

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE**

COMMERCIAL DIVISION

CLAIM NO. BVIHC(COM) 2023/0243

BETWEEN:

**[1] NABIL MARC ABDUL-MASSIH
[2] ANCILE INVESTMENT COMPANY LIMITED
[3] ANCILE SECURITIES LIMITED**

Claimants

and

**[1] RYAN PAUL JARVIS
[2] JOHN JOHNSON
(as Joint Liquidators of Phoenix Commodities Pvt Limited
(in liquidation))
[3] PAUL JAMES LEGGETT
(as liquidator of Phoenix Global DMCC)
[4] PHOENIX GLOBAL DMCC (in liquidation)**

Defendants

Appearances:

David Alexander KC, Brian Lacy, Jeremy Snead and Carl Moran for the Claimants
David Chivers KC, Jeremy Child and Jhneil Stewart for the Defendants

2024: July 23 and 24
December 11

Claim for negative declarations - Application to join party under section 175 Insolvency Act 2003 — Application to strike out claim as an abuse of the process of the Court or for not disclosing a reasonable ground – Application to set aside service of claim outside the jurisdiction – Application to stay proceedings on the ground of forum non conveniens – Recognition of BVI insolvency proceedings in Switzerland – consideration of expert evidence of foreign law – Sections 175 and 256 Insolvency Act 2003 – Parts 7 and 26 of the Civil Procedure Rules 2023.

JUDGMENT

[1] **WEBSTER J [Ag]:** On 23 November 2023 the Claimants commenced proceedings in the Commercial Court of the Virgin Islands (“**BVI**”) seeking negative declarations and injunctive relief against the Defendants (“**the Proceedings**”). The Proceedings are heavily contested. There are three applications in the Proceedings before the Court:

(1) an application by the Claimants under 175(1)(c)(i) of the **Insolvency Act 2003** for permission to join Phoenix Commodities Pvt Ltd (in liquidation) (“**Phoenix BVI**” or “**the Company**”) as a defendant in the Proceedings (“**the Joinder Application**”);

(2) an application by the first defendant, Ryan Paul Jarvis (“**Mr Jarvis**”), one of the two joint liquidators of Phoenix BVI, for:

(a) an order striking out the Proceedings as an abuse of the process of the Court or for not disclosing a reasonable ground;

(b) alternatively, a declaration that the Court should not exercise its jurisdiction regarding the Proceedings on the grounds of forum non conveniens, and that the Proceedings be stayed in favour of the courts of Switzerland;

(3) an application by the third and fourth defendants seeking orders that:

(i) the Court set aside service of the claim form and statement on the third and fourth defendants under part 7.8 of the Civil Procedure Rules (Revised Edition) 2023 (“**CPR**”); alternatively

(ii) a declaration that the Court should not exercise its jurisdiction in respect of the Proceedings on the grounds of forum non conveniens, and an order that the Proceedings be stayed.

The applications are supported by affidavits or witness statements, including expert evidence, and skeleton arguments by counsel for the parties. The applications were heard on 23 and 24 of July 2024. This is my decision on the applications.

Background and parties

- [2] The subject of the joinder application, Phoenix BVI, is a BVI company incorporated on 25 September 2001. It is the ultimate parent company of a group of about 90 companies operating in several countries across Europe, Asia, Australia, North America, Eurasia and other places providing agricultural and logistical services (“**the Phoenix Group**”). Phoenix BVI was put into liquidation under the Insolvency Act by a qualifying resolution of its members on 20 April 2020. On 8 May 2020 the first defendant, Mr Jarvis, and Matthew David Smith, were appointed liquidators by the creditors committee. Mr Smith was replaced by Rachelle Frisby on 28 April 2021. Rachelle Frisby was in turn replaced by John Johnston on 13 December 2023. A consent order was made on 16 February 2024 substituting John Johnston for Rachelle Frisby as the second defendant. Mr Jarvis and Mr Johnston are referred to as “**the BVI Liquidators**”.
- [3] On 15 June 2020 the Court authorised the BVI Liquidators to apply for recognition of their appointment in any jurisdiction in which Phoenix BVI has assets (“**the 15 June 2020 Order**”).
- [4] The fourth defendant, Phoenix Global DMCC (“**Phoenix Dubai**”), is a wholly owned subsidiary of Phoenix BVI. Phoenix Dubai was incorporated in the Multi Commodities Centre Free Zone, United Arab Emirates. It is one of the primary operating companies in the Phoenix Group. Phoenix Dubai owned the shares in four important subsidiaries in the Group, namely, Phoenix Agro Limited (a Ukrainian company), Phoenix Green Farms BV (a Netherlands company), Swiss Sustainable Agri Holdings BV (formerly Agro Syndicate Kazakhstan) (a Kazakhstan limited liability partnership), and Phoenix Feed Mills LLP, another Kazakhstan limited liability partnership (“**the Phoenix Dubai Subsidiaries**”). The shares in these subsidiaries play an important part in the Proceedings.
- [5] The first claimant, Mr Nabil Marc Abdul-Massih (“**Mr Abdul-Massih**”), is a director of the second and third claimants, Ancile Investments Limited and

Ancile Securities Limited (“**the Ancile Companies**”). The Ancile Companies are exempt companies with limited liability incorporated in the Cayman Islands. They are wholly owned subsidiaries of the Ancile Fund Limited, a Cayman Islands exempt company (“**the Ancile Fund**”). Mr Abdul-Massih is a director of the Ancile Fund. Mr Abdul-Massih and the Ancile Companies are referred to as “**the Claimants**”.

[6] The third defendant, Mr Paul James Leggett, is the liquidator of Phoenix Dubai. He was appointed on 9 June 2020 when Phoenix Dubai was placed into liquidation on the application by the BVI Liquidators. Mr Leggett and the BVI Liquidators are referred to together as “**the Liquidators**”

[7] INOKS Capital SA is an asset management firm with offices in Geneva, Switzerland. Mr Abdul-Massih is a director and the chief executive officer of INOKS. INOKS established the Ancile Fund and the Ancile Companies. From 2007 INOKS provided financing to the Phoenix Group. According to the Claimants’ statement of claim security for the loans was provided by the Phoenix Group to Ancile Securities Limited. Two loan transactions are said to be directly related to these proceedings:

- (1) in August 2018 a loan by the Ancile Companies known as “POEX 6” was novated to Phoenix Dubai and increased to US\$140 million extendable to US\$164 million.
- (2) In January 2019 a loan of up to US\$40 million by the Ancile Companies to Phoenix Dubai known as “POEX 7”.

It is said that by that by this time (2019) the Ancile Companies had lent to the Phoenix Group, in aggregate, about US\$500 million.

[8] According to the statement of claim by March 2020 the Phoenix Group needed more financial assistance. Its chairman and chief executive officer, Mr Gaurav Dhawan, approached Mr Abdul-Massih and the Ancile Companies. This resulted in an agreement that has been described as “**the March 2020 Agreement**”. The March 2020 Agreement provided that the Ancile Companies would advance US\$15 million to Phoenix Dubai as a secured loan and Phoenix

Dubai would transfer the shares that it owned in the four Phoenix Subsidiaries (**"the Subsidiaries' Shares"**) to the Ancile Companies. The March 2020 Agreement also provided that there would be two suretyship agreements - one for each of the POEX loans (**"the Suretyship Agreements"**). The debt then due under POEX 6 and POEX 7 would be reduced by the cumulative value of the Subsidiaries' Shares and Phoenix Dubai would have the opportunity to seek the re-transfer the Subsidiaries' Shares on meeting certain conditions set out in the Suretyship Agreements.

- [9] The statement of claim further alleges that on 12 March 2020 the Suretyship Agreements were signed, the US\$15 million paid to Phoenix Dubai, and the Subsidiaries' Shares were transferred to Ancile Securities Limited, making that company the owner of the Subsidiaries' Shares subject to any right of re-transfer under the Suretyship Agreements.
- [10] As stated above, Phoenix BVI and Phoenix Dubai were put into insolvent liquidation on 20 April 2020 and 9 June 2020 respectively.

The letters before action

- [11] On 10 May 2021 the BVI office of Appleby, lawyers for the BVI Liquidators, sent a letter before action to Mr Abdul-Massih on behalf of the BVI Liquidators demanding payment by Mr Abdul-Massih to Phoenix BVI of the sum of US\$100,357,908.36, immediately or within seven days. The reasons for the demand are detailed in the letter which runs 17 pages (**"the Appleby LBA"**). The Appleby LBA outlined the dealings between the parties up to the transfers of the Subsidiaries' Shares to Ancile Securities Limited in March 2020, and the reasons for the demand. The Appleby LBA was sent to Mr Abdul-Massih in his capacity as a director of Phoenix BVI and alleged that he was aware that the Company and Phoenix Dubai were insolvent when the Suretyship Agreements were made and the Subsidiaries' Shares transferred to Ancile Securities Limited. As a result, Mr Abdul-Massih breached his duties as follows:
- (a) he breached his fiduciary duties to Phoenix BVI as outlined in sections 120 and 121 of the BVI Business Companies Act (**"the BC Act"**) and failed to

exercise reasonable care, skill and diligence as required by section 122 of the BC Act;

- (b) he breached his duty to the creditors of Phoenix BVI by causing or procuring the transfer of the Subsidiaries' Shares at an undervalue when he knew or should have known that the Company was insolvent;
- (c) he breached his duty to Phoenix BVI not to profit personally from transactions with the Company;
- (d) he breached his duty to Phoenix BVI by allowing Phoenix Dubai to enter into the Suretyship Agreements.

[12] The Appleby LBA further alleged that the improper transfer of the Shares caused Phoenix BVI to lose value of US\$100,357,908.00 and Mr Abdul-Massih was personally responsible for this loss. The Appleby LBA pointedly accused Mr Abdul-Massih of engaging in insolvent trading contrary to section 256 of the Insolvency Act.

[13] The Appleby LBA ended the way letters before action usually end, with a threat that "[T]he Joint Liquidators may issue proceedings without further notice."

[14] On 11 May 2021 the Cayman Islands office of Appleby issued another letter before action, this time on behalf of the BVI liquidators and the Dubai Liquidator. The letter was sent to the Ancile Companies and Ogier (the BVI lawyers for the Ancile Companies) ("**the Cayman LBA**"). The 15-page letter made similar allegations as in the Appleby LBA and threatened to issue proceedings in the Cayman Islands against the Ancile Companies for breaches of the Companies Act and the Fraudulent Dispositions Act, and for breaches of duty, trust claims, and claims for knowing receipt and unjust enrichment. The Cayman LBA also demanded payment of the said US\$100,357,908.00.

[15] The Cayman LBA and the Appleby LBA are referred to together as ("**the Letters Before Action**").

[16] On 12 May 2021 DLA Piper Middle East LLP, acting for the Liquidators, sent an email to Mr Abdul-Massih attaching copies of the Letters Before Action and

threatening legal action against him “[I]n all relevant jurisdictions in order to obtain orders to restore assets and value to the insolvent estates.” Ogier sent a holding reply to the Letters Before Action on 4 June 2021 and a substantive reply on 5 July 2021 refuting the factual assertions and denying liability for the asserted losses and claims.

[17] On 17 October 2021 DLA Piper Middle East demanded that the Claimants provide an unconditional undertaking to preserve the assets that were the subject of the intended claims. The Claimants provided the undertaking, initially for a period of three months, even though the threatened proceedings had not been launched by the Liquidators. The Liquidators continued to require the undertaking and it was extended from time to time until 17 June 2022 when it was extended indefinitely subject to the right of the Ancile Companies and Mr Abdul-Massih to withdraw it on seven days’ notice. The Liquidators did not provide a cross-undertaking in damages.

[18] On 30 December 2021 DLA Piper Middle East sent an email to Ogier attaching copies of draft statements of claim for the intended claims against the Ancile Companies and Mr Abdul-Massih in the BVI and Cayman Islands. The cover email warned that if the intended claims were not satisfied by 27 January 2022 the Liquidators “[I]ntend to commence legal proceedings in Cayman, BVI, the Netherlands and any other relevant jurisdictions without further notice to you.” The draft statements of claim are 22 pages each. In general, they mirror the allegations in the Letters Before Action. The claimant in the intended BVI claim is Phoenix BVI and Phoenix Dubai is the claimant in the intended Cayman Islands claim. On 27 January 2022 Ogier responded to DLA Piper Middle East by repeating their clients’ denials of liability and agreeing to accept service of the claims in both intended proceedings.

Proceedings by the Liquidators – Netherlands

[19] The Liquidators did not commence claims against the Claimants in the BVI or the Cayman Islands as threatened in the Letters Before Action. Instead, the Dubai Liquidator filed a claim in the District Court of Amsterdam in the Netherlands on 31 May 2022 against the Ancile Companies and others

challenging the transfer of the shares in Swiss Sustainable Agri Holdings BV (**“the Swiss Sustainable Shares”**). The Dutch Court tried the claim and on 21 February 2024 delivered a judgment in which it found that the transfer of the Swiss Sustainable Shares was valid and dismissed the claim.

- [20] The BVI Liquidators also filed a claim against the Ancile Companies in the Netherlands on 20 October 2023 alleging that the transfer of the Swiss Sustainable Shares was prejudicial to Phoenix Dubai. It is unclear what is the status of this claim other than that proceedings in the Netherlands are ongoing.

Switzerland

- [21] On 10 February 2023 the BVI Liquidators applied ex parte in the District Court of Höfe, Switzerland, for recognition of the BVI winding up proceedings. On 25 May 2023 the District Court made an order recognising the BVI winding up proceedings (**“the Recognition Order”**). The experts disagree on whether the Recognition Order went beyond just recognition and gave the BVI Liquidators authority and permission to commence separate proceedings in Switzerland. I will deal with this below.¹

- [22] Mr Abdul-Massih appealed the Recognition Order. The Cantonal Court of Schwyz declared the appeal inadmissible. On 29 August 2024, after the completion of the hearing in this Court, the Supreme Court of Switzerland dismissed Mr Abdul-Massih’s further appeal and confirmed the validity of the Recognition Order.

The BVI Proceedings

- [23] The Liquidators did not launch the threatened claims in the BVI or the Cayman Islands. In the meantime, Mr Abdul-Massih complained that the prolonged threat of substantial litigation hanging over the Ancile Companies and himself was causing commercial uncertainty and significant negative consequences. The consequences included additional disclosures triggered by the demands, the

¹ See paragraphs 59-61 below

Ancile Companies being treated as “high risk” and appearing less attractive in the marketplace, lower investor confidence and a general reduction in the assets under management by the Ancile Fund. Added to this was the cost of engaging lawyers and other professionals and the time spent by Mr Abdul-Massih and others dealing with and responding to the threats. By November 2023 the Claimants were dealing with the threats for more than two and a half years. They asserted in the Joinder Application that the Liquidators had ample opportunity to commence proceedings but had failed to do so. They could not be held in suspense indefinitely and it was time to commence claims for negative declarations from the Court to fully and finally resolve the issues in dispute between the parties. On 23 November 2023 they launched these proceedings by filing a claim form and statement of claim seeking declarations that:

- (i) Mr Abdul-Massih has never been a de jure, de facto or a shadow director of either Phoenix BVI or Phoenix Dubai.
- (ii) Mr Abdul-Massih has never owed any fiduciary or other director’s duties to either Phoenix BVI or Phoenix Dubai.
- (iii) Mr Abdul-Massih has not been in breach of any fiduciary duty owed to either Phoenix BVI or Phoenix Dubai.
- (iv) The BVI Liquidators and/or Phoenix BVI have no valid claim against Mr Abdul-Massih or Ancile Companies under section 254 or section 256 of the Insolvency Act.
- (v) The BVI Liquidators and/or Phoenix BVI have no valid constructive trust claim against the Ancile Companies;
- (vi) The Dubai Liquidator and/or Phoenix Dubai do not have valid claims against Mr Abdul-Massih or the Ancile Companies under sections 145, 146 or 147 of the Cayman Companies Act and/or Section 4 of the Cayman Fraudulent Dispositions Act.
- (vii) The Dubai Liquidator and/or Phoenix Dubai do not have valid claims in knowing receipt or unjust enrichment, or under section 147 of Cayman Companies Act, against the Ancile Companies.
- (viii) The BVI Liquidators, the Dubai Liquidator, Phoenix BVI and/or Phoenix Dubai do not have any other valid claims under BVI or Cayman law against Mr Abdul-Massih or the Ancile Companies arising out of the facts set out in the attached Statement of Claim

[24] The Claimants say that the declarations are intended to reflect the claims that Phoenix BVI and Phoenix Dubai had set out in the draft statements of claim that they were going to make against the Claimants.

[25] The Claimants also seek an injunction in the Proceedings restraining the Defendants from taking any further legal or other proceedings, whether in the BVI, Cayman Islands or elsewhere (except the proceedings in the Netherlands) against any of Mr Abdul-Massih, the Ancile Companies or their subsidiaries or connected persons concerning any of the agreements or other factual matters that are the subject of the BVI Proceedings. Alternatively, the Defendants, and each of them, be prohibited from taking any such proceedings without the permission of a Judge of the Commercial Division in the BVI (“**the Injunction**”).

[26] The claim was served on the Defendants and the Claimants filed certificates of service where necessary. The Defendants filed acknowledgments of service denying the claim.

Negative declarations

[27] It is apparent that the Claimants have moved from being potential defendants to being claimants asserting claims against the persons who were asserting claims against them (the Defendants). The Claimants are now asking the Court to declare that the Defendants do not have valid claims. This is a claim for negative declarations which have been described by the learned editors of **Dicey and Morris** “[A]s a declaration by the court that the defendant has no valid claim or right against the claimant.”² Claims for negative declarations are now a part of English and BVI law and the power to grant them has been recognised by the courts. In **Messier Dowty Ltd v Sabena SA**³ Lord Wolf MR acknowledged the usefulness of negative declarations and said –

“The approach is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion. The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice”⁴

² Dicey Morris and Collins on the Conflict of Laws 16th edition §12-055

³ [2000] 1 WLR 2040

⁴ Ibid at §41

This passage was cited with approval in **Mossack Fonseca v Registrar of Corporate Affairs**⁵ where the Court of Appeal allowed an appeal against the trial judge's refusal to grant a declaration. In **Johann Greuner v Monica Greuner**⁶ the Court of Appeal considered but refused a negative declaration. The claimant was seeking a declaration that he was not indebted to the defendant in respect of a threatened claim by the defendant for a disputed debt. The High Court Judge refused the declaration mainly because there were extant proceedings between the parties in Texas regarding the debt. The Court of Appeal found that the judge made factual errors but declined to interfere with his decision which was based, at least in part, on the ongoing proceedings in Texas. Saunders JA (as he then was) made two comments that I find helpful. At paragraph 13 he said -

“As outlined in The Declaratory Judgment by The Rt Hon. Lord Woolf, a claimant may seek a negative declaration where no right of theirs has, as yet, been infringed. If the claimant is subjected to a demand or is threatened with action, then it may be useful to obtain such a declaration. Whilst in these cases no traditional ‘wrong’ has yet been committed or immediately threatened, a condition of affairs is disclosed which indicates the existence of a cloud upon the [claimant’s] rights, a cloud which endangers his peace of mind, his freedom, his pecuniary interests. This is a tangible interest which the law protects against impairment, and by protecting it, promotes social peace.”

This is a good summary of the reasons why a negative declaratory order may be useful to prevent a threatened invasion of a person's rights (as is being asserted by the Claimants in this case).

[28] Saunders JA went on to deal with a situation where a negative declaration should not be granted because it was being used for strategic reasons. At paragraph 17 he remarked in dismissing the appeal that -

“There are extant proceedings in Texas between the parties on the issue of the alleged loan. A Court should be wary of allowing claimants to derive a jurisdictional advantage by obtaining negative declarations here when it would be more appropriate for the proceedings giving rise to the declaration to be tried in another jurisdiction.”

⁵ BVI Civil Appeal No 13 of 2005 at §32

⁶ Grenada Civil Appeal No 8 of 2003

This passage reflects the Liquidators' position on the use of the negative declaration procedure in this matter. It is their position that the Claimants, and Mr Abdul-Massih in particular, are using the procedure to avoid trial in other jurisdictions where there are ongoing proceedings (Switzerland and the Netherlands), and to bring the trial of the claims to the BVI which, presumably, they see as a more favourable jurisdiction.

- [29] I find that the use of the negative declaration procedure was open to the Claimants on the facts. The Proceedings will likely resolve these important issues which are integral to the disputes between the parties that need to be resolved. The BVI Court is the better forum for resolving these issues because they include matters that are of the internal management of Phoenix BVI and are therefore governed by BVI law. Whether the declarations are granted is an entirely different matter and will depend on the Court's assessment of the claims in the Proceeding.

The Joinder Application

- [30] On 31 January 2024 the Claimants applied under section 175(1)(c)(i) of the Insolvency Act for permission to join Phoenix BVI as a defendant in the Proceedings. Section 175(1)(c)(i) provides-

“[U]nless the Court otherwise orders, no person may
(i) commence or proceed with any action or proceeding against
the company or in relation to its assets”

- [31] Section 175(1)(c)(i) is an important part of the liquidation process. It sets up an automatic moratorium on claims, new and ongoing, against a company that has gone into liquidation. It gives the liquidator breathing space to deal with the issues in the liquidation without having to deal with unmeritorious claims. It is not a bar to proceedings but a way for the Court to regulate the claims that come before the liquidator. The Court has wide discretion in considering applications under section 175. The key consideration in deciding whether to permit a person

to bring a claim against a company in liquidation is doing what is fair in all the circumstances.⁷

[32] Section 175 does not say how the Court should exercise its discretion in considering applications under the section. That is left up to the courts to decide on a case-by-case basis. The equivalent section in England is substantially the same as section 175. It is section 130(2) of the Insolvency Act 1986 (UK) which reads-

“(2) When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose.”

[33] Section 130(2) was considered by High Court in England in **Fennell v Halliwells**.⁸ The claimant sought to bring a claim against the defendant, a firm of solicitors that had gone into administration (an insolvency proceeding). The claim was for a declaration that claims that the administrators had threatened against the claimant but had not pursued could no longer be pursued. In other words, the claimant sought leave to pursue the firm in administration for a negative declaration. The application was heard by Mr N Strauss KC (sitting as a Deputy Judge). In giving his decision allowing the application the learned judge gave the following guidance in dealing with applications under section 130(2) –

- (1) Permission should normally be refused, if the issues raised by the proposed proceedings can conveniently be decided in the liquidation, because it will ordinarily be quicker and less expensive for that course to be taken.
- (2) In other cases, the court has a broad and unfettered discretion to do what is right and fair in all circumstances of the individual case.
- (3) As regards the merits of a claim, the court should not investigate these beyond satisfying itself that there is a genuinely arguable claim.
- (4) The court should be cautious before exposing the liquidators to the burden of dealing with difficult and time-consuming litigation, having regard in particular to the resources available to the liquidator.

[34] Applying the principles to the facts of this case I find, firstly, that the issues raised in the BVI Proceedings are complex and cannot be decided conveniently in the

⁷ Re Aro Co Ltd [1980] Ch 196

⁸ [2013] EWHC 2837 (Ch)

liquidation proceedings of Phoenix BVI. Further, the claim is for declarations and injunctive relief which is a factor in favour of permitting joinder. As regards the merits of the claim, I am satisfied that there are genuinely arguable issues in the BVI Proceedings. I will elaborate on this when I come to deal with the application to strike out the Proceedings. I am also conscious that granting permission to join Phoenix BVI in the Proceedings may make the proceedings more complex, but the reality is that the Proceedings are already underway and the joinder of Phoenix BVI will not add significantly to the complexity of the claim. Quite the contrary, the joinder may help to resolve issues where Phoenix BVI is the proper party to bring some of the claims that are asserted in the draft statements of claim. I also take into account that the BVI Liquidators, unlike the administrators in **Fennell**, have applied for and gotten recognition of the BVI liquidation of Phoenix BVI in Switzerland, and the BVI Liquidators are pursuing a claim in the Netherlands regarding the Swiss Sustainable Shares. The BVI liquidators have also raised issues of public policy. These issues will be considered in detail when I come to deal with the strike out application. For now, I am dealing with the narrower issue of whether Phoenix BVI should be joined to the extant BVI Proceedings.

[35] I find that the Proceedings cannot be accommodated within the winding up proceedings of Phoenix BVI. The claim for negative declarations was prompted by the Letters Before Action written on behalf of Phoenix BVI and Phoenix Dubai threatening claims against Mr Abdul-Massih and the Ancile Companies. The negative declarations that the Claimants are seeking are reflective of the claims threatened by Phoenix BVI in the Letters Before Action and the draft statements of claim. Further, some of these claims can only be brought by Phoenix BVI and, if granted, will affect the Company directly. There was nothing improper about bringing the joinder application after the BVI Proceedings were filed.

[36] Exercising the Court's wide discretion the application to join Phoenix BVI to the Proceedings is granted. I turn now to the applications by the BVI Liquidator.

Application to strike out the Proceedings

- [37] Mr Jarvis applied under CPR rule 26.3 to strike out the Proceedings, alleging that they did not disclose a reasonable ground for bringing the claims or was an abuse of process of the Court, or alternatively, that it be stayed on forum non-conveniens grounds. Ms Frisby did not join him in the application.

No reasonable ground

- [38] The Court's power to strike out a statement of case is CPR rule 26.3 which states –

“(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) ...
- (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
- (c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings”

- [39] The main principles that guide the Court in assessing a strike out application are set out in paragraph 73 of the Claimants' skeleton argument and I repeat most of them in this paragraph. The Court may strike out a statement of case if it does not disclose a valid claim or a reasonable ground for bringing the claim⁹, or the claim is bound to fail.¹⁰ On the other hand, the Court will not strike out a statement of case if it raises a serious live issue that can only be determined by hearing oral evidence¹¹. The Court proceeds on the assumption that the facts pleaded in the statement of case are true and evidence supporting or opposing the pleaded facts is inadmissible.¹² Finally, the Court's power to strike out a statement of case is to be used sparingly and is very much a last resort since the exercise of the power deprives a party of its right to a fair trial and its ability

⁹ Titarenko and others v Attorney General of the Virgin Islands BVIHCOM 2021/0214

¹⁰ Michael Wilson & Partners Limited v Temujin International Ltd BVIHCV 2006/0307 and SLUHCVP 2014/0024

¹¹ Frett v Maduro & Another BVIHCVAP 2018/0004 and BVIHCAP 2015/0004

to strengthen its case by disclosure and cross examination.¹³ If a defective pleading can be dealt with in some other way, for example by amendments, that alternative should be explored.¹⁴

[40] Applying the principles outlined in the preceding paragraph I find that the 42-page statement of claim filed on 23 November 2023 contains issues of fact and law that should not be disposed of on the strike out application. For example, an important issue that has to be resolved is the status of Mr Abdul-Massih. Was he a de facto or shadow director of Phoenix BVI and/or Phoenix Dubai, and did he owe fiduciary duties to these companies. Schedule 2 to the Statement of Claim lists 37 facts that the Claimants say show that Mr Abdul-Massih was not a de facto or shadow of the companies. On the other hand, learned counsel for the Defendants, Mr David Chivers KC, pointed out that Mr Abdul-Massih either held himself out or was held out as a director of Phoenix. This is the kind of factual issue that should be determined at a trial or by some other procedure ordered by the Court or agreed by the parties. It is not an issue to be determined on a strike out application. There are other issues in the pleadings that are not suitable for being struck out without a trial. I will not deal with them because I am satisfied that the statement of claim passes the relatively low threshold of not being so defective that it does not disclose a reasonable ground for bringing the claim and should be struck out.

Abuse of process

[41] Mr Jarvis' other ground for applying to strike out the claim is that it is an abuse of the Court's process. A claim can be struck out under CPR rule 26.3(1)(c) (set out above) or under the Court's inherent jurisdiction to control its procedures. The most notable case dealing with abuse of process is the House of Lords decision of **Hunter v Chief Constable of the West Midlands**¹⁵ where Lord Diplock described the process for dealing with abuse as -

"The inherent power which any court of justice must possess to prevent misuse of its procedure which, although not inconsistent with the literal

¹³ *Didier v Royal Caribbean Cruises Limited* SLUHCAP 2014/0014 and *Ibid*

¹⁴ *Reckitt Benckiser (UK) Ltd v Home Pairfum Ltd* [2004] EWHC 302

¹⁵ [1982] AC 529

application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people”

- [42] Abuse is a question of fact and the burden of proof is on the person relying on the alleged abuse to strike out the other party’s statement of case. The crucial question is whether the respondent to the application is misusing the Court’s procedure in a manner that is unfair to the other party.¹⁶
- [43] Mr Jarvis’ allegation of abuse starts with the fact that the BVI Liquidators have been permitted to pursue a claim against Mr Abdul-Massih in Switzerland (“**the Swiss Claim**”) and the real reason why the Claimants are seeking the negative declarations is to prevent him from progressing the Swiss Claim. More will be said about the Swiss Claim.
- [44] Mr Jarvis also said that the Claimants cannot proceed against the BVI Liquidators because they are officers of the Court and the BVI Proceedings are an attempt by the Claimants to interfere with them in the performance of their duties as officers of the Court. This is not how the Court’s process was meant to be used and it is an attempt by the Claimants to use the process improperly to interfere with the Liquidators in the performance of their duties.
- [45] The Claimants rejected these allegations. Their position is as stated above – they were threatened with substantial claims in the form of the Letters Before Action and the elaborate draft pleadings. No claims were filed for just over two and a half years and in the meantime the Claimants have been operating under the stress of the threatened claims and the effects of the threats on them and their business. Therefore, they filed the claim for negative declarations to resolve the uncertainties and bring the matters to finality. They also assert that the fact that the BVI Liquidators are officers of the Court does not exempt them from being subject to negative declarations.

¹⁶JSC BTA Bank v Shurikhin [2020] EWCA 1337

- [46] Mr Chivers KC made two other points in support of the abuse of process issue, namely, that the Claimants do not have standing to bring the Proceedings and the wrong parties are before the Court.

The Claimants' standing

- [47] Mr Chivers' submitted that the Liquidators are statutory creatures carrying out their statutory duty to wind up the affairs of a company. The Insolvency Act has one provision for bringing claims against liquidators. It is section 273 which reads -

“A person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder.”

The section gives a person who is aggrieved by an act, omission or decision of a liquidator the right to apply to the Court to confirm, reverse or modify the act, omission or decision of the liquidator. Mr Chivers submitted that the complaint against the Liquidators is that they threatened substantial litigation against the Claimants and failed over a long time to carry out the threat. This, he submitted, was a “decision” by the Liquidators and the only way to challenge it was by an application under section 273. This was not done. Instead, the Claimants filed the Proceedings for negative declarations against the BVI Liquidators.

- [48] Mr David Alexander KC for the Claimants stated categorically that this was not a section 273 application. As a result, he did not file evidence or make submissions on whether the Claimants were aggrieved persons within the meaning of section 273. He elected to maintain his position that the Claimants were entitled to bring a direct claim against the Liquidators for negative declarations in response to the threats contained in the Letters Before Action and the draft statements of claim. In other words, they were not challenging a decision, act or omission of the Liquidators, but reacting to the threats of litigation.

[49] I agree with Mr Alexander KC. It is a question of fact in each case whether the conduct of the Defendants is such that the Court should consider whether a claim for declarations should be granted. On the special facts of this case and in the context of a claim for negative declarations, the Claimants should be able to ask the Court to declare that the Liquidators do not have the right to pursue the claims alleged in the draft statements of claim.

Wrong parties

[50] Mr Chivers also submitted that there is no real dispute or lis between the parties that the law recognises. The liquidators of a company do not own the property of the company, legally or beneficially, and they do not have a right to sue to enforce rights relating to the property. The law gives them only a procedure for enforcing those rights. For example, section 256 of the Insolvency Act says that a liquidator can bring proceedings against a director or former director of a company for insolvent trading. This is a procedural right and not a lis that can be enforced by a negative declaration. Mr Chivers relied on **Rolls-Royce plc v Unite the Union**¹⁷ where Aiken LJ listed the requirements for getting a declaration. He referred to the first and second requirements that –

- “(1) The power of the court to grant declaratory relief is discretionary.
- (2) There must, in general, be a real and present dispute between the parties before the court as to the existence and extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.”

[51] Mr Alexander’s response was that the requirement of a lis is only a general rule (as said by Aiken LJ) and on the facts of this case where the Claimants have been threatened with substantial litigation and are responding to the threats, they were entitled to seek negative declarations against the Liquidators regarding the threats to sue for the alleged breaches of section 256 and otherwise by the Claimants. He referred to the requirements (1) and (2) in **Rolls Royce**, as well as requirement (4) which reads

“The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue”.

¹⁷ [2009] EWCA Civ 387

[52] The Court, he said, should exercise discretion in favour of the Claimants who were under threats and were directly affected by the threats. The Court should allow the claim for the negative declarations to proceed.

[53] I accept Mr Alexander's submissions on this issue. I find that the BVI Liquidators have not discharged the burden of showing that the Claimants' conduct in filing the Proceedings was an abusive use of the Court's procedures.

[54] The application for striking out the Proceedings as not disclosing a reasonable ground for bringing the claim and/or as an abuse of the court's procedure is dismissed. I will now consider whether any parts of the statement of case should be struck out.

Striking out part only of the statement of case

[55] I note that CPR rule 26.1(b) allows the Court to strike out part only of the statement of case. With this in mind, I have reviewed the various declarations sought by the Claimants and I am not satisfied that I should allow the fourth declaration to remain a part of the claim. Paragraph 81.4 of the statement of claim seeks a declaration that "The BVI Liquidators and/or Phoenix BVI have no valid claim against Mr Abdul-Massih or the Ancile Companies under section 254 or section 256 of the Insolvency Act ("**Declaration 4**"). The difficulty that I have with this declaration is that the claim for insolvent trading under section 256 of the Insolvency Act is a matter that is now before the District Court in Switzerland following the grant of the Recognition Order. Mr Chivers relied on the Recognition Order.

The Swiss Recognition Order

[56] The Recognition Order was interpreted by the Claimants in paragraph 32 of their skeleton argument and in paragraph 80 of their statement of claim as saying that the Recognition Order of the District Court allowed the BVI Liquidators to

pursue a claim against Mr Abdul-Massih for insolvent trading under section 256 of the Insolvency Act.

[57] I have reviewed the Recognition Order and I have not found that it was as specific as ordering the commencement of a claim by the BVI Liquidators in the Höfe District Court for US\$103 million or any other sum. It is a recognition order that clothed the BVI Liquidators with the power and authority to take further steps as liquidators in Switzerland. I have noted that both experts referred to another order made by the District Court on 28 August 2023. I was not directed to this order and neither counsel referred to it. It appears that it is not before the Court. This is unfortunate because Professor Rodrigo Rodriguez, the expert for the Liquidators, said in paragraph 4.2(b) of his first report that among the documents that his instructing BVI attorneys provided to him was a “Decision of the District Court of Höfe of 28 August 2023 granting a waiver to conduct local ancillary proceedings concerning Phoenix BVI and granting the administrators of Phoenix BVI the rights to dispose of assets and file claims as stated in article 174a para 4 PILA.”¹⁸ (Emphasis added). I accept the accuracy of Professor Rodriguez’s note of the content of the 28 August 2023 Order.

[58] Article 174a of PILA empowers the Swiss Court to give a foreign administrator (such as the BVI Liquidators) “[A]ll the powers to which he or she is entitled under the law of the state in which the bankruptcy proceedings were opened [BVI]; he or she may in particular transfer assets abroad and conduct litigation.” (Emphasis added). Assuming the accuracy of Professor Rodriguez’s note at paragraph 4.1 of his report¹⁹ of what is contained in the missing order of 28 August 2023, his conclusion at paragraph 5.10 of his report seems perfectly reasonable. He concluded -

“The preliminary steps under Swiss law (recognition, decision not to conduct ancillary proceedings) necessary for foreign insolvency administrators to be entitled to file claims in Switzerland have already been taken and the relevant decisions are enforceable (the pending appeal does not suspend the enforceability). The joint liquidators are thus entitled to file such claims before Swiss courts on behalf of the

¹⁸ PILA is the Federal Act of Private International Law of the Swiss Confederation

¹⁹ Page 547 of the Hearing Bundle

foreign bankruptcy estate and to directly receive any proceeds from a successful claim (article 174a para 4 PILA).”

The reference to the BVI Liquidators being entitled to file “such claims” is, in the context of the report, a reference to a section 256 claim for insolvent trading which is the only issue that he was dealing with in that section of his report. The submissions of counsel did not suggest a different interpretation.

[59] Professor Felix Dasser, the Swiss law expert for the Claimants, did not share this opinion. His opinion is that the BVI Liquidators would not be able to bring a section 256 action for insolvent trading in Switzerland. In his opinion the BVI Liquidators –

“[W]ould likely not be able to bring a claim pursuant to section 256 of the BVI Insolvency Act (or its Swiss equivalent) in Switzerland, subject to the unlikely scenario that the Swiss Court would deem a section 256 action as a claim based on company law instead of an insolvency-related claim”²⁰

It is difficult to reconcile the Claimants’ interpretation of the Recognition Order²¹ with this opinion by Professor Dasser.

[60] I am mindful that the applications before the Court are at an interlocutory stage of the Proceedings and the experts have not been cross examined. I should therefore be cautious about preferring the evidence of one expert witness over the other. I can however consider the quality of the evidence having regard to “[T]he experience of the experts, the cogency of the reasoning and the materials relied upon to support it”²², and make such findings as I think are appropriate.

[61] The cogency of the evidence on this issue is not only the opinions of the experts but also the finding of the District Court in Switzerland that the BVI liquidation of Phoenix BVI is recognised and the liquidator can file claims, bolstered by the

²⁰ Pages 639-640 of the Hearing Bundle

²¹ See paragraph 56 above

²² Per Arnold J in *VTB Capital v Nutritek International Corp and others* [2011] EWHC (Ch) 3107 at §201

unqualified statements of the Claimants in their pleadings and skeleton argument that the Swiss Court had authorised the BVI Liquidators to pursue a section 256 claim against Mr Abdul-Massih for the recovery of just over \$102 million. I find that the BVI Liquidators are authorised to make an insolvent trading claim against Mr Abdul-Massih in Switzerland.

- [62] In the circumstances I would not allow the Claimants to pursue a claim for a declaration that the Liquidators do not have a valid section 256 claim against Mr Abdul-Massih. This is a matter that is now before the Swiss Courts.

Conclusion on striking out part of the claim

- [63] The BVI Liquidators' application to strike out the BVI Proceedings has not succeeded but that part of the claim for a declaration that the BVI Liquidators and Phoenix BVI do not have a valid claim against the Claimants or any of them for breaches of section 256 of the Insolvency Act succeeds and the claim for Declaration (4) is struck out.

Forum non conveniens

- [64] The First Defendant, Mr Jarvis, lives and works in the Virgin Islands. He was served as of right in the Territory with the proceedings. In addition to his application to strike out the proceedings, he applied to stay the proceedings on the grounds of forum non conveniens.
- [65] The leading case on forum non conveniens is **Spiliada Marime Corporation v Consulex Ltd**²³ where Lord Goff of Chieveley set out the main principles underlying the doctrine. His guidance has been followed in many cases in England and the BVI. In **IPOC International Growth Fund Limited v LV Finance Group Limited** Gordon JA helpfully summarised the Spiliada principles at paragraph 27 of the Court of Appeal's judgment:

²³ [1987] AC 460

“In the lead judgment, Lord Goff of Chieveley summarised the law in the following way, and I take the liberty of paraphrasing the learned Law Lord:

(i) The starting point, or basic principle, is that a stay on the grounds of *forum non conveniens* would only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In this context, appropriate means more suitable for the interests of all the parties and the ends of justice.

(ii) The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once a defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction. Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of the claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that “where there can be pointers to a number of different jurisdictions” there is no reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that the alternative jurisdiction is clearly or distinctly more appropriate than this jurisdiction.

(iii) When considering whether to grant a stay or not, the court will look to what is the “natural forum” as was decided by Lord Keith of Kinkel in *The Abidin Daver*, “that with which the action has the most real and substantial connection”. In this connection the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions might be subject, in the case of actions in tort where it is alleged that the tort took place and the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of considerations a court should have in exercising its discretion.

(iv) If the court determines that there is some other available and *prima facie* more appropriate forum then ordinarily a stay will be granted unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in the *Abidin Daver* made it very clear that the burden of proof to establish such a circumstance was on the claimant and that cogent and objective evidence is a requirement.”

[66] In **Livingston v Eurochem and others**²⁴ the Court collapsed the *Spiliada* principles into three stages. Firstly, the defendant must satisfy the Court that there is another forum that is available to try the claim (stage 1). If he does, he must also show that the alternative forum is clearly and distinctly more appropriate for the trial of the claim (stage 2). If he does a stay should be granted unless there is a risk that the claimant will not receive justice in the more appropriate forum (stage 3). The burden of proof in the first two stages is on the defendant seeking the stay, and on the claimant at the third stage.

[67] Additional principles from other cases that are relevant to this application are:

- (1) In cases concerned with internal management of companies the place of incorporation is normally the natural forum: **Konamaneni v Rolls Royce International Industrial Power**²⁵;
- (2) If part of the action is bound to be retained by the BVI Court, it will be hard to demonstrate that the BVI Court is not the *forum conveniens* for a related claim:²⁶ **Crofts v Cathay Pacific Airways Ltd**. In this respect, an important factor is the avoidance of the risk of irreconcilable judgments which may arise if different defendants are pursued in different jurisdictions;
- (3) In the context of a claim for a negative declaration, the English Court has held that the law relating to *forum non conveniens* is unaltered i.e. the Court is to apply the principles enunciated in *The Spiliada: Messier Dowty Ltd v Sabena*.²⁷

[68] I will now apply the principles to the facts of this case taking into consideration where necessary the evidence of the experts.

Stage 1 – Available forum

[69] The Proceedings were launched in the BVI against Mr Jarvis who works and resides in the Territory, and Ms Frisby who is not resident but was a liquidator of Phoenix BVI, a BVI company. Phoenix BVI has now been joined in the

²⁴ BVIHCAP 2016/0042-0046

²⁵ [2002] 1 WLR 1269

²⁶ [2005] EWCA Civ 599

²⁷ [2001] 1 WLR 2040

Proceedings as a defendant. The Proceedings were brought in the BVI as of right.

[70] The BVI Liquidators submitted that assuming the Proceedings are not struck out, the BVI is not the forum conveniens for the trial. The more appropriate forum, which is available, is Switzerland because Mr Jarvis has been permitted by the District Court in Höfe to file a claim in Switzerland against Mr Abdul-Massih for insolvent trading under section 256 of the Insolvency Act, or its Swiss equivalent. I have already found that the better view of the expert evidence is that Mr Jarvis can bring an insolvent trading claim in Switzerland. Therefore, Switzerland is an available forum for the trial of such a claim.

[71] The experts are in general agreement that neither Mr Abdul-Massih nor the Ancile Companies would be able to bring a claim for negative declarations in Switzerland. Therefore, apart from a claim for insolvent trading against Mr Abdul-Massih, the court in Switzerland is not an available forum for the trial of the claims in the BVI Proceedings. These include the all-important issues of whether Mr Abdul-Massih was a de facto director of Phoenix BVI and/or Phoenix Dubai and owed fiduciary duties to these companies. Mr Chivers submitted that this did not matter because the Liquidators have started the threatened process of bringing claims against the Claimants and the Court should not direct the Liquidators how to proceed with the claims. Further, the claims do not have any real connection with the BVI as all the transactions and activities took place outside the BVI, and only one party resides in the BVI.

[72] I do not accept this submission. The Court is dealing with a forum non conveniens application for claims in the Proceedings which, except the claim for a negative declaration based on the insolvent trading, have not been struck out by the court. The forum principles should therefore be directed to whether Switzerland is an available forum for the trial of the remaining claims in the BVI proceedings. The potential non-recognition in Switzerland of a judgment in the BVI proceedings is not decisive in determining the forum that is the most appropriate for the trial of the underlying claims in the Proceedings. What is important is whether there is an available forum, other than the BVI, where the

case can be more appropriately tried for the interests of all the parties and ends of justice.

[73] The burden of proving that there is an alternative forum is clearly on the Liquidators and they have failed to discharge this burden. This is sufficient to dispose of the forum challenge in favour of the Claimants. However, I will deal with the other steps in the **Spiliada** procedure.

Step 2 – Connecting factors

[74] The next step is to determine whether Mr Jarvis has discharged the additional burden of showing that his chosen forum, Switzerland, is clearly the more appropriate forum for the trial of the Proceedings. The procedure to determine which of the two forums, BVI or Switzerland, is clearly the more appropriate for trying the claims in the Proceedings involves considering various matters connecting the claims to each jurisdiction, commonly referred to as the connecting factors. This is a balancing exercise. As this Court said in **Global Steel Holding Limited (in liquidation) v Direct Investment Limited and others**²⁸

“This is not a simple arithmetic exercise of counting the connecting factors and finding which forum has the greater number. The process is a delicate balance of judicial discretion to determine the forum that is more suitable to try the claims for the interests of all the parties and the ends of justice.”

[75] The connecting factors in this case are:

- (i) the governing law of the claims;
- (ii) the place where the alleged wrongs were committed;
- (iii) the domicile and residence of the parties and the witnesses;
- (iv) documents and language; and
- (v) the Letters Before Action.

²⁸ BVIHCOM 2023/0127 at paragraph 54

Governing law

[76] The claims in this matter are for negative declarations concerning ongoing disputes between the parties. It is important at the outset of this part of the exercise to determine the governing law in the Proceedings because courts generally prefer to interpret and administer their own laws. As Lady Arden said in **Livingston Properties Equities Inc and others v JSC Eurochem and others**²⁹ -

“When assessing whether there is another more appropriate forum, the court will consider what connecting factors exist in relation to that forum, such as the place where the alleged wrongs were committed and the governing law of the pleaded claims. The governing law is an important factor because it is generally preferable that a case should be tried in the country whose law applies.”³⁰

[77] The claims in the BVI Proceedings are for negative declarations that Mr Abdul-Massih is not and has never been a de facto director of Phoenix BVI or Phoenix Dubai; that he never owed fiduciary duties to Phoenix BVI or Phoenix Dubai and he is not in breach of any such duties; and that the BVI Liquidators and/or Phoenix BVI do not have valid constructive trust claims against the Ancile Companies. The claimants also seek declarations that the Dubai Liquidator and Phoenix Dubai do not have valid claims against the Claimants or any of them for breaches of the Cayman Islands Companies Act.

[78] The declarations concerning Mr Abdul-Massih’s status as a director of Phoenix BVI and whether he has breached those duties are determined by the internal management rules of the company. In the case of Phoenix BVI that is the BVI law. The authorities are clear on this point (**Konamaneni v Rolls Royce International Industrial Power**³¹). Phoenix BVI is a BVI company and whether Mr Abdul-Massih is a director of the Company and has breached his duties as a director are governed by BVI law which is a strong connecting factor in favour of the BVI.

²⁹ [2020] UKPC 31

³⁰ Ibid at paragraph 12.

³¹ Supra note 24

[79] The declaration that Mr Abdul-Massih is not a director of Phoenix Dubai is not governed by BVI law. The conflict of laws rules suggest that this is a matter of internal management of Phoenix Dubai and would be governed by the laws of the UAE. Similarly, the declarations that the Dubai Liquidator and Phoenix Dubai do not have valid claims under the Cayman Islands Companies Act against Mr Abdul-Massih and/or the Ancile Companies would be governed by the laws of the Cayman Islands. These issues do not have any connection to Switzerland.

The alleged wrongs – where were they committed

[80] The alleged wrongs are the events leading up and the signing of the Suretyship Agreements followed by the transfer of the Subsidiaries' Shares to Ancile Securities Limited. It is not clear from the evidence where these events happened or if they happened anywhere. Most things happened electronically and the court was not taken to any evidence of physical meetings between the parties and their representatives. Where there is uncertainty or no evidence about the place where the alleged wrongs happened the Court will treat this as a neutral factor not favouring either side. The Privy Council used a similar approach in **Livingston** where there was insufficient evidence to determine the issue of the governing law of the claims. The Board treated the issue as neutral³².

Residence and domicile of the parties and witnesses

[81] The issue of the location of parties, witnesses and documents used to play an important role in forum applications. However, in modern commercial litigation that importance has diminished because of the developments in airline travel, technology and video conferencing. But it is still a factor to be considered.

[82] In this case the only party who is resident in Switzerland is Mr Abdul-Massih and he has expressed his willingness to come to the BVI to give his evidence. He

³² Supra note 000 at paragraph 32

came to the BVI to give his evidence in another trial in 2023 involving Phoenix BVI and Mr Jarvis. Other directors of Phoenix BVI are in India and Australia and, if needed, would have to travel to give evidence wherever the trial is taking place.

[83] The two expert witnesses live and work in Switzerland. Ms Frisby, Mr Johnston and Mr Leggett do not live in Switzerland and they would, if necessary, have to travel to give evidence wherever the trial takes place.

[84] Mr Jarvis lives and works in the BVI. Phoenix is a BVI company. It is in liquidation supervised by the BVI courts.

[85] Another factor concerning witnesses is the frequency with which witnesses now give evidence by video link. It is not an ideal way of giving evidence where the issue of credibility is so important, but it works and has become a regular feature of trials in the BVI Commercial Court.

[86] Taken together, the location of the parties and witnesses is fairly evenly balanced with a slight edge in favour of Switzerland. However, for the reasons expressed above, I do not attach great importance to this factor.

Documents and language

[87] I repeat my comment about modern commercial litigation – parties no longer have to transport boxes of documents internationally at great cost and sometimes unbearable inconvenience. Documents are now transported in minutes over the internet. When originals are required, they are usually sent by courier. This is not a factor in this case.

[88] I note that some of the documents are in a foreign language and were translated. This is not unusual. If there are witnesses who are not fluent in English, interpreters can be used. This is also a common practice in the BVI Commercial Court.

The Letters Before Action

- [89] A significant factor in favour of trial in the BVI is that on 10 May 2021 the BVI Liquidators caused their BVI lawyers to issue the letter before action addressed to Mr Abdul-Massih threatening to bring claims against him for breaches of the Insolvency Act and the Companies Act of the BVI and the Cayman Islands, stating that he is liable to contribute to the assets of the Company “as the Court thinks fit”. This was obviously a threat to sue Mr Abdul-Massih in the BVI Court, seeking the same remedies that the Claimants used to support the claims for the negative declarations. It is difficult to understand why the Liquidators are now asserting that the BVI Court is not the appropriate forum for the trial of the same claims that they were threatening to bring in the BVI. The Liquidators have not explained the change of position.

Conclusion on Forum non conveniens

- [90] Having conducted the balancing exercise of assessing the connecting factors I find that the Liquidators have not discharged the burden of showing that the Courts of Switzerland are available and are clearly more appropriate for the trial of the claims in the BVI Proceedings. The Liquidators having failed on the first two steps in **Spiliada** it is unnecessary to deal with Step 3 of the Spiliada procedure.

The Dubai Application

- [91] On 3 May 2024 the Dubai liquidator and Phoenix Dubai (together “**the Dubai Defendants**”) applied to the court for:
- (a) an order under CPR rule 7.8 that the Court set aside service on the Dubai Liquidator and Phoenix Dubai of the claim form and statement of claim; alternatively
 - (b) a declaration that the Court should not exercise its jurisdiction in the Proceedings on the grounds of forum non conveniens, and an order that the Proceedings be stayed.

The service application

[92] The claim form and statement of claim were served on the Dubai Defendants in care of their legal representatives in the BVI on the understanding that this was without prejudice to their right to challenge service of the documents. The Claimants' legal representatives filed a certificate of service in accordance with CPR rule 7.6 stating that:

- (i) the claimants have a good cause of action;
- (ii) the action is a specified proceeding within the meaning of CPR rule 7.3(2)(a) - the necessary or proper party gateway; rule 7.3(2)(b) - the injunction gateway; and/or rule 7.3(7) - the company's affairs gateway.
- (iii) the BVI court is the appropriate forum for the trial of the claim; and
- (iv) the proposed method of service will not infringe the laws of the United Arab Emirates.

[93] On 3 May 2024 the Dubai Defendants applied under CPR rule 7.8(1) to set aside service of the BVI Proceedings on them. Rule 7.8(2) states that the Court may set aside service if: (a) the claimant does not have a good cause of action; (b) the proceedings are not listed in rule 7.3; or (c) the court is not the appropriate forum for the trial.

[94] Rule 7.8(4) provides that on the hearing of an application to set-aside service outside the jurisdiction the claimant must satisfy the Court that (a) he has a good cause of action; (b) the proceedings are listed in rule 7.3; and (c) the Court is the appropriate forum for the trial of the action. This rule reflects the requirements for service outside the jurisdiction stated by Lord Collins in **AK Investments CJSC v Kyrgyz Mobil Tel Ltd and others**³³ and **Nilon Ltd and another v Royal Westminster Investment SA and others**³⁴.

³³ [2011] UKPC 7 at paragraph 71

³⁴ (2015) 86 WIR 285 at 291 paragraph 13

Good cause of action

- [95] I made the point before that the statement of claim reflects the claims that were alleged by the Liquidators against the Claimants in the Letters Before Action and the draft statements of claim. By itself, this is an indication that in the opinion of the Liquidators in 2021 the claims that are alleged in the current statement of claim reflect a good cause of action. Additionally, the claims in the Dubai Defendants' draft statement of claim involve proving that Mr Abdul-Massih was a de facto director of Phoenix Dubai and owed fiduciary duties to the company. Further, that Mr Abdul-Massih breached various provisions of the Companies Act of the Cayman Islands by causing Phoenix Dubai to transfer the Shares (in the Dubai Subsidiaries) to the Ancile Companies. These are heavily contested issues that will have to be tried in the BVI Proceedings. I am satisfied that the Claimants have a good arguable case for negative declarations in respect of these heavily contested matters.

Rule 7.3(2)(a) - The necessary or proper party gateway

- [96] The Claimants relied on three gateways in rule 7.3 to justify service of the claim on the Dubai Defendants. They need to succeed on only one.
- [97] Rule 7.3(2), the necessary or proper party gateway, provides that
- “Court process may be served out of the jurisdiction if a claim is made
-
- (a) against someone on whom the court process has been or will be served, and -
- (i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
- (ii) the claimant now wishes to serve the court process on another person who is outside the jurisdiction and who is a necessary or proper party to process;
- (b) for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction; or for a remedy against a person domiciled or ordinarily resident within the jurisdiction.”

[98] The person served or to be served is referred to generally as the anchor defendant. The anchor defendant in this case is Mr Jarvis who was served within the jurisdiction. The necessary or proper parties are the Dubai Defendants who deny that they are necessary or proper parties.

[99] I have already found that there are real issues to be tried between the Claimants and Mr Jarvis and that most of the claims should not be struck out. Further, that Mr Jarvis is defending the claims. As such, I am satisfied that there is utility in trying the claims against Mr Jarvis and that it is reasonable for the Court to try these claims. This satisfies the first limb of rule 7.3(2)(a)(i). The second limb is whether the Dubai Defendants are necessary or proper parties.

[100] An important indicator whether a party to be served outside the jurisdiction is a necessary or proper party is whether “[T]he claims against Mr Jarvis and the Dubai Defendants involve one investigation or there is a sufficient “common thread” between them.”³⁵ There are common threads between the claims against the anchor defendant (claim X) and the claim against the Dubai Defendants (claim Y), based on the following:

- (1) Claims X and Y involve making essential findings about the status of Mr Abdul-Massih as a director of Phoenix BVI and Phoenix Dubai.
- (2) The underlying facts and the legal principles in the claims are substantially the same.
- (3) Claims X and Y involve ultimately a dispute over the same assets – the Shares formerly held by Phoenix Dubai, and such other assets of Phoenix BVI or Phoenix Dubai that the Liquidators can identify.
- (4) The Phoenix companies, though separate legal entities, are part of the Phoenix Group and the evidence suggests that they were being operated as part of “one entity”.³⁶
- (5) The indication suggest that only one investigation will be necessary or that the investigations will overlap

³⁵ Per Andrews J in *Gunn (a protected person) and others v Diaz and others* [2017] 2 All ER (Comm) 157 at paragraph 86(ix)

³⁶ Third Affidavit of Abdul-Mass paragraph 35 (page 182 of the Hearing Bundle)

[101] A similar situation was considered by Coulson J in **Lungrowe v Verdanta Resources plc**³⁷ where the learned judge remarked –

“On the face of it, I consider that the claimants have made out this ingredient of the test. The claims against [the anchor defendant] and the [foreign defendant] are closely bound together and their resolution would only require one investigation. Indeed, the claims are based on precisely the same facts and many of the same legal principles.”

Lungowe was referred to by the Court of Appeal in **Ilyama (UK) Ltd v Samsung Electronics Co Ltd**³⁸ where the Court noted –

“Furthermore, just as in the LCD Action, the claims against Samsung SDI, Samsung SDI Malaysia and LG Inc involve the same or substantially the same issues as would be raised in a trial elsewhere, such a trial would involve substantially the same witnesses and experts (if any), and it would be undesirable to require the parties to litigate the claims against LG UK and LG Wales in England and Wales and the claims against the other defendants elsewhere. The conditions of “gateway 3” contained in para.3.1(3) of CPR PD 6B are therefore satisfied. It is unnecessary to consider “gateway 9” in para.3.1(9) in addition.”

[102] Having considered the facts and the law on this issue I can do no better than adopt the conclusion of Mr Alexander in paragraph 119 of his skeleton argument

“As such, both the claims and the factual matrix giving rise to the claims are the same, similar and/or overlap. In order to establish that the Claimants are not liable to anyone involved in the overarching liquidation of the Phoenix Group, all parties need to be involved in one set of proceedings, rather than there being fragmented proceedings in different jurisdictions. It is therefore clear that the Dubai Liquidator and Phoenix Dubai are necessary or proper parties to the BVI Proceedings.”

[103] The Dubai Defendants are necessary or proper parties in the BVI Proceedings and the Claimants’ reliance on the necessary or proper party gateway succeeds. As such it is unnecessary to deal with the other gateways.

[104] The third requirement of the service out application is that the Claimants must prove that the Court is the appropriate forum for the trial of the action. I dealt with this requirement in the Jarvis application and the same findings apply

³⁷ [2016] EWHC 975

³⁸ [2018] EWCA Civ 220

mutatis mutandis. Nothing further needs to be said other than to repeat the finding that the BVI is the appropriate forum for the trial of the Proceedings .

- [105] The Dubai Defendants' application to set aside service of the claim form and statement of claim is dismissed.

Forum non conveniens

- [106] Applying the Spiliada test the Dubai Defendants must satisfy the Court, firstly, that there is an available forum for the trial of the BVI Proceedings. The Dubai Defendants say in their skeleton argument that Cayman is obviously an available forum given the lack of any connections to the BVI, and that Cayman is the more appropriate forum for the trial of the claims against them. However, these statements are not supported by evidence that Cayman is an available forum or why that forum is more appropriate than the BVI.

- [107] Having found that the BVI is the appropriate forum for the trial of the BVI Proceedings, that there is a substantial overlap of the evidence in the underlying claims, and the obvious convenience and saving of expense of dealing with all the issues in one trial, I do not find that Cayman is a more appropriate forum for the trial of the Claims. Even if Cayman is a more appropriate forum for the trial of the claims against the Dubai Defendants, in the circumstances of this case where the BVI is seised of the overall claim it would not be good case management to fragment the trial by ordering that the BVI is not the appropriate forum for the trial of the claims against the Dubai Defendants.

- [108] The Dubai Defendants' application to stay the action against them on forum non conveniens grounds is dismissed.

The Injunction

[109] The BVI Proceedings include an application for an injunction to restrain the Defendants from taking any further legal or other proceedings, whether in the BVI, Cayman Islands or elsewhere, against any of Mr Abdul-Massih, the Ancile Companies or their subsidiaries or connected persons, concerning any of the agreements or other factual matters that are the subject of the Proceedings. Alternatively, the Defendants, and each of them, be prohibited from taking any such proceedings without the permission of a Judge of the Commercial Court.

[110] The Claimants say that the injunction is necessary because in May 2024 they asked the Defendants' lawyers for an undertaking and the request was refused. Therefore, they sought the Court's assistance to restrain the Liquidators from initiating proceedings in the BVI or elsewhere. Mr Alexander KC said the claimed injunction is not an anti-suit injunction but merely an order ancillary to the claim for the declarations. I do not accept this fine distinction. The injunction seeks to restrain the Defendants from taking action in the BVI, Cayman, Netherlands, Switzerland, Kazakhstan, Ukraine "and/or anywhere else". This has the hallmarks of a worldwide anti-suit injunction. It has no geographical limits. This is important because the Court is reluctant to grant worldwide injunctions restraining foreigners from filing claims in their country. This could have implications for the Court's concerns about comity and interference with a person's right to sue wherever he chooses.

[111] On the facts on this case I take into consideration that:

- (a) the Defendants have commenced two sets of proceedings overseas. They have enjoyed mixed results so far, succeeding in Switzerland and failing (to date) in the Netherlands. There is nothing in their conduct to suggest that they are exercising their powers indiscriminately;
- (b) the Defendants are officers of the Court responsible for the proper administration of the liquidation of substantial companies in a large group of companies; and

(c) in any case, the terms of the proposed injunction are very wide and far too restrictive.

[112] I do not think that the facts of the case disclose a reasonable ground for bringing a claim for a worldwide injunction, or any injunction for that matter. I would strike out the claim for the Injunction in paragraph 82 and sub-paragraph 2 of the prayer of the statement of claim.

Disposal

[113] Having considered the evidence and the submissions of counsel, and for the reasons expressed in this judgment, I make the following orders:

- (1) The Claimants' application to join Phoenix BVI as a defendant in the BVI Proceedings is granted.
- (2) Subject to paragraph (3) and (4), Mr Jarvis' application for an order striking out the Proceedings as an abuse of the process of the Court or for not disclosing a reasonable ground, or alternatively, to stay the BVI Proceedings on the ground of forum non conveniens, is dismissed.
- (3) Paragraph 81.4 of the statement of claim (Declaration (iv)) is struck out.
- (4) Paragraph 82 and the second paragraph of the prayer for relief in the statement of claim are struck out.
- (5) The application by the Third and Fourth Defendants seeking orders that:
 - (i) the Court set aside service of the claim form and statement of claim on the Third and Fourth Defendants; alternatively
 - (ii) a declaration that the Court should not exercise its jurisdiction on the ground of forum non conveniens and that the Proceedings be stayedis dismissed.
- (6) The Defendants shall pay the costs of the Claimants (excluding any costs associated with the Injunction which shall be paid by the Claimants to the Defendants), such to be assessed if not agreed within 21 days.

[114] Finally, I pay tribute to the quality of the written and oral submissions of counsel and acknowledge (again) the quality of the Hearing Bundle.

Paul Webster

High Court Judge [Ag]

BY THE COURT

REGISTRAR