

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(COMMERCIAL DIVISION)**

**Claim No: BVIHC (COM) 2020/0215, 2021/0003 and 2021/0073
CONSOLIDATED CLAIM**

BETWEEN:

MEX CLEARING LTD

Claimant

-and-

(1) MEX SECURITIES SARL

(2) MULTIBANK FX INTERNATIONAL CORPORATION

(3) VON DER HEYDT INVEST SA

Defendants

Appearances:

Mr. Tim Penny QC and Mr. Alexander Cook, with them Mr. Alex Hall Taylor QC and Mr. Simon Hall of Carey Olsen for Von der Heydt Invest SA

Mr. John Carrington QC, Mr. James Bogle and Ms. Reisa Singh of Lanx Lancis for Mex Clearing Ltd

Mr. Hefin Rees QC and Mr. Daniel Warrants, with them Mr. Oliver Clifton of Walkers for Multibank FX International Corporation

Mex Securities SarL did not appear and was not represented

2021 December 15
2022 January 17

JUDGMENT ON FORUM AND SERVICE OUT

[1] **JACK, J [Ag.]:** There are three applications before me:

- (a) the application of VDHI dated 6th July 2021 to serve Mex Clearing out of the jurisdiction;

- (b) the application, also dated 6th July 2021 of Mex Clearing pursuant to CPR 9.7(1), 9.7A(1) and 9.7(6)(a) to challenge this Court's jurisdiction over it; and
- (c) MBFX's application dated 21st July 2021 also challenging this Court's jurisdiction.

I shall use the abbreviations in the previous judgments I have delivered in this matter and will not repeat the factual background, which can be gleaned from my earlier judgments.

[2] Mex Clearing is incorporated in Dubai in the United Arab Emirates, whilst MBFX is incorporated here. MBFX is therefore served as of right with the various proceedings. Each of their applications for a stay of the action is based on this Territory being a *forum non conveniens*. The leading authority in this Territory on this question is **IPOC International Growth Fund Ltd v LV Finance Group Ltd and others**¹ where Gordon JA held:

“This jurisdiction has frequently had to deal with the principles that a trial judge should apply in exercising a discretion whether to stay proceedings on the grounds of *forum non conveniens*. As always the starting point is **Spiliada Maritime Corporation v Cansulex Limited**,² a decision of the House of Lords, the learning within which has on more than one occasion been accepted by this Court. In the lead judgment, Lord Goff of Chieveley summarised the law in the following way, and I take the liberty of paraphrasing the learned Law Lord:

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

(ii) The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once the defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of

¹ Civil Appeal Nos 20 of 2003 and 1 of 2004 (determined 19th September 2005, unreported) at para [27].

² [1987] 1 A.C. 460.

which justice requires that the trial should nevertheless take place in this jurisdiction. Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of a claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that 'where there can be pointers to a number of different jurisdictions' there is no reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that that alternate jurisdiction is clearly or distinctly more appropriate than this jurisdiction.

(iii) When considering whether to grant a stay or not, the court will look to what is the 'natural forum' as was described by Lord Keith of Kinkel in **The Abidin Daver**,³ 'that with which the action has the most real and substantial connection.' In this connection the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions might be subject, in the case of actions in tort where it is alleged that the tort took place and the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of considerations a court should have in exercising its discretion.

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

[3] The first step is to consider whether there is an alternative forum available. Both Mex Clearing and MBFX say that the ordinary courts of the United Arab Emirates in Dubai are available and a better venue. On 12th October 2021, Mr. Gee QC, who appeared for MBFX at that time, submitted that Germany was a more suitable

³ [1984] A.C. 398.

venue, but MBFX never amended its application. Mr. Rees QC, who now appears for MBFX, reverted to the original proposition that Dubai was the appropriate venue.

- [4] MBFX on its application bears the burden of showing that UAE is a more suitable venue: **Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd**.⁴ By contrast, in relation to Mex Clearing (assuming Mex Clearing have not submitted to the jurisdiction), the burden is on VDHI to show a serious issue to be tried, a good arguable case that one of the gateways for service exists and that this Court is clearly and distinctly the most suitable venue, so that it ought to exercise its jurisdiction to permit service outside the jurisdiction.

MBFX's application

- [5] MBFX sought to rely on a legal opinion given by Mr. Amr Bajamal. The copy available at the hearing was unsigned, but a signed version was provided after the hearing. The opinion is not in the form of an expert report. It is not addressed to the Court, does not include the details required by CPR 32.14(2) and does not fully comply with CPR 32.14(1). No permission to adduce expert evidence had been given. It does not appear that Mr. Bajamal was shown the pleadings in the actions before this Court.
- [6] Mr. Bajamal says that under Article 20 of the UAE Civil Procedures Code, Mex Clearing (by reason of its incorporation in Dubai) can be an anchor defendant with MBFX and Mex Securities added under Article 20(7). However, he says nothing about subject matter jurisdiction. He does not consider the nature of the claims brought in this Territory and does not give an opinion as to whether they are judicable in Dubai. He says that liability for unlawful means conspiracy does not exist in the UAE, but does not explain what tortious claims might exist. He does not explain how the Dubai courts would deal with claims under the **Fraudulent Conveyances Act 1571**⁵ and section 81 of this Territory's **Conveyancing and Law**

⁴ [2011] UKPC 7; [2012] 1 WLR 1804.

⁵ 13 Eliz I c. 5.

of Property Act 1961.⁶ Nor does he deal with claims in Luxemburg law under the *actio Pauliana*.

- [7] It follows in my judgment that MBFX's application fails *in limine*. MBFX does not show that Dubai is an available forum. What I say in relation to Mex Clearing will apply equally to MBFX, if I am wrong in this conclusion as to MBFX's application.

Mex Clearing's application

- [8] So far as Mex Clearing's application is concerned, I remind myself of the passages in **IPOC International** above. Further, I remind myself of the warning in **Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd**,⁷ where the UK Supreme Court held:

“Leaving aside questions as to the burden of proof, at common law the *forum conveniens* doctrine requires the English court to decide whether its jurisdiction or that of the suggested foreign court is the more suitable as a forum for the determination of the dispute between the parties. The traditional way in which this question has been framed speaks of the ‘forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice’ (*per* Lord Collins JSC in **Altimo Holdings**...⁸). The requirement in complex litigation to define, at the outset, what is ‘the case’ to be tried runs the risk that the court will by choosing a particular definition prejudice the outcome of the *forum conveniens* analysis, as the Court of Appeal decided had occurred at first instance in **In re Harrods (Buenos Aires) Ltd**.⁹ Harman J had characterised ‘the case’ as a petition under the English Companies Act for relief for unfair prejudice in the conduct of the affairs of an English registered company, which made it ‘blindingly obvious’ to him that England was the appropriate forum. But the company carried on business entirely in Argentina. The matters complained of all occurred there, where there was a parallel jurisdiction to provide relief under Argentinian legislation. So the Court of Appeal preferred Argentina as the appropriate forum. Like the Court of Appeal in the present case, we therefore prefer for present purposes to identify the dispute between the

⁶ Cap 220, Revised Laws of the Virgin Islands.

⁷ [2020] UKSC 37, [2021] 1 All ER 1141 at [94].

⁸ At [88], adopting the language of Lord Goff in *Spiliada*.

⁹ [1992] Ch 72.

parties as the matter to be tried, lest reference to 'the case' should introduce undue formalism into the analysis of a question of substance."

- [9] In the current case, Mr. Bogle and Mr. Rees QC say that the main centre of the case is Dubai. That is where the conspiracy was allegedly hatched. They accepted that only this Court could set aside the Tomlin order. However, that is, they submitted, really a side issue. The Tomlin order could only take effect between the parties to it. There was no need to set it aside. The conspirators conspired in Dubai and that is the heart of the case.
- [10] Mr. Bogle submitted that the ordinary courts of Dubai (as opposed to the specialist English common law courts in the UAE) would use both Arabic and English, so that there was not a language issue. In my judgment, firstly it is not for counsel to give evidence, but secondly his statement is belied by Mr. Bajamal's opinion. At para 4, Mr. Bajamal says that the ordinary courts of the individual emirates in the UAE are "Arabic speaking". Everyone involved in the current case speaks English. Mr. Taher and his son presumably speak Arabic, but they are the only witnesses identified who do. No relevant documents seem to have been written in Arabic. These are contra-indications to the suitability of Dubai as a venue for the litigation.
- [11] Only Mr. Taher and his son have a residence in Dubai, although Mr. Taher as an international businessman is likely to do a lot of travelling. Mr. Duthie appears to have a Mayfair address in London, whilst Mr. Smith is resident in Luxemburg. The VDHI and VDH AG witnesses have no connection with Dubai. It might be slightly easier for witnesses from Europe to fly to Dubai rather than Tortola, but there is in my judgment not much in this point, particularly at present when witnesses give their evidence by Zoom.
- [12] Mr. Penny QC submitted that the correct characterisation of the case was of a conspiracy involving Luxemburg, the UAE and the BVI. The object was to defraud a Luxemburg company by making untrue claims in the BVI. €36 million was paid by

MBFX, a BVI company, from accounts said to be held in the BVI. The overt acts of conspiracy were all in the BVI starting with the bogus letter before action. This letter lead to the Tomlin order purportedly settling the Mex Clearing action as soon as it began. The litigation was conducted by BVI practitioners. The Tomlin order is only justiciable here.

[13] I agree with Mr. Penny QC. The “natural forum” under **The Abidin Daver** is in my judgment this Territory. This is where the fraud allegedly occurred. The only connection with Dubai is that that happens to be where Mr. Smith and Mr. Duthie met Mr. Taher and (on VDHI’s case) agreed the conspiracy. Everything else and all the overt acts pursuant to the conspiracy occurred here. The language issues also favour this jurisdiction.

[14] Since the fraud (on VDHI’s case) was committed here, no issue of double actionability under **Boys v Chaplin**¹⁰ arises. It follows that no issues of the UAE’s laws of tort or delict arise, so even that desideratum in favour of Dubai falls away. Even if there were some UAE claim, there would be a risk of irreconcilable decisions, since only this Court can set aside the Tomlin order.

[15] At para 33.5 of VDHI’s skeleton, I am asked to look at the “broader view”. It is submitted:

“The only sensible course of action is for all claims to be heard and determined in one forum: the BVI. This is a claim based on allegations of the most serious of abuses of the BVI court processes, via collusive proceedings in the BVI, which were sealed under a BVI Tomlin Order, the schedule to which contained a purported contract under which substantial monies were paid from an account in the BVI owned by a company, MBFX, incorporated in the BVI. The abuse was compounded by a series of applications to the BVI Court the purpose or effect of which was to try to prevent those who had suffered damage from discovering the truth. In all normal senses, the BVI Court is the proper and appropriate forum, and clearly and distinctly so.”

¹⁰ [1971] AC 356.

[16] I agree. I dismiss Mex Clearing's application.

VDHI's application to serve outside the jurisdiction

[17] I turn then to VDHI's application for leave to serve outside the jurisdiction or to dispense with service. At present this application is otiose. On 12th October 2021 I ordered that all three actions be consolidated. All of Mex Clearing, Mex Securities and MBFX submitted to the jurisdiction in BVIHC (COM) 2020/0215. They took the risk that other parties like VDHI would become parties and bring counterclaims in the consolidated action: see **Altimo Holdings** at [72]. My order for consolidation is, however, under appeal and leave to appeal has been granted. It is unclear when the appeal will be heard.

[18] For completeness, I should add that I agree with the way VDHI puts its supplemental case on submission to the jurisdiction in its skeleton:

“16. That Mex Clearing and MBFX have so submitted ought to be common ground. When seeking an anti-suit injunction from the BVI Court to restrain the Luxembourg Summons, Mex Clearing made precisely the same point in the following terms:

‘[Mex Securities] submitted to [the Mex Clearing Proceedings] and is subject to the orders made within those proceedings, including the Consent Order. If [Mex Securities] wishes to challenge the validity of the Consent Order, [Mex Securities] must bring that challenge before the court that made the order, rather than to seek a collateral challenge on the validity of the order in a foreign jurisdiction. That is to call directly into question the integrity of the Court's orders, jurisdiction and process’ and

‘To use the language in the **Glencore** decision,¹¹ [Mex Securities], having submitted to the jurisdiction of the BVI Court, is subject “to all the incidents of litigation”.’

17. The same argument plainly applies to Mex Clearing (which commenced the Mex Clearing Claim) and MBFX.

18. Moreover, Mex Clearing has even applied to this Court for a declaration that the Consent Order made in these proceedings on 14 December 2020 is valid and enforceable. Mex Clearing (at least) has clearly submitted to

¹¹ *Glencore International AG v PT Tera Logistic Indonesia* [2016] EWHC 82 (Comm), [2016] Bus LR 408.

the jurisdiction as a result. In the circumstances of this case, such an application is a wholly unequivocal submission to the jurisdiction and there is no other explanation for Mex Clearing's application other than that it was submitting to this Court's jurisdiction...

19. Mex Clearing has also submitted to the jurisdiction by applying for the appointment of receivers over Mex Securities (again, this is an unequivocal submission to the jurisdiction).

20. MBFX has also submitted to the jurisdiction by applying:

20.1. for security for costs...; and

20.2. to set aside the representative order...

21. All of the Defendants have therefore submitted to the jurisdiction. VDHI can assert all of its causes of action against the Defendants without needing to apply for permission to serve out against Mex Clearing and/or Mex Securities."

[19] On the assumption that there was not a submission to the jurisdiction, so that service out of the jurisdiction is needed, I look first at the gateways. The gateways on which VDHI relies are set out in para 25 of its skeleton are follows:

"25.1. CPR 7.3(2)(a) — that Mex Clearing and Mex Securities are necessary and proper parties to the Set Aside Claim against MBFX (which is an anchor Defendant incorporated and domiciled in BVI);

25.2. CPR 7.3(3)(b)(i) — it is a term (either implied or, on a true construction, express) of the settlement agreement between Mex Clearing, Mex Securities and MBFX that the BVI court shall have jurisdiction to determine any claim in respect of the contract;

25.3. CPR 7.3(3)(b)(ii) — it is a term (either implied or, on a true construction, express) of the settlement agreement between Mex Clearing, Mex Securities and MBFX that the agreement is governed by BVI law;

25.4. CPR 7.3(3)(c) — the settlement agreement between Mex Clearing, Mex Securities and MBFX is a sham;

25.5. CPR 7.3(4) — there is a claim in tort and the act causing the damage was the entry into the Tomlin Order in this jurisdiction and/or the payment of the €36.4m by MBFX which is incorporated in the BVI, to Mex Clearing;

25.6. CPR 7.3(9) — the setting aside of the Tomlin Order for fraud will result in an order that Mex Clearing make restitution of the €36.4m plus interest to Mex Securities and such liability arose from the collusive and dishonest Tomlin Order entered into by the Defendants within the jurisdiction;

25.7. CPR 7.3(10) — claims under the **Statute of Elizabeth**¹² and the **Property and Conveyancing Act 1961** satisfy this gateway;

25.8. CPR 7.4 — the residue of VDHI's claims arise out of the same or substantially the same facts as the claims falling within the contract and tort gateways."

[20] I have already determined when I declined to discharge the freezing order that there is a serious issue to be tried. There is in my judgment a good arguable case in respect of each of the gateways identified by Mr. Penny QC. For the reasons already given, this Territory is clearly and distinctly the most appropriate forum for determination of these issues. Accordingly I grant leave to serve Mex Clearing and Mex Securities outside the jurisdiction under each of these gateways.

[21] I am asked in the alternative to dispense with service. It seems to me that it is premature to determine this application. As I have said, my view is that there has already been submission to the jurisdiction. If that be wrong, I have given leave to serve outside the jurisdiction. In order to determine whether there are "exceptional circumstances" within the meaning of CPR 7.8B(1), I would need to know what difficulties have arisen with service. I adjourn this part of the application with liberty to restore.

¹² 13 Eliz I c. 5.

Conclusion

[22] I dismiss the applications of Mex Clearing and MBFX. I give leave to VDHI to serve Mex Clearing and Mex Securities outside the jurisdiction under the gateways identified. I adjourn VDHI's application to dispense with service with liberty to restore.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar