EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2015/0010

BETWEEN:

DMITRY VLADIMIROVICH GARKUSHA

Appellant

and

ASHOT YEGIAZARYAN

Respondent

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Douglas Mendes, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Brian Doctor, QC for the Appellant
Mr. Matthew Collings, QC, with him, Mr. Andrew Wanambwa
for the Respondent

2016: July 20;
2017: June 12.

Application for leave to appeal to Her Majesty in Council – Whether decision of this Court raised questions of great general or public importance which ought to be referred to Privy Council for resolution

The respondent applied for leave to appeal to Her Majesty in Council against the judgment of this Court[1] handed down on 6th June 2016. On that date, the appellant's appeal was allowed. The factual background to the appeal is that by a written agreement dated 23rd January 2008 ("the 2008 Agreement"), the appellant agreed to transfer to the respondent 100% of the shares in a company called Blidensol Trading and Investments Limited ("Blidensol") and the respondent, in turn, agreed to transfer to the appellant 2.75% of the shares in a company called CJSC Decorum. The appellant subsequently entered into two Share Purchase Agreements ("SPAs") with one Vitaly Gogokhiya ("Mr. Gogokhiya"), who

[1] The panel for the appeal hearing was differently constituted.

was the second defendant in the court below. By the first SPA, the appellant agreed to transfer his shares in a BVI company called Hamfast Investment Ltd. ("Hamfast") to Mr. Gogokhiya, and by the second SPA, he agreed to sell to Mr. Gogokhiya the entire of the issued shares in another BVI company known as Hackham Invest & Trade Inc. ("Hackham"). Each SPA contained an exclusive jurisdiction clause which stated that: 'Any disputes, differences or claims arising out of or in connection with this Agreement including with respect to its performance, breach, termination or invalidity, shall be settled in the courts of the British Virgin Islands'. There was no similar clause in the 2008 Agreement.

The appellant filed a claim against the respondent and Mr. Gogokhiya, alleging that he was compelled by threat of violence, intimidation and financial pressure from the respondent and his associates to enter into the 2008 Agreement and the SPAs. He also claimed that at all times Mr. Gogokhiya was the nominee of the respondent. The appellant sought damages for conspiracy to injure, unlawful interference, intimidation and breach of fiduciary duty, restitution of all sums paid and assets transferred to the respondent and Mr. Gogokhiya, a declaration that he is the true legal owner of the shares in Hamfast and Hackham, and rectification of the share register of the BVI companies. The respondent and Mr. Gogokhiya not being residents of the BVI, the appellant sought to and did obtain permission to serve them outside the jurisdiction. However, the judge in the lower court subsequently set aside this permission on the respondent's application, on the basis that the claim brought by the appellant did not fall within the exclusive jurisdiction clauses in the SPAs and that the BVI was not the most appropriate forum for the determination of the disputes between the parties. On appeal however, this Court found that the exclusive jurisdiction clauses in the SPAs did apply to the appellant's claim, which was accordingly triable in the BVI. This Court further held that, there not being a jurisdiction clause in the 2008 Agreement similar to the one in the SPAs, the BVI was not the appropriate jurisdiction for the trial of the claims in relation to that agreement. In coming to its conclusions, the Court of Appeal relied on and followed the judgment of the House of Lords in Premium Nafta Products Limited and Others v Fili Shipping Company Limited and Others[2] ("the Fiona Trust case") and that of Ellis J in Richard D. Vento et al v Martin Kenney & Co (A Law Firm).[3]

The respondent contended that there were two questions of great general or public importance that ought to be referred to Her Majesty in Council for resolution. The first such question arose from the following passage in the judgment of this Court: 'Following the guidance in the English and BVI cases I find that as a general principle tort claims for inducing a contract with an exclusive jurisdiction clause fall within the terms of that clause and unless there are exceptional circumstances should be dealt with in accordance with the clause."[4] The respondent submitted that this represents a misstatement of and is wider than the approach to the interpretation of arbitration clauses taken by the House of Lords in the Fiona Trust case. The respondent stated that by purporting to rely on Fiona Trust but then formulating a principle at variance therewith, the Court of Appeal has left the

[2] [2007] UKHL 40.
[3] BVIHCV2014/0061 (delivered 26th November 2014, unreported).
[4] At para. 35.

law in a state of some uncertainty and a reference to the Privy Council to clarify the law is accordingly necessary.

The second question was whether the Court's determination that permission to serve out of jurisdiction was properly refused in relation to the claims under the 2008 Agreement was a relevant factor in the exercise of the Court's discretion to grant permission in relation to the claims under the Share Purchase Agreements, given that both sets of claims arose out of the same set of facts and circumstances. The assumption is that the Court did not take this factor into account when exercising its discretion to determine whether, in all of the circumstances, permission ought to have been granted.

Held: dismissing the application for leave to appeal and ordering that costs be assessed if not agreed, that:

1. The Court of Appeal did not declare any principle concerning the construction of exclusive jurisdiction clauses which in any way departed or was intended to depart from the guidance given by the House of Lords in the **Fiona Trust** case, nor has the law in this area been plunged into a state of uncertainty. There is no passage in the Court of Appeal's judgment in which a different approach was offered to that taken by Lord Hoffmann in the **Fiona Trust** case, nor was that judgment criticised in any way. It follows therefore that there is no question, far less one of great general or public importance, to be referred to the Privy Council for resolution.

   Premium Nafta Products Limited and Others v Fili Shipping Company Limited and Others[5] ("the **Fiona Trust** case") applied.

2. There is no complaint that the Court made no attempt to construe the exclusive jurisdiction clauses in the SPAs. It accepted that for this purpose there was no distinction to be made between an arbitration clause and an exclusive jurisdiction clause,[6] and it is clear that it intended to follow the approach taken by the Privy Council in the **Fiona Trust** case and by Ellis J in **Richard D. Vento v Martin Kenney & Co**, who had expressly followed **Fiona Trust**, as is apparent from the opening words of his paragraph 35: 'Following the guidance in the English and BVI cases'. It is also clear that when the Court declared the 'general principle' that 'tort claims for inducing a contract with an exclusive jurisdiction clause fall within the terms of that clause' it intended no more than to restate in its own words the assumption of Lord Hoffmann in the **Fiona Trust** case that the signatories to an arbitration clause intended all disputes arising out of their contractual relationship to be decided by the same tribunal, unless the contrary intention is expressly stated. The concluding statement that the parties' intention that disputes should be referred to the court identified in the exclusive jurisdiction clause ought to be followed, 'unless there are exceptional circumstances', was nothing but the foreshadowing of the discretion which the Court accepted to be reposed in it to

[5] [2007] UKHL 40.
[6] See para. 33 of the Court's judgment.

deny a party access to the jurisdiction chosen in the exclusive jurisdiction clause, where there are "strong grounds" for so doing.

Premium Nafta Products Limited and Others v Fili Shipping Company Limited and Others[7] ("the **Fiona Trust** case") applied.

3. In relation to the second question, the Court, in exercising its overriding discretion in deciding whether to refuse permission, did take into account that the disputes connected with the 2008 agreement, if pursued, would have to be litigated elsewhere. This is readily apparent from the fact that the Court asked itself the question whether there were any "strong reasons" or "exceptional circumstances" to deny the appellant access to the BVI courts to resolve his claim. In this regard, the respondent's submission that 'the 2008 Agreement was the commercial centre of the overall transactions', that Russia was the appropriate jurisdiction for that agreement, and that accordingly Russia should also be the jurisdiction for the SPAs, was noted. In rejecting the submission, the Court observed that the 2008 Agreement did not have an exclusive jurisdiction clause and that there was accordingly no conflict in this respect between that agreement and the SPAs; that the SPAs were contemplated in the 2008 Agreement; and that since the 2008 Agreement preceded the SPAs, the selection of the BVI courts to resolve disputes could not be supplanted by an earlier agreement which made no choice of jurisdiction at all.

JUDGMENT

[1] **MENDES JA [AG]**: We have for consideration the respondent's application for leave to appeal to the Judicial Committee of the Privy Council against the judgment of a differently constituted panel of this Court delivered on 6th June 2016. Having regard to the fairly narrow issues which have been raised on the application, an account of the relevant facts may be stated briefly.

[2] By a written agreement dated 23rd January 2008 ("the 2008 Agreement"), the appellant agreed to transfer to the respondent 100% of the shares in a company called Blidensol Trading and Investments Limited ("Blidensol") and the respondent in turn agreed to transfer to the appellant 2.75% of the shares in a company called CJSC Decorum.

[7] [2007] UKHL 40.

[3] The appellant subsequently entered into two Share Purchase Agreements with one Vitaly Gogokhiya ("Mr. Gogokhiya"), the second defendant in the court below. The first was dated 1st February 2008 and by its terms the appellant agreed to transfer his shares in a BVI company called Hamfast Investment Ltd. ("Hamfast") to Mr. Gogokhiya. Hamfast was at the time the beneficial owner of 100% of the shares in Blidensol and was itself beneficially owned and controlled by the appellant.

[4] By the second agreement, which was dated 27th January 2009, the appellant agreed to sell to Mr. Gogokhiya the entire issued shares in another BVI company, Hackham Invest & Trade Inc. ("Hackham"), the third respondent herein.

[5] The Share Purchase Agreements each contain an exclusive jurisdiction clause in the following terms:

> "Any disputes, differences or claims arising out of or in connection with this Agreement, including with respect to its performance, breach, termination or invalidity, shall be settled in the courts of the British Virgin Islands."

There was no similar clause in the 2008 Agreement.

[6] On the appellant's case, Mr. Gogokhiya was at all times the nominee of the respondent. In his claim against the respondents filed on 21st January 2014, he alleges that he was compelled by threat of violence, by intimidation and by financial pressure from the respondent and his associates to enter into the 2008 Agreement and the two Share Purchase Agreements. He claims that he acted under duress and would not have signed the agreements but for the pressure exerted on him. He therefore claimed damages for conspiracy to injure, unlawful interference, intimidation and breach of fiduciary duty, restitution of all sums paid and assets transferred to the respondents, a declaration that he is the true legal owner of the shares in Hamfast and Hackham, and rectification of the share register of the BVI companies.

[7] Because the respondent and Mr. Gogokhiya were not residents of the BVI, the appellant eventually obtained permission on 24th July 2014 to serve them outside the jurisdiction. However, on 12th March 2015, on the respondent's application, Bannister J [Ag.] set aside the permission previously granted and dismissed the claim against the respondent. He did so because he concluded that the claim brought by the appellant did not fall within the exclusive jurisdiction clauses in the Share Purchase Agreements and that Russia, not the BVI, was the most appropriate forum for the determination of the disputes between the parties.

The decision of the Court of Appeal

[8] Webster JA [Ag.], writing for the Court, held that the exclusive jurisdiction clauses in the Share Purchase Agreements did apply to the appellant's claim, which was accordingly triable in the BVI. However, in the absence of a similar exclusive jurisdiction clause in the 2008 Agreement, the BVI was not the appropriate jurisdiction for the trial of the claims in relation to that agreement.

[9] In coming to his conclusions, it is manifest that Webster JA [Ag.] relied on and followed the judgments of the House of Lords in **Premium Nafta Products Limited and Others v Fili Shipping Company Limited and Others**[8] ("the **Fiona Trust** case") and that of Ellis J in **Richard D. Vento et al v Martin Kenney & Co (A Law Firm)**.[9]

[10] A finding that the exclusive jurisdiction clauses covered the appellant's claims was not the end of the matter. It still had to be determined whether the learned first instance judge had exercised his discretion lawfully in setting aside the permission to serve the overseas respondents outside of the jurisdiction or, which is the same thing, whether it was lawful in the first place to grant that permission. For that purpose, it had to be determined whether the three-pronged test for the grant of leave recently set out by the Privy Council in **Nilon Limited and Another v Royal**

[8] [2007] UKHL 40.
[9] BVIHCV2014/0061 (delivered 26th November 2014, unreported).

Westminster Investments S.A. and Others[10] had been satisfied, namely: i) whether there was a serious issue to be tried on the merits; ii) whether there was a good arguable case that the claim fell within one or more of the classes of claims in rule 7.3 of the **Civil Procedure Rules 2000** ("CPR"); and iii) whether the BVI was clearly or distinctly the appropriate forum for the trial of the dispute, and in all the circumstances, whether the court ought to exercise its discretion to permit service out of the jurisdiction. Bannister J [Ag.] had answered the first two questions in the affirmative and Webster JA [Ag.] was satisfied that he was correct. However, Bannister J [Ag.] found that since, in his view, the two BVI companies were worthless, it was wrong to submit a foreigner to a claim in the BVI which has no value to the claimant. He therefore set aside the permission to serve the claim outside of the jurisdiction.

[11] Webster JA [Ag.] disagreed with the learned judge's finding that the BVI companies had no value. He found further that since the parties had freely chosen the BVI to resolve their disputes, "strong reasons" or "exceptional circumstances" were required to depart from their selected forum, but no such "strong reasons" or "exceptional circumstances" had been demonstrated. The fact that the BVI companies may have been valueless, a proposition Webster JA [Ag.] rejected, was insufficient to dislodge the appellant's contractual entitlement to sue to recover them in his forum of choice.

[12] Webster JA [Ag.] nevertheless accepted that the Court had an overriding discretion, taking into consideration all of the circumstances of the case, to refuse service out of the jurisdiction, even where the three-pronged test had been satisfied. However, he was convinced that the judge had exercised his discretion on wrong principles.

[10] [2015] UKPC 2.

The application for leave

[13] The respondent contends that there are two questions of great general or public importance which ought to be referred to the final appellate court for resolution. The first such question arises from the following passage in the judgment of the Court:

> "Following the guidance in the English and BVI cases I find that as a general principle tort claims for inducing a contract with an exclusive jurisdiction clause fall within the terms of that clause and unless there are exceptional circumstances should be dealt with in accordance with the clause."[11]

The respondent says that this represents a misstatement of and is wider than the approach to the interpretation of arbitration clauses taken by the House of Lords in the **Fiona Trust** case. By purporting to rely on **Fiona Trust** but then formulating a principle at variance therewith, the respondent says, the Court of Appeal has left the law in a state of some uncertainty and a reference to the Privy Council to clarify the law is accordingly necessary.

[14] The second question of great general or public importance, the respondent says, is whether the Court's determination that permission to serve out of jurisdiction was properly refused in relation to the claims under the 2008 Agreement was a relevant factor in the exercise of the Court's discretion to grant permission in relation to the claims under the Share Purchase Agreements, given that both sets of claims arise out of the same set of facts and circumstances. The assumption is that the Court did not take this factor into account when exercising its discretion to determine whether, in all of the circumstances, permission ought to have been granted.

[11] At para. 35.

Great general or public importance

[15] In **The Attorney General v Martinus Francois**,[12] Saunders JA held that the test of great general or public importance would be satisfied where 'there is a difficult question of law involved', or there is 'a serious issue of law' or 'a constitutional provision that has not been settled', or there is 'an area of law in dispute', or there is 'a legal question the resolution of which poses dire consequences for the public'. It follows, as the Court of Appeal of Trinidad and Tobago held in **Attorney General of Trinidad and Tobago v Lennox Phillip et al**,[13] that where there is no genuine dispute on the applicable principles of law, there can be no issue of great general or public importance, although even in such a case the court may exercise a reserve discretion to determine "otherwise" that the case ought to be referred to the Privy Council where, for example, there is some reasonable doubt as to the accuracy of the Court's decision. See generally the illuminating judgment of Carrington JA [Ag.] in **Pacific Wire & Cable Company Limited v Texan Management Limited et al**.[14]

[16] If it were the case that this Court had misstated the law applicable to the interpretation of exclusive jurisdiction clauses or had left the state of the law unsettled or in dispute, or had failed to take a relevant material fact into account in the exercise of its discretion, such as to create uncertainty as to the relevant, applicable circumstances, or had otherwise left some reasonable doubt as to the correctness of the outcome, I would have had no hesitation to grant leave to appeal. However, I am not at all satisfied that any of these propositions have been established.

The Fiona Trust case

[17] The appeal in the **Fiona Trust** case concerned the scope and effect of arbitration clauses contained in certain charterparties. It was alleged that the charters were

[12] SLUHCVAP2003/0037 (delivered 7th June 2004, unreported).
[13] Civil Appeal No. 155 of 2006, 6th June 2007.
[14] BVIHCVAP2006/0019 (delivered 6th October 2008, unreported).

procured by bribery, as a consequence of which the charters had been rescinded. The question was whether the arbitrator or a court of law should determine whether the rescission was proper and the issue was accordingly whether, as a matter of construction, the arbitration clause was apt to cover the question whether the contract was procured by bribery. The arbitration clause enabled either party to refer 'any dispute arising under this charter' to arbitration in London.

[18] When the **Fiona Trust** appeal was argued, there was some level of discord among the lower courts as to the proper construction of arbitration clauses. Some courts thought that an arbitration clause referring disputes "arising under" a contract was different in scope to a clause referring disputes "arising out of" a contract. Disputes concerning the rights and obligations created by the contract were said to be captured by the phrase "arising under", whereas a wider class of disputes was covered by the phrases "in relation to" or "in connection with" the contract. The result was that some disputes were referable to a court of law while others could only be referred to arbitration. Lord Hoffmann, reflecting the unanimous views of the Board, lamented that the distinctions made in the previously decided cases 'reflect no credit upon English commercial law'.[15] In his view, 'the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal'.[16] Accordingly, arbitration clauses were to be 'construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction'.[17]

[15] At para. 12.

[16] At para. 13.

[17] At para. 13.

[19] There is no complaint that Webster JA [Ag.] made no attempt to construe the exclusive jurisdiction clauses in the Share Purchase Agreements. He accepted that for this purpose there was no distinction to be made between an arbitration clause and an exclusive jurisdiction clause,[18] and it is clear, in my view, that he intended to follow the approach taken by the Privy Council in the **Fiona Trust** case and by Ellis J in **Richard D. Vento v Martin Kenney & Co**, who had expressly followed **Fiona Trust**, as is apparent from the opening words of his paragraph 35: 'Following the guidance in the English and BVI cases'. It is also clear to me that when he declared the 'general principle' that 'tort claims for inducing a contract with an exclusive jurisdiction clause fall within the terms of that clause' he intended no more than to restate in his own words Lord Hoffmann's assumption that the signatories to an arbitration clause intended all disputes arising out of their contractual relationship to be decided by the same tribunal, unless the contrary intention is expressly stated. His concluding statement that the parties' intention that disputes should be referred to the court identified in the exclusive jurisdiction clause ought to be followed, 'unless there are exceptional circumstances', was nothing but the foreshadowing, in my understanding of his judgment, of the discretion which he accepted to be reposed in the court to deny a party access to the jurisdiction chosen in the exclusive jurisdiction clause, where there are "strong grounds" for so doing. In this regard, he cited[19] a passage from the judgment of Lord Bingham of Cornhill in **Donohue v Armco Inc and Others**[20] to that effect.

[20] It is my view therefore that Webster JA [Ag.] did not declare any principle concerning the construction of exclusive jurisdiction clauses which in any way departed or was intended to depart from the guidance given by the House of Lords in the **Fiona Trust** case, nor has the law in this area been plunged into a state of uncertainty. There is no passage in Webster JA [Ag.]'s judgment in which he offered a different approach to that taken by Lord Hoffmann, or criticised his

[18] See para. 33 of his judgment.
[19] At para. 50.
[20] [2002] 1 All ER 749, 759.

judgment in any way. It follows therefore that there is no question, far less one of great general or public importance, to be referred to the Privy Council for resolution.

[21] Before concluding this part of my judgment, it is significant that the respondent has not suggested that on a proper application of the **Fiona Trust** approach a different interpretation of the exclusive jurisdiction clauses would have resulted. After all, the clauses contain all of the phrases – "arising out of", "in connection with" – which courts prior to the **Fiona Trust** case were satisfied were broad enough to include disputes going beyond the enforcement of obligations and rights created by the contract. And for good measure, the parties were careful to expressly include disputes with respect to the performance, breach, termination and invalidity of the agreements. The respondent's primary concern, therefore, appears to be the effect which the uncertainty which he thought was created by Webster JA [Ag.]'s judgment would portend for future cases. To the extent there is any merit in that concern, I am certain that the clarification of Webster JA [Ag.]'s judgment respectfully offered above has allayed any such fears.

The relevance of the 2008 Agreement

[22] This aspect of the respondent's application can be dealt with more briefly since I am satisfied that in exercising the court's "overriding discretion" in deciding whether to refuse permission, Webster JA [Ag.] did in fact take into account that the disputes connected with the 2008 Agreement, if pursued, would have to be litigated elsewhere.

[23] That this is so, is readily apparent from that part of his judgment where he asked himself the question whether there were any "strong reasons" or "exceptional circumstances" to deny the appellant access to the BVI courts to resolve his claim. In this regard, he noted[21] the respondent's submission that 'the 2008 Agreement

[21] At para. 53.

was the commercial centre of the overall transactions', that Russia was the appropriate jurisdiction for that agreement, and that accordingly Russia should also be the jurisdiction for the Share Purchase Agreements. In rejecting this submission, Webster JA [Ag.] observed that the 2008 Agreement did not have an exclusive jurisdiction clause and that there was accordingly no conflict in this respect between that agreement and the Share Purchase Agreements; that the Share Purchase Agreements were contemplated in the 2008 Agreement; and that since the 2008 Agreement preceded the Share Purchase Agreements, the selection of the BVI courts to resolve disputes could not be supplanted by an earlier agreement which made no choice of jurisdiction at all.

[24] As noted, Webster JA [Ag.] accepted the existence of an "overriding discretion" to refuse permission to serve a claim out of the jurisdiction if the court was 'satisfied in all the circumstances [that] the case is not a proper one for ordering a foreigner to defend himself in the jurisdiction'.[22] He concluded this part of his judgment declaring[23] that he would exercise his own discretion in favour of the appellant 'for the reasons advanced above'. That again in my view was a shorthand reference to all the factors which had been taken into account including, just six paragraphs before, his rejection of the submission that the fact that the proper jurisdiction for the 2008 Agreement was Russia militated against accepting the BVI as the proper forum for resolving the Share Purchase Agreements disputes.

[25] In the result, Webster JA [Ag.]'s judgment cannot be and is not to be taken as holding that the refusal of permission to serve out of jurisdiction in relation to disputes under one agreement is not relevant to the exercise of discretion to permit service of jurisdiction in relation to disputes under another agreement, where both sets of disputes arise out of the same facts. It would follow as well, therefore, that there is no such question to be referred to the Privy Council for resolution.

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[22] At para. 55.
[23] At para. 59.

Disposal

[26] I would accordingly dismiss the respondent's application for leave to appeal to Her Majesty in Council, with costs to be assessed if not agreed.

[27] By way of postscript, I would note that there is nothing in Webster JA [Ag.]'s judgment or in anything submitted to this Court which has caused me to doubt the correctness of his conclusions.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar