

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0042-0046

BETWEEN:

[1] LIVINGSTON PROPERTIES EQUITIES INC
[2] NIMATI INTERNATIONAL TRADING LIMITED (Appellant)
[3] NAUTILUS SERVICES LIMITED (Appellant)
[4] GLOBAL MED SERVICES INC (Appellant)
[5] SEVAN PROPERTIES MANAGEMENT LIMITED (Appellant)
[6] RUMBAY ASSETS CORP.
[7] BANTER INDUSTRIES LIMITED
[8] VALERY ROGALSKIY
[9] DIMITRY POMYTKIN
[10] NEJDET BAYSAN (Appellant)
[11] KOPIST HOLDING LIMITED (Appellant)
[12] ITRADE FERTILISERS S.A. (Appellant)
[13] FABIO SCALAMBRIN (Appellant)
[14] DARLOW ENTERPRISES
[15] DARLOW INVESTMENT LP
[16] DEARBORN ENTERPRISES LIMITED (Appellant)
[17] GIANHILL MANAGEMENT LIMITED (Appellant)
[18] DREYMOOR FERTILISERS PTE LIMITED (Appellant)

Appellants/Defendants¹

and

[1] JSC MCC EUROCHEM
[2] EUROCHEM TRADING GMBH

Respondents/Claimants

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Anthony E. Gonsalves, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Moverley Smith, QC instructed by Carey Olsen for the
2nd – 5th Appellants/Defendants
Mr. Stephen Moverley Smith, QC instructed by Lennox Patton for the
10th – 13th Appellants/Defendants

¹ The 1st, 6th-9th, 14th and 15th named above are not parties to this appeal but are referred to in the judgment. The appellants/defendants in this appeal are identified by the word “appellant” beside their names.

Mr. Stephen Moverley Smith, QC, with him, Mr. Brian Child instructed
by Campbells for the 18th Appellant/Defendant
Mr. Justin Fenwick, QC, with him, Mr. George Spaulton and Mr. Jonathan
Addo instructed by Harneys for the Respondents/Claimants

2017: November 20, 21;
2018: September 18.

Commercial appeal — Interlocutory appeal — Stay of action on the ground of forum non conveniens — Applicable principles in selecting the most appropriate forum — Exercise of discretion by trial judge — Whether the learned trial judge erred in finding that BVI was the more appropriate forum — Application for permission to serve out of the jurisdiction — Requirements for grant of permission to serve out of the jurisdiction

These appeals are against the oral judgment of Wallbank J dated 1st November 2016 on two applications made by the appellants/defendants. In the first application, the 1st, 5th, 11th and 17th appellants/defendants (“the BVI defendants”) applied for a declaration that the court should not exercise its jurisdiction in respect of the respondents’/claimants’ claim, and/or for an order that the claim be stayed on the ground of forum non conveniens. In the second application, the 10th, 12th, 13th, 16th and 18th appellants/defendants (“the foreign defendants”), applied to set aside the order of Farara J granting permission to the respondents/claimants to serve the claim form outside the jurisdiction and/or to strike out the claim. Wallbank J dismissed both applications. The BVI defendants and the foreign defendants have appealed against his decision. For convenience, the respondents to the appeals will be collectively referred to as “the claimants” and the appellants as “the defendants”.

The 1st claimant, JSC MCC Eurochem (“Eurochem Russia”), is a Russian company trading in mineral fertiliser. The 2nd claimant, Eurochem Trading GmbH (“Eurochem Trading”) is a Swiss corporation and an affiliate of Eurochem Russia. Eurochem Trading purchases fertiliser products from Eurochem Russia and its affiliates and resells them to its customers worldwide.

The 8th defendant, Valery Rogalskiy, (“Mr. Rogalskiy”) was at all material times up to his dismissal in 2014, a member of Eurochem Russia’s managing board, as well as its marketing and sales director. The 9th defendant, Dmitry Pomytkin, (“Mr. Pomytkin”) was the deputy head of the marketing and sales division and the head of the fertiliser sales department of Eurochem Russia. Together they were responsible for the worldwide sales of the claimants’ fertilisers. They are referred together in the judgment as “the Russian defendants”.

The claimants’ case is that commencing in 2004, the Russian defendants formed a network of companies registered predominantly in the BVI, for the sole purpose of receiving, concealing and laundering over \$45 million in secret commission payments made by the claimants’ trading partners and their affiliates. In return for these payments, the trading partners obtained the claimants’ fertiliser at a significant undervalue resulting in losses to the claimants (“the bribery scheme”).

The alleged recipients are the 1st to 7th and the 16th defendants (BVI companies), and the 17th defendant, a Cypriot company. The alleged payers of the secret commissions include the 10th to 14th and the 18th defendants who are individuals and companies of varying nationalities. Besides the Russian defendants, none of the defendants that were allegedly involved in the bribery scheme are said to be Russian or reside in Russia, and all the sales of fertilizer products provided for final delivery outside of Russia. Upon investigation by the claimants in 2014, the bribery scheme was uncovered and in May 2014 the claimants dismissed Mr. Rogalskiy and Mr. Pomytkin.

In August 2015, the claimants commenced proceedings against the defendants in the BVI. The claims in the action are a combination of claims in tort for bribery and unlawful means conspiracy ("the tort claims"), and equitable claims for breach of fiduciary duty, knowing receipt and dishonest assistance ("the restitution claims"). The relief sought includes damages, an accounting for profits received and tracing. In November 2015, Farara J granted the claimant's ex parte application for permission to serve the claim form on the 8th - 10th and 12th - 18th defendants (the foreign defendants) outside the jurisdiction. Farara J accepted the expert evidence of the claimants that it is only possible to bring proceedings of the type set out in the claim form against the Russian defendants and that such proceedings cannot be brought against the non-Russian defendants. The learned judge was also satisfied that the BVI is the appropriate forum for the trial of the claims and that it does not seem that there is a more appropriate forum.

Between February and March 2016, six of the BVI defendants applied under rules 9.7 and 9.7A of the **Civil Procedure Rules 2000** ("CPR"), and under the court's inherent jurisdiction, for a declaration that the court does not have jurisdiction to try the claim and that the claim be struck out. Alternatively, a declaration that the court should not exercise jurisdiction to try the claim and to order that the claims be stayed ("the jurisdiction application").

Between March and August 2016, five of the foreign defendants who had been served with the claim form filed applications under CPR 7.7(2)(a), (b) and (c), 9.7 and 9.7A, and/or under the court's inherent jurisdiction for an order setting aside service of the claim form on them, or a declaration that the court does not have jurisdiction to try the claim, and that the claim be struck out. Alternatively, a declaration that the court should not exercise its jurisdiction to try the claim and that the claim be stayed ("the service out application").

On 1st November 2016, Wallbank J in an oral judgment dismissed both applications and found that the BVI was the most appropriate forum for the trial. He refused the applications for a stay by both sets of defendants and maintained the order for service out of the jurisdiction on the foreign defendants.

In November and December 2016, the judge granted permission to five of the BVI defendants and six of the foreign defendants to appeal against his orders. The Russian defendants and the 1st, 6th, 7th, 14th and 15th defendants have not appealed the orders of the judge. The defendants are essentially challenging the exercise of discretion by the trial judge in finding that the BVI is the most appropriate forum for the trial of the action, and in dismissing the applications that were before the court. The common issues that arise from the grounds of appeal in the various notices of appeal

include: the availability of Russia as a forum for the trial of the issues raised in the case; the use of expert evidence of foreign law; the judge's treatment of the connecting factors in the case; and the available remedies and limitation periods in Russia and the BVI. The issues of non-disclosure on an ex parte application and the test for service outside of the jurisdiction under CPR 7.3(2)(a) arise specifically in relation to appeals by the foreign defendants.

Held: allowing the appeal, setting aside the order for service of the proceedings on the foreign defendants outside the jurisdiction and the freezing injunction granted by this Court on 25th February 2016 and granting the appellants/defendants a stay of the proceedings in the BVI, with costs to the appellants/defendants here and in the court below, to be assessed if not agreed within 28 days, that:

1. When a defendant seeks a stay of an action on the ground of forum non conveniens, the court is required to conduct a three-stage inquiry. The court should determine whether there is another available forum and whether that forum is more appropriate for the trial of the case. If there is another forum that is more appropriate, a stay should be granted unless there is a risk that the claimant will not receive justice in the more appropriate forum. The burden of proof in the first two stages is on the defendant seeking the stay, and on the claimant at the third stage.

Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460 applied; **IPOC International Growth Fund Limited v LV Finance Group Limited** BVIHCVAP2003/0020 and BVIHCVAP2004/0001 (delivered 22nd November 2004, unreported) followed.

2. The proof of the availability of an appropriate forum is achieved in most cases by factual and expert evidence. In this case, the learned judge's approach to the expert evidence was correct. He found that he could not resolve conflicts between the experts at this stage, but he went on to consider the cogency of the evidence and made preliminary findings to guide him in considering the issues in the case, without actually preferring one expert's evidence over the other. The learned judge therefore did not err in finding that Russia might be a competent forum for the service out applications or in his observation that there are circumstances in which the Russian courts could hold separate trials for the foreign defendants before the Arbitrazh Court. Based on the state of the expert and factual evidence, and in all the circumstances of the case, Russia is an available forum with competent jurisdiction that is available for the trial of the action.

Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460 applied; **IPOC International Growth Fund Limited v LV Finance Group Limited** BVIHCVAP2003/0020 and BVIHCVAP2004/0001 (delivered 22nd November 2004, unreported) followed.

3. There are very limited circumstances in which an appellate court will interfere with the exercise of the trial judge's discretion. It is settled law that an appellate court will not interfere with the exercise of the learned judge's discretion unless it is satisfied that he committed an error and that as a result

of that error his decision exceeded the generous ambit within which reasonable disagreement is possible, and was clearly or blatantly wrong. By failing to make a specific finding of the governing law of the claims in the action by examining the evidence to determine the law with which the action has its closest connection; by relying on rule 18(2) of Dicey, Morris and Collins to find that the BVI law applies to the claims; by attaching too much weight to the use by the Russian defendants of companies incorporated in the BVI and to the fact that the claimants chose to sue in the BVI, the learned judge failed to find that the claims have their closest connection with Russian law and therefore that the governing law of the claims is Russian law. The learned judge therefore committed errors of principle leading to an incorrect assessment of the connecting factors and the conclusion that Russia is not the more appropriate forum for the trial of the action.

Dufour and others v Helenair Corporation and others (1996) 52 WIR 188 followed; **Spiliada Maritime Corporation v Cansulex Ltd** [1987] AC 460 applied; **VTB Capital plc v Nutritek International Corp and others** [2011] EWHC (Ch) 3107 considered; **Boys v Chaplin** [1971] A.C. 356 applied.

4. Where on a forum application the court finds that a foreign forum is the appropriate forum for the trial of an action, the claimant must take that forum as he finds it, and generally the courts will grant a stay of the local proceedings in favour of the appropriate forum unless it is satisfied that justice will not be done in the appropriate forum. Although in this case the claimants may lose certain advantages such as a wider array of remedies and longer limitation periods if they have to bring the action in the Russian courts, they would not be without a viable claim before the appropriate and available forum. The most appropriate forum for the trial of this action is the Russian courts and the claimants have not discharged the burden of proving that they will not receive substantial justice in that forum. The learned judge therefore erred in finding that availability of more remedies in the BVI tipped the balance in favour of the BVI as the most suitable forum.

Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460 applied; **Connelly v RTZ Corp plc** [1997] 4 All ER 335 applied; **Lubbe v Cape plc** [2000] 4 All ER 268 applied.

5. On an application for service outside the jurisdiction, the claimant must satisfy three requirements. The claimant must satisfy the court that: firstly, in relation to the foreign defendant there is a serious issue to be tried on the merits; secondly, there is a good arguable case that the claim falls within one or more classes of cases in which permission to serve out may be given; and thirdly, in all the circumstances the forum that has been seised is clearly the appropriate forum for the trial of the dispute, and that the court ought to exercise its discretion to permit service out of the jurisdiction. This court, having found that the BVI is not the more appropriate forum for the trial of the action, it follows that the claimants have failed to prove one of the essential elements for a successful service out application, and the order for service out is liable to be set aside for that reason only.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** The principle of forum non-conveniens continues to be heavily litigated in the British Virgin Islands (“BVI”) and in these consolidated appeals we examine several of the issues relating to the principle. The appeals are against the decisions of Wallbank J contained in an oral judgment delivered on 1st November 2016 on two applications made by the appellants/defendants. In the first application, the 1st - 5th, 11th and 17th appellants/defendants (“the BVI defendants”) applied for a declaration that the court should not exercise its jurisdiction in respect of the respondents’/claimants’ claim, and/or for an order that the claim be stayed on the ground of forum non-conveniens. By the second application, the 10th, 12th, 13th, 16th and 18th appellants/defendants (“the foreign defendants”), applied to set aside the order of Farara J granting permission to the respondents/claimants to serve the claim form outside the jurisdiction and/or to strike out the claim. Wallbank J dismissed both applications. The BVI defendants and the foreign defendants appealed against his decision. The Russian defendants and the 1st, 6th, 7th 14th and 15th defendants have not appealed the orders of the judge.

The parties and the factual background

- [2] The factual and procedural background to these appeals is long and complicated and involves litigation between the parties in five different jurisdictions. I will deal only with those parts of the background that are necessary to analyse and determine the issues in the appeals. For convenience, I will refer to the respondents to the appeals collectively as “the claimants” and the appellants as “the defendants”.
- [3] The 1st claimant, JSC MCC Eurochem (“Eurochem Russia”), is a Russian company. At all material times it was Russia’s largest mineral fertiliser trader with a turnover of approximately US\$7 billion in annual sales and operations

worldwide. The 2nd claimant, Eurochem Trading GmbH (“Eurochem Trading”) is a Swiss corporation and an affiliate of Eurochem Russia. Eurochem Trading purchases fertiliser products from Eurochem Russia and its affiliates and resells them to its customers worldwide.²

- [4] The 8th defendant, Valery Rogalskiy, (“Mr. Rogalskiy”) was at all material times up to the time of his dismissal in 2014, a member of Eurochem Russia’s managing board, as well as its sales and marketing director. He was also the “curator” of Eurochem Trading and was responsible for overseeing its sales. During the same period, the 9th defendant, Dmitry Pomytkin, (“Mr. Pomytkin”) was the deputy head of the marketing and sales division and the head of the fertiliser sales department of Eurochem Russia. He was a direct subordinate of and reported to Mr. Rogalskiy. Together they were responsible for the worldwide sales of the claimants’ fertilisers. They are referred together in this judgment as “the Russian defendants”.
- [5] The claimants’ case is that commencing in 2004 the Russian defendants set up a web of companies registered predominantly in the BVI, but also in Panama, Cyprus and Scotland, for the sole purpose of receiving, concealing and laundering the proceeds of over \$45 million in secret commission payments made by the claimants’ trading partners and their affiliates (“the bribery scheme”). The alleged recipients comprise of the 1st to 7th defendants, the 16th defendant (“Dearborn”) and the 17th defendant (“Gianthill”). All of these recipients are BVI companies except Dearborn which was incorporated in Cyprus.
- [6] The alleged payers of the secret commissions include the 10th to 14th and the 18th defendants. The 10th defendant, Mr. Nejdet Baysan (“Mr. Baysan”), is a Turkish national residing in Turkey and the 13th defendant, Mr. Fabio Scalabrini (“Mr. Scalabrini”), is an individual residing in Switzerland. The 11th defendant, Kopist Holding Limited, is a BVI company, and, unlike the other BVI defendants, is alleged to be a payer of bribes. The 12th defendant,

² Paragraphs 1 and 2 of the amended statement of claim.

iTrade Fertilisers SA, is a Swiss corporation. The 14th and 15th defendants, the Darlow companies, were incorporated in Panama and Scotland respectively, and the 18th defendant, Drey Moor Fertilisers PTE Limited, is a Singaporean company.

[7] Apart from the Russian defendants, none of the defendants that are alleged to have been involved in the bribery scheme are said to be Russian or to live in Russia, and all the sales of fertilizer products provided for final delivery outside of Russia. In return for the secret commission payments, the trading partners obtained the claimants' fertiliser at a significant undervalue resulting in losses to the claimants.

[8] The payment of secret commissions was discovered by the claimants in or around 2014 when one of the payers admitted to making payments. The claimants then made a detailed investigation into the bribery scheme which included applications for disclosure in Singapore, Cyprus and Belize. The result of the investigations demonstrated a massive bribery scheme orchestrated by the defendants for more than 10 years. The employment contracts of Mr. Rogalskiy and Mr. Pomytkin with the claimants were terminated on 12th May 2014.

Proceedings in the BVI

[9] The claimants commenced proceedings against the defendants in the BVI in August 2015. The amended statement of claim alleges that the BVI defendants assisted the Russian defendants by receiving, holding and distributing the secret commissions, and that the assistance was provided dishonestly. Further, that they acted as conspirators with the Russian defendants knowing that the Russian defendants were acting in breach of the duties that they owed to the claimants. Alternatively, by virtue of the expressed or implied terms of their employment contracts with the claimants, the Russian defendants owed duties to act in good faith and in the best interests of the claimants, to avoid conflicts of interest, and not to make secret profits or receive secret payments. All the duties owed to the claimants are described as being equivalent or akin to fiduciary duties. The Russian

defendants breached the express and/or implied terms of the employment contracts with Eurochem Russia and, in the case of Mr. Rogalskiy, his duties to Eurochem Trading as its curator. The BVI companies were aware of the duties owed by the Russian defendants to the claimants and that they were receiving secret commissions, which they knew to be dishonest, for the ultimate benefit of the Russian defendants. The other defendants were aware of the breaches of duty by the Russian defendants and participated in the various bribery schemes with full knowledge of the illegal activities.

[10] The claims against the defendants are as follows:

- (i) against the Russian defendants - breaches of fiduciary duties that they owed to the claimants arising out of their employment with the claimants;
- (ii) against the BVI defendants for dishonest assistance and knowing receipt of the secret commissions;
- (iii) against the defendants who paid the secret commissions – an accounting of profits made and;
- (iv) against all the defendants for unlawful means conspiracy and dishonest assistance.

[11] The reliefs sought include:

- (a) declarations that the defendants who received payments of the secret commissions received such payments on a constructive trust for the claimants;
- (b) liability to account as constructive trustees for all payments received and/or profits made from the receipt of such payments;
- (c) liability to account for profits received;

- (d) tracing into the assets or monies held by or on behalf of the Russian defendants of any assets or monies derived from the secret commissions;
- (e) damages and interest.

Procedural background

- [12] Prior to the filing of the consolidated claims in the Commercial Court, the claimants had filed a claim in December 2014 against 21 defendants with applications for permission to serve the claim form outside the jurisdiction, and for a freezing injunction against the defendants. The applications were dismissed by Bannister J, mainly on the ground that the BVI was not the appropriate forum for the trial of the action.³
- [13] The instant claim was filed on 7th August 2015. On 19th November 2015, Farara J granted the claimant's ex parte application for permission to serve the claim form on the 8th - 10th and 12th - 18th defendants (the foreign defendants) outside the jurisdiction. In doing so, the learned judge accepted the evidence of the expert witness for the claimants, Professor Anton Asoskov, that it is not possible to bring proceedings of the type set out in the claim form in Russia against the defendants who are foreign to Russia, and that it will only be possible to bring proceedings of this nature against the Russian defendants. The learned judge went on to find that on balance he was satisfied that the BVI is the appropriate forum for the trial of the claims and that there seems to be no other forum that is more appropriate.⁴
- [14] The claimants later applied ex parte for a freezing injunction against the defendants. On 19th February 2016, Bannister J refused the application finding that "This is a Russian fraud effectively...", that "It has nothing to do with this jurisdiction at all",⁵ and that the BVI was not the appropriate

³ Record of Appeal/A/15/179-183.

⁴ Record of Appeal/A/17/231240.

⁵ Record of Appeal/A/18/82-83.

forum for the trial of the claim. The decision of Bannister J was set aside by the Court of Appeal following an ex parte appeal by the claimants. The Court of Appeal decided that Farara J had already found that the BVI was the more appropriate forum and that Bannister J asked himself the wrong question by focusing on which court (BVI or Russia) was more appropriate for trying the action. The real issue before Bannister J was the risk of dissipation and whether a worldwide freezing injunction should be granted. The Court of Appeal addressed this issue and granted the injunction. The ex parte orders made by Farara J and the orders made by Wallbank J at the inter partes hearing, both dealing with the issues of the more appropriate forum for the trial of the action and service of the proceedings outside the jurisdiction on the foreign defendants, are the subject of the appeals that are now before this Court.

[15] Between February and March 2016, six of the BVI defendants applied under rules 9.7 and 9.7A of the **Civil Procedure Rules 2000** ("CPR"), and under the court's inherent jurisdiction, for a declaration that the court does not have jurisdiction to try the claim and that the claim be struck out. Alternatively, a declaration that the court should not exercise jurisdiction to try the claim and to order that the claims be stayed ("the jurisdiction application").

[16] Between March and August 2016, five of the foreign defendants who had been served with the claim form filed applications under CPR 7.7(2)(a), (b) and (c), 9.7 and 9.7A, and/or under the court's inherent jurisdiction for an order setting aside service of the claim form on them, or a declaration that the court does not have jurisdiction to try the claim, and that the claim be struck out. Alternatively, a declaration that the court should not exercise its jurisdiction to try the claim and that the claim be stayed ("the service out application").

[17] Wallbank J heard the applications over two days on 25th and 26th October 2016. On 1st November 2016, he delivered an oral judgment dismissing both applications.⁶ In a nutshell, he analysed the various connecting factors in the case and found that “I am in no doubt, therefore, upon the facts of this case that the BVI is clearly the most appropriate forum for the trial”.⁷ He therefore refused the applications for a stay by both sets of defendants and maintained the order for service out of the jurisdiction on the foreign defendants. In November and December 2016, the judge granted permission to five of the BVI defendants and six of the foreign defendants to appeal against his orders.

The appeals

[18] The issues that arise from the grounds of appeal in the various notices of appeal that are common to all the defendants are:

- (i) The availability of Russia as a forum for the trial of the issues raised in the case, including the use of expert evidence of foreign law.
- (ii) The judge’s treatment of the connecting factors in the case. These factors include:
 - (a) The place of the commission of the wrongful acts.
 - (b) The governing or proper law of the torts and breaches of duty allegedly committed by the Russian defendants.
 - (c) The location of witnesses and the compellability of witnesses in Russia.
 - (d) The effect of the incorporation of some of the defendants in the BVI and the use of BVI companies in the bribery scheme.

⁶ A copy of the transcript of the oral judgment is at bundle A2 tab 24 of the record of appeal and is referred to in this judgment as “the transcript”, and references are to the internal numbering of the transcript.

⁷ Record of Appeal A/18/323.

(e) The effect of the claimants' commencement of the proceedings in the BVI.

(f) The effect of the defendants not filing defences to the claims.

(iii) The remedies available to the claimants in Russia and in the BVI, including tracing of assets and the use of constructive trusts.

(iv) Limitation periods affecting the claims in Russia and in the BVI.

[19] Additional issues that arise in relation to the appeals by the foreign defendants:

(v) The test under CPR 7.3(2)(a) on an application to serve a party outside the jurisdiction.

(vi) Non-disclosure on an ex parte application.

Exercise of discretion

[20] It is apparent from the listing of the issues in the last two paragraphs that the defendants are challenging the exercise of discretion by the trial judge in finding that the BVI is the most appropriate forum for the trial of the action, and in dismissing the applications that were before the court. The approach of this Court to reviewing the exercise of discretion by the trial judge is very well known and has been applied repeatedly by this Court. The case most frequently cited is **Dufour v Helenair Corporation and others**⁸ where Chief Justice Floissac said:

"We are thus here concerned with an appeal against a judgment by the trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or degree of the error in principle, the trial judge's

⁸ (1996) 52 WIR 188.

discretion exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong”.

- [21] The need for caution in reviewing what is in effect a balancing exercise by the trial judge is even more important in the search for which of two or more competing fora is the most appropriate for trying a claim between disputing parties. In the leading case on forum non conveniens **Spiliada Maritime Corporation v Cansulex Ltd.**⁹ Lord Templeman said:

“In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere.”

- [22] However, the reviewing court is not bound by the decision of the trial judge and can, in appropriate cases, set aside the exercise of his discretion if it finds that the trial judge erred and that as a result his decision is outside the generous ambit of reasonable disagreement. In **Charles Osenton & Co. v Johnston**,¹⁰ the Lord Chancellor Viscount Simon said:

“The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.”

- [23] Another important general consideration in the balancing exercise is that the weight attached to each of the connecting factors can vary from case to

⁹ [1987] AC 460, p. 465.

¹⁰ [1941] 2 All ER 245, p. 250.

case depending on the facts of the case. Thus, the residence of witnesses can be the most important factor in one case and yet attract very little importance in another case. Lord Goff addressed this aspect of the process in the **Spiliada** case:¹¹

“... the importance to be attached to any particular ground [of RSC Ord 11, r 1(1)] invoked by the plaintiff may vary from case to case. For example, the fact that English law is the putative proper law of the contract may be of very great importance (as in *BP Exploration Co (Libya) Ltd v Hunt* [1976] 3 All ER 879, [1976] 1 WLR 788), where, in my opinion, Kerr J rightly granted leave to serve proceedings on the defendant out of the jurisdiction; or it may be of little importance as seen in the context of the whole case.”

- [24] The essence of the defendants’ appeal is that the judge erred in his consideration and application of the principles relating to the determination of the appropriate forum for the trial of this claim to the extent that his decision exceeded the generous ambit within which reasonable disagreement is possible and this Court should therefore set aside his decision and substitute its own discretion.

The BVI defendants’ jurisdiction application

- [25] The BVI court has jurisdiction as of right over the BVI defendants by virtue of their incorporation in the jurisdiction. The applications by these defendants fall under CPR 9.7A as they are asking the court to exercise its jurisdiction by staying the proceedings against them because the BVI is not the natural or appropriate forum for the trial of the claim, and the Russian Federation is an available and competent jurisdiction and is clearly and distinctly the more appropriate jurisdiction for the trial of the action.¹²
- [26] The court is required to conduct a three-stage inquiry to determine what is the most appropriate forum for trying the case in the interests of all the parties and the ends of justice. The steps were set out in detail by Lord Goff

¹¹ supra note [8], 481.

¹² See for example the applications by the 2nd, 3rd and 11th defendants at tabs 1, 2 and 3 of bundle A of the record of appeal.

in the **Spiliada** case. The relevant portion of the leading judgment of Lord Goff of Chieveley was helpfully summarised by Gordon JA in **IPOC International Growth Fund Limited v LV Finance Group Limited**¹³ at paragraph 27:

“In the lead judgment, Lord Goff of Chieveley summarised the law in the following way, and I take the liberty of paraphrasing the learned Law Lord:

- (i) The starting point, or basic principle, is that a stay on the grounds of forum non conveniens would only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In this context, appropriate means more suitable for the interests of all the parties and the ends of justice.
- (ii) The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once a defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction. Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of the claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that “where there can be pointers to a number of different jurisdictions” there is no reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that the alternative jurisdiction is clearly or distinctly more appropriate than this jurisdiction.
- (iii) When considering whether to grant a stay or not, the court will look to what is the “natural forum” as was decided by Lord Keith of Kinkel in *The Abidin Daver*, “that with which the action has the most real and substantial connection”. In this connection the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions might be subject, in the case of actions in tort where it is alleged that the tort took place and the places where the parties reside and carry on business.

¹³ BVIHCVAP2003/0020 and BVIHCVAP2004/0001 (delivered 22nd November 2004, unreported).

The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of considerations a court should have in exercising its discretion.

- (iv) If the court determines that there is some other available and prima facie more appropriate forum then ordinarily a stay will be granted unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in the *Abidin Daver* made it very clear that the burden of proof to establish such a circumstance was on the claimant and that cogent and objective evidence is a requirement.”

Briefly stated, when a defendant seeks a stay of an action on the ground of forum non conveniens the court should determine whether there is another available forum (stage 1), and whether that forum is more appropriate for the trial of the case (stage 2). If there is another forum that is more appropriate, a stay should be granted unless there is a risk that the claimant will not receive justice in the more appropriate forum (stage 3). The burden of proof in the first two stages is on the defendant seeking the stay, and on the claimant at the third stage.

- [27] Following the guidance in the **Spiliada** case, I will now consider the BVI as an appropriate forum and whether there is another available forum having competent jurisdiction which is a more appropriate forum for the trial of the action in the interests of all the parties and the ends of justice. Learned counsel for the defendants, Mr. Stephen Moverley Smith, QC, submitted that Russia is an available forum and that it is the most appropriate or natural forum for the trial of the action. Learned counsel for the claimants, Mr. Justin Fenwick, QC, submitted that Russia is not an available forum and that the BVI is the most appropriate and natural forum for the trial.

Stage 1 – Russia as an available forum/expert evidence

- [28] In the passage from Lord Goff's speech in the **Spiliada** case summarised above,¹⁴ we were reminded of the basic principle that a stay on the ground of forum non conveniens will only be granted if the court is satisfied that there is another available forum with competent jurisdiction which is more appropriate for the trial of the action, i.e., a forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice. The proof of the availability of an appropriate forum is achieved in most cases by factual and expert evidence. During the hearing before the judge, both sides adduced factual and expert evidence on affidavits supporting their respective positions. As is usual in stay applications, there was no cross-examination of the deponents. The expert witnesses were Mr. Maxim Kulkov ("Mr. Kulkov") for the defendants and Professor Anton Asoskov ("Professor Asoskov") for the claimants.
- [29] The experts disagreed on several important issues including, for present purposes, the availability of the Russian courts for the trial of the action. I will briefly summarize their respective positions on this issue.
- [30] It is common ground between the experts that there are two courts in Russia to be considered for the trial of the claim - the Russian court of general jurisdiction, which hears claims against Russian defendants only, and the Russian Arbitrazh commercial court, which generally has jurisdiction over non-Russian defendants. They also agree that the Russian defendants can be tried in the Russian court of general jurisdiction.
- [31] Mr. Kulkov is of the view that the claims against the Russian defendants on the one hand, and the payers and recipients of the bribes, who are all non-Russians, on the other hand, cannot be separated pursuant to the procedures in the Russian Civil Procedure Code, and a consolidated claim against both the Russian and non-Russian defendants will fall under the jurisdiction of the Russian court of general jurisdiction and can be tried by that court. Professor

¹⁴ See para. 26 above.

Asoskov disagrees and is of the view that there is no single court in Russia with the jurisdiction that would be able to decide all of the claims set out in the amended statement of claim. In other words, the Russian court of general jurisdiction will not accept jurisdiction over a non-Russian defendant.

[32] Mr. Kulkov's alternative position is that if the claims can be split, the claim against the Russian defendants will remain in the courts of general jurisdiction, and the claims against the non-Russian defendants will be tried by the Arbitrazh Court. The Arbitrazh Court will have jurisdiction over the non-Russian defendants if at least some part of the losses were suffered by the claimants in Russia, or at least some of the tortious actions were committed in Russia.

[33] Professor Asoskov disagrees. He is of the view that the Arbitrazh Court does not have jurisdiction over the foreign defendants because that court will only have jurisdiction if the tortious actions by the defendants and the losses incurred by the claimants took place in Russia. As none of these matters occurred in Russia, the Arbitrazh court would not have jurisdiction over the foreign defendants. This finding was criticized by the defendants on the ground that it was made on the basis of instructions and not from the expert's own investigation.¹⁵ Be that as it may, I am satisfied that this is an evidence-based conclusion and the professor did not rule out the possibility of the Arbitrazh court having jurisdiction over foreign defendants in a factually appropriate case.

[34] There are further disagreements between the two experts on issues relating to procedural and the substantive law impediments which I do not think are material to resolving the issue of Russia as an available forum.

¹⁵ Eder J also criticised the form of the claimants' instructions to Professor Asoskov for essentially the same reason during the course of an interlocutory hearing on the expert evidence on 7th July 2016 – Record of Appeal/A/19 pp. 357-362.

[35] In this state of conflicting expert evidence, the judge decided not to express a preference for the evidence of either expert. At page 34 of the transcript of judgment he said:

“Mr. Moverley Smith QC urged that I have to decide which expert’s opinion I prefer. As I see it, these two experts are both very able advocates arguing opposite contentions. Without seeing them give oral evidence and having it tested through cross-examination, it is impossible for me to tell which I should prefer. I cannot and will not attempt the impossible.

In respect of the jurisdiction challenges, this means that those defendants who have put their applications on that basis do not discharge their burden of satisfying me that there is some other available forum with competent jurisdiction to try the claim.”

[36] Mr. Moverley Smith, QC contended before this Court that this was an incorrect approach and that the judge should have followed the approach in the High Court decision of **VTB Capital v Nutritek International Corp and others**¹⁶ where Arnold J, faced with a similar situation, said:

“Obviously, I cannot resolve the conflicts without cross-examination. Nor is it necessary for me to do so given that it is sufficient for VTB to establish that there is a real risk that it will not be able to obtain substantial justice in Russia. Nevertheless, counsel were, I think, more or less agreed by the end of the hearing that I was both entitled and obliged to consider the quality of the evidence, taking into account factors such as the experience of the experts, the cogency of the reasoning and materials relied upon to support it.”

Arnold J was directing himself that even though he could not resolve the conflicts between the experts, he nonetheless could consider and be guided by their evidence, taking into account matters such as cogency and the experience of the experts. It appears from a reading of the transcript that Wallbank J adopted a similar approach because, having found as he did at page 34 in the passage cited in the preceding paragraph, he continued on pages 34 to 35 by finding that “For the purposes of this part of the inquiry, I am prepared to assume that Russia might be an available forum of competent jurisdiction.” The part of the inquiry that the judge was referring to was the claimants’ application to serve the foreign defendants outside the

¹⁶ [2011] EWHC (Ch) 3107, para. 201.

jurisdiction. It is difficult to see how Russia could be an available forum of competent jurisdiction for the purposes of the application to serve the proceedings outside the jurisdiction, and not be an available forum for the purposes of resolving the jurisdiction application. In any case, what is important is that Wallbank J did not make specific findings on the disputed expert evidence but considered the cogency of the evidence, as he was entitled to do, in carrying out the balancing exercise required of him on a forum application.

[37] I also note that earlier in his judgment at page 23 of the transcript, the judge, in commenting on the expert evidence regarding suing the foreign defendants in the Russian courts, said:

“The experts subsequently engaged by both sides show that this proposition is debatable at best and that there are circumstances in which the Russian court could, in some combination of proceedings, perhaps in courts of different jurisdictions, that is general jurisdiction and commercial Arbitrazh jurisdiction, determine matters even involving the following (sic)[foreign]¹⁷ defendants. However, for reasons that I will explain, the mere possible availability of Russian Courts to try the dispute is not the end of the inquiry.”

[38] In my opinion, the judge’s approach to the expert evidence was correct. He found that he could not resolve conflicts between the experts at this stage, but he went on to consider the cogency of the evidence and made preliminary findings to guide him in considering the issues in the case without actually preferring one expert’s evidence over the other. One such finding was that Russia might be a competent forum for the purposes of the service out applications. I would go one step further and draw from the conflicting evidence that, depending on the evidence before the courts in Russia, there could be either a single trial of the defendants before the Russian court of general jurisdiction, or, if the claims could be split, separate trials with the foreign defendants being tried before the Arbitrazh Court. The latter part of

¹⁷ It was agreed by counsel at the hearing of the appeal that the judge used the word “foreign” and not “following”.

this finding (split trials) is very similar to the judge's observation at page 23 of the transcript cited in the preceding paragraph.

- [39] In the circumstances, I find that on the state of the expert and factual evidence, and in all the circumstances of the case, that Russia is an available forum with competent jurisdiction that is available for the trial of the action.

Stage 2 - The appropriate forum and the connecting factors
The place of commission of the wrongful acts

- [40] A good starting point in the exercise of determining the most appropriate forum for the trial of the issues in the claim is to determine the place where the torts and breaches of duty were committed. In **VTB Capital plc v Nutritek**¹⁸ Lord Mance said:

“The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to presumptions are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be oversimplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors.”

Lord Mance was dealing with a claim in tort only but his reasoning should also apply in this case involving both torts and breaches of trust.

- [41] The claimants asserted in the amended statement of claim that the Russian defendants were the masterminds behind the bribery scheme, and, as they controlled the BVI defendant companies (except Kopist), they were the de facto directors of the companies and their knowledge of the scheme must therefore be imputed to the companies. Further, that they are unaware of who are the de jure directors of the BVI companies and of what role, if any, they played in the scheme. The determination of who are the persons who directed the companies in perpetrating the scheme must therefore be judged by

¹⁸ supra note 14.

reference to the de facto directors and it is not disputed that they lived and worked in Russia during the relevant period. However, the evidence that is available to the claimants points to the tortious acts and breaches of trust having occurred in places other than Russia and there is no evidence that any of the illegal activities took place in Russia. In short, this was an international scheme orchestrated by the defendants in places other than Russia and therefore Russia is not the place of commission of the wrongful acts.

[42] The defendants countered by submitting that since the Russian defendants are the alleged masterminds and the de facto directors of the BVI companies, and in the absence of the evidence of the activities of the de jure defendants, it can and should be inferred that the wrongful acts were most likely committed in Russia where the Russian defendants lived and worked.

[43] In dealing with this issue, the judge found that the acts of the Russian defendants, as the de facto directors of the BVI defendants, would not have supplanted the acts of the de jure directors wherever they may have occurred. The difficulty that I have with this finding is that there is no pleading or evidence that the de jure directors did anything in relation to the scheme or otherwise. In my opinion, the only reasonable inference that was open to the judge on the evidence was that the BVI defendants acted in the scheme through their de facto directors.

[44] But even accepting for the purpose of the submission that the BVI defendants acted in the scheme through their de facto directors, this is not the end of the matter. There is no direct evidence that the Russian defendants were in Russia when the various acts constituting the scheme were hatched and implemented. Mr. Fenwick, QC submitted that this is an international bribery scheme committed in several countries of the type alluded to by Lord Mance in the **Nutritek** case,¹⁹ and this Court should not infer from the residence of the Russian defendants in Russia that any of the wrongful acts took place in Russia. The judge apparently accepted this submission and did not make a

¹⁹ supra note 16.

finding of the place of commission of the wrongful acts, treating the case as one of international dimensions with no defined place of commission.

- [45] In the absence of direct evidence of the place of commission of the wrongful acts, it is tempting to accept the BVI defendants' submission to infer that the wrongful acts were committed in Russia where the Russian defendants resided and worked. But I think that that borders on speculation rather than inference, and I would prefer to take the position that there is insufficient evidence to upset the judge's finding that the bribery scheme was international in nature and, certainly at this stage, the place of occurrence cannot be determined with any degree of certainty. The result is that the place where the wrongful acts were committed cannot be used as a *prima facie* indicator of the more appropriate forum for the trial of the action.

The governing law of the claims in the action

- [46] The next consideration in the process of determining the most appropriate forum for the trial of the case is to ascertain the governing or proper law of the claims brought by the claimants – the *lex causae*. The governing law of the claims, like the place of commission of the claims, is an important consideration in determining the most appropriate forum for the trial of the claim. It is listed by Lord Goff in the **Spiliada** case²⁰ and by the trial judge in the beginning of his judgment,²¹ as one of the factors to be considered in the balancing process. In the words of Lord Mance in the **Nutritek** case:

“The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum. Neither of these considerations here applies.”²²

²⁰ *supra* note 8, p. 478(B).

²¹ Page 8 of the transcript of the judgment.

²² *supra* note 14.

The analysis above in relation to the availability of Russia as an appropriate forum for the trial of the action, and the analysis below in relation to remedies,²³ show that the governing law of the claims in this action is important because there are important differences between Russia and the BVI in the legal principles applicable to the claims and the available remedies.

[47] The usual starting point in determining the governing law of the claims in an action is the place of commission of the acts leading to the filing of the action. This method is not available in this action because of the unusual situation that the judge found that the case involves a bribery scheme of international proportions and that there is no satisfactory evidence of the place of the commission of the wrongful acts. This Court has not interfered with this finding.

[48] The judge did not make a specific finding of the governing law of the claims in the action. However, at page 45 of the transcript, when he was summarising his reasons for finding that the BVI is the appropriate forum for trying the action he said "...or the fact that Russian law is the natural *lex causae* of the employment relationships ...". In the context of what the judge was saying at the time, this is a finding that Russian law is the governing law of the employment relationships between the Russian defendants and the claimants, but it does not go as far as saying that Russian law is the governing law of the claims.

[49] The judge also dealt with the governing law in an indirect way when he found at pages 26 to 30 of the transcript that the claimants' failure to plead evidence of foreign law means that the *lex fori* will apply BVI law following the rule in Dicey, Morris and Collins' **The Conflict of Laws** that states that "In the absence of satisfactory evidence of foreign law, the court will apply English [BVI] law to such a case."²⁴ In my opinion, this is not the proper approach in

²³ See paragraphs [75-78].

²⁴ Dicey, Morris and Collins on the Conflict of Laws (14th ed. OUP 2006), rule 18(2).

this case. In the first place this is not a case where there is no satisfactory evidence of foreign law. There is ample evidence of Russian law by the two experts and therefore the default provision in rule 18(2) does not apply. Secondly, the claimants cannot seek to benefit from their own default in not pleading and proving the governing law of the claims and then relying on that failure to take advantage of the more generous remedies available in the BVI. This is patently self-serving and bears some resemblance to forum shopping. The judge should have carried out the proper fact-finding exercise to determine what is the proper law of the claims in the action.

[50] In the absence of a clear finding by the judge on the very important issue of the governing law of the claims in the action, it falls upon this Court to determine the issue.

[51] The claims in this action are a combination of claims in tort for bribery and unlawful means conspiracy (“the tort claims”), and equitable claims for breach of fiduciary duty, knowing receipt and dishonest assistance (“the restitution claims”). The relief sought includes damages, an accounting for profits received and tracing.

[52] The governing law of a tort in the BVI is determined by reference to the common law rule of double actionability laid down in **Phillips v Eyre**²⁵ and clarified and confirmed in subsequent cases including the leading case of **Boys v Chaplin**.²⁶ The rule provides that an act done in the foreign country is actionable in the BVI only if: (a) it is actionable as a tort in the BVI, and (b) actionable according to the law of the foreign country where the act was done. Importantly for the purpose of this appeal, the rule has an exception which has its origins in the judgments of Lord Hodson and Lord Wilberforce in **Boys v Chaplin** and is set out in the 11th edition of **Dicey and Morris**²⁷ at page 1366 as follows: “But a particular issue between the parties may be

²⁵ (1870) LR 6 QB 1.

²⁶ [1971] A.C. 356.

²⁷ Dicey and Morris: The Conflict of Laws (11th ed. Sweet and Maxwell 1987).

governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.”

[53] The general rule is difficult to apply in this case because of the concurrent findings by Wallbank J and this Court that on the available evidence the place of occurrence of the torts cannot be determined. For this reason, I find that this is an appropriate case to apply the exception to the double actionability rule and determine the governing law of the tort claims as the law of the country with which they have their most significant relationship in terms of occurrence and the parties. This Court applied the exception to the rule in **IManagement Services Limited v Cukurova Holdings AS and Cukurova (BVI) Limited**.²⁸

[54] The test for determining the governing law of claims in restitution was settled by this Court as “... the country with which the obligation has its closest and most real connection.”²⁹

[55] It is apparent that the tests for determining the governing law of both the tort and the restitution claims require the court to examine the country with which both claims have their most significant relationship or their closest connections, as the case may be. There is little if any difference between the two tests in practice and I will apply them to the facts of this case to determine the governing law of the claims.

[56] The source of the disputes between the claimants and the defendants lies in the employment relationship between the Russian defendants and the claimants. All the acts of conspiracy, bribery, and breach of duty are alleged to have occurred between 2004 and 2014 when the Russian defendants were employed by the claimants. The main thrust of the claimants’ case is that the Russian defendants used their positions in the claimant companies to extract

²⁸ BVIHCVP2007/025 (delivered 6th October 2008, unreported).

²⁹ James Fawcett and Peter North, *Cheshire and North’s Private International Law* (13th ed. OUP 1999) quoted with approval by Barrow JA in *Sibir Energy PLC v Gregory Trading SA and others* BVIHCVP2005/0026 (delivered 18th September 2006, unreported), para. 23.

secret commissions from the claimants' trading partners and wrongfully retained those commissions by the use of a web of companies, including BVI companies, for their own benefit. This resulted in losses to the claimants. The losses would have been suffered by the claimants in their respective places of the incorporation and where they carry on business, being Russia for Eurochem Russia and Switzerland for Eurochem Trading.

[57] The amended statement of claim sets out in paragraphs 5, 6 and 7 the positions held by the Russian defendants in the claimants, and in paragraph 11 they plead that "...they (the Russian defendants) acted in breach of the duties which they owed to all the claimants." Paragraphs 15, 17 and 18 set out particulars of the duties that the Russian defendants owed to the claimants. The duties arise out of the employment relationship and none of the wrongful acts could have been committed but for the Russian defendants' employment with the claimants. Paragraph 16 and 19 describe these duties as being "... equivalent or akin to fiduciary duties."

[58] The amended statement of claim further alleges that the BVI defendants knew of the duties owed by the Russian defendants to the claimants, and that it was the breach of these duties that led to the claims for knowing receipt, dishonest assistance and damages.

[59] There is no pleaded claim for damages for breach of the employment contracts between the claimants and the Russian defendants, only that the employment relationship created fiduciary duties of which the BVI defendants were aware, and they participated in the breaches of those duties. Notwithstanding the absence of a claim for breach of the employment contracts, those contracts are a part of the background to the relationship between the parties. The employment contracts between the 1st claimant and the Russian defendants were exhibited in the proceedings before the judge. Clause 8.1 of Mr. Rogalskiy's contract provides that:

“8.1 Any relations between the Parties arising during the effective term of this Contract but not governed thereby shall be governed by the provisions of the effective legislation of the Russian federation.”³⁰

The equivalent clause in Mr. Pomytkin’s contract reads:

“8.1 The parties’ mutual relations arising from this Contract, but not regulated by it, shall be regulated by the existing laws of the Russian Federation.”³¹

The wording of both clauses is very wide. It suggests that the direct and indirect relations arising from the contracts are governed by Russian law, which is what I would have expected.

- [60] On the basis of the facts as outlined in the preceding paragraphs, the framing of the claims in the amended statement of claim, and the terms of the employment contracts, I am satisfied that the disputes between the claimants and the Russian defendants, whether or not they are governed by the employment contracts, arose out of the employment relationship and are governed by the laws of the Russian Federation. I would therefore hold that Russian law is the governing law of the claims in the action.

Witnesses

- [61] The importance of the availability of witnesses in a forum application cannot be underestimated. In **Nilon Limited and others v Royal Westminster Investments SA**, a Privy Council decision on appeal from the BVI, Lord Collins said of the issue of witnesses:

“In the search for the appropriate forum the question of the location of witnesses will be an important factor and has been described as a core factor: *VTB Capital Plc v Nutritek International Corporation* [2013] UKSC 5 at para 62, per Lord Mance.”³²

- [62] Relying on this principle Mr. Moverley Smith, QC submitted that the judge failed to give any proper weight to the fact that a significant amount of the proposed witnesses reside in Russia and none of the witnesses are in the BVI. Further,

³⁰ Record of Appeal B2/1/974.

³¹ Record of Appeal B2/1/989.

³² [2015] UKPC 2, para. 14.

that there are witnesses who are former employees of the claimants that the defendants may want to cross-examine, but will not be able to do so because there is no procedure for compelling these persons to give evidence in the BVI, or by video conference from any other location.

[63] Mr. Fenwick, QC submitted that the judge adopted a correct approach to the issue of the witnesses. Firstly, he did not lose sight of the importance of witnesses and in delivering his judgment he said “the location of witness (sic) is, of course, another important factor.”³³ He continued by noting that the Russian defendants are consummate travellers with ample resources for attending a trial in the BVI and the other potential defendant witnesses such as Mr. Baysan and Mr. Scalambrin do not reside in Russia, and there is no evidence that they cannot conveniently come to the BVI. Importantly, the judge found that the witnesses can use video-conference facilities to give their evidence and that “This Court has had no difficulty taking evidence in the past by video conference with real time translation.”³⁴

[64] It is axiomatic that giving evidence by video-conference is less effective than giving evidence in court, especially in a case involving serious allegations of bribery and conspiracy. However, giving evidence by video-conference has become a reality in the courts of the BVI, notwithstanding its shortcomings, and I agree with the judge’s finding that those witnesses who cannot attend the trial in the Virgin Islands, can, if they so wish, give their evidence by video-conference. This is a case management issue. As regards the suggestion that the defendants’ counsel would not be able to cross-examine employees and former employees of the respondents, there is no evidence that these witnesses would not submit themselves for cross-examination, and in the absence of such evidence the judge cannot be faulted for not treating this potential problem as a deterrent to trial in the BVI.

³³ Page 41 of the transcript.

³⁴ Transcript page 41 lines 23-25

- [65] There is no basis on which this Court should interfere with the judge's findings on witness availability, subject however to the overriding consideration that giving evidence by video conference is inferior to oral evidence in court.

Language and documents

- [66] The judge accepted the claimants' position on language and documents. He found, probably based on the international trappings of the bribery scheme, that the major players in the dispute speak English and that he has already seen some of the documents that are said to be involved in the scheme, and they are in English. I do not doubt that some of the documents will need to be translated but this is not a major hindrance to trial in the BVI.

Incorporation in the BVI

- [67] The BVI defendants were incorporated and are domiciled in the Virgin Islands and the BVI courts have jurisdiction over them as of right. But this must be balanced against the more important principle in forum applications that was accepted and followed by the judge at page 37 of the transcript:

“This is important because mere incorporation of a company in the BVI is insufficient for this court to become the appropriate forum for trial of a claim.”

The judge's finding on this point confirms the law in the BVI as settled by Lord Collins in the **Nilon** case³⁵ and does not require further repetition in this judgment.

- [68] The appellants submitted, and I agree, that the judge attached too much weight to the domicile of the companies when he went on to find that the Russian defendants' choice of BVI companies to perpetrate the bribery scheme means that they should expect to be tried by the BVI courts. The judge stated at page 38 of the transcript that:

“As the Claimants point out, those parties took care to be seen to have carried out the scheme anywhere else than in Russia, whether by making their arrangements during trips outside Russia, through bank accounts outside Russia or through offshore companies including as a

³⁵ supra note 30.

core BVI companies. The defendants clearly wanted and perceived advantages and benefits of using BVI companies. There is much to say for holding them also to the less convenient, for them, aspects. In particular, they should expect that if they use BVI vehicles to perpetrate their frauds the BVI Courts will hold their companies and them to account.”

The object of a forum application is to determine the forum to which the claim has its closest connections. The domicile of a company in a particular jurisdiction is technically a connecting factor, but only in a limited sense, and very little if any weight should be attached to it in the balancing exercise. What is important is where the company and its agents carried out the activities that led to the claim. There is no evidence that the BVI defendants conducted any of the relevant activities in the BVI and the judge should not have attached any weight to the use of these companies, or expect this factor to be treated as favouring the BVI as the appropriate forum.

Issuing proceedings in the BVI

[69] For the reasons outlined in the preceding paragraph, I think that the judge erred in finding that the claimants’ choice of suing in the BVI is a factor that must be taken into account.³⁶ The unilateral and self-serving decision of a claimant to start proceedings in the Virgin Islands is not a factor that should be taken into account when considering the balancing exercise to determine the natural forum of the trial of this claim, far less as a factor favouring the BVI as the appropriate forum.

The effect of the defendants not filing a defence to the claims

[70] While acknowledging that the defendants are within their rights not to disclose their defences to the claims at this stage and simply putting the claimants to proof, the judge nevertheless went on to comment that he would have expected a response from the defendants having regard to the seriousness of the allegations against them.³⁷ This was an unnecessary comment by the judge which carries with it a subtle message that the defendants should have

³⁶ Page 36 of the transcript.

³⁷ Page 38 of the transcript.

responded to the factual allegations against them. The most that the judge should have said, following the guidance from Lord Clarke in the **VTB v Nutritek** case,³⁸ is that the defendants did not avail themselves of an opportunity to respond to the allegations against them.

Conclusion on the connecting factors

[71] This brings me to an overall consideration of the assessment of the judge's finding that the BVI is the most appropriate forum for the trial of the action in the interests of the parties and the ends of justice. Based on my review of the judge's findings above, I am satisfied that the learned judge erred in the following ways:

- (i) The judge did not make a specific finding of the governing law of the claims in the action. He should have examined the evidence to determine the law with which the action has its closest connection. Had he done so he would have found that the claims have their closest connection with Russian law and therefore the governing law of the claims is Russian law.
- (ii) The judge should not have relied on rule 18(2)³⁹ of **Dicey, Morris and Collins** to find that the BVI law applies to the claims. Had he not done so he would have found that the action has its closest connection with Russian law and that Russian law is the governing law.
- (ii) The judge attached too much weight to the use by the Russian defendants of companies incorporated in the BVI and to the fact that the claimants chose to sue in the BVI. These are neutral considerations in a forum application.

[72] The principles for reviewing the exercise of the judge's discretion are well-known and are set out in sufficient detail in the early paragraphs of this

³⁸ supra note 14.

³⁹ supra note 22.

judgment.⁴⁰ I find that the judge committed errors of principle leading to an incorrect assessment of the connecting factors and the conclusion that Russia is not the more appropriate forum for the trial of the action.

[73] In closing on this stage of the process, I repeat the finding of Bannister J, the first judge to deal with this case, that this is a Russian fraud effectively in which the BVI companies were used as instruments, and that it has nothing to do with this jurisdiction.⁴¹ This finding is not binding on this Court, nor on the other judges in the lower court, but I agree with it to the extent that it represents a fairly accurate assessment of the case. It may have connections with foreign countries other than Russia, but it is bereft of any substantial connection to the BVI.

[74] In the circumstances, I would set aside the exercise of the learned judge's discretion and find that the BVI is not the more appropriate forum for the trial of the action.

Stage 3 – Substantial justice in the appropriate forum

[75] This takes me to the third stage of the process. Having found that Russia is the appropriate forum, should this Court nevertheless refuse a stay of the action on the ground that the claimants will not receive substantial justice in the Russian courts? This is the final step of the process outlined by Lord Goff in the **Spiliada** case at paragraph 26 above. The key consideration here is that the claimants will not obtain justice in the Russian courts. The burden of proving this is on the claimants.

[76] The claimants submitted that the unavailability in the Russian courts of certain remedies that are important to their claims, as well as the shorter limitation period in the Russian courts, are reasons why they will not obtain justice in the Russian courts. I will deal with these two factors, but before doing so, I must address an overriding consideration when dealing with the

⁴⁰ See paragraphs 20-24 above.

⁴¹ See paragraph 14 above.

issue of justice in an available foreign forum. In the **Spiliada case**,⁴² Lord Goff spoke of some of the advantages that the claimant may enjoy in the English court system, but why, nonetheless, the trial should take place in the natural forum. He said:

“Typical examples are: damages awarded of a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under RSC Ord. 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available forum ... generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognized systems applicable in the appropriate forum overseas.”

Lord Goff picked up on this theme in **Connelly v RTZ Corp plc**⁴³ when he referred to his judgment in the **Spiliada case** and continued:

“From the discussion which followed, a general principle may be derived, which is that, if a clearly more appropriate forum overseas has been identified, generally speaking the plaintiff will have to take that forum as he finds it, even if it is in certain respects less advantageous to him than the English forum. He may, for example, have to accept lower damages, or do without the more generous English system of discovery. The same must apply to the system of court procedure, including the rules of evidence, applicable in the foreign forum. This may display many features which distinguish it from ours, and which English lawyers might think render it less advantageous to the plaintiff. Such a result may in particular be true of those jurisdictions, of which there are many in the world, which are smaller than our own, are in consequence lacking in financial resources compared with our own. But that is not of itself enough to refuse a stay. Only if the plaintiff can establish that substantial justice cannot be done in the appropriate forum, will the court refuse to grant a stay.”

Finally, in **Lubbe v Cape plc**,⁴⁴ Lord Bingham referred to Lord Goff’s judgments in the two preceding cases and continued:

⁴² supra note 8, p. 482.

⁴³ [1997] 4 All ER 335, p. 345.

⁴⁴ [2000] 4 All ER 268, p. 275.

“Generally speaking, the plaintiff must take a foreign forum as he finds it, even if it is in some respects less advantageous to him than the English forum ... It is only if the plaintiff can establish that substantial justice will not be done in the appropriate forum that a stay would be refused.”

- [77] These cases illustrate that where the court finds, on a forum application, that a foreign forum is the appropriate forum for the trial of an action, the claimant must take that forum as he finds it, and generally the BVI courts, following the English cases, will grant a stay of the local proceedings in favour of the appropriate forum unless it is satisfied that justice will not be done in the appropriate forum. The **Connelly** case is an example of an English court refusing a stay on the ground that the plaintiff would not receive justice in the appropriate forum. The plaintiff left Scotland as a young man and worked for the defendants in its uranium mines in Namibia for several years. On his return to Scotland, he developed throat cancer and became permanently disabled. He claimed that the cancer was caused by working in the uranium mines in Namibia and brought proceedings against the defendant in England because he could not afford the expenses associated with suing in the natural forum for bringing such a claim, Namibia. However, he could proceed in England because legal aid and conditional fee arrangements were available there. On appeal to the House of Lords, their Lordships were satisfied that the plaintiff could not pursue his claim in Namibia without the benefit of financial assistance and sending him to try his claim in that country would have resulted in him not being able to pursue the claim. Their Lordships were satisfied that justice would not be done in the natural forum and allowed the plaintiff to proceed in England.
- [78] Applying the principles to the instant appeal, I am satisfied that the claimants may lose certain advantages if they have to bring the action in the Russian courts. There are at least two such potential losses.
- [79] The claimants will have fewer remedies in Russia. An important part of their claims in the BVI is the remedies of the constructive trust and the tracing of assets. It is common ground between the experts that these remedies are not available in Russia. They are available in the BVI and are routinely granted and

administered by the Commercial Court. However, the claims in tort are available in both jurisdictions.

[80] The claimants also submit that they will lose the benefit of the longer limitation periods in the BVI and in fact any attempt to initiate a claim in Russia at this or any later stage could be met with a limitation defence. The defendants responded to this submission in two ways. Firstly, after the completion of the hearing before this Court the defendants, through their counsel, gave the Court a written undertaking that they would not take the limitation point if the action was pursued in Russia. The claimants objected to the undertaking saying that it was opportunistic, not in a proper form, and came too late in the day. However, this Court accepts the undertaking with the result that the issue of limitation is no longer a serious consideration, at least in respect of the defendants on whose behalf the undertaking was given. In respect of the defendants who did not participate in the appeals and are not represented by Mr. Moverley Smith, QC, including the Russian defendants, the undisputed expert evidence is that the Russian courts have the power to extend the time for bringing a claim in Russia, and the affected defendants could apply for an extension of time if proceedings are started against them in Russia.

[81] I find on the evidence and the relevant authorities that if a stay is granted in favour of the more appropriate forum, Russia, the claimants, unlike the plaintiff in the **Connelly** case, would not be without a viable claim before the appropriate and available forum. They will not have the array of remedies that are available to them in the BVI, but that is a disadvantage that they will have to deal with. They must take the appropriate forum as they find it. This is not a case where substantial justice will not be done in the natural forum, only that it will be done on a different basis.

[82] The learned judge came to the opposite conclusion. He found that the BVI courts are better equipped to deal with the array of remedies sought by the claimants, which are not in any event available in Russia, and that tipped the

balance in favour of the BVI as a more suitable forum.⁴⁵ However, as I found above, this was not the correct approach in a case where the Russian law is the governing law of the claims in the action and Russia is the appropriate forum.

[83] For the reasons stated above, I find that the most appropriate forum for the trial of this action is the courts of Russia and that the claimants have not discharged the burden of proving that they will not receive substantial justice in that forum.

The service out defendants

[84] The judge having found that the BVI is the natural forum for trying the action, and that the claimants, on whom the burden lay, had satisfied the other requirements for being granted leave to serve the foreign defendants outside the jurisdiction, confirmed the order for service out previously granted by Farara J.

[85] The elements that the claimant had to prove to receive permission to serve the defendants outside the jurisdiction were repeated in summary form by Lord Collins in the **Nilon** case as follows:

“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, i.e. 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 has been 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.”⁴⁶

Taking the third element first, and having found that the BVI is not the appropriate forum for the trial of the action, it follows that the claimants have failed to prove one of the essential elements for a successful service out application, and the order for service out is liable to be set aside for that reason

⁴⁵ Page 45 of the transcript of the judgment.

⁴⁶ *supra* note 30, para. 13.

only. It is therefore unnecessary to deal with the first two elements. However, out of deference to the very full submissions of counsel on both sides regarding the question whether there is a serious issue to be tried in respect of the service out defendants, and in particular the 18th defendant, Drey Moor, I will address this issue briefly.

[86] Mr. Moverley Smith, QC submitted that Wallbank J erred in affirming the leave granted by Farara J to serve Drey Moor outside the jurisdiction because there is no pleaded claim against Drey Moor and therefore the company is not a “necessary or proper party to the claim” within the meaning of the gateway provision in CPR 7.3(2)(a). The pleaded case against Drey Moor is that it paid secret commissions to the 17th defendant, Gianthill, a BVI company. Details of the allegation are set out in paragraphs 93 to 95 of the amended statement of claim under the heading “The Drey Moor Scheme”. The test whether a foreign defendant is a necessary or proper party within the meaning of CPR 7.2(b) was stated by Lord Collins in **AK Investment CJSC and others v Krygyz Mobil Tel Ltd and others**⁴⁷ as whether there is a serious issue to be tried in relation to that defendant. He continued that that issue is usually resolved in favour of the applicant if the pleaded case shows that the claims against the anchor defendants, here the BVI defendants, and the foreign defendant, involve one investigation. In the instant case, I am satisfied that the pleaded case against Drey Moor is a part of the claimants’ investigation of the bribery scheme involving the defendants, including the BVI defendants, and that there is a serious issue to be tried against Drey Moor. The failure to plead an actual claim against Drey Moor was described by Mr. Fenwick, QC in his written submissions as an omission that was being rectified by way of further amending the statement of claim.

[87] In the circumstances, I am satisfied that there is a serious issue to be tried against Drey Moor within the meaning of CPR 7.2(a) and that Wallbank J was correct in deciding this issue in favour of the claimants. However, this does not affect the more important and overarching finding that the BVI is not the more

⁴⁷ [2011] UKPC 7.

appropriate or natural forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

Non-disclosure

[88] Finally, I deal with the issue of material non-disclosure by the claimants. In the proceedings in Cyprus, the claimants sought and obtained Norwich Pharmacal relief and received documents and information about some of the defendants. On 6th August 2014, the Cypriot court recorded an undertaking by Eurochem Russia to use the disclosed documents and information “...exclusively for the taking of legal steps on behalf of the plaintiffs...and not to disclose any documents or information to third parties.”⁴⁸ The claimants were also ordered to return the documents if their application was later rejected. On 11th November 2015, the Cypriot court rejected the application. Nonetheless, the claimants used some of the prohibited information in their ex parte application that was heard by Farara J on 19th November 2015. The undertaking was not disclosed to Farara J. Mr. Moverley Smith, QC submitted that this was a non-disclosure of a material fact and, following the line of well-known authorities, Wallbank J should have set aside the ex parte order for service out granted by Farara J. Mr. Fenwick’s response was that the claimants’ use of the documents was based on advice from their lawyers in Cyprus that they were entitled to do so, and that, in effect, the claimants were not guilty of material non-disclosure. Wallbank J accepted Mr. Fenwick’s submission and found that there was no material non-disclosure. I do not see any basis for interfering with the exercise of the judge’s discretion on this point.

Conclusion

[89] Russia, and not the BVI, is the most appropriate forum for the trial of this action for the interest of the parties and the ends of justice and the claimants have not discharged the burden of proving that they will not receive substantial justice in the courts of Russia.

⁴⁸ Record of Appeal, p. 1389.

Order

[90] I would allow the appeal, set aside the order for service of the proceedings on the foreign defendants outside the jurisdiction and the worldwide freezing injunction granted by this Court on 25th February 2016 and grant a stay of the proceedings in the BVI, with costs to the defendants here and in the court below, to be assessed if not agreed within 28 days.

[91] I would make the following orders:

- (1) The appeal is allowed.
- (2) The appellants/defendants are granted a stay of the proceedings.
- (3) The order for service of the claim on the foreign defendants outside the jurisdiction and the worldwide freezing order granted by this Court on 25th February 2016 are set aside.
- (4) Costs of the appeal and in the court below to the appellants/defendants, to be assessed if not agreed within 28 days.

[92] I gratefully acknowledge the very able and complete assistance from counsel on both sides, and those who assisted them.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Anthony E. Gonsalves, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar

