

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
VIRGIN ISLANDS
COMMERCIAL DIVISION

CLAIM NO. BVIHCOM 2023/0127

BETWEEN:

GLOBAL STEEL HOLDINGS LIMITED (IN LIQUIDATION)
CLAIMANT / RESPONDENT

AND

- (1) DIRECT INVESTMENTS LIMITED
- (2) MEADSWELL ESTATES LIMITED
- (3) PRASAN (PTC) LIMITED
- (4) MR. PRAMOD MITTAL

DEFENDANTS / APPLICANTS

Appearances:

Stuart Adair, Andrew Chissick and Samantha Hollingworth for the
Applicants/Defendants

Matthew Hardwick KC, Christopher Pease, James Petkovic and Andre McKenzie for the
Respondent/Claimant

2024: April 15

September 18

Application to set aside ex parte order for service outside the jurisdiction – test for service out – gateways for service out – application for stay on ground of forum non conveniens – connecting factors – governing law of claims for breach of fiduciary duty, tort, restitution and debt – effect of governing law on forum selection – duty of full and frank disclosure on ex parte applications

JUDGMENT

1. **WEBSTER J [Ag.]** On 8 December 2023 the Defendants/Applicants, Direct Investments Limited ("**DIL**"), Meadswell Estates Limited ("**Meadswell**"), Prasan

(PTC) Limited ("**Prasan**", together with DIL and Meadswell the "**BVI Defendants**"), and Mr. Pramod Mittal ("**Mr. Mittal**") applied under rules 7.7, 9.7 and 9.7A of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("**the CPR**")¹ and the Court's inherent jurisdiction ("**the Application**") for:

(a) in relation to Mr. Mittal, orders:

- (i) setting aside the order granted by this Honourable Court on 26 July 2023 permitting the Claimant, Global Steel Holdings Limited ("**Global**" or "**the Company**"), to serve the claim form and statement of claim in these proceedings on Mr. Mittal at his family home known as Renaissance Court in London (the "**Service Out Order**");
- (ii) setting aside the service of the claim form and statement of claim on Mr. Mittal;
- (iii) declaring that the Court has no jurisdiction to hear the claim against him and setting aside the claim form and statement of claim;
- (iv) alternatively, staying the proceedings against him in favour of the courts of the Isle of Man on the ground of *forum non conveniens*;

(b) in relation to each of the BVI Defendants, an order staying the proceedings in favour of the courts of the Isle of Man on the ground of *forum non conveniens*;

(c) an order that Global pay the Defendants' costs of and occasioned by the Application; and

(d) such further or other relief as the Court thinks fit.

2. The Application was made in proceedings launched by Global, acting by its liquidators, against the BVI Defendants and Mr. Mittal (together "**the Defendants**"), alleging that at a time when Global was insolvent, the Defendants and others caused payments to be made from Global to DIL and Meadswell intending to defraud the creditors of Global ("**the Proceedings**").

Parties and background to the Application

3. The main parties to the Proceedings are:

¹ The parties agreed at the commencement of the hearing that the Application is governed by the CPR 2000 and not the CPR (Revised Edition) 2023 and references in this judgment to the CPR are to CPR 2000.

- (a) Global is a company incorporated under the laws of the Isle of Man. Its main commercial activity was in the steel industry with investments in various steel production businesses across various jurisdictions. In May 2018 it was placed into provisional liquidation by the Isle of Man Court and later into final liquidation on 13 December 2018. Craig Mitchell (a former provisional liquidator), Mark Wilson and Adrian Allen were appointed joint liquidators. Mr. Allen was replaced by James Dowers on 31 December 2022. The liquidators of Global from time to time are referred in this judgment as “**the Liquidators**”. Global’s evidence opposing the Application was given by Mr. Dowers and Mr. Wilson. The Isle of Man liquidation was recognised by the High Court in London on 24 May 2019.
- (b) The first three Defendants are BVI incorporated companies. At all material times DIL was the parent company of Global. DIL in turn is wholly owned by Meadswell. The shares of Meadswell are held by Krestvale Limited, another BVI company, on trust for Prasan. Prasan is a BVI incorporated private trust company limited by guarantee and the trustee of the Prasan Trust. The Prasan Trust is a BVI law-governed family trust settled by Mr. Mittal’s father, Mohan Lal Mittal. The beneficiaries of the Trust are Mr. Mittal’s family members.
- (c) The personal Defendant is Mr. Mittal. He is an Indian national residing in London, England. He was a registered director of Global from 1994 to 2018 when the company went into liquidation. He is also the protector of the Prasan Trust. Global’s position regarding Mr. Mittal is that he is at the heart of the Prasan Trust and controls the Trust and the BVI Defendants. He was declared bankrupt by the English court on 19 June 2020 and his discharge from bankruptcy was suspended indefinitely by Trower J on 24 April 2023.

The claims of wrongdoing

- 4. The essence of the claims against Mr. Mittal and the BVI Defendants is that from 2008 onwards, when Global was either insolvent or bordering on insolvency, it paid out substantial amounts of money to entities within the Prasan group as part of a scheme to strip Global of its assets and put them beyond the reach of the Company’s creditors (“**the Scheme**”). In orchestrating the payments Mr. Mittal acted in breach of his fiduciary duty

as a director of Global. From the records available to the Liquidators they have determined that when the Company went into liquidation the amount owing to independent creditors was over US\$565.9 million, much of which was outstanding for many years. Further, that Global was also balance sheet insolvent. The challenged payments include:

- (a) Shareholder loans to Meadswell (described as “**Post-Transfer Loans**”) between 2008 and 2016, at times when Global was no longer the owner of Meadswell, amounting to US\$9,349,066. The Liquidators’ investigations revealed that Global did not receive any benefit from the Post-Transfer Loans and a substantial amount of the loan proceeds, approximately \$8.8 million, was used to meet mortgage payments of Mr. Mittal’s home in London.
- (b) A subscription of US\$130,000,000 for bonds issued by DIL which will not mature until 31st December 2027.
- (c) Dividends paid to DIL between 2013 and 2017 amounting to US\$95,800,000.
- (d) The assignment of a multi-million debt due to Global from Global Infrastructure (Nigeria) Limited (“**GINL**”), a subsidiary of Global, to DIL in or about 2017, apparently for no consideration.
- (e) Diluting Global’s interest in GINL from 89.5% to 2.3% between 2017 and 2021.

(together, “**the Challenged Transactions**”).

- 5. Global’s position is that the cumulative effect of the Challenged Transactions, which were discovered only after the Liquidators were appointed, was to decimate the value of Global’s assets with the consequence that there are insufficient assets to pay its creditors.

The claims

- 6. On 21 July 2023 Global initiated the Proceedings. The following is a summary of the claims in the statement of claim:
 - (i) Breach of fiduciary duty against Mr. Mittal in his role as a director of Global. It is not disputed that this claim is governed by the laws of the Isle of Man.

