EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2015/0010

BETWEEN:

[1] DMITRY VLADIMIROVICH GARKUSHA

Appellant

and

[1] ASHOT YEGIAZARYAN
[2] VITALY GOGOKHIYA
[3] HACKHAM INVEST AND TRADE INC.
[4] LIMERICK BUSINESS HOLDING LIMITED

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mde. Joyce Kentish-Egan, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Brian Doctor, QC for the Appellant
Mr. Joe Smouha, QC, Mr. Andrew Wanambwa,
Mr. Nicholas Brookes and Mr. Drew Holiner for the Respondents

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2016: January 13;
June 6.

Commercial appeal – Whether learned judge erred in setting aside permission to serve out of jurisdiction – Whether BVI appropriate forum

The appellant, Dmitry Vladimirovich Garkusha ("Mr. Garkusha"), a citizen and resident of the Russian Federation, became involved in a project to renovate the Hotel Moscow ("the Project") with the first respondent, Mr. Ashot Yegiazaryan ("Mr. Yegiazaryan"), a Russian national residing in California, and others. The third and fourth respondents, Hamfast Investment Limited ("Hamfast") and Hackham Invest and Trade Inc ("Hackham") respectively, are BVI companies and on Mr. Garkusha's case, beneficially owned and controlled by him at all material times. Mr. Garkusha arranged funding for the Project

through Hackham and Blidensol Trading and Investment Limited ("Blidensol"). Hamfast beneficially owned 100% of the shares in Blidensol.

On 23rd January 2008 Mr. Garkusha and Mr. Yegiazaryan signed a one page Agreement of Mutual Obligations relating to the Project ("the 2008 Agreement") which contained terms to the effect that Mr. Garkusha is to transfer to Mr. Yegiazaryan one hundred percent (100%) of shares in Blidensol and Mr. Yegiazaryan to document the transfer to Mr. Garkusha of 2.75 percent (2.75%) of shares in CJSC Decorum (later Limerick Business Holdings Limited). On 1st February 2008 Mr. Garkusha signed a share purchase agreement by which he agreed to transfer his shares in Hamfast to Mr. Vitaly Gogokhiya ("Mr. Gogokhiya"), a business associate of Mr. Yegiazaryan and on Mr. Garkusha's case, the nominee of Mr. Yegiazaryan ("the Hamfast SPA"). Mr. Garkusha later signed a second share purchase agreement with Mr. Gogokhiya. This agreement was for the sale to Mr. Gogokhiya of the entire issued shares of Hackham ("the Hackham SPA"). The Hamfast SPA and the Hackham SPA (together "the SPAs") provided that the agreements are governed by the laws of the BVI and disputes are to be resolved by the courts of the BVI.

Mr. Garkusha alleged that he was forced by threats of violence and intimidation, and financial pressure by Mr. Yegiazaryan and his associates, to sign the 2008 Agreement and the SPAs, and not to pursue claims available to him under these agreements. He further alleged that he signed the agreements under duress and would not have signed them but for the pressure that he was under from Mr. Yegiazaryan. As a result he lost his interests in Hamfast and Hackham, and also his entitlement to 2.75% of the shares in Limerick. On that basis he instituted a claim in the BVI against Mr. Yegiazaryan and Mr. Gogokhiya seeking inter alia a declaration that clause 2.1 of the 2008 Agreement and the SPAs are void for duress and damages for conspiracy to injure and unlawful interference. Mr. Garkusha later applied for and was granted permission to serve Mr. Yegiazaryan and Mr. Gogokhiya outside the jurisdiction. He was subsequently granted a freezing injunction on his ex parte application against Mr. Yegiazaryan to restrain him from disposing of his assets up to a value of $240 million.

In relation to Mr. Garkusha's claim, the learned judge found inter alia that the claims in tort do not fall within the exclusion jurisdiction clauses in the SPAs, the recission claim is a waste of time as the BVI Companies (Limerick, Hamfast and Hackham) have no current value and no prospect of becoming valuable and that Russia is the most appropriate forum for the determination of the disputes between the parties. Consequently, the learned judge set aside the service out order; naturally, the freezing injunction fell away.

The appellant appealed alleging that the judge erred in (i) finding that the tort claims are not covered by the exclusive jurisdiction clauses in favour of the BVI in the SPAs; (ii) refusing permission to serve the rescission claim outside the jurisdiction on the ground that the BVI companies do not have any real value; and (iii) finding that Russia was the most appropriate forum for trying Mr. Garkusha's claims.

Held: allowing the appeal and setting aside the order of the learned judge; remitting the tort claims to the Commercial Court for trial in accordance with CPR; confirming the order setting aside permission to serve out for the tort claims relating to the 2008 Agreement and the claim for breach of contract; ordering that the $1 million paid into court as fortification of the undertaking in the freezing order granted on 24th November 2014 be paid to the appellant 21 days after the date of this order; ordering that the $75,000.00 paid by the appellant to the first respondent as an interim payment of the first respondent's costs in the court below be paid to the appellant within 21 days of the date of this order; and awarding the appellant three-quarters of his costs in the court below and two thirds of those costs for the appeal, that:

1. As a general principle tort claims for inducing a contract with an exclusive jurisdiction clause fall within the terms of that clause and unless there are exceptional circumstances they should be dealt in accordance with the clause. The SPAs had exclusive jurisdiction clauses in favour of the BVI. The exclusive jurisdiction clauses covered not only disputes arising under and in connection with the agreements, but also disputes relating to the invalidity of the agreements which would include Mr. Garkusha's claim for rescission of the agreements. Consequently, if as Mr. Garkusha alleges, the tortious conduct induced him to sign the SPAs resulting in the claims for damages, those claims should be dealt with in accordance with the parties' chosen forum - the courts of the BVI.

