[2013–14 Gib LR 180]

VISONE and CAB AIR SRL v. LUONGO, CALCAGNI, CATHEDRAL SQUARE HOLDINGS (GIBRALTAR) LIMITED and RE & PROPERTY RESOURCES LIMITED

SUPREME COURT (Prescott, J.): April 11th, 2013

Conflict of Laws—jurisdiction—domicile—defendant domiciled in Italy can be sued in Gibraltar under Council Regulation (EC) No. 44/2001 if (i) "place of performance" of contract under art. 5(1)(a)—two principal obligations under contract in question (formation and capitalization of company) to be performed here; (ii) place of material harmful event (capitalization using false bonds) under art. 5(3)—may also be expedient to hear case together with other defendants under art. 6

The claimants sought a declaration that a contract entered into between the first claimant and the first defendant was void, and that all assets transferred under it should be returned.

In July 2009, the first claimant and the first defendant entered into a contract, in Italy, to set up an insurance company called Hill Insurance Ltd., which would be incorporated in Gibraltar. The first defendant was to capitalize Hill, which he did, by way of bonds which turned out to be false. The first defendant admitted that false bonds had been put in place, but denied that this had been done by him. As a result, Hill went into liquidation.

On October 8th, 2012, the first defendant filed a *denuncia* (an Italian criminal complaint) against a financial agent whom he had accused of aggravated fraud by putting in place the false bonds.

On October 11th, 2012, the claimants issued a claim form in Gibraltar seeking a declaration that the contract be rescinded, set aside, and declared null and void. As a result, orders for the preservation of trust property and worldwide freezing injunctions were made against all four defendants.

The first and second defendants challenged the jurisdiction of the court to hear the claim. The claimants submitted that the application was made out of time; the first defendant submitted in reply that although his application was indeed filed after the deadline, this was due to his not having local legal advice, and his difficulty understanding the relevant English. He further submitted that if the court were to find his application to be out of time, he would apply for an extension, to which the claimants indicated they would not object.

In substantive argument, the first defendant submitted that under

Council Regulation (EC) No. 44/2001 ("the Regulations"), (i) he had to be sued in Italy, because he was domiciled there and none of the special jurisdiction rules which allowed for a defendant domiciled in one member state to be sued in another applied, as art. 5(1)(a) was not engaged, because the contract was concluded in Italy, the moneys paid under the contract were transferred from Italy, and Italy was therefore the place of performance of the contract; art. 5(4) was not engaged, as any misrepresentation which induced the claimant to part with money under the contract must have occurred in Italy, meaning Italy was also the place in which the harmful event occurred; and art. 6 was also not engaged, as the claims against the third and fourth defendants were not so closely connected to the claims against the first and second defendants that it was expedient to hear them together; (ii) even if any of the special jurisdiction rules did apply, the court could nevertheless decline jurisdiction under art. 28 because the Italian courts were the first seised of related proceedings, the *denuncia* having been filed before the claimant commenced the present action; and (iii) the court should exercise its discretion to decline jurisdiction in this case.

The claimants replied that (i) the first defendant could be sued in Gibraltar under art. 5(1)(a), as Gibraltar was the place the important obligations under the contract, the formation and capitalization of Hill, were to be performed; under art. 5(4), as Gibraltar was the place the harmful event, the capitalization of Hill by way of false bonds, occurred; and also under art. 6, as the claims were closely connected; the third defendant was a Gibraltar company which had received assets under the disputed contract between the first claimant and first defendant; (ii) the court could not decline jurisdiction under art. 28 as it was the court first seised of the matter; the filing of the *denuncia* was not "related proceedings"; and (iii) if the Italian proceedings were related, and the court was not therefore the first seised, it should nevertheless not exercise its discretion to decline jurisdiction.

Held, dismissing the application:

(1) The first and second defendants' application disputing the court's jurisdiction had been made out of time. It should have been filed by November 30th, 2012 at the latest, and was in fact not filed until December 7th. The first defendant clearly had had the benefit of local legal advice, as at the return date for the freezing order on November 23rd he was represented by Gibraltar solicitors. He also clearly had sufficient English to indicate his intention to dispute the court's jurisdiction, as he had signed the acknowledgment of service, and ticked the box indicating he wished to contest jurisdiction, which also bore a reminder that he had only 14 days in which to do so. However, since the claimants would not have objected to the granting of an extension of time, the application would be dealt with on the basis of the substantive arguments (para. 4).

(2) The first and second defendants could be sued in Gibraltar even though they were domiciled in another EU member state, as the present case fell within the exceptions in art. 2 of the Regulations.

(i) Gibraltar qualified as a place in which the first and second defendants could be sued under art. 5(1)(a). It was the place in which at least two principal obligations under the contract in question were to be performed, namely, the formation and capitalization of Hill. Whilst there may have been other locations in which other obligations were to be performed, there was close proximity between these important obligations and Gibraltar, and proximity was an important factor, as recognized by the case law on the "place of performance" under sale of goods contracts, and by the spirit of the Regulations (paras. 10–11).

(ii) Gibraltar qualified as a place the first and second defendants could be sued under art. 5(3). The alleged existence of a harmful event in the form of a misrepresentation in Italy did not preclude the existence of a further harmful event in Gibraltar, and at least one material harmful event—the capitalization of Hill by way of false bonds—occurred in Gibraltar (para. 15).

(iii) Gibraltar qualified as a place the first and second defendants could be sued under art. 6. Severing the claims against the first and second defendants from the claims against the third and fourth defendants, who had submitted to the court's jurisdiction, would increase the risk of irreconcilable judgments, the very evil art. 6 aimed to avoid (para. 21).

(3) Under art. 28 of the Regulations, the court did not have the power or obligation to decline jurisdiction because it was the court first seised of the matter. The *denuncia* filed in Italy was not a related action. It was a criminal complaint made by the first defendant against a third party, with the potential of becoming a criminal action, which in turn had the potential to become a civil action. The question of whether there was a "related action" could not arise until such time as it did become a civil action, and, in any event, it appeared that the civil action (if it did arise) would offer relief only to the victim, *i.e.*, the first defendant (paras. 28–29).

(4) If the *denuncia* was a "related action," and the Gibraltar court was not the court first seised, the court would not exercise its discretion to decline jurisdiction as it was unable to make an assessment of the risk of irreconcilable judgments arising from the two sets of proceedings. There was no evidence of what form the Italian judgment would take, what the effect of it might be on the civil element of the proceedings, or whether the claimant's case would be addressed at all (paras. 30–31).

Cases cited:

(1) *Color Drack GmbH* v. *Lexx Intl. Vertriebs GmbH*, [2010] 1 W.L.R. 1909; [2008] 1 All E.R. (Comm) 168; [2008] All E.R. (EC) 1044; [2010] Bus. L.R. 1044, applied.

(2) *Freeport plc* v. *Arnoldsson*, [2008] Q.B. 634; [2008] 2 W.L.R. 853; [2007] E.C.R. I-8319; [2008] C.E.C. 21; [2007] I.L.Pr. 58, considered.
(3) *Nordea Bank Norge ASA* v. *Unicredit Corp. Banking SPA*, [2011] EWHC 30 (Comm), considered.

Legislation construed:
Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J. 2001, L.12), art. 2: The relevant terms of this article are set out at para. 6
art. 5: The relevant terms of this article are set out at para. 7 and para. 10.
art. 6: The relevant terms of this article are set out at para. 17.
art. 27: The relevant terms of this article are set out at para. 22.
art. 28: The relevant terms of this article are set out at para. 22.

Codice Penale, R.D. 1398/1930 (Italy), art. 185: The relevant terms of this article are set out at para. 27 (in translation).

Codice di Procedura Penale, D.P.R. 447/1988 (Italy), art. 74: The relevant terms of this article are set out at para. 27 (in translation).

K. Azopardi, Q.C. and *A. Lugnani* for the claimants;
O. Del Fabbro and *T. O'Sullivan* for the first defendant.

1 **PRESCOTT, J.:** This is an application by the first and second defendants for a declaration that the court has no jurisdiction to entertain the claimant's claim, or, in the alternative, that the court should decline to exercise any jurisdiction, set aside the claim form, discharge the freezing orders of October 17th and November 23rd, 2012, and generally stay these proceedings on the grounds that all matters complained of by the claimants took place in Italy. The claimants resist this application on the basis that it is out of time and, in any event, is without merit.

2 This application arises following the issue of a claim form by the claimants on October 11th, 2012, seeking, *inter alia*, a declaration that a contract entered into between the first claimant and the first defendant dated July 30th, 2009 be rescinded, set aside, and declared null and void. It is not in dispute that contract was negotiated and entered into by the first claimant and the first defendant in Italy. It is not in dispute that resultant from that contract, and by agreement between the parties, a licensed insurance company was set up in Gibraltar called Hill Insurance Co. Ltd. In essence, the claim advanced by the claimants is that the first defendant failed to capitalize Hill as promised, and as a result the claimants should, *inter alia*, have returned to them the assets which they transferred in consideration of such capitalization by the first defendant. It is alleged by the claimants that the failure to capitalize Hill was because false bonds were put in place by the first defendant. The first defendant accepts false

bonds may have been put in place, but he denies it was by him, alleging instead it was by a third party or parties. In any event, as a result of lack of capitalization, Hill collapsed and is currently in liquidation. On October 17th, 2012 and November 23rd, 2012, upon application by the claimants, this court issued orders for the preservation of trust property and worldwide freezing injunctions against the four defendants. Those orders remain in force to date.

3 It is of note that whilst this application was originally made by the first and second defendants (who are husband and wife), at the previous hearing date, on January 22nd, 2013, Mr. Del Fabbro, originally counsel for the first and second defendants, indicated that he was no longer representing the second defendant due to a conflict of interest. For this reason (amongst others), the matter was adjourned. At this hearing, the second defendant remained unrepresented, and by letter to the court, dated January 31st, 2013, indicated that she wished to—

> ". . . continue with my application to challenge jurisdiction, and with my husband, we want to challenge the freezing order in the light of evidence which my husband has presented in these proceedings. I shall continue with my challenge and adopt my husband's evidence, and I shall fully support submissions made on his behalf. I have decided therefore that I will continue with my defence without a local lawyer as long as it will be possible."

The second defendant makes no reference to a conflict of interest; quite the opposite, she adopts the evidence and submissions of her husband without exception or condition. I shall therefore continue to treat this application as one jointly made by the first and second defendants. The third defendant is a Gibraltar company, domiciled in Gibraltar and currently in liquidation. The fourth defendant is an English company owned by the first defendant. Neither the third nor the fourth defendant challenges the jurisdiction of this court.

4 Before I turn to consider the substance of this application, I shall deal with the claimant's submission that it is made out of time. The procedure for disputing the court's jurisdiction is to be found at Part 11 of the Civil Procedure Rules. Pursuant to r.11(4), an application disputing the court's jurisdiction must be filed within 14 days after the filing of an acknowledgement of service, and be supported by evidence. The first defendant said that the effective date upon which service was acknowledged was November 16th, 2012; the claimants said that it was on November 15th, 2012. This would mean that the application notice disputing jurisdiction would have had to have been filed at the latest by November 30th, 2012. It was, in fact, not filed until December 7th, 2012, first because the first defendant alleges he did not have access to legal advice within this jurisdiction but was instead receiving legal advice from his Italian lawyer,

who advised him that he had 28 days in which to lodge his application, and secondly because of language difficulties. I do not find either reason persuasive. Upon the return date of the freezing order in this court on November 23rd, 2012, the first defendant was represented by the very solicitors on record for this hearing, and it is apparent therefore that he did have access to legal advice within this jurisdiction before the time for filing the relevant application expired. Further, as regards language difficulties, it is evident from the acknowledgement of service, signed by him, that he indicated his intention to contest jurisdiction, and it is to be presumed therefore that he had a sufficient understanding of the language to be able to indicate his intention to contest jurisdiction. It is also of note that alongside the box which was ticked indicating a challenge to jurisdiction is a reminder that jurisdiction must be contested within 14 days. There is no doubt in my mind that the first defendant's (and the second defendant's) challenge to jurisdiction is out of time. Whilst it is submitted for the first defendant that should the court so find, his application would be for an extension of time, no such application notice has been filed. However, given that I have heard submissions on the substantive matter and that counsel for the claimants would not object to an extension being granted in the event of such an application being made, I shall deal with the application on the basis of the substantive argument.

5 Turning to the substantive application, the first defendant's submission is threefold. First, that he must be sued in Italy because he is domiciled in Italy. Secondly, that the special jurisdiction principles of Council Regulation (EC) No. 44/2001 ("the Regulations") which would bestow upon this court a discretion to assume jurisdiction notwithstanding that the first defendant is not domiciled in Gibraltar, do not apply. Thirdly, that even if some or all of the special jurisdiction principles were found to apply, pursuant to arts. 27 and 28 of the Regulations, the court must decline jurisdiction or exercise its discretion in favour of declining jurisdiction.

The Regulations

Article 2: A defendant must be sued in his country of domicile

6 The first defendant submitted that the rule enshrined in art. 2 that ". . . persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that Member State" is an absolute rule, save for very limited and specific circumstances which have no application in this case. The importance of that rule to the spirit and proper interpretation of the Regulations is explained in various recitals of the preamble, most importantly at recital 11, which explains that—

> "the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground

> save in a few well defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor."

It is discernible from recital 11 that the Regulations were intended to narrow issues of jurisdiction in Europe and restrictively limit departure from the general principle. I bear these intentions very much in mind in my approach to this application. The claimants take no issue with the general application of this rule but rather submit that this case falls within the exceptions to the rule.

Articles 3, 5 and 6: Special jurisdiction principles—exceptions

Article 3

7 Article 3 allows for people domiciled in a member state to be sued in the courts of another member state "only by virtue of the rules set out on Sections 2 to 7 . . ." The provisions of relevance in this regard are arts. 5 and 6.

Article 5

The relevant parts of art. 5 provide that:

> "A person domiciled in a Member State may, in another Member State, be sued;
>
> 1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
>
> . . .
>
> 3. in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur;
>
> 4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings . . ."

The first defendant submitted that the place of performance of the contract, the place where the harmful event occurred, and the court seised is Italy.

Article 5(1)(a): "place of performance"

8 The first defendant submitted that the contract which underpins the relationship between the parties was entered into in Italy in 2009, moneys were held in, and the transfer of funds pursuant to contract came from Italy; Italy is therefore the place of performance of the contract.

9 The claimants submitted that, in fact, there were a number of places where the obligations under contract were required to be performed—amongst them Italy, England and Gibraltar—and that whilst it is true that some of the transfer of funds might have come from Italy, over 50% of them went to non-Italian entities. Further, they submitted that importantly, Gibraltar was the place where Hill was to be incorporated to provide insurance services throughout Europe, and Gibraltar was where Hill was to be capitalized by the first defendant.

10 Guidance in respect of the meaning of the words "place of performance" in this context is not abundant. Article 5(1)(b) (first indent) is of some limited assistance, and defines it as—"in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered . . ." Certainly, if the definition of delivery of goods is taken to include the delivery of moneys to Hill by way of capitalization, as well as delivery of shares and other monies, then the contention that Gibraltar is the place of performance is reinforced. Further guidance can be gleaned from *Color Drack GmbH* v. *Lexx Intl. Vertriebs GmbH* (1). There, the court was concerned with whether the first indent to art. 5(1)(b) applied ([2010] 1 W.L.R. 1909, at para. 15) "in the case of a sale of goods involving several places of delivery within a single member state and, if so, whether, where the claim relates to all those deliveries, the plaintiff may sue the defendant in the court of delivery of its choice." The court was of the view that art. 5(1) complemented the general rule of jurisdiction based on the defendant's domicile by recognizing the importance of proximity as a close linking factor between the contract and the court that was to hear the case, in order that proceedings be efficiently organized. As a general rule, it identified the closest linking factor as the place of principal delivery. The court's conclusion was (*ibid*., at para. 45)—

> "that the first indent of article 5(1)(b) of Regulation No. 44/2001 applies where there are several places of delivery within a single member state. In such a case, the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the applicant may sue the plaintiff in the court for the place of delivery of its choice."

11 It is apparent that at least two principal obligations under this contract were to be performed in Gibraltar. One was the formation of Hill, and the other was capitalization by the first defendant of Hill. Whilst there might have been other obligations to be performed elsewhere, the close proximity between Gibraltar and important obligations under the contract is undeniable. The importance of proximity in contract cases of this nature is embraced by the spirit of the Regulations, as is evident from recital 12

of the preamble which states that: "In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice." For these reasons, in my view Gibraltar qualifies as a place where the first and second defendants can be sued under art. 5(1).

Article 5(3): "place where the harmful event occurred"

12 It is not in dispute that the tort involved in this this claim is fraud, however there is divergence of opinion in the identification of the harmful event upon which the tort is founded.

13 The first defendant said that whilst they do not admit that there was any misrepresentation, if there was, it is that misrepresentation which would constitute the harmful event, and that took place in Italy in July 2009, when the contract was being negotiated and when the first claimant was then induced, by that misrepresentation, to part with certain sums of money.

14 The claimant said that it is the lack of performance of the contract which constitutes the harmful event. This was a fraud because the first defendant put false bonds in place in a pretence to capitalize Hill. This harmful event occurred in Gibraltar, and had the resultant effect of rendering shares in Hill worthless, as well as causing the collapse of Hill. Further evidence that the alleged fraud occurred in Gibraltar, say the claimants, is the fact that it is currently under investigation by law enforcement authorities in Gibraltar.

15 Whether there was a harmful event in the form of misrepresentation in Italy is a matter which would need to be established upon the evidence in due course, but even assuming for a moment that there was, that would not necessarily vitiate a further harmful event, which, it is not disputed, occurred in Gibraltar, and that is the capitalization of Hill by way of false bonds. For whilst the question of who proffered those bonds (whether the first defendant, or some third parties) is disputed (and would similarly need to be established by evidence), it is crucially not disputed that false bonds were in fact used to capitalize Hill in Gibraltar. Thus, the inescapable conclusion is that at the very least one material harmful event occurred in Gibraltar, irrespective of whether other harmful events occurred elsewhere. Drawing an analogy between the place of performance under art. 5(1) and the place of occurrence of the harmful event under art. 5(3), and applying the gist of the reasoning in *Color Drack* (1), it is not unreasonable to conclude that, where there is more than one place in which a harmful event occurred, that it should be the place with the closest linking factor between the harmful event and the court having jurisdiction, which should be the place where the principal harmful event

is held to have occurred. I am of the view that, upon the facts before me, the place with the closest linking factor is Gibraltar. Gibraltar therefore qualifies under art. 5(3) as a place where the first and second defendants may be sued.

Article 5(4): "in the court seised of those proceedings"

16 From the claim form, it is apparent that this is a civil claim for damages. The claimants submit that it is based on an act which may give rise to criminal proceedings in this jurisdiction, which, they further submit, is seised of the proceedings. The first defendant alleges that Italy is the court seised because there is an action in that jurisdiction which, although criminal in nature, also has the potential to become a civil action, and that action was commenced in priority to this one. Given that the arguments in relation to this article are inextricably linked to the submissions concerning art. 28, I shall deal with them together in due course.

Article 6

17 The relevant parts of art. 6 provide that—

> "A person domiciled in a Member State may also be sued:
>
> 1. Where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings . . ."

18 The first defendant submitted that although he is one of a number of defendants, and at least one of the defendants is domiciled in Gibraltar, art. 6 is not engaged because the claims against the other defendants are not so closely connected that it is necessary to hear them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. In fact, he contends that if he were to be sued in Italy as he says he must be, the claim against at least the third and fourth defendants will fall away because they are only token defendants.

19 The claimants said that the third defendant is a Gibraltar registered company which received assets as a result of the contract negotiated and entered into between the claimant and the first defendant; the connection is thus established. The fourth defendant is a UK registered company which is wholly owned by the first defendant. Both the third and the fourth defendants have submitted to the jurisdiction of this court.

20 It is apparent from the proviso to art. 6 that importance is attached to ensuring that a given court hears and determines claims together, so that separate proceedings can be avoided and the risk of irreconcilable judgments—which could very well ensue—be likewise avoided. This

departure from the rule that a defendant must be sued in his country of domicile can be justified in order to minimize multiplicity of proceedings and the risk of irreconcilable judgments.

21 In *Freeport plc* v. *Arnoldsson* (2), it was held that provided the claims brought against different defendants were connected in the sense that it was expedient to hear them together to avoid the risk of irreconcilable judgments, the fact that they had different legal bases did not preclude the application of art. 6. This suggests a non-restrictive approach to the interpretation of art. 6, and one that has as its objectives ([2008] Q.B. 634, at para. 49) "procedural economy and compatible judgments." Bearing this in mind, the very real problem which presents itself in this case is that if the court were to accede to the first (and second) defendants' request to decline jurisdiction, the litigation would continue in Gibraltar against the third and fourth defendants, for although the first defendant alleges that the claim against the third and fourth defendants would fall away, that is merely one point of view, which is disputed by the claimants, and would most likely be the subject of further litigation. Thus, a severing of this claim would, in my view, result in the very evil that the article is designed to prevent: separate proceedings resulting in separate, and very possibly conflicting, judgments. The other important issue to bear in mind is that the article, by referring to the importance of avoiding irreconcilable judgments, must necessarily envisage that there would be two or more courts in a position to make and deliver judgments on connected claims. Whether there is in fact such an action existing in the first and second defendants' country of domicile is a pertinent matter which I now turn to consider in relation to further submissions made under s.9 of the Regulations.

Section 9

22 The first defendant relies on arts. 27 and 28 of s.9. Article 27 provides—

> "1. Where proceedings involving the same cause of action 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 motion stay is 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."

Although, on the one hand, the first defendant appears to place some reliance on art. 27, counsel has conceded that there is no cause of action which is the "same" in Italy, between the "same parties," and therefore in

effect the article does nothing to advance the first defendant's cause. More relevant is art. 28 which provides:

> "1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
>
> 2. Where 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 over the actions in question and its law permits the consolidation thereof."

23 This article bestows upon the court discretion to stay its proceedings, or even decline jurisdiction where there is a pending related action in any court other than the court first seised. The issue which requires determination in order to establish whether the discretion of the court to stay or refuse jurisdiction is engaged is whether the Gibraltarian court is the court first seised of pending related proceedings.

24 The first defendant submitted that it is in fact the Italian court which is the court first seised of proceedings which are related to these. This is because, whilst these proceedings were commenced by claim form issued on October 11th, 2012, on October 8th, 2012, a criminal complaint ("*denuncia*") was filed in Italy, by the first defendant, against a Mr. Marco Russo, "the financial agent authorized by the Spanish Government authority for financial transactions," accusing him of aggravated fraud. The allegations contained in the *denuncia* translated into the English language from the Italian language are not easy to decipher, but the thrust seems to be that the first defendant entered into two contracts with Mr. Russo, for Mr. Russo to provide the first defendant with bonds to the value of €6.5m., with which Hill was to be capitalized. I am not sure what the consideration for the provision of the bonds was, but in any event, the bonds turned out to be worthless. As an aside, I note that reference is made in the *denuncia* to a previous complaint filed by the first defendant on September 10th, 2012, but I have not been provided with a copy of that document and remain ignorant as to the nature of that earlier complaint and against whom it was made. For the purposes of this application therefore, I rely on the *denuncia* of October 8th as the material action.

25 Much along the terms of art. 6(1), art. 28(3) defines "related" actions as those "where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings." In debating how to approach this issue, I draw useful assistance from the case of *Nordea Bank Norge ASA* v. *Unicredit Corporate Banking SPA* (3), in which Gloster, J. advocated a common-sense and non-mechanistic approach to the question of whether actions were to be characterized as related.

26 The first defendant submitted that the action in Italy concerns the very subject-matter which is at the crux of the action in Gibraltar, and that is the false bonds. It is accepted that the action in Italy is criminal in nature and not civil, but because of the nature of the Italian legal system, it is submitted that this is not fatal. The first defendant relies, in relation to matters of the Italian law and procedure, on the statement of the Italian lawyer, Mr. Racheli. Mr. Racheli points out that once a criminal complaint is lodged with the public prosecutor, prosecution is mandatory and subject only to discontinuance by judicial authorities, so that the placing of a *denuncia* in Italy is distinguishable from the mere reporting of a criminal matter to the police in this jurisdiction. Once the *denuncia* is lodged, the legal action is alive.

27 Mr. Racheli further explains that the lodging of a criminal complaint will not necessarily mean that the matter will stay within the remit of the criminal justice system alone, but can be transposed into Italy's civil jurisdiction. He refers to art. 185 of the Italian Criminal Code [in translation]: "All crimes that have caused pecuniary or non-pecuniary damage require the culprit and the persons who are liable under civil laws for facts committed by him to make compensation." He further explains, however, that if the damage to be claimed in a civil action arises from the commission of a criminal offence such as fraud, then in order to avoid duplication of proceedings, art. 74 of the Italian Code of Criminal Procedure states that [in translation]—

> "Civil action for restitution and compensation for damage referred to in art. 185 of the Criminal Code can be carried out during the criminal trial proceedings by the person on whom the offence inflicted damage or by his heirs against the defendant and the person bearing civil liability."

Mr. Racheli goes on to explain that art. 78 of the Italian Code of Criminal Procedure "sets out the formalities through which joinder as a civil party can occur." He states that joinder as a civil party in criminal proceedings remains optional and available for the victim, but he is silent as to what the formalities referred to are and, importantly, silent as to whether upon the facts of this case there could be joinder of the parties to a civil action.

28 Whilst I do not dispute the accuracy of the opinion of Mr. Racheli, it is useful only as a general exposition of Italian law because it makes no reference, direct or otherwise, to the facts of this case, to whether upon these facts it is possible or even likely that a civil action will ensue, and importantly professes no opinion as to whether the particular criminal complaint lodged by the first defendant would qualify as a related action. As I understand it, art. 74 of the Italian Code of Criminal Procedure appears to leave it to the person on whom the "offence inflicted damage" to decide whether to bring a civil action for damages. So that, in the event

that the first defendant decided against instituting civil proceedings on the back of the criminal complaint, no such civil proceedings would arise. Crucially, until such time as the first defendant "carried out" civil proceedings, I cannot see how the debate about whether the action is related can properly begin, because up until that point, all there is in Italy is a criminal complaint by the first defendant against someone who is not a party to the action in Gibraltar, with the potential of becoming a criminal action, which in turn has the potential of becoming a civil action.

29 Further, it would appear from the general explanation provided that any relief as a result of civil action which might arise from the criminal action would be available only "to the person on whom the offence inflicted damage," or to his heirs. Given that the only complainant is the first defendant, it would appear that only the first defendant and his heirs would be entitled to relief in that prospective civil action. In the absence of an opinion on Italian law which would indicate that the claimants would also be entitled to relief in the action lodged in Italy, I must conclude they would not be. Therefore, on the basis that the claimants are cited as neither complainants nor interested parties, nor victims in the Italian criminal action, it is difficult to see how their claim against the first defendant would be progressed in Italy, or even what right they would have to be heard. It is difficult therefore to see how the criminal action in Italy could be defined as a related action. If there is a relation, I assess the degree of connection as "loose," for whilst I acknowledge there may be a connection between the two actions in so far as both concern allegedly false bonds, to my mind the connection is not sufficiently close to make the actions related for the purposes of art. 28.

30 In light of the above, it is unnecessary to discuss the risk of irreconcilable judgments issuing from the two actions. If, however, I am wrong and the actions were found to be related, I am unable to make a proper assessment of the risk of irreconcilable judgments. First, I do not know what form a judgment of the criminal court in Italy would take, whether it would be reasoned or, as in this jurisdiction, simply take the form of a verdict of guilty or not guilty. I do not know whether a verdict of not guilty would have the effect of discontinuing the civil proceedings (if any had by then been instituted), or have no impact at all upon them. In the event that any civil proceedings instituted resulted in a judgment, for the reasons aforesaid it is unlikely that judgment would address the claimants' complaints. Even if the Italian court were to find that Mr. Russo was implicated in the false bonds scam, that would not necessarily be inconsistent with a finding by a Gibraltar court that the first defendant was involved in such a scam.

31 Having formed the view that this is not a related action, it follows that Gibraltar must be the court first seised. Given that finding, I can do no better than adopt the words of Gloster, J. in the *Nordea* case (3) ([2011]

EWHC 30 (Comm), at para. 72)—". . . [T]here is no power or obligation, under art. 28, for the court first seised to stay its proceedings." If I am wrong and these are related proceedings, so that the Italian court is the court first seised, I am nonetheless of the view that it would be inappropriate for me to exercise my discretion in favour of staying proceedings or declining jurisdiction, given my conclusion that the first and second defendants can properly be sued in Gibraltar pursuant to arts. 5 and 6, and that this is not an application by all defendants, but only by two out of four. A further important consideration is that discontinuance of the action in Gibraltar against the first and second defendants would have the ancillary effect of discharging the freezing orders. In the absence of being satisfied that the claimants would have some right to continue to pursue their claim in the Italian court, they would be bereft of the protection (in relation to finances) already granted by this court, and that seems to offend principles of justice as well as the spirit of the Regulations.

Orders accordingly.