

13-12-06

1 IN CHAMBERS

2 IN THE GRAND COURT OF THE CAYMAN ISLANDS

3 CAUSE NO: 102 of 2006

4
5 BRASIL TELECOM, S.A.
6 (A corporation organized under the laws of the Federative Republic of
7 Brazil)]

8 Plaintiff

9 -and-

10
11 OPPORTUNITY FUND
12 (A corporation organized under the laws of the Cayman Islands)
13 Defendant
14

15 BEFORE: The Honorable Madam Justice Levers

16 Appearance:

17 Mr. Michael Black, QC and Mr. Andrew & Mr. David McGrath for the
18 Plaintiff

19 Mr. Roger Ellis, QC and Mr. James Chapman for the Defendant

20 Heard: 30th November to 1st December 2006

21
22 JUDGMENT



23 Levers, J.

24
25 This is an application by the Defendant in this matter for the following

26 orders and/or other relief, namely:

- 1 (1) An order staying the action on the ground that the Cayman Islands is
2 not the appropriate forum for trial;
- 3 (2) An order providing for the costs of this application; and
- 4 (3) Such further or other relief as the Court may think fit.

5

6 **Background**

7

8 The Defendant is a successful Cayman Islands Mutual Fund launched in
9 1992. It is divided into sub-funds and investors select the sub-fund or funds
10 in which they wish their investments to be made.

11

12 The Defendant invests, predominately in assets in Brazil and none of its sub-
13 funds invests in the Cayman Islands. It's domicile, however, is the Cayman
14 Islands. Opportunity Asset Management Inc. ("OAM"), a Cayman company
15 owns all the management and voting shares in the Defendant and is its sole
16 director. Opportunity Asset Administradora de Recursos de Terceiros Ltda,
17 ("Opportunity Brazil") a Brazilian company is the Investment Manager for
18 the Defendant. Two funds, which principally invested in the companies
19 formed upon the privatization of the state industries of Brazil in the 1990's,
20 are namely, the "offshore fund" and the "onshore fund". The offshore fund

1 is CVC/Opportunity Equity Partners LP now known as Citigroup Venture
2 Capital International Brazil LP. This is an exempt limited partnership
3 formed under Cayman law. The onshore fund CVC/Opportunity Equity
4 Partners Fundo de Investimento Em Ações is a Brazilian corporate body,
5 which has never transacted business in the Cayman Islands.

6
7 Opportunity Equity Partners Limited formerly known as CVC/Opportunity
8 Equity Partners Limited ("Opportunity Cayman") is a Cayman company and
9 is an exempt company within the meaning of the Companies Law. This
10 means that it is prohibited from conducting business in the Cayman Islands.

11
12 Until March 2005, Opportunity Cayman controlled the offshore fund by
13 virtue of it's being the general partner of that exempt limited partnership.
14 Opportunity Brazil, a Brazilian corporation, which has never transacted
15 business in the Cayman Islands, controlled the onshore fund until September
16 2003.

17
18 Mr. Daniel Dantas, a Brazilian national resident in Brazil is alleged to be the
19 founder and controller of all of Opportunity's companies and hence, of
20 course, of the Defendant, OAM, the offshore fund, the onshore fund,

1 Opportunity Cayman, and Opportunity Brazil. Mrs. Veronica Dantas, a
2 Brazilian national resident in Brazil is director of OAM. She is Mr. Dantas'
3 sister.

4
5 It will be remembered that OAM Inc. is a Cayman company and owns all the
6 management and voting shares in the Defendant and is its sole director.

7 Brasil Telecom S.A, the Plaintiff in this matter, is a Brazilian corporation
8 which does not transact business in the Cayman Islands. It is one of the
9 companies formed from the privatisation of the Brazil state owned
10 telecommunications industry and invested in by the offshore fund and the
11 onshore fund, and the Defendant.

12
13 Brasil Telecom SA has as its holding company Brasil Telecom Participações
14 SA which is a Brazilian corporation and does not transact business in the
15 Cayman Islands. Opportunity Zain SA is the ultimate controlling company
16 of the Plaintiff and it is through that company the offshore fund, the onshore
17 fund and the Defendant hold their investments in the Plaintiff. That is the
18 structure of the Plaintiff and the Defendant.

19
20 The Plaintiff's Cause of Action is:

1
2 (a) A claim under the doctrine of constructive trust for knowing receipt
3 by the Defendant of its spoils and/or knowing assistance by the
4 Defendant in breaches of fiduciary duties owned by others to the
5 Plaintiff; and

6 (b) Direct breaches by the Defendant of fiduciary duties allegedly owned
7 by it to the Plaintiff.
8

9 The Writ of Summons and Statement of Claim allege four separate claims:

10 (1) The Highlake claim,

11 (2) The Alcatel claim,

12 (3) The Lucent claim and

13 (4) Finally, the Telecom Italia claim.
14

15 I will go into the details of the claims later in this judgment when discussing
16 the applicable factors in coming to my decision.
17

18 In support of this application Mr. Ellis, QC has filed an affidavit of Mr.
19 Helfrecht, then an attorney at the firm of Ogier. Mr. Black, QC in his
20 written submissions made much of his objections to Mr. Helfrecht's

1 affidavit, although verified by Mr. Ellis' client Ms. Veronica Dantas. But in
2 oral submissions at the hearing Mr. Black merely drew the Court's attention
3 to the fact that an attorney had filed an affidavit and did not go much further.
4 For the record, it is my view, that the rule that an affidavit may not be filed
5 by an attorney who has immediate conduct of the matter is essentially to
6 prevent an attorney who actually appears in the matter from filing an
7 affidavit as he can be cross-examined on it. And it is for this reason I
8 believe that the rule is in existence. I therefore would not in any event have
9 disregarded Mr. Helfrecht's affidavit.

10
11 Mr. Ellis in support of his application relies on the evidence before the
12 Court, that is, the affidavit of Mr. Helfrecht, the exhibited affidavit of a Mrs.
13 de Oliveira Silva, the affidavit of Ms. Dantas and submits as follows:

14
15 (1) That the causes of action and the facts involved in them have no
16 connection with the Cayman Islands but concern events and the
17 management of the Plaintiff in Brazil;

18 (2) He urges this Court to look at the practical difficulties of a trial in the
19 Caymans, as opposed to Brazil. The witnesses and the documents
20 being physically in Brazil and the Portuguese language. He says in

1 short a trial in the Cayman Islands involves the importation of all
2 witnesses lay and expert and all documentation together with
3 translations and interpreters;

4 (3) As far as witnesses are concerned he submits I should look at the
5 affidavit of Darwin Correa on behalf of the Plaintiff. Mr. Correa
6 suggests that he and other high level officers of Brazil Telecom can
7 speak English and travel to the Cayman Islands and that Mr. and Ms.
8 Dantas can speak English and likewise attend. Mr. Ellis says that the
9 testimony that will be needed is the testimony of directors, officers
10 and employees of the Plaintiff and Opportunity:

11 (a) As to the reasons and motives for decisions allegedly
12 resulting in breaches of fiduciary duty; and

13 (b) How far those making such decisions were influenced or
14 coerced by Opportunity. The testimony of the current
15 officers of the Plaintiff will be virtually irrelevant. In other
16 words, he says that Mr. Correa is a present officer and his
17 testimony for purposes of proving the Plaintiff's case will be
18 irrelevant;

1 (4) He submits that the Plaintiff does not suggest that any Caymanian
2 witnesses will be called. Everyone he says will have to be imported
3 from Brazil;

4 (5) He reminds the Court that the Brazilian witnesses are not compellable
5 if the action is fought in the Cayman Islands;

6 (6) The Plaintiff submits that all constitutional and other documents of the
7 Defendant and OAM are in English. Mr. Ellis however responds that
8 these documents have nothing to do with the issues in the case. The
9 vital documents in this case concern not the constitution and setup of
10 the Defendant but the running of the Plaintiff's business;

11 (7) The Defendant says that the structures of this company in the Cayman
12 Islands are irrelevant. The claim is not about the structure and
13 therefore these do not amount to a very strong connection with the
14 Cayman Islands. The claim he says is that the Defendant not through
15 its normal structure has acquired dishonestly the fruits of breaches of
16 fiduciary duties;

17 (8) Next, he submits that Mr. Correa's affidavit suggests that this
18 litigation is transnational and the Cayman Islands are well accustomed
19 to dealing with such litigation. However, nowhere says he, does the
20 Plaintiff suggest that Brazil is not equally equipped to deal with

1 transnational litigation and therefore he suggests that this question of
2 transnational litigation is irrelevant to the natural forum.

3
4 In this context Mr. Ellis submits that public policy is of little relevance
5 and indeed has been dismissed as a factor to be taken into account if one
6 reads the English authorities. He concedes however that there is an
7 element of public policy involved in the judgments relied on by the
8 Plaintiff, which I shall deal with later.

9
10 Mr. Ellis then deals with the question of the order for accounting being
11 obtainable in Brazil. Mr. Ellis' submission is that until liability is
12 established there is no question of accounting and he says it is nonsense
13 to suggest that in Brazil the legal procedures cannot undertake or do not
14 have a remedy that will result in monies being obtained once liability is
15 established. It may not be called an accounting, he says but that there
16 must be a similar remedy. In any event, the test at this stage is to deal
17 with the question of liability. In this context he submits that the two
18 lawyers for the Plaintiff do not suggest that the action if tried in Brazil
19 will result in an account not being ordered if appropriate or that there will
20 be any difficulty enforcing such an order in Brazil;

1 Finally, he relies on the dicta of Lord Goff in the case of Spiliada
2 Martime Corporation v Canulex Ltd. [1987] 1 AC, HL 460 decision, in
3 which it was said:

4
5 “Furthermore in Order 11 cases the Defendant’s
6 place of residence may be no more than a tax
7 haven to which no great importance shall be
8 attached.”
9

10 Mr. Black QC on behalf of the Plaintiff responds as follows:
11

12 (1) The Defendant is a Cayman Islands entity and the proceedings have
13 been served as of right (he places great importance on this all through
14 his submissions);

15 (2) Brazil does not have the most real and substantial connection with this
16 action. In fact, the Defendant has no connection with Brazil, it has no
17 presence in Brazil, and its directing mind and will is another Cayman
18 Islands entity;

19 (3) The Plaintiff says that the assets were wrongfully diverted to the
20 Defendant. The courts of the Cayman Islands are the natural forum
21 for the making of an enforceable order requiring the Defendant to
22 return those wrongfully diverted assets;

1 (4) If this action were stayed in favour of the courts of Brazil, a virtually
2 identical action nonetheless would have to be commenced before the
3 Grand Court to obtain the relief the Plaintiff seeks here. Thus, a stay
4 accomplishes essentially nothing but delay and a duplication of effort
5 and cost;

6 (5) This same Defendant has contended previously in another matter
7 before the Grand Court that the courts of the Cayman Islands are the
8 more appropriate forum than the courts of Brazil for adjudicating
9 disputes involving the Defendant. This inconsistent position has yet
10 to be suitably explained;

11 (6) The Defendant has been organized in such a way as to take the
12 substantial benefits of incorporation in the Cayman Islands, but it is
13 unwilling to submit to the jurisdiction of the Cayman Islands courts.
14 (This of course, is a public policy issue)

15
16 **The Applicable Law**

17
18 Proceedings can be served as of right on a defendant within the
19 jurisdiction irrespective of the degree of connection with this country or
20 of the Defendant or the cause of action. To prevent completely

1 unsuitable actions proceeding, it has been recognized since the Abidin
2 Daver (1984) AC 398, HL, that the courts have a discretion to stay
3 English proceedings on the principles of *forum non conveniens*. The
4 leading case on that is the Spiliada Maritime Corp v Cansulex Ltd. [1987]
5 AC at page 460, HL. The principles applied are the same as on
6 application for leave under Order 11 rule 1(1) but the burden of proof is
7 reversed to take into account the fact that the Plaintiff has commenced
8 proceedings as of right whereas under Order 11 rule 1(1), the Plaintiff
9 requires leave to serve out of the jurisdiction.

10
11 Only when served as of right, because the domicile of the company is in
12 a particular country then and only then does one make application for
13 “forum non conveniens”. In the Spiliada case (supra) at page 464 Lord
14 Templeman said:

15
16 “Where the plaintiff is entitled to commence his
17 action in this country, the court, applying the
18 doctrine of forum non conveniens will only stay
19 the action if the defendant satisfies the court that
20 some other forum is more appropriate. Where the
21 plaintiff can only commence his action with leave,
22 the court applying the doctrine of forum
23 conveniens will only grant leave if the plaintiff
24 satisfies the court that England is the most
25 appropriate forum to try the action. But whatever

1 reasons may be advanced in favour of a foreign
2 forum, the plaintiff will be allowed to pursue an
3 action which the English court has jurisdiction to
4 entertain if it would be unjust to the plaintiff to
5 confine him to remedies elsewhere.”
6

7 He says exactly what Lord Goff said in that case. In other words, it's not
8 good enough to say Cayman is not appropriate but to point to one that is.

9 Dicey, Morris & Collins, The Conflict of Laws (14th Edition) (2006)

10 Volume 1, at page 476:

11
12 “Seventhly, a stay will not be refused simply
13 because the claimant will thereby be deprived of “a
14 legitimate personal or juridical advantage”,
15 provided that the court is satisfied that substantial
16 justice will be done in the available appropriate
17 forum.”
18

19 It goes on at paragraph 12-028:

20
21 “It follows that an undertaking by the defendant to
22 submit to the jurisdiction of a foreign court can
23 make the foreign court available even though it
24 would not have been so without his undertaking.”
25

26 In this case Mr. Roger Ellis, QC on behalf of the Defendant has given an
27 undertaking to submit to the Brazilian jurisdiction.
28

29 In the Spiliada case, Lord Goff of Chieveley said:

1
2 “The basic principle is that a stay will only be
3 granted on the ground of forum non conveniens
4 where the court is satisfied that there is some other
5 available forum, having competent jurisdiction,
6 which is the appropriate forum for the trial of the
7 action, i.e. in which the case may be tried more
8 suitably for the interests of all parties and ends of
9 justice.”
10

11 The burden of proof rests on the defendant to show there is some other
12 clearly more appropriate forum. If there is no other more suitable forum
13 the stay should usually be refused. For example in the Vishva Abha
14 [1990] 2 Lloyd’s Report, page 312:
15

16 The owners of cargo on board a ship named the Dias brought an action *in*
17 *rem* against the owners of a ship namely Vishava Apurva. The collision
18 happened on the high seas. The only connection with England other than
19 the fact that the defendant’s ship was arrested here was that the
20 defendant’s ship regularly docked in this country. The suggested
21 alternative forum was South Africa, on the ground that the Dias had been
22 arrested there in litigation between the owners of the two ships. The only
23 connection with South Africa was that proceedings had been served there
24 while the Dias was in port. It was pure chance that litigation was

1 pending in South Africa over the same collision as opposed to any other
2 country, so there was no other distinctly more appropriate forum, it was
3 held.

4
5 In considering whether there is an alternative forum, the court must look
6 for the country 'with which the action has the most real and substantial
7 connection', The Abidin Daver [1984] AC, at page 398, per Lloyd Keith
8 of Kinkel. Sometimes, the natural forum of the action will be obvious.
9 For example, where the defendant has an established place of business
10 within the jurisdiction, very clear and weighty grounds must be shown
11 for refusing to exercise the jurisdiction. The court will also consider the
12 availability of factual and expert witnesses, the law governing the dispute
13 and whether the parties have conferred jurisdiction on any particular
14 court. Usually, I would suggest that it was best for proceedings to be
15 continued in the country whose law governs the dispute.

16
17 However, if there is some more appropriate forum and it is available, the
18 court may still refuse a stay if in all the circumstances of the case justice
19 requires that a stay should not be granted. Spiliada Maritime v Cansulex
20 Ltd. [1987] 1 AC 460:

1
2 “The burden of proof regarding showing some
3 reason for not granting a stay despite there being
4 some more suitable forum then shifts to the
5 plaintiff. A stay may be refused, for example,
6 where the plaintiff has cogent evidence that justice
7 will not be done in a foreign jurisdiction.
8 However, a fear that justice will not be done in the
9 plaintiff’s own country, if that is the appropriate
10 forum, is irrelevant Jeyaretnam v Mahmood, the
11 Times, 21st May 1992.”
12

13 In order words generally the court seeks to do practical justice between
14 the parties. If practical justice can be done between the parties then the
15 court should be less worried about depriving a plaintiff of a benefit
16 secured by forum shopping. I have already quoted the leading case in
17 England. Mr. Black refers me to an authority that he calls the leading
18 authority in this country which is KTH Capital Management Ltd v China
19 One Financial Ltd and others [2004-5] CILR 213. The judgment of the
20 Chief Justice Anthony Smellie, QC. In that case Smellie, CJ identifies
21 the factors which were to be considered, including convenience and
22 expense and he differs from Spiliada in a few respects including the
23 question of public policy. That judgment and the subsequent judgment of
24 the Court of Appeal of the Cayman Islands in Contadora Enterprises SA
25 v Chile Holdings (Cayman) Ltd. CILR (1999) at page 194, both appear to

1 say that the question of public policy must be taken into account. The
2 KTH Capital v China One case also places a great deal of emphasis on
3 the fact that the company was sued as of right in the Cayman Islands.
4

5 In the KTH Capital case the question was and remains as such it is in all
6 the applications of this nature that it is a matter of the judge's discretion
7 and must depend on the facts of each and every case. There are guiding
8 factors to be taken into account by the judge. But the rule that there must
9 be a substantial connection must depend on the factual situation of every
10 case. In the KTH Capital Management cause relief sought for specific
11 performance would not have been directly enforceable at common law
12 with the effect that the plaintiff would have to sue all over again in this
13 jurisdiction. In this case however if the plaintiff got a judgment for an
14 account and an account was taken in Brazil (there is no need to suppose
15 that the account cannot be taken in Brazil) then the enforceability of that
16 account as the money/assets are or may be in Cayman would not be an
17 overly difficult proposition.
18

19 Looking at the various claims in the Statement of Claim with a view to
20 deciding on the real and substantial connection:

1
2 **1. The Highlake Claim**

3
4 The Plaintiff in this matter claims:

- 5 (1) The Defendant wrongfully obtained indirect interest in two
6 cellular telecommunications companies with finances largely
7 provided by the Plaintiff that would have been of substantial
8 benefit to the Plaintiff. In other words, the Plaintiff's
9 Opportunity-nominated executives diverted a valuable business
10 opportunity from the Plaintiff and to the Defendant.
- 11 (2) That in June 2002, the Plaintiff's former management caused an
12 offshore investment fund, Telecom Capital Fund BV ("TCF") to
13 be established in Curacao, Netherlands Antilles and that this
14 company was managed by a newly formed asset management
15 company, a Bahamian entity called Link Ventures Inc.
- 16 (3) That the Defendant utilized Highlake International Business
17 Company Ltd., a Barbadian company, which was bought off the
18 shelf, 95% of which was owned by the Defendant, to acquire
19 stakes in these telecommunications companies using US\$43
20 million provided by the Plaintiff.

1 (4) It is further alleged that substantial monies approximately \$43
2 million in two transfers were transferred via the Netherlands
3 company to Highlake. The basic allegation is that Opportunity-
4 Controlled Management and the Defendant effectively conspired
5 together to hide this transaction from the directors and
6 shareholders of Non-Opportunity companies by disguising it as
7 an investment in "TCF". Therefore they claim a breach of
8 fiduciary duty and that the Defendant is a knowing recipient of
9 the benefit of breaches of fiduciary duty and/or dishonestly
10 assisted in the diversion of the business assets from the Plaintiff
11 to itself. They submit that the Plaintiff claims that the Defendant
12 is a constructive trustee of the benefits of the business
13 opportunity on its behalf. The evidence therefore that will be
14 needed in this matter will come from the parties that were
15 involved at that time in Highlake in order to establish:

16 (1) Whether the Plaintiff made a public announcement that it
17 was negotiating to purchase interest of the
18 telecommunication companies, and what is the normal
19 practice in Brazil when these purchases are made etc; and

1 (2) The Plaintiff and management of the Plaintiff will be judged
2 according to Brazilian law (the Plaintiff concedes this in
3 written submissions para 29). Further the Plaintiff does not
4 suggest that Brazilian law relating to directors' duties is
5 different in any respect from the Cayman Law. They submit
6 that the liability of the Defendant itself will be judged by
7 Cayman Islands law;

8 (3) The remedy of an account or the imposition of a
9 constructive trust, are Cayman Islands remedies that would
10 have to be enforced in the Cayman Islands against the
11 Defendant. Mr. Black says that the Plaintiff contends that
12 the Brazilian Court would not entertain this action or grant
13 the order for an account or impose a constructive trust on a
14 company. However, I have no evidence before me that the
15 Brazilian court will not have any remedy to collect the sum
16 awarded or order an account and subsequently a sum
17 awarded.

18
19 In the cases of Lucent and Alcatel, the Plaintiff claims that the Defendant
20 wrongfully received substantial funds of a purported investment by these

1 companies, at about the time these two companies were supplying goods
2 and providing services to the Plaintiff pursuant to lucrative contracts
3 with the Plaintiff.
4

5 The Plaintiff basically claims that the Defendant is a knowing recipient
6 of the benefit of a breach of fiduciary duty and/or dishonestly assisting in
7 a scheme to obtain benefits for Opportunity Group as a *quid pro quo* for
8 the Plaintiff giving valuable contracts to the two companies. The
9 Plaintiff claims that the Defendant is a constructive trustee of those
10 benefits.
11

12 Again, the Plaintiff accepts the fact that the former management of the
13 Plaintiff will be judged according to Brazilian law and it does not
14 suggest that the Brazilian law relating to directors' duties is different in
15 any respect from the Cayman law.
16

17 **2. Telecom Italia**

18

19 The Plaintiff Claims:
20

1 (1) That the Defendant received funds as compensation for
2 orchestrating the execution of an agreement (Cellular Acquisition
3 Agreement) that purported to merge the mobile
4 telecommunications assets of the Plaintiff into a subsidiary of
5 Telecom Italia.

6 (2) The claim basically is for breach of fiduciary duty of the
7 Plaintiff's former officers and the Defendant. The claim will have
8 to be judged in accordance with Brazilian law.

9
10 Those are the four matters that are the backbone of the Statement of
11 Claim.

12
13 This matter requires an analysis of the facts. The constitutional
14 documents of the Defendant, the constitutional documents of OAM, the
15 management's board minutes are all in the Cayman Islands and are likely
16 to be in English. The documents relating to the Highlake transactions
17 including private placement etc. and the promissory notes, evidence of
18 loans from TCF to Highlake are also likely to be in English. Mr. Black
19 submits that there are pointers to a number of different jurisdictions
20 because the domicile of various companies such as Alcatel, Lucent, and

1 Citibank are either American or French, TCF is Curacao, and Highlake is
2 Barbados etc. However it is my view that the case is about whether the
3 business was run properly and whether there was a conspiracy in Brazil
4 to divert funds to the Defendant and that the domiciles of the companies
5 are irrelevant. On a reading of the Statement of Claim, they have no
6 relevance to the facts to be established. In fact, it could be assumed that
7 they would be agreed. The relevance as far as this Court and the factors
8 to be taken into account in exercising its discretion is that in this matter
9 the Defendant was sued as of right. In *Lubbe v Cape Plc* [2001] 1 WLR
10 at page 1546, the HL held:

11 “ (1) Dismissing the defendant’s appeal, that,
12 where a plaintiff sued a defendant as of right in the
13 English court the defendant’s application for a stay
14 on the ground of forum non conveniens could not
15 succeed unless the court was satisfied that there
16 was another tribunal of competent jurisdiction in
17 which the case might be tried more suitably for the
18 interests of all the parties and for the ends of
19 justice; that the defendant, in undertaking to
20 submit to the South African jurisdiction, had
21 sufficiently satisfied the requirement that the
22 alternative forum was available and, since the
23 undertaking was before the judge when he
24 considered the issue of forum non conveniens,
25 their timing was not a relevant factor for the first
26 Court of Appeal to have taken into account; but
27 that , on the plaintiff’s case as then presented, the
28 first Court of Appeal’s assessment of the balance
29 between the issues relating to the responsibility of
30

1 the defendant parent company and the personal
2 injury claims was not shown to be unreasonable or
3 wrong and it was open to that court to conclude
4 that South Africa was not clearly the more
5 appropriate forum.”
6

7 When Mr. Black submits that the Defendant has not shown whether there is
8 a more appropriate forum and if he is wrong about that, there is doubt as to
9 the availability of that forum it would appear that that submission is not
10 supported by the authorities (See the House of Lords case of Lubbe v Cape
11 (supra)). The giving of the undertaking is the establishing of availability.
12

13 All the parties are agreed on the following:
14

15 (1) That the Defendant was sued as of right and therefore the burden is on
16 the Defendant to establish that there is a more appropriate forum with
17 which this case has a real and substantial connection and that that
18 forum is available. This Court therefore has to examine the facts. Is
19 Brazil the more appropriate forum? In order to do that I have already
20 reviewed the claims of the Plaintiff. All the claims revolve around the
21 manner in which the business was carried on and whether the business
22 was properly run. One does not have to look too much further than
23 that to assess the nature of the evidence that has to be given to

1 establish this claim. It must be that the majority of the witnesses
2 reside in Brazil (it is their actions that are of importance in the
3 conduct of the affairs of the company in Brazil).

4 (2) Is Mr. Black accurate when he says that the company does not
5 conduct any business and has no connection with Brazil? This, in
6 view of the evidence, and the oral submissions made and accepted by
7 the parties, must mean that that statement is inaccurate. The company
8 does have business and does conduct business in Brazil. The assets
9 may eventually end up in the Cayman Islands but the business is
10 conducted in Brazil. The very formation of the company was in order
11 to let persons who are not resident in Brazil to be able to invest in
12 Brazil and other areas. There are no investments in the Cayman
13 Islands and Mr. Black in his written submissions submits that the
14 company has no presence in Brazil and that its directing mind and will
15 is in other Cayman Islands companies. This must be so in a formal
16 way but the allegation is that a Mr. Dantas who is the controlling mind
17 behind this entire scheme is a resident of Brazil and resides in Brazil.
18 Even if public policy has to be taken into account.

19
20 Mr. Black's next submission is demanding of some examination:

1
2 “The Defendant has been organized in such a way
3 as to take the substantial benefits of incorporation
4 in the Cayman Islands, but it is unwilling to submit
5 to jurisdiction of the Cayman Islands courts.”
6

7 This of course is the public policy issue.
8

9 Mr. Black himself concedes that the benefits the Defendant chose to take
10 from the Cayman Islands are the benefits of incorporation as opposed to the
11 conduct of business or the conduct of its daily affairs. That even if I were to
12 take public policy into account I do not believe that any of the Cayman
13 authorities states that if the interests of all the parties and the ends of justice
14 outweigh the question of public policy then the court must make a decision
15 to exercise its discretion in favour of refusing a stay.
16

17 Mr. Black submits that the test is, is there another more appropriate forum
18 which is available and is it clearly and distinctly more appropriate? In that
19 context the factors to be taken into account are set out in *Spiliada*:

20
21 (d) Since the question is whether there exists some other forum
22 which is clearly more appropriate for the trial of the action, the
23 court will look first to see what factors there are which point in
24 the direction of another forum. These are the factors which
25 Lord Diplock described, in *MacShannon's* case [1978] A.C.

1 795, 812, as indicating that justice can be done in the other
2 forum at “substantially less inconvenience or expense.” Having
3 regard to the anxiety expressed by your Lordships’ House in the
4 *Société du Gaz* case, 1926 S.C. (H.L.) 13 concerning the use of
5 the word “convenience” in this context, I respectfully consider
6 that it may be more desirable, now that the English and Scottish
7 principles are regarded as being the same, to adopt the
8 expression used by my noble and learned friend, Lord Keith of
9 Kinkel, in *The Abidin Daver* [1984] A.C. 398, 415, when he
10 referred to the “natural forum” as being “that with which the
11 action had the most real and substantial connection.” So it is for
12 connecting factors in this sense that the court must first look;
13 and these will include not only factors affecting convenience or
14 expense (such as availability of witnesses), but also other
15 factors such as the law governing the relevant transaction (as to
16 which see *Crédit Chimique v James Scott Engineering Group*
17 *Ltd.*, 1982 S.L.T. 131), and the places where the parties
18 respectively reside or carry on business.

- 19
20 (e) If the court concludes at that stage that there is no other
21 available forum which is clearly more appropriate for the trial
22 of the action, it will ordinarily refuse a stay; see, e.g. the
23 decision of the Court of Appeal in *European Asian Bank A.G. v*
24 *Punjab and Sind Bank* [1982] 2 Lloyd’s Rep. 356. It is difficult
25 to imagine circumstances where, in such a case, a stay may be
26 granted.”
27

28 So the question must be whether there exists some other forum which is
29 clearly more appropriate for the trial of the action to which the facts of
30 this case have a real and substantial link. The Court must look for
31 connecting factors. These will include not only factors affecting
32 convenience or expense but availability of witnesses and also other

1 factors such as the law governing the relevant transaction and the places
2 where the parties reside or carry on business.

3
4 I must look therefore for the starting point in this matter and that must be
5 that the Plaintiff was sued as of right. The burden is on the Defendant in
6 those circumstances to establish that there is a more appropriate forum
7 which is available and to which the facts of this case have a real and
8 substantial link. When that is done the burden then shifts to the Plaintiff
9 to show the court why a stay should not be granted and if there are any
10 special circumstances meriting a refusal of a stay.

11
12 The Defendant in order to show that there is a more appropriate forum
13 with a real and substantial connection says as follows:

14
15 (1) That the cause of action does not deal with the formalities of the
16 domicile of the Defendant companies but in fact with the day to day
17 running of the Plaintiff company and the activities of the employees
18 of the Plaintiff company in Brazil. The Plaintiff has conceded that
19 Brazilian law will govern the former management of the Plaintiff and
20 the management's breach of fiduciary duty through the Plaintiff.

1 (2) The Defendant submits that the details of board meetings and
2 shareholders' meetings of Brasil Telecom and other companies
3 referred to will all have taken place in Brazil.

4 (3) That it is most likely that the records and documents of Brasil
5 Telecom, the Plaintiff, will be in Portuguese.

6 (4) Details of liaison with and contact between the said former officers of
7 Brasil Telecom and directors and the staff and personnel of
8 Opportunity took place in Brazil between persons resident in Brazil.
9 All the staff of Opportunity are nationals of Brazil and resident in
10 Brazil.

11 (5) That Mr. Helfrecht and Ms. Dantas and Ms. de Silva, the persons who
12 have sworn affidavits in these matters confirm that the activities of the
13 Defendant are predominantly investments undertaken in Brazil and
14 indeed, the assets of Opportunity Fund are predominately investments
15 in Brazil. The cause of action deals with the breach of fiduciary duty
16 and as such it is not unreasonable to suppose that the knowledge of
17 the alleged breaches of fiduciary duty on the part of former employees
18 and directors of Opportunity Fund would be dependant upon the
19 knowledge and actions of Opportunity personnel in Brazil. All of
20 whom are resident in Brazil and nationals.

1 (6) The Defendant relies on the need for extensive expert evidence on
2 Brazilian law, which would only be necessary if the proceedings are
3 tried here. The duties of the Plaintiff's former management to the
4 Plaintiff (as has been conceded by the Plaintiff) will be judged
5 according to Brazilian law and that is the fundamental and underlying
6 breach that gives rise to these causes of action. An extremely
7 important point in the consideration of this application. Whether it be
8 an accounting, or another remedy, that is possible in Brazil if liability
9 is established, in order to assess the assets and alleged loss, expert
10 valuations will be required in Brazil as the losses arose in Brazil.

11 (7) They submit also that the discovery exercise in a matter of this nature
12 will be greatly complicated by the need to review Brazilian documents
13 in Portuguese to determine their relevance. That most of the
14 documents will require translation.

15 (8) They also submit that the Plaintiff has indicated intentions to bring
16 claims in the Brazilian court. I am not minded to take that into
17 consideration and influence me one way or the other as there is little
18 evidence, save and except, for a document called "precautionary
19 protest". Those are the points that have been urged on me by the
20 Defendant's attorney.

1 Are those points then enough to dislodge the jurisdiction being granted
2 by the fact that the Defendant was served as of right in this jurisdiction.
3 Is Brazil a more appropriate forum? I bear in mind the Chief Justice's
4 reasoning and ruling in the KTH case (supra). However there may be a
5 distinction in that case, in that there was evidence that the remedy was
6 not available in the more natural forum and apart from the question of
7 witnesses there seem to be no substantial link with Hong Kong, save and
8 except, on a formal basis. I also bear in mind that nowhere in the
9 submissions nor in the affidavits filed did the Plaintiff say that there will
10 be an injustice done if the matter is tried in Brazil. At the highest, it
11 could be said that it may be disadvantages to the Plaintiff but there is no
12 allegation of an injustice being done if it is tried in Brazil.

13
14 The Plaintiff says:

15
16 (1) That Cayman Islands is a natural forum for this matter because
17 the Defendant's transfer agent is a Cayman company, the sole
18 shareholder is another Cayman company and that the
19 Defendant carries on business in the Cayman Islands. This is
20 not validated by the facts.

1 (2) This case is only about one investment, that is Highlake and
2 money coming into the fund and that there is evidence that the
3 links with the Defendant and the Cayman Islands are strong,
4 and of course that the Defendant has to overcome the issue of
5 being served as of right.

6 (3) The Plaintiff therefore says that the Defendant has failed to
7 discharge the burden as to availability.

8 (4) That there is no evidence from an expert on jurisdiction
9 (availability and/or governing law).

10 (5) No evidence to show inconvenience by this application being
11 allowed.

12 (6) The Cayman courts will be abdicating their duty to supervise a
13 Cayman company.

14
15 As I have said previously, availability has been established by the very
16 undertaking being given. No clearer words can be found than in the
17 authorities quoted above. The requirement for evidence from an expert on
18 jurisdiction is, I believe, perhaps not as necessary as it would have been if
19 the Plaintiff had not conceded that the Brazilian law would be the governing

1 law when it comes to the assessment of duties of the Plaintiff's former
2 management to the Plaintiff.

3
4 The crux of the case is the breaches of duty to the Plaintiff. There may be
5 no specific evidence to show inconvenience but there is sufficient evidence
6 by the Defendant to show that all the witnesses are in Brazil, that the
7 witnesses are not compellable in Cayman and that the majority of their
8 documents will be in Brazil. It is difficult to see how the Plaintiff argues
9 that there is no connection to Brazil on the facts of this case. There is
10 evidence before me which is undisputed that the company was formed to
11 conduct business in Brazil on behalf of non residents of Brazil and that in
12 fact the investments undertaken by the company are predominantly in Brazil.
13 Cayman is the formal headquarters and domicile of the company. There is
14 no business being undertaken in the Cayman Islands. The assets may or
15 some of them may be in the Cayman Islands but save and except for that the
16 actual day-to-day running of investments in Brazil takes place in Brazil. I
17 agree with Mr. Ellis that it is absurd to suggest that the Brazilian court
18 cannot have jurisdiction over a Brazilian company such as the Plaintiff. The
19 Placement Memorandum that is before the Court does show a connection to
20 Brazil and the Court must look objectively at the cause of action and the

1 facts needed to establish a case. Without looking at the Defence, the
2 Plaintiff's cause of action stems from breaches of fiduciary duty and it is not
3 unreasonable to think that all the actions having taken place in Brazil, that
4 the documents, the persons who undertook these various steps and who
5 partook in the daily activities will be needed to establish the Plaintiff's case.
6 It is indeed Brazilian law that is going to decide what remedy the Plaintiff
7 has. It is the Brazilian law that governs the actions of the parties. The
8 various contracts and decisions to invest in the Defendant and the sort of
9 investment that was required to be made by the Defendant will one can
10 reasonably assume be coming from the Brazilian witnesses in Brasil
11 Telecom.

12
13 In the words of Lord Keith of Kinkel in the *Abidin Daver* case [1984] AC at
14 page 398:

15
16 "The court should consider the availability of
17 factual and expert witnesses, the law governing the
18 dispute and whether the parties have conferred
19 jurisdiction on any particular court."
20

21 The latter statement as to jurisdiction is not applicable here, there is no
22 agreement-governing jurisdiction, but over and over again, the authorities

1 speak of the factors that should be taken into consideration by the court in
2 exercising its discretion as being able to override the question of being
3 served as of right. In this case therefore I must decide whether the factors I
4 have already outlined above will give a real and substantial connection to the
5 more appropriate forum Brazil. Admittedly, the Plaintiff has sued in the
6 Defendant's jurisdiction, as of right, the Defendant being a Caymanian
7 company. However, that aside this court must remember that the Plaintiff is
8 a Brazilian company, the actions all took place in Brazil, the objects of the
9 Defendant company is to enable investments being made in Brazil and the
10 cause of action arose from Brazilian transactions.

11
12 The Plaintiff complains that a Defence has not yet been filed but the
13 Defendant had to bring this application for a stay promptly otherwise
14 criticism would have been made of it that it conferred jurisdiction on this
15 Court by taking steps to proceed with the litigation. One can however, in
16 my view, look at the Plaintiff's claim and assess the nature of the Plaintiff's
17 claim and the witnesses that would be required to substantiate the claim.

18 The Plaintiff it admits that some of the breaches i.e the breach of the
19 management is duties to the Plaintiff will be governed by Brazilian law. In
20 those circumstances if the action was to be tried in Cayman, the Brazilian

1 witnesses will not be compellable, expert evidence would be needed to
2 advise this Court and interpret Brazilian law and if it were tried in Brazil,
3 that would not be necessary.

4
5 Weighing all the factors into account, the Plaintiff being a Brazilian
6 company, the Defendant having substantial business interest in Brazil and
7 the fact that Brazilian law will govern the breaches of fiduciary duty, the fact
8 that there will be a need for expert evidence in Brazilian law, I find that
9 Brazil is the most appropriate forum with which this case has a real and
10 substantial link. I also find that availability is proven by the undertaking
11 given by the Defendant's attorney Mr. Ellis. I also find merit in the
12 argument that should the Plaintiff establish liability he can always come to
13 these Courts (where he alleges the assets of the Defendant are) and by virtue
14 of an Originating Summon get judgment to seize those assets expeditiously.

15
16 In those circumstances, I find that Defendant has displaced the burden
17 placed upon it and overcome the factor that the Defendant was sued as of
18 right in this jurisdiction. The Plaintiff has not discharged the burden that
19 would shift to it by proving to the Court that there are special circumstances

1 and that the stay should not be granted. Costs to the Defendant to be agreed
2 or taxed.

3

4 Dated 13th day of December 2006

5

6



7 Judge of the Grand Court

