

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2023/0015

BETWEEN

Bridge Holdings International Corp.

Claimant/Respondent

and

Kiran Taneja

Defendant/Applicant

Appearances:

Tom Roscoe and Lauren Peaty for the Defendant/Applicant
Khamaal Collymore for the Claimant/Respondent

2024: 13 March;
12 July.

Application to set aside service of claim outside the jurisdiction and/or for a stay of the proceedings - forum non-conveniens – gateways for service out – company gateway and contract gateway - CPR 2000 rules 7.3(3)(b)(ii), 7.3(7), 7.7, 9.7 and 9.7A

JUDGMENT

- [1] **WEBSTER J [Ag.]** The application before the Court concerns a dispute between the Claimant/Respondent, Bridge Holdings Limited and Ajay Taneja ("**Ajay**")¹ on the one hand, and the Defendant/Applicant, Kiran Taneja ("**the Applicant**"), on the other. Ajay is the son of the Applicant. On 6 February 2023 the Company started these proceedings in the Commercial Court claiming declarations regarding certain monies being held by the Company for distribution to its shareholders. The Company was granted leave to serve the claim form on the Applicant outside the jurisdiction. Following service of the claim on 7 August 2023 the Applicant applied for a declaration that the Court does not have jurisdiction to try the claim, and for an order that service of the claim to be set aside. Alternatively, for a declaration that the Court should not exercise jurisdiction over the claim and for a stay of the proceedings in favour of the Miami-Dade Circuit Court ("**the Application**"). This is my decision on the Application.

Parties and Background

- [2] Bridge Holdings Limited ("**the Company**") is a company incorporated and domiciled in the British Virgin Islands ("**BVI**"). Its shares were originally owned by the Applicant's other son, Pavan Taneja ("**Pavan**"). From January 2015, the Company was involved in heavily contested litigation in the Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County, against persons who are not involved in these proceedings ("**the Miami Proceedings**"). The litigation was conducted on behalf of the Company initially by Pavan. Pavan passed away in 2016 and his 100% shareholding in the Company was inherited by the Applicant who became the sole shareholder of the Company. The Applicant engaged the services of Ajay to continue the Miami Proceedings on behalf of the Company on the basis of an agreement that he would receive a 50% share of the net proceeds of the litigation. The arrangement was recorded in agreement between the Applicant and Ajay dated 13 February 2017 described in the evidence and in this judgment as "**the Inter**

¹ References to Mr. Ajay Taneja and Mr Pavan Taneja by their first names only is for convenience and clarity and no disrespect is meant

Family Agreement". For reasons that are not material for this judgment, Ajay's entitlement to cash under the Interfamily Agreement was converted to a 50% shareholding of the Company.

- [3] The Applicant appointed Ajay as the sole director of the Company on 19 June 2017.
- [4] The Applicant made another agreement with Ajay on 18 July 2019 which increased Ajay's shareholding in Bridge to 75% with a corresponding decrease in her shareholding to 25%. This agreement is referred to in the evidence and in this judgment as ("**the Assignment Agreement**"). The Applicant's evidence is that she did not have a chance to consider the Assignment Agreement properly before she signed it, and that she did not appreciate the financial impact that it would have had on her.
- [5] The Miami Proceedings were settled in March 2020 on terms set out in a confidential settlement agreement ("**the Settlement Agreement**") by which the Company was to receive an agreed sum payable in instalments ("**the Settlement Proceeds**"). In due course the Settlement Proceeds of over \$800,000 was paid to the Company.
- [6] When the time came to distribute the Settlement Proceeds Ajay claimed 75% based on his shareholding in the Company. The Applicant disputed this and asserted that she was entitled to 50% as reflected in the Inter Family Agreement. The parties attempted to settle their differences with the assistance of their lawyers in Miami but this was unsuccessful. As a result, they agreed to mediate the dispute. The mediation took place in Miami before Jeffery L Kravetz, a certified Circuit Court mediator of the Florida Supreme Court. The Applicant and Ajay, both of whom reside outside the United States, participated by Zoom. The mediation resulted in an agreement dated 25 June 2020 ("**the Mediation Agreement**"). The parties to the Mediation Agreement are the Company, the Applicant and Ajay. The following clauses of the Mediation Agreement are relevant to this application:

- (1) By clause 2 the parties agreed that "[T]he Escrowed Funds and the Settlement Proceeds under the Settlement Agreement are the

exclusive property of Bridge and that its shareholders have no claim to them”.

- (2) Clause 5 records that the shares in Bridge are owned as to 75% by Ajay 25% by the Applicant.
- (3) Clause 7 provides that the balance of the Settlement Proceeds shall be distributed as follows-

- (i) “AMK [the escrow agent] will hold and apply \$78,369.81 (sic)² towards the payment of its attorneys' fees for work done for Bridge, and to pay a \$1 ,000 courtesy fee to the Escrow Agent (as noted at 11, below) leaving a balance of \$800,000.00 available for distribution.
- (ii) AMK will promptly distribute 25% of the \$800,000 balance remaining, namely \$200,000.00, as a distribution to Kiran in respect of her 25% shareholding in Bridge, to the trust account of her attorney.
- (iii) The remaining \$600,000.00 is the property of Ajay, being the corresponding distribution to him as 75% shareholder. Of this sum, AMK will promptly distribute \$532,595.53 to him and will hold the remaining \$67,404.47 for payment of each of the Other Lenders upon receipt of Wiring Instructions and a general release in conventional form of all claims by each lender against Bridge and Ajay personally.”

- (4) Clause 8 deals with the distribution of future settlement proceeds. The clause reads -

“Bridge will first apply future Settlement Proceeds towards the payment of any professional fees and other corporate expenses and debts as may fall due, reserving such amounts for future contingencies as it may deem appropriate, and will distribute the balance to the two shareholders. All distributions shall be made simultaneously as to 75% to Ajay and as to 25% to Kiran.”

- (5) Clause 12 is headed “Jurisdiction and venue” and provides that “The parties agree to submit to the non-exclusive personal jurisdiction and venue of the Miami-Dade Circuit Court to determine any disputes arising under or related to this agreement.

² This amount should be \$878,369.81

- [7] On 24 November 2021, the Applicant received a payment of \$16,000.00 on account of her share of the Settlement Proceeds. A second payment is due to the Applicant but has not been paid because of issues relating to her opening a bank account in Nevis where the Settlement Proceeds are held in an account in the Company's name at Hamilton Reserve Bank.
- [8] The Company resolved through its sole director Ajay, to retain a portion of the Settlement Proceeds ("**the Reserve Fund**") to pay current expenses and future contingencies of the Company as contemplated by clause 8 of the Mediation Agreement. The Applicant did not agree with this decision. She accepted that actual expenses should be paid out of the Settlement Proceeds but it was not necessary to set aside any portion of the Proceeds to settle contingent or future expenses of the Company. As a result, the Applicant filed a motion in the Miami Proceedings on 17 May 2021 to compel enforcement of the Mediation Agreement. The Company opposed the motion and applied to strike it out. It appears from the evidence that this motion was never heard and determined.

The BVI Claim

- [9] The issues of the payment of the balance of the Settlement Proceeds to the Applicant and the creation of the Reserve Fund remained unresolved. On 6 February 2023, the Company filed a claim in the Commercial Court against the Applicant seeking the following relief:
- (1) a declaration that the Settlement Proceeds are exclusively the property of the Company;
 - (2) a declaration that the Company may, at its sole discretion, withhold from the net Settlement Proceeds such amounts as it deems appropriate for future contingencies before distribution to the shareholders of the Company; and
 - (3) costs and further or other relief as the court deems fit.

- [10] The Company also applied ex parte for permission pursuant to rule 7.3(7) of the Civil Procedure Rules 2000 (“CPR”)³ to serve the claim form on the Applicant outside the jurisdiction. CPR 7.3(7) provides a gateway for service out of a claim form if the subject matter of the claim relates to conduct of the affairs of a BVI company.⁴
- [11] The service out application was made on the ground that the claim falls under rule 7.3(7) because it relates to the management and the conduct of the affairs of the Company and the well-being of the Company which was being imperilled at the hands of the Applicant. The essence of the conduct of the Applicant that the Company complained about was the Applicant’s opposition to the use of any part of the Settlement Proceeds to create a reserve account to settle contingent or future liabilities of the Company.
- [12] The service out application was heard by the Court on 20 March 2023 and the learned judge granted permission to serve the claim form on the Applicant outside the jurisdiction. The claim form was served on the Applicant on 7 August 2023. The Applicant filed an acknowledgement of service on 15 September 2023 stating her intention to dispute the jurisdiction of the court to try the claim.
- [13] The Applicant filed the Application on 10 November 2023 challenging the jurisdiction of the Court. The Application was made under CPR 7.7 which authorises a person served with a claim form outside to apply to set aside service of the claim. The Application was on three grounds:
- (1) service of the claim form should be set aside under CPR 7.7 because the claim does not fall under the claimed gateway under CPR 7.3(7) for service out;
 - (2) the proceedings should be stayed on the ground that the BVI is not the forum conveniens for the trial of the claim; and/or

³ Counsel for both parties agreed that the Application should be considered under CPR 2000 and not CPR (Revised Edition) 2023

⁴ Rule 7.3(7) is set out in paragraph 19 below

(3) the Company breached the duty of full and frank disclosure in the ex parte application for permission to serve the Applicant outside the jurisdiction.

[14] The general rule is that an application to set aside an order for service outside the jurisdiction is a rehearing of the ex parte application and it is for the claimant to satisfy the Court to the standard of a good arguable case that it is an appropriate case to grant permission to serve the claim form outside the jurisdiction⁵.

Challenge to the service out order

[15] Applying the well-known and often cited test for service out by Lord Collins in **Nilon Ltd and another v Royal Westminster investment SA and others**⁶, on an application for permission to serve a defendant outside the jurisdiction the 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 case 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 seized (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."

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

⁵ **Canada Trust Co and others v Stolzenberg and others (No 2)** [1998] 1 All ER 318 affirmed on appeal to the House of Lords [2002] 1AC 1

⁶ (2015) 86 WIR 285 at 291 paragraph 13

Serious issue to be tried

[16] The first part of the test in **Nilon** is that the claimant must establish that there is, in relation to the foreign defendant, a serious issue to be tried on the merits, that is, a substantial question of fact or law, or both. The claim form in this case seeks two substantive reliefs. The first is for a declaration that the Settlement Proceeds are exclusively the property of the Company. There is no serious issue with regard to this limb of the claim. The Mediation Agreement states clearly in clause 2 that the Settlement Proceeds are the property of the Company. This has never been disputed by the Applicant. In fact, Mr Tom Roscoe who appeared for the Applicant, stated in his written and oral submissions that there is no dispute that the Settlement Proceeds are the property of the Company. As such, there is no issue, far less a serious issue, to be tried regarding the ownership of the Settlement Proceeds.

[17] The real dispute in the claim relates to the distribution of the Settlement Proceeds. This is confirmed by Ajay in paragraph 28 of his affidavit filed on 6 February 2023 in support of the ex parte application where he deposed that-

“There is therefore a dispute between the Claimant and the Defendant as the management and conduct of the claimant’s affairs, namely the circumstances in which the Claimant is obliged to make distributions to the shareholders.”

[18] The disputed issue is reflected in the second relief sought in the claim, namely, whether the Company is entitled to withhold from the net Settlement Proceeds such amount as it deems appropriate for future contingencies, before distribution the net balance to its shareholders. Clause 8 of the Mediation Agreement deals with this issue and it is set out in full in paragraph 6(4) above. In paragraph 8 I set out the Company’s position on the issue that it is entitled to withhold some of the Settlement Proceeds to meet future contingent liabilities of the Company, and the Applicant’s position that she denies that the Company is so entitled. In my opinion, there is a serious issue to be tried regarding whether the Company is entitled to withhold any

part of the Settlement Proceeds for future contingencies. This satisfies the first part of the **Nilon** test.

CPR 7.3(7) – “The Company Gateway”

[19] The second step is that the Company has to prove that it has a good arguable case that the claim falls within one of the gateways for service out in CPR 7.3. To do this the Company relied exclusively at the ex parte application on the Company Gateway which provides that-

“A claim form may be served out of the jurisdiction if the subject matter of the claim relates to –

- (a) the constitution, administration, management or conduct of the affairs of the company; or
- (b) the ownership or control of a company incorporated within the jurisdiction.”

The learned judge granted permission to serve the Applicant outside the jurisdiction pursuant to the Company Gateway.

[20] Mr. Roscoe referred to two decisions of the Eastern Caribbean courts that explain and apply the principles relating to how the courts should exercise discretion in dealing with applications that rely on the Company Gateway. **Amerinvest International Forestry Group Company Limited v Kwok Ka Yik**⁷ is a decision of the Court of Appeal which found that a claim regarding the ownership and control of the subsidiaries of a BVI company did not fall within the Company Gateway (rule 7.3(7)) because the substance of the dispute did not concern the ownership or control of the BVI company (within the meaning of the Company Gateway), but was about the composition of the boards of the subsidiaries of the BVI company. The other case is **JSC BTA Bank v Timur Sabyrbaev and Others**⁸ where Wallbank J considered and applied the reasoning of the Court of Appeal in **Amerinvest** and set out a helpful summary comprising seven principles that apply to applications under the Company Gateway. Mr. Collymore distinguished these cases and submitted

⁷ 2015 ECSCJ No 39

⁸ BVIHCM 2021/0171

that in both cases the applicant was relying on paragraph (b) of the Company Gateway dealing with the ownership or control of a BVI company. However, the instant case is an application that relies on paragraph (a) of rule 7.3(7) which deals with the management of the affairs of a BVI company (Bridge). While I agree that the cases are distinguishable on this ground, I accept and endorse the respective courts' general approach to applications under rule 7.3(7), and those of the principles of Wallbank J that are of general application in applications relying on the Company Gateway.

[21] The Wallbank J principles that I endorse and apply in this case are:

- (1) Principle 3 - The fact that a party characterises a dispute as relating to the ownership or control of a company does not render it such. In the instant case the fact that the Company states in the ex parte application that the application relates to the business or affairs of the Company and/or the ownership or control of the Company, or that Ajay stated in his affidavit in support of the application that the dispute relates to the affairs of the Company, carry little if any weight.
- (2) Principle 4 - The Court should look to the real issue in the matter rather than any perceived issue on which the case was being sought to be made – see my comment on principle 3.
- (3) Principle 5 - The Company Gateway should not be used to resolve by the back door an issue which is appropriately to be resolved in the Courts of a friendly foreign jurisdiction. This principle is self-explanatory. It applies if the BVI is found not to be the appropriate forum for the trial of the claim. If the BVI is not the appropriate forum for the trial of the claim (as found below), the claim should not be brought in this jurisdiction through the back door if it is not genuinely and substantively a matter that falls under the Company Gateway.

- [22] I also endorse Wallbank J's statement at paragraph 119 of the judgment in **BTA Bank** that the court's reticence to accept that the Company Gateway reflects "the very narrow scope of the Gateway".
- [23] These principles are important and I will apply them in considering whether the claim in respect of the manner of distribution of the Settlement Proceeds is a claim that concerns the management or conduct of the Company's affairs (as submitted by the Company), or the performance of a contract entered into by the Company (as submitted by the Applicant). But first I will consider the submissions of counsel on the issue.
- [24] Mr Collymore submitted that the Company satisfied the requirement in paragraph (b) of the Company Gateway provision because (i) the Settlement Proceeds are the property of the Company, (ii) the Mediation Agreement is tantamount to an agreement by the shareholders regarding how the Company should distribute its property, and (iii) the Mediation Agreement should not be treated as a contractual device for the shareholders to manage or control the affairs of the Company by disposing of its property. Taking all of these matters into consideration it is clear that the claim relates to the management or conduct of the affairs of the Company which takes the claim through the Company Gateway in rule 7.3(7).
- [25] Mr. Roscoe took the opposite view. He outlined the relevant history of the dispute between the parties regarding the proceedings in Miami and the payment and distribution of the Settlement Proceeds. He submitted that the dispute regarding the distribution of the Settlement Proceeds, which is the only issue to be tried in the claim, was submitted to mediation by the parties resulting in an agreement as to how the Settlement Proceeds should be distributed. The claim has nothing to do with the ownership of the assets by the Company, how those assets should be managed, and/or who owns the Company and in what proportions. The outstanding dispute between the parties is the distribution of balance of the Settlement Proceeds and the use of any of those proceeds to satisfy future contingent liabilities of the Company. This, Mr Roscoe submits, is a contractual issue having everything to do

with the Mediation Agreement and nothing to do with the management of the affairs of the Company.

Analysis

[26] It is trite that a mediation agreement is a contract between the parties to the mediation. The lead up to the Mediation Agreement is that the Company owned property (the Settlement Proceeds) and it agreed by contract with Ajay and the Claimant, who happen to be shareholders, how to distribute those proceeds. It is assumed that the Company took whatever corporate steps were necessary to enter into the Mediation Agreement, acting through its directors and/or shareholders, all of whom are parties to the mediation and the Mediation Agreement. There is no challenge to the validity of the .Mediation Agreement. Having freely executed the Mediation Agreement, issues relating to the distribution of the Settlement Proceeds were governed by the terms of the Agreement. Ajay's interpretation of the Agreement is that clause 8 allows the Company to reserve an amount out of the proceeds to meet future contingencies of the Company. The Applicant disagrees saying that the Agreement allows withholding of the proceeds only to meet actual expenses. It is not the function of this Court to determine that disputed issue at this stage, other than to find, as I have done, that it is a real issue that is reasonable for this Court to try.

[27] In the circumstances I find that the parties are involved in a contractual relationship governed by the terms of the Mediation Agreement. The Court will be called upon if the claim proceeds to trial in the BVI to interpret the Mediation Agreement and in particular clause 8 dealing with whether the Company can withhold any amount out of the Settlement Proceeds to settle future contingencies of the Company. This is a contractual issue and not a matter that is concerned with the management or conduct of the affairs of the company within the meaning of the Company Gateway.

[28] However, this was not the end of the gateway issue.

The new ground

[29] The parties filed their skeleton arguments on 11 March 2024, two days before the hearing on 13 March 2024. The Company's skeleton argument contained a new ground. In paragraph 25 it submitted that –

“Separate from CPR 7.3(7), it is at least an arguable (the applicable threshold) that the Mediation Agreement is by implication governed by BVI law, which would bring the claim within an alternative gateway (CPR 7.3(5)(b)(ii)(sic).”

Rule (CPR 7.3(3)(b)(ii) is the gateway for getting leave to serve a claim form outside the jurisdiction if the claim is “about contracts” and the claim is made “... in respect of a contract that is by its terms or by implication governed by the law of any Member State” (here the BVI) (“**the Contract Gateway**”). The Company did not apply to amend its application to include this alternative ground. Notwithstanding, the Court heard submissions on the issue from both counsel and I will deal with the matter.

[30] In order to succeed on this alternative ground the Company has to persuade the Court that the Mediation Agreement, which does not have an express choice of law provision, is by implication governed by BVI law. It is common ground between the parties that the test for determining the governing law of the Mediation Agreement is the common law test. The common law test is that where there is no express choice of law in the contract, and the proper law of the contract cannot otherwise be determined, the contract is governed by the law of the country with which it is most closely connected.⁹

[31] Mr Roscoe submitted that applying this test the evidence points clearly to the laws of Florida being the system of law that is most closely connected to the Mediation Agreement. I agree with this submission having regard to the following factors:

⁹ Dicey Morris and Collins on the Conflict of Laws 16th edition rule 215

- (1) The Miami Proceedings which eventually led to the mediation proceedings and the making of the Mediation Agreement took place in Miami under Florida law.
- (2) The mediation took place by Zoom in Miami before a court appointed mediator of the Florida Supreme Court.
- (3) The attorneys who advised the parties in the Miami Proceedings and the mediation all have offices Miami, Florida.
- (4) The escrow agent who held the settlement proceeds is a firm of attorneys in Florida.
- (5) The parties submitted to the non-exclusive personal jurisdiction and venue of the Miami-Dade Circuit Court to determine any disputes arising under or related to the Mediation Agreement. Mr Collymore treated this as a neutral factor because this submission was not to the exclusive jurisdiction of the Miami Dade Circuit Court. But that is missing the point. The choice of the Miami Dade Circuit Court as the forum for resolving disputes under the Mediation Agreement, albeit on a non-exclusive basis, is a strong indicator that the parties treated that court system and the system of law that the Florida court administers as the system of law that should govern the Mediation Agreement and that Florida law is implied proper law of the contract.
- (6) Satellite litigation in the Miami proceedings involving the interpleader motion by the escrow agent and the motion to enforce the Mediation Agreement by the Applicant were filed in the Miami proceedings.

[32] I have not taken into consideration, as a factor in favour of Florida law being the governing law, the reference by the Applicant in her evidence to the fact that the Mediation Agreement incorporates by reference the Settlement Agreement which has a governing law in favour of the laws of Florida. This may very well be so, but the Court has not had sight of the Settlement Agreement, which is a confidential document, and I would prefer not to refer to rely on that Agreement.

[33] The Company's arguments in favour of BVI law as a governing law of the Mediation Agreement are not persuasive. Mr Collymore seemed to be suggesting that because the Mediation Agreement deals with issues relating to a BVI company and the shares in the Company and the distribution of the assets of the Company raise a presumption or inference that BVI law is the governing law of the Mediation Agreement. I do not accept this argument and I have already found that the

Mediation Agreement is not a shareholders agreement and it does not deal with issues relating to ownership of shares in or the management of the affairs of the Company in the sense contemplated by the Company Gateway.

- [34] I find that the implied governing law of the Mediation Agreement is the law of Florida and the Company's belated attempt to say that the claim form can be served out of the jurisdiction relying on the Contract Gateway fails.

Conclusion of the Gateways

- [35] The only part of the claim that raises a serious issue to be tried is contractual issue relating to the interpretation of the Mediation Agreement. This is not an issue relating to the management or conduct of the affairs of the Company so as to bring the claim within the Company Gateway. The alternative attempt to rely on the Contract Gateway also fails because there is insufficient evidence to satisfy the Court that the governing law of the Mediation Agreement is the law of the BVI. Put another way, the evidence does not come close to satisfying the Court that Florida is not the governing law of the Mediation Agreement

- [36] The Application under rule 7.7 challenging the jurisdiction of the court is successful and the order granting permission to the Company to serve the claim form on the Applicant outside the jurisdiction is set-aside. This finding is sufficient to determine the Application entirely but there were issues of forum non-conveniens and nondisclosure that were addressed by the parties in writing and in oral submissions.

Forum non-conveniens

- [37] The alternative relief sought by the Applicant in the Application is for a declaration that the BVI is not the appropriate forum for the trial of the claim and the Court should not exercise its jurisdiction to try the claim and should stay the proceedings in favour of the Miami-Dade court ("**the Forum Application**"). The forum application was made without prejudice to the Applicant's position that the Court does not have

jurisdiction to try the claim and by pursuing the jurisdiction application she is not in any way submitting to the Court's jurisdiction.

[38] Forum applications are frequently made to this Court and the starting point in the Court's decisions is usually the speech of Lord Goff of Chieveley in **Spiliada Maritime Corporation v Cansulex Ltd.**¹⁰ In summary, Lord Goff stated that there are three steps in the search for determining the appropriate forum for the trial of a claim, namely:

- (1) is there another available forum;
- (2) if so, is that forum more appropriate for the trial of the claim; and
- (3) 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 form.

[39] In steps (1) and (2) the burden of proof is on the defendant challenging the jurisdiction (Mrs Taneja). At the third step the burden of proof is on the claimant (the Company) to show why it will not receive justice in the more appropriate forum.

[40] In this case the two competing jurisdictions are courts of Miami Dade, Florida which the Applicant says is the more appropriate forum, and the Commercial Court of the BVI which the Company says is more appropriate forum and in fact it started the proceedings in this forum. In analysing which of the two forums is the more appropriate the Court will consider the various factors pointing toward one or the other forum. These are commonly described as the connecting factors. Where a connecting factor does not point to either jurisdiction this will be treated as a neutral factor carrying little if any weight in the balancing exercise.

¹⁰ [1987] AC 460

- [41] I began the analysis of the connecting factors in paragraph 31 of this judgment when I was considering the governing law of the Mediation Agreement and it is not necessary to repeat them. The finding in paragraph 34 that the governing law of the Mediation Agreement is Florida is a further connecting factor in favour of Florida being the appropriate forum for the trial of the claim.
- [42] The main connecting factor to the BVI is that the Company is incorporated in the BVI. But incorporation is just another factor in the balancing exercise and it should not be given significant weight. It is given even less weight in this case because the Applicant is a natural person and so the incorporation principle is not a factor connecting her in any way to the BVI.
- [43] The availability and location of witnesses is a finely balanced factor. The main witnesses of fact are likely to be the Applicant and Ajay, neither of whom lives in Florida or the BVI. Expert evidence of Florida law may be necessary and the expert witnesses would likely be from Florida. I balance this against the fact that this trial will involve mainly the interpretation of the Mediation Agreement and there may be little need for fact evidence. The convenience factor of the witnesses travelling to either Miami or the BVI is also fairly evenly balanced with Florida having a slight edge because it is easier to get flights to Miami than to the BVI. In all circumstances I find the factors relating to potential witnesses at the trial is balanced and I regard it as a neutral connecting factor.
- [44] The same is true of documents. In modern commercial litigation most of the documents are transported by the Internet with the result that it does not matter where the documents are physically located. They can be sent to whichever jurisdiction is trying the claim with relative ease.

[45] Having conducted a balancing exercise of the connecting factors I find that the courts of Florida are distinctly the more appropriate forum for the trial of the claim. Applying the third step of the procedure in **Spiliada**, a stay of the BVI claim should be granted unless there is a risk that the Company will not receive justice in the courts of the State of Florida. The burden of proving this is on the Company. There is no evidence of such a risk and therefore find that Florida is the forum conveniens for the trial of the claim.

[46] The alternative ground of the Application is granted and, were it necessary, I would have granted a stay in favour of the courts of the State of Florida as the more appropriate forum for the trial of the claim. However, a stay is not necessary because the primary relief sought is to set aside service of the claim form is granted and effectively brings the claim to an end.

Full and frank disclosure

[47] The court having set aside service of the claim form and alternatively granted a stay of the proceedings, it is not necessary to deal with the issue of full and frank disclosure.

Orders

- [48] (1) The order dated 20 March 2023 permitting service of the claim form out of the jurisdiction on the Applicant/Defendant is set aside.
- (2) The claim is dismissed.
- (3) Costs of the Application and the claim to the Applicant/Defendant, such costs to be assessed if not agreed within 21 days.

**Paul Webster (Ag.)
High Court Judge**

By the Court

Registrar