

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCPMAP2021/0024

BETWEEN:

OSCAR TRUSTEE LIMITED
(AS TRUSTEE OF THE CHLOE TRUST)

Appellant

and

MBS SOFTWARE SOLUTIONS LIMITED

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Esco L. Henry
The Hon. Mr. Godfrey Smith, SC

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. James Willan QC, with him, Mr. William Hare and Mr. Mungo Lowe for the
Appellant
Mr. Sharif Shivji QC, with him, Mr. Guy Olliff-Cooper and Mr. Jonathan Addo for
the Respondent

2022: May 13;
August 17.

Interlocutory appeal – Forum non conveniens – Stay of proceedings on ground of forum non conveniens – Whether the learned judge erred in the exercise of his discretion by incorrectly applying the test for a stay on the ground of forum non conveniens – Whether the learned judge, in granting the stay, attached too much weight to irrelevant factors and too little weight to relevant ones – Costs – Whether the learned judge erred in the exercise of his discretion by awarding costs on the applications to the respondent

Three now former friends, Messieurs Simon Butler, Matthew Paget and Reid Zulpo invested US\$1 million with MBS Software Solutions Limited ("MBS"), a company incorporated in the

Territory of the Virgin Islands (the “BVI”) through Oscar Corporation Pty Limited (“Oscar Corp”). Their investment in Oscar Corp was intended to be channeled into a mining venture in Turkey from which the friends anticipated substantial profits. At the time of their investment, Oscar Corp served as trustee of the Chloe Trust, Mr. Paget’s discretionary family trust. Oscar Corp itself got involved in the venture through a fund-raising exercise conducted by MBS in Hong Kong. The company then invested the funds into MBS pursuant to an equity derivative agreement made between the two companies on 24th August 2012. The derivative agreement was evidenced by an ISDA Confirmation that incorporated the terms of the 2002 ISDA Master Agreement and an associated side letter (collectively “the Agreement”). Among other things, the Agreement stipulated that the governing law was the law of Hong Kong. Oscar Trustee Limited (“Oscar Trustee”) alleged that it succeeded Oscar Corp as the trustee of the Chloe Trust on 22nd December 2016, pursuant to a Deed of Retirement and Appointment of New Trustee. MBS, however, questioned this.

By claim form and statement of claim filed on 5th February 2021 in the BVI, Oscar Trustee sued MBS for breach of the Agreement. It claimed the sum of US\$5,887,874.00, interest and costs. MBS filed no defence but on 8th March 2021, they sought a stay of the proceedings in the BVI in favour of the courts of Hong Kong on the ground of *forum non conveniens* (“the forum challenge application”). On 1st April 2021, Oscar Trustee applied to the court for summary judgment. In a decision made on 6th July 2021, the learned judge dismissed Oscar Trustee’s application for summary judgment and granted MBS’ application to stay the proceedings in the BVI. He found that Hong Kong was the more appropriate forum for trial of the claim and costs were awarded to MBS in respect of both applications. Being dissatisfied with this decision, Oscar Trustee appealed.

Whilst Oscar Trustee took no issue with the learned judge’s decision on the summary judgment application, they contended that the learned judge erred in the exercise of his discretion as regards the decision on forum and the costs order. Oscar Trustee contended that the learned judge erred in law by applying the wrong test to the forum challenge application, and/or by failing to ascribe adequate weight to a number of relevant factors and by attaching too much weight to irrelevant matters. They further submitted that the costs orders were plainly wrong and ought to be reversed.

Held: dismissing the appeal, affirming the trial judge’s decision and awarding costs on the appeal to the respondent at two-thirds of the costs below, that:

1. An appellate court will not lightly reverse a lower court’s findings and will only do so if satisfied that the judge failed to consider, or gave too little or too much weight to relevant factors, or was influenced by irrelevant ones. The judge’s decision must have exceeded the generous ambit within which reasonable disagreement is possible and be considered clearly or blatantly wrong to warrant appellate interference.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed.

2. In a forum challenge, the guiding principle is that the court must consider whether the local jurisdiction is a more appropriate forum than any other foreign forum in the interests of all parties and the ends of justice, and if not, whether justice nevertheless requires that the case should be tried in the local jurisdiction. In considering the matter, the learned judge was cognizant of this guiding principle and comprehensively laid out the *forum non conveniens* test. Contrary to Oscar Trustee's assertions, the learned judge did not apply the wrong test and therefore did not err in this regard.

Spiliada Maritime Corp. v Cansulex Ltd. [1987] AC 460 applied; **Livingston Properties Equities Inc and others v JSC MCC Eurochem and another** [2020] UKPC 31 applied.

3. In considering whether a foreign forum is a more appropriate forum, the court must determine what connecting factors exist in relation to that forum. Such factors include the governing law. This is an important factor since it is generally preferable that a case be tried in the country whose law applies. The learned judge took into account the fact that the Agreement was governed by Hong Kong law. This was a relevant factor for him to consider in a forum challenge. His evaluation of this factor and the weight he attached to it was reasonable in all the circumstances. It therefore cannot be said that the learned judge gave too much weight to this relevant factor. It also cannot be said that he thereby erred in the exercise of his discretion or was blatantly wrong in granting the stay of the proceedings in the BVI in favour of Hong Kong.

VTB Capital plc v Nutritek International Corp and others [2013] 2 AC 337 applied.

4. Factors affecting convenience or expense, such as the availability and location of witnesses, are relevant considerations for a court to bear in mind when dealing with a forum challenge. In this case, the judge considered the circumstances of witnesses based in Australasia. He found that they would either have to endure difficult travel over extremely long distances at significant expense to attend court in the BVI or do so via video link, at times late into the night in their respective time zones. Contrary to Oscar Trustee's assertions, the judge did not confuse the expression *forum non conveniens* with the convenience of witnesses. Rather, he quite clearly drew a distinction between the exercise on which he had embarked, that is, a determination of the more appropriate forum, and a consideration of all the connecting factors, which included the witnesses' convenience. He therefore did not reduce his assessment to considerations of mere practical convenience. His evaluation of this factor was justifiable in the circumstances, was a relevant consideration in arriving at his decision to grant the stay, and cannot legitimately be said to be an error that led to a blatantly wrong decision on the forum challenge.

Spiliada Maritime Corp. v Cansulex Ltd. [1987] AC 460 applied; **Anjie Investments Limited et al v Cheng Nga Yee et al** BVIHCMAP2016/0003 (delivered 24th November 2016, unreported) followed.

5. The judge's conclusion that the Hong Kong court is a more appropriate forum than the BVI is supported by the overall weighting he attached to the connecting factors. On the case as pleaded and the evidence set out in the parties' respective witness statements and affidavits, he had adequate factual and legal bases for his finding that the Hong Kong court is the 'locale with the preponderance of connecting factors' where 'justice can be done at substantially less inconvenience and expense'. He did not err in principle in concluding as he did or thereby exceed the generous ambit within which reasonable disagreement is permissible. Consequently, it cannot be said that his decision was blatantly wrong.

Spiliada Maritime Corp. v Cansulex Ltd. [1987] AC 460 applied; **Livingston Properties Equities Inc and others v JSC MCC Eurochem and another** [2020] UKPC 31 applied; **SFC Swiss Forfaiting Company Ltd. v Swiss Forfaiting Ltd.** BVIHCMAP2015/0012 (delivered 4th July 2016, unreported) considered.

6. Only rarely and with extreme caution will an appellate court permit a party to withdraw from a concession which has formed the basis of argument and judgment in the lower court. On the facts, Oscar Trustee would have conceded in the lower court that MBS, as the successful party, was entitled to its costs on the applications, albeit with a reduction owing to MBS' conduct. This concession formed part of the learned judge's considerations when he made the costs awards. Oscar Trustee put forward no justifiable explanation to permit such a withdrawal and it would be unfair to MBS to permit them to do so. On the facts, the judge considered the relevant legal principles and the conduct of the parties, and it cannot be said that he erred either in his reasoning or decision by awarding costs on both applications to MBS as the successful party.

Rule 64.6 of the **Civil Procedure Rules 2000** applied; **Paramount Export Ltd v New Zealand Meat Board** [2004] UKPC 45 applied.

JUDGMENT

Introduction

- [1] **HENRY JA [AG.]**: This is an interlocutory appeal by Oscar Trustee Limited ("Oscar Trustee") against a court order staying a lawsuit that it brought against MBS Software Solutions Limited ("MBS"). The case arises from the unexpected fallout from a Turkish mining business deal that did not produce, for three friends, the anticipated returns on their investment. The now former friends, Messieurs Simon Butler, Matthew Paget and Reid Zulpo invested US\$1 million with MBS through Oscar Corporation Pty Limited ("Oscar Corp"), a company incorporated under the

laws of New South Wales, Australia. At the time, Oscar Corp served as the trustee of Mr. Paget's discretionary family trust, the Chloe Trust, of which Mr. Paget is a beneficiary.

- [2] Mr. Butler is the CEO of MBS, a company incorporated in the Territory of the Virgin Islands (the "BVI"). Mr. Paget is an Australian lawyer and Mr. Zulpo is a tax partner at Ernst and Young Australia, now EY. Their investment in Oscar Corp was intended to be channeled into the mining venture in Turkey from which the friends anticipated substantial profits. Oscar Corp got involved in the venture through a fund-raising exercise conducted by MBS in Hong Kong that targeted mainly institutional investors. Oscar Corp in turn invested those funds into MBS, pursuant to an equity derivative agreement made between the two companies on 24th August 2012.
- [3] The agreement which was prepared by Mr. Paget is evidenced by an ISDA Confirmation that incorporates the terms of the 2002 ISDA Master Agreement and an associated side letter (collectively "the Agreement"). It was amended on 23rd July 2015. Among other things, the Agreement stipulated that the governing law was the law of Hong Kong.
- [4] Oscar Trustee alleged¹ that it succeeded Oscar Corp as the trustee of the Chloe Trust on 22nd December 2016, pursuant to a Deed of Retirement and Appointment of New Trustee, and has since then acted in that capacity. MBS has not accepted that this was so. In any event, by claim form and statement of claim filed on 5th February 2021 in the Commercial Division of the High Court in the BVI, Oscar Trustee sued MBS for breach of the Agreement. It claimed the sum of US\$5,887,874.00, interest and costs.
- [5] MBS filed no defence. By notice of application filed on 8th March 2021, MBS applied for (i) a declaration that the court should not exercise its jurisdiction in the claim on

¹ See paras. 4 and 5 of the statement of claim filed on 5th February 2021 and paras. 5, 7 and 8 of Mathew Paget's affidavit filed on 1st April 2021.

the ground of *forum non conveniens* and (ii) an order that the claim be stayed in favour of the courts of Hong Kong (“the forum challenge application”). The application was filed on the last day for filing of a defence. On 1st April 2021, Oscar Trustee made an application to the court for summary judgment. MBS resisted the summary judgment application, arguing that it was not liable to Oscar Trustee for additional returns on its investment, because it had repaid the original sums and the venture had failed. In a decision made on 6th July 2021, the learned judge dismissed the application for summary judgment. He found that Hong Kong was the more appropriate forum for trial of the claim and he granted the stay of proceedings in the BVI. Costs were awarded to MBS in respect of both applications.

The appeal

- [6] Oscar Trustee, being displeased with this decision, appealed. While it took no issue with the learned judge’s ruling on the summary judgment application, it contended that he erred in law by applying the wrong test to the forum challenge application, and/or by failing to consider or ascribe adequate weight to a number of relevant factors and by attaching too much weight to irrelevant matters. It submitted further that the costs orders were plainly wrong and should be reversed. MBS responded that there was no basis for contending that the learned judge made an error of principle on the forum challenge application or that he improperly exercised his discretion in making the costs orders.

Grounds of appeal

- [7] Oscar Trustee listed 3 principal grounds of appeal, each of which contained 4 to 6 limbs. The grounds may be conveniently distilled. For simplicity, I have elected to condense them under three broad headings and intend no disrespect to learned counsel whatsoever. The first ground deals with alleged errors of law made by the learned judge in the exercise of his discretion on the forum challenge application in relation to the weight attached to certain connecting factors. The second ground of appeal, also relating to the forum challenge application, addresses the weight that

the learned judge ascribed to some of the connecting factors. The third ground of appeal deals exclusively with the issue of the costs orders.

- [8] For this appeal, it would be more appropriate to consider Grounds 1 and 2 together since they overlap in some respects and engage related principles of law. Ground 3, the costs issue, will be dealt with separately.

Issues

- [9] Two issues therefore arose for consideration on the appeal. Firstly, whether the learned judge erred in law or in the exercise of his discretion by incorrectly articulating or applying the test for a stay on the ground of *forum non conveniens* (“the forum non conveniens issue”). Secondly, whether the learned judge erred in law and/or in the exercise of his discretion by awarding costs on the summary judgment application and/or the forum challenge application (“the costs issue”).

The forum non conveniens issue

- [10] The guiding principles in respect of a forum challenge are set out in **Spiliada Maritime Corp. v Cansulex Ltd.**² and were recently summarized by Lady Arden in the Privy Council judgment in **Livingston Properties Equities Inc and others v JSC MCC Eurochem and another**,³ a case from the BVI. The same principles apply whether the defendant in the court below is a resident of and has been served with the claim in the territory or is a non-resident who has been served with the claim out of the jurisdiction, pursuant to the leave of the court.

- [11] At paragraph 10 of the judgment, Lady Arden articulated the test thus:

“In exercise of its discretion the court will consider whether the BVI is a more appropriate forum than any other foreign forum in the interests of all parties and the ends of justice, and, if not, whether justice nevertheless requires that the case should be tried in the BVI.”

² [1987] AC 460.

³ [2020] UKPC 31.

She pointed out that in the case of a defendant who seeks a stay of proceedings properly served within the jurisdiction, the onus is on that defendant:

“[U]nless the claimants seek to show that, despite the fact that there is another available forum which is *prima facie* the appropriate forum, there are special circumstances why justice requires that the trial should nevertheless take place in the BVI.”⁴

[12] Lady Arden continued at paragraph 12:

“When assessing whether there is another more appropriate forum, the court will consider what connecting factors exist in relation to that forum, such as the place where the alleged wrongs were committed and the governing law of the pleaded claims. The governing law is an important factor because it is generally preferable that the case should be tried in the country whose law applies (VTB [Capital plc v Nutritek International Corpn]⁵ per Lord Mance at [46]). If there is no other available forum which is clearly more appropriate the court will ordinarily refuse a stay. In general, the assessment of the factors relevant to forum conveniens is a matter for the trial judge: see per Lord Templeman in the **Spiliada** at p 465.” (Emphasis added)

[13] Those principles are at the center of the first issue in this case. It follows that since MBS, the defendant in the court below, sought the stay on the ground of *forum non conveniens*, it now has the burden of establishing that another more appropriate forum than the BVI court exists for the proceedings to be conducted. That onus would not shift to Oscar Trustee unless it conceded that another available forum exists which is *prima facie* the appropriate forum, but that special circumstances prevail which make it just for the trial to be conducted in the BVI and for the stay to be denied. Oscar Trustee made no such concession. Therefore, the burden of proof remains on MBS.

Was the wrong test applied?

[14] Oscar Trustee launched a two-pronged attack in respect of the *forum non conveniens* issue. It submitted that the learned judge erred in law by departing from

⁴ Supra n. 3 at para. 11.

⁵ [2013] 2 AC 337.

the correct approach to a forum challenge application and by applying the wrong test.⁶

[15] As to the contention that the learned judge applied the wrong test, Oscar Trustee submitted that he erred by failing to consider, by reference to the material criteria, whether MBS had discharged the burden of establishing Hong Kong to be clearly and distinctly the more appropriate forum than the BVI, for trial of the claim. It submitted further that the learned judge incorrectly applied a test as to whether there was more of a connection with Hong Kong and not whether Hong Kong was clearly and distinctly more appropriate. MBS countered that the learned judge recited and applied the correct test.

[16] Although Oscar Trustee did not expressly state that the learned judge misstated the applicable test, this was implied in and may be inferred from its submissions on this point. It is therefore prudent to address the explicit and implicit contentions.

[17] The learned judge's *ex tempore* decision is set out in the transcript.⁷ A properly formatted written judgment was also prepared which mirrors the *ex tempore* version and incorporates minor cosmetic changes. Both are helpfully included in the appeal bundle. In relation to the test, the learned judge stated:

"I am asked to consider the question of *forum conveniens*. The position is that the defendant has been served as of right in the British Virgin Islands, therefore the burden lies on the defendant to show that there is another more suitable venue. The law was set down in the well-known case of **Spiliada v Cansulex Ltd.** ... It has recently being [sic] the subject of a decision of the Privy Council given on the 30th of November last year: **Livingston Properties Equities Inc v JSC MCC Eurochem.**"⁸

He then quoted verbatim the text of Lady Arden's judgment from paragraphs 10 – 12 of **Livingston Properties**, except that he excluded the small reference to Lord Mance's **VTB** quote. Those paragraphs were set out earlier in this judgment.⁹

⁶ See para. B 1.(a) and Ground 1 of the notice of appeal filed on 3rd February 2022.

⁷ See Consolidated Appeal Bundle Volume 1, pages 71-72.

⁸ See para. [32] of the judge's decision.

⁹ See paras. [11] – [12].

- [18] In view of the approach taken by the learned judge in articulating the test, it is self-evident that he carefully and comprehensively laid out the correct *forum non conveniens* test. He cannot be faulted. To the extent therefore that Oscar Trustee grounds its appeal in the contention that the learned judge invoked an incorrect test in respect of the forum challenge application, such argument is baseless.

**Application of the test to the case
Oscar Trustee's submissions**

- [19] On Oscar Trustee's behalf, learned Queen's Counsel Mr. Willan criticized how MBS formulated and presented its application. He submitted that it is not sufficient for a defendant to contend that the case for a stay is made out simply because the claim is based on a tort and the natural forum is where it was committed. He argued that the test is more specific and accordingly, MBS was required, but failed to identify the particular issues that arose in the claim and did not show why it was more appropriate that the trial take place in Hong Kong. For this proposition, he relied on **Briggs, Civil Jurisdiction and Judgments**.¹⁰

- [20] MBS did not respond to this argument. It is noteworthy that the learned authors included a footnote on this point. At footnote 95, they stated:

“On the complex question whether, in such circumstances, a party is required to plead the application of, and furnish evidence of the content of, foreign law, see **FS Cairo (Nile Plaza) Ltd. v Brownlie** [2020] EWCA Civ 996...”

In light of the footnote, it is pellucid that the learned authors are not advocating that a defendant must identify every disputed issue in the application. Oscar Trustee's argument and insistence on such detail is not supported by that text.

- [21] In any event, MBS listed ten grounds in its application including putting Oscar Trustee to strict proof that it is trustee of the Chloe Trust, denial of a binding agreement between the parties, denial that any obligations under the Agreement

¹⁰ 7th Edn. at [22.12].

were to be executed in or had any connection with the BVI, asserting the Hong Kong governing law clause, and averring that no witnesses are resident in the BVI. Those grounds were supplemented by Mr. Butler's witness statements and after fulsome arguments by both sides, were determined by the learned judge to be related to or constituted relevant connecting factors. Oscar Trustee's contention that they were not pleaded or identified is unfounded.

[22] Mr. Willan QC submitted that the learned judge considered that four factors were relevant to his determination on the forum challenge application. Those were: (a) the Hong Kong governing law clause, to which medium weight was attached; (b) the convenience of witnesses, to which the learned judge ascribed "more weight"; (c) MBS' place of incorporation which was accorded little weight; and (d) a connection between the Agreement and Hong Kong related to the fact of fund-raising from investors in Hong Kong. On this latter factor, the learned judge did not say how much weight if any, he placed on it.

[23] Mr. Willan QC argued that while the learned judge expressly recognized that the weight to be attached to the existence of a governing law clause would vary depending on the particular circumstances of a case, he provided no adequate explanation why he accorded medium weight to that factor. He reasoned that significantly, MBS did not identify any difference which was likely to arise from an analysis under Hong Kong law as distinct from BVI (or English) law. This was significant he said, since under the prevailing circumstances: (i) the contract did not require the dispute to be litigated in Hong Kong; (ii) the BVI courts have no difficulty applying foreign law and do so regularly, and (iii) the contractual provisions were all in English.

[24] Mr. Willan QC contended that the learned judge erroneously ignored or attached no weight to:

- (1) Oscar Trustee's uncontroverted explanation that the sole reason why Hong Kong law was selected as the governing law of the contract was

at the insistence of a Hong Kong resident potential investor who ultimately did not invest; and

- (2) Its submissions that the material issues had to do with the construction of the Agreement and there was no material difference between Hong Kong and BVI law since they both apply the English law of contract.

[25] Learned Queen's Counsel quoted from Lord Mance's opinion in **VTB**, where he said:

"The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum."¹¹

[26] On this point, Mr. Willan QC opined that since no serious issues of Hong Kong law were properly identified, MBS had raised no real or complex issues of interpretation that would lead to a different outcome under BVI or Hong Kong law. He said that in the absence of such issues being flagged, the learned judge was plainly wrong to consider that because the proceedings were at an early stage, he could not exclude the possibility that issues of Hong Kong law might arise in the future. He stressed that in all of the circumstances, the choice of law clause should have been a relatively minor consideration, if found to be relevant at all.

[27] Learned Queen's Counsel concluded that the fact that the Agreement is governed by Hong Kong law is a wholly inadequate basis for the BVI court to decline to hear a claim in respect of which its jurisdiction had properly been invoked. He maintained that MBS having made no attempt to demonstrate how Hong Kong law relatively differed from BVI law, this factor plainly did not approach the **Spiliada**

¹¹ Supra n. 5 at para. [46].

threshold of showing Hong Kong to be a clearly and distinctly more appropriate forum than the BVI.

[28] With respect to the convenience of witnesses factor, learned Queen's Counsel noted that only three individuals had been identified as potential witnesses in the case, two of whom were proposed witnesses for Oscar Trustee and who were perfectly content to travel to the BVI for trial. He argued that the learned judge placed too much weight on Mr. Butler's unsupported assertion that, although he was resident in California, United States of America (at the time of the hearing in 2021), he planned to return to live in Sydney in late 2021.

[29] Mr. Willan QC said that regarding this factor, the learned judge's reasoning was grounded in the existence of a 14-hour time difference between Sydney and the BVI, that residents of Australia and New Zealand were being subject to travel restrictions (in 2021 at the time of the hearing), and his erroneous belief that travel from Australasia to the BVI was inconvenient. He argued that to the extent that international travel restrictions were relevant at all, the learned judge failed to consider that these would obviously vary over time, that the travel restrictions into and out of Hong Kong had, since 2020, been far more onerous than the BVI, and that the courts can and do make full allowance for such restrictions by allowing attendance by video link. He opined that there was no evidence that the logistics would make Hong Kong clearly and distinctly the more appropriate forum.

[30] From Oscar Trustee's perspective, any restrictions on travel were relevant only to trial logistics and listing, not to the ability of a court to accept jurisdiction or whether it should be declined in favour of another jurisdiction. Mr. Willan QC stressed that it was plainly erroneous for a BVI court to decline to exercise jurisdiction over a claim against a BVI company in favour of the Hong Kong courts, based substantially on the "apparent inconvenience" of MBS' alleged witness, where the jurisdiction of the foreign court had not been invoked by either party. He reasoned that this was so,

particularly where the witness' inconvenience was "evidenced by an unsubstantiated future intention" to migrate from the United States to Australia. He argued that such an approach was wrong, and if upheld, would risk opening the floodgates to wholly unmeritorious forum challenges in BVI commercial litigation.

- [31] Mr. Willan QC argued that by attaching decisive weight to this factor, the learned judge wrongly accepted, as being either reliable or relevant, Mr. Butler's averment of his future intention to migrate from California to Australia, and erroneously confused *forum non conveniens* with the personal convenience of a witness and thereby failed properly to apply the **Spiliada** test.

Learned Queen's Counsel submitted that the learned judge clearly grounded his reasoning on considerations of "mere practical convenience" of precisely the type cautioned against by Lord Goff in **Spiliada**, where he warned:

"I feel bound to say that I doubt whether the Latin tag *forum non conveniens* is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However, the Latin tag (sometimes expressed as *forum non conveniens* and sometimes as *forum conveniens*) is so widely used to describe the principle, ... in other Commonwealth jurisdictions ..., that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of 'mere practical convenience'."¹²

- [32] Mr. Willan QC reasoned that in the circumstances, the learned judge ought to have concluded that the convenience of the parties' witnesses was a factor which should be ascribed little, if any, weight in a claim about the meaning and effect of a derivatives contract entered into by a BVI company. He said that it should quite clearly not have been the decisive reason for the court to decline jurisdiction. He argued that the learned judge was wrong at law and in the exercise of his discretion to attach significant weight to this factor and to conclude that for this reason, the BVI was not a convenient forum for witnesses based in Australasia to attend trial.

¹² *Supra* n. 2 at 474E-G.

[33] Learned Queen's Counsel contended that the learned judge erred in relying on these factors in reaching his overall conclusion to decline jurisdiction and stay the proceedings in favour of the courts of Hong Kong. He asserted that the learned judge failed to apply the correct test because he did not consider or put sufficient weight on a number of highly relevant factors, and/or he afforded too much weight to factors that were either irrelevant or had little relevance to the questions being determined. He cited in support the cases of **Spiliada**, **Livingston Properties**, **VTB**, and **Altimo Holdings and Investment Limited and others v Kyrgyz Mobil Tel Limited and others**.¹³

MBS' submissions

[34] Regarding the convenience of witnesses factor, learned Queen's Counsel Mr. Shivji countered that in **VTB**, Lord Mance described the location of oral and documentary evidence as "a factor at the core of the question of appropriate forum".¹⁴ He pointed out that this view was echoed by this Court in **Anjie Investments Limited et al v Cheng Nga Yee et al**,¹⁵ where Gonsalves JA [Ag] stated:

"The location of the witnesses was not simply a factor but was a core factor..."¹⁶

[35] Mr. Shivji QC argued that the location of witnesses is a critical factor because the hearing of oral evidence of witnesses is often the component to which the most time is devoted at trial. He submitted that the court would want to ensure that the trial takes place in the location which maximizes the attendance of key witnesses to ensure that they give evidence in an environment which is conducive to the fair hearing of those witnesses.

[36] Learned Queen's Counsel made the point that while it was not suggested at first instance that Mr. Butler's evidence was false, the suggestion on appeal appeared

¹³ [2011] UKPC 7.

¹⁴ Supra n. 5 at para. [62].

¹⁵ BVIHCMAP2016/0003 (delivered 24th November 2016, unreported).

¹⁶ Ibid at para. [63].

to be that he was lying about his intentions purely to lend weight to MBS' forum challenge application. He said that Oscar Trustee went so far as to suggest that, if this decision were allowed to stand, it may encourage a new tactic in forum challenges of manufacturing non-existent plans to migrate. He submitted that there was no merit to this argument because Mr. Butler's intended relocation was not an unsupported assertion, but a fact recorded in his witness statement¹⁷ and verified by a statement of truth, in respect of which Oscar Trustee did not adduce any contrary evidence.

[37] Mr. Shivji QC submitted further that it was incorrect to assert that only three witnesses had been identified as potential witnesses. He referred to Mr. Butler's second witness statement filed on 10th May 2021,¹⁸ where he mentioned that in addition to Messrs. Butler, Zulpo and Paget, the list of witnesses was likely to include investors based in Hong Kong and the United Kingdom, expert evidence on market practice, and testimony from other witnesses based in Australia and Turkey in relation to the events at the mine.

[38] As to the location of witnesses, he said that there were none in the BVI, Mr. Paget was based in New Zealand,¹⁹ Mr. Zulpo was based in Australia and Mr. Butler was relocating to Australia.²⁰ Further, he stated that Mr. Butler had listed in his fourth witness statement filed on 18th June 2021, various investor witnesses based in Hong Kong and the United Kingdom including Andrew Murray, Craig Swanger, Sam Dixon, Darin Baur, Mark Wilson, Philip Clayton, Ed Hanson and John Fulton who would be able to give evidence on the factual matrix.

[39] Mr. Shivji QC observed that Oscar Trustee criticized the learned judge for placing weight on the 14-hour time difference between Sydney, Australia and the BVI. He submitted that given the substantial impracticalities of conducting a trial across

¹⁷ See second witness statement of Simon Butler filed on 10th May 2021 at para. 20(a).

¹⁸ Ibid at para. 20.

¹⁹ Ibid at para. 20(b).

²⁰ Ibid at para. 20(a).

such a time difference, this must necessarily be a legitimate and important factor to be taken into account. He reasoned that the learned judge rightly considered that the difficulties facing the witnesses in travelling to the BVI and the impracticalities of conducting a trial across a 14-hour time difference was a factor of some weight. It was therefore entirely appropriate for him to place considerable weight on the location of the witnesses as a relevant connecting factor. He pointed out that in the same way it was just a matter of common sense that travel from Australasia to the BVI was inconvenient, as discussed by the judge.

[40] As to Oscar Trustee's contention that the travel restrictions were not likely to be in place by the time the case came to trial, Mr. Shivji QC countered that this argument was not put before the learned judge and furthermore, the future position was unknown. He asserted that it was undeniable that travelling from Australasia to the BVI was more difficult than traveling from Australasia to Hong Kong.

[41] Learned Queen's Counsel argued that although Oscar Trustee has attempted to dress up its complaint as an error of principle or law it was obvious that its real grievance was the learned judge's relative weighting of the factors. He said that the authorities demonstrate that weighting of the factors is "preeminently a matter for the trial judge". He explained that the learned judge was already immersed in the case, had taken the time to carry out pre-reading of over 1,500 pages of documentation and had come to the hearing having heard submissions on the summary judgment application over the course of 2 days. He argued that the learned judge therefore had a strong grasp of the issues in the case to be determined at trial and was therefore in a position of significant advantage in understanding the nature of the case and the key factors necessary to decide the most appropriate forum for the dispute.

[42] Learned Queen's Counsel submitted that through a narrow textual analysis of the learned judge's *ex tempore* judgment, Oscar Trustee mischaracterizes the

evidence, and trivializes the nature of the case and the learned judge's assessment of the factors. He argued that this was precisely the kind of approach that this Court discouraged in **JTrust Asia PTE Ltd. v Mitsuji Konoshita et al**²¹ where Blenman JA underscored the need for care and restraint by an appellate court in 'its review of a judge's exercise of discretion and his findings of facts'. In her words:²²

“... it is almost self-evident that an appellate court should refrain from taking too stringent or literalistic of an approach to the interpretation of a judge's judgment to determine whether the judge erred in the exercise of his discretion. In this regard, and quite instructively, Lord Hoffmann in **Piglowska v Piglowski**²³ stated:

“An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.”

[43] Mr. Shivji QC contended that, as was evident from the judgment in the instant case, the learned judge envisaged that the trial of the claim would be both fact and law heavy as there was a long list of factual contentions on the filed evidence, many of which went to the heart of the dispute between the parties. In this regard, he argued that a significant factual dispute was whether the venture had failed, labelled by the learned judge as “the substantive issue”. He said that the learned judge noted that Mr. Butler and his friends exchanged detailed emails about how the anticipated substantial profits would be shared, but such emails were scant on what would happen if they did not materialize. He opined that the learned judge appreciated that the factual issues were relevant to the context in which the court should interpret the Agreement in relation to the contractual trigger, the return allegedly owed to Oscar Corp or Oscar Trustee, and the mechanism through which funds would be raised for the mining project.

²¹ BVIHCP2020/0031 (delivered 31st May 2021, unreported).

²² Ibid at para. [55].

²³ [1999] 1 WLR 1360 at 1372.

- [44] In relation to the factual assertions, Mr. Shivji QC said that there was significant disagreement over the factual matrix leading up to the original agreement and the 2015 amendments; and as to the relationship between the 2015 amendments and amendments that were discussed, in the context of a proposed investment from the Hong Kong company Long Faith Hong Kong Investments. He submitted further that MBS' case was that the contractual trigger was linked to the venture's success and it was relevant that it had failed. He observed that in this regard, the learned judge had remarked "[t]he venture has not been a success due to difficulties in getting all the licenses and permits to mine in Turkey" and because "the Turkish army [took] possession of the most valuable part of the mines, a deposit of limestone suitable for making cement".
- [45] He highlighted other factual contentions including MBS' evidence that the documents relevant to the issues in the case were primarily in Hong Kong and Australia²⁴ and this was not rebutted by Oscar Trustee, nor did it suggest that any documents were in the BVI. Mr. Paget's and Mr. Zulpo's respective roles in the transactions, including whether they provided services to the Red Rock Group were, he said, also material. Also of relevance, as highlighted in the judgment,²⁵ were Oscar Trustee's status, its role in relation to the Chloe Trust, and its dealings with the former trustee, Oscar Corp.
- [46] Mr. Shivji QC submitted that other disputed issues related to MBS' central place of business and where the Agreement was to be performed. MBS' position was that Hong Kong was its seat of business and the location where the Agreement was to be performed. This is refuted by Oscar Trustee who reasoned that MBS could not be regarded as having an office under Hong Kong law in light of the provisions of the Hong Kong Companies Ordinance.

²⁴ Supra n. 18 at para. 22.

²⁵ See trial judge's decision at paras. [15] to [17].

- [47] Mr. Shivji QC asserted that other factual contentions surrounded what role MBS' Hong Kong place of business played generally and specifically in the transaction, as well as, what, if any, significance arises from it being listed on the ISDA Confirmation. He argued that these factual issues were relevant to the question of the applicability of the Hong Kong Money Lending Ordinance. Although the learned judge excluded MBS' expert evidence on this point and did not agree with that contention, MBS may plead it in its defence at which time it would become a live legal issue in the case.
- [48] Learned Queen's Counsel argued that a significant number of other legal issues arose for consideration. Among them was MBS' argument that the Agreement was unenforceable under Hong Kong law because on Oscar Trustee's construction, the return due on its investment was over 60%. He submitted that such a rate of return would be in breach of the Hong Kong Money Lending Ordinance.
- [49] Mr. Shivji QC asserted that the existence of a governing law clause in the Agreement was germane to the resolution of the dispute and was a connecting factor that linked Hong Kong as the more appropriate forum. He submitted that in construing an ISDA agreement governed by Hong Kong law, issues of Hong Kong market practice would necessarily arise and such evidence was most likely to be given by a practitioner based in Hong Kong.
- [50] Citing **Livingston Properties**, Mr. Shivji QC referenced Lady Arden's statement that "it is generally preferable that a case should be tried in the country whose law applies".²⁶ He explained that there were a number of reasons for this. Firstly, the greatest expertise in the law of a particular jurisdiction was naturally to be found in the courts of that jurisdiction. Trying a case in the country whose law applies, maximizes the prospect of the court reaching the right answer. Secondly, if a case were to be tried under foreign law, the contents of that law must be pleaded and it must also be proved, typically by means of expert evidence. Consequently, as held

²⁶ Supra n. 3 at para. [12].

in **The Cap Blanco**²⁷ trying a case under foreign law usually increases the costs to the parties and the inconvenience to the court.

[51] Thirdly, as held in **Owners of Cargo lately laden on board ship or vessel Eleftheria v The Eleftheria (Owners), The Eleftheria**,²⁸ because foreign law is a question of fact, it is more difficult to appeal such a finding if a mistake is made, thereby increasing the risk of injustice. Fourthly, because the decisions of courts applying foreign laws are generally considered to be less authoritative than the decisions of courts applying their own laws, any decision that is reached would be less helpful in clarifying the law for future court users.

[52] Learned Queen's Counsel submitted that there was an additional consideration in this case. This dispute concerned a contract that was based on the ISDA Master Agreement which had been described in **Lomas v JFB Firth Rixson Inc**²⁹ as "probably the most important standard market agreement used in the financial world". The courts are therefore cautious to ensure that it is interpreted in a manner that provides "clarity, certainty and predictability" for court users. He contended that Hong Kong, being the third largest over the counter derivatives market in the world, where the courts have developed a considerable body of experience and authority in dealing with derivatives and interpreting the ISDA Master Agreement, made it the natural forum for disputes concerning Hong Kong law, governed by ISDA Master Agreement-based contracts.

[53] Mr. Shivji QC noted that Oscar Trustee had criticized as being purely hypothetical, the learned judge's basis for attaching weight to the Hong Kong choice of law clause. He submitted that this was a corruption of the learned judge's reasoning. He outlined certain passages³⁰ from the judgment in which the learned judge discussed why he ascribed a medium weight rating to the governing law factor.

²⁷ [1913] P 130 at page 136.

²⁸ [1970] P 94 at pg. 105.

²⁹ [2011] 2 BCLC 120 at para. [53].

³⁰ Paras. [36] and [37] of the decision.

The learned judge explained that because the case was at an early stage it was not possible to rule out the possibility that issues of Hong Kong law would arise. He acknowledged that technical nuances founded in Hong Kong law may be applicable to the interpretation of “office”.

- [54] Learned Queen’s Counsel submitted that it was clear that when the learned judge referred to the fact that issues of Hong Kong law may arise, those issues were not purely hypothetical but rather was a case on Hong Kong law run by Oscar Trustee. He contended that if Oscar Trustee’s contention was that the learned judge should only have taken into account issues of Hong Kong law that could be said with certainty would arise at trial, then this was wrong. As Lord Neuberger said in **VTB**:

“...when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial.”³¹

- [55] It is fitting to insert here that this pronouncement by Lord Neuberger is quite forceful and germane to the issue under consideration. I make the observation that when the forum challenge application was being considered, MBS had not filed a defence and still has not. Accordingly, the caution about forming only preliminary views on legal issues in the substantive claim at this stage is even more salutary.

- [56] Regarding Oscar Trustee’s argument that the learned judge should have attached less weight to the Hong Kong choice of law clause because it was selected as the governing law at Mr. Wilson’s insistence, Mr. Shivji QC responded that this was irrelevant because the reason for choosing a particular governing law in an agreement was not determinative of or relevant for the purposes of a *forum non conveniens* challenge. He argued that even if there was no material difference in the law applied in BVI and Hong Kong, that this was a point which merely reduced the force of the rationale that cases be tried in the country of the governing law. He reasoned that it did not impact or diminish the importance of the remaining three

³¹ Supra n. 5 at para. [83].

justifications for this underlying principle. He said that this was why, in **VTB**, Lord Mance described differences between the laws of the rival jurisdictions as *a fortiori* ground, not a necessary requirement.³²

[57] As to MBS' BVI residence being a connecting factor, Mr. Shivji QC relied on **Anjie**³³ and made the point that the fact that the BVI court had personal jurisdiction over the company was not a factor in favour of the BVI. Rather, it simply had the effect of placing the burden on MBS to demonstrate that Hong Kong was clearly and distinctly the more appropriate forum. He pointed out that this factor was recognized by the learned judge and given some weight.³⁴ In this regard, the learned judge ascribed some weight to Oscar Trustee's assertions that enforcement against MBS must be effected in the BVI, and concluded that this was not a significant point because judgments in Hong Kong can be readily enforced in the BVI.³⁵ Mr. Shivji QC said that Oscar Trustee's complaint can only be that the learned judge ought to have given this factor more weight.

[58] Mr. Shivji QC submitted that although Oscar Trustee attempted to suggest that any connection with Hong Kong was tenuous, there was plenty of material from which the learned judge could have concluded that Hong Kong was clearly and distinctly the more appropriate forum and that this was a decision he was entitled to reach in the exercise of his discretion. He argued that Mr. Paget had originally threatened Mr. Butler with proceedings in Hong Kong and the BVI, MBS had agreed to submit to the courts of Hong Kong and provided an address for service in Hong Kong,³⁶ and Oscar Trustee had also accepted³⁷ that Hong Kong was an available jurisdiction.

³² Ibid. at para. [46].

³³ Supra n. 15 at para. [69].

³⁴ See para. [45] of the judge's decision.

³⁵ See para. [35] of the judge's decision.

³⁶ Supra n. 18 at para. 8.

³⁷ See letter dated 21st May 2021 addressed to Harney Westwood & Riegels LP by Forbes Hare, pages 1393 - 1394 of Consolidated Appeal Bundle Volume 2.

[59] Learned Queen’s Counsel said that whereas the learned judge considered the various factors and reached an overall assessment in the exercise of his discretion, Oscar Trustee’s approach was to isolate certain factors and then consider whether Hong Kong was the more appropriate forum with respect to each. He argued that this was neither the correct approach under **Spiliada** nor was it followed by the learned judge. He stressed that likewise the correct approach on an appeal was not to conduct a re-evaluation of the learned judge’s weighting of the various factors.

[60] Mr. Shivji QC submitted that Oscar Trustee’s position was that the learned judge erred in his evaluation of the connecting factors by placing too much weight on the “alleged practical convenience of witnesses to attend trial whether in person or remotely”, the Hong Kong choice of law clause in the Agreement, and too little weight on the fact that MBS was resident in the BVI and the BVI court had personal jurisdiction over it; that any judgment would have to be enforced in the BVI, and that there are and were no extant alternative proceedings which could yield an inconsistent decision. He opined that accordingly, the amount of weight that the learned judge placed on the factors under consideration was well within the scope of his discretion and there was no proper basis to interfere with his decision. He reasoned that in circumstances where Oscar Trustee had failed to show any error of principle on the learned judge’s part or any unreasonable exercise of his discretion, the appeal must fail.

Analysis – The forum non conveniens issue

[61] By this ground of appeal, Oscar Trustee is essentially inviting this Court to set aside the learned judge’s exercise of discretion regarding his evaluation of the connecting factors and his determination that Hong Kong is the more appropriate forum. It is well-established that an appellate court will not lightly reverse a lower court’s findings. In the oft-cited words of Sir Vincent Floissac CJ in **Dufour and Others v Helenair Corporation Ltd and Others**:³⁸

³⁸ (1996) 52 WIR 188.

“Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her 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.”³⁹

[62] In considering this ground of appeal therefore, I am guided by Sir Vincent Floissac CJ’s pronouncement and the guiding principles in **Spiliada** and **Livingston Properties** which were referenced earlier. In similar vein, and like Blenman JA in **SFC Swiss Forfaiting Company Ltd. v Swiss Forfaiting Ltd.**⁴⁰ I consider it helpful to highlight and adopt the learning from the text **Caribbean Private International Law** by Professor Winston Anderson, where he explains the analytical process to be undertaken by a judicial officer with respect to a forum challenge application. He states:

“Caribbean Law affirms that a three-stage inquiry is mandated. The first is concerned with whether there is another available foreign forum; the second with whether that forum is more appropriate than the local court; and if so, the third is whether justice would be served [by] allowing the prosecution of the action there.”⁴¹

[63] In the instant case, it is not disputed that the Hong Kong court afforded an available forum. Oscar Trustee’s complaint is aimed at the second and third phases of the inquiry. Professor Anderson provides guidance on how the defendant goes about discharging the onus of proving that the foreign court is the more appropriate forum. He opined:

“In practice the defendant discharges the burden of proof by establishing that the foreign jurisdiction is the natural forum in the sense of being the country with which the action has the most real and substantial connection. The locale with the preponderance of connecting factors may assist in identifying the natural and appropriate forum in that they indicate the place where justice can be done at “substantially less inconvenience or expense”.”⁴²

³⁹ Ibid at pages 190 – 191.

⁴⁰ BVIHCMAP2015/0012 (delivered 4th July 2016, unreported).

⁴¹ 2nd Edn., Sweet & Maxwell, 2014 at page 208.

⁴² Ibid at para. 9.008, page 209.

- [64] I endorse that learning. Applying the foregoing principles to the instant case, it is necessary to examine the learned judge's decision regarding what connecting factors were identified. He considered two connecting factors in relation to the BVI: the fact that MBS is incorporated in that territory and that enforcement of a judgment against it would have to be effected in the BVI. He did not conclude that either of those factors carries significant weight. He found that the place of incorporation attracted modest weight, while the enforcement concerns were insignificant. His explanations for those weightings have been canvassed in the foregoing submissions by the respective parties. I need not repeat them. In my opinion, they were relevant factors. Oscar Trustee accepts this and disagrees only with the judge's weighting of both.
- [65] The learned judge pinpointed two connecting factors with Hong Kong, namely the governing law clause to which he ascribed medium weight and the convenience of witnesses which attracted "more weight". In his assessment of the governing law clause, the learned judge took into account that the pleadings were not closed and therefore more legal issues could potentially arise from Hong Kong law. He noted, for example, that market practice could feature, as could the question of the Hong Kong office which was relevant to the Agreement and had technical significance in the law of Hong Kong.
- [66] The learned judge's evaluation of the convenience of witnesses factor covered the location of those witnesses who had been identified and presumptively others who were yet to be named, having regard to the breadth of factual issues which were likely to arise at trial. He took into consideration that fund-raising for the venture had taken place in Hong Kong, the mine is located in Turkey and a potential witness is re-locating to Australia. Another consideration was the fact that the witnesses based in Australasia would either have to endure difficult travel over extremely long distances at significant expense to attend court in the BVI or do so via video link, at times late into the night in their respective time zones. He considered that either

way it would be more convenient for them if the trial took place in a court in Hong Kong which is within their time zone and closer to their home base.

[67] Having weighed each connecting factor, the learned judge found that the connecting factors weighed more heavily in favour of Hong Kong than the BVI as the more appropriate forum for the trial. He therefore ordered a stay of the proceedings in the BVI.

[68] Oscar Trustee took exception with the learned judge's characterization of "convenience of witnesses" in relation to one of the connecting factors. Its complaint is that the learned judge erred by equating or confusing the expression *forum non conveniens* or *forum conveniens* with the convenience of witnesses. I disagree. The learned judge quite clearly drew a distinction between, on the one hand, the function on which he had embarked, that is of deciding which forum was distinctly more appropriate for the trial, and on the other hand, that the exercise entailed consideration of all connecting factors, one of which was the witnesses' convenience. He did not thereby reduce his complete assessment and balancing exercise to considerations of "mere practical convenience".

[69] In fact, the case law points to "the convenience of witnesses factor" as a relevant consideration in forum challenge applications. In **Spiliada**, Lord Goff said:

"So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction..."⁴³

This Court in **Anjie** made similar observations. Oscar Trustee's criticism of the learned judge's description of the witness convenience factor is therefore unfair and without merit.

⁴³ Supra n. 2.

[70] As is evident in the passage quoted earlier from **Livingston Properties**, the governing law is generally an important connecting factor. In that case, Lady Arden addressed this factor extensively and agreed with the learned judge's finding in that case that foreign law did not have to be pleaded unless it was relied on.⁴⁴ It is also manifest from the authorities, notably **Livingston Properties**,⁴⁵ that the place of incorporation of a company is not typically a significant connecting factor.

[71] I remind myself that the weighting of connecting factors is within the exclusive province of the judge unless he misdirects himself on the law. This would happen if he considered irrelevant factors or assigned too much or too little weight to relevant factors or disregarded them. I am satisfied that the learned judge identified all of the relevant connecting factors and their constituent elements and did not include any irrelevancies in his assessment. In that regard, Oscar Trustee has pointed to none that were either wrongly overlooked or included. None arise from the circumstances of this case. I am accordingly of the considered opinion that the learned judge's evaluation of each of the connecting factors is in keeping with the legal principles enunciated in **Spiliada** and **Livingston Properties**. The weighting he attached to each of them is reasonable and justifiable in all of the circumstances of the case. It cannot justifiably be said that he got it wrong or erred in principle in arriving at the weightings or his ultimate decision.

[72] The judge's conclusion that the Hong Kong court is a more appropriate forum than the BVI court is supported by the overall weighting he attached to the connecting factors. On the case as pleaded and the evidence set out in the parties' respective witness statements and affidavits, he had adequate factual and legal bases for his finding that the Hong Kong court is the "locale with the preponderance of connecting factors" where "justice can be done at substantially less inconvenience and expense". I am satisfied that he did not err in principle in concluding as he did or thereby exceed the generous ambit within which reasonable disagreement is

⁴⁴ Supra n. 3 at para. 32.

⁴⁵ Ibid at para. 39.

permissible and as a result make a decision which is blatantly wrong. On this ground of appeal, Oscar Trustee fails.

The costs issue

Oscar Trustee's submissions

- [73] Oscar Trustee submitted that the learned judge failed to take into account or attached too little or no weight to MBS' "flagrantly unreasonable conduct before and during the proceedings which flouted the overriding objective". On this score, Mr. Willan QC argued that the filing of the summary judgment application was a direct result of MBS' refusal to identify the material issues of its defence in correspondence and in the forum challenge application. He concluded that in the circumstances, notwithstanding that MBS had ostensibly succeeded on both applications, the judge ought to have disregarded the general rule that costs follow the event and should have awarded Oscar Trustee all of its costs or at least all of its costs caused by MBS' failure to engage.
- [74] Mr. Willan QC submitted that the learned judge erred in restricting his consideration of the parties' conduct to the period after proceedings were issued. He said that issues of conduct were not limited to the initial period after proceedings were issued, but continued to be highly material beyond then and extended to the entirety of the proceedings. He argued strenuously that between March and June 2021, MBS consistently refused to engage with written requests to set out and explain the disputed issues, omitted them from its expert evidence filed on 10th May 2021, and revealed them for the first time in its skeleton argument filed on 30th June 2021, just two days before the hearing.
- [75] Learned Queen's Counsel contended that the fact that the arguments against summary judgment were also raised then, for the first time, does not comprise a small failure of openness as characterized by the learned judge, but was instead tactical game-playing, designed to run up exorbitant costs on both sides. He compared this treatment by the judge to what he described as a perverse inconsistency in making an earlier costs order against Oscar Trustee at a directions

hearing for an alleged failure to engage that in its opinion was nothing as serious as the alleged infractions by MBS.

- [76] Mr. Willan QC submitted that it was also very relevant that MBS filed its forum challenge application on the last permissible day, without identifying the alleged issues for determination and in respect of which it contended that the courts of Hong Kong were more appropriate for trial of the dispute. He argued further that MBS' attempt to procure a 28-day extension for filing its defence based on reasons that subsequently turned out to be untrue, was also not accorded the weight that it should have attracted. He contended further that the court should have had regard to the circumstances in which the forum challenge application was originally listed for 24th June 2021, was subsequently re-listed for 24th May 2021 without consultation, and ultimately scheduled by the court office for 12th April 2021, consequent on Oscar Trustee's written communication with the court registry. He submitted that the costs order should therefore be set aside or varied.

MBS' submissions

- [77] Mr. Shivji QC argued that decisions on costs involve an exercise of the judge's discretion. Quoting Stuart-Smith LJ in **Roache v News Group Newspapers Ltd**⁴⁶ he said that '... it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.' He also relied on **Webster Dyrud Mitchell (A Partnership) et al v Jenny Lindsay**.⁴⁷ He submitted that as a matter of policy, the discretion afforded to the judge in the area of costs is interpreted particularly widely. He cited **Blindley Heath Investments Ltd and another v Bass and others**,⁴⁸ where Hildyard J stated at paragraph 127 that "[a]ppeals in relation to costs are

⁴⁶ [1998] EMLR 161.

⁴⁷ AXAHCVP2017/0001 (delivered 20th September 2021, unreported).

⁴⁸ [2017] Ch 389.

discouraged. An appeal court will be particularly loath to interfere with a decision on costs.” Similar sentiments were expressed in **SCT Finance Ltd v Bolton**.⁴⁹

[78] Learned Queen’s Counsel contended that at first instance, Oscar Trustee accepted the learned judge’s decision on the summary judgment application, ultimately conceded that the costs of the applications should follow the event, asked only for a reduction, and made no suggestion that there should be no order as to costs or that costs be ordered in its favour. Mr. Shivji QC submitted that in light of that concession and the usual rule under rule 64.6 of the **Civil Procedure Rules 2000** (the “CPR”), it was entirely natural for the judge to order costs in MBS’ favour.

[79] Mr. Shivji QC argued that, even if this Court were minded to re-exercise the judge’s discretion, this would not lead to a different outcome, for several reasons. Firstly, Oscar Trustee would need leave to resile from its concession that costs follow the event in this case. It has not sought leave and does not satisfy the threshold test for withdrawing concessions as set out in **BT Pension Scheme Trustees Ltd v British Telecommunications Plc and another**.⁵⁰ Secondly, the points that Oscar Trustee identifies for a costs order in its favour are makeweights. Specifically, no evidence has been produced of the alleged admissions of liability by Mr. Butler.

[80] Relying on Lord Neuberger’s statement in **VTB**,⁵¹ Mr. Shivji QC asserted further and rightly so, that the mere fact that a defendant disputes jurisdiction does not mean that it is obliged to plead its defence. He observed that in any event, prior to the exchange of skeleton arguments, Oscar Trustee was well aware of MBS’ principal substantive defences to the action by virtue of communication between Mr. Butler and Mr. Paget where Mr. Butler repeatedly indicated that the venture had failed.

⁴⁹ [2003] 3 All ER 434 per Wilson J.

⁵⁰ [2011] EWHC 2071 (Ch).

⁵¹ *Supra* n. 5 at para. 90.

[81] Mr. Shivji QC noted that Oscar Trustee's complaints about earlier costs orders have not been appealed and are irrelevant to the costs awards that are the subject of the appeal. I agree.

[82] As to the timing of the forum challenge application, learned Queen's Counsel said that it is not unreasonable that MBS would have needed some time after service of the claim on it, to determine its approach to the proceedings. He added that the filing of the application just before expiry of the deadline for filing a defence is not unusual or wrong. He pointed to Oscar Trustee's failure to issue any pre-action solicitor's correspondence before commencing the claim as being comparable to the aspects of MBS' conduct that it criticizes. Mr. Shivji QC said that by issuing proceedings without any solicitors' pre-action correspondence, issuing the summary judgment application without waiting for MBS' defence or foreshadowing the application in solicitors' correspondence, Oscar Trustee had taken the risk that new points of defence would be identified during the course of the applications. He reasoned that given the aggressive way in which Oscar Trustee had litigated the application, it was unsurprising that the learned judge was untroubled by the way that the defence issues had been elicited.

[83] Learned Queen's Counsel submitted further that by arguing that the learned judge erred in restricting his consideration to the parties' conduct after proceedings were issued, Oscar Trustee had thereby raised a new point not foreshadowed in its grounds of appeal. Even so, he pointed to the learned judge's consideration of this point at paragraph 47 of the judgment. He asserted that having been successful on both applications, MBS was entitled to its costs. He submitted that this ground of appeal should be dismissed because the learned judge did not err in principle in awarding costs.

Analysis – The costs issue

[84] It is trite law that a decision as to which party should receive its costs involves the exercise of judicial discretion. As with all discretionary determinations, it must be

exercised judicially and be grounded in sound reasons arising from the case. The CPR establishes different costs regimes and sets out the guidelines for their application. Under rule 64.6(1), generally, the court will order the unsuccessful party to pay the costs of the successful party. However, as per rule 64.6(2), the court may, for justifiable reasons, deviate from this rule and make no order as to costs or order the successful party to pay some or all of the costs of the unsuccessful party. In **Throne Capable Investment Limited v Agile Star Group Limited**,⁵² this Court opined that such circumstances include where there is some misconduct, or misguided or dishonest conduct by the successful party, such as an omission to take some step which ought to have been taken, and which could have saved costs.

[85] In the exercise of this judicial function, the court must take all of the circumstances into consideration. Rule 64.6(6) states expressly that among other things, the court must have regard to the parties' conduct before and during the proceedings, the manner in which a party has pursued a particular allegation or issue and whether it was reasonable for it to do so, whether a party has been successful on a particular issue but not on the entire case, the manner in which a party has pursued the case and whether the claimant gave reasonable notice of intention to issue the claim.

[86] The court is also required to have regard to the overriding objective of the CPR to seek to act justly as between the parties. It follows that the court may award costs to an unsuccessful party if the successful party has behaved unreasonably with respect to aspects of the proceedings, irrespective of whether such conduct preceded or transpired during the proceedings.

[87] As with the exercise of any judicial discretion, this Court would be slow to interfere with the exercise of the learned judge's discretion on costs, unless satisfied that he

⁵² BVIHCMAP2020/0014 (delivered 14th January 2021, unreported) at paras. [25] and [26].

erred in principle in the ways described in the leading case of **Dufour** to which reference has already been made.

- [88] In relation to interference with a costs order, the principle was expressed by the English Court of Appeal in **Scherer and another v Counting Instruments Ltd and another**⁵³ as follows:

“If there is any relevant ground available to the judge and he exercises, or appears to have exercised, his discretion judicially on it, this court cannot review that exercise of his discretion or interfere with his order because this court disagrees with the weight he appears to have attributed to any particular ground or because this court would have exercised the discretion in some other way but if, notwithstanding the availability of that ground, the judge has not, in the judgment of this court, exercised his discretion judicially, that is, if his decision is clearly wrong because the available ground could not in principle support the particular order he has made, it is in our judgment open to this court to correct it.”

- [89] In the instant case, on the issue of costs, the learned judge first cited and rehearsed aspects of rule 64.6. He clearly addressed his mind to the applicable rules and the guidelines governing the award of costs. He then mentioned Oscar Trustee’s legal practitioner’s acknowledgement that having lost both applications the general rule would apply, and that the court should reduce the amount of costs because of MBS’ conduct.

- [90] The learned judge stated:

“[47] ... I have looked at the correspondence immediately after the service of the notice of termination on the registered office. It is an intemperate series of e-mails between Mr. Paget and Mr. Butler, and I can well understand that relations between the parties substantially broke down after those.

[48] ...after proceedings were issued in this Court, there was then a small failure of openness on the part of the defendants in correspondence. However, in my judgment, it is not sufficiently serious to be something which I should reflect in the order for costs I am going to make. Once the application for summary judgment and for a stay on forum grounds were issued by each side, positions had reached a point

⁵³ [1986] 2 All ER 529.

where there was obviously going to be a need for a determination by this Court, and I am not satisfied that any correspondence would have had the effect of avoiding that result.

[49] In those circumstances, although the Court encourages legal representatives in this jurisdiction to cooperate with each other, this is not a case in which that has actually led to any increased costs or any costs which would have been avoided.

[50] ... in my judgment, the usual order ought to follow ...” (Emphasis added)

[91] Within those paragraphs, the learned judge referenced and considered summarily the factors outlined in rule 64.6. It is significant that he recorded Oscar Trustee’s position that costs in both applications should properly be awarded to MBS, albeit with a reduction. In fact, counsel on record for Oscar Trustee at that time submitted that on the summary judgment application MBS should receive only 50% of its costs and on the forum challenge application costs should be awarded to MBS with a small reduction to reflect the court’s disapproval with its conduct. Oscar Trustee’s position has, to some extent, shifted between then and the lodging of the appeal, in that it seeks a total reversal of the costs orders.

[92] In **BT Pension Scheme Trustees Ltd**, Mann J considered principles emanating from the Privy Council’s judgment in **Paramount Export Ltd v New Zealand Meat Board**⁵⁴ and from the English Court of Appeal’s decisions in **Crane v Sky-In-Home Ltd**,⁵⁵ **Jones v MBA**,⁵⁶ and **Slack & Partners Ltd v Slack**.⁵⁷ In those cases, the point was made repeatedly that it would be rare that a party would be permitted to resile from a concession made in the court below, particularly if substantial prejudice would be occasioned to the other party, or would otherwise be unfair. Permission was granted in **Paramount Export Ltd** on public interest grounds. As stated by the Board in **Paramount Export Ltd**, ‘[o]nly rarely and with

⁵⁴ [2004] UKPC 45.

⁵⁵ [2008] EWCA Civ 978.

⁵⁶ CA unreported, 30th June 2000.

⁵⁷ [2010] EWCA Civ 204.

extreme caution will the House permit counsel to withdraw from a concession which has formed the basis of argument and judgment in the Court of Appeal.'

[93] For the same reasons, to the extent that Oscar Trustee seeks to resile from its acknowledgment in the court below that MBS was entitled to its costs in both applications subject only to reductions having acknowledged that costs usually follow the event, it would be unfair to MBS to permit Oscar Trustee to do so. No public interest or other justifiable explanation for permitting this withdrawal has been advanced by Oscar Trustee. In this regard, the principle enunciated in **Paramount Export Ltd** to the effect that counsel will seldom be granted leave to resile from a concession on which arguments were tabled and a decision rendered in a lower court, is apposite. It is affirmed and applied. I would not entertain Oscar Trustee's tacit application for leave to withdraw that concession.

[94] The learned judge disagreed with Oscar Trustee that MBS' conduct justified a decrease in costs. He was not persuaded that MBS' failure to engage with Oscar Trustee in writing prior to the hearing would have prevented the parties from pursuing their respective applications. I am of the opinion that he got that right. There is no basis for disagreeing with his reasoning and conclusion on that point. In view of the assertions and counter-allegations, and the parties' appetite and insistence in pursuing the applications, the learned judge was entitled to so conclude. The evidence clearly supported such a finding. In so concluding, the learned judge took into account as he was required to do, the parties' conduct and the way in which they launched their respective applications and contentions.

[95] At its highest, Oscar Trustee's complaint amounts to nothing more than a disagreement with the weight the learned judge attached to each criterion outlined in rule 64.6. Those criticisms do not expose any error in principle or law by the learned judge in the exercise of his discretion in arriving at the costs order. They do not establish a proper ground for interfering with the learned judge's determination. I am satisfied that his decision on costs in respect of both

applications does not exceed the generous ambit within which reasonable disagreement is possible. I would not interfere with his award in respect of either costs order and I would dismiss this ground of appeal.

Order

[96] For the foregoing reasons, I would dismiss Oscar Trustee's appeal against the learned judge's grant of a stay on the basis of *forum non conveniens*, and against the costs orders and affirm the learned judge's decision. I would also award costs on the appeal to MBS at two-thirds of the costs of the court below.

[97] I am grateful for the helpful submissions of all counsel.

I concur
Mario Michel
Justice of Appeal

I concur
Godfrey Smith
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar