

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

Claim No: BVIHC (COM) 2021/0022

BETWEEN:

OSCAR TRUSTEE LIMITED

Claimant

and

MBS SOFTWARE SOLUTIONS LIMITED

Defendant

Appearances:

Ms. Louise Hutton QC, with her Mr. William Hare and Mr. Mungo Lowe of Forbes
Hare for the Claimant

Mr. Sharif Shivji QC, with him Mr. Jonathan Addo, Ms. Victoria Lissack and Mr.
Andre McKenzie of Harneys for the Defendant

2021 July 6 (Oral Judgment)
September 27 (Written Judgment)

JUDGMENT

- [1] **JACK, J[Ag.]**: There are before me two applications. The first is an application by the defendant made on 8th March of this year to stay proceedings on *forum non conveniens* grounds. The second is an application made on 1st April of this year for summary judgment by the claimant. For reasons I gave at the outset, I heard the summary judgment application first because it seemed to me that if summary judgment was granted, that impacted on the way in which the *forum conveniens* issue should be decided.

- [2] Before I go further, I should remind the parties of what I said in **HQ Aviation Limited v Sun Vessel Global Ltd**,¹ where I dealt with the question of *ex tempore* judgments and I said at paras [7] and [8]:

“Before turning to the issue for determination, I should mention one matter. This is an *ex tempore* judgment. In a number of recent cases, I have been concerned that in the event of an appeal an uncorrected version of the oral judgment has been placed before the Court of Appeal. That is not in anyone’s best interest. As Dankwerts LJ said in **Bromley v Bromley**,² ‘an extemporary judgment is not always easy to deliver perfectly in all respects on the spur of the moment. There must be corrections which need to be made so as to give the real meaning of the judge and he is perfectly entitled, it seems to me, not only to correct mistakes but to alter words which do not express his intended meaning at the time when he uttered them.’ And, of course, there is the need to correct the typescript.”

- [3] This matter concerns a mining venture in Turkey. The venture has not been a success due to difficulties in getting all the licenses and permits to mine in Turkey. More recently, the Turkish army has taken possession of the most valuable part of the mines, a deposit of limestone suitable for making cement.
- [4] There are three men who feature in this case, all with Australian connections. The first is Mr. Butler who is the Chief Executive Officer of the defendant. The second is Mr. Paget, an Australian lawyer. And the third, Mr. Zulpo, a tax adviser and partner in what used to be Ernst & Young but is now EY. They were originally friends.
- [5] I have been shown correspondence leading up to the making of the agreement now sued upon in 2012 and leading up to the amendments in 2015. The e-mails are long on how the men would divide up the anticipated profits of tens or hundreds of millions of US dollars, but short on what would happen if the anticipated profits did not eventuate. This was so, even though the project had been bedeviled with difficulties, including one of the Turkish counterparties

¹ [2021] ECSCJ No. 554, BVIHC (COM) 2018/0062 (determined 17th May 2018).

² [1965] P 111 at p 116.

stealing US\$11 million, part of the mine having already been mined and left in a condition that was dangerous, and one of the key mining licenses for the mine proving to have been forged.

[6] This is of relevance to Mr. Shivji QC's submission that because of the enormous commercial importance of the ISDA Master Agreement, all cases involving the interpretation of the ISDA Master Agreement should go to trial with expert evidence of market practice and an invitation to the ISDA itself to appear. I do not accept that any invocation of the ISDA Master Agreement should automatically lead to a presumption that there should be something corresponding to a state trial. No doubt there are such cases, but this is not one of them. This case involves what might politely be described as a bespoke agreement. It raises no wider ranging issues and needs to be decided on its own terms.

[7] There is a question as to whether the contract is in truth a swaps or derivatives contract at all but that was not argued before me. There is no doubt that a contract was made and it must be interpreted in accordance with its terms. The result of the drafting is such that the contract is anything but a standard terms ISDA contract. Indeed, although Mr. Paget put various legalese into it, it is not unfair to describe it as an effectively homemade contract with the defects typical of such documents.

[8] Against that background, I have to apply the test for summary judgment contained in CPR 15.2. This provides:

“The Court may give summary judgment on the claim or on a particular issue if it considers that (a) the claimant has no real prospect of succeeding on the claim or the issue; or (b) the defendant has no real prospect of successfully defending the claim or the issue.”

[9] Mr. Shivji QC raised six defences which he submitted reached the reasonable prospect of success threshold. The first is that no sums are due under the terms of the agreement. This is the substantive issue between the parties. The second

is that the claimant has no standing. The agreement was made between Oscar Corporation, a New South Wales company, and the defendant. Oscar Corporation was the trustee of the Chloe Trust, Mr. Paget's family trust. In 2016 it retired as trustee in favour of Oscar Trustee Ltd, the current claimant, a New Zealand company. The defendant says that section 7 of the ISDA Master Agreement debars such transfers.

[10] The third defence is that the Notice of Termination was invalid. It is common ground that the claimant served a notice of termination at the defendant's registered office here in the Virgin Islands on 8th October 2020. The defendant makes two points. Firstly, that only Oscar Corporation could serve a Notice of Termination. This is effectively a repeat of the second defence. And secondly, that service provided at the registered office was bad service. The agreement provided, the defendant argues, for exclusive service at its office in Hong Kong at an address given at the Lippo Center in Queensway, Hong Kong. The fourth defence is that Mr. Paget and Mr. Zulpo cannot benefit as both being advisers to the defendant in relationships which involve trust and confidence. The fifth defence is that the claimant cannot rely on the side letter. Mr. Shivji QC argues that an agreement on ISDA terms comprises three documents: the Master Agreement, a schedule and a confirmation in respect of each trade. Section 9A of the Master Agreement is a whole contract provision and therefore, there is no scope for a side letter being effective.

[11] Ms. Hutton QC's answer is straightforward. All documents have to be read together. In this case, there was in fact no schedule. The contract therefore comprised (a) the Master Agreement, (b) the confirmation and (c) the side letter. If one was going to use the Master Agreement's terminology, the confirmation and the side letter should be treated together as the confirmation required by the Master Agreement. The sixth defence was a point on the Hong Kong Money Lenders Ordinance which I have already rejected.

[12] It is convenient to start with the second defence, that of standing. Here, it is important to remember that a key feature of agreements under the ISDA Master Agreement is netting. One of the features of this is that sums owing between the parties under swaps or derivative agreements, varies from day to day and sometimes from minute to minute. Thus, on a Monday a bank might owe its customer substantial sums, but the next day the situation might have reversed with the customer owing the bank a substantial sum instead.

[13] Section 7 of the ISDA Master Agreement provides:

“Subject to section 6(b)(ii) and to the extent permitted by applicable law, neither this Agreement nor any interest or obligation in or under this Agreement may be transferred (whether by way of security or otherwise) by either party without the prior written consent of the other party, except that: (a) a party may make such a transfer of this Agreement pursuant to a consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all its assets to, another entity (but without prejudice to any other right or remedy under this Agreement); and (b) a party may make such a transfer of all or any part of its interest in any Early Termination Amount payable to it by a Defaulting Party, together with any amounts payable on or with respect to that interest and any other rights associated with that interest pursuant to sections 8, 9(h) and 11. Any purported transfer that is not in compliance with this section 7 will be void.

[14] Ms. Hutton QC argues that Oscar Corporation had done all it was required to do under the Agreement, which was to pay a million US dollars to the defendant, therefore there was no difficulty transferring the benefit of the agreement to Oscar Trustee.

[15] I disagree. Section 7 prohibits any transfers save in accordance with the relevant exceptions in section 7(a). This leads to a question whether Oscar Corporation transferred all or substantially all of its assets to Oscar Trustee. Here, there is a dearth of evidence. We know that Mr. Zulpo had an interest in Oscar Corporation because he had a 30 or 50 percent interest in the agreement. However, we do not know how he held it. We are told that the Chloe Trust was Mr. Paget's family trust.

Now it is possible, I suppose, that the trustee could appoint Mr. Zulpo as a beneficiary of the Chloe Trust and make an appointment of 30 or 50 percent of the trust's assets to him. That however would be fairly unusual. More likely, I would have thought, would be for Oscar Corporation to establish a separate trust in favour of Mr. Zulpo.

[16] Mr. Paget does not produce any trust documentation, so this issue simply remains a blank in the evidence. I do not need to reach any conclusion on this. It suffices that on the evidence there is a realistic prospect that Mr. Zulpo's interest in the agreement remained with Oscar Corporation. If that is right, then Oscar Corporation would not have transferred all or substantially all of its assets to Oscar Trustee. Likewise, no evidence has been adduced as to what other assets Oscar Corporation had apart from the agreement. This too is simply a blank. Yet it is for the claimant to establish a valid transfer under section 7(a).

[17] It follows that the defendant has shown a realistic prospect of success on the standing point.

[18] I turn then to the third defence, the validity or otherwise of the termination notice. It will be recalled that the notice was served by Oscar Trustee at the defendant's BVI registered office. I have already held that it is arguable that the retirement of Oscar Corporation as trustee in favour of Oscar Trustee was ineffective. If that is right, then the notice should have been served by Oscar Corporation and is thus invalidated on this ground. Was the notice served at the wrong address? Section 12 of the Master Agreement provides:

"Effectiveness.

Any notice or other communication in respect of this Agreement may be given in any manner described below (except that a notice or other communication under section 5 or 6 may not be given by electronic messaging system or e-mail) to the address or number or in accordance with the electronic messaging system or e-mail details provided (see the Schedule) and will be deemed effective as indicated: —

(i) if in writing and delivered in person or by courier, on the date it is delivered;

- (ii) if sent by telex, on the date the recipient's answerback is received;
- (iii) if sent by facsimile transmission, on the date it is received by a responsible employee of the recipient in legible form (it being agreed that the burden of proving receipt will be on the sender and will not be met by a transmission report generated by the sender's facsimile machine);
- (iv) if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date it is delivered or its delivery is attempted;
- (v) if sent by electronic messaging system, on the date it is received; or
- (vi) if sent by e-mail, on the date it is delivered, unless the date of that delivery (or attempted delivery) or that receipt, as applicable, is not a Local Business Day or that communication is delivered (or attempted) or received, as applicable, after the close of business on a Local Business Day, in which case that communication will be deemed given and effective on the first following day that is a Local Business Day.

Change of Details.

Either party may by notice to the other change the address, telex or facsimile number or electronic messaging system or e-mail details at which notices or other communications are to be given to it."

- [19] Two points arise in the present case. Firstly, does section 12(a) require notice to be given in one of the six ways set out there, so that service in another way is invalid? Second, if notice was given in writing under section 12(a)(i), was the office address in Hong Kong a mandatory address for the purposes of section 12?
- [20] Turning to the first point, the argument that section 12(a) is not mandatory in that it says notice "may" be given in the various manners set out. This suggests that it is discretionary. That was the view of two commentators on the Master Agreement, Simon James of Clifford Chance and Simon Firth of Linklaters. However, the case law is in favour of construing the term so as to be mandatory. In **Greenclose Limited v National Westminster Bank Plc**,³ Andrews J, as she then was, held as follows at para [121]:

³ [2014] EWHC 1156 (Ch), [2014] 2 BCLC 486.

“Having had the advantage of seeing the materials to which I have referred and hearing full argument by leading counsel on the rival constructions, I disagree with the view of Mr. James and reject Mr. Firth’s contentions as to how these provisions should be construed. Section 12(a) is mandatory and notice has to be given by the means it prescribes, by reference to and in accordance with the information provided in Part 4 of the Schedule, unless there has been an amendment of that information by a notice given by the party to whom that information relates to the other contracting party under Section 12(b). If the Schedule does not provide certain information necessary for service by a prescribed method, then the contract must be construed as limiting the prescribed methods to those expressly permitted by the Schedule unless and until the missing information is notified under Section 12(b) or the contract is formally amended.”

[21] In so holding, she followed an American case to the same effect. At para [115] she states:

“My view that the specified methods of giving notice are mandatory is consistent with that of” — she says Justice Duffy but I think it must be Judge Duffy — “of the US District Court in New York in a very similar case, albeit that the form under consideration was a 1987 ISDA Master Agreement (which did not make provision for notices to be served by fax). New York law and English law are the two systems that are usually chosen by the parties to ISDA Master Agreements to govern their transactions. The case was **First National Bank of Chicago v Ackerley Communications Inc.**⁴ As in the present case, the bank, First Chicago, had a two-year option to extend a derivative — in that case, an interest rate swap. It claimed to have given effective notice by fax of its election to extend the agreement. The judge referred to the fact that the relevant 1987 ISDA Master Agreement did not provide for facsimile transmission as an acceptable means of notification between the parties. He quoted the notice clause, which is in similar, but slightly different terms to section 12(a)... He added: ‘It is hornbook law that when the terms of a written contract are clear and unambiguous and those terms require written notification in a particular manner then such notification can be given only in that manner...’”

⁴ (2001) No 94 Civ 7539 (KTD), 2001 WL 15693 (Southern District of New York), affirmed 28 F App’x 61 (2nd Circuit, 2002).

[22] Now, **Greenclose** is not binding on me and is not binding on a Hong Kong Court. Nonetheless, it has persuasive value and indeed, slightly more than just persuasive value. This is because it is important that international standard terms such as the ISDA Master Agreement are, so far as possible, construed in the same way wherever they come to be litigated. London and New York are acknowledged centres of derivatives and swaps litigation. It is significant, in my judgment, that courts in both jurisdictions have reached the same conclusion. Thus, I hold as a matter of construction, that section 12(a) is mandatory.

[23] I then turn to the second point: was the office address given in Hong Kong the “address for notice for the purpose of section 12(a)”, as is provided for in Part 4(a) of the schedule? The schedule was in fact never completed so there is no specified address for service in the schedule itself. That however is not necessarily fatal to the argument the office address should be treated as the address for service of notices.

[24] There is a recognised type of documentation for an ISDA Agreement where there is no schedule completed. A “long form confirmation” is defined in the Practical Law UK Glossary as follows:

“A document that specifies the terms of a swap transaction, which functions as both a schedule to an ISDA Master Agreement and a trade confirmation. Parties to a derivatives transaction may use a long-form confirmation if they wish to engage in derivatives trade but have not executed an ISDA Master Agreement and therefore have no umbrella agreement in place that governs their trading relationship generally or who have not varied the terms of ISDA Master Agreement by using a schedule.

The long-form confirmation typically states that it supplements, forms a part of, and is subject to the terms of, a standard form ISDA Master Agreement, whether or not one has been executed by the parties without any schedule. It lists the commercial terms of transaction that would usually be found in a confirmation in addition to terms that might typically be found in a schedule such as additional termination events or events of default.”

- [25] Given that the office address in the Lippo Center is the only address given to the defendant, it is properly arguable, in my judgment, that that address should be construed as the address for service as well. It is true that section 10 of the Master Agreement makes provision about offices and what is described as Multibank Parties, but it does not seem to me that those provisions affect this construction issue.
- [26] What prevents me from reaching a final view on the construction of the Agreement, insofar as it does or does not stipulate an address for service, is the factual matrix. I need to consider this in determining the true construction of the Agreement: see the well-known decision in **Investors Compensation Scheme Limited v West Bromwich Building Society**.⁵
- [27] It is common ground that the address in the Lippo Center was not the address of an office used by the defendant. Rather, it was the address of a firm of solicitors whom the parties were using at the time. It seems to me that there are factual issues raised as to the situation of the project at the time in both 2012 and 2015 which may be relevant parts of the factual matrix.
- [28] I cannot determine these on a summary judgment application. I therefore hold that there is an arguable defence with a reasonable prospect of success that the Notice of Termination was not valid. This ground of objection therefore succeeds as well.
- [29] This leads to the first, fourth, and fifth defences. In my judgment, it is not appropriate for me to determine these points. Firstly, what I assume will now happen is that Oscar Corporation will be restored to the register, assuming that could be done in New South Wales. Oscar Corporation and Oscar Trustee will then serve fresh Notices of Termination on both the Hong Kong and the BVI addresses and the pair of them will then sue in which ever jurisdiction I determine

⁵ [1998] 1 WLR 896.

is the *forum conveniens*. There may well be difficult issues of *res judicata* if I make any determinations in respect of the three outstanding defences. For example, it is difficult to see how what I determine can be binding on Oscar Corporation, which is currently dissolved.

[30] Secondly, there is likely to be more evidence available if this matter proceeds either here or in Hong Kong. My determination in respect of Defences 2 and 3 is sufficient to resolve this application.

[31] Accordingly, I shall dismiss the summary judgment application on these grounds without determining Defences 1, 4 and 5.

[The Judge then heard argument on *forum conveniens*.]

[32] 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.**⁶ It has recently being the subject of a decision of the Privy Council given on 30th November last year: **Livingston Properties Equities Inc v JSC MCC Eurochem.**⁷ This was an appeal from my brother Wallbank J in this Court. The advice of the Privy Council was given by Lady Arden and she summarized the matter in this way. In the 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. The same principles apply where the defendants seek to obtain a stay of proceedings properly served within the jurisdiction on the basis that there is a more appropriate forum.

[33] The onus, however, is on the defendants seeking a stay, and not the claimants, unless the claimants seek to show that, despite the fact that there is another

⁶ [1987] AC 460

⁷ [2020] UKPC 31

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.

[34] When assessing whether there is another more appropriate forum, the court will consider what connecting factors exist in relation to the forum, such as the place where the alleged wrongs were committed and the governing law of the pleaded claims. The governing law is an important factor because it is generally preferable that a case should be tried in the country whose law applies. “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 **Spiliada** at p 465.”⁸

[35] Turning to the current case, the only connecting factors with the jurisdiction are the fact that the defendant is incorporated here. Ms. Hutton says that it is also relevant that questions of enforcement are likely to be important here because Red Rock, the underlying trading entities, are all held through the holding company in the form of the defendant. In my judgment, that is not a significant point. It would be a point of some significance if a judgment in Hong Kong were difficult to enforce here, but given that any judgment given in the Hong Kong courts would be readily enforcement in this jurisdiction, in my judgment, it is a matter which affords little weight in considering the *forum conveniens*.

[36] There are two factors on which Mr. Shivji, QC puts some weight. The first is that the agreement is governed by Hong Kong law and, therefore, the Hong Kong courts are more suitable as a venue for the trial of that matter. It is, of course — as the passage I have just read from the advice of Lady Arden shows — a consideration. The weight to be given in a particular case is something which varies. In some cases it may be of critical importance to know what Hong Kong law is and how it differs. In other cases, it may be a matter of little weight.

⁸ Eurochem at [12].

- [37] In my judgment in the current case, it has what I might describe as medium weight, in that the proceedings at the moment are at an early stage. I certainly cannot exclude the possibility that there are going to be issues of Hong Kong law. Although I was able to deal with the question of the Hong Kong Money Lending Ordinance summarily, there are other issues, as Mr. Shivji has drawn my attention to. For example, an important issue is the question of the Hong Kong office. That, it will be recalled, was the place which was the only address given for the defendant in the agreement which is the subject of this action.
- [38] It appears that an office is not just a matter of relevance to the master agreement. It is also a matter which has some technical significance in Hong Kong law. Now that may or may not mean that it becomes a significant issue in the case, but it is something, it seems to me, I need to weigh in the balance when deciding whether this Court or the Hong Kong court is more appropriate. And, in particular, it does not seem to me that I can say at this stage, when no pleadings have been completed, that there will not be issues of Hong Kong law. If there were issues of Hong Kong law, then that, of course, would be a strong indication that Hong Kong was a more suitable place.
- [39] Of more weight though, in my judgment, is the question of the convenience for witnesses. At the moment, international travel is extremely difficult, and as I understand it, there are strict limitations on leaving and returning to Australia and New Zealand. That of course may have eased, and one hopes that it will have eased, by the time a trial comes; but even if the restrictions on international travel were completely lifted, it has to be said that among inhabited places on this planet which have regular airline services, it is difficult to find somewhere which is more difficult to get from and to than Tortola and Sydney. Thus, in terms of witness attendance, the BVI is not convenient for those in Australasia.
- [40] It is right to say that a number of trials have been conducted now by this Court involving Chinese witnesses and those have been managed reasonably successfully with the witnesses giving evidence from Hong Kong or Macau.

However, the time zones are different for China in that the time difference between here and China is 12 hours which means that if the Court sits at eight o'clock in the morning, a witness will be giving evidence in Hong Kong or Macau at eight o'clock at night.

[41] The time difference with Sydney is 15 hours (although it may change with their summertime) but 15 hours is a time difference which makes it really quite impossible for this Court to carry out a trial with witnesses in that timezone, with the effect that it would be necessary for the witnesses to attend.

[42] Now Ms. Hutton QC draws my attention to the fact that the only witnesses who have been identified thus far are the three men who were the movers behind the Turkish mining venture. Of those it is, of course, a matter for Mr. Zulpo and Mr. Paget where they chose to sue. If they chose to sue in the Virgin Islands, then they need to take into account the fact they will be the ones having to travel. However, that does not apply to Mr. Butler. Although he is currently living in California, from which is less difficult to get to Tortola, he is planning to move back to Australia at the end of 2021, so that by the time a trial takes place, he will be in the position of having to make the very difficult journey from Sydney to Tortola.

[43] There is also the point — and it is too early to say at the moment — that other witnesses too are likely to be inconvenienced by having to come to the BVI. In particular, if there is any question of having to have evidence of market practice, that can be very much more conveniently given in Hong Kong than here.

[44] The other matter is that the contract does have a connection with Hong Kong. That was where monies were hoped to be raised from investors. That is why the office was nominated in Lippo Centre, albeit that there seems to be an issue as to what precisely the purpose of having the office there was. That though does show some connection with Hong Kong. Now it is right that the mine with which we are concerned is in Turkey and that the other jurisdiction with which the underlying facts have a connection is Australia, but neither of those places are available

jurisdictions. The sole question for me is whether Hong Kong is a much more suitable jurisdiction than the BVI.

- [45] When I stand back from this and look at the matter overall, this is a case, which in my judgment, has no connection with the BVI beyond the modest weight to be given to the place of incorporation. It has more of a connection with Hong Kong, and in my judgment Hong Kong is the appropriate forum for the trial of issues in this action. I shall therefore grant the application for a stay.

[The judge then heard argument on costs.]

- [46] I am asked to consider the question of costs of the two applications. The general rule is set out in CPR 64.6:

“(1) Where the Court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.”

I do not need to read the next two subrules.

“(5) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(6) In particular, it must have regard to” ..

And then it sets out things like the conduct, the manner in which the parties pursued the case, whether a party has succeeded on particular issues, whether it was reasonable for a party to pursue particular issues and whether the claimant gave reasonable notice of an intention to issue a claim.

- [47] Ms. Hutton QC accepts that she has lost both applications, but she says that the behaviour of the claimant is such that there ought to be a reduction in the amount of costs which is ordered against her client. 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] Now it is right to say that 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 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 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 those circumstances, in my judgment, the usual order ought to follow that the claimant should pay the defendant's costs of the two applications to be subject to a detailed assessment if not agreed.

[The judge then heard an application for permission to appeal by both sides.]

[51] I am asked to consider permission to appeal. The decision I reached in respect of forum was well within the bounds of a reasonable decision. In those circumstances, in my judgment, an appeal has no prospect of success and there are no other substantial reasons for granting permission to appeal, so I shall refuse permission to appeal.

[52] Likewise, in respect of Mr. Shivji QC, I refuse him permission to appeal, but I will extend his time by seven days in the event of an appeal being lodged by the claimant. And I shall extend time for appealing 14 days after I approve a transcript of the judgment which I have handed down. That is subject, of course, to the party wishing to appeal exercising reasonable diligence in obtaining the transcript in the first place.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar