BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2007/0291

BETWEEN:

PETROVAL SA

Claimant

and

(1) STAINBY OVERSEAS LIMITED
(2) NORREYS WORLDWIDE LIMITED
(3) JOHN LUSH
(4) FRANCOIS OSTINELLI

Defendants

(5) CARIBBEAN CORPORATE SERVICES LIMITED
(6) MORGAN & MORGAN TRUST CORPORATION LIMITED
(7) OFFSHORE INCORPORATION LIMITED

Discovery Defendants

(8) ARTEM ZAKHAROV
(9) ALEXANDER NOVOSELOV
(10) EURO PACIFIC TRADE DEVLOPMENT LIMITED
(11) EVERON ASSOCIATES LIMITED
(12) BOYCE OVERSEAS LIMITED
(13) WEALE INVESTMENT HOLDINGS LIMITED
(14) MAJOR OIL & PROPERTY SERVICES LIMITED
(15) INNES OVERSEAS COMPANY LIMITED
(16) ODEY INTERNATIONAL HOLDINGS LIMITED
(17) FIORTINO INVESTMENT LIMITD
(18) PODIUM CAPITAL HOLDINGS INC

Defendants

Appearances:

Charles Hollander Q.C., David Scannell and Mark Forte of Conyers Dill and Pearman for the Claimant
Paul Girolami Q.C., Charles Dougherty, Philip Kite and Andrew Thorp of Harney Westwood & Riegels for Defendants 1 - 4, 10, 14 & 15
Paul Webster Q.C., and Willa Liburd of O'Neal Webster for Defendants 9th 16th and 18th
Robert Foote of Ogiers for 11th and 17th Defendants
Stephen Dougherty of Applebys for 13th Defendant
(Noted that Mr. Zakharov, the 8th Defendant and Boyce Overseas Limited, the 12th Defendant are not represented)

Observers:

Ms. Arabella di Iorio of Maples & Calder for Mr. Cosimo Borelli and Mr. Meade Malone, the Receivers

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2008: March 17th, 18th, 19th
May 21st

JUDGMENT IN CHAMBERS

(Commercial law - allegation of massive international fraud- application to set aside service outside the jurisdiction on the basis that the requirements of CPR 7.3(2) not met in that no good arguable case disclosed and /or it is not reasonable for the action to be tried in the BVI
Forum challenge - defendants contend that Switzerland is the more appropriate forum- factors to be considered
Application to set aside worldwide freezing injunctions obtained ex-parte – non disclosure and/ or case not presented fairly - delay – no risk of dissipation - principles to e considered
Application to discharge receivership order on the basis that it is oppressive)

[1] **Joseph-Olivetti J.**:- This is another chapter[2] in the hydra-headed dispute between the international group, Yukos Oil who is the beneficial owner of the Claimant ("PSA") and Messrs. John Lush and Francois Ostinelli. Essentially, PSA seeks to recover property, namely the entire shareholding in Petroval Singapore, a company incorporated in Singapore of which PSA claims it was fraudulently deprived of by Messrs Lush and Ostinelli and to recover damages for unlawfully diverting PSA's bunkering business to Norreys, a BVI company beneficially owned by Messrs Lush and Ostinelli. PSA has sought to join as parties those whom it asserts partook in the fraud together with certain entities or person whom it asserts hold specific assets into which it claims to trace profits derived from Petroval Singapore and Norreys. Both Messrs Lush and Ostinelli deny liability. This interlocutory hearing was concluded on 19th March and ruling reserved. Delivery of this ruling took somewhat longer than originally anticipated because of the court's schedule compounded by the fact that I took leave of absence. The parties' patience is appreciated.

[2] Presently, we have several applications before the Court of which four are made by the Defendants. First, is an application by Defendants 10, 14 and 15 to challenge the jurisdiction and the grant of leave to serve out. Second is an application by

[2] This court delivered a ruling on an interlocutory issue - judgment dated 7th February 2008 which gives a more detailed picture of the parties and the nature of the underlying dispute.

Defendants 1 and 2 to discharge the receivership and freezing orders and the grant of leave to serve out and a challenge to the jurisdiction. Third is an application by Defendants 9 and 16 (Defendant 18 joined in subsequently) to discharge the freezing and receivership orders and a challenge to the jurisdiction and leave to serve out. Fourth is an application by Defendants 11 and 17 to discharge the receivership and freezing orders. And lastly an application by PSA to continue the said freezing and receivership orders.

[3] It is noted that the Defendants 11 and 17 ("Everon" and "Fiortino") settled the claims against them in the terms of a Tomlin Order which the court approved of immediately prior to the hearing of these applications and therefore did not proceed with their application.

[4] The court also remarks that no challenge was brought by Defendant 8, Mr. Zakharov, Defendant 12, Boyce Overseas Ltd and Defendant 13, Weale Investment Holdings Ltd. In fact these defendants have taken no part in these proceedings to date. However, Mr. Dougherty on behalf of Weale has indicated to the court that if the court is minded to stay proceedings on the ground of forum non conveniens in favour of Switzerland that his client has agreed to submit to the jurisdiction of the Swiss courts.

The Parties

[5] PSA is a company registered in Switzerland and engaged in business there. It is part of the international Yukos Oil group of companies. PSA was set up by the Yukos Oil group in December 2000 to trade and market crude oil products to countries outside the Russian Federation.

[6] Mr. Lush is the former general manager of PSA. He is a beneficial owner of Stainby, Norreys and Euro Pacific, and the beneficial owner of Major Oil. He is the president of Petroval Singapore. He is domiciled in Switzerland.

[7] Mr. Ostinelli is the former chief financial officer of PSA, a beneficial owner of Stainby, Norreys and Euro Pacific, and the beneficial owner of Innes. He is a vice president of Petroval Singapore. He is domiciled in Switzerland.

[8] Stainby, Norreys, Everon, Boyce, Weale, Major Oil, Innes, Odey, Fiortino and Podium Capital Holdings Inc and Euro Pacific are all BVI Companies.

Background and nature of the Case

[9] The nature of this case, the main allegations and the procedural history can be gleamed from the pleadings and the comprehensive written submissions of the parties.

[10] For these purposes it will suffice to refer to the background allegations as stated by PSA:-

> 1. "The present case concerns the circumstances in which an oil trading company, Petroval Singapore, came to be incorporated on 8 December 2004. It is PSA's case that its former senior management, namely Mr. Lush and Mr. Ostinelli (D3 and D4, respectively), represented to PSA that they would take the shares allotted in the new company in their own names, but would hold them on trust for PSA; and that they would execute draft letters of confirmation ("the Letters of Confirmation") to that effect.
>
> 2. Messrs Lush and Ostinelli signed and executed the Letters of Confirmation on 1December 2008. They forwarded the Letters of Confirmation to DrewCorp, PSA's Singaporean incorporation agents, on 3 December 2008. For its part, PSA paid for the incorporation of Petroval Singapore: and, together with Yukos group, allowed its highly profitable oil trading business (which had realised gains of US$40 million in 2004 alone) to be transferred to Petroval Singapore for the payment of nil considered.
>
> 3. However, secretly and in breach of trust, Mr. Lush and Mr. Ostinelli then transferred their shares in Petroval Singapore to the BVI companies D1 and D2; Stainby and Norreys. All of the Defendants have now refused to recognise PSA's beneficial interest in Singapore: and apparently will contend that PSA intended to gift its lucrative oil trading business to D3 and D4, all for nothing.
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> 4. In the light of all that evidence, this Honourable Court was persuaded that there was a good arguable case against D1-D4, and a real risk that the defendants, unless they were restrained by the Court, would take steps to dissipate their assets: and on that basis, granted the freezing and receivership orders of 7 December 2007. Further freezing and receivership orders were granted against the other Challenging Defendants on 3 January 2008 (D8-D11) and D14-D16), on 24 January 2007 (D17) [and on 26 February 2008 D18]."

[11] The summary of the underlying cause of action by the defendants represented by Mr. Girolami(the "JL/FO Defendants') is also insightful:- "PSA's case is in essence, and indeed has to be, that they have been the victim of a massive fraud, involving a large number of people over a significant period of time, and that in setting up Petroval PTE ("Petroval Singapore") the Defendants dishonestly misappropriated PSA's business for themselves and in relation to the bunkering business, the Defendants have diverted business to themselves and have made secret profits at the expense of PSA."

[12] A considerable amount of evidence has been filed in relation to these applications. The JL/FO Defendants helpfully suggest and I am so guided that for these purposes it is only necessary to refer to the following:- the Re-Re-Amended statement of claim [A1/A/Tab.3/26]; the affidavits served on behalf of PSA - the first affidavit of Mr. Bernard O'Sullivan of 6th December 2007 [B1/A/Tab5.], the 11th affidavit of Mr. O'Sullivan of 28th February 2008 [B1/A/Tab.28], the 1st affidavit of Mr. Stephen Theede of 4th December 2007 [B1/A/Tab2], the 1st affidavit of Mr. Bruce Misamore of 6th December 2007[B1/A/Tab.6] and the 2nd affidavit of Mr. Bruce Misamore of 26th February 2008. [B1/A/Tab.24]. For the JL/FO Defendants, the 3rd affidavit of Mr. John Lush of 1st February 2008 [B2/A/Tab 5], the affidavits of Mikhail Elfimov of 29th November 2007 [B2/A/Tab 1] and 23 January 2008 [B2/A/Tab 2], the first affidavit of Yury Beylin of 24th January 2008 [B2/A/Tab 3], and the 3rd affidavit of Dorian Drew of 18th of February 2008 [B2/A/Tab 6]. In addition, the expert reports on Swiss law of Mr. Benoit Chappuis on behalf of the JL/FO Defendants on 11th Feb. [i1/Tab 4], and 10 March [i1/Tab 6], and the report of Professors Grisberger and Jeandin [i1/Tab.5],on behalf of PSA.

[13] The Novoselov Defendants rely on the second and third affidavits of Mr. Novoselov dated 29th February and 14th March 2008.I have also found the chronology of events and the Defendant companies' structure so to speak useful.

The Issues

[14] Substantially the same grounds are relied on by all the challenging Defendants. In short, they are: (1) PSA does not have a good arguable case on the merits; (2) No risk

of dissipation; (3) non-disclosure, (4) delay, (5) oppressive nature of the receivership orders, and (6) Switzerland is a more convenient forum.

[15] I shall now consider the applications to set aside the orders granting leave to serve process outside the jurisdiction.

The application to set aside the orders granting leave to serve process outside the jurisdiction.

[16] First, the law. CPR Part 7 prescribes the circumstances in which court process may be served outside the jurisdiction and the procedure for such service. Rule 7.2 stipulates unambiguously that a claim form **may** be served out of the jurisdiction **only if r. 7.3 allows and the court permits.** This is conjunctive – both conditions must be satisfied, i.e. the applicant must bring his or her case within r.7.3 and the court must exercise its discretion in his or her favour by granting leave. Therefore, leave is not automatically granted simply because an applicant brings his or her self within r.7.3.

[17] Rule 7.3 lists the types of claims for which the court may permit service outside the jurisdiction. In its applications for leave which were made ex parte as permitted by r. 7.5(1), the gateway specifically relied on by PSA was r.7.3(2)(a).

[18] It is remarked that r. 7.5(1) specifically provides that the supporting affidavit must state the grounds on which the application is made, that in the deponent's belief the claimant**, "has a claim with a realistic prospect of success",** in what place within what country the defendant may probably be found and if the application is made under r. 7.3(2) (a), the grounds for the deponent's belief that the conditions of that rule are satisfied.

[19] Rule 7.7(3) enumerates the grounds on which the court may set aside service. Service may be set aside if (i) **service out of the jurisdiction is not permitted by the rules,** (ii) "**the claimant does not have a good cause of action**" or (iii) "**the case is not a proper one for the court's jurisdiction"**. In addition r.7.7 (3) specifically provides that this rule does not limit the court's power to make an order under r. 9.7(the usual procedure for disputing the court's jurisdiction).Clearly these grounds overlap.

[20] Now I turn to Rule 7.3(2) (a) which is the specific gateway PSA used. This provides: - "7.3 (2) A claim form may be served out of the jurisdiction if a claim is made – against someone on whom the claim form has been or will be served**, and –** there is between the claimant and that person **a real issue** which it is reasonable for the court to try; **and** the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is **a necessary and proper party to that claim**;" (Emphasis added)

[21] PSA must therefore justify the grant of leave under this rule by satisfying the court of four matters:-that it has served or will serve a claim form as of right against defendants in the jurisdiction that there is between it and those defendants**, 'a real issue'** to be tried, **that it is reasonable for the court to try this issue; and** that Messrs. Lush, Ostinelli and Novoselov are, "**necessary and proper parties**" to the action.

[22] The gravamen of the challenge made by Mr. Girolami and Mr. Webster on behalf of their respective clients, as I understand it, is that there is no real issue between PSA and these corporate defendants, alternatively that Messrs. Lush, Ostinelli and Novoselov are not necessary and proper parties to this action or further and alternatively, that the BVI is not the more appropriate forum for the trial of this issue.

[23] All counsel filed comprehensive written submissions which they supplemented by oral argument at the hearing. In the interest of proper case management, Mr. Webster QC adopted in **toto** the arguments of Mr. Girolami although he did make several specific points in addition on behalf of his clients.

[24] All counsel agreed that in relation to the issues taken under this head the applicable standard of proof is whether it can be said that PSA, "**has much the better of the argument on the material available"** to justify the court in assuming jurisdiction over the foreign defendants. This is based on the English Court of Appeal case of **Canada Trust Co. v. Stolzenberg (No. 2).**[3] No authority binding on this court was cited to justify this position. The court has no wish to question the appropriateness of this agreement but feel obliged to make the following comments in parenthesis.

[25] **Canada Trust Co** was decided under the old English rules of procedure and one would have thought it necessary to show that the same concept applies to the

[3] 1 W.L.R. [1998] 547 at page 555

provisions of CPR. Next, the specific issues before that court were as stated by Waller L.J at p. 552 H.[4] Clearly, these do not directly address the issues before us. Furthermore, the specific rules with which we are concerned have the concepts built in by CPR of, " **a real issue",(r.7.3(2),** " a **realistic prospect of success"(r.7.5) , "a good cause of action**"(r. 7.7(3))and one would have thought that these at least merited some direct consideration.

[26] Now to **Canada Trust** to seek to understand the concept agreed on, "a much better argument on the material available". Waller L.J. explained this concept thus:- '… It is I believe important to recognise, as the language of their Lordships in Korner's case [1951] A.C. 869 demonstrated, that what the court is endeavouring to do is to find a concept not capable of very precise definition which reflects that the plaintiff must properly satisfy the court that it is right for the court to take jurisdiction. That may involve in some cases considering matters which go both to jurisdiction and to the very matter to be argued at the trial, e.g. the existence of a contract, but in other cases a matter which goes purely to jurisdiction, e.g. the domicile of a defendant. The concept also reflects that the question before the court is one which should be decided on affidavits from both sides and without full discovery and/or cross-examination, and in relation to which therefore to apply the language of the civil burden of proof applicable to issues after full trial is inapposite. … **It is also important to remember that the phrase which reflects the concept "good arguable case"** as the other phrases in Korner's case "a strong argument" and "a case for strong argument" were originally employed in relation to points which related to jurisdiction but which might also be argued about at the trial. The court in such cases must be concerned not even to appear to express some concluded view as to the merits, e.g. as to whether the contract existed or not. It is also right to remember that the "good arguable case" test, although obviously applicable to the ex parte stage, becomes of most significance at the inter partes stage where two arguments are being weighed in the interlocutory

[4] "… (1) What is the correct standard of proof to apply to the question whether a defendant is domiciled in England on an application under Ord.12, r.8 involving issues arising under article 6 [the Lugano convention]? (2) What is the correct date for determining whether or not a defendant is domiciled in England for the purpose of determining whether the court has jurisdiction under article 6? (3) Should article 6 on its true construction require the defendant domiciled within England to have been served prior to issue or service of the proceedings against defendants in other contracting states?"

context which, as I have stressed, must not become a "trial**."** "Good arguable case" reflects in that context that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction.' (emphasis added)

[27] In short, the concept **'much the better of the argument on the material available,**' I observe, with something nigh on relief, is "the good arguable case" concept in the context of an inter partes hearing. And as Waller L.J reflected and it is worth repeating, " It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction.' (emphasis mine)

[28] However, what is more is that in any event I note that Waller LJ at p. 558 para. D referred to and approved of **Seaconsar**.[5] **Seaconsar** has been followed in this jurisdiction. Waller LJ explained that **Seaconsar** held that "what has to be sufficiently shown for the purpose of establishing jurisdiction both in relation to the argument as to whether the contract existed or not ((which may arise more fully at the trial) and as to where the breach took place (which will not) has to be shown to the standard of a "good arguable case". As further appears from Seaconsar case that is a threshold below, "proved on a balance of probabilities," because that is the civil burden after a full trial, but higher than a "serious question to be tried", which relates to the plaintiff 's claim relative to the contract."

Discussion – no good arguable case

[29] Mr. Girolami and Mr. Webster say that they have much the better of the argument and that in fact the action as pleaded is unsustainable having regard to the evidence.

[30] It is readily appreciated that the bedrock of this action is the claim against Messrs. Lush and Ostinelli that they acted in breach of trust when they claimed the beneficial

[5] (1994) 1 A.C. 438

ownership in Petroval Singapore for themselves and transferred the shares to Stainby and Norreys.

[31] Mr. Girolami analyzed with a fine tooth comb the causes of action as pleaded in the Re-Re-Amended Statement of Claim and sought to show that in each case the defendants had much the better of the argument. I have considered all his arguments and that of his opponent but in the interests of brevity which alas is already proving all too elusive I will only refer in brief to his primary points.

[32] First of course is the claim for breach of an express trust as against Messrs. Lush and Ostinelli. [A1/A/Tab 3/32-35]. Mr. Girolami took us through the pleadings and the documentary evidence relied on to support this claim. He submitted that no arguable case could be made out for an express trust governed by Singapore law as contended for by PSA as there was no certainty of intent or certainty of object. The documents relied on by PSA as establishing express trusts are the Letters of Confirmation[6] signed by Messrs Lush and Ostinelli which Mr. Ostinelli sent to Drew Corp (the incorporating agent of Petroval Singapore in Singapore) stating that they would hold the shares on trust for PSA. The shares in Petroval Singapore were not yet in existence at the date of the letters as Petroval Singapore had not yet been incorporated and in law one cannot have an express trust of future property. He relied on **Halsburys Laws of England** Vol. 48 para. 544 and **Snell's Equity** 31st Edn. para. 20-15, 16.

[33] I have considered the arguments on this issue. It is remarked that the contention of PSA is that the Letters of Confirmation constitute an express trust made in Singapore and governed by the law of Singapore which in this respect is English common law. Expert evidence of Singapore law to that effect was put in evidence by PSA. The law without more appears to be as stated in **Halsburys** op.cit. Mr. Hollander, in my view, would have an uphill task to get around the requirements for establishing an express trust as stated in **Halsburys** having regard to the respective dates of the Letters of Confirmation (1st December) and the date on which Petroval Singapore was incorporated (December 8, 2004). On this aspect, the challenging defendants have much the better of the argument.

[6] See Bundle C10 219 & 220 undated copies but it was common ground that they were executed on or about 1st Dec.2004.

[34] Next, Mr. Girolami dealt with the alternative claim for resulting and/ or constructive trust of the **Gissing v Gissing** type which is based on a common intention either expressed or implied to create a trust. To establish such a trust PSA places reliance on the correspondence between Mr. Ostinelli and DrewCorp and in particular the Letters of Confirmation. Mr. Girolami says that the most that this correspondence could be taken to evidence is an intention to create a trust. However, says Mr. Girolami this cause of action is hopeless as the evidence indicates that Messrs. Lush and Ostinelli withdrew the Letters of Confirmation subsequent to incorporation and therefore clearly there was no common intention to create a trust so the claim must fail.

[35] This analysis safely avoids going into the issues as to whether Messrs Lush and Ostinelli having initially agreed with PSA to hold the shares on trust for PSA and PSA acting on that basis to its possible detriment could subsequently without advising PSA unilaterally withdraw the Letters and so affect the relationship **inter se.** It is noted too that this was done just after the incorporation of Petroval Singapore. Mr. Hollander of course points to the evidence which seem to indicate just that, namely that the correspondence to DrewCorp **about** withdrawing the Letters of Confirmation was not copied to PSA's board nor to the YMC unlike earlier correspondence and likewise neither was the letter **actually** withdrawing the Letters of Confirmation. This last letter Mr. Hollander received at Heathrow Airport on the Friday before this hearing. He also points to the initial reluctance of Messrs. Lush and Ostinelli to admit to executing the Letters of Confirmation in the first place.

[36] Mr. Hollander also submitted that Everon and Fiortino received the lion's share of the proceeds of the fraud and that Mr. Elfimov, one of the persons on whose evidence Messrs, Lush and Ostinelli rely on to deny that they fraudulently deprived PSA of its interest in Petroval Singapore has an interest direct or indirect in these companies and thus Mr. Elfimov 's evidence of a meeting he held with Messrs. Lush , Ostinelli and Novoselov and query Mr. Leonovitch on 5th December 2004 at which the decision was taken to withdraw the Letters of Confirmation must be viewed with circumspection. None of these men were members of the Board of PSA. Mr. Elfimov is the head of Yukos Refining and Marketing and Mr. Leonovitch was the former

treasurer of the Yukos group and the beneficiary of Everon and Fiortino. Further, that PSA subsidized Petroval Singapore by significant amounts in the period January to August 2005 although it appears that the incorporation fees were repaid by Petroval Singapore.

[37] On consideration of all the arguments on this issue in my judgment PSA has much the better of the argument.

[38] Counsel also analysed in depth the claim against Norreys. The foundation of this claim is that Messrs. Lush and Ostinelli fraudulently represented to PSA that its bunkering business was not profitable and that stocks at Rotterdam was in danger of being seized by the Russian authorities and caused PSA to transfer it lucrative business to Norreys (a wholly owned subsidiary of Petroval Singapore). The claim is that Norreys acted as nominee for PSA and as such owed it fiduciary duties and breached those duties when it sold back bunkering supplies to PSA at greatly inflated prices. See Re-Re-Amended Statement of Claim [A1/A/tab.3/40-41]

[39] Mr. Girolami argued that this claim was not sustainable as pleaded. PSA could not simply rely on the "mere device of pleading nomineeship" to establish that Norreys owed any fiduciary obligations to it, that on the face of the relevant contract between PSA and Norreys there was no mention of nomineeship and that the contract appeared to be a straightforward commercial contract.

[40] He also referred to the jurisdiction clause contained in the said contract which I will consider under the forum challenge.

[41] I have considered these submissions and those of Mr. Hollander's. In my view Mr. Hollander has made out a stronger argument to establish that he has good arguable case on this head and that the existence of a fiduciary obligation is independent of and separate from a contractual obligation and whether such an obligation exists depends on all the circumstances. This claim against Norreys is not framed in contract and therefore the terms of the contract will not necessarily be decisive on the merits and for that matter on jurisdiction. I remark also that although a litigant might have different causes of action arising from an alleged wrong it is entirely open to the litigant to determine what cause of action it would pursue.

[42] Mr. Girolami considered at length also the evidence in relation to the claims in tort for fraudulent misrepresentation and conspiracy, knowing assistance and the claim for unjust enrichment.

[43] Mr. Girolami raised also the question of the proper law governing these causes of action a question which inevitably falls to be considered in relation to jurisdiction. Accordingly, I will address this under the forum challenge.

[44] In conclusion in relation to the merits of the case I find that PSA has established that it has a good arguable case against the defendants who were served as of right to which the foreign Defendants including Messrs. Lush Ostinelli and Novoselov are both proper and necessary parties. In arriving at this conclusion the court is mindful that both parties sought to rely to a very large extent on inferences to be drawn from a wealth of documents including minutes of meetings and that this can only give one side of the story without a full trial and all that entails. Suffice it to say that I am satisfied that on the majority of the issues canvassed that PSA has the better argument on the material available at this stage of the proceedings. In short, PSA has made out a good arguable case on the merits against all the challenging defendants.

[45] Next I turn to consider whether this is a case which ought properly to be tried here. This is of course rolled up with the forum challenge simpliciter as under r. 7.7(3) PSA in order to justify the granting of leave to serve out must also satisfy the court that the BVI is a convenient forum. The court will therefore deal with this under one head as the principles are basically the same except as regards the onus of proof.

The Forum Challenge

[46] First, the law. All counsel have properly agreed that in both types of application, the traditional forum challenge to stay proceedings on the basis that the BVI is forum non conveniens and the application to set aside the orders granting leave to serve the claim form outside the jurisdiction under r.7.3 (2) on the basis that it is not reasonable for the court to try the action, the law is the same - the **Spiliada** principles. However, with respect to the onus, PSA has the burden of establishing as against the foreign defendants that the BVI is the proper forum. This is readily ascertainable from the

wording of r.7.3 (2) itself. While the burden is on the defendants who were served as of right to establish that BVI is not the proper forum.

[47] The **Spiliada** principles have been adopted by our courts (See **IPOC v LV Finance** p. 27 (Gordon J.A.) It is well established that the remedy is a discretionary one and that a stay on the ground of *forum non conveniens* will 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. See Gordon J.A. – **IPOC** p. 13 para 17(i). The appropriate forum is the natural forum or in other words the forum with which the action has the most real and substantial connection.

[48] The challenging Defendants contend that Switzerland is patently the forum with which the action has the most real and substantial connection. First I note that the challenging Defendants who are corporate defendants and the Defendant, Weale have all indicated that if the court finds that this contention is correct that they all undertake to submit to the Swiss courts. This is necessary as Switzerland will have no jurisdiction as of right over them as they are not domiciled or resident in Switzerland and so it will not be a competent jurisdiction. I note too that both experts agree that if these Defendants so submit that the Swiss courts would have jurisdiction over them.

[49] In deciding which of the two jurisdictions contended for in the appropriate forum, again to use the words of Gordon J.A. paraphrasing the **Spiliada** principles in **IPOC** p. 13 para 27(iii):–

> "**the court will be mindful of the availability of witnesses, the likely languages they speak, the law governing the transactions to which the fructification of the transactions might be subject, in case of actions in tort where it is alleged that the tort took place and the place where the parties reside and carry on business. 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. Once the court finds that there is some other available and prima facie more appropriate forum it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nonetheless not be granted. Such a circumstance might be**

that the claimant will not obtain justice in the appropriate forum. <u>The burden of proof to establish such a circumstance is on the claimant and cogent and objective evidence is required</u>[7]. (Emphasis added)

Discussion - Forum Challenge

[50] The Defendants say that the factors in the case point overwhelmingly to Switzerland as the appropriate forum for this dispute. They put it attractively like this:- **"it is difficult to understand how this dispute between a company registered and operating in Switzerland and some of its former employees, all domiciled in Switzerland, about a new company operating in Switzerland and Singapore has anything to do with the BVI."** (See para 20 of the Defendant's Skeleton).

[51] We heard argument on this case for 3 days. I note with genuine dismay Lord Templeman's sage advice in **Spiliada** which is worth repeating and which alas we seem to have lost sight of but by which I will be guided - **"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'. (See pg. 465 paras F-G)**

[52] Now to examine the circumstances and to weigh the different factors. I have heard lengthy and persuasive arguments on behalf of both sides, from Mr. Hollander in favour of the BVI and from the challenging defendants in favour of Switzerland.

[53] One of the main contentions of the challenging defendants, as I understand it, is that the underlying dispute despite the way in which it is framed here, is really a dispute arising out of the contracts of employment that Messrs. Lush and Ostinelli had with PSA and that the proper law of these contracts is Swiss law and exclusive jurisdiction is given to the Geneva labour courts ("Tribunal des Prud'hommes" and "Cour de justice").

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[7] See: **The Abidan Diver** [1984] A.C. 398 and **IPOC** Gordon J.A. p. 14 para 27(iv).

[54] Both parties relied on Swiss law experts to resolve the issue as to whether the present dispute falls within Article 21 of the employment contracts thus giving the labour courts of Geneva ('Tribunal des Prud'hommes' and 'Cour de Justice') exclusive jurisdiction. In short, Mr. Benoit Chappuis was of the view that it did (see Vol. i1 tab 7 paras 73-76 his first report and Vol. i1 tab 6 para 11-15 his second report). This is based on his opinion that these claims, however characterized would be regarded as falling within the scope of the employment contracts and would not be classed as a trust dispute. Profs. Girsberger and Jeandin, PSA's Swiss law experts disagreed with that conclusion. (See Vol. i1 tab para 98-100). They were of the opinion that the claims would not be regarded as arising out of the employment contract and that in any event the Geneva labour courts had limited jurisdiction with the result that if the claims were to be litigated in Switzerland PSA would be obliged to go before two different courts. Issues also arose as to whether Swiss law would recognize a claim in trust.

[55] One must look at the cause of action as framed, not at what the Defendants say it ought to be. PSA's claims here do not lie in contract and therefore these considerations are strictly not relevant in determining with which jurisdiction this case has its most real and substantial connection. The same holds good in relation to Norreys as the challenging defendants submit that this claim also arises under a contract which is governed by English law and that the courts of London have exclusive jurisdiction. I am also told that Norreys will waive this clause in favour of Switzerland, not the BVI as the dispute has no real connection with the BVI.

[56] Mr. Girolami advanced also that if the action for breach of trust is tenable here then the proper law is Swiss law and not Singapore as this is the place with which it is most closely connected (see Dicey and Morris op, cit para. 29-019). Counsel also submitted that in relation to the causes of action framed in tort that the proper law is Swiss law and so too the claims for unjust enrichment.

[57] Mr. Webster reminded the court that there are two sets of proceedings in Switzerland currently and that it is unfair for the defendants to be required to litigate on so many fronts. He also like Mr. Girolami pointed out the difficulties PSA would have in enforcing a judgment obtained here in Switzerland although strictly speaking that rather helps their clients if judgment is obtained here.

[58] The only factor connecting this dispute to the BVI say the challenging defendants is the fact that all the corporate defendants are incorporated here. They point to difficulties of language, the costs of witnesses including expert witnesses having to travel here and also the costs of having to translate numerous documents into English. Further, that PSA is also based in Switzerland and that Petroval SA operates both in Singapore and Switzerland. All the individual defendants reside and are domiciled in Switzerland.

[59] Mr. Hollander on the other hand places heavy reliance on the fact that the corporate defendants are domiciled here and that certain interim remedies are not available in Switzerland. .In addition he submits, as his secondary position that by virtue of section 82 of the Trustee Ordinance this court has **mandatory** jurisdiction over the BVI corporate Defendants and in particular Stainby and Norrey's and thus has no discretion to stay the proceedings against them. It follows then that in any event there will be a trial here as against those two at least and therefore it would make sense not to h require PSA to litigate in two different jurisdictions.

[60] The challenging defendants dispute that the section applies. It is their case that there is no good case for a trust and in any event the section does not apply to constructive or implied trusts and I that in any event the section could not be so construed as to oust the court's discretion to stay proceedings on the basis of forum non conveniens.

Conclusion on the forum challenge

[61] I have considered all the circumstances, including the various undertakings to submit to the Swiss jurisdiction and in my judgment Switzerland is clearly and distinctly the more appropriate forum for the trial of this action. The main protagonists, PSA, Mr. Lush and Mr. Ostinelli are all resident and domiciled in Switzerland. I am of the tentative view that the law governing these issues as raised in this court would be Swiss law and/or Singapore law. It would be more costly for the foreign parties and their witnesses including the experts to travel to the BVI. I also take into account the costs of preparation for a trial here in terms of having to translate documents and perhaps even have interpreters in attendance as although it appears that the main witnesses speak English, English is not their mother tongue and often in such

situations parties opt for interpreters and that would not be unreasonable or unexpected. Overall in my view it would be more costly to hold a trial here.

[62] PSA have not persuaded me that it will not obtain justice in Switzerland although it is arguable whether Swiss law recognise trusts in the form that we do or that PSA will not have the benefit of certain remedies for example world- wide freezing relief. However, that by itself is not sufficient to retain jurisdiction. In my view PSA must go further and show that being deprived of those remedies would result in substantial injustice to it such that it could be said that it could not obtain justice in Switzerland. PSA could not establish that.

[63] The main factor which connects this case to the BVI is that the corporate Defendants are incorporated and thus domiciled here. I must resist Mr. Hollander's siren voice that the court should make a policy statement that in case of fraud involving BVI companies that the BVI will not cede jurisdiction. This might just be the seductive voice to lure one onto the rocks as according to the authorities cited this factor cannot by itself be decisive. Furthermore the recent IPOC prosecution shows that the relevant BVI authorities are on the ball so to speak.

[64] Now to Section 82 of the Trustee ordinance which provides:-

"The court has jurisdiction where

(a) the proper law of a trust or a particular aspect of a trust is the law of the Territory;

(b) the trustee of any trust is resident in the Territory;

(c) in the case of a corporate trustee of any trust, it is incorporated or registered to do business in the Territory;

(d) any trust property is situate in the Territory but only in respect of property so situate;

(e) the administration of any trust is carried on in the Territory; or

(f) the court thinks its appropriate."

[65] I have considered the arguments and the opinions relied on including the opinion of the consultants who assisted with the drafting of the legislation although the court queries how far the court can look to such material in interpreting this sort of legislation. Being careful not to be seen to be deciding the point the court is of the view

that PSA has not made out a good arguable case to show that s. 82 vests mandatory jurisdiction in the courts and that the courts' inherent jurisdiction to stay proceedings brought against BVI companies who are alleged to be trustees is automatically ousted.

[66] I now turn to consider the applications to discharge the worldwide freezing injunctions.

Should the worldwide freezing injunctions be discharged or continued?

[67] First, the law. A freezing injunction and a world-wide one at that is another form of interlocutory injunction although more draconian in nature than the usual type of injunction and the court's authority to grant such interim relief stems from **s. 24 of the West Indies Associated States Supreme Court (Virgin Islands Order) Cap. 80**. This section gives the court the discretion to grant such relief when it is just and convenient to do so and on such terms as it sees fit. The procedure for obtaining such injunctions is set out in CPR Part 17.

[68] The governing principles for the grant of worldwide freezing injunctions are well settled and have been adopted in our jurisdiction.[8] Further, as the injunctions were made ex parte (except the order against Podium)[9]. PSA had a duty to make full disclosure of all relevant material to the Court.

[69] The Defendants challenge the freezing injunction on the following grounds :-(1) there is no real risk of dissipation (2) PSA did not make full disclosure at the ex parte hearings and / or unfairly presented the evidence and (3) delay such as to debar them from seeking urgent ex parte relief.

Was there an objective risk of dissipation?

[70] On this issue, **Gee on Commercial Injunctions** explains the governing principles at para. 12.032 onwards. (See p.347-372) Essentially the test is an objective one of assessment of the risk that any judgment may not be satisfied and each case depends on its own facts. Gee lists some of the factors which may be relevant at para. 12.039. Among them is, "the defendant's behaviour in response to the claim, a pattern of evasiveness or unwillingness to participate in the litigation or arbitration or raising defences after admitting liability or total silence may be factors which assist the

[8] See Gee op.cit.12.023
[9] See Bundle A1/B/15

claimant." On this aspect I recall in particular that the main defendants, Messrs. Lush and Ostinelli failed to confirm that they had executed the Letters of Confirmation until well after proceedings were commenced in this jurisdiction.

[71] Mr. Girolami submits that there was no objective risk of dissipation at the time the ex parte application were made in December 2007 because of the extreme delay involved and the early notice of the claims having been given. He argued that the trigger for any possible dissipation would have been when the issue of ownership was first raised or when the Swiss criminal proceedings or Swiss debt demand was made.

[72] Further, that any allegations of non-compliance with the orders cannot be relied on to justify the making of the orders in the first place. I accept this submission as one is concerned with the position which prevailed at the time the orders were made.

[73] I am not persuaded by the arguments on behalf of the challenging defendants. I am satisfied in all the circumstances that at the ex parte hearing PSA made out a strong arguable case that Messrs. Lush and Ostinelli had acted fraudulently or dishonestly and established objectively a sufficient case risk of dissipation. I remark para. 12 .040 of Gee op.cit: which I think apposite - "Good grounds for alleging that the defendant has been dishonest is relevant. Dishonesty is not essential to the exercise of the jurisdiction and there is no need to show an intention to dissipate assets. But if there is a good arguable case in support of an allegation that the defendant has acted fraudulently or dishonestly, (e.g. being implicated in an ingenious scheme for the misappropriation of funds belonging to the claimant)…then it is often unnecessary for there to be any further specific evidence on risk of dissipation."

Delay

[74] Again I refer to Gee op.cit at para 2.034 pg. 62, para. 23.029 at pg. 724 and para. 23.031 pg. 726. In brief as the remedy is an equitable one the court will take into account any inordinate delay on the part of the claimant in seeking relief. Once the relief has been granted it is incumbent on the claimant to prosecute his case with all due dispatch. If there is undue delay the injunction may be discharged. In deciding whether to discharge or not the court will look at all the circumstances for example any explanations tendered for the delay and the degree of prejudice that might result to the claimant if the injunction is discharged.

[75] Mr. Girolami and Mr. Webster submit that there was inordinate delay before PSA applied to the court for ex parte interim relief and that PSA has also delayed in progressing the proceedings and that accordingly the injunction ought not to have been granted. In the first place or now falls to be discharged. Counsel emphasized that PSA did not lodge the criminal complaints against Mr. Lush and Mr. Ostinelli in Switzerland until early 2007 when they were aware of the dispute in relation to Petroval Singapore since 2005 and that they did not commence these proceedings until December, 2007.

[76] We are concerned with two scenarios here - delay in obtaining the injunction and delay in progressing the action after the injunction was obtained. I have considered all the circumstances of the case. First I am not persuaded that there was undue delay in seeking the remedy. I say this having regard to the complexity of the issues raised in this action and to the lengths PSA had to go to obtain information to assist it in tracing the disputed assets and the difficulties encountered having regard to the alleged structures employed by the Messrs. Lush and Ostinelli to protect and allegedly conceal their interests in Petroval Singapore and Norreys. Mr. O'Sullivan was retained to carry out investigations in 2006 or thereabouts and had PSA moved the court before it had sufficient evidence to meet the required standard of proof it was likely that it would have failed or on inter partes hearing be met with allegations that it had not investigated the matter. As it is allegations of insufficient investigations were still leveled at PSA in any event.

[77] Next, in my judgment there has been no undue delay in progressing this matter. One only has to look at the growing case file to see the level of activity that has been taking place since the grant of the injunctions. I speak inter alia of Norwich Pharmacal applications and the several hearings relating to alleged non-compliance with the disclosure provisions of the freezing orders and of course these applications.

Non - disclosure

[78] First, the law. On a without notice application, the applicant has a duty to disclose all matters which are material to be taken into account by the court in deciding whether or not to grant relief, and if so upon what terms. And if he fails to do so the court may

deprive him of whatever advantage he may have gained from the proceedings. See Warrington LJ in **R v Kensington Income Tax Commissioners.**[10]

[79] The duty includes a duty to make all proper inquiries and investigations before making the application. And the extent of the necessary inquiries will depend on the circumstances of the case and the degree of legitimate urgency **- Brink's Mat Ltd. v Elecombe**. See generally **IPOC International v LV Finance (2004)** at paragraph at 37 where Gordon JA gives a useful summary of the relevant principles. The same principles apply to misrepresentations, namely the applicant has a duty to avoid making any material misrepresentation and counsel has a personal duty to present the case fairly.

[80] **And see Gee op.cit; para. 12.025:- "**On an ex parte application the claimant must place before the court the results of inquiries conducted by him or on his behalf into the claim and into defences or partial defences which may be raised by the defendant, even though the legal burden of proof in relation to those possible defences lies upon the defendant. **The claimant must disclose all defences to the claim which the defendant has already raised or which are open to him, though he need not indulge in speculation." Emphasis added.** See also para. 9.018 pg. 256.[11]

[81] The challenging Defendants' main complaints are as follows:- the Beylin email of 6th December 2006 and the defences that arose from it were not fairly presented to the court, the explanation of the circumstances of the PSA Board's dismissal was unfair and misleading; the court was materially misled as to how Petroval Singapore had been accounted for by Yukos related companies ("Mazeiku Nafta accounts"); PSA failed to disclose material documentation to the court ,there was a serious failure to

[10] [1917] 1 KB 486

[11] The discretion to maintain the order, or to allow a new application for relief in the same terms, is to be exercised "sparingly". On the other hand, where there is a clear prima facie case of a substantial fraud, innocent albeit careless non-disclosure may not result in the discharge of the ex parte relief. Whilst a penal jurisdiction is necessary in order to deter non-disclosure, when there is non-deliberate material non-disclosure which is not of central importance in a serous fraud case, courts have, in the exercise of their discretion, often been willing to continue the relief on the ground that the need to do substantive justice outweighs that consideration. In such cases once the first instance judge has exercised his discretion the Court of Appeal will only interfere with it when it was not legitimately open to the judge to take that view. There are still occasions on which the breach of the disclosure duty is so serious that the court will refuse freezing relief to the claimant even though this may result in an alleged fraudster against whom prima facie case has been made out, not being held to account.

carry our a proper investigation, there was no proper disclosure of the jurisdiction arguments available to the Defendants.

[82] The court has had due regard to all the arguments advanced on this issue. I recall in particular the application for the first of the freezing injunctions .This took several hours and counsel who presented the case took great pains to give a fair picture and to raise all possible defences that might be available to in particular the key defendants paying special regard to the correspondence between Mr. Sullivan and their lawyers. The exclusive jurisdiction clauses in the several contracts were not raised at the hearing but they were not matters relied on by the lawyers for Messrs. Lush and Ostinelli during the course of the investigations. Furthermore, I have already held these actions are not framed in contract and therefore the contracts are not relevant to the merits of the case although they might be considered to have some bearing in relation to jurisdiction. However, I am not persuaded that the omission to raise the existence of the jurisdiction clauses was deliberate or that this omission is of such a material nature as to warrant the court discharging the injunctions.

[83] I have also considered the arguments on the other alleged failings. In a case of this complexity it cannot be expected that a prospective claimant would carry out such in-depth investigations so as to answer every possible point that might be raised in a defence. If that were so then he or she would run the risk of being accused of inordinate delay for one. Furthermore, at the interim stage a claimant is not expected to prove his or her case on a balance of probabilities but must meet a lesser standard, that of making out a good arguable case. Accordingly, he or she cannot be faulted for not making thorough investigations into every aspect of the case before seeking interim relief.

[84] The only issue under this head that I find has some merit is the complaint about the way in which the circumstances giving rise to the resignation of PSA's board of directors was presented in that Counsel for PSA failed to make clear that the Board wanted to investigate the matter further before laying the criminal complaints against Messrs. Lush and Ostinelli and that that reluctance was not necessarily to be read as if they were in league with them. However, I do not consider that that was deliberately done to mislead the court. And, in that respect I observe that neither of the members

who were specifically referred to by counsel are defendants in the matter. In all the circumstances in my judgment this is not such an unfair presentation of the evidence as would lead to the discharge of the injunction.

Should the receivership orders be discharged?

[85] Mr. Girolami contends that the appointment of receivers is a far-reaching remedy and if as is submitted the freezing orders should not have been granted then a fortiori the receivership orders should not have been made.

[86] No specific challenge was brought save this general complaint. I note in particular that the corporate defendants are not carrying on any trade or business which ostensibly might be hampered by having receivers in place and that in fact the receivership extends only over the shares.

[87] I am also guided by this passage in **Gee op.cit**.(para. 16-008) as I find it applies to this case:- "If (1) assets are liable to be dissipated or are otherwise in jeopardy and cannot satisfactorily be preserved by injunction then it may be appropriate to appoint receiver. This arises when the defendant controls a network of overseas trusts or companies and it appears that he has arranged his affairs in such a complicated way that if the step were not taken he might be judgment proof. The appointment of a receiver might be effective when an injunction on its own would not be". What is taking place revealed by the disclosure given and the difficulties faced by the receivers amply demonstrate this. In my judgment therefore the receivership orders must remain in place.

[88] In the light of the conclusions reached on the forum challenge and on the applications to set side service and the applications to discharge both the freezing injunctions and the receivership orders the court has considered whether it is in the interests of justice to continue the injunctions and the receivership orders if the trial will not be heard here. The Court has a discretion on the grant of such a stay as to whether or not to continue the injunction. All the circumstances must be taken into account. (See Gee op.cit p. 151 para 6.022). Having regard to all the circumstances, in my judgment, it is just and convenient to continue both forms of interim relief.

Conclusion

[89] For the foregoing reasons the court has determined as follows. The applications to set aside the orders granting leave to serve outside the jurisdiction are granted, the applications to discharge the freezing injunctions and the receivership orders are dismissed; the freezing injunctions and the receivership orders are to remain in place until further order; the action is stayed in favour of proceedings to be begun in Switzerland .The court seeks the assistance of counsel in drawing up the appropriate orders.

[90] At the hearing the parties had indicated that they would want to address on costs and also that depending on the outcome of the various applications they would need to make further applications particularly if the injunctions were to remain place. In relation to costs I direct that written submissions be exchanged within 14 days of the date hereof. With respect to any other matter, I have no doubt that the parties will make the appropriate applications in a timely manner and that the court will endeavour to hear the applications in a like manner. I thank counsel for their invaluable assistance.

Rita Joseph-Olivetti
Resident Judge
British Virgin Islands