- (ii) Dishonest assistance against all the Defendants for their respective roles in facilitating the Challenged Transactions. It is not disputed that this claim is also governed by laws of the Isle of Man.
 - (iii) Knowing receipt against DIL and Meadswell for their respective roles in receiving payments or other benefits from the Challenged Transactions.
 - (iv) Claims under the Conveyancing and Law of Property Act 1961 and the Fraudulent Conveyances Act 1571 against DIL and Meadswell arising out of the payments by Global in connection with the Challenged Transactions (“**the CLPA Claims**”). Global claims that these payments were made to put assets beyond the reach of Global’s creditors. This is a BVI law claim that is governed by the laws of the BVI.
 - (v) Unlawful means conspiracy against the Defendants in that they combined together and/or acted in concert with one another under an agreement or common understanding to commit the Challenged Transactions intending to injure or cause financial loss to Global by the use of unlawful means. Pursuant to the conspiracy, Mr. Mittal and Prasan caused the Company to enter into the Challenged Transactions with Meadswell and DIL intending to strip the Company of its valuable assets to the detriment of the Company and its creditors, and transferring those assets to other companies within the Prasan Trust structure.
 - (vi) Global also claims repayment of the amounts owing in respect of the Post-Transfer Loans (\$9,349,066.47) and the subscription for the bonds (\$130 million), plus interest, as debts due to Global from Meadswell and DIL respectively (“**the Debt Claim**”).
7. On 21 July 2023 Global issued an ex parte application in the Proceedings seeking, inter alia, injunctive relief against the Defendants, and in respect of Mr. Mittal, permission to serve the claim form and statement of claim in the Proceedings on him outside the jurisdiction. On 26 July 2023 the Court granted the service-out application (“**the Service Out Order**”), as well as the injunctive relief sought by Global.
8. The Claim Form and the Statement of Claim were served on the BVI Defendants and they filed acknowledgments of service on 14 August 2023.

9. The Claim Form and the Statement of Claim were served on Mr. Mittal and he filed an acknowledgement of service on 1 September 2023.
10. The due date for the filing and service of defences by the Defendants was 8 December 2023. On that date the Defendants filed the Application challenging the jurisdiction of the Court to hear the claim on the grounds set out in the first paragraph of this judgment. This had the effect of postponing the time for the filing of the defences until after the Application is resolved.²

Issues

11. The two main issues in this matter are (1) the validity of the Service Out Order, and (2) the applicability of the principles of forum non conveniens to the Application.

The Service Out Order

12. The power to order service of BVI court proceedings on a person who is outside the jurisdiction is contained in CPR 2000 rule 7.3. The rule provides that the Court may grant permission to serve the claim form outside the jurisdiction if the claim is one of those listed in the rule. The application may be made without notice but must be supported by evidence on affidavit stating –
- (a) the grounds on which the application is made;
 - (b) that in the deponent's belief the claimant has a claim with a realistic prospect of success;
 - (c) the place and country in which the defendant may probably be found; and
 - (d) if the application is made under rule 7.3 (2) (a)³, the grounds for the deponent's belief that the conditions are satisfied.
13. The test for getting permission to serve a claim outside the jurisdiction is in three stages and is very clearly set out in the opinion of Lord Collins in **Nilon Ltd and another v Royal Westminster Investment SA and others**⁴ which has been referred and followed

² CPR 2000 rule 9.7(7).

³ Rule 7.3(2)(a) is set out in paragraph 21(1) below.

⁴ (2015) 86 WIR 285 at 291 paragraph 13.

in many decisions of the courts of the Eastern Caribbean. A claimant must satisfy the court of three things:

- (1) that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both;
- (2) that there is a good arguable case that the claim falls within one or more classes of cases in which permission to serve out may be given. In this context 'good arguable case' connotes that one side has a much better argument than the other; and
- (3) that in all the circumstances the forum which is being seised [here the BVI] is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction." (**"the Nilon Test"**)

14. A person served with a claim form outside the jurisdiction may apply under CPR rule 7.7 to set aside service and the Court may set aside service if any one of the three conditions in the Nilon Test is not satisfied.

15. I will now apply the principles in the **Nilon** Test to the facts of this case.

Serious issue to be tried

16. Following their appointment as provisional liquidators in May 2018 and later as full liquidators in December 2018, the Liquidators investigated the financial affairs of Global taking into consideration the Company's dealings with other entities in the Prasan group. The Liquidators concluded that the Challenged Transactions, which occurred between 2008 and 2021 at times when Global was either insolvent or bordering on insolvency, gave rise to various claims that can and should be pursued to recover assets for the benefit of Global's insolvent estate. As a result, the Liquidators launched the Proceedings making the claims listed in the statement of claim and summarised in paragraph [6] above.

17. The issue is whether any, some or all of the claims raise serious issues to be tried on the merits.

18. I am satisfied that the claims against Mr. Mittal for breach of fiduciary duty raise serious issues of fact and law. For example, the Liquidators have discovered evidence that a substantial amount of the Post-Transfer Loans was used to meet the mortgage payments on Mr. Mittal's home.⁵
19. There are also serious issues to be tried regarding Mr. Mittal's role as a de facto or shadow director of the BVI Defendants and his control of these companies and other entities in the Prasan group. The Liquidators say that these entities benefited from the Challenged Transactions.
20. I find that there are serious issues to be tried regarding Mr. Mittal.

The Gateways

21. The second step of the Nilon Test is whether there is a good arguable case that the claim falls within one or more of the classes of cases for which permission to serve out may be given under CPR rule 7.3. Rule 7.3 lists nine such claims. Global relied on four of the gateways in rule 7.3. These are:

(1) Rule 7.3(2)(a) Features which may arise in any type of claim

A claim form may be served out of the jurisdiction if a claim is made against someone on whom the claim form 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 claim form on another person who is outside the jurisdiction and who is a necessary or proper party to that claim

This gateway is commonly described as "the necessary or proper party gateway" and I will do the same in this judgment.

⁵ See paragraph 2(a) above

(2) Rule 7.3(4) - Claims in tort

A claim form may be served out of the jurisdiction if a claim in tort is made and the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction.

(3) Rule 7.3(8) - Claims about trusts

A claim form may be served out of the jurisdiction if -

- (a) a claim is made for a remedy against the defendant as a constructive trustee and the defendant's alleged liability arises out of acts committed within the jurisdiction.

(4) Rule 7.3(9) - Claims for restitution

A claim is made for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction or out of acts which, wherever committed, were to the detriment of a person domiciled within the jurisdiction.

- 22. Global also relied on the separate ground in Rule 7.4 headed "Proceedings which include other types of claim". Rule 7.4 provides that if the Claimant makes a claim which falls within rule 7.3(4) (claims in tort) or rule 7.3(7)(a) (claims about trusts) the court may grant any claim for a remedy which does not fall within rule 7.3 but arises out of the same facts or substantially the same facts as the claim in respect of which the order is made. This ground was not pursued seriously by Global in its submissions.

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

- 23. The wording of the necessary or proper party gateway is set out in paragraph 21.1 above. It is the main gateway that Global relied on in its written and oral submissions. To meet the requirements of this gateway Global had to satisfy the Judge that a claim is made against a defendant or defendants on whom the claim has been or will be served (the anchor defendants), and that there is a real issue with the anchor defendants that it is reasonable for the court to try. If these elements are satisfied the claimant must go on to prove that the foreign defendant (Mr. Mittal) is a necessary or proper party to the claim.

24. Rule 7.3(2)(a) is substantially the same as English CPR 3.1 PD6B which was considered by Andrews J in **Gunn v Diaz**.⁶ The learned judge reviewed the authorities and summarised the relevant principles in paragraph 86 of his judgment. Counsel for both parties in this case referred to and relied on the judgment of Andrews J and I will do the same.
25. Andrews J began his summary with the general statement that the gateway does not depend on a territorial connection between the claim and the court. He said at sub-paragraph (i) -
- “The “necessary or proper party” gateway is anomalous, in that, by contrast with the other heads of jurisdiction, it is not founded upon any territorial connection between the claim, the subject-matter of the relevant action, and the jurisdiction of the English courts: *AK Investment* at [73]”
26. The learned editors of the **White Book 2024** make a similar point regarding the necessary or proper gateway;
- “The formulation for this head of jurisdiction has evolved over the years. Throughout it has been described as unusual or anomalous in that, by contrast with the other heads of jurisdiction, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action, and the jurisdiction of the English [BVI] courts. The connecting factor is instead the connection between a claim against one defendant, which is brought in the English courts, and a claim against another. Because of the potential width of this head of jurisdiction, it is to be treated with caution (see *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 W.L.R. 180, PC at [73], and the authorities referred to there).”
27. The important aspect of this gateway is that, unlike the other gateways, the claim against the foreign defendant does not have to have any territorial connection with the jurisdiction of the court trying the main claim (against the anchor defendant). What is required is that the claim against the anchor defendant raises a serious issue that is reasonable for the court to try, and the foreign defendant is a necessary or proper party to that claim.
28. There are four steps in the necessary or proper party gateway. Firstly, there must be one or more anchor defendants. The anchor defendants in this case are the BVI

⁶ [2017] EWHC 157 (QB).

Defendants which, at the time when the application for permission to serve out was made, were to be served in the jurisdiction with the claim. They have since been served and have filed acknowledgments of service stating their intention to defend the claim. There is no dispute that they are anchor defendants within the meaning of the necessary or proper party gateway.

29. The second step is to determine whether there is a serious issue to be tried between the claimant (Global) and the BVI Defendants. This is set out in sub-paragraph (v) of **Gunn v Diaz** as -

“The court must first ask itself, viewed in isolation, (a) whether there is a real issue to be tried between the claimant and the anchor defendant on the merits (i.e. one with a real, rather than fanciful, prospect of success), and (b), if so, whether it is reasonable for the English court to try that claim:
Erste Group Bank AG v JSC “VMZ Red October” [2015] 1 C.L.C. 706.”

The inclusion of the words “viewed in isolation” is a reminder that at this stage the court is reviewing only the claims between the claimant and the anchor defendant without reference to claims against any other defendant.

30. In my analysis above regarding Mr. Mittal, I found that the claims against him raised serious issues to be tried. The same is true of the claims against the BVI Defendants. The pleadings and the evidence implicate them in the Challenged Transactions and there is undisputed evidence that Meadswell received the proceeds of the Post Transfer Loans, DIL received the subscription for the bonds and the dividends paid by Global, and Prasan is alleged to be a major player in the Scheme to carry out the Challenged Transactions and thereby put Global’s assets beyond the reach of its creditors. All the transactions happened at a time when the liquidators found that Global was insolvent or bordering on insolvency. The circumstances of the receipt of these monies raise serious issues to be tried on the merits and contributed to the filing of the claims against the BVI Defendants for dishonest assistance, knowing receipt, conspiracy, claims under the CLPA, and the claim in debt for the return of the Post-Transfer Loans and the subscription for the DIL bond.

31. The BVI Defendants did not specifically dispute that there are serious issues to be tried regarding the necessary or proper gateway, but this was not a concession, as suggested by Global, that there are serious issues between Global and the BVI Defendants. The burden of proof on all the issues of service out remained throughout on Global and in the absence of a specific concession it is for Global to satisfy all the elements of the test. The defendant's reaction, or lack thereof, to the claim is only one of the factors to be considered in deciding whether there is a serious issue to be tried within the meaning of rule 7.3(2)(a).

32. That said, I am satisfied that Global has met the requirement of showing that there are serious issues to be tried against the BVI Defendants.

33. The next step is to determine whether it is reasonable for the BVI court to try the claims between Global and the BVI Defendants. This requirement is set out in sub-paragraph (vi) of **Gunn v Diaz** –

“The question whether it is reasonable for the English [BVI] court to try the claim between the claimant and the anchor defendant is an objective one: it is not the same question as whether it was reasonable for the claimant to start proceedings against that defendant within the jurisdiction: *Erste Group Bank* at [48].”

This principle, like the previous issue of whether there is a serious issue between the claimant and the anchor defendants, must be judged between Global and the BVI Defendants, and it must be done objectively. The fact that there are claims against Mr. Mittal that involve issues relating to service out of the jurisdiction are relevant only because they form a part of the background. However, the Court is concerned with the utility of the claim against the BVI Defendants. If there is no utility in the claim and the BVI Defendants were joined only to get jurisdiction to serve the foreign defendant (Mr. Mittal), the Court will generally decide that it is not reasonable to deploy its resources in trying such a claim. In that event permission to serve out would not be granted. These principles are illustrated by reference to some of the cases that the Court was referred to by counsel.

34. **Erste Group Bank AG (London) v JSC (VMZ Red October)**⁷ is a decision of the Court of Appeal in England. The claimant bank (C) had claims against the anchor defendant (D1) and the English court had personal jurisdiction over D1 by virtue of an exclusive jurisdiction clause. D1 did not acknowledge service or take any steps to defend the claim. C was granted permission to serve the substantive defendant (D2) outside the jurisdiction in Russia using the necessary or proper gateway. The Court of Appeal set aside the order for service, finding that D1 had not filed an acknowledgment of service and was not disputing the claim, and there was no real issue between C and D1. C could just as easily have applied for the default judgment against D1. The real claim was between C and D2. C had issued proceedings against D1 to avail itself of the service out procedures in the necessary or proper party gateway to sue D2 and execute a judgment against its assets wherever located. In effect, it was not reasonable for the English court to try the claim between C and D1 because there was no substantive dispute before the court between these parties.
35. Similarly, in **Microsoft Mobile Oy (Ltd) v Sony Europe Ltd**⁸ Marcus Smith J set aside permission to serve out of the jurisdiction against certain defendants because the claims against the first defendant (the anchor defendant) were stayed on the grounds that they fell within an arbitration clause. Therefore, there was no real issue which it was reasonable for the court to try against the anchor defendant.
36. **Erste** was approved and applied by this Court in **JSC BTA Bank v Timur Sabyrbaev and 53 others**⁹ where the anchor defendants were defunct shell companies that were restored to the Register of Companies three days before the claim was filed. They were served with the claim to found jurisdiction against the foreign defendants in the claim. They did not acknowledge service or take any part in the proceedings and were struck off the Register again and dissolved after leave was granted. Wallbank J found that they were joined as anchor defendants purely to get jurisdiction against the foreign defendants and that there was no useful purpose in the claim against the anchor

⁷ [2015] EWCA Civ 379; [2015] 1 C.L.C. 706, CA at [38].

⁸ [2017] EWHC 374 (Ch).

⁹ BVIHCM 2021/0171.

defendants. The claimant's reliance on the joinder was "no more than an artifice".¹⁰ The learned judge set aside the ex parte service out order.

37. The instant case is different. The BVI Defendants are corporate vehicles with substantial assets. They are key targets in the claim. They filed acknowledgments of service stating their intention to defend the claim. They also applied for and received an extension of time to file their defences, but before filing they applied to set aside service of the Service Out Order.
38. The case is also different because there is utility in the Proceedings. Global made claims that over \$535 million of its assets were paid out to DIL and Meadswell at the instigation of the directors of these companies acting in concert with Prasan and Mr. Mittal, at times when Global was either insolvent or bordering on insolvent. The Liquidators of Global now seek to recover some or all of these monies, plus damages and interest, from the BVI Defendants and Mr. Mittal, for the benefit of the creditors of Global.
39. Learned counsel for the Defendants, Mr. Stuart Adair, submitted that there is no utility in the claims against the BVI Defendants and that these claims are parasitic on the claim against Mr. Mittal. Therefore, if the claims against Mr. Mittal for breach of fiduciary duty fail the claims against the BVI Defendants will also (necessarily) fail. This is a very sweeping statement by counsel and it is too early in the proceedings to decide that the failure of the breach of fiduciary duty claims against Mr. Mittal will necessarily result in the automatic dismissal of the claims against the BVI Defendants. These are BVI law claims alleged to have been committed by the corporate Defendants acting by their directors, and it is possible that the claims can continue if the claim for breach of fiduciary claims against Mr. Mittal is dismissed.
40. In conclusion on this point, I find that there are serious issues to be tried in the proceedings. There is utility in the claims against the BVI Defendants and, subject to what I will say below on the issue of forum non conveniens, it is reasonable for this court to try claims.

¹⁰ Ibid note 9 at paragraph 213.

41. Having found that there are real issues to be tried between Global and the BVI Defendants that are reasonable for this Court to try, it is necessary to consider the final step in the process under the necessary or proper party gateway of whether Mr. Mittal, who is outside the jurisdiction, is a necessary or proper party to the claims. The relevant passages in **Gunn v Diaz** are subparagraphs (viii) and (ix):

“(viii) It is only if both limbs of PD 6B, para.3.3(1)(a) [CPR 7.3(2)(a)(i)] are satisfied that the court should go on to consider under sub-paragraph (b) [(a)(ii)] whether there is a good arguable case that B [Mr. Mittal] is “a necessary or proper party” to the claims between the claimant [Global] and A [the BVI Defendants]: *Erste Group Bank* at [38].

(ix) The question whether B is a “proper party” to the claim against A is answered by asking: “supposing both parties had been within the jurisdiction, would they both have been proper parties to the action?” *AK Investment* at [87] (applying *Massey v Heynes & Co* (1888) 21 Q.B.D. 330); *Nilon Ltd* especially at [15]. B will be a proper party if the claims against A and B involve one investigation or there is a sufficient “common thread” between them.”

42. Applying the test in subparagraph (ix) of **Gunn v Diaz**, if both the BVI Defendants and Mr. Mittal were within the jurisdiction they would have been proper parties to the claim. Further, the investigation by the Liquidators has disclosed that all the Defendants, including Mr. Mittal, participated in paying away the various sums of money comprising the claim, and that Mr. Mittal was the key human factor in the Challenged Transactions. On the facts of this case there is a sufficient common thread between Mr. Mittal and the BVI Defendants to make Mr. Mittal both a necessary and proper party to the claim.

43. I am satisfied that Global has met all the requirements of the necessary or proper party gateway in that the anchor defendants have been served and are actively opposing the claim; there are serious issues to be tried on the merits between Global and the BVI Defendants; it is reasonable for the court to try the claims and Mr. Mittal is a necessary or proper party for the trial of the claims. This finding is sufficient to affirm the Service Out Order and to dismiss the application for a declaration that the Court does not have jurisdiction to hear the claim.

Gateways 7.3(4) (tort), 7.3(8) (trusts) and 7.3(9) (restitution)

44. Learned counsel for Global, Mr. Matthew Hardwick KC, relied heavily on the necessary or proper party gateway and did not spend as much time in his written and oral submissions on the other gateways. His overarching submission on these gateways is that wrongful acts were committed by Mr. Mittal and the BVI companies, the monies were received by DIL and Meadswell in the BVI, and that the Scheme was operated to the detriment of persons domiciled in the BVI (DIL and Meadswell).
45. Mr. Adair's general response to these gateways is that they are not available to Global because the relevant acts constituting the torts, breach of trust and/or restitution claim were not committed within the BVI and no loss or damage was sustained in the BVI. This is a compelling response but as the claims qualify for service outside the jurisdiction using the necessary or proper party gateway it is not necessary for me to rule on the availability to Global of the other gateways.
46. I will now deal with the application made by all the Defendants to stay the proceedings against them on the ground of forum non conveniens.

The stay application – forum non conveniens – connecting factors

47. The Defendant's alternative position on the Application is that even though the Court has jurisdiction as of right to try the BVI Defendants, and may find that it has jurisdiction to try the claims against Mr. Mittal by upholding the Service Out Order (which it has done), it should not do so because the BVI is not the appropriate forum, or the forum conveniens, for the trial of the claims. The Isle of Man is the most appropriate forum and this Court should stay the action in favour of trial in the Isle of Man.
48. This statement of the Defendants' position on the stay application contains the main elements of the principle of forum non conveniens. The Court has jurisdiction as of right over the BVI Defendants by virtue of their incorporation in the jurisdiction, and over Mr. Mittal by the Service Out Order. The issue is whether the Isle of Man is an available forum that is more appropriate for the trial of the claims in the action. This is an objection

that is frequently raised in the courts of the BVI. There are several judgments at all levels of the courts where the opinion of Lord Goff of Chieveley in the leading case **Spiliada Maritime Corporation v Cansulex Ltd**¹¹ is referred to for the guidance that it provides on the principles relating to the doctrine of forum non conveniens.

49. Lord Goff's well-known principles include that it is a serious matter to order a foreigner to submit to trial in the local jurisdiction and that the court should be cautious in exercising discretion in making such an order. However, he did not go as far as to describe the jurisdiction as "exorbitant" as had been done by other courts in previous cases.¹² The modern approach to service out of the jurisdiction was developed and applied by the Supreme Court in **Abela and others v Baadarani**¹³ where Lord Sumption described the historic view of service out as being exorbitant or an interference with the sovereignty of the state of the foreign defendant as no longer a realistic view of the situation because, among other things, "Litigation between residents of different states is now a routine incident of modern commercial life."¹⁴ I agree that this view represents the modern approach to service of persons outside the jurisdiction.

50. Returning to the **Spiliada**, Lord Goff, having acknowledged the seriousness of ordering service of a local claim on a foreigner outside the jurisdiction, went on to say -

"The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England [BVI] is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right."¹⁵

The obverse burden that Lord Goff was referring to is the burden on a defendant who was served as of right in the jurisdiction, such as the BVI Defendants, and is now seeking a stay on forum grounds. They must prove that there is an available forum that is clearly more appropriate for the trial of the action. The important point is that the party relying on forum principles must satisfy the court that the chosen forum is clearly the more appropriate for the trial of the claim. If the claimant is applying the chosen court is the

¹¹ [1987] AC 460.

¹² Ibid at page at 480.

¹³ [2013] 4 All ER 119.

¹⁴ Ibid at paragraph 53.

¹⁵ Supra note 9 at page 481.

court in which the challenged claim is brought. If the defendant is applying for a stay he must satisfy the court that the foreign court is available and that it is clearly the more appropriate forum for the trial of the action.

51. Lord Goff's opinion in **Spiliada** is also well known for its clear exposition of the steps to be taken when a court is considering an application for a stay based on forum non-conveniens. In summary, Lord Goff said that there are three steps in the search for determining the most appropriate forum, namely:

- (i) is there another available forum;
- (ii) if so, is that forum more appropriate for the trial of the claim; and
- (iii) if there is another more appropriate forum a stay should be granted unless there is a risk that the claimant will not receive justice in the more appropriate forum.

In steps (i) and (ii) the burden of proof is on the defendant challenging the jurisdiction (the Defendants). If there is an available forum that is more appropriate for the trial of the claim the burden shifts to the claimant (Global) to show why it will not receive justice in the more appropriate forum.

52. At the first step the Defendants must prove that there is another available forum to try the claims. The Defendants rely on the evidence of Ms. Chiva Samani, an Isle of Man advocate, who opined that the Isle of Man is an available forum for the trial of the claims against the Defendants. Ms. Samani's evidence is a short 1 ½ page affidavit in which, apart from formalities about herself, she made two short statements that are relevant to this case, namely – (1) that she had read the claim form and statement of claim; and (2) that "From my review of these documents and the claims pleaded therein, I can confirm that the Isle of Man Court is an available forum of competent jurisdiction to hear the claims against the defendants." The affidavit does not comply with part 32 of the CPR dealing with expert evidence, and her conclusion about the availability of the Isle of Man Court is unsupported by any reasoning or reference to authorities. It is a bald assertion. This is highly unsatisfactory "expert evidence" but there is no other expert evidence that Manx Court is not an available forum for the trial of the claims. Further, there is lay evidence from Mr. Vijay Singh, a director of Meadswell, and Mr. Rajib Das, a director of DIL and Prasan, that the BVI Defendants are willing to submit to the Isle of Man Court.

Their willingness to submit buttresses Ms. Samani's evidence that the Isle of Man is an available forum for trying the action.

53. In the circumstances I find that the Defendants have discharged the burden of showing that it has a good arguable case that the Isle of Man is an available forum for the trial of the action.

54. The next step is to determine whether the Defendants have discharged the additional burden of showing that the Manx Court is clearly the more appropriate forum for the trial of the action, or as Lord Goff put it "The forum in which the case can be suitably tried for the interests of all the parties and of ends of justice."¹⁶ (borrowing from the phrase coined by Lord Kinnear in **Sim v Rabinow**).¹⁷ The procedure to determine which of the two forums, BVI or the Isle of Man, is clearly the more appropriate for trying the claims in the action involves considering various matters connecting the claims to each jurisdiction, commonly referred to as the connecting factors. 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.

55. Where a connecting factor points elsewhere and not to one of the two competing forums, or it points equally to both forums, it is treated as a neutral factor and has little or no effect in the balancing exercise.

56. The connecting factors in this case are:

- (i) the governing law of the claims;
- (ii) the domicile or place of incorporation of the parties;
- (iii) the location of witnesses;
- (iv) the location of documents and other materials to be used in the trial of the claims; and
- (v) languages spoken by the parties and the witnesses.

¹⁶ Supra note [11] at page 476.

¹⁷ (1892) 99R 665 at 668.

Governing law of the claims

57. The governing law of the claims in the action is an important factor in the balancing exercise of deciding which of two forums is clearly more appropriate for the trial of the action. This point has been made in the leading English authorities and followed by the courts of the Eastern Caribbean. In **Livingston Properties Equities Inc and others v JSC Eurochem and another**¹⁸ Lady Arden opined -

“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.”¹⁹

Similarly, Lord Mance said in **VTB Capital plc v Nutritek International Corp and others**:

“The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies.”²⁰

Livingston is a decision of the Privy Council on appeal from the Eastern Caribbean Court of Appeal and **VTB Capital** is a decision of the UK Supreme Court. Both decisions were followed by the EC Court of Appeal on this point in **Tibit Limited v The Federal Republic of Nigeria**.²¹

58. The search for the governing law of a claim can be elusive and difficult to apply in determining the forum conveniens, especially in a case such as the present where there are several causes of action and events happened in different jurisdictions. In a simple case the parties agree which law should govern their relations. This is usually in breach of contract claims where the parties stipulate the law of the jurisdiction that will govern matters related to the contract. The more common situation is a dispute between A and B and there is no agreement as to which law governs matters arising in the dispute. In

¹⁸ [2020] UKPC 31.

¹⁹ Ibid at paragraph 12.

²⁰ [2013] 2 AC 337 at 369 paragraph 46.

²¹ BVIHCMAP2021/0042.

this situation the court is called upon to determine governing law of the claims in the dispute.

Governing law – breach of fiduciary claims

59. The claims against Mr. Mittal include that he, as the controlling mind of Global and acting with other directors of Global, committed various breaches of fiduciary duty that he owed to Global. Alternatively, if he did not orchestrate the breaches, he assisted the directors of Global to commit the breaches knowing that the resulting transactions were dishonest. As such he is liable for breaches of fiduciary duty and/or dishonest assistance.

60. The governing law of a claim for breaches of fiduciary duty owed to a company by a director is uncontroversial. The general rule is that the governing law of such claims is treated as a matter of internal management of the company and is governed by the law of the place of incorporation. Global is a company incorporated in the Isle of Man and there is no dispute that the claims for breach of duty as a director of the Company and for dishonest assistance are governed by the laws of that country. The Liquidators acknowledged this in the ex parte application for permission to serve the claim outside the jurisdiction. Mark Wilson, one of the Joint Liquidators, said in paragraph 365 of his affidavit filed on 21 July 2023 –

“The Joint Liquidators understand that the claim for breach of fiduciary duty will likely be governed by Manx law on the basis that the duties in question are owed to a Manx registered company. For the same reason, the Joint Liquidators understand that the claim for dishonest assistance will likely be governed by Manx law. The general principles applicable to these claims as a matter of Manx law are addressed in a letter dated 18 July 2023 provided to the Liquidators by Rob Long of Long and Co Limited, a Manx advocate.”

61. This is a strong connecting factor in favour of trial in the Isle of Man of the claims for breach of fiduciary duty and dishonest assistance. However, Global raised two counterpoints to this way of proceeding, namely-

(a) the strength of the connection to the law of the place of incorporation is weakened when the law of the chosen forum (BVI) is similar to the law of the place of incorporation on the defendant to the relevant claim (Isle of Man) (“Point A”); and

- (b) the rule that the trial of a claim should take place in the forum of the governing law is not absolute and the court can and should examine all circumstances ("Point B").

62. Support for Point A can be found in **Dicey, Morris & Collins – The Conflict of Laws**

14th edition paragraph 12 – 029:

"If the legal issues are straightforward, or if the competing fora have domestic laws which are substantially similar, the identity of the governing law will be a factor of rather little significance. But if the legal issues are complex, or the legal systems very different, the general principle that a court applies its own law more reliably than does a foreign court will help to point to the more appropriate forum, whether English (BVI) or foreign."

63. Mr. Hardwick KC submitted that the law about the fiduciary duties owed by a director of Manx company is not complicated and is similar to BVI law. As such, the Court should not attach undue weight to this connecting factor in the balancing exercise. He referred to the opinion of Lord Mance in **VTB v Nutritek**²² where, after dealing with the issue of the similarity between the competing laws, he said -

"However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum."

64. The dictum by Lord Mance was referred to and relied on by the Court of Appeal in **Livingston** to support the Court's finding that the governing law of the claims was important because "[T]here are important differences between Russia and the BVI in the legal principles applicable to the claims and available remedies."²³ Mr. Hardwick KC referred to both **VTB** and **Livingston** and invited the Court to attach very little weight to the fact that the breach of fiduciary duty and dishonest assistance claims are governed by Manx law because of the similarities between BVI law and Manx law about these claims. To support his position he relied on the expert report of Robert Long, a Manx advocate engaged by Global. Mr. Long opined that the duties that directors of a Manx company owe to the company that appointed them are heavily influenced by the duties

²² Supra note [19] at paragraph 46.

²³ Supra note [17] at paragraph 46.

established by the English common law relating to directors' duties. Further, the Isle of Man court had not yet specifically considered whether the reasoning of the UK Supreme Court in **BTI 2014 LLC v Sequana SA & Ors** that directors owe duties to creditors of a company if the company is or may be insolvent applies. However, if that situation were to arise it is likely that the Manx Court would follow the decision in **BTI** and find that directors of a Manx company owe duties to act in the interest of the company's creditors in an insolvency or potential insolvency situation. Mr. Long also cited the Manx case of **Isle of Man Financial Services Authority v Louis and others** (judgment 8 April 2019) and stated that a Manx Court held in that case that "where a company is or may be insolvent or on the verge of insolvency, directors owe a duty to consider and act in the interests of its creditors in general and impartially."

65. I have reviewed Mr. Long's report and I am satisfied that it shows that there are no significant differences between Manx law and BVI law relating to the duties of directors generally and specifically with reference to those duties in the context of a company that is or may become insolvent.
66. The second point raised by Mr. Hardwick (Point B), which follows from and develops the first point, is that while it is preferable that a case should be tried in the country whose law applies, this is only a general rule or preference. This was established by Lawrence Collins J (as he then was) in **Konamaneni and others v Rolls Royce Industrial Power (India) Ltd and others**.²⁴ The learned judge began his treatment of this point with a consideration of the Chancery Court decision of **Permamon Press Ltd v Maxwell**²⁵ where Pennycuik J had to consider an application to order the defendant, Robert Maxwell, to call a meeting of the New York company of which he was the president. Pennycuik J refused the order on the ground that the power to call the meeting was a fiduciary power of a discretionary nature vested in the defendant as an officer of the New York company to which he owed a duty. It was not open to an English court to make orders regarding the exercise of such a power arising out of the internal management of a foreign company.

²⁴ [2002] 1 WLR 1269.

²⁵ [1970] 2 All ER 609.

67. In **Konanameni** Collins J considered an application by shareholders of a company incorporated in India for permission to bring a derivative action in England against two English companies on behalf of the Indian company and for permission to serve the Indian company (a necessary defendant in the English proceedings) outside the jurisdiction. The master granted the application for service outside the jurisdiction. The defendant companies applied to set aside the service out order. Collins J found that the court had jurisdiction to entertain the derivative proceedings but set aside the order for service out on the ground that the claimants failed to show that England was the forum conveniens for bringing the derivative claim.

68. In considering the court's discretionary powers regarding foreign proceedings Collins J took note of Pennycuik J's findings in **Pergamon Press** and continued

“Two points are being made by Pennycuik J. The first is that the extent of the duties of the director of a foreign company is governed by the law of that company, the place of incorporation. The second is that the courts of that place are “the only proper tribunal” in which the members can seek to control the exercise of that power. The first point is unexceptional and indeed obvious, but it may be that the second proposition goes too far, in allocating exclusive responsibility to the courts of the place of incorporation for making orders controlling the exercise of discretionary powers. The decision predates the development of the modern forum non conveniens principles from later in the 1970s: see *The Atlantic Star* [1974] AC 436, and was given at a time when the prevailing view was that if the English court had jurisdiction, there was not normally a discretion to refuse to exercise it. If a similar point were to arise for decision today, I consider that the correct approach would be to say that the courts of the place of incorporation are very likely indeed to be the appropriate forum, but not so overwhelmingly that they will necessarily be the exclusive forum. So understood *Pergamon Press Ltd v Maxwell* [1970] 1 WLR 1167 confirms that questions of internal management are governed by the law of the place of incorporation, and that the courts of that place are best suited to give decisions on the control and extent of the powers of the management.” (Emphasis added)

69. The important point that emerges from Lord Collins's judgment for the purposes of this case is that he acknowledges that the duties of directors are fiduciary duties that are governed by the law of the place of incorporation and that the courts of that jurisdiction are best suited to try such claims. However, the jurisdiction to do so is not exclusive and the court has the discretion to order that the claim can be tried in another jurisdiction which the court finds to be clearly the most appropriate forum of the action.

70. Applied to this case Mr. Hardwick KC submitted that, notwithstanding that the breach of fiduciary duty and dishonest assistance claims are governed by the Manx law, the Court should order that the trial take place in the BVI for at least the following reasons:

- (a) although the breach of fiduciary duty and dishonest assistance claims are governed by Manx law this is not a case where the directors' breaches go to the internal management of Global. Instead, the Defendants have engaged in an asset-stripping scheme to make the assets of Global unreachable by its creditors. The Court is not being asked to regulate the management of the company by the directors but to allow the Liquidators to pursue a claim for the recovery of the misappropriated assets for the benefit of the company's creditors.
- (b) For the reasons set out below the BVI is the centre of gravity of the dispute between the parties and the most appropriate forum for the trial of the action.
- (c) The remaining claims are governed by BVI law and should be tried in one court, the BVI, to avoid risks of inconsistent decisions and minimise costs and inconvenience.

71. The upshot of Mr. Hardwick's submissions is that the claims against Mr. Mittal for breach of fiduciary duty and dishonest assistance are governed by Manx law and this is an important but not decisive factor in the balancing exercise to determine the forum that is clearly the most appropriate for the trial of the claims.

Governing law – other claims

72. The claims against DIL and Meadswell under the CLPA are statutory claims and are governed by laws of the BVI. However, following the analysis in the preceding paragraphs regarding the proper law of the claims for breach of fiduciary duty and dishonest assistance, it does not follow that the BVI is the most appropriate forum for the trial of the CLPA claims. But it is a factor in favour of trial in the BVI.

73. The claim for knowing receipt is a restitutionary claim and the determination of the governing law of this claim is not straightforward. In **Sibir Energy PLC v Gregory Trading SA and others**,²⁶ Barrow JA writing for the Court of Appeal, gave a learned discourse on the test for determining the governing law of claims based on an equitable obligation to restore property knowingly received in breach of trust (knowing receipt). Barrow JA reviewed the alternative tests

²⁶ BVI Civil Appeal No 26 of 2005.

for determining the governing law of a knowing receipt claim as either the place of receipt of the disputed property or the place with which the obligation to restore the disputed property has its closest and most real connection. He decided at paragraph 23 that the latter test is the proper test. The Court of Appeal considered both tests in the later case of **Tibit** and also applied the test of the closest and most real connection to the restitutionary claims in that case.²⁷

74. I will apply the test of the place with which the obligation to restore the disputed property has its closest and most real connection in determining the governing law of the claim for knowing receipt. The first point to note is that there is no evidence that the knowing receipt claim has any connection with the Isle of Man other than that the monies that were paid out belonged to Global, a Manx company. Therefore, Manx law is not an option for being the governing law of the knowing receipt claim.

75. The other option is the BVI as the governing law of the claim. The claim was pleaded in paragraphs 99-103 of the statement of claim and supplemented by the evidence of Mark Wilson, one of the Liquidators. At paragraph 369 of his affidavit filed on 21 July 2023 Mr. Wilson said that the BVI Defendants were enriched by the knowing receipt of Global's assets in the BVI. As such this claim is likely governed by BVI law. This argument is superficially attractive but factually and legally incorrect. There is no evidence that DIL and Meadswell received the monies in the BVI. Contrary to Mr. Wilson's evidence, the fact that the monies were received by BVI incorporated entities does not mean that the monies were received in the BVI. In fact, there is no evidence of where the monies were received. This is similar to what happened in **Livingston**, a case involving allegations of international fraud committed by various persons in different parts of the world. There were several BVI companies involved in the scheme and there were claims based on fraud, unlawful means conspiracy, dishonest assistance and knowing receipt, but no evidence of where the events underlying the claims occurred. The judge, faced with these claims and little or no evidence to determine where and by whom the acts were committed, did not make a finding on the proper law of the claims and applied BVI law as the law of the forum. This finding was upheld by the Privy Council. At paragraph 32 of the Board's opinion Lady Arden noted that -

“The Board therefore has much sympathy with the judge's approach that the governing law was not knowable at that point in time and was therefore a neutral factor.”

²⁷ Supra note 21 paragraph 39.

76. I adopt a similar stance in this case. There is little or no evidence that the Court can use to make an informed finding of the forum with which the knowing receipt claim has its closest and most real connection to determine the governing law of the claim. As such, I will apply BVI law as the law of the forum to this claim.

77. The claim for unlawful means conspiracy is a claim in tort. The governing law of a tort claim is determined by reference to the place where the tort was committed or the damage from the tort was sustained. This is reflected in the tort gateway in rule 7.3 (4) which provides that the claim form may be served out of the jurisdiction if the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction. The claim for unlawful means conspiracy is pleaded in paragraph 107-111 of the statement of claim and supported by the evidence in paragraphs 272-274 of Mr. Wilson's affidavit. In paragraph 274 he deposed that -

“Given that the conspiracy entailed various actions by DIL, Meadswell and Prasan, all of which are companies registered in the BVI, tortious acts likely took place in the BVI such that there is a good arguable case that BVI law governs these claims.”

This evidence and the pleading suffer from the same weakness as the evidence about knowing receipt – the fact that the tortious acts may have been committed by BVI companies and the monies received by BVI companies do not mean that the acts occurred in the BVI or that the monies were received in the BVI. Further, there is no evidence that tortious acts or the damage suffered occurred in the Isle of Man. In the circumstances the governing law of the claims for unlawful means conspiracy are “unknowable” at this stage and the court will apply BVI law to these claims as the law of the forum.

78. The Debt Claim suffers a similar fate. The underlying documents for these transactions do not contain choice of law provisions and there is no evidence connecting the transactions to the Isle of Man other than that the monies that were paid out was Global's money. There is some evidence that some of the Loan proceeds were received and used in London, but not the Isle of Man or the BVI. I will apply BVI law as the law of the forum to these claims.

79. To sum up the issue of the governing law of the claims, the claim for breach of fiduciary duty and dishonest assistance are governed by Manx law which is a strong indicator in favour of trying this claim in the Isle of Man. However, the strength of this connection is weakened by the fact that on the evidence Manx law is similar to BVI law in all material particulars. The CLPA claim is a statutory claim that is governed by BVI law. It is not feasible at this stage to determine the

proper law of the claims for knowing receipt and unlawful means conspiracy and the court will apply BVI law as a law of the forum to these claims. The same is true of the Debt Claim and the Court will apply the law of the forum.

Witnesses and travel

80. Mr. Adair relies heavily on the availability and location of witnesses as a strong connecting factor in favour of the Isle of Man. He made the obvious point that none of the potential witnesses reside in the BVI and all witnesses would have to travel to attend the trial. But the same is true of trial in the Isle of Man. The only potential witness who resides in the Isle of Man is Craig Mitchell, one of the Liquidators, and he has expressed a preference for trial in the BVI. Mr. Mittal lives in England as well as Messrs Wilson and Dowers; Mr. Arvind Sinha of Prasan is based in India; Mr. Rajib Das of DIL and Prasan is based in Dubai; and Mr. Vijay Singh of Meadswell is based in China.
81. Mr. Mittal made the additional point that travel to the Isle of Man is more convenient than travel to the BVI. Even if this is correct it is not a strong connecting factor – it goes to convenience and not appropriateness. Mr. Mittal's health is also important but it is a matter that can be accommodated and dealt with if there is a trial in the BVI. All the parties speak English and if Mr. Mittal needs an interpreter because English is not his first language, an interpreter can be provided.
82. The issues relating to witnesses, for and against trial to the respective jurisdictions, cancel each other out and I regard this issue as what I described in paragraph [55] above as a neutral factor not favouring either jurisdiction.
83. The location and availability of documents is not a significant factor in this case. There is no evidence that the documents for the trial are in the Isle of Man or the BVI. As a matter of inference some of the documents in the form of corporate records may be in the BVI at the registered offices of the BVI Defendants. If there is any difficulty retrieving these documents the registered agents will be subject to the BVI Court's jurisdiction. The key consideration regarding documents is that in modern commercial litigation documents are moved around with relative ease using the internet and there is no longer the need to transfer boxes of documents across borders. This is a neutral factor not favouring the BVI or the Isle of Man.

84. Global argued that a strong connecting factor to the BVI is that the three BVI Defendants are BVI incorporated companies. In his written submissions Mr. Hardwick noted the dictum of Adderley J in **Best Grain K/S 7 Samoran v Emerwood Ventures Ltd**²⁸ that “mere incorporation in the BVI is not sufficient to found jurisdiction”,²⁹ but submitted that the BVI Defendants were an integral part of the scheme to strip assets out of Global and put them beyond the reach of its creditors. This and other factors such as the receipt of the monies paid out of Global, make the BVI the “centre of gravity of the claims” and as such a strong connecting factor to the BVI. The phrase “centre of gravity” has been used in recent English cases but I do not think that it changes the principles relating to the test for determining the forum conveniens, and I agree with Mr. Adair’s comment that -

“In recent English decisions on forum the phrase “centre of gravity” has been used as a colloquial way of identifying the jurisdiction with which a claim has the strongest link having regard to a range of factors”.³⁰

In other words, the test for determining the forum conveniens for the trial of a claim is still governed by the **Spiliada** principles with the court weighing the connecting factors and giving such weight to each factor as is appropriate in all the circumstances.

85. Mr. Hardwick KC attempted to develop the point about the incorporation of the BVI Defendants in the BVI as a connecting factor by submitting that as a matter of policy persons using BVI companies to carry out their nefarious activities should accept that in the event of a challenge to their conduct the use of the BVI companies will provide a strong connection to the BVI. He referred to the decision of the Court of Appeal of the Cayman Islands in **Telesystem International Wireless v CVC Opportunity Equity Partners**³¹ which considered the application of public policy considerations in this area and concluded at page 23 -

“We understand the appellants to be saying that the public policy factor is so strong that once an ELC or an NRC³² defendant is served as of right in the Cayman Islands, a forum non conveniens application should be rejected. We do not agree. We hold that public policy is an important factor to be taken into consideration by the trial judge but it does not trump all other factors. At the end of the day, the test must still be that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other

²⁸ BVIHC(COM) 2018/153.

²⁹ Lady Arden made a similar finding in **Livingston** at paragraph 39 of her opinion.

³⁰ Defendants’ skeleton argument paragraph 38.

³¹ Cayman Islands Civil Appeals Nos 15, 16 & 18 of 2001.

³² ELC’s and NRC’s are Cayman Islands companies.

available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action.”³³

86. Apart from the reference to public policy I agree with this statement of principle. The place of incorporation of a corporate defendant in a forum application is a factor that the court can and should consider, but by itself it is not a strong connecting factor and it certainly does not confer jurisdiction on the court. The fact that it should be considered is not a matter of BVI public policy but because it is a factor that is usually considered in applying the test for the forum conveniens in **Spiliada**.

Summary of the connecting factors

87. Based on the court’s analysis of the connecting factors the claims against Mr. Mittal for breach of fiduciary duty and dishonest assistance are governed by Manx law and this is a connecting factor in favour of trial in the Isle of Man of this claim. However, the strength of that connection is weakened by the court’s finding that the BVI law relating to the claims is similar to Manx law and the latter can be applied by the courts of the BVI. This claim can be tried in the BVI which has similar laws and a Commercial Court that is accustomed to trying similar claims.

88. The claims against the BVI Defendants under the CLPA are governed by BVI law and are triable in the BVI. The other claims against the BVI Defendants do not have a distinct governing law but they are BVI claims that have been commenced in the BVI and the BVI court will apply the law of the forum to those claims.

89. The fact that the BVI Defendants are BVI incorporated companies is also a factor in favour of trial in the BVI.

90. The issues relating to witnesses, documents and language are neutral factors that do not weigh heavily in the balancing exercise.

91. An important factor is that the courts generally favour trial of all related claims by the same court. The claims in this case are undoubtedly related and arise out of the same factual background. All the claims should be tried together and the trial should take place in the most appropriate

³³ Ibid note 31 at paragraph 23 - per Rowe JA.

forum. This can be extracted from Lord Collins' opinion in **Altimo Holdings and Investments Limited and others v Kyrgyz Mobil Tel Ltd and others**³⁴ where he said "[T]he task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and ends of justice." On my analysis, the claims for breach of fiduciary duty and dishonest assistance against Mr. Mittal are governed by Manx law but can be tried in the BVI applying Manx law which is similar to BVI law. The BVI Defendants are BVI incorporated companies that are domiciled in the BVI. They have been served as of right in the jurisdiction and have entered notices to defend the claims. The claims against them are either governed by BVI law (the CLPA claim), or have no discernible governing law at this stage and the BVI court will apply the law of the forum.

92. In all the circumstances I find that the BVI is the forum that is more suitable to try the action for the interests of all the parties and the ends of justice, and the Defendants have not discharged the burden of showing that there is an available forum that is clearly more appropriate for trying the claims in the action. In other words, the BVI is the forum conveniens.

Breach of duty of full and frank disclosure

93. The Defendants claim that Global breached its duty of full and frank disclosure at the ex parte hearing in July 2023 by failing to draw to the Court's attention the conflict of laws principle that issues relating to the internal management of the company and the declaration and payment of dividends are governed by the law of the place of incorporation, and the courts of the place of incorporation are best suited to deal with such issues. Further, that the judge was not told that the transactions and acts complained of did not take place in the BVI and that no damage or detriment. was suffered in the BVI. As such, the jurisdiction gateways relied on in the Application were not available to Global.
94. The duty of full and frank disclosure on an ex parte application is well-known and often dealt with by this Court. It includes disclosing all known facts that are material to the application and making proper inquiries about other material. The disclosure includes all material, whether factual or legal and whether for or against the applicant. The material must be presented fairly and objectively and include both sides of the argument. The duty is owed to the court. Generally,

³⁴ [2012] 1 WLR 1804 at paragraph 88.

where there is a breach of this duty the court will not allow the applicant to keep the benefit of the ex parte order regardless of the state of the applicant's knowledge. It is not every act of nondisclosure that will result in the immediate discharge of the ex parte order. The undisclosed fact must be sufficiently material to justify immediate discharge of the order without examination of the merits. Materiality is to be judged by the court and not by the applicant or his legal advisers. The court has the discretion to regrant an ex parte order that has been set aside for material nondisclosure.

95. Applying the principles to the facts of this case it is correct that Global did not refer to the internal management rule and the cases on the point at the ex parte hearing. What it did was to concede in paragraph 365 of Mr. Wilson's affidavit that the claims for breach of fiduciary duty and dishonest assistance are governed by Manx law. Global also conceded in paragraph 305 of Mr. Wilson's affidavit that the payment of dividends was a matter of Manx law. Both concessions referred to the expert evidence of Mr. Long which contains details of Manx law relating to the fiduciary duty and the payment of dividends by a Manx company. Global's position at the ex parte hearing was that this is not a case involving the internal management of its affairs but one of a scheme to strip assets out of Global and make them unreachable by creditors. Judged in the context of the evidence and submissions at the ex parte hearing Global's concessions made it clear that it accepted that Manx law governed the issues of the directors' duty to Global and the payment of dividends by the Company. However, on the facts of the case these issues could be tried by the BVI court along with the claims against the BVI Defendants. In short, I do not think that the failure to deal specifically with the internal management rule and the related cases was a material nondisclosure by Global.

96. Similarly, the failure to mention that none of the transactions or acts complained of took place in the BVI and that no damage or detriment was suffered in the BVI is not material nondisclosure. Global's case is that the monies paid out of Global were received by the BVI companies and by inference they were received in the BVI. I have rejected this submission but a party can make incorrect submissions on an ex parte application "[P]rovided that such errors do not deprive the court of knowledge of any material circumstance ... and the court receives a fair presentation of the case."³⁵ I do not think that the Court was deprived of the knowledge that this was a case that involved claims governed by Manx law that could be tried in the Isle of Man. However, Global

³⁵Commercial Injunctions – Steven Gee KC 6th ed. 9-001.

submitted that the BVI was clearly the most appropriate court for the trial of all the claims in the action.

97. The Defendants' application to set aside the ex parte order for material non-disclosure is not made out.

Disposal

98. The Defendants' application to set aside the Service Out Order and the service of the claim on the 4th Defendant, and for a stay of the proceedings on the ground of forum non conveniens, is dismissed with costs to the Claimant to be assessed if not agreed within 21 days.

Paul Webster
High Court Judge [Ag.]

By the Court
Registrar