EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE CLAIM NO. BVIHC(COM} 2015/0060

IN THE MATTER OF TIAN LI HOLDINGS LIMITED

AND IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT 2004 BETWEEN:

[1] ANJIE INVESTMENTS LIMITED

[2] TIAN LI HOLDINGS LIMITED

Applicants/Defendants

And

[1] CHENG nga YEE

[2] CHENG Nga MING VINCENT

Respondent/Claimant

Appearances:

Mr Mathew Hardwick QC and with him Mr Richard Evans and Mr Murray Laing for the First Defendant/Applicant

Mr. Matthew Collings QC and with him Mr. Mark Rowlands for the Claimants/Respondents

2016: January 21; 29.

Application to strike out, alternatively, to stay the Claim-CPR 26.3 and 9.7A - Whether claim for rectification of share register premature and ought to be struck out - Application of forum non conveniens principles - Whether BVI or Hong Kong is the

more appropriate forum- effect of non-exclusive jurisdiction and forum non conveniens waiver clauses in agreement.

JUDGMENT

The Application

[1] FARARA J [Ag): By Notice of application filed 16 June 2015, the First Defendant, Angie Investments Limited, a company incorporated under the laws of the British Virgin Islands, applied for "an Order striking out the Claim herein against the First Defendant, alternatively, staying all proceedings in this action against all Defendants."1 The grounds of the application, as set out in the Notice, are as follows:

(1)The dispute between the Claimants and the First Defendant over the lawful ownership of the shares in the Second Defendant, Tian Li Holdings Limited ("the Company), a company incorporated in the BVI, has 'negligible connection' with the BVI, and Hong Kong is clearly and distinctly the more appropriate forum for the resolution of the dispute;

(2) The Share Purchase Agreements entered into by the parties contain a non

exclusive jurisdiction clause in favour of the courts of Hong Kong;

(3) All potential witnesses and the natural persons involved with the dispute are resident in Hong Kong, or the People's Republic of China ("PRG"), speak either Mandarin or Cantonese as their first, and in most cases, only language or speak English as a second language;

(4) All documents likely to be disclosed in relation to the dispute are either in Hong Kong or the PRC; and

(5) The claim for rectification of the share register of the Company is premature and should be stayed pending resolution of the dispute itself.

[2] A draft order2 accompanied the Notice of Application. On its face it seeks an order striking out the Claim against the First Defendant, and a stay of these proceedings against the Company, pending determination of the dispute by the courts of Hong

2 Tab 2

Kong as to whether the Claimants are entitled to have their names entered on the

1 See Tab 1

Register of Members of the Company. The terms of the draft order is therefore at some variance with the Notice of Application, since the latter seeks a stay against all Defendants and the draft order seeks a stay only against the Company, the Second

Defendant. Some heavy weather has been made of this difference by Mr Collings QC, learned counsel for the Claimants. As I see it, this is a non-point. The important consideration is that the Notice of Application seeks, in the alternative, a stay against both Defendants. The primary relief sought is to strike out the claim against the First Defendant only.

[3]The Application is supported by the affirmation of Wu Mainquing, also known as Robert Woo (Mr Wu) together with Exhibit "WM-1" filed 16 June 20153. He is said to be one of the two directors of the Company and to have been authorised by the sole director of the First Defendant to make the affirmation on its behalf. The Applicant also relies on the Second Affirmation of Mr Wu filed 18 November 20154 in response to the evidence filed on behalf of the Claimants.

[4] The Claimants filed two affirmations in opposition to the Application. These are the

Affirmation of Cheng Kong Kei (Mr Kei) filed 30 July 2015, together with Exhibit "AC-1"5. He is a partner in the law practice of Cheng & Cheng in Hong Kong. They also rely on the Affirmation of Cheng Nga Ming Vincent {the Second Claimant) filed 30 July 2015, together with Exhibit "VC-1"6.

The Parties

[5] The First and Second Claimants are sister and brother respectively, both of whom reside in Hong Kong, as stated in the Claim Form and statement of claim7. The First Defendant, Angie Investments Limited ("Angie Investments") is a company incorporated in the BVI, as is the Second Defendant, ("Tian Li" or "the Company").

3 See Tabs 5 and 6

4 See Tab 11

5 See Tabs 7 and 8

6 See Tab 9 and 10

7 See Tabs 3 and 4

The Claim

[6]By the Claim Form issued 20 May 20158, the reliefs sought by the Claimants are

(i) a declaration that they are the owners of 1000 shares respectively in the Company ("the disputed shares"), (ii) rectification of the Register of Members of the Company to record them as the owners of the disputed shares, and (iii) further or alternatively, damages (together with interest thereon).

[7]In the statement of claim filed 20 May 2015, the same three reliefs are sought by the Claimants. However, the Claimants plead their case against the Defendants in the

statement of claim in this way. At paragraphs 16 and 17, the Claimants plead two categories of representations, which they say were made to them on various dales between November 2011 and February 2014 by Dr Cho, Mr Lin, Mr Zang and Mr Cao (together with Mr Wu, who is said to have been fully aware of events), and which were both either false or fraudulent. None of these named persons are parties to these proceedings. However, it is pleaded at paragraph 5 of the statement of claim, that Zhongyuan (Ms Zhang) "is and was at all material times, sole shareholder and director of the [First Defendant]. Ms Zhang's knowledge is to be imparted to [the First Defendant]." The two categories of representations pleaded are 'the Investment Representation'9 and 'the Representation of lntent'10.

[8] At paragraph 20, the Claimants plead that, in reliance on these two representations, they were induced to enter into and to execute a suite of agreements and documents. These included two sale and purchase agreements {the SPAs) for the sale of their respective shares in the Company to the First Defendant, letters of resignation as directors of the Company, and a written resolution of the directors of the Company confirming their resignation as directors and the appointment of Zhang Zhongyuan and Wu Mianqing as directors of the Company1. 1 These are all conveniently referred to in the statement of claim as 'the

8 See Tab 3

9 See para 16

10 See para 17

11 See Exhibit "WM-1" to Affirmation of Wu Mianqing (Mr. Wu)

Documents'. However, although not listed at paragraph 20, the Claimants also signed instruments of transfer of their respective shares in the Company to the First Defendant.12

[9] At paragraph 21 of the statement of claim, the Claimants also plead that the Documents were not in fact signed on the various dates listed at paragraph 20, and they 'did not pay attention to the Documents, expecting them to be of no legal effect, and not to be acted on, without their prior consent.' Most importantly, it is pleaded at paragraph 22:-

"For the aforesaid reasons, the Documents were not intended to create legal relations or to be acted upon without (the Claimants] prior agreement or consent, and were signed by the Chengs for the sole purpose of demonstrating to the individual in the PRC that PRC citizens were effectively in control of (or could be in control oQ, and owned (or potentially owned), the Company and therefore both that PRC citizens were in control of Smartpay and were capable of transferring shares in Smartpay held by the Company in the event that suitable terms could be agreed."

[10] This pleading seems to suggest that the Claimants agreed to create a false state of affairs regarding the true ownership or control of the Company and hence Smartpay, so

as to induce the 'wealthy individual' in the PRC to invest in Smartpay, to facilitate its acquisition of assets in the PRC, and generally to cooperate with Smartpay in respect of its business, in return for equity in Smartpay13.

[11] At paragraphs 23 the Claimants plead further, that when they became concerned that the Documents (which they had handed over to representatives of the First Defendant having executed them) might nevertheless be acted upon without their

1, See para 16(b) SOC

12 See ExhibitWMI Tab 6 pages 113, 115and 118

consent, they passed a written resolution on 19 November 2014 confirming that Mr Wu and Ms Zhang, were not to be appointed directors of the Company, and had no authority to act on its behalf. A copy of this resolution was sent to Smartpay on 14 January 2015 by the Claimants' Hong Kong solicitors. Apparently, this then led to the Hong Kong solicitors for the First Defendant and Mr Wu and Ms Zhang, on 20 January 2015, writing to the registered agent for the Company in BVI, requesting that the Register of Members be changed to reflect the First Defendant as the sole shareholder. It also prompted the First Defendant to issue a Stop Notice in BVI on 28 January 2015.

[12] Accordingly, the Claimants plead that the Documents were of no legal effect, and the steps taken by the First Defendant to present them to the Company and to have the Register of Members changed to reflect the First Defendant as the sole holder of the disputed shares, were a nullity, and the disputed shares remain the property of the Claimants14. They therefore claim an entitlement to declarations "that they are the legal (and for the avoidance of doubt, beneficial) owners of the entirety of the shares in the Company..."15 . This is important, particularly when I come to consider and apply the principles applicable to a rectification claim under Section 43 of the BVI Business Companies Act 2004, and the decision of the Privy Council in **NiIon.** But more about that below.

[13] The Claimants also plead that the two representations, which led to them execute and handing over the Documents to the representatives of the First Defendant, were made fraudulently by the named individuals on behalf of the First Defendant and with its knowledge1 6. These representations were knowingly false in that there was in fact no such 'wealthy individual' interested in investing in Smartpay,17 and were made dishonestly, and were acted upon by them. At paragraph 32 of the statement of claim, they plead in these terms-

14 See para 27 SOC

15 See para 28 SOC

16 See para 29 SOC

17 See SOC para. 3

"If, contrary to the Claimants' **primary contention,** the Documents are of any legal effect, the Claimants are entitled to their rescission on the ground of fraudulent misrepresentation, and to declarations that they are the owners of the shares in the Company..." (emphasis added)

[14] The rectification claim is pleaded in this way at paragraph 34:-

"Further, **insofar as possible in this action,** the Claimants seek rectification of the Register of Members of the Company to restore their names as the owners of the shares, as pleaded above. **Alternatively,** the Claimants reserve the right to make an application to rectify the Register of Members in light of the declaratory relief sought in this claim." (emphasis added)

[15] Mr Collings, on behave of the Claimants, remarked during the course of his submissions in opposition to the Application, that the rectification claim was so pleaded with the Privy Council's decision in **Nilon** in mind. However, it is clear from the prayer, that one of the reliefs being sought by the Claimants is rectification of the Register of Members of the Company.

[16] I should add here for completeness, that in its evidence in opposition to the Application, the Claimants rely on two matters of significance. The first is that Mr Kei, a lawyer in Hong Kong, in his Affirmation in support of the Application, denies certain factual assertions made by Mr Wu in his First Affirmation. These include the avenment that he, Mr Kei, was involved in the negotiations surrounding and advised the Chengs in relation to, the purported transaction, whereby it is alleged that the disputed shares were sold by the Claimants to the First Defendant. He also denies being present at any meetings relating to the deal, and deposes that he does not know Ms Zhang or Mr Wu, and none of the alleged meetings took place in his office at any time, nor were any of the Documents signed in his office1 8.

18 See Affirmation of Cheng Hong Kei, Tab 7 para 9 to 12

[17] The second matter, although this is not pleaded in the statement of claim, which is addressed by Mr Kei, is that as far as he is aware, the Chengs did not receive any 'consideration' in connection with the purported transaction. The matter of no consideration is also addressed at paragraph 17 of the Second Claimant's Affirmation[19] where he states: "I can categorically confirm that this did not happen. We [referring to his sister, the First Claimant, and himself did not receive any consideration, for our shares in the Company." As mentioned, the pleaded case does not rely on a total failure of consideration, but on the Documents being of no legal effect because they were never intended to be of any legal effect and were not to be used without the prior consent of the Claimants. It may be that implicit in this plea, is an assertion that no consideration was paid by the First Defendant to the Claimants **for** the transfer of the designated shares in the Company. The Claimants also plead, as a secondary or alternative case, that

if the Documents are of any legal effect, they are entitled to have them rescinded on the ground of fraudulent misrepresentation.[20]

[18] Mr. Wu addresses the matter of consideration for the sale of the disputed shares, at paragraph 18 of his First Affirmation, by referring to clause 3 of the First SPA, whereby the parties confirmed that a consideration of fair value had been paid by Angie [First Defendant] as Purchaser to [the Claimants] as Vendors.21 The same provision is to be found in the Second SPA22. In his Second Affirmation, Mr Wu does not address the issue of no consideration being paid for the purported sale of the disputed shares to the First Defendant. This has been the subject of quite forceful adverse comment by Mr Collings during his submissions. In this regard, it is to be noted that the SPAs simply states that "[t]he consideration of a fair value has been paid by the Purchaser to the Vendors." 23 No actual sum is stated and thus far no proof of payment has been produced by the First Defendant in these

19 See Tab 9 para 17

20 See para. 32 SOC 21 See Tab 5 para 18 22 See para 22

23 see clause 3.1 of the first SPA at Tab 6 page 77

proceedings. Likewise, the 'Sold Notes'24 and Instrument of Transfers25 all speak of 'fair value'. This is a matter which I will have to return to when I come to consider which party has 'the better of the argument' in my analysis of the forum non conveniens challenge.

Should the claim for rectification be struck out or stayed?

[19] Section 43 of the BVI Business Companies Act 2004 states:-

(1) If

(a) information that is required to be entered in the register of members under section 41 is omitted from the register or inaccurately entered in the register, or

(b) there is unreasonable delay in entering the information in the register, a member of the company, or any person who is aggrieved by the omission, inaccuracy or delay, may apply to the Court for an order that the register be rectified, and the Court may either refuse the application, with or without cost to be paid by the applicant, or order the rectification of the register, and may direct the company to pay all costs of the application and any damages the applicant may have sustained.

(2) The Court may, in *any proceedings under subsection (1), determine any question relating to the right of a person who is a party to the proceedings to have* his *name entered in or omitted from the register of members, whether the question arises between*

(a) two or more members or alleged members, or
(b) between members or alleged members and the company.

[24]Tab 6 page 114

[25]Tab 6 page 113

and generally the Court may, in the proceedings, determine any question that may be necessa,y or expedient to be determined for the rectification of the register of members.

[20] The most recent and authoritative learning on a section 43 application, is the decision of the Privy Council delivered 21 January 2015 in**Nilon Limited and another v Royal Westminister Investments S.A. and others** [2015] UKPC 2. The main issue before the Board on appeal from the judgment of the Court of Appeal, was whether it was competent for an applicant to bring proceedings under section 43 for rectification of the share register of a BVI company, when the reason or basis for such rectification was an "untried allegation that a defendant has agreed to allot shares..." in the company to the applicant/claimant26. The opinion of the Board was delivered by Lord Collins who, having reviewed a long line of authorities, concluded that the decision of the English Court of Appeal in ***Re Hoicrest Ltd*** [2000] 1 WLR 414 to the effect that where there is a claim for rectification under the equivalent section 125(3) of the English statute, it was sufficient for the applicant to have a prospective claim and not an immediate right against the company for rectification, stood alone and was not good law27. The essence of this point is capture in this statement of Lord Collins: -

turned on the question whether proceedings for rectification are a

"[48]....*Re Hoicrest*...stands alone in being an actual decision which

permissible vehicle for determining a dispute about beneficial ownership, and whether they can be used not only by a person seeking registration of a share transfer, but also by a person claiming an order for transfer of shares."

[21] Of importance also is this statement at paragraph [37] of the opinion:-

"[37] .....from the earliest days of the legislation, the courts have made it clear that the summary nature of the jurisdiction makes it an unsuitable vehicle if there is a substantial factual question in dispute.."

26 See per lord Collins at para.1

27 See per lord Collins at paras 38 and 48

[22] And at paragraph [40]:-

"[40] The great majority of the cases on the power of the court to order rectification involve a situation where a transfer has been executed but not registered, and the applicant seeks to be put on the register."

[23] The *ratio decedendi* is stated by Lord Collins at paragraph [51] in these terms-

"[51] In the view of the Board, proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependent on the conversion of an equitable right to a legal title by an order for specific performance of a contract. It follows that Re *Hoicrest* was wrong as a matter of principle, however sensible it might have been as a matter of case management."

[24] The clear cautionary principle is that the court must not allow considerations of

• case management, or what may be considered best from a case management perspective, to detract from the real purpose and jurisdiction of section 43 which is not to be used to decide substantial factual issues or disputes over the beneficial ownership of shares in a BVI company. Such matters are to be decided independent of section 43 under the court's general jurisdiction to decide disputes between rival parties. Once the substantive dispute has been decided in favour of the claimant, he is only then entitled to invoke the court's jurisdiction and powers under section 43 to secure his registration on the register as the legal owner of those shares.

[25] In **Nilon,** the Board concluded that the Mahtani parties had no present right to registration of the shares, but only a prospective one which can only arise once they have been successful in their principal claim. Accordingly, the case was "not a suitable one for the application of what has always been meant to be the summary procedure which, in the BVI, is contained in s 43 of the BVI Act."28 In the

28 See para. 53

particular circumstances of that case, the Board concluded that the appropriate step was not to stay or adjourn the rectification application, but to strike it out29.

[26] Mr Hardwick QC, learned counsel for the Applicant, submitted, based on the principles in **Nilon,** that it followed that the Claimants have no present right to rectification, but only a perspective right, in the event that they are successful on their substantive claim at trial3o. Accordingly, their claim to a rectification order, as one of the reliefs sought in the statement of claim, ought to be either stayed or struck out.

[27] Mr Collings QC, learned counsel for the Claimants disagrees. Firstly, he submits that Mr Hardwick has mischaracterised the Claimants' claim. The principal claim is that the Documents, executed by the Claimants and used by the First Defendant to obtain registration of it as the holder of the disputed shares in the Company, are null and void and of no legal effect and, consequently, all steps taken in reliance upon them are also ineffective. The effect of this would be, if the Claimants succeed in their Claim, to put them back in the position they were in prior to the Documents being submitted to the registered agent of the Company in BVI, which resulted in the changes being made to the Register of Members and Register of Directors. Accordingly Mr Collings submits, the Clamants' primary case is not based on a claim of fraudulent misrepresentation, which is

put as an alternative or further claim. Thus the claim to rectification of the Register of Members of the Company to restore the Claimants as the owners of the disputed shares, is based not on their primary claim, but on their secondary claim of fraudulent misrepresentation, and there is no proper basis for striking out the rectification claim based on the principles in **Nilon.**

[28] Secondly, Mr Collings submits, that in any event, the Claimants' claim is to the legal title to the disputed shares. In this regard, he points to paragraph 28 of the statement of claim where it is pleaded that the Claimants are entitled to a

29 See para.53

30 See Applicants' Skeleton Argument at para. 24

declaration "that they are the legal (and for the avoidance of doubt, beneficial) owners of the entirety of the shares in the Company..." The significance of this in the context of the **Nilon** decision, is that section 43 is ccncemed only with claims to the legal title of shares, and not to the determination of issues concerning the beneficial ownership of shares.

[29] A further point made by Mr Collings is that the Claimants have not brought a rectification claim against the First Defendant, Angie Investments, but only against the Company. Of course, because the relief under section 43 is for rectification of the company's share register, any claim must of necessity involve the ccmpany, even where it may be necessary and proper to include another member as a party to those proceedings. Furthermore, neither paragraph 34 or relief no.2 in the statement of claim state that the claim for rectification is against the Company only. Indeed, both the claim for declarations and for rectification for that matter, are, as currently pleaded, against both Defendants, that is, Angie Investments, the current registered owner of the disputed shares, and the Company itself.

[30] Mr Collings next point on this aspect, relates to the reliefs sought in the First Defendant's Notice of Applicatio3n1, particularly paragraph 4, and also paragraph 2 of the accompanying draft order32, both of which are asking for all further proceedings against the Company to be stayed and not struck out. He remarked that the Company has thus far, quite ccrrectly, taken an entirely neutral position in this litigation, and once the trial has taken place and the Claimants prevail in their claims against the First Defendant, the court can then proceed to order rectification of the Register of Members by making an order against the Company.

[31] Additionally, he submits, the claim in this case can be distinguished from the claim in **Nilon.** In this case, the claim is brought against the First Defendant, a BVI Company, as the alleged wrongdoer, in relation to shares in another BVI ccmpany, the Second Defendant. Whereas, in **Nilon** the company itself had to be made the

32 See Tab 2

31 See Tab 1

'anchor' defendant. Here the substantive claim is not against the Company, but against Angie Investments. Accordingly, he submits, the only just and sensible course is for the court to allow the rectification claim to remain as part of the proceedings, and to proceed to deal only with the substantive claim against Angie Investments. Once that has been determined, then the rectification claim under section 43 can properly be proceeded with by the Court.

[32] Having considered the submissions of learned counsel for the parties on this issue, I am firmly of the opinion that the rectification claim ought to be stayed. I am not persuaded that it ought, in the particular circumstances of this case, and also taking into account what Lord Collins said at the end of paragraph [53] in **Nilon** and the characterization of the Claimants' claim by Mr Collings, to be struck out, unless I decide to strike out the entire Claim on the ground of *forum non conveniens.*

[33] Clearly, based on the exposition of the law in **Nilon** relating to section 43 applications, it is not permissible for a rectification claim under that section to be entertained by the court as part of the determination of a substantive dispute, involving serious questions of fact and law, over the ownership of the disputed shares, whether legal or beneficial ownership. This is not a simple matter of the entitlement to be registered in the Register of Members on the basis of a signed instrument of transfer of the shares. In fact, the Claimants have no transfer of shares for presentation, and they do not rely on any to base their claim. They say that the instruments of transfer of the disputed shares upon which the First Defendant obtained registration as the owners of the legal title to the disputed shares, are null and void and of no legal effect. Accordingly, the registrations or changes to the register to give effect to those transfers, ought to be similarly declared null and void.

[34] As regards striking out the Company as a party to these proceedings, this will also depend upon whether I conclude that BVI is distinctly the more appropriate forum for the trial of the dispute between the Claimants and the First Defendant, or whether Hong Kong is the more appropriate forum.

Is BVI the more appropriate forum or is Hong Kong?

[35] This issue has been canvassed at some length by counsel for the parties in their respective submissions. A consideration of this issue on the particular parts of this case, does not just involve applying the principles of *forum non conveniens* as expounded by Lord Geoff in **Spiliada Maritime Corporation v Cansulex Ltd** [1987] 1 AC 460. In this matter, Mr Hardwick QC for the ApplicanUFirst Defendant also relies on the effect in law of the Hong Kong non-exclusive jurisdiction clause and on the *forum* non *conveniens* waiver clauses in the Share Holders Agreements, forming part of the suite of documents which the Claimants executed and handed over to the representatives of the First Defendant, and upon which they became registered in the register of members as the owners of the legal title to the disputed shares.

[36] As to these clauses, Mr Collings, while accepting as a matter of law, on the authorities, the force of any submission based on the forum waiver clauses in the SPAs, contends that (i) these are the very same documents which the Claimants allege are null and void and of no legal effect; and (ii) in any event, upon a proper examination of the Documents and the evidence in the Affirmations of Mr Wu, the First Defendant does not have 'the better of the argument'. In his submission, any advantage that would normally flow to an applicant with the benefit of a forum non conveniens waiver clause, does not apply in the circumstances of this case and, accordingly, the question of whether BVI is the more appropriate forum for the trial of the claim between the Claimants and the First Defendant, has to be decided solely on the principles in **Spiliada.**

The Governing Law, Jurisdiction and Forum Non Conveniens Waiver Clauses in the

SHAs

[37] The governing law clause in the SHAs in favour of Hong Kong states:-

"11.1 this Agreement (together with all documents referred to in it) shall be governed by and construed and take effect in accordance with the laws of Hong Kong (which each of the Parties considers to be suitable to govern the international commercial transactions contemplated by this Agreement)

[38] The jurisdiction clause in the SHAs state:-

"11.2 with respect to any question, dispute, suit action or proceedings arising out of or in connection with this Agreement ("the Proceedings") each party irrevocably:

(A) submits to the [non-exclusive/exclusive] jurisdiction of the courts of Hong Kong; and

(B) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such proceeding have been brought in an inconvenient forum and further waives the right to object with respect to such Proceedings, that such court does not have any jurisdiction over such Party."

[39] The 'other jurisdictions' clause in the SHAs state:-

"11.3 nothing in this Agreement precludes either Party from bringing Proceedings in any other jurisdiction nor will the bringing of Proceedings in any one or more jurisdictions prelude the bringing of Proceedings in any other jurisdiction."

[40] It is submitted by Mr Hardwick for the First Defendant, and this is accepted as a matter of principle by Mr Collings for the Claimants, that by the 'other jurisdiction' clause, if one party commences proceedings in any jurisdiction other than the contractual jurisdiction, that would not preclude the other party from commencing proceedings in the contractual jurisdiction. Essentially, the contractual jurisdiction in this matter, as

submitted by Mr Hardwick, is Hong Kong, by virtue of the non exclusive jurisdiction clause and, by the second limb of that clause, the Claimants agreed to waive any objection to proceedings being brought before the courts in Hong Kong.

[41] In this matter, whereas the contractual documents between the parties identify an agreed jurisdiction (namely Hong Kong), the English courts have emphasised the importance of keeping parties to their bargain, and there must be "strong cause or strong reason" to override that agreement. My Hardwick cites in aid of this principle, paragraphs 10.05 to 10.13 and 10.35 to 10.36 from the text *Jurisdiction and Arbitration Agreements and their Enforcement*, Third Edition by David Joseph QC. He also refers, at paragraph 34 of the First Defendant's skeleton argument, to a number of decided English cases where this principle has been authoritatively stated.

[42] Specifically regarding the 'non-exclusive' jurisdiction clause, Mr Hardwick relies on this extract from the judgment of Toulson J at first instance in **Highland Crusader v Deutsche Bank** (2009] 2 Lloyd's Rep 617 at [50.9] and [64] -

arguing that the forum identified is not an appropriate forum on grounds

"A non-exclusive jurisdiction agreement precludes either party from later

foreseeable at the time of the agreement, for the parties must be taken to have been aware of such matters at the time of the agreement..."

[43] He submits that such a non-exclusive jurisdiction clause as we have in the SHAs in this matter, "creates a strong prima facie case that the identified forum is the forum conveniens..."33

[44] This position is strengthened by the forum non conveniens waiver clause. It is a contractual commitment on the part of the parties to the SHAs not to put forward an argument that the agreed forum of Hong Kong is not the appropriate forum. Mr. Hardwick cites, from the plethora of decided cases on this principle, the judgment of Field J at first instance in **Bank of New York Mellon v GB Films** [2009] EWHC 2338 where he states-

33 See paragraph 10.36 in Joseph ibid

"....in such a case especially strong reasons will be required before the exclusive jurisdiction clause can be departed from on grounds founded on convenience..."

[45] However, Mr Collings for the Claimants makes the point that the Applicant does not in fact rely on the non-exclusive jurisdiction clause in the SHAs as a ground for striking out or staying the Claim. He refers, in particular, to paragraph 2 of the grounds in the Notice of Application where it is asserted that the dispute has a negligible connection with the BVI, and Hong Kong "being available to the parties for the purpose, are clearly and distinctly the more appropriate forum for the resolution of that dispute."

[46] For my part, I do not find much merit in this submission. It is clear that the Applicant is contending that Hong Kong is not only available, but is clearly the more appropriate forum for the resolution of the dispute between the Claimants and the First Defendant. In my view, the First Defendant is not precluded from relying on arguments based on the exclusive jurisdiction clause and forum non convenience waiver clauses, to say that Hong Kong is either an 'available' or 'more appropriate' forum. It is open to them to say that Hong Kong is available because the parties agreed in the contractual documents to it being the forum of choice for resolution of their disputes and, likewise, these clauses, including the forum waiver clauses, make Hong Kong distinctly the more appropriate forum.

[47] However, it is important for the court to consider whether the Applicant can rely, or the extent to which it can rely, on these clauses in the SHAs, being part of the Documents which the Claimants contend, as a primary plank of their pleaded case, are null and void and of not legal effect. This point is made at paragraph 5.2 of the Claimants' skeleton argument, and quite forcefully by Mr Collings in his oral submissions before me. Having cited from paragraph [17] of Lord Hoffmanns' speech in the House of Lords in **Fiona Trust & Holding Corporation and others v Privalov and others** (2007] 4 AER 951 at 958, where he dealt with the severability and validity of an arbitration clause notwithstanding the invalidity of the main agreement, Mr Collings submitted that where, as here, the grounds upon which the main agreements are invalid are the same grounds upon which these clauses are said to be invalid, they do not survive and cannot be severed. This is because the Claimants are saying in their pleaded case that 'the Documents', including the SHAs, were all null and void and of no legal effect, and they were never to be used without the consent of the Claimants.

[48] Mr Collings also makes the submission that where, as here, the Claimants are asserting that no consideration was paid for the shares, (even if the Applicant can rely on these clauses in the agreements), "ii is more difficult to argue that the institution of proceedings in BVI is a breach of contract," even in the face of a clause which confers jurisdiction on Hong Kong. In those circumstances, the application for a stay will be determined on the basis of the principles in **Spiliada,** but the fact that the parties have contractually chosen that foreign forum is clear evidence that it is an available forum.34

[49] Specifically as regards void contracts, Mr Collings submits that excising the jurisdiction clause from the main agreement so it can stand on its own as a separate agreement, is not likely in circumstances where, as here, the Claimants are alleging that no contract came into existence because of an absence of consideration _35

[50] This brings me to a consideration of which party has 'the better of the argument'36 In brief, Mr Hardwick submits, based mainly on the existence of the signed Documents, that the First Defendant clearly has 'the better of the argument'. After all, the Claimants did execute each of the Documents, not just share purchases agreements in respect of the sale and transfer to the First Defendant of the disputed shares, but the actual instruments of transfer. They even went further and signed letters of resignation as directors of the Company and written resolutions

34 See Dicey, Morris and Collins, 15• Edition at paras 12 to106

35 See Dicey, Morris and Collins on The Conflict of Laws, 15 edition at paras 12 to113

36 See Dicey, Morris and Collins on The Conflict of Laws, 15• Edition at paragraph 12 to 114.

accepting these resignations. In short, they signed and handed over all the documents necessary to effect the change in ownership of the disputed shares in the Company, and they did so with full knowledge of the implications and effect of such documents, and of the valuable interest in the company Smartpay. By contrast, Mr Hardwick categorises the Claimants' case as being nothing but pure conjecture.

[51] Mr Collings, recognising the importance of this issue, focused his submissions on what could be termed the lack of plausibility of what the First Defendant and Mr Wu have said in their respective Affirmations. He zeroed in on the issue of consideration, and the assertion by Mr Kei and the First Claimant in their respective Affirmations, that no consideration was paid or received for the alleged sale and transfer of the shares. The SHAs and other documents merely state that "fair value has been paid by the Purchaser to the Vendors." Likewise, the instruments of transfer and 'Sold Note' and 'Bought Note,' merely state 'fair value'. Furthermore, he contends, it would have been a simple matter for the First Defendant in his Second Affirmation in reply to the Second Claimant's Affirmation, in which he made the assertion that no consideration had been paid, to produce documentary proof of the actual payment or payments, but instead he remained altogether silent on this issue. Mr Collings also submits that, having regard to the value interest which the Company holds in Smartpay, any consideration paid for the disputed shares would have to run into millions of dollars.

[52] Mr Collings also points to the Affirmation of Mr Cheng Hong Kei, the lawyer in Hong Kong, who categorically denies any involvement whatsoever in the negotiations, and in advising the Claimants in relation to this purported transaction of the sale of their shares in the Company. He also avers that he never met either Ms Zhang or Mr Wu, and no meetings took place in his office in Hong Kong relating to this alleged transaction, nor were any of the documents signed in his office.

[53] As to which of the two parties can be said to have 'the better of the argument,' I can see the obvious force of the First Defendant's position, whereby they were provided with these fully executed documents, which were unquestionably signed by the Claimants, and which, on their face, evidence the transaction of the sale of the disputes shares in the Company to the First Defendant for valuable consideration. Furthermore, there is no written agreement or correspondence produced by the Claimants to back up their contention that these documents were not intended to be used at all or only with their consent. All of this, on its face, gives rise to a 'presumption of authenticity' in favour of the First Defendant's title to the disputed shares.

[54] However, the matters identified by Mr Collings certainly raises suspicions, especially the peculiar way in which the consideration has been stated in the documents, the absence (at least thus far) of any statement of what exactly the consideration was in terms of amount and currency, and of any proof of its payment. Concerns are also raised by the Affirmation of Mr Kei, in response to the First Affirmation of the Mr Wu, whereby

he refutes or seeks to refute each and every material factual matter relied on by Mr Wu concerning the negotiations leading up to, and the execution of, the Documents.

[55] Having taken all these matters into account, I am not satisfied that either party has 'the better of the argument' in this matter. These issues will have to be properly aired, examined and scrutinised at a trial, through the benefit of disclosure and cross examination of the witnesses on both sides. Accordingly, I conclude that neither party has the better of the argument. I must now go on to consider the matter based upon principles of *forum non conveniens.*

Forum Non Conveniens

[56] The principles were set out by Lord Geoff in **Spiliada37** They are:-

(a) The basis principles is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other vailable forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice;

(b) In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay;

(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, *ex hypothesis,* founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established.....In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is distinctly more appropriate than the English forum....I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas;

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in *the* direction of another forum....that which the action has the most 'real and substantial connection'. So it is for connecting factors in this sense that the court must look; these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction

....and the places where the parties respectively reside or carry on business;

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. It is difficult to imagine circumstances where, in such a case, a stay may be granted; and

(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be, if established objectively by cogent evidence that the plaintiff will not obtain justice in the foreign jurisdiction. On this inquiry the burden shifts to the plaintiff.

[57] These principles have been reformulated somewhat in*Dicey, Morris and Collins, The Conflict of Laws, 15 th edition at paragraphs 12-030* thus-

Firstly, the legal burden is on the defendant to persuade the court to exercise its discretion to grant a stay of the proceedings, although the evidential burden will remain with the party who seeks to rely on a particular matter in persuading the court to exercise its discretion in his or her favour;

Secondly, if the court is satisfied that there is another available forum which is a clearly more appropriate forum for the trial of the matter, the burden will shift to the claimant to show there are special circumstances by reason of which justice requires that the trail should take place in England;

Thirdly, the burden on the defendant is not just to show that England is not the natural or appropriate forum, he must establish that there is another forum which is clearly or distinctly more appropriate than England;

Fourthly, the natural forum is the forum to which the action has the most real and substantial connection. In determining this factor the court will consider a range of factors such as the convenience and expense of witnesses, the law governing the transaction, the places where the parties and the potential witnesses reside and whether the claim is part of a larger dispute and it would not be desirable to have fragmented proceedings ;

Fifthly, if the court concludes that there is no other available forum which is clearly more appropriate for the trial of the action, the court will ordinarily refuse the stay;

Sixthly, if, however, the court concludes that there is some other available forum which prima facie is clearly more appropriate, it will ordinarily grant the stay unless there are circumstances by reason of which justice requires that a stay should not be granted. In conducting this latter inquiry the court will consider all the circumstances of the case.

Seventhly, a stay will not be refused simply because the claimant will thereby be deprived of 'a legitimate personal or juridical advantage', provided the court is satisfied that substantial justice will be done in the available appropriate forum.

Is Hong Kong an available forum?

[58] The first limb of the **Spiliada** test requires the Applicant to show that there is another available forum which is more appropriate than the BVI for the trial of the Claim. The forum with which the claim has the most real and substantial connection. The burden of proof is on the First Defendant to establish this factor.38 The foreign court (in this case Hong Kong) will be considered 'available' to the Claimants if by the time of the application for the stay, it would have been open to the Claimants to bring proceedings before the courts in Hong Kong.

[59] In the instant matter, the alleged wrongdoer is a BVI company and the claim concerns shares in another BVI company. As a result, this court has personal jurisdiction over these two Defendants, Accordingly, the issue is not whether the Claimants have founded jurisdiction in the BVI, it is whether this court ought, on principles of *forum non conveniens,* to decline jurisdiction in favour of Hong Kong.

[60] It cannot be gained said that Hong Kong is not an available forum to the Claimants to bring this Claim. The matters the subject of the Claim, are said to have taken place either in Hong Kong or in the PRC. Furthermore, the laws and legal system of Hong Kong are based on the common law, similar to BVI, and Hong Kong is the non-exclusive forum purportedly agreed by the parties in the Documents, if valid. Also, the First Defendant has written indicating that it would be willing to accept service and defend proceedings brought in Hong Kong.39 Likewise, it cannot be said that the claim or some remedy (with the exception of rectification) which the Claimants seeks in these proceedings, will not be available to them in Hong Kong. The only question is whether Hong Kong is a more appropriate forum than BVI for the trial of the claim.

38 Dicey, Morris and Collins, The conflict of Laws, 15 edition at paragraph 12 to032

39 Mr Wu's First Affirmation at paragraph 36 and 37

Is BVI or Hong Kong the Natural and/or more appropriate Forum?

[61] The First Defendant submits that Hong Kong is the natural and more appropriate forum for the trial of this action. They say that all factors such as the parties, documents, witnesses, factual investigations, causes of action, law and jurisdiction clauses, point to Hong Kong as the natural forum40 .

[62] The Claimants submit that the BVI is the natural and appropriate more forum for the trial. II is the place with which the dispute has its most real and substantial connection41.ln this regard, Mr Collings, at paragraph 6.2 of the Claimants' skeleton argument, relied on some five factors, although in his oral submissions he conceded that his fifth factor was not a good point. The other four factors are:-

(i) The Shares are in a BVI company (the Second Defendant), accordingly the assets are within the jurisdiction.

(ii)While this is correct, the substantial dispute for determination by a court at trial concerns whether the Documents executed by the Claimants are null and void and of no effect and, hence, not capable of being used to effect a transfer of the disputed shares in the Company from the Claimants to the First Defendant;

The wrong was done in this jurisdiction, namely the removal of the Claimants from the Company's Register of Members and the substitution of the First Defendant, so the cause of action arises in this jurisdiction.

This is a factor in favour of BVI. The wrong being complained of is using the Documents, which are said to have been executed by the Claimants in Hong Kong having been induced to do so by two fraudulent misrepresentations, without the consent of the Claimants, and contrary to the agreement of the parties when the Documents were executed and handed over. The registration of the First Defendant on the Register of Members in respect of the disputed shares, was done in BVI, in furtherance of the wrong allegedly committed to the Claimants, that is, using the

40 See para. 39 onwards Applicants skeleton argument

41 See para. 6.1 Claimants' skeleton argument.

Documents in this manner contrary to the agreement that they were to be of no legal effect. Again this factor seems to me to favour either BVI as the more appropriate forum, or to be at least a neutral factor.

(iii) The wrong was done by a person in BVI, namely the First Defendant, which is sued in the jurisdiction as of right. Mr. Collings contends that this is a strong pointer and connecting factor with the BVI, and he relies on this passage at paragraph

[27] of the judgement of Rawlins J (as he then was) in **Bitech Downstream Ltd v Rinex Capital Inc** BVIHCV 2002/0233-

"While I agree with the thrust of these submissions, I do not think that the domicile of a company is necessarily the quintessential connecting factor or that it should be so as a matter of public policy. It is, like the law that governs the transaction or the issues for trial, a strong pointer or connecting factor. Like these, it is to be considered with other connecting factors." Indeed, the alleged wrongdoer is a BVI company, and as such, the BVI court has jurisdiction to try the Claim. This is an important and strong factor which,

coupled with the dispute being over shares in a BVI company, point in favour of BVI being the most appropriate forum.

(iv) BVI law applies to the claim in respect of the shares in the Company. Here Mr Collings cites *Dicey, Morris and Collins on the Conflict of Laws, 15th Edition, Rule 128 and paragraph 22-044* - "The law of the place of incorporation of the company decides how shares in the company may be transferred. If they may be transferred only by registration on a particular register, they will be regarded as situate at the place where the register is kept."

It is to be observed that this passage is concerned with the transfer of shares in a company and compliance with the law of the country of incorporation when transferring shares. In the instant matter, there is no issue pleaded regarding whether the transfer of the shares in the Company from the Claimants to the First Defendant was done in compliance with the laws of the BVI or indeed the Articles of Association of the Company. The question is whether the documents used in BVI to effect the transfer of the shares, in conformity with BVI law and the Articles of Association, were null and void and of no effect, a different issue and question. In my opinion, this question may involve issues of both BVI and Hong law, including the alleged failure of consideration.

[63] In my judgment, the BVI is as much the natural forum for the trial and determination of this Claim as is Hong Kong. The dispute has a connection with Hong Kong for a number of reasons. The negotiations took place in Hong Kong, the documents were prepared in Hong Kong, the agreement or understanding allegedly reached with regard to the Documents and how or when they may or could be used was made in Hong Kong. The Claimants and the principals of the First Defendant all reside in Hong Kong or the PRC, and any other witnesses on either side will come from either Hong Kong or the PRC. Essentially, this is a dispute between Hong Kong resident individuals and a BVI company, owned and controlled by persons resident in Hong Kong, concerning shares in BVI Company.

[64] Against this must be balanced the connecting factors with BVI. The dispute concerns shares in a BVI company, the alleged wrongdoer is also a BVI company, and the acts or wrong complained of, that is the submission of the Documents to the registered agent of the Company in BVI and the changes made to the Registers of Members and Directors based on these documents, all took place in BVI.

[65] The tort of fraudulent misrepresentation is alleged to have been committed in Hong Kong. All relevant communications between the parties or their principals took place in Hong Kong, and perhaps also in the PRC. In this regard, the dicta of Lord Mance's in **VTB Capital Pie v Nutritek International Corp** [2013] UKSC 5, a case concerned with the appellant being induced in London into entering into a facility agreement, is apposite:-

"51.The place of commission is a relevant starting pcint when considering the appropriate forum for a tort claim....The preferable analysis is that, viewed by itself and in insolation, the place of commission will normally establish a prima facie basis for treating that place

as the appropriate jurisdiction....The significance attaching to the place of commission may be dwarfed by other countervailing factors."

[66] There are some other factors, however, which also point to Hong Kong being the appropriate forum. These are the fact that in the Documents themselves, the parties clearly had in mind that Hong Kong law should govern, and the parties should submit to the non-exclusive jurisdiction of the Hong Kong court. This provision was coupled with a forum waiver clause. While I have accepted that these are the very documents, the validity of which are being called into question in these proceedings and, therefore, must not be overly relied upon as an important factor, the fact that they were executed by the Claimants is some pointer as to what the parties contemplated as the appropriate jurisdiction for the resolution of their disputes concerning those documents, and the shares to which they relate.

[67] I have already dealt with the residence of the potential witnesses. The evidence before me establishes that many of these witnesses speak either Mandarin or Cantonese as their native language, although some do also speak English. While the BVI Commercial Court can accommodate a trial involving such witnesses, with interpreters being sourced by the parties themselves, it is obvious that the Hong Kong court would have more facilities available to it than the BVI court, to property accommodate such trials. Likewise, interpreters fluent in such languages, would be more readily available in Hong Kong than BVI. However, I have been made to understand by counsel that court proceedings in Hong Kong are usually conducted in English. Also, the Commercial Court in BVI has accommodated trials involving parties from such jurisdictions who speak Mandarin or Cantonese

[68] As regards the inconvenience and cost related to having these witnesses come to BVI for a trial, this is certainly a consideration, but one which must not be overstated. This is so especially because persons who incorporate companies in BVI must contemplate that they may be required, in the event of disputes over or involving such companies, to have to travel to BVI to attend court proceedings.

[69] Finally, on this issue, it is submitted by the Claimants, that the remedy of rectification of the Register of Members of the Company is not available before the courts in Hong Kong. This is of course correct. That remedy is only available in BVI where the Company is incorporated. However, this is not unusual. The gravamen of the decision in **Nilon** is that the substantive dispute between the parties over the ownership of the shares must first be determined, often by the foreign court, and the claimant, if successful, can then bring a section 43 claim in BVI for rectification. It is also said by the Claimants that if proceedings are to be brought in Hong Kong, the parties **will** have to instruct new local counsel there (but not new leading counsel) and, therefore, incur further expense. While this may be an important factor in some situations, I do not regard it as much of a factor in all the circumstances of this matter. It is clear that both parties have lawyers in Hong Kong, who may already be seized of the dispute and the issues underpinning the claim.

Conclusions

[70] Having taken into account the various factors, in my judgment the BVI is the most appropriate forum for the trial of this claim. The weightiest factor is that the Claimants have founded jurisdiction in BVI as of right. The BVI court ought not to lightly disturb jurisdiction so established. This is a claim against a BVI defendant company concerning the disputed ownership of shares in a BVI company. It concerns on alleged wrong committed in BVI, that is, the wrongful submission and registration of documents which are said to be null and void and wholly ineffective in law. The changes effected to the Register of Members and Register of Directors, based on these Documents, took place in BVI. It is by these steps that the Claimant complains they were deprived of their shares in the Company.

[71] The BVI has personal jurisdiction over the alleged wrongdoer and the disputed shares are in a BVI Company. Issues concerning whether: (a) the documents were null and void and of no effect, and (b) the First Defendant, or persons on behalf of the First Defendant, made fraudulent misrepresentation to the Claimants as to why the Documents were required to be signed by the Claimants, while they likely will involve issues of Hong Kong law, they can, in my view, be properly address by this court, in the BVI. Furthermore, the laws of Hong Kong relating to these issues are unlikely to be substantially different from the corresponding laws of the BVI.

[72] In all the circumstances, BVI is the most appropriate forum or jurisdiction for the trial of this dispute. It is clearly and distinctly more appropriate than Hong Kong.

Orders

[73] The Claim for rectification is stayed pending determination of the substantive dispute in these proceedings.

[74] The Application to stay or strike out the Claim on grounds of forum non conveniens is dismissed.

[75] The Claimants are to have their costs of the Application to be assessed if not agreed.

Commercial Court Judge (Ag.)