EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
[Civil]

Claim No. BVIHCV 2014/0061

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION ORDINANCE, CAP 6

BETWEEN:

(1) RICHARD D. VENTO
(2) LANA VENTO

Claimants/ Respondents

And

MARTIN KENNEY & CO (A LAW FIRM)

Defendant/Applicant

Appearances:

Merrick Ricardo Watson and Andrew Gilliland for the Applicant
Andrew Emery and Tina Asgtarian for the Respondents

2014: November 26th

JUDGMENT

[1] ELLIS J: This matter came before the Court on the Applicant's application to lift the stay of proceedings prescribed in the Order of Master Glasgow on 6th May 2014 for the purposes of pursuing this application and for an interim injunction to restrain the Respondents Richard Vento, Lana Vento and those they represent namely, Nicole Mollison (nee Vento) Gail Vento, Renee Vento, NVLP, LLC, RVLP, LLC, GVLP LLC and DVLP LLC, from pursuing the proceedings which have been commenced in the United States Virgin Islands (USVI Proceedings) or from commencing or pursuing any other claims on the merits arising out of or in connection with or in any way related to the said contract otherwise than by arbitration.

[2] For the most part the background facts of this Application are not disputed so the Court will not detail them here. The following facts are however directly relevant to the Application:

i. The Ventos are US citizens. The Applicant asserts that he is a registered legal practitioner in the United Kingdom and the BVI who operates as a licenced sole trader under the name "Martin Kenney and Co".

ii. On or about 20th January 2011, a Letter of Engagement was executed retaining the Applicant to carry out legal services[1] (the Agreement).

iii. Following a breakdown in relationship between the Parties, arbitration proceedings were commenced by the Applicant and shortly thereafter challenged by the Respondents. In January 2014, Richard Vento (individually and on behalf of NVLP, LLC, RVLP, LLC, GVLP LLC and DVLP LLC) commenced legal proceedings in the USVI against Martin Kenney individually and *dba* Martin Kenney and Co. in which he seeks damages, and order declaring that the Agreement is unlawful and unenforceable. This Claim initially advanced the following causes of action: breach of contract, negligence, legal malpractice and fraud. The Claim was later amended on the 6th March 2014.

iv. In the latter Claim, the Respondents first set out the jurisdictional basis of the Claim. They indicate proper venue for the prosecution of the Claim is the USVI because the Applicant's wrongful conduct was committed within and outside the USVI and the injury and damages suffered were and continue to be suffered by them within and outside the USVI. They also state that the Agreement was entered into in the USVI and that substantial sums of money were transmitted to the Applicant from the USVI. The amended causes of action include: breach of contract, negligence, legal malpractice, breach of fiduciary duties, fraud, and defamation of character and wrongful commencement of proceedings.

[3] The basis of the Application before this Court is that the USVI Proceedings are in breach of an agreement to arbitrate which is set out in Clause U of the Agreement. That Clause provides:

[1] The Court notes that although the face of the Agreement indicates that Richard Vento, Lana Vento and those they represent namely Nicole Mollison (nee Vento) Gail Vento, Renee Vento, NVLP, LLC, RVLP, LLC, GVLP LLC and DVLP LLC are parties, the only executing signatory is Richard Vento signing on his own behalf and as duly authorised agent for Lana Vento and Nicole Mollison (nee Vento) Gail Vento, Renee Vento

> "These Terms of Business shall be governed by and construed in accordance with the laws of the British Virgin Islands. Any dispute, controversy, claim or question to be resolved between you and ourselves arising out of or in any way related to our retainer, work or fees, or to our Letter of Engagement or these Terms of Business, or to the relationship between us, shall be resolved by arbitration before a sole arbitrator (who shall be a member of the BVI Bar Association) pursuant to the UNCITRAL rules governing international commercial disputes, in Road Town, Tortola, British Virgin Islands. The parties, their representatives, other participants and the arbitrator shall hold the existence, content and result of the arbitration in confidence unless to the extent that disclosure is required by law or as is reasonably necessary to defend claims of procedural rights of the party making the disclosure. To the extent that the parties are unable to agree on the appointment of a sole arbitrator, either party may request that such appointment be made by the then President of the BVI Bar Association. The parties shall be bound by any appointment thus made. You hereby submit and attorn to the jurisdiction of BVI Courts in connection with any and all matters related to the judicial supervision of any arbitration arising hereunder; and in respect of any proceedings brought by us to have any arbitral award converted into a judgment of the Eastern Caribbean Supreme Court at the BVI. Should any invoice which we issue remain unpaid for more than 60 days, and should you fail to raise an objection to the payment of such invoice within such 60-day period, the invoice shall be deemed an account stated. Any accounts stated may be taxed and made into a money judgment by the BVI High Court and no arbitration proceeding shall be necessary in respect of it, accordingly."

And later:

> "All or any portion of any provision of the Letter of Engagement to which these Terms of Business are affixed (including these Terms of Business and any and all of the other Appendices thereto), which is prohibited or unenforceable in any jurisdiction or before any arbitrator appointed hereunder, shall, as to such jurisdiction or arbitration, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining part of the impugned provision and any other unaffected provisions hereof or affecting the validity or enforceability of such provision in any other jurisdiction. Specifically, in the event that all or any portion of the fees that are to be paid to Martin Kenney & Co. under the terms of the Letter of Engagement to which these Terms of Business are affixed, are deemed to be unreasonable or in excess of any limit imposed

by any rule of law or legal professional ethical conduct, then the amount that shall be deemed payable to Martin Kenney & Co. shall be adjusted downward to the maximum amount permissible, accordingly.

[4] This clause no doubt also informed the terms of the Stay Order which stayed proceedings in accordance with section 6 of the Arbitration Ordinance and which further provided that the Applicant take all necessary and mandatory steps to reinstitute arbitral proceedings against the Ventos and those they represent namely, Mollison (nee Vento) Gail Vento, Renee Vento, NVLP, LLC, RVLP, LLC, GVLP LLC and DVLP LLC in strict accordance with the UNCITRAL Arbitration Rules and the laws of the British Virgins Islands.

[5] The Stay Order was made in the current action which was brought by the Ventos. In this action, the Ventos allege unfairness and procedural impropriety in the purported appointment of Michael Pringle and request that the Court either remove him as arbitrator or rule that the arbitration provision is ineffective based on the impossibility of its fair enforcement.

[6] The Applicant has therefore brought this action to enforce the arbitration clause which is expressed to be governed by the laws of the British Virgin Islands and the Stay Order which mandated that the Parties proceed to arbitration.

Court's Analysis and Conclusions

[7] There can be no doubt in the wake of The Angelic Grace[2] that in enforcing an arbitration clause by anti-suit injunction, courts will act robustly. The existing tension between principles of comity and the contractual bargain are increasingly being resolved in favour of the latter.[3]

[8] However, the Court cannot ignore that ultimately this remedy is an equitable or discretionary one exercisable only when the ends of justice require it. The Court must therefore consider the essential principles which go towards both jurisdiction and contract.

Are Parties amenable to the jurisdiction of the Court?

[9] The Court is satisfied that on the face of it, Richard Vento on his own behalf and as duly authorised agent for Lana Vento and Nicole Mollison (nee Vento), Gail Vento, Renee Vento is amenable to the jurisdiction of the this Court. This critical requirement is satisfied by the fact that the arbitration agreement prescribes that

[2] [1995] 1 Lloyd's Report 86 at page 96

[3] XL Insurance v Owens Corning [2000] 2 Lloyd's Rep. 500; Navigation maritime Bulgare v Rustal Trading Ltd. (the Ivan Zagubanski) [2002] 1 Lloyd's rep 106; Through Transport [2005] 1 Lloyd's Rep 67 at 88; The Front Comor [2005] 2 Lloyd's Rep 257 at 258

the forum and the governing law is the BVI. That agreement therefore constitutes a submission by Mr Vento (personally and as agent) to the courts of the BVI.[4] Moreover, the Parties have commenced legal proceedings in the BVI which are extant albeit stayed by Court Order.

Forum for the Arbitration

[10] While it is doubtful that a court would grant an injunction where the arbitration has no connection to this forum, the clear and unambiguous terms of the Clause U establish that the Parties have agreed that the arbitration is to be conducted in the BVI and that the supervisory jurisdiction of the courts of this forum (BVI) is to be engaged in connection with any and all matters related to the judicial supervision of the arbitration. It is therefore open to this Court to assume jurisdiction in this regard.

Do the US Proceedings fall within the scope of the Arbitration Clause?

[11] Before an anti-suit injunction can be granted to restrain a respondent from engaging in foreign proceedings in breach of an arbitration agreement, a court must be satisfied that the claims sought to be advanced fall within the scope of the arbitration agreement. The terms of the arbitration agreement are therefore critical to a determination of this Application.

[12] A comprehensive arbitration agreement will tend to embrace most if not all of the possible claims or disputes likely to arise[5] and the modern approach dictates that courts give full effect, so far as the terms of the agreement permit. This Court must there adopt a "generous" interpretation of the dispute resolution clause and to apply a presumption in favour of one-stop adjudication.[6]

[13] Counsel for the Respondents relied on the case of Econet Satellite Services Ltd v Vee networks Ltd [2006] EWHC 1664 in submitting that the claims advanced in the USVI Proceedings are not captured by the arbitration clause. He submitted that the causes of action arise from the alleged liability of the Applicant in tort (including negligence, fraud and defamation). He stated that these causes of action do not arise from the main contract to which the arbitration clause refers and can be seen to fall outside the scope of the arbitration jurisdiction. Alternatively, he submitted that the causes of action maintained in USVI

[4] Tracomin SA v Sudan Oil Seeds [1993] 1 WLR 1026 at 1035

[5] Fiona Trust and Holding Corporation v Privalov [2008] 1 Lloyd's Rep 254 at 256- 257 and 259-260

[6] Bingham LJ's dictum in Ashville Investments Ltd v Elmer Contractors Ltd [1989] QB 488 at page 517F, "I would be very slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings".

proceedings are excluded because the main contract was void *ab initio* by reasons of the Applicant's failure to incorporate its proper regulatory provisions in the terms of the contract.

[14] In considering these submissions, this Court is guided by the dicta in The Angelic Grace where the English Court of Appeal considered the words of an arbitration clause which provided that "*all disputes from time to time arising out of this contract shall … be referred to the arbitrament of two arbitrators carrying on business in London*." Leggatt LJ in that case observed,

> "The question in a nutshell is whether the relevant claims and cross-claims arise out of the contract. It is common ground that the question must be answered in the light of The Playa Larga [1983] 2 Lloyd's Law Reports 171, in which the Court upheld the dictum of Mr Justice Mustill that a tortious claim does arise out of a contract containing an arbitration clause if there is a sufficiently close connection between the tortious claim and a claim under the contract. In order that there should be a sufficiently close connection, as the Judge said, the claimant must show either that the resolution of the contractual issue is necessary for a decision on the tortious claim, or, that the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other."

[15] The Court must therefore approach the question of construction by reference to the words used by the parties which represent their mutual intentions. Moreover, the Court must presume that the Parties most probably wished to have one stop adjudication, so that if a part of the claim or cross-claim arose out of the contract, it was inherently likely that the parties intended that they should all be heard in one forum if the facts were closely knitted together.[7]

[16] In this Court's view, the arbitration clause in this Agreement is drafted in the widest of terms which clearly indicates that the Parties "*intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal*" per Lord Hoffman in Fiona Trust & Holding Corporation v Yuri Privalo.

[17] The case law makes it plain that an arbitration clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. There is no such language at issue here. What the clause provides is that - "*Any dispute,*

[7] Fiona Trust & Holding Corporation v Yuri Privalo

controversy, claim or question to be resolved …arising out of or ***in any way related to our retainer, work, fees or to our Letter of Engagement or these Terms of Business or to the relationship*** *between us* ***shall be*** *resolved by arbitration.*"

[18] Having reviewed the claims advanced in the USVI proceedings, this Court is satisfied that there are clear breach of contract allegations raised touching and concerning the performance of the Applicant under the contract which fall squarely within the arbitration agreement. To the extent that there are tortious claims, this Court is satisfied that there is a sufficiently close connection between the tortious claims and a claim under the contract so as to conclude that the tortious claims does arise out of the Agreement.

[19] Adopting this approach, this Court (like Lord Hoffman in Fiona Trust & Holding Corporation v Yuri Privalo) can find nothing in the wording of Clause U of Agreement to exclude disputes about the validity of the contract, "*whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else*". On that basis, the substantive issues in dispute including the claims for breach of contract, negligence, legal malpractice, breach of fiduciary duties and fraud and champerty do fall within the scope of the Agreement.

[20] The Court is fortified in this view by the Respondents' own evidence and pleadings in the subject proceedings. At paragraph 20 of the statement of claim the following is asserted:

> "To my knowledge of the facts, the dispute is not limited to fees but relates strongly to "*the relationship between us*" which brings into play my counterclaims for breach of contract, negligence and downright failure to do the required professional work for which I am being asked to pay heavily."

[21] The Court is also satisfied that the claim for wrongful commencement of proceedings (which alleges that the Applicant unlawfully attempted to commence proceedings against them despite the fact that no money is owed and the agreement upon which the Defendant seeks to rely is illegal, void and unenforceable) will fall well within the remit of the arbitrator.

[22] It is not surprising that during the course of his oral submissions, Counsel for the Respondents relied largely on the claim in defamation which he argued fell well outside the scope of the agreement. It is apparent from the Particulars of this claim that this purported defamation "occurred in the context of attorney-client privileged communications (in which it was alleged that the Respondents refused to pay their debts which are due and owing and in furtherance of the "*defendant's improper*

illegal and wrongful attempt to commence arbitration proceedings against the Plaintiff and his family."

