

**IN THE EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

Claim No: BVIHC (COM) 2017/0134

IN THE MATTER OF DURANT INTERNATIONAL CORP (In Liquidation)

BETWEEN:

**(1) KEVIN HELLARD
(2) MATTHEW RICHARDSON
(As Joint Liquidators of Durant International Corp (in Liquidation))**
Applicants

and

FLAVIO MALUF
Respondent

And Claim No: BVIHCM (COM) 2020/0062

IN THE MATTER OF DURANT INTERNATIONAL CORP (In Liquidation)

BETWEEN:

DURANT INTERNATIONAL CORP (in Liquidation)
Claimant

and

FLAVIO MALUF
Defendant

Appearances:

Mr. Adrian Francis, Mr. Carl Moran and Mr. Scott Tolliss of Maples & Calder for the
Applicant liquidators and Claimant Company
Mr. John Machell QC, with him Mr. Timothy de Swardt of Kobre & Kim (BVI) LP for the
Respondent and Defendant

2021 June 28 and 29
August 23

JUDGMENT

- [1] **JACK, J [Ag.]:** On 22nd April 2020 I granted *ex parte* a world-wide freezing order against the current respondent and defendant (“Mr. Maluf”) in case number 2017/0134. The same day I granted permission to serve Mr. Maluf with the proceedings out of the jurisdiction in Brazil in action number 2020/0062 and in the liquidation proceedings. The order in 2020/0062 was subsequently amended on 4th May 2020. I signed a letter rogatory addressed to the Brazilian authorities.
- [2] On 27th November 2020 Mr. Maluf issued an application seeking relief based on non-service of the proceedings on him and seeking in any event discharge of the freezing order. Both this application and the return date on the original freezing order are now before me for determination. (There have been various adjournments previously.)

The background

- [3] The background of this matter is what is alleged to be a substantial fraud carried out between 1993 and 1996 by Paulo Salim Maluf, the then mayor of São Paulo in Brazil. Mr. Maluf, who is a party to the current proceedings, is his son. The two men are alleged to have taken massive kick-backs and bribes at the expense of the municipality. These monies were laundered through to various companies including Durant International Corp (“Durant”), which is a BVI company. Durant was placed in liquidation on 6th November 2017. The application for the freezing order was brought by Mr. Hellard and Mr. Richardson, Durant’s current liquidators, on 23rd March 2020 in the liquidation proceedings, because that was the only case in existence at that time. The substantive action is brought in Durant’s own name.
- [4] São Paulo and the Brazilian state brought proceedings before the Royal Court of Jersey and recovered judgment against Durant and another BVI company, Kildare Finance Ltd (“Kildare”), a wholly owned subsidiary of Durant. An appeal went to

the Privy Council: **Federal Republic of Brazil v Durant International Corp.**¹ The Board dismissed Durant's appeal and held that tracing was a more flexible remedy than previously thought and was available in respect of the monies misappropriated.

[5] Mr. Maluf was a director of Durant at all relevant times. On 27th May 1998 Durant lent Mr. Maluf US\$67.3 million, of which US\$44.3 million is, Durant asserts, outstanding. In the current substantive action, the liquidators seek repayment of that amount, or compensation in equity in a like sum for breach of fiduciary duty, knowing receipt and dishonest assistance.

[6] Mr. Maluf and his father have been convicted in Brazil in respect of the fraud on the municipality, but due to the slowness of the appeal process, Mr. Maluf has not yet done any gaol time. (His father was released into house arrest from prison on compassionate grounds due to his ill-health.) Mr. Maluf has also been more recently convicted in France of aggravated money laundering, although the lateness of the evidence adduced in relation to this means that Mr. Maluf has not been able to answer the evidence and it would be wrong to place weight on the French conviction. Again, because he is living in Brazil, he has not served time in France. Mr. Maluf asserts in the current proceedings that there was never any fraud or money-laundering, but he concedes (at any rate for the purpose of the current hearing) that "there is a serious issue to be tried as to whether the loan was made from the proceeds of the alleged fraud." Given that fraud has been proven in at least the Jersey and Brazilian proceedings, that is in my judgment an inevitable concession.

