by Mr Alaeddin of many elements of Mrs Sharab's account of the circumstances of the alleged contract, albeit not critical elements, as well as his less than categorical denial of any commission offer stand out as evidence which go some way to give the present impression (and it can be and is no more) that Mrs Sharab has the better of the argument as to whether the alleged contract was made.

69. Fourthly, as to the August 2002 telephone call (para. 27 above), the alleged variation in April 2003 (see paras. 28 and 29 above), the telephone conversations of July and August 2003 (see para. 30 and 31 above), these matters are described by Mrs Sharab in her statement, but are not the subject of any specific comment by or on behalf of the Prince. While Mrs Sharab does not attach to her statement any contemporaneous documents in support of these matters (with the exception of a photograph of her and the Prince), her description thereof is detailed and credible.

70. Fifthly, Mrs Sharab gives a detailed account of negotiations for the sale of the aircraft and her extensive involvement therein. Moreover, her account is backed by a substantial amount of corroborating documents which are not only consistent but are also very supportive of her having a financial interest in the success of the negotiations. In contrast, little beyond a general denial is advanced on behalf of the Prince. There is no attempt to deal with the detail of Mrs Sharab's account or to explain documents relied upon by her in terms consistent with his denial of liability. Moreover, the little that is said by Mr Baker in his first statement consists of double hearsay. It is at least surprising that no statement has been provided by Mr Alaeddin or the Prince responding to Mrs Sharab's statement, let alone one which descends to detail. They had ample time to respond.

71. As to the alleged variation (in Libya) of the alleged contract, it involved a potential increase in commission. It did not alter the obligations of Mrs Sharab. It can scarcely be argued that that increased commission allegedly agreed had the effect of discharging the original alleged contract and substitute it with another (see para. 62 above).

CLAIM TYPE (2): CONTRACT MADE BY AGENT TRADING WITHIN THE JURISDICTION - CPR 6.20(5)(b)

The law

72. Reliance on CPR 6.20(5)(b) entails a claimant establishing a good arguable case that (1) the claim is in respect of a contract, (2) the putative agent had the claimant's actual or apparent authority to make the contract on the claimant's behalf, (3) there was a contract, (4) it was made by or through that agent and (5) that agent trades or resides within the jurisdiction. It has been held that "*through*" denotes the case of a contract negotiated by an agent in this country but concluded by the principal abroad: *National Mortgage Co. v. Gosselin* (1922) 38 T.L.R. 832 (C.A.). The footprint of CPR 6.20(5)(b) is different from that of CPR 6.20(5)(a) insofar as the latter relates to a contract made by an agent. The wording of CPR 6.20(5)(b) is apt to cover not only a contract made through as well as by an agent, but also a contract made outside the jurisdiction by or through an agent who trades or resides within the jurisdiction.

Conclusion

73. There is no evidence of Mr Alaeddin trading (or residing) within the jurisdiction, as opposed to making occasional visits. There is evidence of his being an accountant and a partner of accountancy firms in the Middle East. There is no evidence of his being a partner of an accountancy firm in this country. Mrs Sharab's description of his role is consistent with him acting as agent of the Prince, including in negotiations for the sale of the Airbus aircraft. Nevertheless, her description is far from indicating that he was trading as such an agent within the jurisdiction, let alone coming even near a good arguable case to that effect.

CLAIM TYPE (3): CONTRACT GOVERNED BY ENGLISH LAW - CPR 6.20(5)(c)

The law

74. Reliance on CPR 6.20(5)(c) entails a claimant establishing a good arguable case that (1) the claim is in respect of a contract, (2) there was a contract and (3) the contract is governed by English law. There is no question of there having been an express choice of English law. Accordingly, the default position falls to be ascertained in accordance with the choice of law rules in Article 4 of the EEC Convention on the Law Applicable to Contractual Obligations ("**the Rome Convention**") which has been incorporated in the law of the United Kingdom by the Contracts (Applicable Law) Act 1990. In its application to the present facts, the position is follows. First, the general rule is that the contract is governed by the law of the country with which it is most closely connected (Art.4(1)). Secondly, that is presumed to be the country where the party who is to effect "*the performance which is characteristic of the contract*" has, at the time of conclusion of the contract, "*his habitual residence*" if an individual (Art. 4(2)). Thirdly, that first presumption is displaced in favour of a second presumption if the contract is entered into in the course of that party's trade or profession. Then, the relevant country is (a) the country in which the principal place of business is situated or (b) where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated (Art. 4(2)). Fourthly, neither of the two presumptions applies in two situations: (a) if the characteristic performance cannot be determined or (b) if it appears from the circumstances as a whole that the contract is more closely connected with another country (Art. 4(5)).

75. The approach adopted by English courts is that a presumption should be disapplied on the basis that it appears that the contract is more closely connected with another country only if it clearly so appears (*Dicey*, para. 32-126 and the cases there referred to). In principle "*the presumption may most easily be rebutted in those cases where the place of performance differs from the place of business of the party whose performance is characteristic of the contract*" (*Dicey*, para. 32-127, as approved in ***Bank of Baroda v Vysya Bank Ltd.*** [1994] 2 Lloyd's Rep 87, 93.

76. The Rome Convention does not define what is meant by characteristic performance of a contract (*Dicey*, para. 32-116). The concept is derived from Continental jurisprudence. In accordance with that jurisprudence, in the case of a bilateral contract where the performance of one party takes the form of payment of money, that is not the characteristic performance. Rather it is the service for which the payment is due which is characteristic of the contract. Thus in the case of an agency contract, the characteristic performance is that of the agent.

Conclusion

77. Ascertaining the applicable law of the alleged contract involves applying to the facts the choice of law rules in Article 4 of the Rome Convention. The party required to effect characteristic performance under the alleged contract was Mrs Sharab, not the Prince. The first presumption, which applies unless displaced by the second presumption, is in favour of Mrs Sharab's habitual residence. On the basis of her evidence (see paras. 10 and 11 above) Mr Craig argued in favour London being *the*, or at least *a,* habitual residence of Mrs Sharab. I conclude, however, that the evidence does not so indicate. The evidence strongly indicates that Mrs Sharab's habitual residence is in Amman, Jordan. Not only does she have a house there where her daughter lives and goes to school, but her company, TAWCO, is based there. She has an apartment in London, but not in her own name. Moreover, while in one paragraph of her statement she states she *lives* in London for some months during the year, in another she refers to *staying* in London when not *living* in Amman (see para. 10 above).

78. The first presumption is displaced in favour of the second presumption if the alleged contract was entered into in the course of Mrs Sharab's trade or business. Mrs Sharab's evidence is that she runs a substantial consultancy company, TAWCO. The trade or business which she conducts as a director and chairman of TAWCO is that of the company and not her trade or business. Nevertheless, her evidence is that the alleged contract was made by her in a personal capacity. On the evidence the making of the contract seems to have been a one-off act in that capacity (as opposed to in the capacity of a director of TAWCO). It is arguable that as a one-off act, it is insufficient, of itself, to have amounted to a trade or business. Alternatively, it is arguable that the requirement that the contract be carried on in the course of a trade or business predicates a previously established trade or business and there is no evidence of Mrs Sharab having done so in any personal capacity. On the other hand, the contrary is arguable. In any event, it was not argued for either party that the second presumption applied such as to displace the first presumption.

79. Nor was it argued that any applicable presumption should be disapplied on the basis that it appeared from the circumstances as a whole that the contract was more closely connected with another country.

80. I have some reservations as to the conclusion that, applying the first presumption, Jordanian law is the applicable law. It suffices if I confine my conclusion to Mrs Sharab having failed, at this stage, to have had the better of the argument, such as to be able to establish that her claim falls within CPR 6.20(5)(c) (contract governed by English law).

CLAIM TYPE (4): BREACH OF CONTRACT WITHIN THE JURISDICTION - CPR 6.20(6))

The law

81. Reliance on CPR 6.20(6)) entails a claimant establishing a good arguable case that (1) there was a contract, (2) there was a breach of that contract, (3) the claim is in respect of that breach and (4) that the breach was committed within the jurisdiction: ***Seaconsar*** at 454, per Lord Goff.

82. Establishing a breach committed within the jurisdiction in turn entails establishing that the contract required performance of the relevant duty within the jurisdiction and not elsewhere, as illustrated in several cases where the breach consisted of the failure to pay money: ***Bell & Co v. Antwerp London and Brazil Line*** [1891] 1 Q.B. 103 (C.A.); ***The Eider*** [1893] P 119 (C.A.); ***Comber v. Leyland and Bullins*** [1898] A.C. 525; ***Cuban Atlantic Sugar Sales Corp. v. Compania de Vapores San Elefterio Lda*** [1960] 1 QB 187. As variously observed in the judgments in those cases, the court must examine the contract, the parties to it and circumstances in which it was made in order to ascertain whether it imposed a duty on the defendant to pay within the jurisdiction.

Conclusion

83. It is common ground that there was no express term of the alleged agreement, at least initially as to where payment of Mrs Sharab's commission was to be made. Mr Craig submitted that on Mrs Sharab's evidence as to a telephone conversation with the Prince in August 2003 (see para. 31 above), she notified him that she wanted her commission paid in London and accordingly non-payment resulted in a breach within the jurisdiction. Mr Pymont QC countered, like Mr Baker (see para. 32 above), that there was no agreement but only a request by Mrs Sharab as to payment in London. Both counsel invoked the default rule in the absence of an express term as to payment, namely that it is the duty of the creditor to seek out his creditor (e.g. ***The Eider*** [1893] P 119, 136-7 (CA)). Mr Craig submitted that it was London. Mr Pymont QC submitted that, if the default rule applied, the place of payment was Mrs Sharab's habitual residence in Amman. Hence his submission there was no breach of any contract within the jurisdiction.

84. The application of CPR 6.20(6)) is predicated upon the claimant having a good arguable case as to the existence of a contract. I have previously stated that Mrs Sharab has such a case. I have also previously stated that her

account of the August 2003 telephone conversation is detailed and credible. Moreover, given her case that the alleged contract was varied in April 2003 to provide for increased commission and that two agreements were made in July 2003 pursuant to which the Prince was to receive US$120m upon sale (see para. 34 above), it is reasonably to be expected that she should have a discussion with the Prince as to the manner and place of payment of her commission.

85. I conclude that Mrs Sharab has a good arguable case that, arising from the August 2003 telephone conversation with the Prince, the place of payment of her commission was agreed as London and not elsewhere and that the alleged contract was further varied so as to impose that obligation. An alternative argument open to her and of like strength is that it was an implied term of the alleged contract and/or the alleged contract as varied that her commission would be paid at a place to be nominated by her and that in the August 2003 telephone conversation London was nominated by her. On either argument, breach consisting of non-payment occurred within this jurisdiction.

86. Mr Pymont QC drew my attention to the fact that Mrs Sharab's original requests for payment in September 2003 were made from Jordan. I regard this as irrelevant. He alternatively submitted that, on the premise that the alleged contract was made, it required the Prince to pay the commission in Jordan as Mrs Sharab's usual place of business. He has an arguable case to that effect. On balance, however, I conclude that presently Mrs Sharab has the better of the argument as to the required place of payment and breach. It was London and not elsewhere.

INTRINSIC MERITS: "REASONABLE PROSPECT OF SUCCESS"

The law

87. The criterion of "*reasonable prospect of success*" in the context of the requirement as to the intrinsic merits of each cause of action, involves a relatively low threshold. It is lower than "*good arguable case*". It is substantively the same as the test of whether there is a serious issue to be tried or whether the claimant has a realistic prospect of succeeding on her claim: ***Cherney v. Deripaska*** (para. 12).

Conclusion

88. It follows from my conclusions that Mrs Sharab that has a good arguable case as to the existence and breach of the alleged contract as varied, that her claim also has reasonable prospects of success.

SUMMARY OF CONCLUSIONS AS TO CLAIM TYPE

89. In summary, Mrs Sharab has a good arguable case that her claim is within the types in CPR 6.20(5)(a) (contract made within the jurisdiction) and CPR 6.20(6) (breach within the jurisdiction). Her arguments that her claim falls within those provisions is better than the Prince's arguments to the contrary.

APPROPRIATE FORUM

The law

90. The burden is on Mrs Sharab to show that England and Wales is clearly the appropriate forum (or *forum conveniens*) for the trial of the action. It is the Prince's case that it is not. Rather it is Libya. He does not contend for Jordan or Saudi Arabia.

91. In ascertaining the appropriate forum, the dominant consideration is to identify that forum in which the case can suitably be tried for the interests of the parties and for the ends of justice: ***Spiliada*** at 480 per Lord Goff, endorsing Lord Kinnear's formulation of principle in the Scottish case of ***Sim v. Robinow*** (1892) R. 665, 668. The position is the same both in CPR 6.20 cases, such as the present, where the claimant asks the court to exercise its discretionary power to permit service on the defendant out of the jurisdiction and also in *forum non conveniens* cases. The latter are cases where the court has jurisdiction as of right but the defendant seeks a stay of the proceedings on the basis that England and Wales is not the appropriate forum. In CPR 6.20 cases, the burden of proof is on the claimant to persuade the court that England and Wales is clearly the appropriate forum for the trial of the action. In contrast, in *forum non conveniens* cases the burden is on the defendant to establish that England and Wales is not the appropriate forum: *Spiliada* at 481-2.

92. In a case where the claimant seeks permission to serve a defendant out of the jurisdiction, it has frequently been said that the exercise of jurisdiction by an English court is "*exorbitant*". As cautioned by Lord Goff in ***Spiliada*** at 481, however, that word means no more than that the exercise of the jurisdiction is extraordinary in the sense explained by Lord Diplock. That is in the sense that "*it is one which, under English conflict rules, an English court would not recognise as possessed by any foreign court in the absence of some treaty providing for such recognition*": ***Amin Rasheed*** at 65.

93. In ascertaining the appropriate forum, several factors are to be taken into account. In this regard, I was referred to well known passages in the speeches of Lord Wilberforce in ***Amin Rasheed*** and Lord Goff in ***Spiliada*** and ***Seaconsar.*** The requirement as to appropriate forum is quite distinct from the requirements as to types of claim and substantive merits. A strong case on the merits cannot compensate for a weak case as to the appropriate forum. Nor can a strong connection with the English forum compensate for a weak case on the merits: ***Seaconsar*** at 456. Factors which the court must take into account include the nature of the dispute, the legal and practical issues involved, matters of local knowledge, availability of witnesses and their evidence and expense: ***Amin Rasheed*** at 72. The importance to be attached to the type of claim invoked by the claimant may vary from case to case. In some cases the fact that English law is the applicable law may be of very great importance, but in others it may be of little importance when seen in the context of the whole case. The residence and place of business of the defendant is also a factor: ***Spiliada*** at 481-1. Also of relevance is the enforceability of a

judgment obtained in one jurisdiction, as opposed to another: ***International Credit and Investment Co (Overseas) Ltd. v. Adham*** [1997] EWCA Civ 2583; ***Inter-Tel Inc. v. OCIS Plc*** [2004] EWHC 2269.

94. Lord Diplock in his speech in ***The Abidin Daver*** [1984] A.C. 398 at 411 did not exclude the possibility that there may be countries in which justice may not be obtained for various reasons, including "*the inexperience or inefficiency of the judiciary*". Nevertheless, a claimant who wishes to maintain that even handed justice may not be done to him in the relevant foreign jurisdiction must assert this "*candidly and support his allegations with positive and cogent evidence*." Lord Wilberforce in ***Amin Rasheed*** at 72 deprecated embarking on a comparison of the procedures, methods, reputation or standing of the courts of one country as compared to another. I was referred to the citation in a footnote in *Dicey* (under para. 12-031) of ***Lubbe v. Cape Plc*** [2000] UKHL 41 in relation to judicial inexperience or inefficiency. The case was not concerned with that, but rather with the significance of the lack of availability legal aid in the foreign jurisdiction concerned, South Africa. Reference was made to the high repute in which South African courts are held (*ibid*. at para. 12).

The rival submissions

95. Counsel for each party relied on various factors in support of his favoured forum for the trial of the action. For Mrs Sharab it was submitted that there were several connections with England and Wales. These included the same connections invoked in support of the submission that the claim is within CPR 6.20(5) and (6). Reference was also made to connections in the Settlement Agreement: English law is chosen as the applicable law of the agreement and London as the venue for arbitration of disputes. In addition it was submitted that both parties and the main witness, Mr Alaeddin, travelled widely and London is convenient venue for all of them. The parties would have a fair trial here. Libya was criticised as a forum principally on the basis of Dr Abderrahmane's view as to inexperience of the Libyan courts (see para. 48 above). An additional criticism was that Mrs Sharab would have serious difficulties in enforcing a Libyan judgment in her favour in Saudi Arabia. It was also submitted that there were no statutory basis for the recognition of a Libyan judgment in this country.

96. For the Prince it was submitted that the natural forum for the hearing of the dispute was Libya. Reference was made to the fact that the parties and Mr Alaeddin are "*all Middle Eastern*". They were free to come and go to and from Libya and conduct business there. The Prince's defence required Libyan government officials to give evidence. It was further submitted on the basis of Dr Tumi's reports that there was no proper basis for saying that a Libyan court would not provide a fair trial or a suitable remedy or that Mrs Sharab would be prejudiced as a woman.

97. The burden is on Mrs Sharab to demonstrate that England and Wales is clearly the appropriate forum for the determination of her claim. It was submitted on her behalf that the present application is to be taken as the equivalent of an application by a defendant to stay the present proceedings on *forum non conveniens* grounds. I reject that submission. Although formally the Prince's application, what the court has to determine is whether following full argument at the *inter partes* hearing before me, Mrs Sharab should retain permission to serve out of the jurisdiction previously obtained *ex parte*.

Conclusion as to forum

98. The appropriate forum is England and Wales. I so conclude having regard to the following considerations.

99. The first point to observe is that the favoured forum on the Prince's case, Libya, is not one in which a court may be able to exercise jurisdiction over him as of right, at least in relation to the subject-matter of the present dispute. The exercise of jurisdiction over the Prince by a Libyan court would be just as exorbitant in Lord Diplock's sense as the exercise of jurisdiction over him by an English court. Not only in England and Wales but also in Libya, the Prince is a foreigner and the courts of neither country have jurisdiction over him as of right. For each party to stigmatise as exorbitant the exercise of jurisdiction over the Prince by a court of the forum favoured by the other party, amounts to no more than the pot calling the kettle black.

100. Second, if Mrs Sharab were to pursue her claim in Libya, she would need to persuade that court to grant her permission to serve process on the Prince out of that jurisdiction. The Prince has resisted the present application on the basis that the appropriate forum for the hearing of the dispute is Libya, but it has not been submitted on his behalf that he would voluntarily submit to that jurisdiction. It may be that if he were to have succeeded in resisting the present application on the basis that Libya was the appropriate forum, a Libyan court would not be tolerant of his contending otherwise. That, however, is not clear.

101. Third, it cannot be disputed that a claimant is permitted to pursue a claim within this jurisdiction against a foreign defendant, albeit by way of invoking the discretionary jurisdiction to effect service. It is not suggested that it was not reasonable for Mrs Sharab to have started proceedings here or that it was not reasonable for her not to have started proceedings in Libya or elsewhere (note like observations by Lord Goff in ***Spiliada*** at 484, in the context of a discussion of time bars). Nor could it be credibly so suggested. It follows in such circumstances that the initiative having been taken by her to start proceedings here and to incur the expense of so doing, it is relevant to ask rhetorically what is achieved consistent with the interests of the parties and the ends of justice in acceding to the Prince's application and thereby depriving Mrs Sharab of the advantage of that initiative and resulting in her having wasted time and costs to date. The answer to the question is nothing.

102. Fourth, as to intrinsic nature of the dispute, it is a relatively simple and straightforward contractual dispute, turning mainly on issues of fact. There is nothing in its intrinsic nature that favours one forum over the other. I wholly reject any suggestion that the trial of the action will engage any unusually difficult issues or any issue that of itself

makes this jurisdiction less appropriate than Libya. The essential issues are whether or not there was a concluded contract, whether it was varied, if so where and when, what were the terms express and implied and whether the pre-conditions for the payment of commission have been fulfilled. There appears to be no dispute as to the facts of the sale of the Airbus aircraft or as to the receipt by the Prince of payments totalling US$120m. It is submitted for the Prince that a "*key part*" of his defence will be that Mrs Sharab "*did not broker the ultimate transaction in the way she claims*." This seems to be an alternative case on the premise that there was some kind of agency contract. It seems to raise issues both as to the precise nature of her obligation under that contract and as to causation. It remains to be seen whether the Prince's alternative case will be that payment of commission was predicated upon Mrs Sharab being the effective cause of the sale (as in many domestic claims for commission by estate agents), or that there was some other, perhaps weaker, causation criterion.

103. Fifth, I accept the submission that London is a convenient venue for Mrs Sharab, the Prince and Mr Alaeddin. The case will turn mainly on their oral evidence and their credibility. The documentary evidence is relatively limited. It is submitted for the Prince that the contention that Mrs Sharab did not broker the ultimate transaction "*depends in large part*" on the evidence of those involved in the negotiations in Libya, principally government officials, who are not compellable in this jurisdiction but who would be subject to the Libyan courts. On the material before me and even making full allowance that the Prince has chosen not yet to deploy his defence or evidence in any degree of detail, that submission seems less than convincing. I also observe that no mention of a causation defence or the need to call Libyan government witnesses in support is made in Mr Baker's statements.

104. Sixth, I reject the submission for the Prince that the fact that he, Mrs Sharab and Mr Alaeddin are "*all Middle Eastern*" is relevant to the choice of jurisdiction. The Middle East is a geographic classification reflecting a mid-Atlantic perspective of debatable boundaries, which may not cohere for others elsewhere in the world. While there may be consensus as to its inclusion of Jordan and Saudi Arabia, it is difficult to see how that advances the argument in favour of Libya which is outside the classification or only within it penumbrally. If the suggestion is that Libya has the advantage of geographical proximity to the persons concerned, it may have some resonance in an age of eco-propriety. Nevertheless, that resonance is very faint given that they practise jet age transhumance, with London as a summer pasture, or are otherwise regularly airborne. If the intended connotation is ethnic, cultural or religious, it reflects a classification of a particular perspective, which may even be offensive to many within it, who perceive their identity in terms of a more particular ethnicity, culture or religion.

105. Seventh, as to various connecting factors invoked, I accept that, consistent with my previous conclusions, the fact that Mrs Sharab has an arguable case that the alleged contract was made here and the breach occurred here, favours the choice of this jurisdiction. I accept that insofar as Libya was the place of characteristic performance, that factor favours Libya as a forum. However, in relation to choice of forum, that is not to be taken as more potent than other factors, certainly not on the basis of the presumptions in Article 4(2) of in the Rome Convention (see para. 74 above). That convention has no relevance in the current context. It relates to choice of law not choice of forum. Even if the presumption in favour of the place of characteristic performance in Article 4(2) did apply, its application would indicate Jordan (as the country of Mrs Sharab's habitual residence) and not Libya as the appropriate forum.

106. Eighth, I also reject the submission that in evaluating the appropriate jurisdiction much weight is to be attached to the fact that "*the underlying*" transaction, namely the sale of the Airbus aircraft, has multiple connections with Libya, whereas connections with England and Wales seem limited to the choice of law and arbitration venue in the Settlement Agreement. The characterisation of the aircraft sale transaction as "*the underlying*" transaction has a subliminal force, but its siren suggestion of relevance to the choice of jurisdiction must be resisted. The alleged commission contract and the aircraft sale agreements are wholly separate transactions. Certainly they are interrelated to the extent that entitlement to commission pursuant to the former contract was predicated on conclusion of the latter agreements (and payment pursuant thereto). But apart from that factor which is itself neutral in relation to the issue of choice of jurisdiction, there is nothing intrinsic to the aircraft sale agreements themselves that is of relevance to that choice

107. Ninth, on the issue of enforcement, I am unpersuaded that Mrs Sharab's prospects of enforcing a judgment in her favour in Saudi Arabia would be any the poorer if the judgment were that of a Libyan court rather than a judgment of an English court. I accept that there is no statutory basis for the recognition of a Libyan judgment in this country. It would be open to Mrs Sharab to seek to enforce a judgment of a Libyan court by way of a claim brought in this country against the Prince. Whether she would succeed in so doing would depend on various factors, including whether the Libyan court had the requisite jurisdiction over the Prince (see Dicey, 574-611). At this stage I conclude that the prospects of Mrs Sharab being able to invoke successfully the common law jurisdiction to enforce a Libyan judgment in this country, are at best theoretical. I am persuaded, however, that the ease of enforcement in this country of an English judgment is a factor clearly favouring this as the appropriate forum for the determination of Mrs Sharab's claim. The enforceability of such judgment has obvious relevance if the Prince has assets in this country.

General

108. Overall I conclude that the interests of the parties and the ends of justice are consistent with Mrs Sharab being able to pursue her claim in this jurisdiction and having permission to serve the claim form on the Prince out of the jurisdiction. Accordingly I dismiss the Prince's application for the order sought under CPR Part 11.