[23] The Court was not persuaded on the Respondents' arguments that the claim as drafted would fall outside the remit of the arbitration agreement. Counsel submitted no authority to support the view that an arbitration could not cover a defamation claim and the Court is satisfied that the agreement in the case at bar is sufficiently wide to accommodate this claim.

[24] In any event, relevant case law demonstrates that courts should be robust in not countenancing any attempt by a party to construct artificial and unrealistic grounds of claim in order to evade the agreement to arbitrate. While somewhat reluctant to so categorize this claim, the Court also cannot ignore the fact that the amendment including this claim would have been made after the attempt at arbitration had been opposed by the Respondents.

[25] As to the alternative argument advanced, this Court assumes for present purposes that the arbitration clause is separable from the substantive agreement and could well survive any declaration nullifying the agreement.[8] As Lord Hoffman stated in Fiona Trust & Holding Corporation v Yuri Privalo; (in that case the claim advanced was the that contract induced by bribery subject to arbitration).

> "It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the invalidity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But section 7 in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.

Available Remedies

[26] As an adjunct to the previous submissions, Counsel for the Respondents submitted that the remedies available to the Respondents in the USVI proceedings are not available under arbitration. He described the BVI Arbitration Ordinance 1976 as a toothless tiger. He referred the Court to section 17 of the Act, and submitted that (unlike the 2013 BVI Arbitration Act which has no application in the case at bar) the only remedy available on arbitration is an order for specific performance. He submitted further that cash awards in the form of compensatory damages, and punitive damages are specifically not available. This submission

[8] Clause U of the Agreement expressly provides for this, see paragraph 3 herein.

was opposed by Counsel for the Applicant who submitted that the Respondents had wrongly construed the 1976 Ordinance.

[27] Generally, the remedies which are available to an arbitrator depend on the law of the place of the arbitration and the terms of the arbitration agreement. Unlike the 2013 Arbitration Act, the only express provision in the 1976 Act relating to the grant of remedies by the arbitrator is its power to make order for specific performance (other than in relation to the sale of land). In the Court's view, this provision in no way limits the remedies available to an arbitrator. Otherwise, the utility of sections 22 and 28 (which speaks to the award of interest on the sum directed to be paid by an award and the enforcement of such an award) of the Arbitration Act would have to be doubted.

[28] Parties are in any event generally free to agree on the scope of the tribunal's power to grant remedies. Unless the parties have agreed otherwise (and subject to public policy exceptions and sovereign powers), the arbitrator should be able to award compensatory damages.

[29] The Court has taken into account whether the Respondents to the Application would be deprived of advantages in the US Proceedings. This Court accepts that as a matter of law, an arbitrator's powers to award punitive damages would be limited. However, this would not *without more* militate against the grant of this anti-suit injunction.

Is the purported breach vexatious or oppressive?

[30] Applying the reasoning of the English Court of Appeal in The Jay Bola [1997] 2 Lloyd's Rep 279 at 28, this Court is satisfied that in order to successfully seek an anti-suit injunction, an Applicant is not obliged to prove that the breach of the arbitration agreement is vexatious or oppressive. A purported breach of the contractual bargain such as is alleged here is sufficient.

[31] However, at paragraphs 19 – 27 of the Notice of Application, and paragraphs 48 – 58 of the Written Submissions, the Applicant contends that the Respondents have conducted themselves in a contumelious fashion, in breach of the Court order and their contractual obligations. At paragraphs 32 – 38 Counsel cited in support the case of Kenneth Krys et al v Stichting Shell Pensioenfonds [9] in which Pereira JA (as she then was) had this to say:

> "The guidance which we derive from these cases is that the most obvious example in which the jurisdiction will be exercised is where the conduct of the claimant pursuing foreign proceedings is said to be vexatious or

[9] HCVAP 2011/036 British Virgin Islands Civil Appeal

> oppressive or otherwise unconscionable. However, we do not understand the authorities to be suggesting that without a finding of oppressive or unconscionable conduct the jurisdiction is not available. We do not read the statements by Lord Goff as requiring such a finding. Indeed we also prefer Sopinka J's formulation of the principle as being based simply on the 'ends of justice' as in our view the emphasis on the expressions 'vexatious' or 'oppressive' conduct runs the risk of imposing a rigid formulation in respect of a jurisdiction which must remain fluid in its development and adaption to new challenges precisely for the purpose of meeting the 'ends of justice'.

And later;

> "It seems to us that both Lord Rix (in the Glencore case) and Lord Goff (in the Airbus case) tacitly recognised that the jurisdiction is available where the conduct of the claimant by pursuing the foreign proceedings would interfere with the 'due process of the court' or where it is required to protect the polices of the local forum, as a separate and distinct consideration although when looked at from the other end of the spectrum, it may very well be viewed as an abuse of process."

[32] This Court respectfully applies reasoning. In opting to pursue and continue the USVI proceedings rather than to fully engage the arbitration process, the Respondents have flagrantly disregarded the spirit and purpose of the learned Master's Order. No application has been made to set it aside and it is not the subject of an appeal; and yet the Respondents have wilfully chosen to ignore its terms.

Comity (evidence of the foreign court's attitude)/ Risk of inconsistent decisions

[33] Counsel for the Respondents throughout his submissions reiterated to the Court that it must pay due regard to the principles of comity. It is generally accepted that due to international comity, anti-suit injunctions should be applied cautiously. The practical reality however is that such caution is applied only if the anti-suit injunction enforces an equitable right not to be sued in foreign proceedings on the basis of vexation or oppression. When it comes to enforcing jurisdiction and arbitration agreements, courts will grant an anti-suit injunction unless there is "good reason not to"[10] with the Respondent bearing the burden of proving that exception.[11]

[10] The Angelic Grace

[11] Shell International Petroleum Ltd v Coral Oil Ltd. [1999] Lloyd's Rep 72 at page 78 per Moore-Bick J

[34] While there can be no doubt that an anti-suit injunction will inevitably result in interference with foreign court procedures, like the English Court of Appeal in Through Transport, this Court can see no reasons why any court should be offended by an injunction to restrain a party from invoking a jurisdiction in breach of a contractual promise that the dispute be referred to arbitration in the British Virgin Islands.

[35] The Respondents have offered no evidence to suggest that the foreign court would not recognise or enforce the order if made. What is advanced by Counsel for the Respondents is that this Court should take into account the possibility that the grant of this injunction may be inconsistent with the ruling of the foreign court which will hear the Applicant's pending Motion to Dismiss. Counsel submitted that the two applications directly mirror each other and for that reason this Court should exercise its discretion to refuse to grant the anti-suit injunction or at the very least to stay the determination of this Application pending the hearing and determination of the Applicant's Motion to Dismiss. He cited in support the case of World Pride Shipping Ltd. v Daiichi Chuo Kisen Kaisha ("The Golden Anne").[12]

[36] The English House of Lords in Donohue v Armco Inc [2002] 1 Lyoyd's Rep has acknowledged the importance of taking into account the risk of inconsistent decisions in considering whether to grant an anti-suit injunction to restrain the breach of an arbitration agreement. However, the peculiar facts of the case at bar must also have some bearing. In this Court's judgment, it is not open to the Respondents to complain about the risk of inconsistent decisions when they have filed a suit in a foreign court in breach of the arbitration agreement and where as a result of their legal suit filed on 28th February 2014 (after the USVI Proceedings have commenced), the Courts in this jurisdiction have already granted a stay pursuant to section 6 of the Arbitration Ordinance and has compelled the Applicant to reinstitute arbitration proceedings. The Respondents have not appealed or applied to set aside this Order.

[37] The Parties have agreed that their disputes are to be arbitrated and they determined that a BVI Court is to have sole jurisdiction over any dispute touching and concerning the arbitration. Here, the true role of comity is to ensure that the Parties' agreement is respected.[13] In the premises, the Respondents' arguments lacked credibility and in the Court's view did not amount to good reasons for depriving the Applicant who relies on the arbitration agreement of its contractual rights.

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[12] [1984] 2 Lloyd's Rep 489 at page 498

[13] OT Africa Line [2006] 1 All ER 32; and see Joint Stock Asset Management Company Ingosstrakh Investments v BNP Paribas SA [2012] EWCA Civ. 644 at para 68

Delay

[38] In Toepfer International Gmbh v Molino Boschi SRL ("The Molino Boschi")[14] Mance J observed that it had never been the law that an individual could with complete impunity allow foreign proceedings to continue practically to judgment. This statement merely prescribes that the application for the injunction should be made promptly and before the foreign proceedings are too advanced.

[39] However, mere delay will not itself militate against the exercise of discretion. While the length of the delay is relevant, it is the consequences of the delay which will be determinative of whether the injunction will be granted. The effect of the delay on the other party will therefore be critical. There may have been significant inconvenience and expense incurred in pursuing that litigation while the applicant sat on his laurels. If there is real prejudice to the other party as a result of delay, this may militate against the grant of the injunction.

[40] Counsel for the Respondents highlighted only the time, effort and expense involved in pursuing the foreign proceedings thus far. In the Court's view any such prejudice/detriment can be made good by reimbursement of expenses incurred and by appropriate undertakings and would not inevitably militate against the injunctive relief.[15]

[41] At paragraph 54 – 56 of the Affidavit of Shaun Reardon–John filed in support of this Application; he sets out the explanation for the delay. Counsel for the Respondents submitted that this in no way justifies the failure of the Applicant to make this Application in March 2014 when he filed his Motion to Dismiss in the USVI Proceedings. In response, Counsel for the Applicant argued that while he was obliged to move quickly to protect his position in the USVI Proceedings from the strategic standpoint, he felt obliged to wholeheartedly engage in the *bona fide* settlement discussions which had been initiated and which were actively being pursued by Counsel in the BVI. These discussions may well have yielded a global resolution of all outstanding issues between the Parties.

[42] The Court has also taken into account the fact that delay in seeking the injunction may interfere with the processes of the foreign court. In that regard the stage at which the foreign proceedings have reached is particularly significant. In this case, notwithstanding that seven months have elapsed since the USVI proceedings were issued, it is conceded that the proceedings are at an early stage. Like Toepfer International Gmbh v Societe Cargill France ("Societe Cargill")[16], the proceedings have gone no further than the Applicant's filing of a motion

[14] [1996] 1 Lloyd's Rep 510
[15] The Jay Bola [1997] 2 Lloyd's Rep 279 at 288
[16] [1998] 1 Lloyd's Rep. 379

challenging the jurisdiction of the court. No hearing date has been fixed and no defence has been filed.

[43] In all the premises, notwithstanding that the USVI proceedings are seven months old, the delay here does not disgorge the exercise of the Court's discretion. The Court is also satisfied that any prejudice which may be suffered by the Respondents can properly be the subject of appropriate undertakings which the Applicant has consented to provide.

Waiver/Submission to the US jurisdiction

[44] Counsel for the Respondents did not pursue this issue with any enthusiasm. Counsel for the Applicant submitted that he has not sought to engage the merits of the action before the USVI Court. Rather his participation has been confined to applying to have the matter moved into a US Federal Court and then challenging the jurisdiction of the Court in a Motion to Dismiss. This is not disputed by the Respondents.

[45] In the Court's judgment, some latitude is warranted in exercising the discretion. The Applicant has clearly engaged in the foreign proceedings with the intention of dismissing the litigation and reverting to his bargain to arbitrate.

Forum Conveniens

[46] Counsel for the Respondents argued trenchantly that the proper forum for the Parties' dispute is the USVI and not the BVI. He pointed out that notwithstanding that the Terms of Business are to be governed by and construed in accordance with the laws of the BVI, the Agreement contains no exclusive jurisdiction clause. Counsel for the Respondents further contended that because the Agreement and the harm and injury suffered is more closely connected to the USVI, then the Respondents should not be restrained from pursuing their legal rights in US Courts.[17]

[47] Unfortunately for the Respondents, the modern approach generally prescribes that considerations of convenience are to be discounted where a party in breach of an arbitration agreement seeks to resist an anti-suit injunction. Since the judgment in Angelic Grace, such arguments have held little sway. For example, in The Jay Bola, Hobhouse J observed that the jurisdiction to restrain foreign proceedings in breach of an arbitration agreement did not depend upon the concept of *forum non conveniens*. This position is also reflected in Welex AG v Rosa Maritime Ltd. ("the Epsilon Rosa) (No.2)[18] where the English Court of Appeal in essence,

[17] Paragraph 74 of the Respondents' Written Submissions
[18] [2003] 2 Lloyd's Rep 509 and see Societe National Industrielle Aerospatiale v Lee Kui Jak [1987]

downplayed the importance of factors of convenience in the context of arbitration agreements.

[48] In Atlanska Plovidba and another v Consignaciones Asturianas S.A. ("The Lapad") Moore-Bick J said at page 115,

> "An agreement to arbitrate has many similarities to an exclusive jurisdiction clause. In each case the parties have agreed upon their chosen tribunal and the location of any proceedings….It is clear from this and other cases, as Mr. Lord accepted, that factors which might ordinarily influence the Court when considering the question of forum conveniens are of little or no relevance where an exclusive jurisdiction clause is concerned. This principle applies equally to arbitration agreements and with even greater force to international arbitration agreements falling within the scope of the New York Convention for the reasons already stated by Mr. Justice Colman in Toepfer international G.m.b.H. v Sociėtė Cargill France. The parties have chosen their tribunal and the place of arbitration and neither of them can be heard to say that the agreement should not be enforced because it would be more appropriate, as things have turned out, to resolve the dispute in another manner or in another place."

[49] Where the Parties to this Agreement have chosen arbitration in the BVI as the means of resolving any claims which they may have against each other, this Court will presume that they did so in order to avoid the vagaries of litigation in foreign courts. In this Court's judgment, upholding that bargain to arbitrate supersedes any *forum* considerations.

Third Parties

[50] Counsel for the Respondents submitted that in any event, injunctive relief would not be available as against the Companies of NVLP, LLC, RVLP, LLC, GVLP LLC and DVLP LLC as they are not party to the Agreement which contains the arbitration clause. He submitted that they are essentially third parties upon whom this court can impose no burden consequent upon the arbitration agreement. Having not executed the said Agreement, they cannot be compelled to submit their claims to arbitration.

[51] He further argued that none of the Parties - NVLP, LLC, RVLP, LLC, GVLP LLC and DVLP LLC have been joined in these proceedings nor have they been served with this application. No order appointing Richard Vento to act in a representative capacity has been granted and so the only parties to the BVI proceedings are Richard and Lana Vento. He pointed out that in those circumstances, the grant of

an injunction against Richard Vento would have no impact on the ability of the Companies to continue prosecution the USVI claims. Counsel submitted that the inevitable multiplicity of proceedings must militate against the grant of injunctive relief.

[52] Counsel for the Applicant argued that notwithstanding that they are not signatories to the Agreement as a whole or indeed to the arbitration clause, the Companies are effectively Parties to agreement and it is open to this Court to also restrain them in furtherance of the arbitration agreement. First, Counsel referred the Court to the first page of the Letter of Engagement which recites the names of all the "Parties" to whom the letter was addressed and to Clause 16 which provides: "We *may receive our instructions from Mr Richard Vento for and on behalf of each of you as beneficiaries of the trusts, as well as on behalf of the trustee of the trusts which is also a party to the LOE.*"

[53] He then referred to the filings in the USVI Proceedings where the Respondents have repeatedly asserted that the Companies are parties to the Letter of Engagement. For example, at paragraph 1, 4 and 19 of the First Amended Complaint, the following in asserted;

> "*The Plaintiff Richard G. Vento is an individual who resides on the island of St. Thomas in the United States Virgin Islands. The companies named as Plaintiff herein are number of entities that are owned, operated and controlled by Richard Vento*.
>
> "*A contract to perform and to provide legal services to be performed by defendants for plaintiffs in the Virgin Islands was also entered into in the US Virgin Islands. Substantial sums of monies were paid to Kenney by Plaintiff and were sent and transmitted upon Plaintiffs directions to Kenney from the Island of St. Thomas, Virgin Islands*."
>
> *"The Plaintiff agreed to make payments to Kenney representing the required legal fees that were requested and entered into a Retainer Agreement that memorialized the activity that the defendants would be engaged in."*

[54] Counsel for the Applicant argued that it is disingenuous and wrong for the Respondents to now contend in BVI proceedings that the Companies were not party to the agreement to provide legal services encapsulated in the Letter of Engagement.

[55] Generally, the equity which attends the enforcement of an arbitration agreement will arise only where the parties before the Court are in fact party to the arbitration

agreement. Third parties who have not expressly signed on to the agreement would have neither the benefit nor the burden of the agreement. However, where an anti-suit injunction is sought by or against third parties, it is still open to an Applicant to seek an injunction against the third parties on the ground of vexation or oppression.

[56] Although the approach here is less robust, the English courts have recently demonstrated a willingness to bind third parties. In Joint Stock Asset Management Company Ingosstrakh Investments v BNP Paribas SA[19] the Court of Appeal upheld an anti-suit injunction against a non-party to an arbitration clause on the grounds that Russian proceedings being pursued by that non-party were vexatious and oppressive.

[57] On the facts of that case both Defendant 1 and Defendant 2 were Russian companies ultimately controlled by a Mr. Deripaska. Defendant 1 had provided a guarantee to BNP Paribas S.A (the Bank) by which it guaranteed certain liabilities of one of its subsidiaries under a loan made by the Bank to that subsidiary. The guarantee was governed by English law and provided for London seated arbitration under the LCIA Rules (with an option for the Bank to bring proceedings in the English courts). Defendant 2 was the trust manager of a very small shareholding in D1 (0.14%). A dispute arose under the loan and the Bank brought arbitration proceedings against Defendant 1 seeking payment under the guarantee. Defendant 1 asserted in those proceedings that the guarantee was void as it had not been properly approved under Russian company law. Defendant 2 (and other shareholders of Defendant 1) brought proceedings in Russia in the Moscow Arbitrazh Court against the Bank and Defendant 1 seeking a declaration that the guarantee was void. The Bank obtained an interim anti-suit injunction against both Defendant 1 (seeking to restrain Defendant 1 from assisting in the Russian proceedings) and Defendant 2 on the basis that the Russian proceedings were vexatious and oppressive. Both Defendants appealed.

[58] The Court of Appeal upheld the injunction on the basis that there was sufficient evidence to show that Defendant 2 colluded with Defendant 1 in bringing the Russian proceedings in an attempt to defeat or impede the arbitration brought by the Bank. The factors taken into account by the Court of Appeal were:

i. the common control of Defendant 1 and Defendant 2;
ii. the importance of the transaction (i.e. that Mr. Deripaska must have known of the guarantee and both sets of proceedings);

[19] [2012] EWCA Civ. 644

iii. the timing of the Russian proceedings (being brought so long after the guarantee was executed in 2008, but shortly after the Bank filed its Statement of Case in the arbitration); and

iv. the improbability of Defendant 2 acting alone.

[59] This decision demonstrates that there will be circumstances (for example, where there is sufficient evidence of control or collusion) in which courts may be willing to grant an anti-suit injunction against a third party. In the Court's view there is sufficient basis upon which it can legitimately be advanced that Richard Vento owns, operates and controls the Companies. This has repeatedly been asserted. It is also clear that both Richard Vento and the Companies have jointly issued the USVI Proceedings in which they seek relief relative to the arbitration proceedings.

[60] In this Court's judgment there is a good basis upon which it can properly be advanced that the Companies should also be directly prohibited from proceeding. Unfortunately, the Applicant in this case has not satisfied this Court the Trust Companies had proper notice of this Application. The Companies are mentioned only obliquely in this Application and they do not appear to have been served with the Application or the supporting evidence[20]. Given serious implications of this *in personam* remedy, this Court is not minded grant a remedy as against the Companies which would essentially flout the *audi alteram partem* principle.

[61] The Court is however minded on the basis of the Respondents' representations to grant the relief sought as against Richard Vento personally and in his capacity as duly authorised agent for his wife, Lana Vento and Nicole Mollison (nee Vento) Gail Vento and Renee Vento.

[62] The Court has considered the risk of parallel proceedings and inconsistent decisions where the interests of the other parties are involved.[21] However the Court has considered that the risk of inconsistent decisions may not in any event be avoided even if the Application were to be refused. The Applicant certainly seems intent on exercising his legal right to arbitration in the BVI and has in fact initiated these proceedings.[22] In those circumstances, the Court is not satisfied that the risk warrants the refusal of the relief sought.

Conclusion

[20] Proper service and notice were critical in the reasoning of the Court of Appeal in Joint Stock Asset Management Company Ingosstrakh Investments v BNP Paribas SA

[21] Donohue v Armco Inc. at page 433

[22] And there is certainly precedent which shows that a court may give effect to the arbitration agreement by appointing an arbitrator despite ongoing foreign proceedings. Atlanska Plovidba v Consignaciones Asturianas SA ("the Lapad')

[63] Having applied the relevant principles and this Court is satisfied that achieving the ends of justice warrants the grant of equitable injunctive relief in this case. The Court is satisfied that the anti-suit injunction should be granted against Richard Vento personally and in his capacity as duly authorised agent for his wife, Lana Vento and Nicole Mollison (nee Vento) Gail Vento and Renee Vento.

[64] The Court's Order is therefore as follows:

i. The stay of proceedings granted in the Order of Master Glasgow dated 6th May 2014 is lifted for the limited purpose of pursuing the Application herein.

ii. The Respondent, Richard Vento personally and in his capacity as duly authorised agent for his wife, Lana Vento and Nicole Mollison (nee Vento) Gail Vento and Renee Vento is hereby restrained from taking any further steps in proceedings St-2014-CV-0000064 commenced on 6th March 2014 in the Superior Court of the Virgin Islands Division of St. Thomas and St. John now moved to the District Court of the Virgins Islands of St. Thomas and St. John, Civil No. 2014-27 against the Applicant or from issuing or otherwise commencing any proceedings against the Applicant in the Superior Court of the Virgin Islands Division of St. Thomas and St. John or District Court of the Virgins Islands of St. Thomas and St. John or elsewhere within the United States Virgin Islands or taking any steps as against the Applicant in any proceedings in any court or tribunal in connection with the Letter of Engagement.

iii. The injunction set out in paragraph ii shall not, and does not restrain the Respondent from proceeding and/or continuing with the arbitration initiated by the Applicant pursuant to Clause U of the Letter of Engagement and the Order dated 6th May 2014.

iv. The Applicant will have his costs of the Application to be assessed before the Master if not agreed.

Vicki Ann Ellis
High Court Judge