Service

[7] Service of BVI proceedings in Brazil is normally effected under the provisions of the **Hague Convention**.² By May 2020, however, the Covid pandemic had closed the unit at the Foreign Office in London dealing with service: see **Starr**

¹ [2015] JCPC 35, [2016] AC 297.

² Convention of 15th November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

Investments Cayman II Inc v Ou Wen Lin.³ Service through the diplomatic channels was therefore not possible. Instead Durant had the claim couriered to the Brazilian authorities.

- [8] There were then two stages of proceedings in Brazil. On 28th July 2020, the Superior Tribunal de Justiça (“the STJ”), Brazil’s highest ordinary civil court, accepted the letter rogatory and authorized the execution of the freezing order against Mr. Maluf. This is described as “the exequatur decision”. The execution of the exequatur decision was sent to the Federal Court of São Paulo for enforcement. Mr. Maluf learnt of the BVI proceedings and the subsequent exequatur decision on 6th August 2020. On 12th August 2020, Mr. Maluf’s Brazilian lawyers were able to gain access to the Brazilian Court file.
- [9] Mr. Maluf asserts that this gaining of access was without prejudice to his position that he had not been properly served. However, the Federal Court in São Paulo disagreed. On 21st September 2020, it held that, because the lawyers had had access to the Court file, there was deemed service of the substantive proceedings by way of a voluntary appearance. This I shall call “the service decision”.
- [10] There is provision under the Brazilian Code of Civil Procedure for the exequatur decision to be reviewed by another section of the STJ. That is currently occurring, but the review has not yet been finished. Likewise, the service decision can be and has been appealed by Mr. Maluf. Again, the appeal has not been determined. It is unclear when either of these procedures will be finalized. It may take a considerable time.
- [11] When considering the matters concerning international proceedings, the Courts of Brazil receive independent advice from the office of the Federal Attorney-General. The most recent advice is to this effect:⁴

³ [2020] ECSCJ No 197, BVIHC (COM) 2018/0225 (determined 8th June 2020) (Jack J) at para [4].

⁴ Bundle B3/245-246 (references to the relevant pages of the Brazilian Court file are omitted).

“The concerned party [i.e. Mr. Maluf] challenged the decision... claiming that the letter rogatory is not enforceable because: a) it has not been processed through diplomatic channels; b) it violates the national sovereignty, since the facts stated therein occurred in Brazil; c) it violates public order, because ‘the Claimant, in its complaint, admits that it collects debt that would, in its opinion, arise from a null contract, due to the illegality of the subject matter thereof, and sham’; d) there is no sufficient reason or facts in the foreign decision to understand the dispute.

The concerned party was granted full access to the case records and the service of process from the Ministry of Justice and Public Security, so that, within a period of 10 days, he could request whatever he deemed appropriate, in accordance with the provisions of The Hague Convention on Service and Notice Abroad. The Federal ATTORNEY GENERAL Office issued an opinion on the validity of this letter rogatory and return of this letter rogatory to the requesting court, so that the purpose thereof be complied with. The concerned party filed a statement claiming, in sum, undue processing of this letter rogatory, as it was submitted by initiative of the party, not through diplomatic channels or through the central authority, as set forth in the Hague Convention...

A summary of the report is provided below: Preliminarily, according to the provisions of article 26, of the Code of Civil Procedure, ‘the international legal cooperation shall be governed by a treaty which Brazil is a party to’, considering that paragraph 1 of that legal provision determined that ‘in the absence of a treaty, the international legal cooperation may take place on the basis of reciprocity, expressed through diplomatic channels’. In this case, it appears that the Caribbean Supreme Court of the British Virgin Islands requests (a) from the [STJ] to grant urgent provisional relief regarding the execution, in Brazil, of the worldwide order to freeze assets owned by Flávio Maluf, as issued by that Court, without prior hearing of the concerned party, and (b) serving process on him to answer the collection proceedings filed in that jurisdiction. It is also verified that the requesting court determined that reciprocity be granted for similar measures issued by the Brazilian Courts.

It also appears that the letter rogatory was submitted by the claimant directly to the [STJ] under the following claim: As a public and notorious matter, the pandemic that currently affects the population of virtually all countries in the world, including the British Virgin Islands, which are on lockdown, the usual procedure for a motion like this through diplomatic channels remains absolutely impaired, making it impossible to timely assess urgent cases filed here, thus making it impossible to meet the deadlines set by the requesting court, the Eastern Caribbean Supreme Court.

Finally, it appears that, given the impossibility of processing the request through diplomatic channels, the claimant requested: Thus, and considering that the authenticity of the attached documentation has been certified by a notary public and apostilled under the terms of the Hague Convention, he respectfully requests waiver of processing through the Ministry of Foreign Affairs; or, successively, requests a period of ninety (90) days (to be extendable, depending on the isolation measures) to re-submit the letter rogatory with the stamp of the foreign consular authority — without prejudice to urgent review of the requests made below.

Therefore, it must be recognized that the request for assistance from the British Virgin Islands courts was duly carried out, as it was based on the promise of reciprocity, which was not expressed through diplomatic channels due to the difficulties imposed by the COVID-19 pandemic. In addition, it appears that the concerned party expressly requested in the complaint waiver of processing through the Ministry of Foreign Affairs, with the Honorable Rapporteur Justice having ordered to continue with the case by granting the *exequatur*. In view of the above, the FEDERAL ATTORNEY GENERAL OFFICE confirms the opinion on [the Court file], and hereby decides for referral of the records to the requesting court, through the central authority.

Brasília, January 18, 2021.

Humberto Jacques de Medeiros, Deputy Federal Attorney General.”

- [12] This opinion supersedes an earlier opinion to the contrary effect given on 25th September 2020 by Arnaldo Jose Alves Silveira, who is merely the general coordinator of international legal cooperation and clearly much more junior to Mr. de Medeiros. I prefer Mr. de Medeiros’ opinion to that of Mr. Alves Siveira.
- [13] Both sides have put expert reports in dealing with service in accordance with Brazilian law. Durant’s experts, Antenor Madruga and Claudia Chagas, say there was good service; Mr. Maluf’s expert, Prof. Velloso, a retired Federal Supreme Court judge, says there was not.
- [14] The evidence at present is in my judgment in favour of good service having taken place in accordance with Brazilian law. The STJ says the letter rogatory is valid; the Federal Court of São Paulo says there has been good service; the Deputy Federal Attorney-General, a completely independent lawyer, says there has been good service. Without intending any disrespect to the experts, it is not appropriate

that I examine the differing expert opinions and reach my own conclusion, when the Courts of Brazil and one of the Brazilian state's most senior legal representatives have spoken. I accept that both the exequatur decision and the service decision are subject to review and appeal, but unless and until the review or the appeal is allowed, the weight of the evidence is such that I must in my judgment accept that there has been good service as a matter of Brazilian law. Accordingly, I find that service has been effected under CPR 7.8(1)(b).

- [15] Mr. Machell QC submits that service in accordance with Brazilian law is not sufficient to show that there has been good service in accordance with BVI law. He submits that the original order for service out provided for service "on the respondent at [a named apartment in São Paulo] or other address for service in Brazil." The form of service by the voluntary appearance of his lawyers does not, he submits, fall within this description: it is not service "on the respondent". He cites no authority for this proposition and in my judgment it is a bad point. If the form of service accepted by the Brazilian Court as having occurred was good service, then it follows that it was good service "on the respondent". (It could be on no one else.) That service would be at the place where the lawyers did the acts constituting the voluntary appearance.

Code for the e-Litigation Portal

- [16] Mr. Maluf takes the point that there was bad service in any event, because the authorization code for access to the e-Litigation Portal was only emailed to Kobre & Kim, his lawyers, on 28th September 2020, the business day after deemed service was effected on Mr. Maluf in Brazil. Further Kobre & Kim were not authorised to accept service in any event. This point only applies to the 2020 action, not to the 2017 action, which was not on the e-Litigation Portal.
- [17] Rule 13 of the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules 2018 (as amended by the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) (Amendment) Rules 2019) provides, so far as relevant:

“(3) Where proceedings have commenced —

(a) service must be effected in accordance with the applicable rules of court; and

(b) the filing party must at the same time serve the authorization code generated by the Electronic Litigation Portal in the form set out in Schedule 2.

(4) Where the authorization code generated by the Electronic Litigation Portal is not served on a party in accordance with sub-rule (3), service is deemed not to have been effected.”

[18] Mr. Machell QC submits on Mr. Maluf’s behalf that the failure to serve the code before 28th September 2020 is fatal to Durant’s attempt to serve Mr. Maluf. The defect cannot be remedied.

[19] That is in my judgment a surprising submission. Rule 3(6) of the 2018 Rules indicates that the e-Litigation Rules need to be considered as part of the general procedural rules of the Court. This is in accordance with CPR 2.2(1), which applies the CPR to all civil litigation (bar the irrelevant exceptions in CPR 2.2(3)). It is thus legitimate to apply the overriding objective in CPR 1.1 when considering the 2018 Rules. A further corollary is that the back-stop emergency power in CPR 26.9(3) to rectify procedural errors can potentially apply to rectify procedural missteps under the 2018 Rules.

[20] In fact, it is not necessary in my judgment to have to resort to these powers (as I would have done, had it been necessary). A perfectly sensible interpretation of rule 13(4) of the e-Litigation Rules is to interpret the paragraph as deeming service not to have been effected “until the authorization code is served”. The purpose of rule 13(4), as Mr. Francis rightly points out for Durant, is to ensure that judgment by default cannot be entered until the defendant has the code. Without the code a defendant cannot enter an appearance. Rule 13(4) is not in my judgment intended to create some irremediable bar to service as a result of some technical defect, which can be and in the current case has been easily fixed.

[21] In this regard, Mr. Machell QC submits that the “Court cannot convert non-service into service.” In my judgment, he is wrong about that. CPR 5.13 provides for “alternative service”. Such service is only good if the Court retrospectively endorses the method of service: CPR 5.13(4)(b), thereby converting non-service into good service. Further CPR 7.8B(1) allows the Court to dispense with service completely in exceptional circumstances. This also has the practical effect of turning non-service into service.

The modern approach to service and dispensing with service

[22] One also needs to stand back and look at the modern approach to service out of the jurisdiction. As I said in **Commercial Bank of Dubai v 18 Elvaston Place Ltd**:⁵

“[25] At common law, the only form of service available was personal service within the jurisdiction. Permission to serve out of the jurisdiction in limited circumstances was first permitted by sections 18 and 19 of the **Common Law Procedure Act 1852**.⁶ The gateways were subsequently included in the (English) **Rules of the Supreme Court** and gradually expanded during the twentieth century. This was considered a potential encroachment on the sovereignty of the foreign state in which process was to be served, so that the jurisdiction was considered to be an ‘exorbitant’ one to be exercised narrowly.

...

[27] In the current century, the old approach is no longer sustainable. As Lord Sumption JSC said in **Abela v Baadarani**⁷, a case involved with service of English proceedings on a defendant in the Lebanon:

‘53. In his judgment in the Court of Appeal, Longmore LJ described the service of the English court’s process out of the jurisdiction as an ‘exorbitant’ jurisdiction, which would be made even more exorbitant by retrospectively authorising the mode of service adopted in this case. This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation. The adoption in English law of the doctrine of *forum*

⁵ [2020] ECSCJ No 202, BVIHC (COM) 2020/0072 (16th June 2020).

⁶ 15 & 16 Vict c 76.

⁷ [2013] UKSC 44, [2013] 1 WLR 2043.

non conveniens and the accession by the United Kingdom to a number of conventions regulating the international jurisdiction of national courts, means that in the overwhelming majority of cases where service out is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and this country. Moreover, there is now a far greater measure of practical reciprocity than there once was. Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries. The basic principles on which the jurisdiction is exercisable by the English courts are similar to those underlying a number of international jurisdictional conventions...

[28] Lord Neuberger PSC held:

'33. The question is whether the judge was entitled to hold that there was a good reason to order that the delivery of the documents to Mr Azoury [the defendant's Lebanese lawyer] on 22 October 2009 [in the Lebanon] was to be treated as good service. Whether there was good reason is essentially a matter of fact. I do not think that it is appropriate to add a gloss to the test by saying that there will only be a good reason in exceptional circumstances. Under CPR r 6.16 [our CPR 7.8B], the court can only dispense with service of the claim form "in exceptional circumstances". CPR r 6.15(1) [our CPR 5.14 and 7.8A] and, by implication, also 6.15(2) [our CPR 5.13] require only a "good reason". It seems to me that in the future, under rule 6.15(2), in a case not involving The **Hague Service Convention** or a bilateral service Treaty, the court should simply ask whether, in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service.

...

35. As stated above, in a case of this kind the court should simply ask itself whether, in all the circumstances of the particular case, there is a good reason to make the order sought. It should not be necessary for the court to spend undue time analysing decisions of judges in previous cases which have depended on their own facts.'

...

[30] It should be noted that Lord Neuberger took a pragmatic approach to service:

'37. Service has a number of purposes but the most important is to my mind to ensure that the contents of the document served,

here the claim form, is communicated to the defendant. In **Olafsson v Gissurarson (No 2)**⁸ I said, in a not dissimilar context, that

“...the whole purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's case: see e.g. **Barclays Bank of Swaziland Ltd v Hahn**⁹ *per* Lord Brightman, and the definition of ‘service’ in the glossary to the CPR, which describes it as ‘steps required to bring documents used in court proceedings to a person's attention...’”

I adhere to that view.

38. It is plain from... his judgment... that the judge [at first instance] took account of a series of factors. He said that, most importantly, it was clear that the respondent, through his advisers was fully apprised of the nature of the claim being brought. That was because... the respondent must have been fully aware of the contents of the claim form as a result of it and the other documents having been delivered to his lawyers on 22 October in Beirut and communicated to his London solicitors and to him. As Lewison J said...:

‘The purpose of service of proceedings, quite obviously, is to bring proceedings to the notice of a defendant. It is not about playing technical games. There is no doubt on the evidence that the defendant is fully aware of the proceedings which are sought to be brought against him, of the nature of the claims made against him and of the seriousness of the allegations.’

I agree.’

[31] It could be said that the UK Supreme Court approved a test that the proof of the pudding is in the eating. If service did in fact result in the proceedings coming to the attention of the defendant, then the courts should lean in favour of finding the service good.”

[23] In the current case, I have found that there has been good service.

⁸ [2008] EWCA Civ 152, [2008] 1 WLR 2016 at para [55].

⁹ [1989] 1 WLR 506 at p 509.

- [24] Nonetheless it is clear to me that the effect of deciding this case on that basis is simply going to generate more litigation. An appeal is inevitable. The case is likely to be delayed whilst the Brazilian Courts determine the review and the appeal. The pragmatic approach in my judgment is to apply the overriding objective and dispense with service under CPR 7.8B(1). Mr. Maluf knows full well about the current proceedings. Absolutely no injustice is done to him by putting an end to his wholly technical and unmeritorious arguments about whether or not service has technically been effected or not.
- [25] In the current case, the circumstances are in my judgment exceptional. Durant have attempted to serve, but due to the pandemic the ordinary means of service through diplomatic channels were suspended. There is wrangling in the Brazilian Courts about the effect of the suspension of the diplomatic channels which has not yet been resolved. There is no indication when a final decision will be forthcoming in Brazil. In the meantime, Durant's claims will make no progress.
- [26] An order dispensing with service under CPR 7.8B(1) is not one which the Court can make of its own motion: see CPR 7.8B(2). Mr. Francis said that Durant had not wanted to show "weakness" by applying for dispensation from service. However, advocates regularly adopt a belt-and-braces approach. There was not in my view a good reason for failing to ask in the alternative for dispensation.
- [27] The Court should not, however, punish this misstep, which can be easily remedied. That would be contrary to the overriding objective and disproportionate. Durant should be able to issue a *pro forma* application with affidavit in support to support such an order. If Durant does so, I will make such an order.

Service out

- [28] I turn then to the second limb of Mr. Maluf's application. He submits that Durant has not established a sufficient case against him to justify the authorization of service out of the jurisdiction. It is common ground that the test to be applied is that applicable to a summary judgment application. If Durant's case would survive

an application by Mr. Maluf for summary judgment, then the requisite hurdle for the grant of permission to serve outside the jurisdiction has been jumped.

[29] Before I look at Mr. Machell QC's particular points, it is worth noting the overall thrust of Durant's case. All the monies which flowed through Durant were proceeds of Maluf senior's enormous fraud in which Mr. Maluf on Durant's case was a willing participant. He has provided no evidence to support the proposition that the monies came from successful investing which his father carried out in the late 1990's. Indeed, already at the end of the 1990's he and his father were being questioned by their bankers about potential money-laundering. This is not a promising starting point for assertions that Durant have no reasonably arguable claims against Mr. Maluf.

[30] With those words, I turn to the specific points made on Mr. Maluf's behalf. Mr. Machell QC says firstly that the claim for the outstanding balance of the loan must be statute barred. It was due after two years and the six-year limitation period has long expired. Again, it is an unattractive submission that a director can borrow tens of millions of dollars from a company, that he can deliberately wait until the limitation period runs against the company and that he can then assert that any claim is statute-barred. The law is complicated by the question whether a director who keeps money in breach of his fiduciary duties from the company holds the money as an express trustee (for which there is no limitation period) or as a constructive trustee (for which there is potentially a six year limitation period): see **McGee on Limitation Periods**.¹⁰ In my judgment it is arguable that a director may not assert a limitation defence against a company when he is in breach of his fiduciary obligations to the company in allowing the limitation period to elapse.

[31] Further, there is a potential extension of any limitation period based on fraudulent concealment. Knowledge of a director will not be imputed to the company where the director is committing a wrong-doing against that company: **Jetivia SA v Bilta**

¹⁰ 8th Ed (2018) at paras 14.028ff.

(UK) Ltd (in liquidation).¹¹ Mr. Machell QC says that there was no fraudulent concealment which could extend the limitation period, because all the monies lent were shown in the books. However, if nobody apart from the fraudulent directors was going to look at the books until the company was placed in liquidation, it is properly arguable in my judgment that there was fraudulent concealment for the purposes of the **Limitation Act 1961**.¹²

[32] Mr. Machell QC's second point is that the knowing receipt claim is bound to fail. This is, he says, because the liquidators of Durant have ratified the 1998 loan agreement. By ratifying the agreement, he submits, they necessarily accept that legal and equitable title to the monies advanced passed to Mr. Maluf. In my judgment the facts need to be explored here. It is perfectly normal for a claimant to put forward alternative claims. Certainly, the liquidators cannot recover judgment both for the loan and for the same money by way of knowing receipt, but it is far too early in the action to hold that the liquidators have made some irrevocable election only to pursue the loan claim. For example, there must be an issue as to how genuine the loan agreement was. Fraudsters (assuming Mr. Maluf was a party to a fraud) often conceal the true effect of their transactions. (This is a point on which the Brazilian authorities have picked up: see Mr. de Medeiros' opinion above.)

[33] His third point is Mr. Maluf could only have owed a fiduciary duty to creditors of Durant, if Durant was insolvent or likely to become insolvent. No doubt — but if Durant was laundering vast sums from the São Paulo fraud, it is unlikely to have been solvent. The monies which the municipality could trace to Durant would render the company insolvent. (It is not suggested Durant had any trading business of its own which could have generated funds.) Mr. Machell QC accepts that if the breach of fiduciary duty claim stands the dishonest assistance claim also stands.

¹¹ [2015] UKSC 23, [2016] AC 1.

¹² No 43, Revised Laws of the Virgin Islands, section 25(b).

[34] In my judgment, the liquidators pass the summary judgment test and it is not appropriate to set aside the permission to serve outside the jurisdiction.

Material non-disclosure

[35] Mr. Maluf asserts that there was material non-disclosure, which would entitle the Court to discharge the *ex parte* order on that ground alone. I set out the principles on which the Court acts in **Great Panorama International Ltd v Qin Hui and others**,¹³ which cites the well-known passage from Ralph Gibson LJ's judgment in **Brink's Mat Ltd v Elcombe**.¹⁴ I also remind myself of the observations of Toulson J in **Crown Resources AG v Vinogradsky**,¹⁵ as approved by the English Court of Appeal in **Kazakhstan Kagazy Plc v Arip**.¹⁶

[36] The matters of non-disclosure on which reliance is placed start with the failure to present a reasoned argument in respect of limitation at the hearing on 22nd April 2020. In fact, I raised the question of limitation at that hearing. For the reasons I have given above, there is an arguable case that the debt claim is not statute-barred. There was therefore no relevant non-disclosure: I knew the point and resolved it in the same way I have done in this judgment after hearing adversarial argument.

[37] The second issue of non-disclosure tracks the arguments dealt with above in respect of the breach of fiduciary duty claim.

[38] The third head of non-disclosure is said to be the "serious error in presenting the matter as if it was an established fact (i) that Mr. Maluf was involved in a fraud under which he and those with whom he was associated had stolen US\$200 million; and (ii) that that stolen money was all paid through the Claimant, other companies and Sun Diamond and substantial part (US\$172 million) was invested

¹³ [2020] ECSCJ No 278, BVIHC (COM) 2019/0180 (determined 13th August 2020) at paras [70] and [71].

¹⁴ [1988] 1 WLR 1350 at p 1356.

¹⁵ Unreported, 15th June 2001.

¹⁶ [2014] EWCA Civ 381, [2014] 1 CLC 451 at [36].

back in Brazil in the form of shares in Eucatex.” There is nothing in this complaint. I was always aware that matters were disputed.

[39] Similarly, Mr. Maluf asserts that the “Jersey structure was set up to hold historical family wealth that could no longer be maintained in Switzerland due to regulatory changes in Switzerland.” That is something which will have to be determined in due course. Counsel complains that Durant’s evidence said: “What is clear is that the Companies [i.e. Durant and Kildare] had no legitimate purpose other than... money laundering.” The emphasis was added by counsel to support a submission that by saying “it was clear” there was a material misrepresentation. With all due respect this is scraping the barrel. Again, I was aware there were potentially many issues. Mr. Richardson is entitled to say what he believed.

[40] Even if there were non-disclosure, it is not such that I would in my discretion set aside the *ex parte* order.

Miscellaneous points

[41] Mr. Machell QC then submits that there should be a stay of the current proceedings pending the determination of the civil proceedings in Brazil. The parties in Brazil are different. The causes of action are different. The obvious place for determination of the issues in the current action is this Territory. I refuse a stay.

[42] In the light of the enormous fraud said to have been committed, there is in my judgment an obvious risk of dissipation of assets by Mr. Maluf. Mr. Machell QC is right that Durant could have proceeded *inter partes*, but it is ultimately a matter for this Court whether to hear a matter *ex parte*. It is not a ground for setting aside the order granted.

[43] The living expenses issue has been resolved between the parties with Mr. Maluf being permitted to spend US\$75,000 per month on the usual terms.

[44] Lastly, it is said that the cross-undertaking in damages given by the liquidators should not be capped at the value of the assets of Durant. Such a cap is the usual order where liquidators seek an injunction. I accept it is not an invariable order, but there must be some reason to depart from the usual terms. Mr. Machell QC submits that, since the “real” creditor is São Paulo, the municipality should give an unlimited cross-undertaking. Further, he says, Grant Thornton UK are effectively funding the litigation by taking a 150 per cent uplift on the fees of the liquidator.

[45] Against this, I note Mr. Maluf has given no quantification of what any claim he might make under the cross-undertaking would comprise. Given that he accepts he is the subject in Brazil of a freezing order of the Brazilian Courts and has been for many years, it is difficult to see what substantial claim he might have under this cross-undertaking. I conclude that the real purpose behind the application for an uncapped undertaking is to dissuade the liquidators from pursuing the current claim. That is, of course, the reason why the usual order does cap liability under the cross-undertaking.

[46] In the exercise of my discretion, I refuse to order that the liquidators provide an uncapped cross-undertaking.

Conclusion

[47] Accordingly, I shall continue the injunction. I shall hear counsel on what consequential orders I should make.

Post-script

[48] After distributing the draft judgment in this matter to the parties on 19th August 2021, Mr. de Swardt of Kobre & Kim on Mr. Maluf’s behalf drew my attention to a further development in this matter since I heard argument on 28th and 29th June 2021. On 27th July 2021, Judge dos Santos, the judge dealing with the matter in the São Paulo Court handed down a further decision (“the third dos Santos decision”), which Mr. de Swardt said was relevant.

[49] In order fully to understand the issues the judge was determining in the third dos Santos decision would require expert evidence of Brazilian law. It appears, however, that there is a procedure in Brazil whereby a party can ask a judge to “clarify” an order. In the current case both Durant and Mr. Maluf asked for clarification. On its face, the “clarification” seems to have been limited to elements of the exequatur decision and Judge dos Santos does clarify that decision. However, Mr. de Swardt submits in his email of 19th August 2021:

“4. As explained on page 3 of the third dos Santos decision, Durant had argued that the STJ had granted exequatur to the letter rogatory as a whole, and therefore that Judge dos Santos was required to implement not only the request to freeze Mr. Maluf’s assets, but *also* the request to serve Mr. Maluf.

5. Judge dos Santos has now expressly rejected this argument. At pages 11-12 of the third dos Santos decision, she confirms that she was only directed by the STJ to freeze Mr. Maluf’s assets by the STJ. This has been done, and there is no aspect of the exequatur left for her to implement. Although the translation is a little difficult to follow, the meaning is quite clear...”

[50] I disagree that “the meaning is quite clear.” On the contrary, the issue being decided was that of interpreting the exequatur decision, not the service decision. The third dos Santos decision needs to be read in that context. Likewise, Mr. de Swardt may be being unfair to the translator in saying that her translation is “a little difficult to follow.” Translating technical legal expressions from the original into English is extraordinarily difficult. The reason is that any technical word must be read against the background of the legal system where the technical term is used. Simply making a “natural” translation of a technical word is liable to produce a misleading “false friend”, because the technical meaning (in English law) of the “natural” translation of the technical term in the foreign legal system may differ from that in the foreign system. The difference may be small or it may be large, but even a small difference may be significant.

- [51] Regardless of these considerations, there is still the problem that, even if Mr. de Swardt is right, there appears to be an inconsistency with the service decision. All of these points would require expert evidence. Further, I assume there is some means of appealing against the third dos Santos decision, either by way of a new appeal or by subsuming the challenge as part of the pending appeal, so that the third dos Santos decision (even assuming its meaning is unequivocal) is not the last word on the issue of service.
- [52] All of these matters reinforce the view I express at paras [24] and [25] above. The wrangling in the Brazilian courts is likely to be ongoing for an indeterminate period of time. In the exceptional circumstances of this case, it is right to dispense with service. In Leoncavallo's words at the end of *Pagliacci*: "È finita la commedia."
- [53] Again, following the distribution in draft of this judgment, Durant has issued an application to dispense with service. Since the matter was fully canvassed in June, there is no injustice to Mr. Maluf in determining that application on paper, which I shall now do. For the reasons given in this judgment, I abridge time of my own motion and grant the application.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar