IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIHC 228 OF 2016

IN THE MATTER OF THE NOBLE MORE GROUP

BETWEEN:

[1] CHI HUNG ANDY CHAN
[2] CHI LIM AU
[3] HUNG KWONG FOK
[4] WAI KEUN ELINOR FUNG
Claimants/Respondents

-and-

[1] NOBLE MORE GROUP LIMITED
[2] OFFSHORE INCORPORATIONS LIMITED
[3] KA CHUEN KEVIN LAI
Defendants/Applicants

Appearances

Mr. Nicholas Brookes of Ogier for the First and Third Defendants/Applicants
Mr. Peter Ferrer of Harney, Westwood & Riegels for the Claimants/Respondents

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2017: February 23, March 23

Company – Ownership of Shares – Executed Instruments of Transfer – BVI company refusal to correct share register – Recorded owner challenging validity of Instrument of transfer – Service out of jurisdiction - Application to set aside service out of jurisdiction – Jurisdictional gateways – Necessary or proper party to claim CPR7.3(2) – Claim related to ownership and control of company CPR 7.3(7) – Whether BVI clearly or distinctly the appropriate forum – Connecting factors to the BVI –Whether the pleadings, correspondence, common sense or submission demonstrate that connecting factors point away from the BVI.

The claimants are all nationals and residents in Hong Kong, each of whom claim to hold an executed 'Instrument of Transfer' of 7000 shares in their respective names, in the Noble More Group Limited (D1), a BVI company. They filed a Fixed Date Claim in the BVI High Court seeking

rectification of D1's company's register under section 43 of the BVI Business Companies Act 2004, to reflect that they were the owners of the respective shares. The claim was brought against D1 and two other defendants, namely Offshore Incorporations Limited (D2), another BVI company, the registered agent of D1, and Ka Chuen Kevin Lai (D3), a Hong Kong national residing in that jurisdiction. In the affidavit and documents supporting the claim, the claimants' case is as follows: 'In October 2005, the company the Noble More Group Limited (D1) was incorporated as an international business company in the BVI. At the date of its incorporation it had seven shareholders who were also directors – these were all the claimants and three others, two nationals of Hong Kong and one from mainland China. At that time the claimants were shareholders and directors in a Hong Kong company, one Offmax which was in the business of selling office furniture out of Hong Kong. The three other persons were suppliers of Offmax. D1 was a joint venture between the claimants as owners of Offmax and the suppliers. The business of the two companies was conducted largely from Hong Kong; no business was done in the BVI. D3 became involved with the business of the two companies providing expertise in exporting furniture and became a shareholder of D1 in September 2008 and a director in December 2012. On or about December 2010, the claimants, being advised that Offmax and D1 should not have common directors and shareholders for tax reasons, ceased being shareholders and directors. As a result of this, D3 executed four 'Declarations of Trust' stating that he held 7,000 ordinary shares in D1 in trust for each of the claimants. The Declarations stipulated that D3 was under an obligation to transfer to each of the claimant on request, the 7,000 shares he held on trust. On the 10th July 2015, each of the claimants exercised his rights under the Declaration and requested that the shares be transferred to each of them respectively. It is contended that on the 10th July 2015, D3 executed four separate instruments of transfers vesting 7,000 shares in the names of each claimant. Between the months of October to December 2015, the claimants sought to have D2, the registered agent of D1 rectify the share register to reflect that each of them was the owner of 7,000 shares. By late October 2015, the claimants considering themselves shareholders, held a shareholder's meeting and removed D3 as a director of D1 and appointed themselves directors. Eventually D2 informed the claimants that it would not rectify the register as D3 had informed that the share transfer were 'void and of no effect'. He had earlier told the claimants that D3 was also not agreeing with 'the changes of administrator of the company'.'

An application was made to serve the claim out of jurisdiction on D3 and the court queried during that hearing about whether the summary nature of a rectification application was appropriate when there was an underlying dispute related to the ownership of the shares. The Fixed Date Claim was then amended to remove the rectification application and to seek in its stead, declarations that the Instruments of transfers of the shares and the resolutions removing D3 and appointing them directors were valid and binding. On the 11st November 2016, leave was granted to serve the claim out of jurisdiction.

This then led to the present applications before the court filed on the 31st of January 2017, and the 1st February 2017, on behalf of D3 and D1 respectively.

D3's application was an application to set aside service on the basis that (a) there were certain procedural irregularities related to the service, (b) that there were no jurisdictional gateways to allow for service out of jurisdiction, and (c) the BVI was not the natural or appropriate forum. D3's supporting affidavit stated *inter alia* that the 'declarations of trust which are the subject matter of the claimants' claim are governed by Hong Kong Law' and that there were other connecting factors

point to Hong Kong being the more appropriate form. It was also contended that there had been material non-disclosure by the claimants at the hearing of the application to serve out. Additionally, it was argued that the claimants were bound by an arbitration clause contained in D1's Articles of Association to submit themselves to arbitration to resolve any dispute related to ownership of shares or to the administration of the company.

D1's application was also an application going to jurisdictional issues, seeking an order to stay the proceedings and a declaration that the court should not exercise it jurisdiction to hear the claim. This application was grounded on contentions that the claim disclosed no cause of action and or was frivolous and vexatious, as well as that the BVI was not the appropriate forum to try the claim.

Held: setting aside service of the proceedings against D3 and staying the claim against D1 and D2, that:

1. An application to set aside service out of jurisdiction amounts to a rehearing of the original application for permission to serve out and accordingly the burden of proof is on the claimants to show that there is (a) a real issue between the claimant and the foreign defendant to be tried on the merits, (b) that there is an arguable case that one or more of the jurisdictional gateways are available and (c) that the local jurisdiction is clearly or distinctly the appropriate forum and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction and on this application not set aside service already granted.

   Applied: Nilon Limited and Anors v Royal Westminister Investment S.A. and ORs [2015] 4 LRC 584; Spiliada Martime Corp v Cansulex Ltd. [1987] AC 460 Collier v Williams [2006] EWCA 20; Marty Steinberg et al v Banque De Patrimoines Prives Geneve et al Claim No. 253 of 2009

2. It is the claimants' case that they held executed Instruments of Transfer executed by D3 giving to each of them 7,000 shares in the company, and that when they had requested the registered agent D2 to correct the share register to reflect that each was the owner of 7,000 shares, there was a refusal purportedly on the basis that the recorded owner of the shares D3, had instructed D2 that the Instruments of Transfer were void and of no effect'. These contentions gave rise a serious issue to be tried on the merits between the claimants and D1 and D2. Further, having regard to the contentions that D3 had caused D2's refusal, and D3's apparent acceptance on his own application to set aside service that he was challenging the validity of the Instruments of Transfers, a serious issue on the merits for trial arose between the claimants and D3.

3. There is a good arguable case that the claim falls within two classes of cases in which permission to serve out may be given. First, D3 was a necessary or a proper party to finally resolve this issue between the claimants and D1 and D2 once and for all. Accordingly CPR 7.3(2) grounds the first gateway. As pleaded, the case is one related to the ownership and administration of a BVI company and this engages CPR 7.3(7) grounding the second jurisdictional gateway.

4. In considering whether the claimants have shown that the BVI is clearly or distinctly the appropriate forum, the court must have regard to the connecting factors in the context of the nature of the dispute. Here the court is to have regard to the pleaded case, the evidence including the correspondence, common sense and the submissions made by counsel. Whilst the court could not use the submissions to fill any gaps in the evidence or to find connecting factors which the evidence did not ground, matters which were raised must be considered in a practical manner. In this case, D3's answer to the claim comprises of two statements, one contained in correspondence to D2 that the share transfers are 'void and of no effect' and the second in his affidavit that 'Declarations of Trust …are the subject matter of the claimants' claim'. These statements when taken together with the claimants' claim and the supporting documents suggest that in considering whether to grant the relief sought, the 'dealings' or documents in Hong Kong are likely to be relevant to claim. The claimants' own evidence of events leading up to the declarations and the instruments of transfer, show certain events which led up the declarations and the instruments. All of these parties are resident in Hong Kong and largely conduct the business of the company in Hong Kong. When they would have executed these documents, they would have hardly contemplated that they would have to journey to the BVI to resolve issues arising therefrom. Ultimately this is not about the internal administration of the company, but about the dealings and events which led up to the declarations and the instruments of transfer. These are not domestic issues and in all the circumstances of this case, whether or not the burden is on the claimants, the court is not satisfied that the BVI is clearly or distinctly the appropriate forum.

   Considered: *VTB Capital plc v Nutritek International Corp* [2013] 1 All ER 1296; Nilon Limited and Anors v Royal Westminister Investment S.A. and ORs [2015] 4 LRC 584; Spiliada Martime Corp v Cansulex Ltd. [1987] AC 460 Collier v Williams [2006] EWCA 20; Marty Steinberg et al v Banque De Patrimoines Prives Geneve et al Claim No. 253 of 2009; Le Guevel-Mouly v AIG Europe Limited [2016] EWHC 1794; Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2011] UKPC 7; Commercial Bank-Cameroun v Nixon Financial Group Limited BVI Court of Appeal No. 5 of 2011; Anjie Investments Limited and another v Cheng Nga Yee and another BVIHCMAP2016/0003 Claim No. BVIHC (COM) 2015/0060; Thornton Tomasetti v Anguillan Development Corporation Ltd. [2015] ECSCJ No. 203

5. A party making an ex parte application to serve out of jurisdiction must be sensitive to matters which showed connection to both the local and any foreign jurisdiction and ensure that these are brought to the court's attention; it should not be left to the court's industry to discover these among the attached documents and correspondence. The governing law clause and the arbitration clause were pointed out as matters not brought properly to the court's attention. It is no doubt true that important features of a case should not be hidden away in exhibits and left to the court's industry It is also accepted that if there is a 'failure to make full and fair disclosure' on the ex parte application, the court 'would be justified in discharging the order, even although the party might afterwards be in a position to make another application'. Even so, the point has also been made that the application threshold test does not require examination of the merits of the case, and so an applicant's failure at the ex parte hearing to canvas

the merits of the defendants' defence may likely be regarded as immaterial and any such failure would not justify the setting aside of service. The matters which were complained of in this case amounted in part to matters which could be considered part of D3's defence. Further, the Court could make no finding that the non-disclosures complained of were an attempt to deliberately mislead the court. In any event, in the circumstances of this case, if the BVI had been shown clearly or distinctly to be the appropriate forum, the 'non-disclosure' complaint would not have operated to cause this court to set aside the permission to serve out.

Considered: The Hagen [1908] P 189; Craig Reeves v Platinum Trading Management Limited - [2008] ECSCJ No. 144

6. On the pleaded case, the Company D1, has allegedly taken a stance that these claimants are not 'members' of the company. As far as Arbitration is concerned it seems that a preliminary issue is to be determined as to whether the claimants are first entitled to be treated as shareholders so that they may then be entitled to call in aid the Arbitration clause. In these circumstances this court would not have not exercised its discretion to stay the proceedings on this basis.

7. In finding that the substantial underlying dispute would require a full trial between the claimants and D3, and having regards to the fact the BVI is not the appropriate forum to try those matters, it would not be in the interests of justice to continue the proceedings against the remaining defendants.

DECISION

[1] RAMDHANI J. (Ag.) These are two applications heard on the 23rd February 2017. Both applications have raised matters going to the jurisdiction of the court.

[2] The first application in time was filed on the 31st January 2017, on behalf of third defendant, a Mr. Ka Chuen Kevin Lai (D3), a shareholder of first defendant, the Nobel More Group Limited (D1), a company incorporated in the BVI. This application seeks orders to set aside service of the amended claim form on the primary ground that the BVI is not the appropriate forum to try the substantive matter. This application is also grounded in claims of material non-disclosure of crucial matters at the ex parte application for service out of jurisdiction as well as the fact that a number of documents required to be served together with the claim and its supporting documents were not served together with the bundle.

[3] The second application in time was filed on the 1st February 2017, on behalf of the first defendant, Noble More Group Limited (D1), a company incorporated under the Business Company Act of the BVI, and seeks to stay the claim made against it, and for a declaration that the court should not exercise its jurisdiction to try the substantive claim.

Background to the Applications

The Substantive Claim – The Original Fixed Date Claim

[4] The substantive proceeding was commenced on the 11th August 2016, by way of a Fixed Date Claim. It was primarily a 'rectification application' brought under section 43 of the BVI Companies Act, 2004 though it also sought an order that 'resolutions passed by the shareholders of the Company on the 26 October 2015 are valid and binding'. These resolutions effectively sought to remove Mr. Lai, D3, as a director and to replace each of the claimants as a director of the Company.

[5] The claimants, all residents of Hong Kong, were seeking an order of the court directing that the register of the first defendant's Company be rectified to show that each of the claimants were the lawful owners of 7,000 shares each. They joined D2, also a BVI Company, the registered agent of D1 with its registered address at Offshore Incorporations Centre, P.O. Box 957, Road Town, Tortola, contending that this defendant had refused to effect changes on the register of the Company. They joined D3 who had transferred to each of the claimants 7,000 shares in Noble by instruments of transfers dated the 10th July 2015, but who, they contended had caused D2 to refuse to effect changes on the share register.

[6] The claimants' case is gleaned from the affidavits and documents supporting the claim. Essentially, it is contended as follows: In October 2005, the company the Noble More Group Limited (D1) was incorporated as an international business company in the BVI. At the date of its incorporation it had seven shareholders who were also directors – these were all the claimants and three others, these latter being two nationals of Hong Kong and

one national from mainland China. At that time the claimants were shareholders and directors in Offmax, a Hong Kong company, which was in the business of selling office furniture out of Hong Kong. The three other persons were suppliers of Offmax. D1 was a joint venture between the claimants and the suppliers and together with Offmax it sold office furniture from Hong Kong. D3 became involved with the business of the two companies providing expertise in exporting furniture and he became a shareholder of D1 in September 2008 and a director in December 2012. On or about December 2010, the claimants, being advised that Offmax and D1 should not have common directors and shareholders for tax reasons, ceased being shareholders and directors. As a result of this D3 executed 'Declarations of Trust' stating that he held 7,000 ordinary shares in D1 in trust for each of the claimants. The Declarations stipulated that D3 was under an obligation to transfer to each of the claimant on request, the 7,000 shares he held on trust. On the 10th July 2015, each of the claimants exercised his rights under the Declaration and requested that the shares be transferred to each of them respectively. It is contended that on the 10th July 2015, D3 executed four separate instruments of transfers vesting 7,000 shares in the names of each claimant.

[7] On the 28 October 2015, the claimants gave instructions to their attorneys in Hong Kong to make contact with D2, the registered agent of D1 to secure the changes of the D1's register to reflect that they were now the owners of the shares. Between October 2015 and December 2015, a number of documents were forwarded to D2. These included the Declarations of trust and the executed Instruments of Transfers.

[8] By late October 2015, the claimants considering themselves shareholders, held a shareholder's meeting and removed D3 as a director of D1 and appointed themselves directors.

[9] By November 2015, the claimants caused communication to be sent to D2 to have these changes reflected in the Register of members of the company. D2 response was that such changes could not be made as the 'recorded client of the company did not agree with the changes of administrator of the company…'.

[10] On the 14th April 2016, D2 advised the claimants that D3 who was recorded as the sole Director and Shareholder of the Company on its register, had instructed D2 that the four Instruments of Transfer were 'void and of no effect', D2 further advised that if the BVI court would confirm and validate the four transfers, D2 would make the necessary changes. This led to the substantive claim. At the time it was originally filed, it was essentially a claim under section 43 of the BVI Business Companies Act for rectification. It was later amended to remove the rectification claim, and to seek declarations related to the validity to the instruments of transfers and the resolutions.

The Application for permission to serve out of jurisdiction – being grounded on the Original Fixed Date Claim

[11] On the 22nd August 2016, the claimants filed an application for an order to serve D3 out of jurisdiction. An affidavit of Mr. Man Yee Chan of even date was filed in support. In grounding this application for permission to serve out of jurisdiction, the claimants contended that there was a real issue between the claimants and D1 and D2, and that D3 was a necessary or proper party to the claim. They stated:

> *"In this case, the prayer for relief in the Claim herein seeks relief under section 43 of the BVI Business Companies Act, 2004. Relief under that section would determinate the rights of all the shareholders of the Company including the [third defendant]. His rights would be clearly affected by any relief which the court might grant to the applicants.*
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> *"It is only right in these circumstances that he joined to the proceedings because he has an interest in the Claim and so that he is properly bound by any decision for the sake of finality and certainty. He is both a necessary and proper party. [The Third Defendant] was a registered shareholder of the Company; the Applicants have been aggrieved by his omission, inaccuracy and delay with regards his handling of the Company. In addition if the [Third Defendant] was within the jurisdiction, he would quite possibly be properly joined.*
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> *There can be no question in this case that the [third defendant] could be properly joined to proceedings because there is a real issue between him and the applicants.*

The Claim relates to the Administration of the Company; namely the issue of delay and refusal to update the Company's register of members and return the shares to the Applicants Claimants."

[12] This application came before the court on the 10th October 2016, before Justice Ellis. Some concerns were expressed by the Learned Judge at this hearing about whether the summary process of a section 43 application was appropriate when there was a substantive dispute about the validity of the instruments of transfer[1]. The learned Judge identified D2's statements contained in the email correspondence, that D3 was disputing the validity of the Instruments of the Transfer. The Court queried whether the court might be required first, to make a declaration as to the validity of the transfers. On this note the court called on the claimants' attorney to make further submissions on that point, and the matter was adjourned.

The Application for permission to serve out of jurisdiction – being grounded on The Amended Fixed Date Claim

[13] On the 2nd December 2016, the claimants then filed an Amended Fixed Date claim removing the rectification application under section 43 and seeking instead as a substantive relief, a declaration that the instruments of the transfer to the claimants are respectively valid and binding – essentially matters related to the share ownership and the directorship of the company. The amended claim also sought a declaration that the resolutions passed by the claimants as shareholders respectively (a) removing D3 as a director, and (b) naming the claimants as directors were valid and binding.

[14] On the adjourned hearing date on the service out application, the claimants argued through their attorney[2] that the claim had met the threshold of CPR 7.3 (7) which sets out that a claim form may be served out of the jurisdiction if the subject matter of the claim relates to the constitution, administration, management or conduct of the affairs of the company, or to the ownership or control of a BVI company.

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[1] Record of the Transcripts of the hearing on the 10th October 2016.
[2] Skeleton Arguments for hearing dated 1 November 2016.

[15] It was also argued 'there was a real issue which it is reasonable for the court to try, and [D3] is a necessary or proper party to the substantive application. In order for [D2] to effect the necessary transfers in accordance with the instruments of transfers and the Resolutions, and as a result of [D3's] alleged instructions to [D2] advising it not to effect the share transfers, it is necessary and or proper that the [D3] be a party to the substantive application.'

[16] The Court granted the order that D3 be served out of the jurisdiction. He was so served on or about the first week in December 2016. On the 10th of January 2017, he caused an acknowledgment of service to be filed on his behalf reserving his right to dispute the court's jurisdiction pursuant to CPR 9.6. He has contended that the application for service out of jurisdiction and the supporting documents had not been served with the fixed Date Claim.

[17] D2 was served with the original Fixed Date Claim on 11th August 2016. On the 10th January 2017, it caused an unconditional acknowledgment of service to be filed on its behalf.

The Application to set aside service

[18] Mr. Lai, D3 present application is for an order under CPR 9.7 to set aside the 'purported service of the proceedings' on him which took place on or about the 5th December 2016. He moves this application on three primary grounds.

[19] First, he contends that such service was contrary to CPR 11.5 and/or established practice, in that he was not provided with the Notice of Application for permission to serve proceedings out of jurisdiction, any affidavit(s) filed in support, any skeleton argument(s) relied on at the ex parte hearing, or any note or transcript of the ex parte hearing. On this basis he has asked that the service be set aside. During the arguments, it was accepted that those of the documents which were available had since been provided to him.

[20] Second, D3 contended that none of the procedural gateways afforded by CPR are available or in the alternative, 'any part of the claimants' claim which might otherwise engage any such procedural gateway does not carry any or any realistic prospect of success.

[21] Third, D3 contended that the BVI is not the natural and appropriate forum for the adjudication of the Claimants' claim, in that all of the significant connecting factors are with Hong Kong and any connecting factors with BVI are insufficient or irrelevant.

[22] The claimants have resisted this application. Their arguments will be set out at the relevant points of this decision.

Service out of Jurisdiction – Whether it should be set aside?

[23] On any application to set aside service, the court is empowered by CPR 7.7(2) to set aside such service if the court considers that:

(a) Service out of the jurisdiction is not permitted by the rules;

(b) The claimant does not have a good cause of action; or

(c) The case is not a proper one for the court's jurisdiction.

[24] CPR 7.3 sets outs those cases in which service out of jurisdiction will be permitted. It states:

(1) The court may permit a claim form to be served out of the jurisdiction if the proceedings are listed in this Rule.

(2) A Claim form may be served out of the jurisdiction if a claim is made –

(a) against someone on whom a claim form has been or will be served, and –

(i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and

(ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary or proper party to that claim.

CPR 7.3(7) provides specifically for claims related to companies. It states:

(7) A Claim form may be served out of the jurisdiction if the subject matter of the claim relates to –

(a) the constitution, administration, management or conduct of the affairs; or

(b) the ownership or control of a company incorporated within the jurisdiction.

[25] On this application, it is for the claimants to satisfy the court that this is an appropriate case to have allowed service out of jurisdiction; it really amounts to a re-hearing of the original application.[3] (The claimants did in fact assert that in relation to the forum issue it was for D3 to prove that the BVI was not the appropriate forum. This submission will be dealt with in due course.)

[26] I adopt the Lord Collins outline of the relevant approach on service out of jurisdiction in Nilon Limited and Anors v Royal Westminister Investment S.A. and ORs[4] appeal from the BVI. This was a case in which an application was made to set aside service out of jurisdiction. His Lordship stated at para. 13:

> *On an application for service out of the jurisdiction, three requirements have to be satisfied. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, ie a substantial question of fact or law, or both. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context 'good arguable case' connotes that one side has a much better argument than the other. Third, the claimant must satisfy the court that in all the circumstances the forum which is being seised (here the BVI) is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.*

[27] In this case, the service out of jurisdiction application was grounded on several gateways under CPR 7.3. First, it was asserted that this was a claim properly brought against the anchor defendants, D1 and D2 and that D3 was a necessary or proper party. Second, it was contended that CPR 7.3(7) applied in that this was a claim which related to the administration and ownership of a company incorporated in the BVI.

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[3] *Collier v Williams [2006] EWCA 20 at para. 83 cited with approval by Bannister J in Marty Steinberg et al v Banque De Patrimoines Prives Geneve et al Claim No. 253 of 2009*

[4] [2015] 4 LRC 584

[28] In this case, the claimants are contending that there is a serious issue to be tried between themselves and the anchor defendants and to resolve that issue as between them, D3 is a necessary and proper party. It is clear that they also are separately contending that as between them and D3, there is a serious issue to be tried which engages a jurisdictional gateway which does not require proof of a viable claim against any anchor defendants.

Serious Issue to be tried against D3 – The Case against the Anchor Defendants

[29] Mr. Ferrer for the claimants has asserted that there is a real issue which it is reasonable for the court to try between the claimants and D1, namely whether the executed Instruments of Transfers are valid and binding. This is an issue because the registered agent, D2 has refused to accept the Instruments and rectify the Register.

[30] Learned counsel submits that D2 has disclosed that it is D3 who has caused it to refuse to act on the instruments of transfer. This is why counsel says that D3 is a necessary or proper party. He goes to argue that when the court frames the issue, it becomes obvious the question remains one as to the validity of the transfer, and that in the circumstances of this case, the law of the BVI applies. The fact that the business of the company is conducted out of Hong Kong, and that all the claimants and D3 reside in Hong Kong, matters not, as the issue which is before the court can be properly and conveniently tried in the BVI.

[31] Mr. Brookes, learned Counsel for D3 has on the other hand, submitted that that this case involves a dispute between the claimants and D3 about the ownership of the shares and has nothing to do with the Company. Learned Counsel submits that there is no BVI cause of action as the reality of the situation is that the claimants' case is based on Hong Kong law governed Declarations of Trust. It is argued that 'the claimants notably fail to mention the Declarations of Trust in the Amended Fixed Date Claim at all and instead rely on the Instruments of Transfer and certain shareholder resolutions allegedly passed on 26 December 2015, as the basis for their claims. With respect to governing law, this puts the cart before the horse. The validity of the Instruments and the resolutions stem from the validity and construction of the Declarations of Trust, such that the heart of the claim concerns this Hong Kong Law governed document.'

[32] Arguments for D3 assert that 'the claimants have failed to set out any BVI cause of action in the [claim]. Whilst it is a point militating against service out, they have also failed to produce evidence of Hong Kong Law with respect to the Declarations of Trust on which their case depends.'

[33] On this point there is merit to Mr. Ferrer's submissions. The claimants may have been proper to have amended their claim to one for declarations as to the validity of the transfers, as it has been recognized that rectification would likely be an unsuitable vehicle where there is a substantial dispute as to fact. Lord Collins referring to these situations stated in Nilon:

> *In such a case an issue may be directed to be tried (*Re Diamond Rock Boring Co Ltd, Ex p Shaw *(1877) 2 QBD 463 at 484) or the [rectification] application may be adjourned or stayed (*Re South Kensington Hotel Co Ltd, Braginton's Case *(1865) 12 LT (NS) 259), but it may also be dismissed or struck out:* Re Hoicrest Ltd *[2000] 1 BCLC 194 at 199, citing* Re Greater Britain Products Development Corp Ltd *(1924) 40 TLR 488 at 489, where it was said:*
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> > *'Where it was clear that there was something to be answered and something to be investigated, the ordinary course, as far back as the Court had been able to trace, had been for the Judge to dismiss the summons or motion, but to leave it open to the party to bring his action.'*

[34] An action was brought in this case. It related to the transfer of shares. The Articles of Association of D1 contain a number of relevant provisions. Article 38 reads:

> "Subject to any limitation in the Memorandum, registered shares in the Company may be transferred in a written instrument of transfer signed by the transferor and containing the name and address of the transferee, but in the absence of such written instrument of transfer the directors may accept such evidence of a transfer of shares as they consider appropriate."

Article 40 reads:

> *"Subject to any limitation in the Memorandum, the Company must on an application of the transferor or transferee of a registered share in the Company enter in the share register the name of the transferee of the share save that the registration of the transfer may be suspended and share register closed at such times and for such periods as the Company may from time to time by resolution of directors determine provided always that such registration shall not be suspended and the share register closed for more than 60 days in any twelve months."*

[35] In this case, it is being alleged that there are executed instruments of transfers of certain shares. D2, relying on D3 alleged statements that the instruments of transfer are not valid, has refused to enter the claimants' names on the share register. This, in my view, has given rise to the issue as to whether these instruments are valid. This is an issue existing between the claimants and D1 and D2. The Privy Council in Nilon affectively recognized that whilst a claimant would have had no cause of action against the Company where beneficial interests stemming from its members were being asserted, such a claimant would in fact have a cause of action where executed instruments of transfer were being presented and there was a refusal to rectify.

[36] To my mind, it would be reasonable for the court to try this issue as between the claimants and the anchor defendants, D1 and D2.

Necessary or Proper Party Gateway

[37] The claimants have argued that D3 is a necessary or a proper party. The dispute which has arisen between the claimants and D1 and D2 may not be finally settled unless the underlying dispute between the claimants and D3 is also resolved. In Alberta Inc v Katanga Mining Ltd and others[5], the court made the point at paragraph 26 that:

> *The court's power to permit service on the "necessary or proper party" basis is no less wide than the court's power to add or substitute a party under CPR 19.2(2): see* United Film Distribution Ltd v Chhabria *[2001] EWCA Civ 416 at paras 36 – 38, [2001] 2 All ER (Comm) 865. On this basis, it is sufficient to show that "there is an issue involving [Tain and Wayland] and [Alberta] which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue"…"*

[38] In considering whether to serve a person out of jurisdiction under this head, the court should consider a number of matters. These were well set the Privy council in AK Investment v Kyrgyz Mobil[6] at [73] et seq and summarised by the Board in Nilon as being:

> (1) *The necessary or proper party head of jurisdiction was anomalous, in that, by contrast with the other heads, it was not founded upon any territorial*

[5] [2009] 1 BCLC 189
[6] [2011] 5 LRC

connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts.

(2) *Caution must always be exercised in bringing foreign defendants within the jurisdiction under that head, and in particular it should never become the practice to bring in foreign defendants as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction.*

(3) *The fact that the defendant within the jurisdiction (D1 or the anchor defendant) is sued only for the purpose of bringing in the party outside the jurisdiction (D2) is not fatal to the application for permission to serve D2 out of the jurisdiction, but it is a factor in the exercise of the discretion.*

(4) *The action is not properly brought against D1 if it is bound to fail.*

(5) *If a question of law arises on the application which goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case.*

(6) *The question of the merits of the claim is relevant to the question of whether the claim against D1 is 'bound to fail' and to the question whether there is a 'serious issue to be tried' in relation to the claim against D2; and there is no practical difference between the two tests, and they in turn are the same as the test for summary judgment.*

(7) *In considering the merits of the claim, whether the claim against D1 is bound to fail on a question of law should be decided on the application for permission to serve D2 (or to discharge the order), but it would not normally be appropriate to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts.*

(8) *The question whether D2 is a proper party is answered by asking: 'Supposing both parties had been within the jurisdiction would they both have been proper parties to the action?'*

[39] I have considered that there is a viable claim against D1 and D2. At this point, I am unable to see that this is an action which is bound to fail against D1 and D2. The claimants have asserted that the anchor defendants have refused to rectify the register of its members because as D2 has asserted, D3 has instructed him not to do so.

[40] D3 has presented the court with evidence that the 'subject of the claim relates to the Declarations of Trust' and together with the email correspondence there is an inference that this is what may have led to the questions regarding the validity of the Instruments of Transfer. From all of this, it ought to be obvious, that not only is D3 is crucial to resolving the issues, but he is necessary to resolving that dispute about 'validity' that he has identified. For this reason, it is desirable that he be joined so that issue can be resolved.

[41] Quite apart from the above, there are other gateways to ground service out of jurisdiction on D3.

Additional Gateway - Matters related to administration and ownership of BVI Company

[42] This is now the new CPR 7.33(7) which provides for a new head of jurisdiction to allow service out of the jurisdiction if the subject matter of the claim relates to (i) the constitution, administration, management or conduct of the affairs; or (ii) the ownership or control of a company incorporated within the jurisdiction.

[43] The application for leave to serve out of jurisdiction did not expressly refer to the applicable gateway provision in the sense of identifying the appropriate sub rule, but rather it recited grounds which made it clear that it was being moved under CPR 7.3(2) in seeking to ground jurisdiction by identifying a foreign person as a necessary or proper party. It also relied on the gateway provision provided for by CPR 7.3(7) when it stated that the claim related to the 'administration of the company, namely the issue of delay and refusal to update the Company's register of members and return the shares to the [claimants]'[7]. Though arguments were taken that CPR 7.3(7) applied to make service out permissible, the Order which was granted did not take this issue any further; it simply did not refer to any gateway on which permission was grounded.

[44] In this case, the declarations which are being sought relate to resolutions which were passed on the 26th June 2015, by which Mr. Lai was removed as a director and new

[7] *Ground 6 of the application dated the 22nd August 2016.*

directors were appointed. This surely relates to the 'constitution, administration, management or conduct of the affairs of the company. The second relates to a declaration that certain instruments of transfers of shares are valid. There is an arguable case that on one view it relates to the ownership or control of the company. In these circumstances, the claimants have also satisfied this court that these gateways are available for this claim. There is thus no need to search for an anchor defendant to justify the service of a claim out of jurisdiction where any of these gateways are available.

[45] Having found that there is a real issue to be tried between the claimants and D3, and that service is available through several gateways, the question which now arises is whether the claimants have satisfied the third and last limb of the test as set out above.

Whether in all the Circumstances the BVI is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction?

[46] The claimants appeared to have approached this issue as one of *forum non conveniens*. In their written submissions, they argued that the burden of proof was on a defendant who seeks to stay proceedings on this ground. In doing so they relied on Le Guevel-Mouly v AIG Europe Limited[8].

[47] The applicant, D3 has argued the contrary and has relied on a number of cases including Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd[9], and Commercial Bank-Cameroun v Nixon Financial Group Limited[10]. Reference was also made to dicta of Lord Goff in Spiliada Martime Corp v Cansulex Ltd.[11]where in highlighting the distinction between an application for stay on *forum conveniens* in proceedings that were commenced as of right and an application to set aside permission to serve out of jurisdiction, when his Lordship stated:

> *"The effect, not merely that the burden of proof rests with the plaintiff to persuade the court that England is the most appropriate forum for the trial of the action, but*

[8] [2016] EWHC 1794
[9] [2011] UKPC 7
[10] BVI Court of Appeal No. 5 of 2011
[11] [1987] AC 460

he has to show that this is clearly so. In other words, the burden is quite simply, the obverse to that applicable where a stay is sought of proceedings started in this country as of right."

[48] The application by D3 is an application to set aside permission to serve out of jurisdiction. I am of the view the applicant is right that the burden of proof is on the claimants. The Privy Council in Nilon accepted that on an application to set aside service out of jurisdiction it would be for the claimant to show that the BVI was the appropriate forum.[12]

[49] In arguing that the BVI is the most appropriate forum for the trial of the claim, Mr. Ferrer for the claimants has urged that: "This is not a case which involves extensive witness evidence in person. Indeed there is no good reason why it cannot be dealt with on paper. There is no issue of Hong Kong Law to be determined nor are any of the events in Hong Kong relevant." The court was again urged to consider the evidence before it in framing the dispute which the claimants assert will point to the BVI as the appropriate forum.

[50] Mr. Brookes on the other hand submitted that there was only one connecting factor in favour of the BVI and that is the formal incorporation of Noble More Group Limited in the BVI'.' He argues that this connecting factor is outweighed by all other factors.

[51] Learned Counsel has asked that this court to consider that (a) there was a dispute between the claimants and D3 and this in turn related not just to the Instruments of Transfers but the Declarations of Trust which are governed by Hong Law, (b) that the underlying business of the Company was operated in Hong Kong and or mainland China; (c) that all of the named individuals in the claim are nationals and residents of Hong Kong; (d) that 'all of the events alleged and relied on by the claimants at paragraphs 9-23 and 35-41 of the First Affirmation of Hung Kwong Fok dated 9 August 2016 to support their claim took place in Hong Kong'; that '[e]ven the communication between the claimants' Hong Kong solicitors and the second defendant which are alleged and relied upon by the claimants at paragraph 24-26 of the above affirmation were communications which were

[12] *At paragraph 62 of the judgment of the Privy Council.*

conducted entirely in Hong Kong between the Claimants' Hong Kong solicitors and the Hong Kong office and personnel of the second defendant.'

[52] Mr. Brookes also suggested that it was likely that other witnesses and a substantial part of the any relevant documentation would most likely be found in Hong Kong.

[53] Counsel for the applicants also submitted that the court ought to have regard to certain material non-disclosure by the claimants at the ex parte application for leave to serve out. He pointed out that the claimants only mentioned the 'Declarations of Trust' in passing and more importantly failed to point out that they were governed by Hong Kong law. He further contended that at the ex parte hearing, the claimants have failed to properly identify the dispute between the claimants and D3.

Analysis and Findings on the Forum Issue

[54] In deciding whether the BVI is shown to be clearly the natural forum, the court agrees that the nature of the dispute between the parties will in turn inform the identification of connecting factors. In Amin Rasheed Shipping Corporation v Kuwait Insurance Company[13] Lord Wilberforce stated that:

> *'In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense.'*

[55] I have had regard to MR. Ferrer's submission that the claimants have presented the court with what is the dispute, namely, the validity of executed instruments of transfer.

[56] In relation to the law governing the ownership and transfer of shares, I have also noted Dicey 15th ed. at paragraphs 22-044 which speaking of the common law position states:

> *"…the basic principle here is that shares are situate in the country where, under the law of the country in which the company as incorporated, they can be effectively dealt with as between the owner for the time being and the company.*

[13] [1984] A.C. 50

The law of the place of incorporation of the company decides how shares in the company may be transferred.

[57] Section 245 of the Business Companies Act 2004 has codified this principle. It states:

> *"For the purposes of matter relating to title and jurisdiction but not for purposes of taxation, the situs of the ownership of shares, debt obligations or other securities of a company is in the Virgin Islands."*

[58] As far as the law governing the internal management of a company is concerned, the Court of Appeal in Nilon accepted the relevance of learning in set out in Dicey, Morris and Collins, Conflict of Laws, 15th ed (2012), para 30-028 where is stated:

> *"English courts have been reluctant to intervene in domestic issues between members of a foreign corporation. In particular they will not normally seek to control the exercise of discretionary powers which are given to officers of a foreign corporation by its constitution. In such cases and in other matters involving the internal management of a foreign corporation the English court will give considerable weight to the court of the country of incorporation as the appropriate forum, though in the light of the development of the doctrine of forum non conveniens the jurisdiction of the latter should not be necessary be regarded as exclusive."*

[59] The Privy Council in Nilon also effectively agreed that such matters would be regarded as domestic issues. The Board stated:

> *"The relevant principles have been developed in the context of such issues as those arising between members, or issues related to the powers of organs of a company, the appointment of directors, the extent of member's liabilities for the debts of the company, or the right of shareholders to bring derivative actions."*

[60] In the context of the claimants claiming to hold executed instruments of transfer of shares in a BVI company, there are presumptively strong connectors to BVI, but even so, the court must examine whether other connectors will operate to displace the BVI as the appropriate forum.

[61] In Nilon, notwithstanding that the issues related to the ownership of shares, the Board considered that the most appropriate forum for the summary rectification proceedings was not the BVI. This was primarily because the Board held first, that rectification was not appropriate when there was underlying dispute between members as to a breach of contract and the beneficial interests in shares and which had nothing to do with the BVI

Company. Second, the Board considered that the factual matters related to the dispute occurring in other jurisdictions; dealings which had nothing to do with the BVI. The connectors of the BVI law being the applicable law and the fact that rectification would be ultimately sought were not sufficient to outweigh the displacing factors. The Board considered that rectification would be a mere formality once the underlying issue was resolved by court order and noted that there was no suggestion of any real issue related to the modalities of performance or the intervention of a BVI court if there was a refusal to comply with the order. As the Board noted at paragraph 66:

> *"The reality of the matter is that, apart from the fact that the claim is that Mr Varma made a promise to allot shares in a BVI company, and that if they are successful the Mahtani parties may obtain an order that Mr Varma procure the allotment or transfer to them of shares in Nilon, the issues have nothing to do with the BVI at all. The alleged contract was made in England, the company was to be managed from Jersey, the underlying business was concerned with Nigeria and India, the operating companies would be in Nigeria, the witnesses (including Mr Mata and Mr Surana, the managing director and secretary of Nilon, and who were said to be involved in the formation and performance of the joint venture agreement) would be mainly in England. The documents are in England or Jersey. There is no suggestion that there are any witnesses or documents in the BVI, or that there is any connection with the BVI other than as the place of Nilon's incorporation.*

[62] This claim was originally started as a rectification claim under section 43 of the BCA. It was then amended when the court at the ex parte hearing enquired about the effect of the underlying dispute regarding the validity of the Instruments of Transfers between the claimants and D3. For all intents and purposes, even though declarations were now being sought instead of a rectification, it still remained a claim which sought orders that the Instruments of Transfers were valid and binding. Presumably this is so because the ultimate intention is to secure a rectification of the members' register.

[63] It is important to examine Mr. Ferrer's statements that D3 has failed to provide the court with any details of his case to show any real connectors to any other jurisdiction. This court has borne in mind the learning set out in VTB Capital plc v Nutritek International Corp[14], where the court considered the extent to which a defendant should set out his

[14] [2013] 1 All ER 1296

case on a challenge to jurisdiction of the local court. As was stated in at paragraphs 90 and 91:

> *"90….In my view, the position is reasonably clear. As a matter of principle, a defendant is entitled to keep his powder dry: he can simply put the claimant to proof of its case. [2013] 2 WLR 398 at 428In general at least, that is true at any point of the proceedings. The mere fact that the defendant is challenging jurisdiction does not somehow impose a duty on him to specify his case. The onus is on the claimant to satisfy the court that there is a serious issue to be tried on the merits of the claim, and not on the defendant to satisfy the court that he has a real prospect of successfully defending it.*
>
> *"91. However, if the defendant chooses to say nothing, then it would be quite appropriate for the court to proceed on the basis that there is no more (and no less) to the proceedings than will be involved in the claimant making, or trying to make, out its case. Of course, in many instances, the defendant will be able to say that, although he has not submitted a draft statement of case, or produced a witness statement, setting out the details of his case, its nature is clear from correspondence, common sense, or even submissions. Consistent with my observations on the first point, I would not want to encourage a defendant to go into great detail as to his case in a long document with many exhibits, but if he is wholly reticent about his case, he can have no complaint if the court does not take into account what points he may make, or evidence he may call, at any trial."*

[64] When I consider the evidence in relation to the dispute between the claimants and D3, I am pointed to questions which relate not only to the validity of the Instruments of Transfers but ultimately to the Declarations of Trust. It is the email trail between D2 and the claimants solicitors in Hong Kong as well as the statement in the First Affirmation of Ka Chuen Kevin Lai at paragraph 15 where he stated that" "The Declarations of Trust which are the subject-matter of the claimants' claim are governed by Hong Kong law', which have informed the court's finding. [emphasis supplied]

[65] Mr. Brookes' submissions that events and dealings in other jurisdictions are relevant is to be approached in a practical manner. No doubt the statement in VTB that 'even submissions' may be used to determine what the defendant's case was, could not mean that the court was to rely on submission to find factual connectors which was not otherwise found in the evidence and the papers before the court. But common sense must also guide these considerations.

[66] Mr. Ferrer's arguments that the claimants' case is straightforward and more connected to the BVI falters. Those matters which Mr. Brookes has pointed me which relate to the business of the company and correspondence taking place in other jurisdictions which led up to the declarations of trusts and the executed instruments of transfers are likely relevant; the court is not satisfied that they are not. All of these documents were signed in Hong Kong. Those discussions and events which led to those documents also took place in Hong Kong. The declarations themselves declared that they were to be governed by the laws of Hong Kong. The business is primarily being conducted in Hong Kong and all the parties reside in that jurisdiction.

[67] As the OECS Court of Appeal recently held in Anjie Investments Limited and another v Cheng Nga Yee and another[15]:

> *"The residence/convenience of witnesses is a factor which is at the core of the question of the appropriate forum for the trial of a claim. Its importance is not to be diluted by a consideration that BVI incorporators should expect to have to travel to the BVI to attend court proceedings. This is a consideration which would be applicable to matters concerning the membership and administration of such companies, which were not the issues involved in this case. The issues in this case concerned the alleged negotiations and representations which took place in Hong Kong and documents which were signed in Hong Kong. These are not domestic issues in respect of which persons should have to contemplate travel to the BVI."*

[68] The Court of Appeal in Thornton Tomasetti v Anguillan Development Corporation Ltd.[16], also addressed the relevance of events taking place and witnesses living in the foreign jurisdiction. This was a claim for breach of contract and negligence which allegedly took place in New York. Using that as a starting point the Court of Appeal considered the fact that all of the many relevant witnesses were in New York State meant that substantial justice would not be done in the local jurisdiction.

[69] In my view, even though the claim as pleaded arguably relates to the ownership and the administration of a BVI company, it is ultimately one in which the dispute relates to the

[15] BVIHCMAP2016/0003 Claim No. BVIHC (COM) 2015/0060
[16] [2015] ECSCJ No. 203

execution of the declarations of trust and the Instruments of transfer. This being so, the discussions and events leading up these documents are not domestic issues. All of the preceding and relevant events appeared to have taken place in Hong Kong. It would hardly have been in the parties' contemplation to have to come to the BVI to resolve issues arising from the declarations and the instruments of transfer. For these reasons, whether or not the burden is on the claimants, the court is not satisfied that the BVI is clearly or distinctly the appropriate forum, and that in all the circumstances of this case, service of the proceedings on D3 out of jurisdiction is now set aside.

[70] I did not consider that the costs expended on this claim so far was relevant to find connection. Costs would always be incurred in any claim and forum challenges would go nowhere if it were simply on how much a claimant has already expended; real connectors must be found in other factors. I have reminded myself that 'it cannot normally be right to take into account costs which have been expended as a result of the [claimants'] attempt to establish BVI jurisdiction'[17].

Non-disclosure and Other Matters

[71] In the exercise of my discretion, I have also given consideration to the applicant's claims of material non disclosures of the part of the claimants at the ex parte hearing. The governing law clause and the arbitration clause were pointed out as matters not brought properly to the court's attention.

[72] It is no doubt true that important features of a case should not be hidden away in exhibits and left to the court's industry. A party making an ex parte application to serve out of jurisdiction must be sensitive to matters which showed connection to both the local and any foreign jurisdiction and ensure that these are brought to the court's attention; it should not be left to the court's industry to discover these among the attached documents and correspondence.

[17] *Nilon at paragraph 65*

[73] It is also accepted that if there is a 'failure to make full and fair disclosure' on the ex parte application, the court 'would be justified in discharging the order, even although the party might afterwards be in a position to make another application'[18]. Even so, the point has also been made that the application threshold test does not require examination of the merits of the case, and so an applicant's failure at the ex parte hearing to canvas the merits of the defendants' defence may likely be regarded as immaterial and any such failure would not justify the setting aside of service.[19]

[74] The matters which were complained of in this case amounted in part to matters which could be considered part of D3's defence. Further, the Court could make no finding that the non-disclosures complained of were an attempt to deliberately mislead the court. In any event, in the circumstances of this case, if the BVI had been shown clearly or distinctly to be the appropriate forum, the 'non-disclosure' complaint would not have operated to cause this court to set aside the permission to serve out.

[75] A point was taken as to the Arbitration clause contained in the Articles of Associations binding 'members of the company'. It was argued that this was a separate reason why this claim should be stayed. It would seem to me that the Company has already taken a stance that these claimants are not 'members' of the company and there is really this preliminary issue to be determined as to whether they are first entitled to be treated as shareholders. In these circumstances this court would not have exercised its discretion to stay the proceedings on this basis.

[76] I have considered the points related to the claimants related to the failure to serve all of the required documents when claim was served. This, it was asserted was in breach of CPR 11.5 which provided that certain named documents are to be served whenever a claim is served out of jurisdiction pursuant to CPR 7.3.

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[18] The Hagen [1908] P 189 at page 201 -per Farwell L.J.

[19] Craig Reeves v Platinum Trading Management Limited - [2008] ECSCJ No. 144

[77] This court was informed at the hearing that all of the documents which do exist were in fact served. It was even suggested by Mr. Brookes that the prejudice which might have been initially caused was reduced by the subsequent service of the 'missing' documents. At this point, this was not a factor which affected the court's discretion to set aside service.

[78] Two other matters were pointed as being breaches of specific rules of CPR (CPR 7.6 and CPR 8.1(4) and (5)). These were not included as grounds on the application and for this reason this court will not consider them on this application.

The Application by D1

[79] The application by D1 is an application going to the court's jurisdiction, specifically seeking orders two orders, namely:

(a) An order under CPR 9.7A to stay these proceedings against the first defendant; and

(b) A declaration that the court should not exercise it jurisdiction in respect of the claimants' claim herein."

[80] The application was based on two grounds. First, it was contended that that the relief on the Fixed Date Claim seeking a declaration that resolutions passed by the claimants acting as shareholders of D1 did not disclose no reasonable cause of action, with no reasonable prospect of success and was further frivolous and vexatious as the claimants were not registered as shareholders of D1 when they purported to make these resolutions. Second, as an additional or alternative ground, D1 contended that the BVI is not clearly and distinctly the natural and appropriate forum for the adjudication of the claimants' claim, in that all the significant factors are with Hong Kong and any connecting factors with the BVI are insufficient or irrelevant.

[81] D1 relied on all the evidence which had been filed in the matters by the claimants and D3 as well as submissions made on the first application.

[82] Apart from the arguments taken by Mr. Ferrer related to the cause of action on the first application, learned counsel also argued D1 has no entitlement to challenge jurisdiction as it has filed and served an 'unequivocal acknowledgement of service'. He points out that there is no application for an extension of time before the court.

[83] Mr. Brookes has effectively asked this court to consider that when service was in fact effected on D1, it was service of the original Fixed Date Claim which was primarily a rectification application, and so that the acknowledgement of service filed in response to that should not bar D1 from taking a jurisdictional point now. He relied on all of his previous arguments taken for D3 to show that there was no real dispute against D1.

[84] On this application for a stay, jurisdiction being as of right against a defendant properly served within jurisdiction, it would have been for this defendant to show that there was a more appropriate forum to try this dispute.[20]

[85] Quite apart from any issue related to the 'unequivocal acknowledgement of service', I have already found on D3's application that the Amended Fixed Date Claim reveals a real issue to be tried between the claimants and D1 and D2, and that jurisdictional gateways are available for service out, but that the claimants have not shown that the BVI is clearly and distinctly the appropriate forum to try this dispute.

[86] For all the reasons given above, this court is satisfied that Hong Kong is where the case may be tried "suitably for the interests of all the parties and for the ends of justice'[21].

[87] In these circumstances, a stay of these proceedings is granted against D1. In the interests of justice, it would be improper to try this claim against the remaining defendant, and so the court will also grant the relief being sought on this application.

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[20] Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460

[21] Spiliada Maritime Corp v Cansulex Ltd, The Spiliada [1987] AC 460 at 482 per Lord Goff of Chieveley, citing in turn Lord Kinnear in *Sim v Robinow* (1892) 19 R (Ct of Sess) 665 at 668

[88] The order of the court is as follows:

(a) An order is granted under CPR 9.7 setting aside service of the proceedings on the third defendant which took place on or about the 5th November 2016.

(b) An Order is granted under CPR 9.7 staying these proceedings against D1;

(c) The Court declines jurisdiction in respect of the claim.

(d) Costs to be assessed if not agreed.

[89] Finally, I wish to thank all Counsel for their assistance.

…….
Darshan Ramdhani
High Judge (Ag.)