   Premium Nafta Products Limited and others v Fili Shipping Co Limited and others ("the Fiona Trust case") [2007] UKHL 40 applied; Richard Vento and another v Martin Kenney & Co BVIHCV2014/0061 (delivered 26th November 2014, unreported) approved.

2. In relation to the service out of the recission claims, there are three requirements that a claimant must satisfy to be granted leave to serve a foreigner outside the jurisdiction, namely (i) there is a serious issue to be tried on the merits in relation to the foreign defendant; (ii) there is a good arguable case that the claim falls within one or more of the classes of claims in CPR 7.3; and (iii) in all the circumstances the BVI is clearly or distinctly the appropriate forum for the trial of the dispute, and the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. The appellant has satisfied all three requirements and the Court should exercise its discretion to permit service of the proceedings out of the jurisdiction.

   Nilon Limited and another v Royal Westminster Investments SA and others [2015] UKPC 2 applied; Rule 7.3 of the Civil Procedure Rules 2000 applied.

3. The rescission claims to set aside the SPAs fall within the exclusive jurisdiction clauses of those agreements. The essential quality of an exclusive jurisdiction clause in a contract is that it represents the parties' choice of the forum that should resolve any dispute that arises between them regarding the contract. The BVI courts will respect that choice and will not allow one of the parties to depart from

the selected forum unless there are "strong reasons" for so departing. In this case, there are no "strong reasons" or "exceptional circumstances" for the Court to allow Mr. Yegiazaryan to resist a claim against him in the BVI for rescission of the SPAs. Even if the companies have no present or potential value, which this Court does not accept, Mr. Garkusha is entitled to sue for the recovery of his companies and thereafter (if successful) to do with them what he sees fit.

Donohue v Armco Inc and Others 2001] UKHL 64 applied; BAS Capital Funding Corporation et al v Medfinco Limited et al [2004] 1 Lloyds Law Reports 652 applied.

4. The 2008 Agreement does not have an exclusive jurisdiction clause. As a result, the tort claim for damages in respect of this agreement and the claim for damages for breach of the 2008 Agreement are not covered by the exclusive jurisdiction clauses. The resolution of disputes about the relative merits of trial in the BVI and trial abroad is pre-eminently a matter for the trial judge. An appeal should be rare and the appellate court should be slow to interfere. The learned judge having taken the relevant principles on forum conveniens into consideration in setting aside the permission to serve out and having found that these claims have none but an entirely formal and currently irrelevant connection with this jurisdiction, this Court will not interfere with the exercise of his discretion in relation to these claims.

Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460.

JUDGMENT

[1] WEBSTER JA [AG.]: This is an appeal against the order and judgment of the learned judge of the Commercial Court delivered on 12th March 2015 by which the judge:

(a) set aside the permission previously granted to the appellant on 24th July 2014 to serve the first and second respondents outside the jurisdiction;

(b) dismissed the claim against the first respondent;

(c) discharged the freezing injunction granted on 24th November 2014 and continued on 8th December 2014;

(d) ordered the appellant to pay the costs of the first respondent of the applications;

(e) dismissed the appellant's application to continue an injunction previously granted restraining the first respondent and others from receiving monies from the arbitration award in the Kerimov Arbitration; and

(f) gave the appellant permission to appeal his decision on condition that $1 million paid into court by the appellant as fortification of the cross-undertaking in damages in connection with the freezing injunction continue to be held by the court pending further order of the Court of Appeal.

("the Discharge Order**")**

Parties

[2] The events leading up to the Discharge Order are summarised below. The summary is based on the allegations in the statement of claim and the various affidavits filed by the parties.

[3] The appellant, Dmitry Vladimirovich Garkusha ("Mr. Garkusha" or "the appellant"), is and was at all material times, a citizen and resident of the Russian Federation. He has a broad range of business interests including real estate development.

[4] The first respondent is a Russian national now residing in California in the United States of America ("Mr. Yegiazaryan" or "the first respondent"). He was a member of the Russian State Duma (lower house) and of the Russian Liberal Democratic Party from 1999 to 2012. In October 2010 criminal proceedings were commenced against him by the Russian General Prosecutor's Office and a warrant was issued for his arrest. The warrant is outstanding and Mr. Yegiazaryan now resides in California.

[5] The second respondent, Mr. Vitaly Gogokhiya ("Mr. Gogokhiya"), is a business associate of Mr. Yegiazaryan and on the appellant's case is the nominee of Mr. Yegiazaryan.

[6] Beginning in 2002 Mr. Garkusha and Mr. Yegiazaryan and others became involved in a project to renovate the Hotel Moscow located in Red Square, Moscow ("the Project"). Mr. Yegiazaryan's investment in the Project was originally made via a Russian company CJSC Decorum ("Decorum") which he owned jointly with two other Russian businessmen. Mr. Garkusha's involvement in the Project started in the autumn of 2002. At about that time he entered into an oral agreement with Mr. Yegiazaryan the essence of which was that he would arrange financing and manage the Project and eventually he would become entitled to 2.75% of the shares in Decorum ("the 2002 Agreement"). As a result of subsequent changes, which are not relevant to this appeal, his entitlement became a 2.75% interest in the fifth respondent, Limerick Business Holdings Limited, another BVI company ("Limerick").

[7] The third respondent, Hamfast Investment Limited ("Hamfast"), is a BVI company which, on the appellant's case, was beneficially owned and controlled by him at all material times up to 1st February 2008. From August 2006 to August 2008 Hamfast beneficially owned 100% of the shares in Blidensol Trading and Investment Limited ("Blidensol"). In 2006 Mr. Garkusha arranged partial funding for the Project by a loan of $100 million from Deutsche Bank. The Bank advanced the loan to Blidensol which in turn loaned it to various entities involved in the Project. This created substantial accounts receivable in favour of Blidensol.

[8] Hackham Invest and Trade Inc ("Hackham") is another BVI company over which Mr. Garkusha claims beneficial ownership. He used Hackham and Blidensol to invest in the Project. He claims to have loaned approximately US$154 million into the Project via Hackham.

