

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0005

BETWEEN:

SHALLAN OVERSEAS INVESTMENTS LIMITED

Appellant

and

**[1] PRIMEFUELS INVESTMENTS LIMITED
[2] PRIMEFUELS HOLDINGS LIMITED**

Defendants

**[3] NEW RODINA LIMITED
[4] MAXIM VENTURES TRADING CORP.**

Respondents/Defendants

**[5] FUEL TRANSPORT HOLDINGS LIMITED
[6] ASIF ABDULLA
[7] GEORGE MACHAN**

Defendants

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Paul Webster
The Hon. Mde. Vicki Ann Ellis

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

Appearances:

Mr. Michael Todd, QC, with him, Mr. Philip Gillyon and Ms. Rhonda Brown for the Appellant

Mr. Giles Richardson, with him, Mr. Peter Ferrer and Ms. Marcia McFarlane for the 3rd and 4th Respondents/Defendants

2019: July 15;
2020: September 18.

Interlocutory Appeal – Commercial Appeal – Counter Appeal – Joint Venture – Parity of interest – Relief under section 184I of BVI Business Companies Act - Application for stay of proceedings — Forum non conveniens — Connecting factors to the jurisdiction – Whether judge erred in principle to such a degree that Court should interfere with findings – Proper law for determination of internal management issues of company – Risk of inconsistent judgments – Consideration of delays in the court system in Mauritius – Consideration of expense of consecutive trials – Case management decision – Appellate court’s approach to case management decision by trial judge

This appeal has its origin in the circumstances surrounding a disputed joint venture between the Somji family of Kenya and the 6th defendant, Mr. Asif Abdulla. The Somji family structured its investment in the joint venture through the appellant, Shallan Overseas Investments Limited, a company incorporated in the British Virgin Islands (“BVI”). Mr. Abdulla, structured his investment in the joint venture through his various companies, starting with Rodina Holdings Limited (“RHL”).

The terms of the venture appeared to have evolved out of mutual understandings and course of dealings between the parties. They were in essence that (i) the appellant and the Rodina Parties (as hereinafter defined) would each own equal shares in Primefuels Holding Company (“Holdings”), the holding company of the Group; (ii) there would be equal representation on the boards of directors of each company within the Group; (iii) all decisions of the boards of the companies in the Group would require the consent of both the appellant and the Rodina Parties; and (iv) the appellant and Rodina Parties would each be entitled to participate equally in the management of the companies in the Group. It was also claimed that in 2007, the appellant and the Rodina Parties concluded a voting agreement that preserved the parity of interest and joint control of Holdings and its subsidiaries.

In 2007, the 1st defendant, Primefuels Investments Limited (“PIL”), was incorporated in the BVI for the purpose of acquiring all the shares of Holdings. The appellant and Mr. Abdulla became equal shareholders of PIL. Mr. Abdulla owned his shares through RHL. RHL later transferred its shares to the 3rd respondent, New Rodina Limited, which then transferred the said shares to the 4th respondent, Maxim Ventures Trading Corp. (“Maxim Ventures”). These entities were controlled by Mr. Abdulla. New Rodina Limited, Maxim Ventures and Mr. Abdulla, are individually and collectively referred to as the “Rodina Parties”. Also, in 2007 Holdings issued and sold shares representing 15% of its issued capital to Aureos East Africa Fund LLC (“Aureos”), a Mauritian company, reducing PIL’s holding in Holdings to 85% of its issued capital. On 16th July 2013, Aureos transferred its 15% interest in Holdings to the 5th defendant, Fuel Transport Holdings Limited (“FTHL”), a company controlled by Mr. Abdulla. In the following month FTHL was acquired by Mapplewell Global Group Limited (“Mapplewell”), a BVI company beneficially owned and controlled by Mr. Abdulla. This resulted in Mr. Abdulla having a further 15% interest and effective control of Holdings from August 2013, thereby disturbing the parity of ownership and control of Holdings and its subsidiaries contemplated by the joint venture agreement.

In 2015, the appellant’s representative on the board of PIL resigned as a director of the company. It is claimed that the Rodina Parties blocked the appointment of the appellant’s replacement director, thereby allowing Mr. Abdulla’s representative on the board to act as sole

director of PIL. Further, the appellant claims that through acquisition of FTHL by Mapplewell, and the Rodina Parties' veto of the appellant's nominee to the board of directors, the appellant has lost effective control of PIL. Additionally, FTHL acquired additional shares of Holding through a rights issue. This diluted the appellant's indirect interest in Holdings and gave Mr. Abdulla effective control of Holdings.

On 18th January 2018 the appellant commenced proceedings in the BVI under section 1841 of the BVI Business Companies Act ("BC Act") against the defendants (including the 3rd and 4th respondents), on the ground that the affairs of PIL have been conducted and are being conducted in a manner that was oppressive, unfairly discriminatory and/or unfairly prejudicial to the interest as a member of PIL ("BVI Claim"). Meanwhile, on 20th February 2018, FTHL commenced proceedings in Mauritius against Shallan and some (but not all) of the other parties seeking declaratory relief in respect of Holdings in relation to the board of directors, confirmation that the rights issue was duly made and that FTHL is the rightful owner of the shares issued to it ("Mauritius Claim"). The Mauritius Claim has yet to be determined in Mauritius.

In relation to the BVI Claim, the 3rd and 4th respondents applied to strike out the claim form and statement of claim against them, or that the BVI Claim be stayed under rule 9.7 or 9.7A of the Civil Procedure Rules, 2000 ("CPR"). The matter came before Adderley J ("the Judge") who ordered a limited stay of the BVI Claim until the hearing and final determination (including any appeals) of the Mauritius Claim.

Being dissatisfied with the stay granted by the Judge, the appellant appealed to this Court. The respondents, being dissatisfied only with the Judge's finding that Mauritius was not clearly and distinctly the correct forum to decide the BVI Claim, filed a counter notice of appeal challenging this finding. As a result, the issues for this Court to determine are: (i) the most appropriate forum for the trial of the claims; (ii) the nature of the claims in the BVI and in Mauritius and the proper court for resolving the issues arising from the claims (iii) the risk of inconsistent judgments; (iv) delays in the court system in Mauritius; and (v) the expense of consecutive trials in Mauritius in the BVI brought about by the stay order.

Held: dismissing the appeal; dismissing the counter appeal; affirming the orders of the Judge, including the order that the costs of the proceedings in the Commercial Court be reserved; and ordering that each party shall bear their own costs of the appeal, that:

1. In determining the most appropriate forum for the trial of an action, a trial judge must consider (a) is there another available forum; (b) if so, is that forum more appropriate for the trial of the claim and; (c) if there is another more appropriate forum, a stay should be granted unless there is a risk that the claimant will not receive justice in the more appropriate forum. In the second limb of the test, the trial judge is required to make an assessment of the connecting factors to the jurisdiction to decide whether the jurisdiction is clearly the most appropriate forum. The Judge did not err in principle in finding that the respondents had not satisfied him that Mauritius or any jurisdiction other than the BVI was clearly and distinctly the more appropriate forum for the trial of the BVI Claim.

Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 applied; **IPOC International Growth Fund Ltd v LV Finance Group Limited et al** BVIHCVAP2003/0020 (delivered 22nd November 2004, unreported) applied; **Lubbe and others v Cape plc** [2000] 1 WLR 1545 applied; **Anjie Investments Limited and another v Cheng NGA Yee and another** BVIHCMAP 2016/0003 (delivered 24th November 2016, unreported).

2. Questions of internal management of a company are governed by the law of that company's place of incorporation, and the courts of that jurisdiction are best suited to give decisions on the control and extent of the powers of management. However, this rule is not absolute or exclusive, as different considerations can arise, especially when the court being asked to adjudicate on a matter of the internal management of a foreign company, is the forum conveniens for the trial of the action. The Judge treated the case as one where the issues of Mauritian law should be decided in Mauritius before the BVI Action could proceed. However, this was not mandatory, as the court that is the forum conveniens can deal with issues involving the internal management of a foreign company on the basis of expert evidence of foreign law, if necessary. The Judge erred in principle in his treatment of the issues of Mauritian law, but this was not fatal to his overall decision.

Pergamon Press Ltd v Maxwell [1970] 1 WLR 1167 considered; **Konamaneni and others v Rolls Royce Industrial Power (India) Ltd and others** [2002] 1 WLR 1269 applied; **KMG International NV v Chen and another** [2018] EWHC 1078 (Comm) considered; **Reeves v Sprecher and others** [2007] EWHC 117 (Ch) considered.

3. The risk of inconsistent judgments is a matter of real concern to the courts and should be avoided where possible. A judge must satisfy himself that (a) there is an overlap of issues between the two actions; (b) the parties are the same or substantially the same in both actions; and (c) there is a real risk of inconsistent judgments being delivered on the common issues. In this case there was an overlap between the claims and reliefs sought in the BVI and Mauritius Claims, the parties are substantially the same in both Claims, and there was a risk of inconsistent judgments being delivered. The Judge was therefore correct in his finding that there was a risk of inconsistent judgments.

Stencor UK Ltd v Global Steel Holdings Ltd and another [2015] EWHC 363 (Comm.) considered.

4. On the issue of delay, the Court does not find that the evidence of the appellant supports a finding of significant delay. The appellant has attempted to highlight previous judicial commentary of the "endemic" delays in the Mauritian court system. However, each case should be considered on its own facts. The conduct of the Mauritian Claim through the Mauritian courts to date is not an indication of a court system with endemic delays.

Hurnam v Attorney General and others [2017] UKPC 33] considered; **Tex Services Ltd v Shibani Knitting Co Ltd (In Receivership)** [2016] UKPC 31 considered.

5. If the stay had not been granted, the BVI Claim would have proceeded alongside the Mauritian Claim and the costs of both trials would have had to be met immediately. The effect of the stay is that the costs of the BVI Claim will be incurred at a later date, not that there will be substantially more costs overall.
6. An appellate court should not interfere with the case management decision of a trial judge unless the decision was plainly wrong. An appellate court should take into consideration the nature of the case management decision being reviewed. If it finds that the judge erred and the consequences of his decision are far-reaching, the appellate court would be more inclined to intervene. Each case is to be decided on its own facts. While in the instant case, the Court finds that the Judge erred in his treatment of the stay application as one where the Mauritian internal issues should be determined before the BVI Claim proceeds, the Court does not find this to be fatal to the overall decision on the stay. The Judge was exercising his discretion in the context of his management of the BVI Claim and his decision cannot be said to be plainly wrong. As such, the Court will not interfere with the decision of the Judge to stay the BVI Action until the determination of the Mauritius Action.

Aquaduct Limited and another v Faelesseje and another SVGHCVP2014/0017 (delivered 18th April 2016, unreported) applied; **HRH Prince Abdulaiziz v Apex Global Management Ltd and another** [2014] UKSC 64 applied.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an appeal against the order of Adderley J (“the Judge”) dated 8th February 2019 granting a stay of the appellant’s claim against the defendants in the court below for relief under section 184I of the **BVI Business Companies Act**¹ (“the BC Act”) until the hearing and final determination (including any appeals) of the claim by the 5th Defendant, Fuel Transport Holdings Limited, in the Supreme Court of Mauritius. In coming to his decision, the Judge found that the respondents had not satisfied him that “Mauritius or any other jurisdiction other than the British Virgin Islands

¹ BVI Business Companies Act No. 16 of 2004.

(“BVI”) is clearly and distinctly the most appropriate forum for the parties.”² This is effectively a finding that the BVI is the most appropriate forum for the trial of the claim. The 3rd and 4th respondents have counter appealed against this finding.

Parties and background

- [2] The claims in both the BVI and Mauritius have their origin in a disputed joint venture between the Somji family of Kenya and the 6th defendant, Mr. Asif Abdulla. The venture started in the 1990’s as a part of the businesses carried on by the Primefuels Group of companies (“the Primefuels Group” or “the Group”). The Group carried on the business of transporting bulk liquids, petroleum products and dry cargo in the East Africa region. It also supplied lubricants and petroleum products within the region.
- [3] There was no written joint venture agreement. The terms of the venture appear to have evolved out of the mutual understandings and the course of dealings between the parties. The terms of the venture are set out in section D paragraphs 17 to 20 of the statement of claim.³ The essence of the joint venture is that Shallan and the Rodina Parties (as hereinafter defined) would each own equal shares in the holding company of the Group, Primefuels Holding Limited (“Holdings”); there would be equal representation on the boards of directors of each company within the Primefuels Group; all decisions of the boards of the companies in the Group would require the consent of both the Shallan Parties and the Rodina Parties; and the Shallan and Rodina Parties would each thereby be entitled to participate equally in the management of the companies in the Group.
- [4] The Somji family participated in the joint venture through the appellant company, Shallan Overseas Investments Limited (“Shallan”), a BVI company. Mr. Abdulla participated in the joint venture through his various companies starting with Rodina Holdings Limited (“RHL”), a company incorporated in 2005.

² Page 12 lines 11-14 of the transcript of the judgment of the Court dated Friday 8th February 2019 (“Transcript”).

³ Tab 11 of the Appeal Bundle.

- [5] The statement of claim also alleges that, in 2007, Shallan and the Rodina Parties concluded a voting pool agreement that Shallan claims preserved the parity of interest and joint control of Holdings and its subsidiaries.
- [6] The existence of the joint venture is heavily disputed by the Rodina Parties.
- [7] The 1st defendant, Primefuels Investments Limited ("PIL"), was incorporated in 2007 in the BVI. It became the top tier holding company for the joint venture in place of Holdings. Shallan and Mr. Abdulla became equal shareholders of PIL with 16,000 shares each. Mr. Abdulla owned his shares through RHL. RHL later transferred its shares to the 3rd respondent, New Rodina Limited, and New Rodina Limited transferred the said shares to the 4th respondent, Maxim Ventures Trading Corp ("Maxim Ventures"). The Rodina companies and Maxim Ventures are controlled by Mr. Abdulla and I refer to them in this judgment, whether individually or collectively, as "the Rodina Parties".
- [8] PIL initially held all the shares in Holdings. In 2007, Holdings issued and sold shares representing 15% of its issued capital to Aureos East Africa Fund LLC, a Mauritian company ("Aureos"). This reduced PIL's holding in Holdings to 85% of its issued capital. On 16th July 2013, Aureos transferred its 15% interest in Holdings to the 5th defendant, Fuel Transport Holdings Limited ("FTHL"). During the following month FTHL was acquired by Mapplewell Global Group ("Mapplewell"), a BVI company that Shallan later discovered was beneficially owned by Mr. Abdulla. This gave Mr. Abdulla a further 15% interest and effective control of Holdings from August 2013, thereby disturbing the parity of ownership and control of Holdings and its subsidiaries contemplated by the joint venture agreement.
- [9] In or about 2015 Shallan's representative on the board of PIL, RBC Directorship Services (CI) Limited, resigned as a director of the company for reasons that are not material to this appeal. The Rodina Parties blocked the appointment of Shallan's replacement director, Chasseral (Directors) Limited. Thereafter, Mr. Abdulla's representative on the board, Mr. George Machan, acted as the sole director of PIL.

Shallan claims that Mr. Abdulla is a shadow director PIL and that Mr. Machan performed his duties on the instructions of Mr. Abdulla.

- [10] Shallan's position is that it lost its effective say in the control of PIL starting in August 2013 when Mapplewell acquired FTHL, and then in early to mid-2016 when the Rodina Parties vetoed Shallan's nominee to the board of directors leaving Mr. Machan as the sole director of the company.

The rights issue

- [11] The final step in the Rodina Parties taking control of PIL and Holdings was the rights issue. In October 2017, the board of directors of Holdings, which by then was controlled by the Rodina Parties, resolved to authorise a rights issue of US\$7.8 million for 111,428 ordinary shares in Holdings. The new shares were offered in the following proportions:
- 94,714 shares to PIL for \$6,629,980;
 - 16,714 shares to FTHL for \$1,169,980.

Shallan disputes that the rights issue was properly made, both as to the procedures used and that PIL was not given a reasonable opportunity to take up the 94,714 shares offered to it. As it turned out PIL did not take up the offer and the entire 111,428 shares were issued to FTHL. This resulted in Shallan's indirect interests in Holdings dropping from 43.3% to 21.6%, and Mr. Abdulla's interest, through his control of Maxim Ventures and FTHL, rising to 78.4%. In short, Shallan claims that Mr. Abdulla acquired effective control of Holdings in breach of the parity provisions in the joint venture agreement and the voting pool agreement.

The BVI and Mauritian Claims

- [12] On 18th January 2018, Shallan launched proceedings in the BVI under section 184I of the BC Act against the defendants on the grounds that the affairs of PIL have been and are being conducted in a manner that is oppressive, unfairly discriminatory and/or unfairly prejudicial to its interest as a member of PIL ("the BVI Claim"). The relevant part of section 184I reads:

“(1) A member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the Court for an order under this section.

(2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit, including, without limiting the generality of this subsection, one or more of the following orders...”

Apart from the general power to “make such orders as it thinks fit...”, the specific orders listed in the section include the power to make orders “(c) regulating the future conduct of the company’s affairs”, a power that directly relevant to Shalan’s claim.

- [13] The language of section 184I of the BC Act is deliberately drafted in broad terms giving the courts a wide discretion to do what it considers to be fair. The equivalent provision to section 184I of the BC Act in the United Kingdom is section 459(1) of the **1985 Companies Act** (as amended). In commenting on section 459 in the House of Lords decision of **O’Neil and another v Phillips and others**⁴ Lord Hoffman said:

“In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in *In re Saul D. Harrison & Sons Plc.* [1995] 1 B.C.L.C. 14, 17–20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J. said in *In re J.E. Cade & Son Ltd.* [1992] B.C.L.C. 213, 227: ‘The court ... has a very wide discretion, but it does not sit under a palm tree.’”⁵

The same principles apply to the interpretation of section 184I of the BC Act.

- [14] The BVI Claim seeks wide-ranging relief relating to the affairs of PIL and its former subsidiary, Holdings. The main items of relief sought are:

⁴ [1994] UKHL 24.

⁵ [1999] 1 WLR at 1092 at 1098 (HL).

- (1) a declaration that the affairs of PIL and its direct and indirect subsidiaries are required to be conducted in accordance with the terms of the joint venture agreement;
- (2) orders under section 184I(2)(c) regulating the future conduct of PIL's affairs;
- (3) orders requiring Mr. Abdulla, PIL, Mr. Machan, and FTHL to take all necessary steps to cause Holdings to allot and requiring PIL to allot such number of shares to such persons as is necessary to reverse the dilutive effect (if any) of the rights issue, and to reinstate parity of interest and equality of voting rights between Shallan and the Rodina Parties (paragraphs (3)(a) and (b) of the claim form);
- (4) an order appointing a nominee of Shallan as a director of PIL or convening a meeting of the shareholders of PIL to appoint such a director (paragraphs (4) and (5) of the claim form);
- (5) an injunction restraining the Rodina Parties from taking any steps to cause and/or procure the removal of the directors appointed to the board of PIL (pursuant to paragraphs (4) and (5) of the prayer in the claim form);
- (6) orders requiring PIL, Mr. Abdulla, Mr. Machan and Holdings to reconstitute the board of Holdings, and to reinstate parity between Shallan and the Rodina Parties (paragraph (8)(a)(i) of the claim form);
- (7) an order procuring the removal of Mr. Abdulla from the board of directors of Holdings and prohibiting Mr. Abdulla from acting or purporting to act as a director or otherwise of PIL and Holdings (paragraph (8)(a)(ii) of the claim form).

[15] On 9th March 2018, FTHL commenced proceedings in Mauritius in Case number SC/COM/MOT/ 00215/ 2018 ("the Mauritius Claim") seeking declaratory relief in respect of Holdings relating to the procedure for appointing directors, the function of directors, the composition of the board of directors, and confirmation that the issue

of the 111,428 ordinary shares to FTHL (the rights issue) was duly made and that FTHL is the rightful owner of such shares as reflected in the register of members of Holdings. Finally, that Holdings cannot allot and issue additional shares except in accordance with the company's constitution, an operating agreement dated 8th July 2013, and the Companies Act 2001 of Mauritius. Unless so allotted and issued, Holdings is not obliged to alter the shareholdings of its members and/or make amendments to its register of members.

- [16] On 26th March 2018, the 3rd and 4th defendants in the BVI Claim, New Rodina Limited and Maxim Ventures Trading Corp ("the Applicants"), applied to strike out the claim form and statement of claim as against them, or that the BVI Claim be stayed under rule 9.7 or 9.7A of the **Civil Procedure Rules 2000** ("CPR").
- [17] The Applicants' strike out or stay application came up for hearing in the Commercial Court on 17th July 2018. The Judge reserved his decision. On 8th February 2019, the Judge delivered an oral judgment by which he ordered a limited stay of the BVI Claim until the hearing and final determination (including any appeals) of the Mauritius Claim. In coming to his decision, the Judge found that "the Applicants have not proved that any forum other than the British Virgin Islands is clearly and distinctly the correct forum for the action".⁶ This was effectively a finding that the BVI is the most appropriate forum for the trial of the BVI Claim. Notwithstanding this finding, the Judge said that the stay that he granted was to await the outcome of the Mauritian Action, and not on the basis of forum non conveniens.
- [18] The Judge dismissed the Applicants' strike out application and there is no appeal from that part of his order.

The appeal and counter appeal

- [19] Being dissatisfied with the stay granted by the Judge, Shallan appealed to this Court by way of Notice of Appeal filed 9th April 2019. The notice of appeal lists seven

⁶ Page 3, lines 19-22 of the Transcript.

grounds of appeal which I have taken the liberty to summarise for convenience only, as follows:

- “(i) Ground 1 – The Judge, having found that the BVI was the appropriate forum, erred in granting a stay of the BVI Claim pending the outcome of the Mauritian Claim.
- (i) Grounds 5 to 7 – The Judge erred in deciding that the stay was justified to avoid the risk of inconsistent judgments.
- (ii) Grounds 2,3, 4 and 7 – The Judge erred in finding that the stay would save costs and expenses, allow the BVI Claim to proceed more expeditiously, and be in accordance with the “overall objective of the Civil Procedure Rules”

[20] The notice of appeal lists seven respondents. They are the same seven persons or entities that were named as defendants in the court below. Only two of the seven respondents to the appeal, New Rodina Limited and Maxim Ventures Corp., responded to the appeal. They were previously referred to in this judgment as “the Applicants” and are hereafter referred to as “the respondents”.

[21] On 23rd April 2019, the respondents filed a counter notice of appeal supporting the Judge’s stay order and challenging the finding that Mauritius was not clearly and distinctly the correct forum to decide the issues in dispute between the parties. The counter notice seeks an order from this Court upholding the stay order for the reasons given by the Judge and/or on the ground that Mauritius is the correct forum to decide those issues that are in dispute in both the BVI Claim and in the Mauritius Claim.

Issues

[22] The following issues contained in the notice of appeal and the counter notice of appeal arise for consideration and determination by this Court:

- (i) The most appropriate forum for the trial of the claims - forum non conveniens

- (ii) The nature of the claims in the BVI and in Mauritius and the proper court for resolving the issues arising from the claims including, issues relating to the internal management of the affairs of PIL and Holdings.
- (iii) The risk of inconsistent judgments.
- (iv) Delays in the court system of Mauritius.
- (v) The expense of consecutive trials in Mauritius in the BVI brought about by the stay order.

Forum non conveniens

[23] Shallan is a BVI company claiming relief that is available to it under a BVI statute – section 184I of the BC Act - against seven defendants, three of which are BVI companies. The Judge found, correctly, that Shallan founded jurisdiction as a right to try the BVI Claim in the BVI. As a general rule, the BVI Claim should proceed in the BVI unless the Court orders a stay of the proceedings on the ground that the BVI is not the most appropriate forum for the trial of the BVI Claim (forum non conveniens), or because there are related proceedings in another jurisdiction dealing with the same or similar issues, in this case Mauritius, and the court considers it just to stay the BVI Claim in favour of the Mauritian Claim. The Judge found that the BVI is the most appropriate forum for the trial of the BVI Claim but did not grant a stay on forum grounds. He granted a stay pending the determination of the Mauritius Claim. The judge's finding is at pages 11-12 of the Transcript of his decision:

“These proceedings relate to the conduct and affairs of the Company [PIL] and so the Claimant has founded jurisdiction as of right in the BVI. The claim under Section 184I of the BCA can only be brought in the BVI as the place of incorporation of the Company. Three of the five corporate parties to the BVI action are companies registered in the BVI. The fifth defendant, FTHL, which is incorporated in Mauritius is a subsidiary of Mapplewell, a BVI company. I have analysed the connecting factors pointed out by each party and find that the applicant has not satisfied me on the balance that Mauritius or any other jurisdiction other than the BVI is clearly and distinctly the most convenient forum for the Parties. Nevertheless, prima facie not to grant a stay leaves the possibility of inconsistent judgments on certain issues in the Mauritian Proceedings. By granting a limited stay, all the

issues which must be decided under Mauritian law will have been finally decided and the consequential amendments, if any, to the BVI proceedings may take place.”

Two things are apparent from the trial judge’s findings. Firstly, by finding that there was no other forum that was more convenient for the parties, he found that the BVI is clearly and distinctly the court most appropriate forum for the parties. Secondly, the courts of Mauritius should decide issues of Mauritian law before the BVI Claim can proceed, with consequential amendments to the BVI Claim if necessary. For this reason, and also because he was concerned about the possibility of inconsistent judgments, he granted a limited stay to await the outcome of the Mauritian proceedings.

[24] Shallan appealed against the stay and the respondents counter appealed against the finding by the Judge that Mauritius was not clearly and distinctly the correct forum to decide the issues that are in dispute both in Mauritius and in the BVI. It is therefore necessary to test the Judge’s finding that Mauritius was not the most appropriate forum.

[25] The starting point in any modern discussion of the test for determining the most appropriate forum for the trial of an action is the judgment of Lord Goff of Chieveley in **Spiliada Maritime Corporation v Cansulex Ltd.**⁷ Lord Goff’s judgment was helpfully summarised by Gordon JA in **IPOC International Growth Fund Limited v LV Finance Group Limited et al**⁸ and applied repeatedly in the courts of the Eastern Caribbean. Following the trial judge’s lead I further summarise the test into three steps:

- (a) Is there another available forum;
- (b) If so, is that forum more appropriate for the trial of the claim; and

⁷ [1987] AC 460.

⁸ BVIHCVAP2003/0020 and BVIHCVAP2004/0001 (delivered 22nd November 2004, unreported).

- (c) If there is another more appropriate forum a stay should be granted unless there is a risk that the claimant will not receive justice in the more appropriate form.

In steps (a) and (b) the burden of proof is on the defendant challenging the jurisdiction. In the third step the burden of proof is on the claimant to show why he will not receive justice in the more appropriate forum.

[26] Applying the principles to the facts of this case, the Judge found that Mauritius was an available forum. He then went on the second stage which, as he said:

“[R]equires the court to conduct an analysis of the pleadings and evidence in enough detail to determine what are the connecting factors to the jurisdiction and whether they can lead to a conclusion of which jurisdiction is clearly or distinctly the most appropriate forum.”⁹

The Judge dealt with the connecting factors to both the BVI and Mauritius describing some of them as “*largely neutral*” which I understand to mean that some factors do not favour Mauritius or the BVI. At page 11 of the Transcript of his decision, the Judge set out in note form the connecting factors relied on by Shalan. I will repeat his listing, adding my comments to each connecting factor:

- i. “*The place where the wrongs were committed.*” Comment: The Judge did not make a finding or comment on this issue. The alleged wrongs in this case were the steps taken by the Rodina Parties to gain control of the companies in the Primefuels Group in breach of the joint venture agreement and the voting pool agreement. The wrongful acts, which are not yet clearly defined, took place in various places where the parties live and work like Switzerland, the Channel Islands, Kenya and the United Kingdom. None of them took place in either Mauritius or the BVI. The place or places where the wrongful acts were committed is therefore a neutral factor between Mauritius and the BVI.
- ii. “*The nature of the claims*” and “*the law governing the transactions*” Comment: The Judge dealt with these issues. He set out details of the claims in both actions and found that the BVI Claim is a statutory claim under section 184I of the BC Act and can only be brought in the BVI as the place of incorporation. This is a strong factor in favour of the BVI as the correct forum. The Judge found that the issues in the Mauritius

⁹ Page 8, lines 15-20 of the Transcript.

Claim were governed by the laws of Mauritius and had to be determined by the Courts of Mauritius. This is a strong factor in favour of Mauritius.

- iii. “The *“location of witnesses”* Comment: The Judge found that this was a largely neutral factor. While the location of witnesses is usually more than a neutral factor, in this case where none of the key witnesses reside in either the BVI or Mauritius, and all of them will have to travel to wherever the trial takes place. The fact that it may take a longer time to get to the BVI is not a significant factor and the Judge was entitled to find that the location of witnesses was largely neutral. It would be a different matter if the some or all of the witnesses resided in one of the competing jurisdictions.
- iv. “*The location of documents*” Comment: The Judge did not make a finding or comment on this issue. It appears from the evidence that most of the relevant documents are with the parties where they reside or carry on business, not in Mauritius or the BVI. In any case we live in a time when the transporting documents electronically or by courier takes a minimal amount of time. The location of documents should not be considered a significant connecting factor in this case.
- v. “*Language*”. Comment: All the parties speak English and this is also a neutral factor.
- vi. “*Place of business*” Comment: The evidence discloses and the Judge found that the Primefuels Group carried on business in East Africa. This is also a neutral factor.
- vii. “*The parties*” Comment: The Judge dealt with the parties noting that three (actually four) of the corporate parties are BVI companies and a fourth (actually fifth) party is owned by a BVI company (Mapplewell)”.

[27] Leading counsel for the respondents, Mr. Charles Richardson, submitted that the Judge erred in his assessment of the connecting factors, came to the wrong conclusions, and gave insufficient weight to the factors connecting the BVI Claim to Mauritius and gave too much weight to the factors connecting the claim to the BVI. For example, the Judge is criticised for failing to give sufficient weight to the internal management issues relating to Holdings when dealing with forum non conveniens. However, the Judge dealt with issue when he was dealing with the stay application and found that the internal management issues of Holdings should

be dealt with by the Mauritian courts.¹⁰ The Judge, in his discretion, did not have to repeat his findings on internal management when dealing with forum.

[28] It is easy to criticise a trial judge conducting a balancing exercise to determine the most appropriate forum for the trial of an action. The judge is engaged in assessing the evidence on paper, considering submissions, weighing the connecting factors and exercising wide discretion to determine an important issue in a summary way. He should not be criticised for the weight he attaches to the connecting factors unless the weight he attaches is obviously out of proportion.

[29] The Judge was specifically criticised for not clarifying the weight that he attached to issues such as the location of witnesses and documents and where the alleged wrongs were committed. I dealt with these issues above. The conclusion that I draw from the facts and the way that the Judge dealt with the connecting factors is that this is a case where the parties' connections with the competing jurisdictions are limited to incorporation and the causes of action and matters of law that flow from the place of incorporation. The other important connecting factors such as the place where the parties carried on business and/or committed the wrongful acts, and the location of witnesses and documents, are in diverse places outside the BVI and Mauritius. In the circumstances, it is not surprising that the Judge found that respondents had not discharged the burden of proving that "...any forum other than the British Virgin Islands is clearly and distinctly the correct forum for the action."

[30] In my opinion it would have been better if the Judge had commented in greater detail about his findings on the connecting factors, but his failure to do is not fatal to his overall finding. As Lord Bingham of Cornhill said in **Lubbe and others v Cape plc**¹¹:

"This is a field in which differing conclusions can be reached by different tribunals without either being susceptible to legal challenge. The jurisdiction to stay is liable to be perverted if parties litigate the issue at different levels

¹⁰ Pages 6-7 of the Transcript - see paragraph [40] below.

¹¹ [2000] 1 WLR 1545 at 1556.

of the judicial hierarchy in the hope of persuading a higher court to strike a different balance in the factors pointing for and against the foreign forum.”

[31] The issue for this Court is whether the trial judge erred in principle to such a degree that the Court should interfere with his decision of the most appropriate forum for the trial of the BVI Claim. In the decision of this Court in **Anjie Investments Limited and another v Cheng NGA Yee and another**¹² Gonsalves JA [Ag.] gave a timely reminder that:

“The immediate question is whether this Court has any right to interfere with the decision of the learned trial judge. The approach that an appeal court should take on a forum non conveniens appeal is well established. Firstly, as Lord Templeman observed in *Spiliada*, the solution of disputes about the relative merits of trial in the instant jurisdiction and trial abroad is pre-eminently a matter for the trial judge and an appeal court should be slow to interfere.”¹³

I am satisfied that the Judge did not err in principle in finding that the respondents had not satisfied him that Mauritius was the most appropriate forum for the trial of the BVI Claim and his decision is not outwith the generous ambit of reasonable disagreement. I would not interfere with his decision on forum non conveniens.

The shift in power and Shallan's complaints

[32] Shallan complains that by taking control of Holdings and PIL, Mr. Machan and Mr. Abdulla caused Holdings to formulate and propose the rights issue.¹⁴ However, they failed to inform Shallan's representatives of the intended issue of shares in a timely manner, did not fix a proper price for the new shares, and did not take necessary steps to allow PIL to take up the shares that were offered to it. As a result, the PIL shares were taken up by FTHL which then became the majority shareholder of Holdings. These complaints are matters of internal management of Holdings and are governed by the law of the place of incorporation, Mauritius.

¹² BVIHCMAP2016/0003 (delivered 24th November 2016, unreported).

¹³ Ibid paragraph 13.

¹⁴ Details of the rights issue are set out in paragraph [11] above.

[33] Shallan's other complaints are about the effect of the rights issue. They claim that the issue of the additional shares to FHL diluted PIL's interest in Holdings disturbed the balance of power in the joint venture. Shallan says that because of the reduced voting power of PIL in Holdings, it is no longer an equal partner in the joint venture. Decisions that should be made jointly by the two joint venturers, were being made unilaterally by the Rodina Parties who control PIL and by extension, Holdings. Mr. Todd, QC submitted that these complaints are not matters of internal management. They show how those in control of PIL and Holdings have conducted the affairs of these companies to unfairly prejudice or discriminate against the minority shareholder, Shallan.

[34] The respondents' response to these complaints is that the validity of the issue of the additional shares in Holdings is a matter of internal management and as such is governed by the laws of Mauritius and only the courts of Mauritius can determine these issues. Further, once the Mauritius courts determine that the rights issue is valid "the BVI action would become unsustainable in its entirety and would not proceed at all",¹⁵ and "Indeed, if the Mauritius courts conclude that there was no breach of Mauritian company law, the BVI Claim may not proceed at all."¹⁶

Internal management issues

[35] This takes me to a consideration of the proper law for the determination of the internal management issues in the BVI Claim.

[36] The position regarding the internal management issues of PIL is straightforward. PIL is a BVI company and the courts of the BVI have jurisdiction to deal with those issues. The position regarding the internal issues of a foreign company (Holdings), which Shallan says impacts PIL and the joint venture, is not the same. I will attempt to illustrate this by reference to the duties of a director and the decided cases.

¹⁵ Respondents' Skeleton Argument filed 23 April 2019 para. 13.1.

¹⁶ Respondents' Skeleton Argument filed 23 April 2019 para. 14.2.

[37] Prior to 1970, the commonly held view at common law was that the extent of the duties of the director of a foreign company was governed by the law of that company's place of incorporation, and the courts of that place are "the only proper tribunal" in which the members can seek to control the exercise of that power (per Pennycuik J in **Pergamon Press Ltd v Maxwell**).¹⁷ Lawrence Collins J treated this strict position as somewhat outdated in **Konamaneni and others v Rolls-Royce Industrial Power (India) Ltd and others**,¹⁸ a case involving a minority shareholder's right to bring derivative claims in the UK on behalf of a foreign company. In commenting on Pennycuik J's statement in **Pergamon Press Ltd** Lawrence Collins J said at paragraph 55:

"Two points are being made by Pennycuik J. The first is that the extent of the duties of the director of a foreign company is governed by the law of that company's place of incorporation. The second is that the courts of that place are "the only proper tribunal" in which the members can seek to control the exercise of that power. The first point is unexceptional and indeed obvious, but it may be that the second proposition goes too far in allocating exclusive responsibility to the courts of the place of incorporation for making orders controlling the exercise of discretionary powers. The decision predates the development of the modern *forum non conveniens* principles from later in the 1970s: see *The Atlantic Star* [1974] AC 346 and was given at a time when the prevailing view was that if the English court had jurisdiction, there was not normally a discretion to refuse to exercise it. If a similar point were to arise for decision today, I consider that the correct approach would be to say that the courts of the place of incorporation are very likely indeed to be the appropriate forum, but not so overwhelmingly that they will necessarily be the exclusive forum. So understood *Pergamon Press Ltd v Maxwell* [1970] 1 WLR 1167 confirms that questions of internal management are governed by the law of the place of incorporation, and that the courts of that place are best suited to give decisions on the control and extent of the powers of the management."

Lawrence Collins J's judgment has been cited with approval in subsequent decisions of the courts of England – see for example Moulder J in **KMG**

¹⁷ [1970] 1 WLR 1167.

¹⁸ [2002] 1 WLR 1269 para. 55.

International NV v Chen and another¹⁹ and Lewison J in **Reeves v Sprecher and others**.²⁰

- [38] There is no gainsaying that questions of internal management are governed by the law of the place of incorporation, and that the courts of that place are best suited to give decisions on the control and extent of the powers of the management. What Lawrence Collins J said in the **Konamaneni** case is that this is not an absolute or exclusive rule and different considerations can arise, especially when the court, being asked to adjudicate on a matter of internal management of a foreign company, is the forum conveniens for the trial of the action.
- [39] The Judge found that the BVI was the forum conveniens for the trial of the BVI Claim and we have affirmed that finding – see paragraph [31] above. This means that the BVI court has jurisdiction to deal with the internal management issues of Holdings always bearing in mind that the law of Mauritius is the governing law and the courts of Mauritius are best suited to deal with these issues. Consistent with this approach Mr. Michael Todd, QC who appeared for Shallan submitted that the BVI court has jurisdiction to deal with all the claims in the statement of claim, and can deal with the internal management issues of Holdings insofar as they impact the joint venture. He was careful to point out that Shallan is not asking the BVI court to determine the validity of rights issue. This is not a part of the relief that Shallan seeks. Mr. Todd, QC emphasised that Shallan does not need to set aside or invalidate the rights issue to sustain its claim in the BVI. What Shallan is asking the BVI court to do is to find that the sole director of PIL, Mr. Machan, with or without the connivance of the shadow director, Mr. Abdulla, exercised his powers in breach of the joint venture agreement by causing PIL not to participate in the rights issue and generally excluded Shallan from the management and decision making of the companies in the joint venture. This conduct was unfairly prejudicial to Shallan's interest in PIL and Holdings. The validity or otherwise of the rights issue is not essential to their

¹⁹ [2018] EWHC 1078 (Comm) para 35.

²⁰ [2007] EWHC 117 (Ch) para 14.

case. Shallan is asking the Court to deal with these matters in the BVI Claim, relying on expert evidence of Mauritian law if necessary.

[40] The Judge took a different view of this aspect of the case. At pages 6 to 7 of the Transcript of his decision he found:

“In pursuing the claims made in the BVI Proceedings, it appears that some of the orders claimed, for instance, claim number 3, 4, 5, 7 and 8(e) will be directly affected by the decision in the Mauritian Proceedings which must, in any event, be decided under Mauritian law as Holdings is a Mauritian company and the Company (PIL), and the Claimant, and the Fourth and Fifth Defendants are parties to the Mauritian proceedings. It seems to me that those matters should finally be determined by the Mauritian court to save costs and so that the action, once it proceeds in the BVI, can do so expeditiously and in accordance with the overall objective of the Civil Procedure Rules.”

The Judge is saying here that at least some of the reliefs claimed by Shallan in the BVI Claim, (claims 3, 4, 5, 7 and 8(e)) “..must, in any event, must be decided under Mauritian law.” This, according to Lawrence Collins J’s judgment in the **Konamaneni** case, is not mandatory. The court that is the most appropriate for trying the action can deal with issues involving the internal management of a foreign company (Holdings) on the basis of expert evidence of foreign law (Mauritius) if necessary.

[41] I find that the judge erred in principle in treating the application before him for a stay of the proceedings as one where he was obliged to stay the BVI Claim until the issues of Mauritian law were resolved by the courts in Mauritius. However, I do not think this is fatal to his overall decision. The Judge’s decision is also based on concerns about issues relating to costs and delays, and fundamentally the risk of inconsistent judgments being delivered in the two sets of proceedings if the BVI Claim was not stayed. On page 12 of the Transcript, the Judge found that the BVI was the convenient forum but “Nevertheless, prima facie not to grant a stay leaves

the possibility of inconsistent judgments on certain issues in the Mauritius proceedings.”²¹ I will now deal with the risk of inconsistent decisions.

Risk of inconsistent decisions

[42] The risk of inconsistent judgments is a matter of real concern to the courts and should be avoided where possible. As Hamblen J said in **Stencor UK Ltd v Global Steel Holdings Ltd and another**²² referring to a risk of inconsistent outcomes between Commercial Court and arbitration proceedings “This would self-evidently be most unsatisfactory”.

[43] The Judge, having found that there was a risk of inconsistent judgments and having granted a stay of the BVI Claim in favour of the Mauritian proceedings, must have been satisfied that:

- (a) there is an overlap of issues between the two actions;
- (b) the parties are the same or substantially the same in both actions; and
- (c) there is a real risk of inconsistent judgments being delivered on the common issues.

[44] I have examined the claims in both actions and the reliefs sought by the parties. Details of the claims and the reliefs are set out in paragraph [14] above. It is clear that the relief sought by the parties overlap to some extent in at least the following ways:

- (i) The order seeking the allotment and issue of additional shares in Holdings (number 3 in the BVI claim form)²³ overlaps with FTHL’s claim for an order prohibiting the allotment and issue of additional shares except in accordance with stated procedures (number 6 in motion

²¹ See the full text of this passage at para. [23] above.

²² [2015] EWHC 363(Comm.) at para. 44.

²³ The claim form is in the Appeal Bundle Tab 10.

paper in Mauritius).²⁴ If the Mauritian court grants this order any order by the BVI Court ordering new shares would potentially be in conflict with the Mauritian order.

- (ii) The orders seeking the appointment of the PIL nominated directors to the board of Holdings and the removal of Mr. Abdulla as a representative director of the Rodina Parties on the board of Holdings (number 8(a)(i) and (ii) in BVI) overlap with numbers 2 and 4 in Mauritius. An order by one court could conflict with orders by the other court resulting in two boards of directors of Holdings.
- (iii) Orders prohibiting the Rodina Parties from taking steps to remove the directors nominated by Shallan and from increasing the number of directors of Holdings appointed to an amount greater than the Shallan nominated directors (number 8(c) and (d) of BVI) could overlap with number 4 in Mauritius.

These findings beg the question what would happen if, for example, the Mauritian Court finds that any new shares in Holdings are to be issued following the procedure asserted by the respondents in the Mauritian Claim, and the BVI Court orders the issue of new shares to Shallan, and, as it must, the rectification of the share register of Holdings to reflect the ownership of the new shares. There is no expert evidence of how the Mauritian Court would treat with the order from the BVI Court.

- [45] I am satisfied that there is an overlap between the claims and the reliefs sought in the two actions. I am also satisfied that the parties are substantially the same for the purpose of considering the stay on this ground. All the parties in the Mauritian Claim are parties in the BVI Claim and all but three of the BVI parties are in the Mauritian Action. The three BVI parties who are not joined in Mauritius are included in the broad definition of the Rodina Parties or are otherwise associated with them.

²⁴ The motion paper with the reliefs sought in Mauritius is in the Appeal Bundle Tab 14 pages 31-33.

[46] In the circumstances, I find that the Judge was correct to find that there was a risk of inconsistent decisions, which is a serious matter, and I will take it into consideration in deciding what is the appropriate order to make in this appeal.

[47] I should mention one other matter that a court usually considers when dealing with a submission that there is a risk of inconsistent decisions. It is the sequence of the filing of the respective claims. The tendency is to favour the claim that was first in time. The BVI Claim was first in time. Shallan did not apply in the BVI for an order in the nature of an anti-suit injunction preventing the respondents from pursuing the Mauritius Claim. Instead, it asserted in proceedings in Mauritius that the BVI Claim was filed before the claim in Mauritius, and that the latter was an attack on or a reaction to the BVI Claim. For this and other reasons Shallan applied by motion in Mauritius on 9th July 2018 to set aside service of the Mauritius Claim.²⁵ A successful result would have the effect of dismissing the Mauritian Claim. On 14th July 2018, prior to the hearing of the set aside application, Shallan applied for a stay of the Claim pending the determination of the set-aside application. The judge in Mauritius dismissed both the stay application and the set-aside application. It follows that Shallan has applied for a stay of the Mauritian Claim, or more accurately, a setting aside of the Claim and a stay pending the hearing of the setting aside application. Both applications were dismissed by the judge in Mauritius. The judge's decision is on appeal and the order dismissing the set-aside application is stayed.²⁶ If the appeal is dismissed the Mauritius Claim will proceed and it could generate decisions that are inconsistent with orders being sought in the BVI courts.

Other issues concerning the stay – delay and expense

[48] I made the point earlier in this judgment that there are issues in the BVI Claim that will not be determined in the Mauritian Claim. This is not disputed. One of the

²⁵ Paras. 106-108 of the affidavit of Mahmood Hussein Ahmed in support of the set-aside application which is exhibited to the Third Affidavit of Marcia McFarlane at Tab 6 of the Third and Fourth Respondents' Counter Notice Hearing Bundle. The application is also referred to by Andre Patrice Dodger de Speville in paragraph 9 his affidavit at Tab 7 of the said bundle.

²⁶ Page 6 of the Transcript of the Judge's decision.

consequences of the stay is that these issues will have to be tried after the Mauritian Claim is disposed of by trial or appeal. The Judge found that the BVI trial will proceed expeditiously and save costs once the issues of Mauritian law are settled by the courts in Mauritius.²⁷ Shalan disputes these conclusions in its notice of appeal and its written and oral submissions.

- [49] On the issue of delay, Mr. Todd, QC submitted that there are endemic delays in the Mauritian court system and it will take a long time for the trial in Mauritius to be completed resulting in significant delays in trying the BVI Claim. He relied on cases in Mauritius which not only took a long time to be completed, but also dealt with the issue of delays. In **Hurnam v The Attorney General and others**,²⁸ a 2017 decision of the Privy Council on appeal from the Supreme Court of Mauritius, the Board noted that it “must make allowance for the long systemic delays which, despite massive efforts, continue to bedevil the justice system on the island.” In **Tex Services Ltd v Shibani Knitting Co Ltd (In Receivership)**²⁹ Lord Mance also referred to the delays in the Mauritian court system. One can take from these cases that at least up to 2017 there were delays in the court system in Mauritius and hope that the words of Their Lordships in both appeals have fallen on fertile ground. However, each case should be considered on its own facts and in the current climate. I note that the Mauritius Claim was filed in the Commercial Division of the Supreme Court on 9th March 2018 and a trial date was set for the 18th July 2018. The trial was adjourned because of two interlocutory applications filed by Shalan. The interlocutory applications were dismissed by October 2018 and appeals filed against the dismissals.³⁰ As far as I am aware the appeals are pending. This is not an indication of a court system with endemic delays. As I said – each case must be considered on its own facts. In this case, I do not find that the evidence supports a finding on significant delays and no such finding was made by the Judge. It may be that Their Lordships words about delays in the Mauritian court system have indeed

²⁷ Page 7 of the Transcript, the relevant part of which is set out in paragraph [23] above.

²⁸ [2017] UKPC 33 at para. 20.

²⁹ [2016] UKPC 31 at para. 50.

³⁰ See paragraph 44 above.

fallen on fertile ground. The Judge's point is that once the Mauritian issues are resolved in Mauritius the BVI trial will proceed expeditiously.

- [50] The complaint about additional expenses and costs does not carry much weight. If the stay had not been granted the BVI trial would have proceeded alongside the trial in Mauritius and the expenses and costs of both trials would have had to be met immediately. The effect of the stay is that the BVI costs will be incurred at a later date.

Case management decision

- [51] The CPR have been in force for almost 20 years. The new rules brought many changes to the way cases are dealt with by the civil courts. The judges now have an expanded role to manage cases and to so in accordance with case management principles and the overriding objective. The judge in the court below was faced with a case management decision. Having found that the BVI was the most appropriate forum for the trial, he then, exercising his case management powers decided to stay the claim pending the outcome of the proceedings in Mauritius. This Court is now being asked by Shallan to interfere with that decision by lifting the temporary stay and allowing the BVI Claim to proceed.

- [52] It is now settled law that an appellate court should not interfere with the case management decision by a trial judge unless the decision was plainly wrong. This Court acknowledged this principle in **Aqueduct Limited and another v Faelesseje and another**³¹ where Baptiste JA noted at paragraph 21:

“In ordering as she did, the learned judge was in essence making a case management decision. A case management decision is peculiarly that of the first instance judge. As Lady Justice King stated in **Re U (children)**:⁸

‘It has always been the case that a case management decision is peculiarly that of the first instance judge and the Court of Appeal will be slow to interfere with such a determination.’

³¹ SVGHCVP2014/0017 (delivered 18th April 2016, unreported).

Baptiste JA also relied on the Supreme Court decision of **HRH Prince Abdulaziz v Apex Global Management Ltd and another**³² where Lord Neuberger made a similar pronouncement, emphasising that it is inappropriate for an appellate court to interfere with a case management decision unless it was “plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree.”³³

[53] Mr. Todd, QC did not dispute the general principle, but asked the Court to recognise that there is a whole range of case management decisions and where the decision has far reaching consequences for the party adversely affected the appellate court should be more inclined to interfere. He continued that this is one such case. The decision to stay the claim is a very serious one with far-reaching consequences for Shallan. This Court should therefore interfere with the decision to stay the BVI Claim notwithstanding that it is a case management decision.

[54] It is trite that an appellate court will take into consideration the nature of the case management decision being reviewed. If it finds that the judge erred and the consequences of his decision are far-reaching, the court would be more inclined to intervene than if it was a simple decision to extend time to file skeleton arguments. Each case must be decided on its own facts. This case is no different.

Summary

[55] The Judge in this case was faced with a difficult case management decision. The BVI Court was seised of the claim. The respondents urged the judge to stay the claim until the determination of their own claim in Mauritius. There are common or overlapping issues in both claims. The claims in Mauritian are largely included in the BVI claim. They are governed by Mauritian law and are best suited to be tried by the Mauritian courts. The Judge decided that the Mauritian issues should be resolved ahead of the BVI trial having regard to the governing law of the issues and

³² [2014] UKSC 64.

³³ *Ibid* at para. 13.

the risk of inconsistent decisions if a stay was not granted. He found that this approach would result in a more expeditious and cost-effective disposal of the issues between the parties. However, the Judge erred in treating the application for a stay as one where the Mauritian internal issues should be determined before the BVI Claim proceeds. However, I have found that this was not fatal to the Judge's overall decision on the stay, not the least because the undisputed position in law is that the internal management issues of Holdings are governed by the laws of Mauritius and the Mauritian courts are best suited to resolve these issues.

[56] In granting the stay, the Judge was exercising discretion in the context of his management of the BVI Claim. Following the principles set out in paragraphs 50-53 above I do not think there is a proper basis for this Court to interfere with his decision. I would dismiss the appeal against the Judge's orders staying the BVI Claim pending the outcome of the proceedings in Mauritius and the counter appeal against the finding that the BVI is the most appropriate forum for the trial of the BVI Claim.

[57] There were two issues of relatively equal proportion in this appeal and each party was successful in resisting the other party's appeal. In the circumstances I would order that the appellant and the 3rd and 4th respondents bear their own costs of the appeal and counter appeal respectively.

Order

- (1) The appeal against the Judge's order staying the BVI Claim pending the outcome of the proceedings in Mauritius is dismissed.
- (2) The counter appeal against the Judge's finding that the BVI is the most appropriate forum for the trial of the BVI Claim is dismissed.
- (3) The orders of the Judge, including the order that the costs of the proceedings in the Commercial Court be reserved, are affirmed.

(4) The appellant and the 3rd and 4th respondents will bear their own costs of the appeal and counter appeal respectively.

[58] I gratefully acknowledge the assistance of counsel and those assisting them and apologise for the delay in the delivery of this judgment due mainly to the pressures of work.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Vicki Ann Ellis
Justice of Appeal [Ag.]

By the Court

Chief Registrar