THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2007

CLAIM NO. AXAHCV/2007/0002

BETWEEN:

BACARDI INTERNATIONAL LIMITED

Claimant/ Respondent

AND

(1) PENDRAGON INTERNATIONAL LIMITED
(2) GIGI OSCO-BINGEMANN
(3) VADIM FRIDMAN
(the two latter Defendants, as trustees of the Estate of Martin Crowley)

Defendants/ Applicants

APPEARANCES:

Mr. Geoffrey Robertson Q.C, Mr. Mark Brantley and Ms Jean Dyer for the Defendants/Applicants
Mr. Robert Hildyard Q.C, Mr. Mark Fortè, Mr. Richard Evans, Ms. Tameka Davis and Mr. Harry Wiggin for Claimant/ Respondent

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Date: 2007: 12th November
3rd , 4th December
2008: 14th January

JUDGMENT

[1] **REDHEAD A, J. (Ag):** Mr. Martin Crowley, a Californian, was undoubtedly a philanthropist. He was, obviously, also a very successful businessman. He, with his genius, along with John Paul DeJoria, developed in California the Patrón Tequila. This brand of Tequila was marketed very successfully in the United States of America. Both Mr. Crowley and Mr. DeJoria, in 1993, formed a company, Caribbean Distillers Corporation (CDC) which, with its subsidiaries, carries on the Patrón Tequila business.

[2] Mr. Crowley established Pendragon, which is an Offshore Company, to act as a holding company for his 50% share in CDC. Pendragon is an Anguilllian International Business Company (IBC) incorporated in Anguilla. This company does not carry on business in Anguilla.

[3] Mr. Crowley died in April 2003 in Anguilla. Prior to his death he established a charitable trust, the Windsong Trust, for the education of poor children throughout the world. By his Will, Mr. Crowley left his entire estate to the Windsong Trust. The shares in Pendragon were the principal assets of Mr. Crowley's estate and they are now held by Ms. Gigi Osco-Bingemann and Mr. Vadim Fridman, the 2nd and 3rd Defendants, as Trustees.

[4] Before Mr. Crowley's death, Bacardi, the Claimant, in 2000 showed an active interest in acquiring the Patrón Tequila business. In 2004, Bacardi again expressed an interest in acquiring either all of Patrón's shares in CDC or Pendragon's 50% shares. Bacardi proposed buying the shares then for between US$175 and US$200 million.

[5] In July and August, 2004, Bacardi's executives and advisers travelled to California for negotiations for the purpose of acquiring an interest in Patrón. Meetings were held at Los Angeles office of the Trustees' lawyer, Barry Fink, and were attended by the Trustees, their Californian banker, Lloyd Grief, some five Bacardi executives and Bacardi US lawyers. The lawyers exchanged drafts of the proposed sale conditional contract. The Stock Purchase Agreement (the SPA) was eventually signed on 26th August 2004. This agreement became binding on 3rd September 2004. It is this Agreement which forms the subject of this action brought by Bacardi, the Claimant, in an action filed in the High Court of Anguilla. Bacardi is suing the Trustees to enforce this Agreement.

[6] However, prior to Mr. Crowley's death in April 2003, he entered into an agreement – The Shareholders' Agreement – with Mr. DeJoria to purchase Mr. Crowley's shares. Mr. DeJoria, as a result, claimed to be entitled to buy the shares in CDC for $43 million by virtue of the Shareholders' Agreement. The Trustees contended that it is unclear whether

the Shareholders' Agreement applied to the shares in CDC. As a result, the Trustees commenced proceedings against Mr. DeJoria in Anguilla to have this issue resolved.

[7] Anguilla was the natural forum for that litigation because the Shareholders' Agreement is governed by Anguillian Law and called for dispute resolution in Anguilla. That case is now before the Privy Council.

[8] The Trustees also contended that notwithstanding the SPA Agreement with Bacardi, they are not precluded from settling the DeJoria litigation on reasonable and prudent commercial terms. Mr. DeJoria has now made a commercial offer to settle for $755 million, which they believe as Trustees they have a duty to accept to put the Windsong Trust in funds to carry out its charitable objectives.

[9] In its Re-amended Statement of Claim, the Claimant, by paragraph 7, alleges that Pendragon and the Trustees have acted in breach or anticipatory breach of the Agreement – The Stock Purchase Agreement.

[10] By paragraph 8 of the Re-amended Statement of Claim the Claimant alleges:

> *"… the Defendants and each of them conspired together to injure Bacardi's interest. The 3rd Defendant is a director of CDC and as such CDC had, if not actual knowledge then constructive knowledge of the existence of the Agreement. By agreeing to participate in the sale of Pendragon's shares in CDC or the entire outstanding share capital of Pendragon to a third party in contravention of the Agreement knowing that Bacardi would be injured thereby, the Defendants each conspired as aforesaid …"*

[11] On the 14th March, 2007, the 1st named Defendant , Pendragon, made an application to the High Court in Anguilla seeking a declaration that the Anguilllian Court is a forum non conveniens. Pendragon, which is registered in Anguilla, was properly served. However, the 2nd and 3rd Defendants were maintaining at that time that they were not properly served. As a result, the legal representatives of the parties, Claimant and Defendants,

exchanged correspondence in relation to this issue. On the 21st March, 2007, counsel for the Defendants wrote to Counsel for the Applicant in the following terms:

> *"Please be advised that our clients are disclosing the said letter of intent pursuant to the order of the court and our clients do not waive their rights to contest the jurisdiction of the Anguillian Court or contest service on them or to mount any forum challenge."*

[12] The 2nd and 3rd Defendants applied to the High court seeking an order that the Anguillian Court is not the appropriate court for the trial of the claim which Bacardi brought against them. In other words, they were mounting a forum challenge. The matter came before George-Creque J. who dismissed the application of the 2nd and 3rd Defendants. The learned Judge said that the 3rd Defendant acknowledged that he was properly served and found as a fact that the 2nd Defendant was properly served. The learned Judge held that the 2nd Defendant had not filed an Acknowledgment of Service and therefore the Claimant could therefore have requested judgment in default. The learned Judge in referring to the correspondence between the parties went on to say:

> *"[9] There is also the indication now that the 3rd Defendant and 4th Defendant reserves (sic) their right to challenge the jurisdiction of the court, although no mention whatsoever was made of this in their correspondence. All indications were that their defences would be filed and Case Management Conference be undertaken albeit at a date later than those fixed previously by consent.*
>
> *[10] It is apparent to this Court that the 3rd Defendant (*2nd Defendant*) and the 4th Defendant* (3rd Defendant*) by their conduct are seeking to utilize the Rules in a way which is contrary to the overriding objectives particularly having regard to the fact that they must be taken to be well aware of the Claim in these proceedings from its inception, in as much as they are the controlling minds of the 2nd Defendant (who was served from February 2007) and the part the 3rd (2nd Defendant) and 4th Defendant (3rd Defendant) have clearly played in these proceedings.*

[11] I also point to part 1.3 of CPR 2000 which also says that it is the duty of the parties to help the Court in furthering the overriding objective.

[12] The Court strongly deprecates the conduct of the 3rd Defendant (2nd Defendant) *and 4th Defendant (3rd* Defendant*) in light of the correspondence coupled with their failure to acknowledge service, within the period specified to now seek to rely on Rule 9.3(4) and still further, seek to reserve the right to challenge the Court's jurisdiction.*

[14] The Court has been left with no other impression of the Defendants' conduct, other than that every advantage is being taken, by the use of the Rules to delay these proceedings. Such will not be conducted." (I suspect that it should be condoned.)

With these remarks, the learned judge dismissed the 2nd and 3rd Defendants' challenge to this jurisdiction as being the forum non-conveniens.

[13] The Defendants appealed. This appeal was heard by a single Court of Appeal Judge – Barrow JA. In allowing the appeal, Barrow JA at paragraph 20 said:

"It seems quite clear to me that the words of appellants' letter of 5th June quoted above are at least highly equivocal and by explicitly reserving <u>all</u> the appellants' rights in relation to the jurisdiction of the Anguilla court that letter recorded an intention to give up none of their rights. I find the Judge misdirected herself on the facts because the letter of 5th June was not brought to her attention and, it follows, the judge was in no position to appreciate the true facts of the appellants' position in relation to jurisdiction. Therefore, the Judge exercised her discretion to debar the appellants from challenging the jurisdiction of the Anguilla court, or concluded that the appellants had lost the right to make that challenge, on a wholly erroneous basis. I am satisfied that if the Judge had properly appreciated the appellants' position she would not have made the order that she made and, accordingly, I allow the appeal and set aside the Judge's order. …."

[14] The matter is now before me as a result. Learned counsel for the 2nd and 3rd Defendants in their written submissions began by saying:

"This application comes before the Court, by order of Barrow JA in exceptional and perhaps unprecedented circumstances."

[15] I now analyse the application before me.

Bacardi, the Claimant, is part of an international conglomerate which makes and distributes alcoholic drinks. It is incorporated in Bermuda but it mainly operates in the United States of America with a number of subsidiaries. Most of its directors are US citizens resident in America. Learned counsel for the Defendants in their written submissions argued that California is the natural forum for the trial of this case. They argued that the parties to this dispute are all Americans or companies with mostly American directors. They pointed out that the other Defendant, Pendragon, is an Anguillian International Business Company. It has no substantive business connection with Anguilla. Its directors are the Trustees both resident and domiciled in America. Pendragon's mind and management have therefore at all times been in California. Learned counsel contended that when Bacardi was first seeking to purchase the shares in 2000 and later when it came to negotiate the terms of the SPA in 2004, executives and lawyers travelled readily to California to do so. Bacardi cannot reasonably complain that California is not a convenient jurisdiction for the trial of a claim arising out of an agreement which it negotiated and concluded in California, so argued learned counsel.

[16] Learned counsel in their submissions contended that while the Defendants and Bacardi have not yet exchanged witness statements, statements have been exchanged in Bacardi's claim against Pendragon. For the purpose of the present application they provide a guide to the likely witnesses in the claim against the Trustees. Virtually all the witnesses are resident in America – five on behalf of the Defendants and two on behalf of the Claimants – three are resident in London. Not a single witness resides in Anguilla. Learned counsel concluded that as a result, a trial in California will be significantly more convenient than Anguilla. It will be easier for those living in London to get to California than it is to Anguilla because there are no direct flights from London to Anguilla. In addition, two of Pendragon's witnesses, Mr. Fink and Mr. Grief, are busy professional men

and have indicated that they are reluctant to travel to Anguilla to give evidence, though they are prepared to do so in California.

Learned counsel for the Defendants made the argument that the Anguillian legal system is based on the English common law. The Courts in Anguilla do not permit admission of US lawyers. The massive extra costs of litigating in Anguilla rather than California include the necessity in the former jurisdiction to achieve equality of arms with Bacardi by instructing an English QC and solicitors, a local law firm in Anguilla and counsel from nearby Nevis. If the litigation proceeds in Anguilla, learned counsel argued in their written submissions, legal representation alone together with business airfares and expensive accommodation on a resort island will run upwards of a million dollars. Such expenses will not have to be incurred if this dispute is litigated in California. It is, in any event, necessary for the Defendants to maintain their Californian lawyers because they are essential to the Trusts.

[17] Mr. Rovenger swore an affidavit in which he sets out the current position. He swore that hotels in California are half the price of Anguillian tourist hotels. This demonstrates, according to learned counsel, the vastly increased costs of litigating in Anguilla rather than in California. Learned Counsel said that this is a serious loss of money available for distribution by a charity to relieve poor children.

[18] In their written submissions, learned counsel for the Defendants contended that the drafting history of the SPA will be relevant under New York Law to resolve any ambiguities. Expert reports filed so far indicate serious disagreements, most importantly, perhaps a trial in the US will be essential to enable the court to get at the truth, so they argue, because certain important witnesses who were involved in the negotiation of the SPA are only compellable in the US.

[19] Learned counsel further argued that documents relating to the SPA, the conspiracy claim and the breach of confidence claim are all located overseas mainly in California and are full of American legal terminology. On that basis, this factor was and should be a factor strongly favouring California as the choice of the natural forum, as already borne out by the

absurdity of sending US documents for inspection in Anguilla in order to prepare witness statements in the US. It appears that none of the documents disclosed were originally located in Anguilla. The Claimant has already threatened to seek specific discovery of documents it alleges to be in California.

[20] In their written submission, learned counsel for the Defendants pointed out that the Trustees are not resident in Anguilla. They argued that they are outside the jurisdiction of the Courts of Anguilla and any proceedings for contempt of Court for breach of an injunction could only be brought (enforced) against them in the United States, their country of domicile. They are also the sole directors of Pendragon, so that any action against them for contempt by Pendragon would also make more sense in the US.

[21] The Defendants contended that this is a dispute involving an enormous sum of money. It involves difficult and complex issues and would be a major piece of litigation wherever heard. Anguilla is a small island with one resident judge and an under-resourced Court. It is not suited for major litigation when compared with California. They also contended "… a Californian Court can exert disciplinary control over members of its bar or from bars of other states. In terms of the *Spiliada* factors that connect with the ends of Justice i.e., getting at the truth, this is an important connection." In my considered opinion the above contentions are not only parochial but also condescending.

[22] Counsel for the Defendants, argued that only the California Probate Court can issue an order instructing the Trustees that is binding on all interested parties including the beneficiaries and the California Attorney General as well as Bacardi. Such an order would operate to release the Trustees from personal liability for taking actions approved by the Probate Court's order. The Anguillian Court has neither the authority nor the necessary jurisdiction to provide the Trustees with such instructions and protection from liability.

[23] Finally, learned counsel for the Defendants contended that the more natural forum for the enforcement of Bacardi's claims is California, where the Trustees, who are also directors of Pendragon, are resident and where Pendragon has already submitted to the jurisdiction

of the Californian Courts. Furthermore, a judgment of the Californian Court is likely to be enforceable in Anguilla. For that proposition they refer to a judgment of Rawlins J. (as he then was). See ***Autland Heavy Equipment and Construction v. Phillip Holzman International***. [1]

[24] Counsel for the Claimant in their submissions contended that on the 30th January 2007, the Claimant became aware that the Trustees and Pendragon were proposing to sell the shares in CDC to Mr. DeJoria. In order to protect its interest, Bacardi had no option but to seek injunctive relief against Pendragon to prevent Pendragon and the Trustees from disposing of the shares. Pendragon, being registered in Anguilla, Anguilla was therefore the appropriate forum to seek such a relief. They contended that it would have been negligent on the part of Bacardi's lawyers not to apply to the Anguilla Court for relief on the 30th January 2007, because it is the only forum that could give protection against the transfer of the shares which are registered in Anguilla. It is the only forum which could block the transfer of shares and, therefore, they concluded that Anguilla must be regarded as the natural forum. Bacardi, having chosen Anguilla as the natural forum and being first in time, the burden is now on the Defendants to displace that forum. Mr. Hildyard QC pointed out that the original Claim Form was issued on 2nd February 2007.

[25] Pendragon launched a forum challenge on its own. In a judgment delivered by Madam Justice George-Creque on 24th May 2007, she dismissed Pendragon's challenge because Pendragon had failed to show that California was clearly or distinctly a more appropriate forum than the Court in Anguilla.

[26] Now, the other Defendants mount the same challenge to this forum, i.e., Anguilla is a forum non-conveniens. I am of the view that it is rather unfortunate that the case should proceed in this manner. Learned counsel for Bacardi, the Claimant, said blame for this unfortunate situation should be placed squarely at the door of the Defendants because they avoided service of the Claim Form. Learned counsel contended that they should

[1] BVI HCV 2002/0111

have accepted service and then make their forum challenge. In that way, there would have been one application involving all three Defendants.

[27] I agree, notwithstanding the contention of learned senior counsel for the Defendants, who firmly maintained that the Defendants were entitled under CPR Rule[2] to insist that they were properly served. However, learned Queen's Counsel, Mr. Hildyard, for the Claimant argued that Pendragon is an Anguillian company, served as of right. Therefore, it does not lie in its mouth to contend that its home court is an inadequate forum.

[28] The Claimant argued that the Testator, Mr. Crowley, chose Anguilla as the law of incorporation of both Pendragon and CDC. The Trustees derive their rights from Mr. Crowley, to pretend to be a stranger to this jurisdiction which he selected is a difficult argument to make. The umbilical cord which gives both companies life is in Anguilla and only in Anguilla can their demise be brought about. Learned counsel contended that the shareholdings which have given rise to the DeJoria proceedings voluntarily brought by the Trustees in Anguilla which are so closely related with these proceedings are governed by the law of Anguilla. The Shareholders' Agreement provides by paragraph 23(a) *"Applicable Law – This Agreement shall, in all respects be governed by the laws of Anguilla without regard to conflicts of laws principles."*

[29] The Claimant argued that the fact that the trial would be much sooner in this jurisdiction than in California is an important factor in itself. But it is of greater significance in this particular case because the expiry date of the SPA is 31st December 2008 and a real risk that delay would literally be fatal to the claim.

[30] Learned counsel, Mr. Hildyard QC, contended that if the case is stayed in favour of California that would create a delay that would almost certainly lead to the next argument that Bacardi would have lost its right under the SPA. He also said that a stay would be likely to result in a denial of justice, in that a stay would bring a demonstrably real risk that

[2] Rule 7.8(1)(b)

the Claimant could not obtain justice, because a legal right would likely be forfeited because of delay in the other forum and that a stay should be refused unless the existing forum is wholly inappropriate. ***Dicey and Morris*[3].**

[31] I turn now to address the applicable law: ***Spiliada Maratime Corporation*** (Appellants) ***and Cansulex Ltd.*** [4](Respondents) which is the locus classicus on the subject of forum non conveniens. Both sides rely on this authority. Lord Goff summarised the law as follows:

> *"(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.*
>
> *(b) …In general, the burden of proof rests on the defendant to persuade the Court to exercise its discretion to grant a stay …. in his favour. …. the evidential burden will rest on the party who asserts its existence. … if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country.*
>
> *(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established….*
>
> *(d) Since the question is whether there exists some other forum which is clearly more appropriate* (my emphasis) *for the trial of the action, the court will look*

[3] 14th Edition Vol. 1 para 12.031
[4] 1987 A.C. 460

first to see what factors there are which point in the direction of another forum….

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

(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are some circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the Abidin Daver[5] …. the burden of proof shifts to the plaintiff."

[32] I entertain no doubt that Pendragon; the 1st named Defendant was properly served within the jurisdiction. In other words, jurisdiction as against Pendragon was founded as of right.

Learned Queen's Counsel, Mr. Robertson, said that Pendragon is not a party to this application. I agree, but Pendragon cannot, in my view, be left out of the equation in considering this application which is before me. Pendragon is one of the Defendants in the main action. It would be wholly inappropriate, in my view, to disregard Pendragon's position simply because it has gone ahead and challenged this jurisdiction without the other two Defendants. Pendragon is an Anguillian Company. It is a creature of Anguillian law. The shares Pendragon owns in CDC, without doubt, are situate in Anguilla, notwithstanding the contention of Mr. Robertson QC that the share certificates are in California. The transfer of the shares could only be effected in Anguilla according to Anguillian law. Section 129 of the International Business Company Act mandates:

[5] [1984] AL 398, 411

"For the purposes of determining matters relating to title and jurisdiction, the situs of the ownership of shares, debt obligations or other securities of an international business company is in Anguilla."

[33] Mr. Robertson QC contended that Pendragon is no more than the Holding Company of the shares in CDC and which is incorporated in Anguilla for tax efficiency. I do not agree with this characterisation. Learned Counsel, Mr. Robertson QC, argued that the Trustees are not bound by the decision on Pendragon's forum application and the Court should now consider the question of forum non conveniens afresh and make a ruling as to the appropriate forum for the trial of the action against the Trustees. I now do so.

[34] Learned Counsel Mr. Robertson QC contended that California is clearly the more appropriate forum for the trial of this action and that the claim against the Trustees should be stayed in favour of that jurisdiction. He said that the heart of the present case is the proper interpretation of the SPA which is governed by New York law and the principles of New York Law will apply to its interpretation; the admissibility of parol evidence for the calculation of damages for any breach, the Courts of California are ideally suited to determine these issues. The law of New York is often chosen as the applicable law of commercial agreements in the United States, and California Courts routinely are called upon to apply New York law to those disputes.

[35] I agree entirely with Madam Justice George-Creque when, in the Pendragon matter, she said at paragraph 22 of the judgment:

"The SPA does not contain an 'exclusive jurisdiction' provision. The reasonable inference to draw from this is that the parties to the SPA retained the freedom and remain free to bring proceedings in any convenient and competent jurisdiction despite the governing law of the contract."

[36] In the written submissions, counsel for the Defendants argued that a further crucial point to consider is whether the parties have or by implication, chosen a particular forum as suitable for the resolution of their disputes. In this case, the SPA contains an arbitration

agreement, which provides that any claim for damages as a result of a breach of contract is to be submitted to arbitration under the rules of the American Arbitration Association, and is to take place in Chicago unless the tribunal otherwise directs. In my judgment, this needs little or no consideration in an argument when considering a jurisdictional point in determining the appropriate forum for the trial of this case because the question for damages for breach has not arisen. Mr. Robertson QC argued that it is clear from ***Spiliada*** that the burden rests upon Bacardi to prove that Anguilla is clearly more appropriate. It must show good reasons why these foreign Defendants should be ordered to appear here, taking into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and the evidence and expense. Above all, the Court must be conscious of the *Dreyfus Bros* principle – ***Société Générale de Paris v. Dreyfus Brothers.***[6]

> *"It becomes a very serious question… whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction."*

In my view, it cannot be said with much force that the Defendants would be brought here with inconvenience and annoyance to contest their rights in this country, when they are already here contesting their rights in the DeJoria matter which, in my opinion, is closely linked to the instant matter.

[37] The shares in Pendragon are the principal asset of Mr. Crowley's estate and they are now held by the Defendants as Trustees. The money "to feed the Trust," for the want of a better expression, is to be realized from the sales of the shares in Pendragon, an Anguillian company.

The Defendants' authority to act therein, emanates from the shares in Pendragon because they cannot act without the shares. In other words, they are powerless without the shares. Moreover, they both are directors of Pendragon. In this regard, can the Trustees be truly

[6] 1885 29 Chd 239

regarded as "strangers" to this jurisdiction? It think not. I have said that the Bacardi has, in my view, established jurisdiction against Pendragon as of right. Learned Counsel, Mr. Hildyard QC, submitted that the fact that one of the substantive and key Defendants is served as of right in the forum is always an important connecting factor. ***National Iranian Oil Company v. Ashland Trading Ltd.*** [7]

In ***Du Pont v. Agnew[8],*** Lord Justice Bingham said at page 593:

> *"**The critical equation**.*
>
> *I now turn to consider the comparison which the authorities indicate must be carried out. In doing so I make three points at the outset. First, in a case such as this where some defendants have been served within and some without the jurisdiction, the Court must in my judgment view the case in the round. It would not be correct to review the position of the English defendants independently and treat that decision as concluding the position of the foreign defendants. Or vice versa. Relative appropriateness and the requirements of justice should be assessed taking account of the case as a whole and not giving preponderant weight to the position of either group of defendants*."

The fact that Pendragon was served within and Defendants were served without this jurisdiction, I must now take a pragmatic approach as to the Defendants' position and view the case in the round.

[38] The first point I wish to reiterate and emphasise is that the connection between the company, Pendragon, and the Defendants is so complete that as Mr. Hildyard QC says "they cannot travel one without the other".

[39] The second point is that the Defendants, through their counsel, argued strenuously that it is much more costly litigating in Anguilla rather than in California. In fact, it is argued that the entire costs of litigating in Anguilla are massive as compared to litigating in California.

[7] (1988) Bda LR 13
[8] 1987 2 Lloyd's Law Report 580, 593

In this regard the Defendants say virtually all the witnesses are resident in America. They point out the costs involved in getting the witnesses here. They also say that two of Pendragon's witnesses are busy professional men who are reluctant to travel to Anguilla. In their written submissions, they argued that the Attorney General of California has a supervisory role over the Trustees in their capacity as Trustees of the Windsong Trust and is entitled to play an active role in the proceedings. Clearly, they contended, a trial in California will be more convenient to the Attorney General than one in Anguilla in terms of his oversight role, whether or not he wishes to intervene. I find it very difficult to appreciate that an Attorney General would, in that way, be interested in the litigation of a matter involving a contract or litigation of a matter involving trustees. He would, I should imagine, be interested in the outcome of litigation and how the trust is managed.

[40] Learned counsel for the Claimant, Bacardi, in their written submissions made the observation that the argument by the Defendants that only a Californian Probate Court has the necessary authority and jurisdiction to give the trustees instructions and protect them from liability. Even if that is so, it is irrelevant. It cannot be sensibly maintained that because a trustee may wish to go to his home Court for directions for his own protection that this is relevant in assisting the identification of the appropriate forum. I agree.

[41] Having regard to the issues in the case, I am of the view that it is a very important consideration to determine which jurisdiction would offer an earlier trial. Mr. Hildyard QC in his written submission said that the fact that a trial could be possible much sooner in this jurisdiction than in California, is important in itself. In ***XN Corporation v. Point of Sale Ltd.***,[9] Rimer J. said:

> *"In particular, I regard as very important that the English court is able to offer the parties an expedited trial date in February 2001. The evidence satisfies me that an expedited trial date is vital from XN's view point. It is planning to launch the software in the first quarter of 2001 and it is also planning a stock market floatation later in the year. The XN software is a key product in XN's planning, and unless the title to it is clarified as soon as possible it may be unable to carry out its plans*

[9] [2001] IL Fr 35 at p. 30

and may suffer unquantifiable losses. I conclude from the evidence that there is no like prospect of a similarly early trial date in Israel. … The availability of an early trial date is, in my judgment, a very material factor. Speedy justice is usually better justice and the relative speed which England can offer as compared with Israel is a factor which satisfies me that the ends of justice would be better achieved by a trial here than by one in Israel."

[42] A hotly contested dispute ensued on the submissions of counsel for the Claimant and counsel for the Defendants as to whether there can be an earlier trial in Anguilla or California. Learned counsel for the Claimant in his submission argued that there is a real prospect of an early trial in Anguilla. This is a real and legitimate juridical advantage, the loss of which would almost certainly result in Bacardi unjustly being deprived of any sensible chance of having its contractual rights protected. Mr. Hildyard QC, submitted a stay would result in the likely denial of justice to Bacardi if a stay would bring a demonstrably real risk that the Claimant concerned could not obtain justice (for example, because a legal right would be likely to be forfeited because of the delay in the other forum) then a stay should be refused unless the existing forum is wholly inappropriate - ***Dicey & Morris.***[10]

[43] In their written submissions, learned counsel for Bacardi argued that it is noteworthy that nowhere in their evidence do the Trustees face up to what is practical, a practical matter, the most important factor which is that, in addition to the fact that these proceedings are intimately connected with and arise out of the sworn factual circumstances as the DeJoria litigation in the same jurisdiction, substantially all the pre-trial work in these proceedings has already been done. Pleadings are closed, discovery substantially completed, factual and expert evidence exchanged, and the experts have met. In short, the case is almost entirely ready for trial. The only outstanding matters are Supplemental Experts' Reports, some very limited disclosure from Pendragon and agreeing issues. Although the trial date fixed (entirely realistically) for 7th January 2008 is in doubt following the stay on the Pendragon action, if the Pendragon appeal (on a matter of discretion) is dismissed, there

[10] 14 Edn. Vol 1 para 12-031

should be no reason why the trial should not be listed as soon as possible in the first months of the new year. He contended that the Court should follow an intensely practical approach and as a practical matter it cannot be sensible to discern the progress made in this jurisdiction in favour of proceedings in California which as present stand dismissed and which it can be said with near certainty would come on for hearing after efforts here, substantially later than would proceedings in this jurisdiction.

[44] Learned counsel for the Defendants contended that the California State Probate Court offers a speedier trial then is likely to be obtained in Anguilla. It offers compulsory mediation in an alternative dispute resolution, but which Bacardi cannot be compelled to accept in Anguilla. I make the observation that even if compulsory mediation is available in California, this does not mean that the parties are compelled to accept the findings or result. So, in my view, that counts for nothing or very little on the side of the equation in determining the appropriate forum.

[45] The Executors, the Defendants, brought proceedings before the California Probate Court on 7th March 2007. Bacardi sought to have those proceeding dismissed. On the 11th June 2007, Judge Matz granted Bacardi's application. That decision "incorporated by reference the findings and observations set forth in ruling written by Justice George-Creque". There is a diversity of opinion as to the effect of Matz's judgment. Mr. Hildyard QC, in his oral submission, argued that the effect of Matz's decision is to set up issue estoppel. California has bolted its door so far as the trustees are concerned. He argued also that according to Matz's judgment, Anguilla is the adequate forum. It is no longer open to dispute by the Trustees. Mr. Hildyard QC concluded that the Matz's judgement is final, not provisional. He however, said that the experts disagree as to the effect of the Matz's judgments. Some say the Matz's decision is final, while others say that it is provisional. In fact, some experts argued seriously that the decision of Matz creates an issue estoppel so far as the Trustees are concerned, whereas other experts say that the decision is provisional. For example, professor Klerman explains that judge Matz's decision is not binding on the State Court. He also says that "as a matter of simple justice quite apart from all other factors, the Matz

judgment would be given no preclusive effect in Californian State Courts." Professor Klerman asserts that Judge Matz's decision is not binding on the California State Court.

[46] Gregory Rovenger, an attorney licensed to practice in California gave as his opinion that the Matz's decision is under review but Bacardi has opposed this. "If Bacardi were to stop obstructing the progress of proceedings in California, there is no question that the ….. true facts for determination in this action could be tried there." This, to my mind, seems to be saying that the Californian court is conditionally available for trial of the issue if Bacardi would cooperate. I cannot resolve the issue whether or not Matz's judgment is binding on the California Court on this application except to say that I accept, as a fact, that judge Matz's decision is on appeal.

[47] Having regard to the foregoing, I consider that the prospect of a trial in Anguilla is more definite that one in California. I therefore conclude that with other factors, a trial in Anguilla would be much sooner in Anguilla than in California. In my judgment, that is a very important consideration in light of the fact that the SPA Agreement expires on 31st December, 2008.

[48] Is California Court available for the resolution of this dispute? Having regard to the diversity of opinion, I cannot answer this question conclusively at this stage. I can, however, say explicitly that judge Matz's decision does not bind the Court in Anguilla. The Pendragon appeal is now pending before the Anguilla Court and this decision, whichever way it goes, is appealable.

[49] Mr. Robertson QC, in his submission made reference to ***Etoile Commercial SA v. Owens Bank Ltd.***[11]; ***Owens Bank Ltd v. Bracco***;[12] ***Alfred Powell v. George Powell***.[13] He said these cases set out clearly that a foreign decision cannot as a matter of Anguillian law create an issue estoppel if that decision is subject to appeal. That is important because Matz's decision on which Bacardi relies as creating such an estoppel is under appeal to

[11] [1992] 42 WIR 28
[12] [1992] 2 WIR 021, 632
[13] Claim No. NEV HC 2005/0026

the ninth circuit. Moreover, the decision of Madam Justice George-Creque in the Pendragon forum application on which Judge Matz heavily relied, is itself also under appeal in the Eastern Caribbean Court of Appeal.

[50] Mr. Hildyard QC contended that a strong connecting factor is that the Trustees, the Defendants, took out letters of Administration to the Estate of Martin Crowley in the High Court of Anguilla. The declaration listed the Shareholdings in Pendragon among the assets of Martin Crowley.

[51] In my judgment, I do not regard Anguilla as an exorbitant jurisdiction . I consider Anguilla to be the appropriate forum for the trial of the issues. Pendragon is an Anguillian company. The situs of the CDC shares in Pendragon is Anguilla. Only in Anguilla can the shares be properly transferred. Anguilla forum is established as of right. The connection with Anguilla is not a fragile one.

[52] The Pendragon case is proceeding in Anguilla. To refuse a stay would result in multiplicity of proceedings (See the ***Abidin Daver***)[14]. In my judgment, the balance in this case does not favour the Defendants. Bacardi's choice of the Anguillian forum should not be disturbed. The Anguilla court has been seized with jurisdiction by the service of process on the Defendants, in a case involving a foreign element, Defendants now wish to have the dispute resolved in another forum, California, has applied for a stay of proceedings. The Defendants have not shown that California is more appropriate than Anguilla for the trial of these proceedings. The Claimant, in my judgment, has shown Anguilla to be the most appropriate forum for the trial of the action.

[53] The real issue in the instant case is that Bacardi wants the shares it has contracted to purchase from the Trustees. This is a contractual issue. The interpretation of the SPA agreement will be central to the resolution of this dispute.
The SPA agreement mandates:-

[14] [1984] App case 398

"This Agreement, and any disputes arising out of and relating to this Agreement or the Parties' relationship, shall be governed and construed in accordance with the laws applicable to contracts made and to be performed entirely in the State of New York without regard to any applicable conflicts of law."

This, however, in my judgment does not create an exclusive jurisdiction clause. The Claimant is therefore free to litigate in this jurisdiction which is convenient and competent. Mr. Hildyard QC produced a chart comparison list. This shows a remarkable similarity in contract law between New York Law and Anguilla Law. (See for example ***Propositions of New York Law, Propositions of English Law.***)

Under New York Law:

"Such an "agreement to agree" is, as a matter of New York Law, unenforceable."[15]

Under English Law:

"The reason why an agreement to negotiate, like an agreement to agree, is unenforceable , is simply because it lacks the necessary certainty."[16]

Under New York Law:

"Under certain New York law parol evidence is inadmissible to vary, modify, or contradict the express terms of an unambiguous contract."[17]

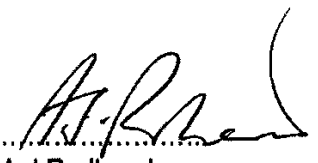
Under English Law:

"[….] if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract."[18]

[54] In the exercise of my discretion, I shall not grant a stay in favour of the Defendants of the proceedings in Anguilla.

[15] GOBVF 000384
[16] Walford v. Miles [1992] 2 AC 128, at 138
[17] GOBVF 000390
[18] Gross v. Lord Nugent [1833] 5B. & AD. 58, at 64

[55] Defendants to pay the Plaintiff's costs in these proceedings. By consent, the quantum is reserved to be determined by the Court of Appeal.



A J Redhead
High Court Judge (Ag)