[9] By late 2007 the relationship between Mr. Yegiazaryan and Mr. Garkusha had deteriorated and on 23rd January 2008 they signed a one page Agreement of Mutual Obligations relating to the Project ("the 2008 Agreement"). The 2008 Agreement contained the following terms that are relevant to this appeal:

> "1. Obligations of [Mr. Yegiazaryan]:
>
> …
>
> 1.3 to document the transfer to Party 2 [Mr. Garkusha] of 2.75 percent of shares in CJSC Decorum (*non-voting*)[1]."
>
> 2. Obligations of [Mr. Garkusha]:
>
> 2.1 to transfer to Party 1 [Mr. Yegiazaryan] one hundred percent (100%) of shares in Blindensol [sic] Trading and Investments Limited."

[10] On 1st February 2008 Mr. Garkusha signed a share purchase agreement by which he agreed to transfer his shares in Hamfast to Mr. Gogokhiya ("the Hamfast SPA"). The main terms of the Hamfast SPA are:

(a) Recital A – Mr. Garkusha is the legal and beneficial owner of the shares in Hamfast.

(b) Recital B – Hamfast owns 100% of the issued shares of Blidensol.

(c) Recital C – Blidensol is a party to a US$100,000,000 loan agreement with Deutsche Bank.

(d) Clause 1 – Mr. Garkusha would transfer the entire issued capital of Hamfast to Mr. Gogokhiya.

(e) Clause 1.3 – Mr. Gogokhiya would pay Mr Garkusha US$1 million for the shares.[2]

(f) Clause 6 – The Hamfast SPA is governed by BVI law and disputes are to be settled by the courts of the BVI.

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[1] Later Limerick - see para. 5 above.

[2] Mr. Garkusha says that he has not been paid for the share.

[11] On 17th April 2008 Mr. Garkusha executed a transfer of his shares in Hamfast to Mr. Gogokhiya and on 22nd April 2008 Mr. Gogokhiya was registered in the share register of the company as the owner of the shares.

[12] Mr. Garkusha signed a second share purchase agreement with Mr. Gogokhiya. The agreement is dated 27th January 2009 but the date of signing is disputed. It was for the sale to Mr. Gogokhiya of the entire issued shares of Hackham for $1,000.00 ("the Hackham SPA"). The Hackham SPA provides that Mr. Garkusha is the owner of the shares in Hackham, and that the agreement is governed by the laws of the BVI and disputes are to be resolved by the courts of the BVI.

[13] Mr. Yegiazaryan denies that Mr. Garkusha is or was the beneficial owner of any of the shares in Hamfast and Hackham, and asserts a positive case that Mr. Garkusha was his nominee in the transactions relating to the Project including, but not limited to, the ownership of the shares and arranging the financing. The disputes between the parties are many and wide-ranging which may have prompted the learned judge's comment at paragraph 2 of his judgment that, "It would be an exaggeration to say that every fact is disputed, but it is true that there is very little that is agreed".

[14] The main thrust of Mr. Garkusha's claim is that he was forced by threats of violence and intimidation, and financial pressure by Mr. Yegiazaryan and his associates, to sign the 2008 Agreement and the Hamfast and Hackham SPAs (together "the SPAs"), and not to pursue claims available to him under these agreements. He signed the agreements under duress and would not have signed them but for the pressure that he was under from Mr. Yegiazaryan. As a result he lost his interests in Hamfast and Hackham, and also his entitlement to 2.75% of the shares in Limerick.

[15] It is apparent from the evidence that Hackham and Blidensol have disposed of their assets namely, the receivables from the monies they loaned to various parties involved in the Project.

Proceedings in the Commercial Court

[16] On 21st January 2014 Mr. Garkusha filed a claim in the Commercial Court seeking the following reliefs:

i. Against Mr. Yegiazaryan and Mr. Gogokhiya:

(a) Damages for conspiracy to injure and unlawful interference

(b) Restitution (of all sums and assets paid to the defendants)

(c) Damages for breach of contract (in failing to transfer the 2.75 shares in Limerick).

ii. Against Mr. Yegiazaryan:

(d) Damages for intimidation

(e) Damages for breach of fiduciary duty

(f) A declaration that clause 2.1 of the 2008 Agreement, the Hamfast SPA and the Hackham SPA, are void for duress ("the rescission claim").

iii. Against all defendants:

(g) Declarations that he is the true legal owner of the shares in Hamfast and Hackham

(h) A declaration that he is the true legal owner of 2.75% of the shares in Limerick or that Mr. Yegiazaryan holds the shares in trust for him

(i) Rectification of the share registers of the three BVI companies.

[17] On 24th November 2014 the judge, on Mr. Garkusha's ex parte application, granted a freezing injunction against Mr. Yegiazaryan to restrain him from disposing of his assets up to a value of $240 million.

[18] Mr. Yegiazaryan applied to set aside both the order to serve him outside the jurisdiction and the freezing injunction. The application was heard over two days on 25th and 26th February 2015 and on 12th March 2015 the learned judge made the Discharge Order.[3]

The Learned Judge's Decision

[19] In coming to his decision the learned judge made the following important findings:

(a) The claims in tort do not fall within the exclusion jurisdiction clauses in the SPAs.[4]

(b) The BVI companies (Hamfast, Hackham and Limerick) have no current value and no prospect of becoming valuable. As such the claims to restore the companies to Mr. Garkusha (the rescission claim) is a waste of time and the court's resources, and it would be frivolous to bring a foreigner into the jurisdiction to contest such proceedings.[5]

(c) Although Mr. Garkusha can say that the loss of the shares occurred in the BVI, his actual economic loss was the valuable receivables due to the companies. This loss occurred in Russia.[6]

(d) Russia, and not the BVI or California, is the most appropriate forum for the determination of the disputes between the parties.[7]

(e) Mr. Garkusha's claims are almost certainly time barred in Russia.

The judge concluded by saying that based on his earlier findings (that the tort and rescission claims should not be tried in the BVI) he did not have to deal with Mr. Garkusha's claim for 2.75% of the shares of Limerick.

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[3] See para. 1 above.
[4] Para. 15.
[5] Para. 10.
[6] Para. 16.
[7] Paras. 17 and 18.

[20] The setting aside of the order to serve out and the claim against Mr. Yegiazaryan logically resulted in the discharge of the freezing injunction. The result is that this appeal is concerned only with the issues relating to the setting aside of the service of the claim on the foreign defendants. If the appellant is successful on these issues the claim can proceed in accordance with this Court's order, with or without a fresh application for a freezing order.

[21] When the judge handed down his decision on 12th March 2015 he gave Mr. Garkusha permission to appeal the decision on condition that the $1 million previously paid into court to fortify the undertaking in damages in the freezing injunction should remain in court pending a further order by the Court of Appeal.

[22] The notice of appeal sets out three grounds of appeal which are the three main issues in this appeal. They are:

(a) The Tort Issue - The judge erred in finding that the tort claims are not covered by the exclusive jurisdiction clauses in favour of the BVI in the SPAs and so Mr. Garkusha cannot found jurisdiction in the BVI on the basis of these clauses. The tort claims are the claims for damages and consequential relief for conspiracy, unlawful interference and intimidation.

(b) The Rescission Issue – the judge erred in refusing permission to serve the rescission claim outside the jurisdiction on the ground that the BVI companies do not have any real value and it would be pointless to grant leave under Part 7 of the Civil Procedure Rules 2000 ("CPR") to require a foreigner to defend such a claim in the BVI courts.

(c) The Forum Issue – The judge erred in finding that Russia was the most appropriate forum for trying Mr. Garkusha's claims.

The Tort Issue

[23] The tort issue in a nutshell is that Mr. Garkusha was forced by a course of intimidatory conduct organised and orchestrated by the first respondent consisting of threats of physical violence to himself and his family, threats of prosecution by the Russian authorities, extortion and other financial pressures, to sign the SPAs and to agree to clause 2.1 of the 2008 Agreement. Since the SPAs contain exclusive jurisdiction clauses in favour of the BVI the issue is whether the tort claims are covered by these clauses and are triable in this jurisdiction (barring exceptional circumstances), or the claims are outside the jurisdiction clauses and are triable in Russia where they have their closest factual connections.

[24] The SPAs contain exclusive jurisdiction clauses in the following identical terms:

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

Counsel for Mr. Garkusha, Mr. Brian Doctor, QC, reminded the Court that the judge found that the tort claims fall within the jurisdictional gateway in CPR 7.34(4). Counsel for Mr. Yegiazaryan, Mr. Joe Smouha QC, did not challenge this finding, and rightly so. The primary loss that Mr. Garkusha claims is the loss of his shares in Hamfast and Hackham. These are BVI companies and the situs of the shares is the BVI.[8] Therefore, as a matter of law, the loss of the shares occurred in the BVI.

[25] Having opened the jurisdictional gateway for the tort claims the judge went on to find that the claims did not fall within the exclusive jurisdiction clauses. His reasoning is that the relationship between the parties extends beyond the SPAs and the alleged wrongs are wholly independent of the agreements. Further, Mr. Garkusha could claim damages for intimidation without relying on the agreements

[88] Section 245 of the BVI Business Companies Act, 2004.

and the damages claims have nothing to do with the agreements.[9] As a result the tort claims are outside the exclusive jurisdiction clauses and they fall to be dealt on the usual principles relating to forum non conveniens.

[26] Mr. Doctor's submissions in relation to the judge's findings on the exclusive jurisdiction clauses are in two stages. Firstly, as a matter of interpretation tort claims for inducing a contract that contains an exclusive jurisdiction clause fall within the clause and must be dealt with in accordance with the parties' choice of forum ("the interpretation issue"). Secondly, that on the facts of this case the tort claims fall within the exclusive jurisdiction clauses and are therefore triable in the BVI ("the factual issue").

The interpretation issue

[27] Mr. Doctor submitted that on a proper construction of the exclusive jurisdiction clauses in the SPAs the tort claims are claims "arising out of or in connection with" the SPAs and so fall squarely within the exclusive jurisdiction clauses. In support of this submission he relied on a series of cases ending with the House of Lords decision in Premium Nafta Products Limited and others v Fili Shipping Co Limited and others ("the Fiona Trust case").[10]

[28] Prior to the decision in the Fiona Trust case the courts had made a distinction between disputes "arising under a contract" and disputes "in connection with" a contract, finding that the latter expression is wider and included claims in tort for inducing the contract. Conversely, that a tort claim is not a claim "arising under" the contract.[11]

[29] The appeal in the Fiona Trust case involved construing the scope and effect of identical arbitration claims in eight charterparties. The ship owners claimed that the charterparties were procured by bribery and should be rescinded, and since a

[9] Paras. 13 – 14 of the judgment.
[10] [2007] UKHL 40.
[11] See for example Ashville Investments v Elmer Construction Ltd [1989] 1 QB 488 per Bingham LJ.

finding of rescission would include rescission of the arbitration clause, the arbitration clause did not apply and the court could resolve the dispute. The arbitration clause in the charterparties read:

> "41 (b) Any dispute arising under this charter shall be decided by the English courts to whose jurisdiction the parties hereby agree.
> (c) Notwithstanding the foregoing ... either party may, by giving written notice of election to the other party, elect to have any such dispute referred ... to arbitration in London..."

[30] Their Lordships took a simple, unified approach to the interpretation and application of jurisdiction clauses. They chose not to follow the previous limitation on the expression "arising under the contract" as not covering pre-contract events such as tortious conduct inducing a contract, and gave that expression a much wider interpretation to cover all disputes that affect the contract in any way. Put simply, their Lordships effectively broadened the scope of the expression "arising under" to embrace all disputes previously covered by the expression "in connection with", and treated the jurisdiction clause as the method that the parties chose to resolve any dispute in relation to the contract.

[31] Three additional points must be made about the Fiona Trust case. Firstly, the wording of the exclusive jurisdiction clauses in the SPAs is even wider than the arbitration clauses in Fiona Trust. The exclusive jurisdiction clauses cover not only disputes arising under and in connection with the agreements, but also disputes relating to the invalidity of the agreements which would include Mr. Garkusha's claim for rescission of the agreements.

[32] Secondly, their Lordships rejected the doctrine of separability and found that an attack on the validity of an agreement is not an attack on the jurisdiction clause which is to be treated as a separate agreement in this exercise. The doctrine of separability requires a direct attack on the jurisdiction clause itself.

[33] Thirdly, in the Court of Appeal Longmore LJ made the point that as a matter of construction there is no difference between an arbitration clause and an exclusive jurisdiction clause. Counsel for both parties before this Court accepted that this is the position. Therefore, the observations of the courts in the cases dealing with arbitration clauses are equally applicable to cases dealing with exclusive jurisdiction clauses.

[34] The Fiona Trust case was followed in the BVI by Ellis J in Richard Vento and another v Martin Kenney & Co.[12] The parties entered into a retainer contract for the provision of legal services by a BVI firm, Martin Kenney & Co., to the applicants. The retainer contract contained a clause calling for arbitration for any dispute "arising out of or in any way related to our retainer, work or fees." The applicants brought proceedings against the firm in St. Thomas in the United States Virgin Islands for various claims including claims for the torts of fraud, negligence and defamation of character. The firm applied to the High Court in the BVI to restrain the applicants from pursuing the case in the USVI as being in breach of the arbitration clause in the retainer contract. The application was initially stayed by the master but the stay was lifted by Ellis, J. The learned judge delivered a written judgment in which she followed the reasoning in the Fiona Trust case and concluded that claims in tort for fraud, negligence and defamation fell within the scope of an arbitration clause in the retainer contract. Her decision on this point is set out at paragraph 19 of the judgment:

> "Adopting this approach, this Court (like Lord Hoffman in Fiona Trust…) can find nothing in the wording of Clause U of (retainer) 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."

[12] BVIHCV2014/0061 (delivered 26th November 2014, unreported).

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

The finding of fact

[36] Mr. Doctor's second submission is that the judge's finding that the tort claims are not covered by the exclusive jurisdiction clauses because the SPAs are "irrelevant"[13] to the tort claims and "have nothing to do with the parties' relationship as parties to the SPAs"[14] is wrong and has no basis. He submitted that the appellant's case is that the intimidatory conduct by Mr. Yegiazaryan and his associates caused him to sign the SPAs and to agree to clause 2.1 of the 2008 Agreement against his will. The resulting tort claims are for loss and damage which he particularises in paragraph 85 of the statement of claim as including the value of the Hamfast and Hackham shares and the 2.75% share entitlement in Limerick.

[37] Mr. Smouha supported the judge's findings on this issue. He submitted that the factual issues underlying the tort claims for damages are outside of the SPAs and should therefore be dealt with by some other court system, in this case the Russian courts. This submission may be correct in respect of the 2008 Agreement which does not have an exclusive jurisdiction clause in favour of the BVI. But the SPAs are different. They have exclusive jurisdiction clauses in favour of the BVI, and if, as Mr. Garkusha alleges, the tortious conduct induced him to sign the SPAs resulting in the claims for damages, those claims should be dealt with in accordance with the parties' choice of forum - the courts of the BVI.

[13] Para. 13 of the lower court judgment.
[14] Para. 14 of the lower court judgment.

[38] In all the circumstances I find that Mr. Garkusha's claims for damages for conspiracy, intimidation and unlawful interference are covered by the exclusive jurisdiction clauses in the SPAs and are triable in the BVI. The 2008 Agreement does not have an exclusive jurisdiction clause and the proper forum for the trial of that part of the tort claim, as well as the claims for rescission of the 2008 Agreement and for damages for breach of that agreement, fall to be determined on the usual forum non conveniens principles.

[39] I would allow the first ground of appeal insofar as it relates to claims in tort for damages for inducing the SPAs.

The Rescission Claim

[40] The rescission claim in the statement of claim is to set aside the SPAs and clause 2.1 of the 2008 Agreement on the ground that they are void for duress. The judge found that the rescission claims to set aside the SPAs fell within the exclusive jurisdiction clauses of those agreements. He then went on to find that the object of the rescission, the restitution of the shares in Hamfast and Hackham to Mr. Garkusha, was a waste of time and the resources of the court because the companies no longer had assets and were valueless. Further, there is no prospect that they will ever have value. His finding is set out in paragraph 10 of the judgment:

> "One of Lord Falconer's submissions, however, was that there is no current value in any of Hamfast, Hackham or Limerick and no prospect that there ever will be. The shares of those companies are and will remain valueless. This submission was not challenged by Mr. Michael Bools QC, who appeared, together with Mr. Oliver Jones, for Mr Garkusha, nor could it be, because the whole of his evidence is to that effect."

Mr. Garkusha challenged the finding that the companies have no value in paragraph 2.1(b) and ground 3.2 of the notice of appeal and in his counsel's written and oral submissions.

[41] The tenor of Mr. Garkusha's evidence is that he lost control of the companies and he does not know what, if any, assets they still own. This is not a concession or an admission that the companies do not have value. It is a comment on his ignorance of the current asset position of Hamfast and Hackham, having been dispossessed since 2008 and 2009 respectively. I do not accept the judge's findings in paragraph 10 of the judgment that the whole of Mr. Garkusha's evidence is to the effect that the companies are valueless and have no prospect of ever having value. If nothing else this finding is inconsistent with Mr. Garkusha's pursuit of the recovery of the shares in these proceedings. One does not spend huge sums of money in legal fees in pursuit of something that has no present or potential value. For the same reason it is difficult to understand the judge's finding at the end of paragraph 10 that "Mr. Garkusha is not interested in owning or controlling all or any part of Hamfast, Hackham or Limerick".

[42] It is accepted by counsel on both sides that the relevant time for determining the value of the shares in Hamfast and Hackham on a rescission claim is when they were received by Mr. Gogokhiya.[15] The Hamfast SPA was signed on 1st February 2008 and the shares were transferred on 17th April 2008. The Hackham SPA was signed on 29th June 2009 and the shares were transferred to Mr. Gogokhiya the same day. On these dates the companies had the following assets: Hamfast owned the shares in Blidensol which itself was entitled to substantial loan payments. Hackham owned over $100 million in receivables.

[43] The receivables of Blidensol and Hackham were subsequently assigned to various entities owned or controlled by Mr. Yegiazaryan and finally to Kamenz Trading Inc. ("Kamenz"), a company owned and controlled by Mr. Suleyman Kerimov ("Mr. Kerimov"). The transfers of the receivables out of Hamfast and Hackham started on 29th June 2009. Kamenz agreed to pay for the receivables by promissory notes to Hackham, Blidensol and Longlake amounting to approximately $240

[15] Goff & Jones – The Law of Unjust Enrichment (formerly the Law of Restitution) (8th edn., Sweet & Maxwell 2011) para. 4-34, cited by counsel for the appellant.

million. Apparently the notes were not actually issued. There was also arbitration between Mr. Yegiazaryan and Mr. Kerimov resulting in an award of $242,500,000.00 to Mr. Yegiazaryan on 4th November 2014.

[44] The foregoing is a very brief and over-simplified summary (but adequate for the purposes of this appeal) of numerous transactions regarding the receivables that were due to Blidensol and Hackham when the shares in Hackham and Hamfast were transferred to Mr. Gogokhiya. The level of activity surrounding these receivables suggests to me that when Mr. Garkusha transferred the shares in Hamfast and Hackham he was transferring shares that had real value. If he is successful in his claim to recover these shares there is a compelling argument for saying that the companies have at least potential claims to recover some or all of these receivables. This is in no way a comment on the companies' ability to recover any value for the lost receivables and I am not required to make a finding on this issue. Suffice it to say that I do not agree with the learned judge's finding that the companies have no current value and no prospect of ever having value.[16]

Exercise of judge's discretion under Part 7

[45] Having found that the rescission claims are within the exclusive jurisdiction clauses and that they have value, the next issue is whether the permission to serve the overseas respondents outside the jurisdiction should have been set aside by the judge. In the recent Privy Council decision in Nilon Limited and another v Royal Westminster Investments SA and others[17]Lord Collins, following his own decision in AK Investments CJSC v Kyrgyz Mobil Tel Limited and Others,[18] set out the three requirements that a claimant must satisfy to be granted leave to serve a foreigner outside the jurisdiction, namely:

[16] Para. 10 of the judgment.
[17] [2015] UKPC 2. Lord Collins' outline of the three requirements was followed by this Court in Amerinvest International Forestry Group Company Limited v Kwok Ka Yik BVIHCMAP2014/0033 (delivered 4th March 2015, unreported)
[18] [2011] UKPC 7.

(a) there is a serious issue to be tried on the merits in relation to the foreign defendant;

(b) there is a good arguable case that the claim falls within one or more of the classes of claims in CPR 7.3; and

(c) in all the circumstances the BVI is clearly or distinctly the appropriate forum for the trial of the dispute, and in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

I will deal with these requirements in turn.

Serious issue to be tried

[46] Mr. Smouha submitted that the judge did not make a specific finding that there is a serious issue to be tried and in fact there is no serious issue to be tried in this case. Mr. Doctor disagreed. He submitted that what the judge said in paragraph 9 amounts to a finding that there are serious issues to be tried. I agree with Mr. Doctor. In paragraph 9 of the judgment the judge effectively rejected the submissions of Lord Falconer, QC, who appeared for the first respondent in the court below, that there are no serious issues to be tried and he went on to say that it was impossible on an interim application to "salami slice" the evidence to determine factual issues. The judge cannot be faulted for taking this approach and in the absence of a specific finding that there are no serious issues to be tried I accept Mr. Doctor's submission that the judge proceeded on the basis that there were serious issues.

[47] In any event I think that there are serious issues to be tried in this case. For example, the parties signed the SPAs acknowledging Mr. Garkusha as the owner of the shares of Hamfast and Hackham, and Mr. Yegiazaryan now disputes that ownership. The issue of the ownership is and will be heavily contested and will be central to the resolution of the disputes between the parties. It cannot be seriously suggested that this is not a serious issue to be tried.

Claims within Part 7.3

[48] In granting leave to serve the foreign defendants outside the jurisdiction the judge found that the rescission claims fell under rule 7.3(7) of the CPR (ownership or control of a BVI company) and rule 7.3(6) (property in the jurisdiction), and that the tort claims fell within rule 7.3(4). The judge did not reverse any of these findings in his judgment and Mr. Smouha did not contend that the claims did not fall under any of the gateway provisions in rule 7.3. This requirement is also satisfied.

Appropriate forum – the rescission claims

[49] The judge found that Mr. Garkusha should not be granted leave to serve the rescission claims on the foreign defendants outside the jurisdiction because the companies, Hamfast and Hackham which are the object of these claims, are worthless.[19] He went on at paragraph 11 of the judgment to say that his conclusion (on service out) is not affected by the fact that the SPAs have exclusive jurisdiction clauses and the BVI court should "... shrink from submitting the foreigner to its jurisdiction in order for him to answer a claim which has no value, present or potential, to the claimant". He went on to set aside the service of the rescission claims on the first respondent because the claims had no present or future value.

[50] The essential quality of an exclusive jurisdiction clause in a contract is that it represents the parties' choice of the forum that should resolve any dispute that arises between them regarding the contract. The English and BVI courts will respect that choice and will not allow one of the parties to depart from the selected forum unless there are "strong reasons" for so departing. In Donohue v Armco Inc and Others[20] Lord Bingham said at paragraph 24:

> "If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion

[19] See para. 40 above.
[20] [2001] UKHL 64.

(whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his case to equitable relief by dilatoriness or other unconscionable conduct."Not only will the courts respect the parties' choice of forum, but that choice will have the further effect of displacing the usual factors that go into determining the appropriate forum for determining a dispute between the contracting parties. In BAS Capital Funding Corporation et al v Medfinco Limited et al[21] Lawrence Collins J made the important point that:

> "… it would require very strong grounds to override a choice of English jurisdiction, and that the normal forum conveniens factors have little or no role to play, especially where it could be inferred from the lack of other connections with England that the parties had chosen the English forum as a neutral forum."[22]

[51] Collins J would not speculate as to what exceptional circumstances would allow the courts to depart from the chosen forum, but gave as an example where the party seeking to rely on the exclusive jurisdiction clause (in England) already has ongoing proceedings with overlapping issues in another jurisdiction. He said at paragraph 193:

> "It would not be useful to speculate on what exceptional circumstance would justify the court in not accepting jurisdiction where the parties had conferred non-exclusive jurisdiction on the English court, but I accept that one feature which may be highly relevant is whether there are already proceedings in a foreign country which involve overlapping issues, especially if they have been commenced by the party which subsequently seeks to sue in England."

[21] [2004] 1 Lloyds Law Reports 652.
[22] Para. 192.

[52] In my opinion there are no "strong reasons" or "exceptional circumstances" in this case for the Court to allow Mr. Yegiazaryan to resist a claim against him in the BVI for rescission of the SPAs. Even if the companies have no present or potential value, which I do not accept,[23] Mr. Garkusha is entitled to sue for the recovery of his companies and thereafter (if successful) to do with them what he sees fit.

[53] Mr. Smouha attempted to avoid the obvious consequences of the exclusive jurisdiction clauses by relying on the case of UBS AG, UBS Securities LLC v HSH Nordbank AG[24] to submit that where parties are involved in complex commercial contracts with conflicting jurisdiction clauses the court should find the commercial centre of transaction and the jurisdiction clause that applies to that centre should govern all the agreements. Applied to this case he submitted that the 2008 Agreement was the commercial centre of the overall transactions between the parties and under the relevant conflict of law rules Russia was the jurisdiction of that agreement. As such Russia should also be the jurisdiction of the SPAs. The fatal weaknesses of this submission are:

(a) There are no conflicting jurisdiction clauses in the contracts in this case. The 2008 Agreement does not have a jurisdiction clause. The only jurisdiction clauses are in the SPAs.

(b) The SPAs were contemplated by the 2008 Agreement.

(c) The 2008 Agreement preceded the SPAs and the express choice of BVI courts to resolve disputes under these agreements cannot be supplanted by the earlier agreement that does not have a jurisdiction clause.

I do not accept Mr. Smoutha's submission.

[23] See paras. 40-44 above.
[24] [2009] Lloyds Law Reports 272.

[54] It should be apparent from my conclusions above on CPR Part 7 that Mr. Garkusha has satisfied the requirements of serious triable issue and the gateway provision. The third requirement of appropriate forum is satisfied by the exclusive jurisdiction clauses in the SPAs which have not been displaced by strong reasons or exceptional circumstances. Having also rejected the judge's finding that the rescission claims have no present or future value I do not think that there was a proper basis for the judge to set aside the permission that he had previously granted at the ex parte stage to serve the foreign defendants outside the jurisdiction in respect of the rescission claims.

A fourth requirement ?

[55] Mr. Smouha submitted that even if the BVI court is satisfied that it has jurisdiction to order service out under rule 7.3 the court still has an evaluative power to refuse permission if it is satisfied in all the circumstances the case is not a proper one for ordering a foreigner to defend himself in the jurisdiction. He submitted that this is what happened in this case. The judge was satisfied that the rescission claims fell within the jurisdiction clauses (and therefore satisfied the three requirements in Nilon Limited and another v Royal Westminster Investments SA and others) but went on to decline permission to serve out because the claims were worthless and the foreign defendants should not be required to come to the BVI to defend them.[25]

[56] I am satisfied that the court does have an overriding discretion, after considering the first three requirements, to decide whether to grant or refuse permission to serve out depending on all the circumstances. This is apparent from the words used by Lord Collins in the Nilon Limited and another v Royal Westminster Investments SA and others case. After setting out the first three requirements of serious issue, gateway and appropriate forum he continued '…and that in all the circumstances the court ought to exercise its discretion to permit service of the

[25] Para. 11 of the judgment.

proceedings out of the jurisdiction."[26] This suggests that the court can, in an appropriate case, refuse permission even if the claimant has satisfied the three requirements in Nilon Limited and another v Royal Westminster Investments SA and others and it does not matter whether it is treated as a fourth requirement or as an aspect of the third – the appropriate forum issue.

[57] The existence of this fourth requirement, or the second part of the third requirement, is supported by the decision of this Court in Commercial Bank-Cameroun v Nixon Financial Group Limited[27] where Bennett JA [Ag.] said:

> "A party whose application satisfies the criterion set out in Rule 7.3 Civil Procedure Rules 2000 does not have an absolute right to permission to serve out. The Court will generally need to be satisfied that the case is a fit and proper one for service out, and that the British Virgin Islands are the appropriate forum for trial of the intended action."[28]

[58] The case at bar is an example of the exercise of this evaluative stage or overriding discretion. The judge had an overriding discretion to refuse permission. However, he exercised his discretion on wrong principles because:

1. Where a party has signed a contract agreeing the forum for the resolution of disputes under or in connection with the contract he cannot be heard to complain that the selected forum in not appropriate for the trial of any dispute in connection with that contract. In this case it does not matter that the agreements were not signed by Mr. Yegiazaryan himself. There is abundant evidence, albeit untested, that Mr. Gogokhiya is his nominee and that Mr. Yegiazaryan has taken benefits under the agreements.

2. In any case the judge erred in finding that the BVI companies had no present or future value, and this was the basis on which he exercised his discretion.

[26] Para. 13.
[27] BVIHCVAP2011/05 (delivered 6th June 2011, unreported).
[28] Para. 18.

[59] Having exercised his discretion on the wrong principles this Court can exercise its own overriding discretion[29] which I would exercise in favour of the appellant for the reasons advanced above.

[60] In all the circumstances I would allow the ground of appeal on the rescission issue (ground 3.2) and restore the order giving the appellant permission to serve the defendants outside the jurisdiction insofar as it relates to the rescission claims.

The other claims

[61] Based on my conclusion in paragraph 38 above that the tort claim for damages in respect of the 2008 Agreement and the claim for damages for breach of the 2008 Agreement are not covered by the exclusive jurisdiction clauses, it follows that these claims should be tried in the BVI only if it can be established that the BVI is the most appropriate jurisdiction for the trial applying the usual principles in the Spiliada Maritime Corporation v Cansulex Ltd case.[30]

[62] The starting point on this issue is the speech of Lord Templeman in the Spiliada case at page 465 where he reminded us that:

> "In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity... An appeal should be rare and the appellate court should be slow to interfere."

[63] The judge's handling of the forum non conveniens issue is at paragraph 17 of the judgment where he summed up the issues as follows:

> "This is a case about alleged wrongdoing in the Russian mineral and property development industries. All of the acts complained of (with the exception of ministerial acts such as the registration of share transfers) took place in Russia. All of the documents are in Russia and, for the most part are written in Russian. None of the persons likely to have useful evidence to give about these matters is here in the BVI. Some may speak

[29] Per Sir Vincent Floissac in Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188.
[30] [1987] AC 460.

> English, but the major parties apparently do not. There is already a mountain of evidence on Russian law, most, if not all, on the question of limitation and in my judgment, given the sharp differences of opinion between the experts, it would be far better for the Courts of the Russian Federation to decide the issues with which they deal. Put shortly, these claims have none but an entirely formal and currently irrelevant connection with this jurisdiction."

[64] The judge's observations apply to the claims mentioned in paragraph 61 above and this Court should be reluctant to interfere with the exercise of his discretion in relation to these claims. I would only make the following observations.

[65] Firstly, the judge observed in paragraph 18 of his judgment that Mr. Garkusha's claims "... are almost certainly time barred in the Russian Federation" but he did not think that it mattered because BVI is obviously not the appropriate forum. This finding means that Mr Garkusha will not be able to pursue this claim because it is time barred in the appropriate jurisdiction and cannot be pursued here. The loss of a claim in the appropriate forum can be a factor in allowing the claim to proceed in the selected forum in order to achieve "practical justice."[31] But to benefit from the court's limited discretion on this point Mr. Garkusha must have acted reasonably in commencing the claim for these remedies in the BVI.[32] Reasonableness on this issue includes issuing a protective writ in the appropriate jurisdiction (Russia) to preserve the time limit.[33] Mr. Garkusha did not take any steps to preserve his position in Russia and did not account for not doing so in his evidence. In the circumstances, there is no basis for giving Mr. Garkusha any favourable consideration on this point.

[66] Secondly, it is apparent that neither party asked the court to order that the claim be pursued in Russia. Mr. Garkusha chose the BVI and Mr. Yegiazaryan asked for California because that is where he is residing, and he says that he cannot leave the United States. The judge did not accede to either party's request and

[31] Lord Goff in Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460 at p. 483.
[32] Ibid at p. 483.
[33] Ibid at p. 484.

ordered that the trial take place in what is undoubtedly the forum with which the disputes have their closest connections – Russia.

[67] There is no basis for interfering with the judge's decision on the most appropriate forum for the trial of the claims that fell outside the exclusive jurisdiction clauses and in my view the appeal against the judge's decision relating to these claims fails.

Conclusion

[68] The tort claims for damages relating to the SPAs and the rescission claim for setting aside these agreements fall within the exclusive jurisdiction clauses in the SPAs and it is appropriate that these claims proceed in the BVI. The tort claims in relation to the 2008 Agreement and the claim for breach of contract are outside the exclusive jurisdiction clause and the BVI is not the most appropriate jurisdiction for the trial of those claims. There is no basis for interfering with the judge's decision to set aside service of the claim form in respect of the latter claims.

Order

[69] In all the circumstances I would make the following orders:

(1) The appeal is allowed and subject to sub-paragraph (3) below the order of the learned judge is set aside.

(2) The claims for damages for tort for inducing the SPAs and the claim for rescission of the SPAs and consequential relief are remitted to the Commercial Court for trial in accordance with CPR.

(3) The order setting aside permission to serve the foreign defendants outside the jurisdiction for the tort claims relating to the 2008 Agreement and the claim for breach of contract is confirmed.

(4) The appellant was not completely successful in setting aside the Discharge Order and is awarded three-quarters of his costs in the court below and two thirds of those costs on the appeal.

(5) The $1 million paid into court as fortification of the undertaking in the freezing order granted on 24th November 2014 is to be paid out to the appellant 21 days after the date of this order.

(6) The $75,000.00 paid by the appellant to the first respondent as an interim payment of the first respondent's costs in the court below be paid to the appellant within 21 days of the date of this order.

Paul Webster
Justice of Appeal [Ag.]

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Joyce Kentish-Egan
Justice of Appeal [Ag.]