

**THE EASTERN CARIBBEAN COURT OF APPEAL
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0042

BETWEEN:

TIBIT LIMITED

Appellant

and

THE FEDERAL REPUBLIC OF NIGERIA

Respondent

Before:

The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Sydney Bennett	Justice of Appeal [Ag.]
The Hon. Mr. Godfrey Smith	Justice of Appeal [Ag.]

Appearances:

Mr. Matthew Hardwick, KC with him Mr. Neil McLarnon and
Ms. Monique Peters for the Appellant
Mr. Steven Thompson, KC with him Mr. Faisal Osman, Ms. Isabella
Prusskaya, Mr. Richard Brown and Mr. Paul Griffiths for the
Respondents

2022: September 20;
2023: March 24.

Commercial appeal – Forum non conveniens – Stay on ground of forum non conveniens – Appellate restraint on forum applications – Appropriate forum - Whether the learned judge’s decision to find that the BVI is the appropriate forum to try claims was plainly wrong – Governing law – Connecting factors – Whether the judge was wrong to find that BVI law is the governing law of the claims – Res judicata – Issue Estoppel – Whether the judge was wrong to find that the Italian proceedings are irrelevant to the claims against appellant – Delay – Part 9.7A of the Civil Procedure Rules 2000

In 1998, Chief Dauzia Loya Etete (“Chief Etete”), the then Minister of Petroleum Resources of the Federal Republic of Nigeria (“FRN”), awarded the exploration rights to a very valuable oil block in the Eastern Nigeria

Delta ("OPL 245"), to a Nigerian company, Malabu Oil Gas Limited ("Malabu"). The award was subsequently revoked by the FRN. This resulted in heavily contested litigation between Malabu, FRN and several oil and gas companies. The litigation was settled in 2006 and OPL 245 was reallocated to Malabu. From late 2008 to April 2011 a consortium of companies entered into a series of negotiations to acquire the rights to OPL 245. In April 2011, a deal was concluded whereby Malabu would surrender its rights in OPL 245 and waive all claims to any interest in OPL 245 for a payment of US\$1,092,040,000.00 ("the 2011 deal"). A part of the US\$1,092,040,000.00 (the "Malabu Proceeds") was paid into the accounts of Malabu in the name of Rocky Top Resources Limited ("Rocky Top") at two Nigerian banks, Keystone Bank and First Bank of Nigeria, and the balance was held in escrow in an account managed by JP Morgan Chase in London. FRN contends that Chief Etete is the beneficial owner and controller of Rocky Top and has signing authority on the company's bank account at Keystone Bank Limited.

FRN also contends that Chief Etete instructed Keystone Bank to make an urgent transfer of US\$54 million from Rocky Top's account at the bank to Insured Aircraft Title Services Inc ("IATS"), a company incorporated in the state of Oklahoma in the United States, to secure the purchase of the Jet by or on behalf of Chief Etete. FRN also contends that Chief Etete and Rocky Top retained the services of Mr. Justin Ickonga, a Congolese national with an address in the Republic of Congo, to act as a broker and facilitator for the purchase of the Jet for and on behalf of Chief Etete and Rocky Top. Additionally, in November 2011, AV West Aircraft Ltd ("AV West") an aviation services company based in Western Australia, entered into an aircraft purchase agreement with Bombardier for the purchase of the Jet and also entered into a share sale and purchase agreement with Rocky Top. AV West then assigned the aircraft purchase agreement to Yokhona Investments Ltd, a BVI company. In April 2012 IATS paid US\$37,875,000.00 to AV West on account of the purchase of the Jet. In March 2013, following payments totalling US\$56.7 million by IATS, AV West caused Bombardier to deliver the Jet to Tibit Limited ("Tibit"), a special purpose vehicle registered in the BVI and owned by Mr. Ickonga.

In 2020, FRN started proceedings in the Commercial Court initially against Tibit and later Mr. Ickonga. The claim against Tibit is for knowing receipt of a part of the Malabu Proceeds and/or the Jet, unjust enrichment and dishonest assistance. The claim against Mr. Ickonga is for dishonest assistance. FRN sought a declaration that Tibit holds the Jet or the traceable proceeds thereof on a constructive trust for FRN, an account and enquiry, alternatively, equitable compensation or restitution in the amount of US\$58,847,829.00, interest and costs. In October 2021, some 17 months after the claim was filed, Tibit applied for a stay of the proceedings in the court below on the grounds of *forum non conveniens* and/or abuse of the court's process and/or

case management. The learned judge heard the application on 23rd November 2021 and delivered an *ex tempore* judgment dismissing the application and ordered Tibit to pay FRN's costs of the application. The judge granted permission to Tibit to appeal.

Tibit appealed against the judge's order. The notice of appeal contains four grounds which can be condensed into three issues, namely: (i) whether the learned judge's decision to find that the BVI is the appropriate forum to try FRN's claims and to not stay the proceedings was plainly wrong; (ii) whether the judge was wrong to find that BVI law is the governing law of the claims against Tibit for unjust enrichment, knowing receipt and dishonest assistance; and (iii) whether the judge was correct in refusing to stay the proceedings on the ground of abuse of process and issue estoppel.

Held: dismissing the appeal; affirming the decision of the learned judge; and awarding costs to the Federal Republic of Nigeria, such costs to be assessed if not agreed within 21 days, that:

1. The appellate court will not interfere with the judge's exercise of discretion unless the applicant can show that the judge erred in principle and that as a result of his error his decision exceeded the generous ambit of reasonable disagreement and was clearly or blatantly wrong. This need for appellate restraint is even greater in forum applications where the judge is carrying out a balancing exercise to determine the most appropriate forum for trying the action.

Dufour v Helenair Corporation and others (1996) 52 WIR 188 applied; **Spiliada Maritime Corporation v Cansulex Ltd** [1987] AC 460 applied; **Livingston Properties Equities Inc and others v JSC MCC Eurochem and another** [2020] UKPC 31 applied.

2. The principle of *forum non conveniens* gives the court a discretionary power to stay an action when it is satisfied that there is another court that is more appropriate to try the case. To determine the most appropriate forum for trying a case, the court must conduct a three-stage inquiry. The first is whether there is another available forum, second, whether that forum is more appropriate than the local court. If there is an available forum that is more appropriate, the third stage is whether there is a risk of injustice if the claim were to be prosecuted in the foreign forum. In this case the real dispute is in relation to the second stage – which of the BVI or Nigeria is the more appropriate forum for the trial of the action. To determine this stage the court must examine the pleadings and evidence to determine what are the connecting factors to the two competing jurisdictions, to see which of the two is clearly and distinctly the more appropriate forum for the trial of the action. The connecting factors in this case are the governing law

of the claims, the location of witnesses and documents, and the incorporation in the BVI of Tibit and other companies used in the acquisition of the Jet.

Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460 applied.

3. The governing law of a claim is an important factor because it is generally preferable that a case should be tried in the country whose law applies. The starting point for determining the governing law of the claims is the pleadings. The claims in this case for unjust enrichment, knowing receipt and dishonest assistance were pleaded in the statement of claim and there was no suggestion in the defence, nor in any evidence filed by Tibit, that these claims are governed by the laws of Nigeria, or by the laws of any other country. The only factor pointing to Nigeria is that the underlying fraud that led to the filing of the claims occurred in Nigeria. This is outweighed by the facts that the claims in the action are governed by BVI law and relevant documents and witnesses relating to the central issue of the ownership and control of Tibit are in the BVI; other witnesses are located in diverse countries and not Nigeria; the activities leading to the purchase of the Jet occurred outside Nigeria and were done by persons resident and working outside Nigeria. As a result, the BVI is the most appropriate forum for the trial of the action because Tibit is sued as of right in the jurisdiction, and there are connecting factors pointing to the BVI. The learned judge in making these findings did not err in principle and his decision did not exceed the generous ambit of reasonable disagreement. His decision was not clearly or blatantly wrong.

Livingston Properties Equities Inc and others v JSC MCC Eurochem and another [2020] UKPC 31 applied. **VTB Capital plc v Nutritek International Corp and others** [2013] 2 AC 337 applied; **Sibir Energy PLC v Gregory Trading SA and others** BVI Civil Appeal No. 26 of 2005 (delivered 18th September 2016, unreported) applied; Rules 25 and 230(1)(c) of Dicey, Morris and Collins (*15th edn*) applied.

4. The Federal Republic of Nigeria v JP Morgan Chase Bank NA case is a different case on different facts and the findings and observations of Cockerill J do not impel this Court to set aside the exercise of discretion by the judge and come to a different conclusion on the issue of the appropriate forum for the trial of the claims.

The Federal Republic of Nigeria v JP Morgan Chase Bank NA [2022] EWHC 1447 (Comm) considered.

5. A foreign judgment creates an estoppel when (1) the judgment relied on as creating the estoppel is (a) by a court of competent jurisdiction; (b) final and conclusive; and (c) on the merits; (2) the parties (or their privies) must be the same in both sets of proceedings; (3) there must be a clear determination of the issue by the foreign judgment—it must not be merely collateral or an obiter comment; and (4) the issue in the later action must be the same as the issue decided by the judgment in the earlier proceedings. In this case, the allegation of *res judicata*/issue estoppel was not made out by Tibit and there is no abuse of process in starting and continuing the BVI action. For the same reasons, the BVI action is not a collateral attack on the Italian judgment. The BVI action should not be stayed or struck out on any of these grounds.

Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1AC 853 applied; **Michael Wilson & Partners Ltd v Sinclair** [2017] 1 WLR 2646 considered.

6. Delay in filing an application under Part 9.7A of the Civil Procedure Rules 2000 or under the inherent jurisdiction of the court will not result in an automatic barring or dismissal of the application. However, an unreasonable delay in filing the application can have adverse consequences for the applicant, the most obvious being that if the late application is successful and the claim is stayed, the court may order the applicant, though successful, to pay the costs of the proceedings up to the date of the filing of the application, or may make such other order as the court sees fit.

Part 9.7A of the **Civil Procedure Rules 2000** applied.

JUDGMENT

- [1] **WEBSTER JA [AG]:** On 23rd November 2021 Wallbank J (“the Judge”) dismissed the appellant’s application to stay the proceedings in the court below on the ground of *forum non conveniens* and/or for abuse of the court’s process and/or case management. This is an appeal against the Judge’s decision.
- [2] The claim in the court below involves allegations of a massive fraud committed by several persons over a long period of time in Nigeria,

and the use of the proceeds of the alleged fraud in Nigeria and other places. In the first part of the judgment, I will describe the persons involved in the alleged fraud and the background to the alleged fraud. In doing so I will rely heavily on the pleadings and the written and oral submissions of counsel. Nothing that I say in this section of the judgment will constitute a finding of fact by this Court.

Cast of characters

[3] The main characters in this appeal are:

- (i) Tibit Limited, a British Virgin Islands (“BVI”) company with its registered office in Road Town, Tortola (“Tibit”). Tibit was incorporated as a special purpose vehicle to acquire and hold a Bombardier executive jet aircraft (“the Jet”). Tibit is the 1st defendant in the proceedings in the lower court and the appellant in this appeal.
- (ii) The Federal Republic of Nigeria (“FRN”) is the claimant in the court below and the respondent to the appeal.
- (iii) The Federal Government of Nigeria (“FGN”).
- (iv) Malabu Oil and Gas Limited is a Nigerian company incorporated on 24th April 1998 (“Malabu”).
- (v) Chief Dauzia Loya Etete (“Chief Etete”) was at a material time the Minister of Petroleum Resources of the Government of the FGN and the beneficial owner or one of the beneficial owners of Malabu.
- (vi) Justin Ickonga (“Mr. Ickonga”) is the second defendant in the court below. He is a Congolese national with an address in the Republic of Congo. He is not a party to this appeal.

- (vii) Rocky Top Resources Limited is a Nigerian company incorporated (“Rocky Top”). It is alleged that Chief Etete is the beneficial owner and controller of Rocky Top and has signing authority on the company’s bank account at Keystone Bank Limited, a bank operating in Nigeria.
- (viii) AV West Aircraft Ltd (“AV West”) is an aviation services company based in Western Australia and is in the business of acting as a middleman buying aircrafts from Bombardier.
- (ix) Insured Aircraft Title Services Inc (“IATS”) is a company incorporated in the state of Oklahoma in the United States which at all material times provided escrow services to parties buying and selling aircrafts.
- (x) Yokhona Investments Ltd (“Yokhona”) is a BVI company incorporated on 6th August 2010 on behalf of AV West to hold a position for the delivery of an aircraft from Bombardier.
- (xi) Precision Aviation Group Limited (“PAGL”) is a Bermudan company incorporated on 18th October 2011. Its sole share was at all material times owned by Mr. Ickonga.
- (xii) Lenord Holdings Corp (“Lenord”) is a BVI company that took an assignment of AV West’s rights under a share sale and purchase agreement.

Background facts

- [4] On 29th April 1998, Chief Etete, in his capacity as the Minister of Petroleum Resources, awarded the exploration rights to a very valuable oil block in the Eastern Nigeria Delta (“OPL 245”) to Malabu. A signature bonus of \$20 million was due to FRN on the signing of OPL 245. Only \$2 million of this amount was paid. In or about 2000, Malabu entered into negotiations with the Shell group for the sale of a 40% participation interest in OPL 245 to Shell.
- [5] On 2nd July 2001, FRN revoked Malabu’s licence to OPL 245 and entered into negotiations with Shell for the sale of the licence to Shell. In the meantime, Malabu petitioned the Nigerian House of Representatives protesting the revocation of OPL 245. In May 2003 the House of Representatives recommended that the revocation of OPL 245 to Malabu be set aside. This led to heavily contested litigation between Malabu, Shell, FRN and others.
- [6] On 30th November 2006, the litigation was settled and the FGN reallocated OPL 245 to Malabu subject to the payment of a signature bonus of US\$20 million (“the 2006 Settlement Agreement”). The 2006 Settlement Agreement was negotiated and entered into on behalf of Nigeria by the then Attorney General, Adebayo Oja, who subsequently admitted receiving a payment of US \$10 million for his role in the negotiation of the settlement. This was followed by litigation by Shell challenging the 2006 Settlement Agreement.
- [7] From late 2008 to April 2011, a consortium of companies including Shell and ENI S.P.A. entered into a series of negotiations to acquire the rights to OPL 245. On 29th April 2011, a deal (“the 2011 deal”) was concluded whereby (a) Malabu would surrender its rights in OPL 245 and waive all claims to any interest in OPL 245 for a

payment of US\$1,092,040,000.00, and (b) the FGN would grant the rights in OPL 245 to the Shell/ENI consortium for a signature bonus of US\$207 million and a further sum of US\$1,092,040,000.00. The US\$1,092,040,000.00 (“the Malabu Proceeds”) was paid to FGN by a payment of US\$801,540,000.00 into the accounts of Malabu in the name of Rocky Top at two Nigerian banks, Keystone Bank and First Bank of Nigeria, and the balance of some US\$200 million was held in escrow in an account managed by JP Morgan Chase in London.

- [8] FRN’s statement of claim alleges that in granting OPL 245 to Malabu in 1998, Chief Etete acted in conflict of interest and in breach of his fiduciary duties to the FGN by effectively granting OPL 245 to himself. Further, the 2006 Settlement Agreement and the 2011 deal were procured by fraud and the payment of bribes. As such, the approximately US\$1.1 billion paid to Malabu under the 2011 deal, was and is held on a constructive trust for FRN. The Jet was paid for out of the Malabu Proceeds on the instructions of Chief Etete and persons and entities such as Tibit, Rocky Top, Yokhona, PAGL and its owner, Mr. Ickonga, who were all controlled by Chief Etete and used by him to purchase the Jet using the Malabu Proceeds.
- [9] The events outlined above covering the period 1998 when the OPL 245 was awarded to Malabu to 2011 when the 2011 deal was made are referred to in this judgment for convenience only and not tendentiously as “the Nigerian Fraud”.
- [10] The statement of claim further alleges that on 1st September 2011, Chief Etete instructed Keystone Bank to make an urgent transfer of US\$54 million from Rocky Top’s account at the bank. This was achieved by a series of internal transfers. On 7th September 2011,

US\$54 million was transferred to IATS to secure the purchase of the Jet by or on behalf of Chief Etete.

[11] In or about September 2011, Chief Etete and Rocky Top retained the services of Mr. Ickonga to act as a broker and facilitator for the purchase of the Jet for and on behalf of Chief Etete and Rocky Top.

[12] On 4th November 2011, AV West entered into an aircraft purchase agreement with Bombardier for the purchase of the Jet. AV West also entered into a share sale and purchase agreement with Rocky Top. AV West then assigned the aircraft purchase agreement to Yokhona. On 24th April 2012, IATS paid US\$37,875,000.00 to AV West on account of the purchase of the Jet.

[13] On 27th March 2013, following payments totalling US\$56.7 million by IATS, AV West caused Bombardier to deliver the Jet to Tibit. The Jet was delivered in Canada and registered in the Isle of Man. At the time of payment and delivery of the Jet, PAGL was the sole shareholder of Tibit. On 31st March 2017, PAGL transferred the sole share in Tibit to Mr. Ickonga. He effectively became the owner of the Jet. The FRN says that Tibit holds the Jet on a constructive trust for FRN.

The BVI proceedings

[14] On 8th May 2020 FRN started proceedings in the Commercial Court of the Virgin Islands initially against Tibit. It amended the claim on 18th September 2020 to, among other things, add Mr. Ickonga as a defendant. The claim against Tibit is for knowing receipt of a part of the Malabu Proceeds and/or the Jet, unjust enrichment and dishonest assistance, and against Mr. Ickonga for dishonest assistance. FRN sought a declaration that Tibit holds the Jet or the

traceable proceeds thereof on a constructive trust for FRN, an account and enquiry, alternatively, equitable compensation or restitution in the amount of US\$58,847,829.00, interest and costs.

[15] Tibit filed an amended defence to the amended claim on 18th September 2020. It either denied or stated that it did not have any knowledge of the allegations of the underlying fraud and pleaded a positive case that neither it, Mr. Ickonga, Rocky Top nor any of the other entities involved in the acquisition of the Jet was under the control of Chief Etete or acted on his instructions. Mr. Ickonga did not file a defence and did not participate in the proceedings in court below.

[16] FRN filed a reply to the amended defence on 2nd December 2020 signifying the close of pleadings in the claim.

Proceedings in the court below

[17] On 4th October 2021, some 17 months after the claim was filed, Tibit applied for a stay of the proceedings in the court below on the grounds of *forum non conveniens* and/or abuse of the court's process and/or case management. FRN opposed the application. The application came up before the Judge on 23rd November 2021. He heard counsel for the parties for approximately 5 ½ hours, adjourned for a few minutes, and then delivered a comprehensive *ex tempore* judgment. The Judge dismissed the application, ordered Tibit to pay FRN's costs of the application and granted permission to Tibit to appeal.

[18] The Judge found that the court had jurisdiction as of right over Tibit and that Tibit, on whom the burden lies as the party applying for a stay, had not shown that there is another forum that is clearly and

distinctly more appropriate for the trial of the claims in the action. He noted that Nigerian law would be the governing law of the Nigerian Fraud, but the most appropriate forum for the trial of the claims for knowing receipt, unjust enrichment and dishonest assistance is the BVI. He then analysed the other connecting factors. These include Tibit's registered office and registered agent in the BVI that would probably have documents showing the ownership of Tibit which is a key issue in the *forum* application. He concluded that the connecting factors point to the BVI or elsewhere, and not to Nigeria and that the BVI is clearly and distinctly the appropriate forum for the trial of the claims for knowing receipt, unjust enrichment and dishonest assistance.¹

[19] On the issue of abuse of process, the Judge found that the claim is not a collateral attack on the Italian judgment nor is it causing Tibit to defend the same claim twice.

[20] Tibit did not pursue that part of the application seeking a stay on case management grounds.

The appeal

[21] Tibit's notice of appeal lists four grounds of appeal with ground 1 broken down into several sub-grounds. The essence of ground 1 (numbered 3.1 in the notice of appeal) is that the learned Judge's decision to find that the BVI is the appropriate forum to try FRN's claims and to not stay the proceedings was plainly wrong. The Judge should have not found that the BVI is an appropriate forum for the trial of the claims because none of the acts relied on by FRN took place in the jurisdiction of the BVI and the applicable governing

¹ Transcript of the judgment internal page 210 lines 1-5.

law of the claims is the law of Nigeria. The sub-grounds of ground 1 include:

- (i) The Judge was plainly wrong to find that the incorporation of Tibit in the BVI with a registered agent in the Territory rendered the BVI the appropriate forum for the trial of the claims (3.1.4).
- (ii) The Judge erred in finding that the presence of other BVI companies involved in the acquisition of the Jet was a connecting factor to the BVI. This finding could not displace Nigeria as a natural forum for the trial of the claims (3.1.12).
- (iii) The Judge fell into error by treating the issue of “who owns Tibit” as a key issue in the case. The Judge should have followed the decision of the Privy Council in **Nilon Ltd v Royal Westminster Investments SA**² and the decisions of this Court in **Anjie Investments Ltd v Tian Li Holdings** and **Ben Oldman Special Situations Fund LP v Karver investments Ltd**,³ and stay the BVI proceedings until the dispute relating to the underlying wrongdoing has been resolved in the natural and more appropriate forum (3.1.5). This ground was not pursued by Tibit.
- (iv) Sub-grounds of 3.1.6 to 3.1.9 contain further reasons why the Judge was wrong for not accepting Nigeria as the appropriate forum for the trial of the claims.
- (v) The Judge erred in accepting that the trial of a case involving allegations of fraud against prominent

² [2015] UKPC 2.

³ BVIHCMAP2017/0023 (delivered 26th November 2018, unreported).

persons living in Nigeria could be properly tried on the basis of documentary evidence (3.1.11).

[22] Ground 2 (numbered 3.2 in the notice of appeal), which follows from the complaints in ground 1, is that the Judge was wrong to find that BVI law is the governing law of the claims against Tibit for unjust enrichment, knowing receipt and dishonest assistance. The governing law of the claims is Nigeria as the law with the closest connection to the alleged wrongful acts.

[23] Grounds 3, 4 and 5 relate to the Judge's refusal to stay the proceedings on the ground of abuse of process and issue estoppel. Tibit complained that the Judge was wrong to find that the Italian proceedings are irrelevant to the claims against Tibit and should have found that the Italian judgment gave rise to an issue estoppel in relation to the issues that are central to the claims.

Appellate approach

[24] The application before the Judge required him to exercise discretion whether to grant or refuse the application for a stay on the ground of *forum non conveniens* and/or as an abuse of process. The appeal challenges the Judge's dismissal of the application on both grounds. The principles on which the Court of Appeal will interfere with the Judge's exercise of discretion to grant or refuse a stay are well known and often repeated by this Court. A good starting point is the dictum of Sir Vincent Floissac in **Dufour v Helenair Corporation and others**⁴ where Chief Justice Floissac said:

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her

⁴ (1996) 52 WIR 188.

judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong".

Put simply, the appellate court will not interfere with the judge's exercise of discretion unless the applicant can show that the judge erred in principle and that as a result of his error, his decision exceeded the generous ambit of reasonable disagreement and was therefore clearly or blatantly wrong.

- [25] The need for appellate restraint is even greater in forum applications where the judge is carrying out a balancing exercise to determine the most appropriate court for trying the action. This is clear from the opinion of Lord Templeman in the 1987 decision in **Spiliada Maritime Corporation v Cansulex Ltd.**⁵ Lord Templeman said:

"In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere."

- [26] Lord Templeman's approach to appeals from decisions in forum applications has been followed in several cases in England and the Eastern Caribbean, most recently by Lady Arden in the 2021

⁵ [1987] AC 460, p. 465.

decision of the Privy Council in **Livingston Properties Equities Inc and others v JSC MCC Eurochem and another**⁶ on appeal from this Court.

[27] Learned counsel for Tibit, Mr Matthew Hardwick KC, did not dispute the general principles relating to appellate interference with decisions by a trial judge. His position is that the Judge was plainly wrong to find that BVI, and not Nigeria, is the most appropriate forum for the trial of the claims, and to dismiss the application for a stay on *forum* grounds and/or as an abuse of process. As to the latter he should have found the action is a collateral attack on the judgment of the Italian court, and/or that the Italian judgment gave rise to issue estoppel in relation to issues that are central to FRN's case in the BVI.

Forum non conveniens

[28] This takes me to the main issue in this appeal of *forum non conveniens*. Briefly stated, the principle of *forum non conveniens* gives the court a discretionary power to stay an action when it is satisfied that there is another court that is more appropriate to try the case. Lord Goff in the leading case of the **Spiliada**⁷ outlined a three-step procedure for dealing with applications for a stay on *forum* grounds which I summarise as follows:

- (a) When a defendant seeks a stay of an action on the ground of *forum non conveniens*, the court should determine whether there is another available forum for the trial of the action.

⁶ [2020] UKPC 31.

⁷ Supra note 5.

(b) If there is an available forum, whether that forum is the more appropriate forum for the trial of the action for the interests of the parties and the ends of justice.

(c) If there is another forum that is more appropriate, a stay should be granted unless there is a risk that the claimant will not receive justice in the more appropriate forum.

[29] Lord Goff also commented on the situation where the dispute between the parties is multi-jurisdictional and it is not clear where the various acts underlying the action took place. He opined at page 487-

“Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions (see, e.g., *European Asian Bank A.G. v. Punjab and Sind Bank* [1982] 2 Lloyd's Rep. 356), or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum - in *The Atlantic Star* [1974] A.C. 436 (Belgium); in *MacShannon's case* [1978] A.C. 795 (Scotland); in *Trendtex* [1982] A.C. 679 (Switzerland); and in the *The Abidin Dayer* [1984] A.C. 398 (Turkey). In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see *MacShannon's case* [1978] A.C. 795, *per* Lord Salmon);”

[30] Applied to this case, Tibit is a BVI company that was served as of right in the jurisdiction and the court has personal jurisdiction over it. The BVI court should therefore proceed with the action unless it is satisfied that there is another forum that is available and is clearly

and distinctly more appropriate for the trial of the action. The burden of proving that there is a more appropriate court is on Tibit. If Tibit discharges the burden by showing that Nigeria is a more appropriate forum the onus will shift to FRN to show that it will not receive justice in Nigeria.

[31] It is not seriously disputed that Nigeria is an available forum for the trial of the action. The real dispute in this matter is in relation to the second stage – which of the BVI or Nigeria is the more appropriate forum for the trial of the action. To determine this stage the court must examine the pleadings and evidence to determine what are the connecting factors to the two competing jurisdictions, to see which of the two is clearly and distinctly the more appropriate forum for the trial of the claims. The connecting factors in this case are:

- (a) the governing law of the claims which includes a consideration of where the acts constituting the claims were carried out and by whom;
- (b) the location of witnesses and documents; and
- (c) the incorporation in the BVI of Tibit and other companies used in the acquisition of the Jet.

Governing law

[32] It is a basic principle of private international law that when the court is evaluating the connecting factors in a forum application the governing law of the claim will be considered and play an important role. In **Livingston Properties**⁸ Lady Arden said '[t]he governing law is an important factor because it is generally preferable that a case

⁸ [2020] UKPC 31.

should be tried in the country whose law applies'⁹. To the same effect Lord Mance said in **VTB Capital plc v Nutritek International Corp and others**:¹⁰ “[t]he 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.”¹¹ This is guidance from the highest courts that the governing law of a claim will play an important part in determining the most appropriate forum for the trial of the claim.

[33] In dealing with the governing law of the claims in this case it is important to identify the claims that are being pursued by FRN. FRN is seeking a declaration that Tibit holds the Jet, or the traceable proceeds thereof, on a constructive trust for FRN, and for delivery of the Jet or equitable compensation or restitution in an amount up to the value of the Jet. The constructive trust is based on claims of (a) Tibit’s knowing receipt of the Jet, (b) its unjust enrichment in retaining the Jet for which it gave no valuable consideration, and (c) dishonestly assisting Chief Etete and Rocky Top in acquiring the Jet and later concealing its true ownership. The claim against Mr. Ickonga is for dishonest assistance.

[34] Claims for knowing receipt and unjust enrichment are restitutionary claims. Dishonest assistance is a claim in tort alleging wrongdoing in fraud for which compensation is sought.

[35] The Nigerian Fraud is the background to the claims. FRN will be required to prove either a fraud or breach of trust arising out of the Nigerian Fraud to establish that Tibit holds the Jet on a constructive

⁹ Ibid at paragraph 12.

¹⁰ [2013] 2 AC 337.

¹¹ Ibid paragraph 46.

trust for FRN. FRN does not dispute that the governing law of the alleged wrongdoing in the Nigerian Fraud occurred in Nigeria and is governed by the laws of that country. But, FRN says, this is not a claim in fraud. It is a claim that Tibit knowingly received trust property, the Jet, and has been unjustly enriched at FRN's expense. These are claims in restitution that are based on the events occurring after the Nigerian Fraud using monies from the Malabu Proceeds. FRN's case is that these events did not occur in Nigeria and Nigeria is not the governing law of the claims in the action.

- [36] The starting point for determining the governing law of the claims is the pleadings. The basic rule is set out in Rule 25 of **Dicey and Morris**¹² that –

“Rule 25(1) any case to which foreign law applies, the law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.

(2) in the absence of satisfactory evidence of foreign law, the court will apply English [BVI] law to such a case.”

- [37] The claims in this case for unjust enrichment, knowing receipt and dishonest assistance were pleaded in the statement of claim and there was no suggestion in the defence, nor in any evidence filed by Tibit, that these claims are governed by the laws of Nigeria, or by the laws of any other country. Therefore, applying rule 25, the BVI court will apply BVI law to the claims.

- [38] FRN also referred to 230(1)(c) of **Dicey and Morris** and submitted that the place where the benefit from the unjust enrichment was received should be considered in determining the governing law of the claims. Rule 230 reads –

¹² Dicey, Morris and Collins (15th edn).

“(1) The obligation to restore the benefit of an enrichment obtained at another person’s expense is governed by the proper law of the obligation.

(2) The proper law obligation is (semble) determined as follows:

- (a) if the obligation arises in connection with the contract, its proper law is a law applicable to the contract ;
- (b) if it arises in connection with a transaction concerning an immovable (land), its proper law for the law of the country where the immovable is situated (lex situs);
- (c) if it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.”

The enrichment in this case was the delivery of the Jet. The Jet was received in Canada and registered in the Isle of Man. FRN says that the enrichment took place in one or both of these countries, and not in Nigeria. The result is that the place of the receipt of the enrichment is a neutral factor in this case because it does not point to any one of the two competing jurisdictions, specifically, it does not point to Nigeria.

[39] The other test for determining the governing law of the claims in this case is the law of the country with the closest and most real connection to the claims. This test was accepted and applied by this Court to restitutionary claims in **Sibir Energy PLC v Gregory Trading SA and others**.¹³ Mr. Hardwick KC relied on the test and submitted that the claims in the action must be determined by reference to the events in the Nigerian Fraud. These events occurred in Nigeria by persons living in Nigeria. As such the action has its closest connection with Nigeria and Nigerian law is a governing law of the claims in the action. The difficulty with this submission is that the acts constituting the restitutionary claims did

¹³ BVI Civil Appeal No. 26 of 2005 (delivered 18th September 2016, unreported).

not occur in Nigeria but in other countries, using BVI entities. Therefore, it is still necessary to determine the country with the closest and most real connections to the claims.

[40] The Judge's approach to finding the governing law of the claims in the action was to start with a summary of the submissions of counsel for the parties. He then went directly to the question of ownership of Tibit. He did this because he thought that the real issue in the case was 'who owns Tibit'¹⁴, or more precisely 'who is the real owner behind a company.'¹⁵ This approach is not surprising. In restitutionary claims based on a constructive trust the state of mind of the recipient (those who control Tibit) when it received the Jet is crucial, and this will be an important issue at the trial. The Judge then noted that the information to determine the real owner of Tibit is likely to be with the registered agent of the company in the BVI. The Judge effectively found that the registered office of Tibit, with information about who are the real owners of the company, is a strong connecting factor to the BVI.

[41] The Judge then reminded himself that the issues in the Nigerian Fraud are issues of Nigerian law and that they were being dealt with by the High Court in England in **Federal Republic of Nigeria v JP Morgan Chase Bank NA**¹⁶ by Cockerill J sitting in the Commercial Court of the Queen's Bench Division in London ("**JP Morgan**"). I will return to this case later. The Judge then made the important point that –

“The fraud that we are concerned with here is whether the assets originally belonging to the Federal Republic of Nigeria were fraudulently transferred to Malabu. That is a different fraud, perhaps related, but it's a different fraud from whether

¹⁴ Transcript internal page 197 line 24.

¹⁵ Transcript internal page 198 lines 24-25.

¹⁶ [2022] EWHC 1447 (Comm).

or not bribery and corruption took place involving oil companies such as Shell and ENI.”¹⁷

This extract from the Judge’s decision shows that he was alive to the fact that he was dealing with the restitutionary claims in respect of the use of monies that formed a part of the Malabu Proceeds. Implicit in these findings is that the Judge thought that BVI law was the governing law of the restitutionary claims. The Judge’s finding on the governing law of the claims in the action was put beyond doubt later in the transcript of his decision when he said ‘the question of the ownership and the three causes of action, the governing law isn’t BVI law’.¹⁸ It was common ground between the parties in the appeal that the word “isn’t” should read “is” as this is clearly what the Judge meant to say (or actually said but the transcriptionist got it wrong). The sentence following shows that the Judge treated the governing law of the claims as BVI law: ‘In relation to who did what in relation to those causes of action, again none of that seems to be connected to Nigeria.’ Both parties treated the appeal as one where the Judge found that the governing law of the claims in the action is BVI law. They differ on whether the Judge erred in so finding.

- [42] Implicit in the Judge’s finding on the governing law is that the BVI is the country with the closest and most real connections to the claims in the action.¹⁹

Other Connecting Factors

- [43] Having found that the governing law of the claims is BVI law the Judge proceeded to deal with the other connecting factors. I will

¹⁷ Transcript internal page 199 lines 3-9.

¹⁸ Transcript internal page 202 lines 21-23

¹⁹ See paragraph 39 above.

deal with them in the same order as he did in his *ex tempore* judgment.

- [44] Witnesses – In dealing with the issue of the ownership of Tibit (see paragraph 40 above) the Judge found that the witnesses who can give evidence about the real ownership of Tibit reside in the BVI. Some of Tibit's witnesses may reside in Nigeria but, as the Judge noted, trials in the Commercial Court are frequently conducted virtually, and even if travel is necessary, this is not a significant inconvenience. Other potential witnesses live and work in diverse places such as the Democratic Republic of the Congo, Canada, the United States, Western Australia and the Isle of Man. The location of witnesses is therefore a connecting factor in favour of the BVI, or is neutral, and certainly does not favour Nigeria.
- [45] Tibit does not carry on business in Nigeria. To the extent that it carries on business it would be in connection with the operation of the Jet and there is no evidence that any of this takes place in Nigeria.
- [46] FRN says that the documents that they intend to rely on are already disclosed in the JP Morgan case in London.
- [47] In terms of establishing the process to acquire the Jet, the Judge found that nothing points to Nigeria. This is not completely accurate. The initial payment of US\$54 million came from the account of Rocky Top, a Nigerian company, in a Nigerian bank, and the payment was allegedly made on the instructions of Chief Etete and Malabu. This is a pointer towards Nigeria. However, the other entities involved in the acquisition are not Nigerian and there is no evidence that they carry on business in Nigeria or conducted any of

the transactions leading to the acquisition and use of the Jet in Nigeria. AV West is based in Western Australia; IATS is an Oklahoma company; Bombardier Aviation, the maker and seller of the Jet, is based in Canada and has offices in Canada and the United States; PAGL is a Bermudan company – its sole shareholder is Mr. Ickonga who is a Congolese national with an address in the Republic of Congo. Three of the entities in the acquisition project: Yokohona, Lenord and Tibit itself, are BVI companies. Apart from the person or persons initiating the transfer of funds, the other entities and persons involved in the acquisition of the Jet were located outside Nigeria and there is no evidence that they carried out the various transactions in the acquisition process in Nigeria. This factor does not favour Nigeria.

- [48] Mr. Hardwick KC submitted that the Judge erred by accepting and giving weight to the submission by counsel for the claimant that there are three BVI companies involved in the acquisition of the Jet. The transcript of the judgment shows that the Judge referred to counsel's submission but his own position on the issue of the incorporation of the BVI companies is at internal page 204: 'It is clearly established that for a foreign company to be established in a jurisdiction is not sufficient for the court to take jurisdiction over a company.' At their highest, these words mean no more than the Judge saying that the use of the three BVI companies in the scheme is a connecting factor, but a weak one, and it is not sufficient for the court to take jurisdiction over Tibit.

Summary of the connecting factors

- [49] The Judge's assessment of the connecting factors of the claims in the action point either towards the BVI or towards countries other than Nigeria. The only factor pointing to Nigeria is that the

underlying fraud that led to the filing of the claims occurred in Nigeria. This is outweighed by the facts that the claims in the action are governed by BVI law and relevant documents and witnesses relating to the central issue of the ownership and control of Tibit are in the BVI; other witnesses are located in diverse countries and not Nigeria; the activities leading to the purchase of the Jet occurred outside Nigeria and were done by persons resident and working outside Nigeria.

- [50] The effect of the Judge's findings on the connecting factors is that Tibit failed to discharge the burden of showing that Nigeria was clearly the most appropriate forum for the trial of the action. As a result, the BVI is the most appropriate forum for the trial of the action because Tibit is sued as of right in the jurisdiction, and there are connecting factors pointing to the BVI. This was the Judge's finding having carried out the balancing exercise that he was conducting. As suggested by Lord Templeman in **The Spiliada** and Lady Arden in **Livingston**, this Court should be slow to intervene.

The JP Morgan case – proof of the claims

- [51] Mr Hardwick relied on **JP Morgan**²⁰, a case that also deals with what I have described in this appeal as the Nigerian Fraud. He submitted that this case supports his position that Nigeria is the governing law of the claims in the action and that Nigeria is the most appropriate forum for the trial of the action.
- [52] The claim in **JP Morgan** was by the FRN against the Bank alleging that the Bank had breached its so-called Quincecare duty to the FRN. The Quincecare duty imposes a duty on a bank to refrain from carrying out its customer's instructions when it is put on notice

²⁰ Supra note 16.

that the instructions may be the result of a fraud. A part of the FRN's burden in the case was to prove that the Bank should have been on notice of the underlying Nigerian Fraud and the events leading up to the payment of the Malabu Proceeds to Malabu. The FRN attempted to discharge this evidential burden by documentary evidence. The attempt was rejected by the learned Judge who dismissed the claim. Mr Hardwick, KC relied on several passages from the judgment of Cockerill J and in particular paragraph 231 where the learned Judge dealt with proving the allegation of fraud against the former Attorney General of Nigeria, Mr. Ojo who was not a party to the claim. The allegation by FRN was that Mr Ojo accepted a bribe of US\$10 million from Malabu in connection with the 2006 Settlement Agreement. FRN sought to make good this allegation on the basis of documentary evidence. The learned Judge observed that:

“Those oddities and question marks have not been able to be properly tested before me – how, for example, am I to form a view as to Mr. Ojo's evidence on the payment and the work he says he did without him before me, without having evidence on the issues in some other form?”

[53] Mr. Hardwick, KC submitted that the difficulties that Cockerill J faced will confront the Judge in the BVI if the trial proceeds on the basis of documentary evidence. The BVI court will not be able to make findings of fraud against a former Attorney General of Nigeria, a former President of Nigeria, and other important government officials when those persons are not before the court. These difficulties, he submitted, highlight the obvious position that the BVI is not the more appropriate court for the trial of the action.

[54] Leading counsel for FRN, Mr. Steven Thompson, KC, countered by submitting that the underlying fraud that FRN will be required to prove at the trial is relatively simple and FRN will be able to do this

using documentary evidence. The essence of his submission on this point is at paragraph 33.3 of his skeleton argument –

“In the light of Tibit’s Amended Defence to the Claim, the main focus of these proceedings will entail consideration of whether Tibit and those behind it, such as Mr. Ickonga, knew or should have known that the Malabu Proceeds were derived from Etete’s breach of trust. This will entail analysis of the documents relied upon by Tibit, which have been put squarely in issue in these proceedings by Tibit and which now fall under scrutiny by the BVI Court.”

[55] The Judge accepted this submission and found at internal page 203 line 20 to page 204 line 1 of the transcript of his judgment that -

“In terms of the underlying alleged fraud, Mr Masefield²¹ says, and I accept, that for the purposes of the BVI action, and as it is pleaded, those matters can be established largely based on the primary documentary evidence. And I do not see that we would need a nine month or a very long trial to go over all those grounds. It is simply not necessary.”

[56] This is a clear finding by the judge managing the case that the underlying fraud and breach of trust on which the claims rely can be proved by documentary evidence.

[57] There is merit in Mr. Hardwick’s submissions, but they must be seen in the context that this is a *forum* application where Tibit is sued as of right in the BVI. This is not a strike out application or an application for summary judgment where the prospect of success or failure of the claims is a central issue. The main objective of the forum application in this case is to determine which of Nigeria or the BVI is more appropriate for the trial of the action. Wallbank J is an experienced judge of the Commercial Court who is accustomed to dealing with *forum* applications. He is deeply immersed in the facts of the case and the relevant law and it was for him to decide, weighing the connecting factors, which of the two courts is the more

²¹ Mr. Roger Masefield appeared for FRN in the Commercial Court.

appropriate. He carried out this exercise and found that apart from the underlying Nigerian Fraud none of the connecting factors point to Nigeria. He found, with his detailed knowledge of the case, that the fraud could be proved by documentary evidence and that the BVI is the more appropriate court for the trial of the action. These are findings made by the Judge in the exercise of his discretion and I would not interfere with them unless I am satisfied that he erred in principle and as a result, his decision exceeded the generous ambit of reasonable disagreement, and that his decision was clearly or blatantly wrong. **JP Morgan** is a different case on different facts and the findings and observations of Cockerill J do not impel me to set aside the exercise of discretion by the Judge and come to a different conclusion on the issue of the appropriate forum for the trial of the claims.

Abuse of process

- [58] The second limb of Tibit's application is that the action should be stayed for abuse of process. The second limb of the application was expanded in Tibit's skeleton argument to say that the Court should strike out the claim for abuse of process and that it is a collateral attack on a judgment of the Italian court reached after a full trial. The Italian judgment was delivered by the Criminal Division 7 of the Italian Republic on 6th September 2021 by a panel of three judges. Charges were brought against 15 defendants, including Chief Etete, for corruption under Italian law. The case lasted more than two years between December 2018 and June 2021. The Italian court acquitted the defendants of the corruption charges. One of the conclusions of the court at paragraph 3.3.2 page 77 of the judgment is that Chief Etete's original conflict of interest (when OP 245 was originally granted in 1998) had become irrelevant and no legal issue could be raised any longer about this

aspect. The Italian court also found that the 2006 Settlement Agreement and the 2011 deal were made in furtherance of lawful directives by the President in exercise of his executive powers (“the Italian Judgment”).

[59] Tibit argued that the matters decided by the Italian judgment were binding on FRN, which was a civil party in the Italian proceedings, and it created an issue estoppel between Tibit and FRN. Therefore, proceeding with the action in the BVI would be an abuse of process. The BVI action should be stayed at least pending the outcome of FRN’s appeal against the judgment.

[60] The principles for a foreign judgment creating an estoppel are set out in **Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)**²² and repeated in paragraph 56 of Tibit’s skeleton argument as follows:

- (1) the judgment relied on as creating the estoppel must be
 - (a) by a court of competent jurisdiction; (b) final and conclusive; and (c) on the merits;
- (2) the parties (or their privies) must be the same in both sets of proceedings;
- (3) there must be a clear determination of the issue by the judgment—it must not be merely collateral or obiter comment;
- (4) the issue in the later action must be the same as the issue decided by the judgment in the earlier proceedings.

[61] Tibit also relied on **Michael Wilson & Partners Ltd v Sinclair**²³ for the proposition that where there is no *res judicata* or issue

²² [1967] 1AC 853.

²³ [2017] 1 WLR 2646.

estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated.²⁴

- [62] There is disagreement between the parties as to whether the Italian Judgment was final and conclusive (principle 1 above). Tibit's expert, Professor Carlo Torsello, opined that the Italian Judgment is final and conclusive and FRN would not be able to re-litigate the issues that had been finally determined by the judgment. FRN's position was more nuanced. It is that there is no final or conclusive judgment that Tibit could rely on because Tibit was not a party to the Italian proceedings.
- [63] FRN also submitted that the Italian Judgment is not final and conclusive because the Italian court found that it did not have jurisdiction to decide on the liability of Chief Etete²⁵ and acquitted him with the other defendants.²⁶ It follows that there is no determination on the merits of the charges against Chief Etete.
- [64] The evidence on these issues is clear – Tibit was not a party in the Italian proceedings and the acquittal of Chief Etete was on jurisdictional grounds. In the circumstances the Italian judgment is not a final and conclusive judgment against Chief Etete.
- [65] The second principle in **Carl Zeiss** is even more apt in this case. It is that the parties (or their privies) must be the same in both sets of proceedings. FRN submitted that this principle is not satisfied in this case for the obvious reason that Tibit is not a party in the

²⁴ Ibid at paragraph 48(1).

²⁵ Paragraph 24.1 of the Italian Judgment at page 847 of Final Appeal Bundle.

²⁶ Page 856 of the Final Appeal Bundle.

Italian proceedings. Tibit argued that FRN cannot say that Tibit is not a party or privy in the Italian proceedings because it is their case that Tibit is the privy of Chief Etete who was a party in the Italian proceedings. FRN cannot now take a contrary position by saying that Tibit is not a party for the purpose of the estoppel issue. Unsurprisingly, FRN adopted the obverse position by submitting that Tibit cannot resile from the position in its pleaded case that it was not a party in the Italian proceedings.²⁷

[66] On principle, I prefer FRN's argument. Issue estoppel requires both persons to be parties in the foreign litigation. *Ex facie*, Tibit is not a party in the Italian case and it has denied that it is a party. It cannot take a contrary position and argue that it is a party in Italy for the purpose of *res judicata* but not otherwise a party or a privy of Chief Etete.

[67] The Judge resolved the issue by reference to the principles of *res judicata*. He referred to the principle that the whole purpose of *res judicata* is that a party should not be vexed twice with the same claim. Further, Tibit is not a party in the Italian proceedings and has not been vexed in that case, and -

“[U]nless Tibit can turn around and say, well, actually, I am identical as Chief Etete and actually there is something which is final and conclusive against Chief Etete in Italy, then Tibit's argument that it was being vexed twice or that it has *res judicata* goes nowhere. So I dismiss the line of argument which Tibit tries to raise.”²⁸

[68] As a matter of principle and applying the test that a person should not be vexed twice with the same claim, I adopt the Judge's finding that Tibit was not a party or the privy of Chief Etete in the Italian

²⁷ Paragraph 25 of the Amended defence (page 1202 of the Appeal Hearing Bundle).

²⁸ Internal page 208 lines 9-15 of the transcript.

proceedings and that is sufficient to rule out the possibility of abuse of process based on *res judicata*.

[69] I also find that the fourth principle in **Carl Zeiss** was not satisfied. The main issue in the Italian proceedings was a specific allegation of bribery in the Nigerian Fraud and not the entire fraud. The issue in the BVI action is the restitutionary claims relating to the acquisition of the Jet using monies from the Malabu Proceeds. These are different claims and are not covered by the fourth principle that the issue in the later action (BVI) is the same as the issue decided by the Italian judgment.

[70] In conclusion on this issue, I find that the allegation of *res judicata*/issue estoppel was not made out by Tibit and there is no abuse of process in starting and continuing the BVI action. For the same reasons the BVI action is not a collateral attack on the Italian judgment. The BVI action should not be stayed or struck out on any of these grounds.

Delay

[71] FRN filed the claim on 8th May 2020 and an amended claim on 18th September 2020. Tibit filed its amended defence on 1st December 2020. On 4th October 2021, some 17 months after the claim was filed, Tibit applied to stay the proceedings in the court below on the grounds of *forum non conveniens* and/or abuse of the court's process and/or case management. This was the first time that the issue of a stay was mentioned by Tibit. Mr. Thompson, KC raised the issue of Tibit's delay in filing the stay application and submitted that the court should bar the application. He said that any challenge to the exercise of jurisdiction by the court should be made at an early stage so that if it is successful, there will be

minimal use of the courts' and the parties' time and resources. Generally, this is correct.

[72] Mr. Hardwick, KC responded by saying that applications for a stay on *forum* grounds are now governed by the **Civil Procedure Rules 2000** ("CPR") Part 9.7A which provides that applications under the rule can be made at any time. The rule does not provide for any adverse consequences as a result of delay.

[73] The correct position lies somewhere between the submissions of counsel. Delay in filing an application under CPR Part 9.7A or under the inherent jurisdiction of the court will not result in an automatic barring or dismissal of the application. However, an unreasonable delay in filing the application can have adverse consequences for the applicant, the most obvious being that if the late application is successful and the claim is stayed, the court may order the applicant, though successful, to pay the costs of the proceedings up to the date of the filing of the application , or may make such other order as the court sees fit.

Conclusion

[74] For all the reasons set out in this judgment I would uphold the Judge's findings that the BVI is the appropriate forum for the trial of the claims in the action and that the action should not be stayed or dismissed as an abuse of process. I would dismiss the appeal with costs to FRN, such costs to be assessed if not agreed within 21 days.

I concur.
Sydney Bennett
Justice of Appeal [Ag.]

I concur.
Godfrey Smith
Justice of Appeal [Ag.]

By the Court

Chief Registrar