

IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 153 of 2018

BETWEEN

**[1] BEST GRAIN K/S
[2] SAMORAN INVESTMENTS LTD**

Claimants/Applicants

And

**[1] EMERWOOD VENTURES LTD
[2] VIKTOR KUPAVTSEV
[3] BUSINESS INVENTIONS LTD
[4] GA INVESTMENTS LTD
[5] VIKTOR KIYANOVSKIY**

Defendants/Respondents

Appearances:

Mr Richard Evans and Dr Alecia Johns of Conyers Dill & Pearman

2018: 15 October

2019: 28 February

JUDGMENT

- [1] **ADDERLEY, J:** This is an ex parte application for permission to serve the 2nd, 4th and 5th Respondents namely, Viktor Kupavtsev, GA Investments Limited; and Viktor Kiyanovskiy with a filed copy of the Claim Form and the Statement of Claim out of the Jurisdiction.
- [2] Webster, JA on behalf of the panel in **Eurochem**¹ in giving a comprehensive survey of the authorities helpfully set out the major connecting factors that should be considered by the court in carrying out the balancing act to determine the correct forum in which a trial should be held in fairness to all the parties.
- [3] A very brief summary of the arrangements which led to the dispute follows. A Memorandum on sale of Grain dated 18 December 2008 was entered into between Mr Iakiv Gribov on the one hand and Mr Viktor Kupavtsev and Mr Bogdan Krishun on the other under which Mr Kupavtsev owned Grain crops in Ukraine, and a capacity to procure Grain crops, and intended to export them from Ukraine. He was responsible for the project's operation, including preparation of documents, supply of Grain crops, chartering vessels budgeting and so on.
- [4] Mr Gribov was responsible as an investor for providing financing. This was "the agreed basis" upon which the business operated going forward even though there were changes in structure over the years.
- [5] Under that arrangement the structure was as it was introduced under an agency framework as follows:
- (1) A Ukrainian operating company procured grain crops in the Ukraine and exported them to a Latvian agent company:
 - (2) a Latvian agent company transferred the grain crops to a Dutch seller company;
 - (3) a Danish seller company sold the grain crops to customers and accumulated income from the project "Zerno-Trading"

¹ Livingston Properties Equities Inc v JSC Eurochem BVIHCMAP2016/0042-0046

- [6] Mr Kupavtsev was responsible for procuring that the companies were formed and saw to their day to day management. The structure developed over the years so that Mr Gribov owned 51% of Best Grain through **Samoran**, and Mr Kupavtsev 49 % of Best Grain through **Emerwood**. However, the evidence supported the view that Mr Kupavtsev acting as the controlling mind of **Emerwood** was the mastermind behind the operations.
- [7] **Samoran** and other related entities made loans to finance the operations of the partnership over the years. Differences developed between the parties on a number of issues which led **Mr Gribov** to withdraw from the joint venture. Following his withdrawal he discovered evidence of misuse of funds, misrepresentations about the state of the business before loans were advanced, unauthorized transactions with the funds, and diversion of business from the partnership to the benefit of the defendants.
- [8] The claimants therefore claim under the Statement of Claim under the heads of misappropriation of funds belonging to Best Grain, diversion of business from Best Grain, abandoning the operation and management of Best Grain in February 2018, and claims for conspiracy to defraud and/or injure the claimants by unlawful means, damages for conspiracy, damages for misrepresentation and account of sums due and an order for payment of sums found due and interest. From an analysis of the statement of claim there is clearly a serious issue to be tried between the plaintiffs and the first and second defendants because of the pivotal role which they played. It was not as clear in relation to the 4th defendant.
- [9] A memorandum on sale of grain crops was concluded between Mr Gribov and Mr Kupavtsev and Mr Krishun on 18 December 2008. In October 2010 the structure was changed and Mr **Kupavtsev** and Mr Gribov established Best Grain. The connecting factors are reviewed below.

The place of commission of the wrongful acts:

- [10] The applicant states that the mastermind behind the actions was **Kupavtsev** who lived in Ukraine. He controlled Best Grain, a partnership of two BVI companies. The partnership was governed by

Danish law. The process of the business involved Ukraine, Denmark and then sales to customers, apparently worldwide.

- [11] Can the judge treat the case as an international one with no defined place of commission? If so it is possible to say that the place where the wrongful act took place cannot be used as barometer?

The governing proper law of the torts and breaches of duty allegedly committed:

- [12] It is one of the connecting factors. Said Lord Mance in *Nutritek*:

“The governing law, which is here English, is in general terms a positive factor in favor of a trial in England, because it is generally preferable, other things being equal that the 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. Neither of these considerations here applies.”

- [13] As the defendants are Russian defendants, one has to examine whether there are material differences between the Russian law and the BVI law on the issues that have been pleaded. There is no expert evidence either way on the difference in law on the issues and so the court is not able to evaluate this connecting factor by itself.

Language and documents:

- [14] The evidence in support of this application was in the Ukrainian language and had to be translated. There is no indication where the majority of the documents are: some of the documents would be located in Ukraine, some in Cyprus and some in the BVI. However, in perusing the statement of claim it is clear that reliance is being placed on various transaction documents.
- [15] Each of the transaction documents adopts a substantive law for disputes; the language is English for arbitration, and the venues are international as follows.

Memorandum of the Grain Project 2009

Russian

The loan agreement dated 9 August 2012: Somoran to Best Grain	Cyprus
Shareholder's Agreement on management of business 1 Sept 2014	Cyprus
The Surety Agreement dated 2015 (without arbitration)	Ukraine
The draft Master Deed dated 2016 between Samoran and all the parties	Cyprus
Lease from Emerton Solutions to Best Grain for 15000 sq feet	England
Thesis Shareholders Agreement 21 March 2016 b/t Rostok Holding and GA Inv	Cyprus

- [16] They also expect to rely on board of directors' minutes, management accounts all of which will be centered outside the BVI.

The effect of the incorporation in the BVI of some of the defendants and the use of BVI companies in the bribery scheme:

- [17] It is settled (Nilon²) that mere incorporation in the BVI is not sufficient to found the BVI as the appropriate forum. This was confirmed by the EC Court of Appeal in **Eurochem** and although it is a connecting factor very little weight should be given to it.

The effect of commencement of the proceedings in the BVI by the claimants:

- [18] The EC Court of Appeal has made it clear that the unilateral and self-serving decision of a claimant to start proceedings in the BVI is not a factor that should be taken into account when considering the balancing exercise to determine the natural forum for the trial of the claim, far less as a factor favoring the BVI as the appropriate forum.
- [19] The claimants made a number of disclosures in attempting to satisfy its duty of full and frank disclosure that may be raised:
1. It might be argued that the first applicant, Best Grain, the affairs with which the claim is concerned is in substance a Danish Law governed partnership between two BVI companies, Samoran Investments Ltd and Emerwood Ventures Ltd. Accordingly, any proceedings should be commenced and pursued in Denmark, not BVI. The applicants

² Nilon Ltd v Royal Westminister Investments SA [2015]UKPC 2

point out that, in fact, this is not a partnership dispute, the partnership is simply the victim of the wrongdoing.

2. The description of Samoran as the general partner is at odds with its allegations that Emerwood controlled Best Grain. The evidence shows the roles of the parties were not as they were described; Samoran was the majority partner and had the ability to take control as general partner should the need arise (which it regrettably did).
3. The parties operated on what is called “the Agreed Basis” in the statement of claim before and after the establishment of Best Grain in 2010. The Defendants might say that the Agreed Basis did not exist, or enjoy any legal recognition as a concept.
4. The defendants might say there are insufficient pleadings to link the 3rd to 5th defendants to a conspiracy and rely on the decision of Bannister J in *Arkhangelsky v Bank of St Petersburg* (Claim No BVIHC (Com) 61 of 2011, 22 July 2011) where he refused leave because there was insufficient pleading for the BVI’s company involvement in the conspiracy. The applicant’s state that they have documentary evidence to support the involvement of those defendants who distinctly stood to benefit from the misappropriation of Best Grain’s funds.
5. The defendants will say that they are tortious claims and most of the parties are not BVI entities, and that the domicile of the company is a particular connecting factor but as stated in **Eurochem** of greater importance is where the company and its agents carried out the activities that led to the claim. The applicants point out that the claim has arisen from complex international transactions such that the place of commission of the wrongdoing cannot be taken in isolation as the appropriate forum.

[20] Having considered the relevant Law and weighing up the connecting factors as set out above, in my judgment it cannot be said that the BVI is clearly and distinctly the most convenient forum compared to the other possibilities. The strongest point in the BVI’s favor is that the alleged fraud has been committed against the partnership which is made up of two BVI Companies.

[21] However that, along with the other matters in its favour are not sufficient to offset what appears to be the applicable law which is not likely BVI law, the non-BVI laws governing the transactional documents on which breach is based, the evidence which will support those allegations which are likely outside the BVI, the non-English language of the protagonists, and a number of other factors,

militate strongly against a view that the BVI is clearly and distinctly the most convenient forum. The claimants can pursue their causes of action in the convenient forum.

[22] Having determined that the BVI is not the convenient forum, it is unnecessary to explore the gateways for service out. Accordingly, I dismiss the application to serve the claim outside the jurisdiction.

Hon. K. Neville Adderley

Commercial Judge

By the Court

Registrar