EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2015/0012

BETWEEN:

SFC SWISS FORFAITING COMPANY LTD.

Appellant

and

SWISS FORFAITING LTD

Respondent

Before:

The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Mr. James Collins, QC, with him, Mr. Jonathan Addo for the Appellant
Mr. Charles Samek, QC, with him, Ms. Arabella di Iorio for the Respondent

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2016: January 14;
July 4.

Stay of proceedings – Forum non conveniens – Whether judge ought to have applied the "strong reasons" test –Whether judge failed to give reasons for decision – Whether judge properly exercised discretion in granting stay on basis of forum non conveniens

The appellant, SFC Swiss Forfaiting Company Ltd ("SFC"), is a company incorporated and domiciled in the Virgin Islands ("BVI") and established as an investment company. Independent Asset Management Company Limited ("IAMC") was responsible for SFC's investment strategy and SFC entered into an investment management agreement with IAMC for that purpose.

The respondent, Swiss Forfaiting Ltd ("the Fund") is a company based in Switzerland and provides forfaiting related services. The Fund commenced proceedings against SFC in the Zurich Commercial Court ("the Swiss Proceedings") alleging that SFC acted as its agent pursuant to a Trust Agreement and owed it substantial sums of monies which it held on trust. SFC did not challenge jurisdiction in the Swiss court and has defended the claim

on its merits. SFC asserted that it is entitled to retain monies for services it provided to the Fund, but that it is entitled to pursue a claim for monies against the Fund in the BVI. SFC claims that the Fund owes it substantial sums of monies for services it provided to the Fund pursuant to a Services Agreement that SFC entered into with IAMC. The Fund disputes this agreement between SFC and IAMC and asserts that, in any event, it is not a party to the Services Agreement.

SFC subsequently presented a statutory demand against the Fund and commenced a claim in the BVI against the Fund for the monies which it alleged the Fund owed it under the Services Agreement. There is a total overlap of the sums claimed in the BVI and in the Swiss Proceedings as well as a number of connecting factors between the BVI claim and the Swiss Proceedings. In the circumstances, the Fund applied to the BVI court for a stay of the BVI proceedings on the basis of forum non conveniens.

In an extempore oral judgment, the learned Commercial Court judge granted the stay of the BVI claim. SFC is aggrieved by the judge's decision and has appealed on a number of grounds, namely: the court applied the wrong test for a stay; if the court rejected the argument that the claim was covered by a jurisdiction clause or rejected that, if covered by the jurisdiction clause that the "strong reasons" test applied, it failed to give reasons for doing do; the court erred by failing to apply the domiciliary presumption to which the Fund is subject; the court erred by taking account and/or giving too much significance to the fact that the claim arose out of the same business relationship; and the court failed to give sufficient weight to the fact that the claim was governed by BVI law.

Held: dismissing the appeal, and awarding costs to the Fund to be assessed if not agreed within 21 days, that:

1. As a general rule, where parties have bound themselves by an exclusive or non-exclusive jurisdiction clause, effect should ordinarily be given to that obligation in the absence of "strong reasons" for departing from it. Accordingly, in order to be able pray in aid of not granting a stay on the basis that the "strong reasons" test applies, there must be in existence between the parties an exclusive or non-exclusive jurisdiction clause. In this case, SFC sought to rely on a services agreement and a management agreement to show the existence of a jurisdiction clause to which the Fund should be held. However, the Fund was not a party to these agreements. Accordingly, there was no written agreement between the Fund and SFC which SFC was able to point to, to form the basis on which the court could apply the "strong reasons" test. In the circumstances, there was no question of the "strong reasons" test being applicable in the absence of a written agreement between the Fund and SFC.

   Donohue v Armco Inc and others [2001] UKHL 64 applied.

2. Where there is an appeal based on the inadequacy of reasons, the appellate court has to review the judgment in the context of the material evidence and submissions to determine whether, when all of these are considered, it is the case that the reason is apparent and that it is a valid basis for the judgment. In the

present case, it is clear from a reading of the transcript that the learned judge considered the "strong reasons" test as being inapplicable in the absence of a written agreement between the Fund and SFC even though he did not say so expressly. It is also clear that the Services Agreement and the Management Agreement upon which SFC sought to rely could not avail as a basis for the application of the "strong reasons" test since the Fund was not a party to the agreements. In the circumstances, it cannot be said that SFC genuinely is unaware of the reasons for the learned judge's decision.

English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605 applied.

3. There is no domiciliary presumption in private international law in relation to commercial law matters. Domicile is simply one of the connecting factors to be considered by the court in the determination of the clearly appropriate forum. In this case, it is trite law that the fact that the Fund is domiciled in the BVI founds jurisdiction to the extent that the BVI court is an available forum. However, a court that applies the test in **Spiliada Maritime Corporation v Cansulex Ltd** must go on to determine in light of the other connecting factors, which forum is clearly or distinctly the appropriate forum for the trial. In the circumstances, there was no error on the part of the learned judge for not giving consideration to the domiciliary presumption.

   Spiliada Maritime Corporation v Cansulex Ltd [1987] 1 AC 460 applied; **Bitech Downstream Limited v Rinex Capital Limited** consolidated with **Bitech Downstream Limited v Woodbridge Trading Limited** BVIHCV2002/0233 and BVIHCV2003/0008 (delivered 12th June 2003, unreported) considered.

4. An application for a stay of proceedings on the basis of forum non conveniens is a request that the court exercise its discretion not to hear the case before it on the basis that there is clearly or distinctly a more appropriate foreign forum. The court has to consider whether there is another available forum; whether that forum is more appropriate than the local court and if so, whether justice would be served by allowing prosecution of the action there. A party would have to demonstrate to the court that the foreign jurisdiction is the natural forum in that it is the country with which the action has the most real and substantial connection. A preponderance of connecting factors may assist in identifying the connection. In essence, the court must decide which forum comprises the centre of gravity of the dispute. In the present case, there is no doubt that the learned judge assessed the connecting factors and attached the relevant weight to them and came to the conclusion that the SFC claim had the most real and substantial connection with Switzerland.

   Spiliada Maritime Corporation v Cansulex Ltd [1987] 1 AC 460 applied.

5. An appellate court should only interfere with the judge's exercise of discretion where it is clear that an error of principle has been made or that the result falls outside the range of potentially "right" answers and it should not reassess the

weight to be given to the matters which the judge was entitled to take into account in exercising his or her own discretion. In the case at bar, the judge made no error of principle in granting the stay but rather exercised his discretion quite properly.

Cherney v Dempaska [2012] EWCA Civ 1235 applied; **Dufour and Others v Helenair Corporation Ltd and Others** (1996) 52 WIR 188 applied.

JUDGMENT

Introduction

[1] **BLENMAN JA**: This is an appeal by SFC Swiss Forfaiting Company Ltd ("SFC") against the judgment of a learned judge of the Commercial Court in which he granted a stay of proceedings that was brought by SFC. Indeed, SFC had instituted proceedings in the Virgin Islands ("BVI") against Swiss Forfaiting Limited ("the Fund") in circumstances where there already were ongoing and advanced proceedings that were instituted by the Fund against SFC in Switzerland ("the Swiss Proceedings"). The Fund therefore applied to the Commercial Court to stay the BVI proceedings on the basis of forum non conveniens and the learned judge granted the stay of proceedings. In addition, the learned judge made a number of orders that are not pertinent to this appeal. SFC is dissatisfied with the learned judge's decision to stay its claim and has appealed on several grounds.

[2] I will now address the background in some detail in order to provide the necessary context to the appeal.

Background

[3] The Fund is a company which is incorporated in the BVI. It is also domiciled in the BVI and was established as an investment company. Responsibility for the investment strategy was that of an investment manager, namely, a company called Independent Asset Management Company Limited ("IAMC"). For that purpose, the Fund and IAMC entered into an investment management agreement ("IMA").

[4] SFC is a company that is based in Switzerland and it provides various forfaiting related services. SFC was and is not a party to the agreement between IAMC and the Fund.

[5] Subsequently, IAMC and SFC entered into a Brokerage Agreement to which the Fund is not a party. Apart from a Trust Agreement, there is no written agreement between the Fund and SFC. SFC claims that the Fund owes it substantial sums of monies for services that it provided pursuant to a Services Agreement. It is noteworthy that the Fund is not a party to the Services Agreement.

[6] The Fund was involved in forfaiting and has alleged that SFC acted as its agent pursuant to the Trust Agreement. The Fund has alleged that SFC owed it substantial sums of monies which it held on trust and seeks to recover these monies. Towards this end, the Fund commenced proceedings against SFC in the Zurich Commercial Court ("the Swiss Court"). SFC did not resist jurisdiction in the Swiss Court and has defended the Fund's claim on its merits and has filed what is in effect a defence and a sort of counter claim. SFC's assertion in the Swiss proceedings is that it is entitled to retain monies for services it has provided to the Fund, but asserts that it is entitled to pursue its counterclaim for the monies in the BVI.

[7] SFC alleges that it entered into a Services Agreement with IAMC. This is disputed by the Fund and in any event the Fund asserts that, here again, it is not a party to the Services Agreement.

[8] Several months after the Fund had filed the Swiss proceedings, SFC presented a statutory demand against the Fund. At the same time, it commenced a claim in the BVI against the Fund for the monies which it alleged the Fund owed it on the basis of the Services Agreement. There was and is a total overlap between the monies claimed in the BVI and those claimed in the Swiss Proceedings. In addition, there are overwhelming connecting factors between SFC's claim in the

BVI and the Fund's claim in Switzerland. While there were few connecting factors that pointed to the BVI as the appropriate forum, there are several connecting factors that indicate that Switzerland is the centre of gravity in which SFC's claim should be resolved. It was against that background that the Fund applied and obtained a stay of the BVI proceedings on the basis of forum non conveniens.

[9] The judge did not give a written judgment but provided an extempore oral judgment.

[10] SFC is aggrieved with the judgment and has appealed on several grounds. For the sake of convenience, I will utilise the grounds of appeal as agreed by the parties.

Grounds of Appeal

[11] SFC has appealed on the following grounds:

(1) the court (sub silentio) erred in law and/or principle by applying the wrong test for a stay;

(2) if the Court rejected (1) the argument that the claim was covered by the jurisdiction clause; or (2) the argument that, if covered by the jurisdiction clause, the "strong reasons" test applied, the court erred by failing to give any reasons for doing so;

(3) whichever test was appropriate, the court erred in law and/or principle by failing to apply the domiciliary presumption to which the respondent is subject;

(4) in seeking to identify the "natural forum" and/or determining whether or not Switzerland was "clearly or distinctly more appropriate" than the BVI, the court erred by taking into account and/or giving too much significance to the fact that the BVI claim arose out of the same business relationship as the claim in the Swiss Proceedings;

(5) in seeking to identify the "natural forum" and/or determining whether or not Switzerland was "clearly or distinctively more appropriate" than the BVI, the court erred by failing to give sufficient weight to the fact that the BVI claim was governed by BVI law.

Appellant's Submissions

Ground 1: The court erred in law and/or principle by applying the wrong test for a stay

[12] Learned Queen's Counsel, Mr. Collins, reminded this Court that the law draws a clear distinction between cases where the claim is covered by a jurisdiction clause agreement and cases where it is not. Mr. Collins, QC, told this Court that where there is a jurisdiction agreement, a stay will not be granted unless there are "strong reasons" for doing so. He referred to **Donohue v Armco Inc and others**[1] in support of his argument. He quite correctly stated that for these purposes, it makes no difference whether the jurisdiction clause is exclusive or non-exclusive. Absent "strong reasons", the BVI proceedings should not be stayed. In further support of his arguments he referred to **British Aerospace PLC v Dee Howard Co**, [2] **Mercury Communications Ltd and another v Communication Telesystems International**, [3] and **Import Export Metro Ltd and another v Compania Sud Americana de Vapores S.A**.[4]

[13] Next, Mr. Collins, QC, stated that on the other hand, where there is no jurisdiction clause, the usual forum non conveniens test applies. He referred to the well-known case **Spiliada Maritime Corporation v Cansulex Ltd** [5] and **IPOC International Growth Fund Limited v LV Finance Group Limited et al**.[6] He said that where the defendant is domiciled in the BVI:

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[1] [2001] UKHL 64.
[2] [1993] 1 Lloyd's Rep 368 at pp. 375-377 (Waller J).
[3] [1999] 2 All ER (Comm) 33 at pp. 40-41 (Moore-Bick J).
[4] [2003] 1 Lloyd's Rep 405 at paras. 13-14 (Gross J).
[5] [1987] AC 460.
[6] BVIHCVAP2003/0020 and 2004/0001 (delivered 19th September 2005, unreported).

> "The burden resting on the defendant is not just to show that [the BVI] is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the [BVI] forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in [the BVI] as of right".[7]

[14] Mr. Collins, QC, in oral argument sought to rely on the Brokerage Agreement and the Investment Management Agreement to bolster his argument that there exists a jurisdiction clause to which the Fund should be held to. This is so even though his oral arguments were at variance with his pleaded case. Mr. Collins said that before the court of first instance, SFC argued that the "strong reasons" applied as the claim was made under the Services Agreement, which included a BVI jurisdiction clause. In his extempore judgment, the learned Commercial Court judge appeared to accept that the jurisdiction clause applied. Mr. Collins argued that the learned judge, having found that the jurisdiction clause applied, erred in law by applying the usual forum non conveniens test rather than the "strong reasons" test. Learned Queen's Counsel, Mr. Collins urged the Court to allow the appeal on this ground of appeal even though he conceded that the basis of the jurisdiction clause was not clearly pleaded.

[15] Mr. Collins QC next turned his attention to the second ground of appeal.

Ground 2: If the Court rejected (1) The argument that claim was covered by the jurisdiction clause; or (2) The argument that, if covered by the jurisdiction clause, the "strong reasons" rest applied, the Court erred by failing to give any reasons for doing so

[16] Mr. Collins, QC, said that it is trite law that judicial decisions must be reasoned. He said that the reasoning need not be elaborate, but 'justice will not be done if it is not apparent to the parties why one has won and the other has lost'.[8] He argued that in the present case, it is wholly unclear why the judge applied the usual forum non conveniens test rather than the "strong reasons" test. He said that the point was argued and the judge appeared to accept that the jurisdiction

[7] Spiliada Maritime Corporation v Cansulex Ltd[1987] AC 460 at p. 477 (Lord Goff).
[8] English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409 at para. 16 (Lord Phillips MR).

clause applied, but he then applied the wrong test. During his oral submissions, Mr. Collins, QC, was not as forceful in advancing this point when confronted with the transcript of the proceedings in relation to the reasons why the strong reasons test was rejected. Nevertheless, Mr. Collins, QC, said that the appeal should be allowed for failure to give reasons.

[17] Alternatively, Mr. Collins, QC, submitted that if allowed on this basis, the "strong reasons" test should be applied in place of the usual test. He said that whilst there is a dispute as to whether the Fund is bound by the Services Agreement, this is a merits issue for trial. The fact that the Fund challenges the Services Agreement does not prevent the application of the "strong reasons" test. Mr. Collins, QC, reasoned that jurisdiction agreements are (like arbitration agreements) separable from the agreement of which they form part. A challenge to the Services Agreement does not impeach the jurisdiction agreement found within it. He referred to **Deutsche Bank AG and others v Asia Pacific Broadband Wireless Communications Inc and another**[9] where Longmore LJ opined that:

> "…disputes about the validity of the contract must, on the face of it, be resolved pursuant to the terms of the clause and, indeed, the last sentence of the clause expressly so provides. It is only if the jurisdiction clause is itself under some specific attack that a question can arise whether it is right to invoke the jurisdiction clause."[10]

[18] In examining his pleaded case, Mr. Collins was forced to accept that the pleadings were not clearly drafted and that they did not indicate that the Fund was a party to the Services Agreement. Interestingly, this is the same position that he had taken before the learned judge, yet up to the date of the appeal, no attempt was made to amend the pleadings so as to indicate that the Fund was a party to the Services Agreement. Much of Mr. Collins' oral argument in relation to the Services Agreement was not borne out by the pleadings that were before the judge. What is interesting is as indicated earlier, much of his oral arguments were not under guided by his pleaded case. In fact, Mr. Collins' oral arguments were not

[9] [2008] EWCA Civ. 1091.
[10] At para. 24.

supported by his pleadings.

[19] Mr. Collins, QC, submitted that where the jurisdiction agreement is itself disputed, the burden on the claimant is not to conclusively prove that the jurisdiction agreement is valid and binding on the defendant. He said that this is a matter for trial. At the interlocutory stage, the task of the judge is to determine which party has the better argument. In support of his contention, he referred this Court to the treatise **Private International Law in English Courts**[11] by Adrian Briggs at paragraph 4.425:

> "However, in cases in which the court is asked to stay proceedings by reference to an agreement on jurisdiction which is itself disputed, the approach is to require the party who relies on the agreement to claim relief to show that he has, in the light of these principles, the better of the argument on the issue that there was, for good or ill, an agreement on jurisdiction."

[20] Mr. Collins, QC, opined that the judge appears to have determined that SFC did have the better argument: he held that the jurisdiction clause was "a factor" in favour of the BVI. However, whether he did or did not, SFC plainly had the better argument. Mr. Collins maintained that SFC was appointed by the Fund to perform various roles for the Fund, including (by way of illustration) acting as agent, broker and custodian. This he stated is clear from the IMA (to which the Fund was party). Clause 1.1(B) names SFC as the agent. The Fund's witness, Mr. David Payne, does not dispute that this was true. Mr. Collins, QC, referred this Court to Mr. Payne's evidence. He does not dispute that SFC did act as the Fund's broker as well as agent.

[21] Mr. Collins, QC, said that the preamble to the Services Agreement refers to IAMC's authority "to give third parties any instructions on behalf of the Fund …" Clause 1 and exhibit A identified the services that were to be provided and the fees that were to be paid; and clause 3(a) provided that the Fund was to be invoiced directly. The instructions given by IAMC and accepted by SFC in the

[11] (1st edn., Oxford University Press 2014) 345.

Services Agreement were given by IAMC "on behalf of the Fund" pursuant to clause 3.4 of the IMA.[12] Consequently, the Fund is bound by the terms on which the instructions were given and accepted, which includes the BVI law and jurisdiction clause. Furthermore, the jurisdiction clause (which covers "any disputes that may arise") is clearly broad enough to cover the dispute as to whether or not the sums that have been invoiced are due. Mr. Collins, QC, argued that this is another basis upon which the appeal should succeed.

[22] Next, Mr. Collins addressed ground 3.

Ground 3: Whichever test was appropriate, the court erred in law and/or principle by failing to apply the domiciliary presumption to which the respondent as a BVI person is subject

[23] Mr. Collins, QC, argued that since the Fund is domiciled in the BVI, this founds jurisdiction in the BVI Court. The burden of proof is therefore on the Fund to show why there should be a refusal by the court below to exercise that jurisdiction which is founded as of right. He opined that this is a heavy burden and referred to **Banco Atlantico S.A. v The British Bank of the Middle East**.[13] Bingham LJ said at page 510:

> "It must be rare that a corporation resists suit in its domiciliary forum. Rarely would this court refuse jurisdiction in such a case…. very clear and weighty grounds for doing so were not shown."[14]

Also, he referred this Court to **Bitech Downstream Ltd v Rinex Capital Inc**. consolidated with **Bitech Downstream Limited v Woodbridge Trading Limited**.[15] He posited that Rawlins J, at paragraph 28, said '…the fact that the defendants were incorporated in this Territory [the BVI] is a factor that clearly militates against their application for a stay on the ground of forum non conveniens.' Mr. Collins, QC, also referred to the decision of the Court of Appeal

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[12] For the avoidance of doubt, the Services Agreement was <u>not</u> a delegation by IAMC of its duties as Manager. These duties are set out at clause 3 of the Investment Management Agreement ("IMA") and do <u>not</u> include custody, brokerage and agency services etc.. It is for that reason that the Fund, rather than IAMC, is liable.
[13] [1990] 2 Lloyds' Rep 504.
[14] At p. 510.
[15] BVIHCV2002/0233 and BVIHCV2003/0008 (delivered 12th June 2003, unreported).

in **Imanagement Services Limited v Cukurova Holdings A.S. et al**.[16]

[24] Though not pressing this point too much, Mr. Collins, QC, sought to extrapolate from the above cases the fact that the Fund is domiciled in the BVI is not only relevant to the test that is to be applied on the application for a stay, it is also a strong connecting factor that must be weighed in the balance when applying that test. Mr. Collins, QC, maintained that the judge erred in not giving any consideration to this fundamental point. He said that the judge acknowledged that "the Fund is domiciled in BVI" but only in the context of considering whether or not a Swiss judgment would be enforceable (which he held was not an issue). He said that the judge did not recognise that the Fund's BVI domicile was itself a weighty factor in favour of BVI jurisdiction, nor did the judge explain why he gave this factor no weight. In doing so, he erred in principle by failing to take account of a factor that he should properly have considered and attached weight to. Accordingly, Mr. Collins, QC, urged this Court to set aside the stay on the basis that the judge committed an error of principle in failing to pay regard to the domiciliary presumption.

Ground 4: In seeking to identify the "natural forum" and/or determining whether or not Switzerland was clearly or distinctly more appropriate than the BVI, the Court erred by taking into account and/or giving too much significance to the fact that the BVI claim arose out of the same business relationship as the claim in the Swiss Proceedings

[25] Learned Queen's Counsel, Mr. Collins, said that it is accepted that '[w]here a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in [the BVI] about the same matter' then the additional inconvenience and expense which must result from this is a factor – and may be a powerful factor – in favour of a stay. He referred this Court to **The**

[16] BVIHCVAP2007/0025 (delivered 6th October 2008, unreported).

Abidin Daver[17] and **Commercial Bank – Cameroun v Nixon Financial Group Limited**[18] in support of this contention. He said that this principle is not an exception to the approach to forum non conveniens, but rather it is an example of its application. Also, he referred to **De Dampierre v De Dampierre**[19] and **Cukurova Holdings A.S. v Imanagement Services Ltd et al**[20] which address connecting factors and the court's approach.

[26] Mr. Collins, QC, said that, furthermore, it has no application where the "subject matter" of the two claims is different. He maintained that the learned judge erred in law by applying this principle to different claims, i.e. different subject matter, on the basis that the claims arose out of the same business relationship. Mr. Collins complained that in his judgment the learned judge said 'the reason I think that dominates the decision' to grant the stay 'is the fact that there is one business relationship and despite the different aspects to it, it is logical, efficient and sensible to use the concept that was discussed in **The Abidin Daver**'. Mr. Collins, QC, argued that the fact that the claims in the Swiss Proceedings and the claims in the BVI proceedings arose out of "one business relationship" is not sufficient to trigger the application of the principle derived from **The Abidin Daver**. He argued that the claim in the Swiss Proceedings was based on trust agreements governed by Swiss law and subject to Zurich jurisdiction; but the BVI claim is a claim for non-payment for services provided by SFC to the Fund as *inter alia* agent pursuant to the Services Agreement, which was expressly subject to BVI law and jurisdiction.

[27] Moving along, Mr. Collins, QC, maintained that the fact that the two claims arise out of what can be loosely viewed as a single relationship – albeit one with many facets – does not mean that the two distinct claims involve the "same subject matter" which, he contended, they do not.

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[17] [1984] AC 398 at p. 411.
[18] BVIHCVAP2011/0005 (delivered 6th June 2011, unreported) at para. 29.
[19] [1988] AC 92 at p. 108B.
[20] BVIHCV2006/0305 (delivered 17th July 2007, unreported).

[28] Mr. Collins, QC, posited that the only connection between the two claims arises from the fact that, in the Swiss Proceedings, SFC has asserted a right of retention: essentially a right to withhold the money held on trust until its fees are paid. However, SFC is not seeking to have the merits of its claims against the Fund determined in Zurich. In the Swiss Proceedings, SFC has (1) asserted a right of retention pending payment of the sums due; (2) stated that it will commence proceedings in the BVI for the sums that are due; and (3) reserved the right to set off such sums against any liability to the Fund (as and when the amount of the set-off is established by the BVI proceedings). Mr. Collins said that it is clear that SFC is not seeking judgment on its claims. It is seeking to exercise 'its statutory right of retention until the plaintiff satisfies the claims of the defendant to pay for work done and expenses';[21] and it is stating that '[SFC] will sue for its claims against [the Fund] at its registered office in the BVI. It is asserting its retention right in the present proceedings because [the Fund] is failing to comply with its obligations …'[22]

[29] Learned Queen's Counsel, Mr. Collins, accepted that in the Swiss Proceedings, SFC has had to spell out and quantify its claims against the Fund in order to establish its right and quantum of retention. But he said that it is abundantly clear that SFC is not seeking to have its disputed claims resolved in that forum. He said that furthermore, to the extent that the judge was entitled to take the Swiss Proceedings into account, it is apparent from his judgment that he placed far too much significance on them. The Swiss Proceedings would have been a weighty factor if the same claims were to be litigated in each forum, but as the different fora are being asked to determine different claims, the Swiss Proceedings are virtually irrelevant. In placing so much weight on the Swiss Proceedings, the judge did not balance the various factors fairly on the scale. Mr. Collins opined that this is sufficient grounds for interfering with what was – at this stage of the analysis - the exercise of a discretion. In support of his arguments, Mr. Collins purported to

[21] See Defence filed in Swiss proceedings at para. 3.
[22] Ibid.

rely on **A.E.I. Rediffusion Music Ltd v Phonographic Performance Ltd.**[23] He therefore urged this Court to set aside the stay.

Ground – 5: In seeking to identify the "natural forum" and/or determining whether or not Switzerland was "clearly or distinctly more appropriate" than the BVI, the Court erred by failing to give sufficient weight to the fact that the BVI claim was governed by BVI law

[30] Mr. Collins, QC, opined that in his judgment the learned judge appeared to accept the argument that SFC's claim was governed by BVI law, but then dismissed it as a factor. He said that the judge was wrong to do so. Although the Fund has not yet had to plead its case, it has made it clear that it disputes all liability to SFC. Mr. Collins said that in particular it does not accept that it is bound by the Services Agreement. In these circumstances, it is clear that the forum determining the dispute is going to have to apply BVI law to determine issues such as: (1) whether there was any privity of contract between the Fund and SFC; and/or (2) the scope of IAMC's authority under the IMA (which was governed by BVI law) and/or (3) whether SFC was bound by the terms of the Services Agreement. Mr. Collins said that this is not just a factual dispute about how much SFC is owed.

[31] Mr. Collins, QC, asserted that courts have frequently accepted that in general, it is more satisfactory for the laws of the courts of one country to be applied by the courts of that country (rather than the courts of some other country). He referred the Court to **The Eleftheria**[24] in support of this point. He said that the weight attached to this consideration depends on a number of matters. For example, if the rival jurisdictions are both common law jurisdictions, each is less likely to have difficulty applying the law of the other than would be the case if one was a common law jurisdiction and the other a civil law jurisdiction. He said that even where the legal systems are similar, the fact that the law is "foreign" will still be relevant, as it may have an impact on the ability to appeal. In support of this contention, Mr. Collins referred the Court to the following passage from **The**

[23] [1999] 1 WLR 1507 at p. 1523.
[24] [1969] 2 All ER 641 94 at p. 105.

Eleftheria:

> "A question of foreign law decided by a court of the foreign country concerned is appealable as such to the appropriate appellate court of that country. But a question of foreign law decided by an English court on expert evidence is treated as a question of fact for the purposes of appeal, with the limitations in the scope of an appeal inherent in that categorisation. This consideration seems to me to afford an added reason for saying that, in general and other things being equal, it is more satisfactory for the law of a foreign country to be decided by the courts of that country. Moreover, by more satisfactory I mean more satisfactory from the point of view of ensuring that justice is done".[25]

Mr. Collins, QC, stated that by failing to give this factor any significant weight, the learned judge erred to such an extent that he did not balance the various factors fairly in the scale.

[32] Mr. Collins, QC, argued that for the reasons given above the appeal should be allowed. The decision to stay the BVI proceedings should be set aside and the costs order replaced by an order that the Fund pay the costs both of the appeal and below.

Respondent's Submissions

Ground 1: The Court erred in law and/or principle by applying the wrong test for a stay

[33] Learned Queen's Counsel, Mr. Samek, said that it is accepted that there is a different test to be applied if the case is one where there is an agreement between the parties that the courts of a particular place are to have exclusive or non-exclusive jurisdiction to determine disputes between the parties. Mr. Samek, QC, accepted that in such a case, whether the jurisdiction agreement is exclusive or non-exclusive, a stay will not be granted unless there are "strong reasons" so to do. Mr. Samek, QC, further stated that, in the case at bar, there was and is no written agreement between the Fund and SFC, and thus no agreement that the BVI courts should have jurisdiction to determine any disputes between them. This

[25] Ibid at 649 – 650.

is acknowledged in SFC's defence in the Swiss Proceedings. Mr. Samek, QC, said that it is made clear in **Donohue v Armco** that there is a distinction to be drawn between cases where litigants are contracting parties who have indisputably agreed that their disputes should be determined in a particular exclusive jurisdiction and cases where the litigants are not such contracting parties. He referred to paragraphs 24 and 25 in **Donohue v Armco** (which also refers to the **British Aerospace** case cited by SFC):

> "[24]…But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it…
>
> "[25]. Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause. That was the result in …*British Aerospace plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368…"

[34] Mr. Samek, QC, reminded this Court that in its submissions before the learned judge, SFC acknowledged (correctly) that the "strong reasons" test would only apply if "the jurisdiction clause applies." Counsel for SFC continued (correctly) "I mean if it [i.e. the jurisdiction clause] doesn't apply, it [the "strong reasons" test] doesn't apply." Mr. Samek, QC, was adamant that the learned judge was alive to the point that for the purpose of determining the correct test, the jurisdiction clause had relevance only if there was no dispute that it had been agreed between the parties. Mr. Samek, QC, argued that SFC's submission that the jurisdiction clause applied so as to engage the "strong reasons" test was and is a bad point. That was because there was so obviously a dispute as to whether the jurisdiction clause applied and because SFC had in the Swiss proceedings expressly disavowed reliance on any choice of law and necessarily, jurisdiction provision in any of the written agreements. He reminded this Court that the juridical reason why "strong reasons" are required in such a case is because it is the policy of the common law to keep parties to their bargain. Mr. Samek, QC, said that in this case, there is no written bargain between the Fund and SFC, let alone one which contains a choice of law and jurisdiction clause. Mr. Samek, QC, was adamant

that it is quite wrong, as SFC submits, that "the Judge appeared to accept that the jurisdiction clause applied." Learned Queen's Counsel, Mr. Samek, said that a fair reading of the transcript as a whole shows quite clearly that the learned judge (correctly) rejected the submission that the disputed jurisdiction clause mandated that he should apply the "strong reasons" test, but (correctly) took account of it as a factor in the exercise of his discretion. Accordingly, Mr. Samek, QC stated that SFC's submission was wrong: the learned judge did not find that the jurisdiction clause applied in the context of determining the right test.

[35] Learned Queen's Counsel, Mr. Samek, said that, furthermore, SFC's criticism of the learned judge that he applied the wrong test is hollow given that when SFC sought permission to appeal from the learned judge at the end of the hearing, it did not submit that he had applied the wrong test. On the contrary, the only complaints ventilated were that the learned judge had been wrong to treat the claims in the BVI and Swiss Proceedings as "one subject matter", and that he had gone wrong in the exercise of his discretion. Mr. Samek, QC, referred this Court to the transcript of the chamber proceedings[26] in which the judge had specifically addressed this matter.

[36] Mr. Samek, QC, said that so far as SFC's submissions (which are broadly to the effect that the learned judge should have applied the "strong reasons" test notwithstanding the dispute about the jurisdiction clause) as to SFC's reference to the **Deutsche Bank** case, he accepts that in general terms a challenge to the validity of an agreement does not necessarily impeach a jurisdiction clause within it. But that case has no application where a person (X) seeks to rely on a jurisdiction clause in a contract to which the other person (B) is not (even assuming the contract is valid) a party, let alone where X in related proceedings submits a defence in which it advances the proposition that there is no relevant contract between X and B. Mr. Samek, QC, said that this is not a case where the

[26] Hearing bundle, volume 1, tab 2, at pp. 184-185.

Fund advances a "mere allegation"[27] that it is not a party to the Services Agreement (or Brokerage Agreement). On the contrary, SFC even accepts (see above), in the Swiss Proceedings, that the Fund is not a party to any written agreement with it, with any express or implied choice of law and, by extension, jurisdiction agreement between them.

[37] Turning next to SFC's submission that it was for the Court to have determined who had the better argument as to the applicability of the jurisdiction clause, Mr. Samek, QC, pointed out that this was not a submission advanced by SFC to the learned judge. Mr. Samek, QC, indicated that it is not therefore now open to SFC to raise it on appeal. But in any event, if the learned judge (or this Court) did have to determine which side had the better of the argument, it is plain that the Fund did for the reasons referred to above. He said that it follows from the foregoing that it is completely incorrect for SFC to submit that 'the Judge appears to have determined that SFC did have the better argument'. Mr. Samek, QC, maintained that the learned judge's reference to the jurisdiction clause was by way of his identifying it as a factor of which to take account in the exercise of his discretion.

[38] In passing, Mr. Samek, QC, said that in relation to SFC's argument[28] that the Fund is somehow bound by the BVI jurisdiction clause in the Services Agreement even though it is not a party to it and even though SFC's case in the Swiss Proceedings is to the contrary; firstly, SFC adduced no evidence whatsoever to explain the relationship between the parties. He said that all it did was to serve two affidavits of a barrister employed by its lawyers (Ms. McFarlane) which were confined to seeking permission to rely on expert evidence relating to Swiss legal procedure and to exhibit (without more) the Services Agreement. Secondly, there is no factual or legal basis whatsoever, let alone any identified in SFC's argument, to support the proposition advanced by SFC, namely, that the Fund is bound by the BVI law and jurisdiction clause in the Services Agreement because IAM gave SFC

[27] See Deutsche Bank at para. 17.
[28] Which, Mr. Samek, QC, submitted, confusingly appears under ground 2, when on the face of it, its natural home is under Ground I.

instructions pursuant to the Services Agreement. Thirdly, in its argument below, SFC submitted that the "approach" would apply 'if and insofar as the claims are not made under the agreements containing BVI jurisdiction clauses.'[29] But SFC's claims are not made under any of those agreements. He said that further, SFC's reliance on its pleaded case as set out in the particulars of claim was expressly abandoned by counsel at the hearing.[30] Finally, Mr. Samek, QC, said that the upshot was that the learned judge was confronted by a party, SFC, which had adduced no evidence of its contractual and legal version of events, let alone its purported claims, and, had eschewed reliance on its pleaded case.[31] Mr. Samek, QC, was adamant that in the circumstances the learned judge applied the correct, test. He submitted that ground 1 should be rejected.

Ground 2: Alternatively, if the court (sub silentio) rejected (1) the argument that the claim was covered by the jurisdiction clause; or (2) the argument that, if covered by the jurisdiction clause, the "strong reasons" test applied, the court erred by failing to give any reasons for doing so

[39] Mr. Samek, QC, said that a fair reading of the transcript shows that the learned judge did not reject SFC's said submissions "sub silentio". However, Mr. Samek, QC, accepted that the judge did not expressly give his reasons in his ex tempore judgment, but it was obvious to all that the judge had accepted the Fund's submission that there was nothing to displace the test given that it was not "undisputedly" the case that the Fund and SFC had agreed that disputes between them were to be determined in the BVI courts. Accordingly, it was apparent why the "strong reasons" test had been rejected. Next, Mr. Samek, QC, argued that the issue of the adequacy of a judge's reasons depends on the nature of the case, including whether it is a trial or an interlocutory hearing. He referred the Court to

[29] Skeleton argument of SFC in the court below (dated. 2nd September 2015) at para. 21.
[30] See transcript of chamber proceedings, record of appeal, tab 2, pp. 102 – 109 (internal pp. 98 – 105). For example: "Well, I accept that the pleading is not a model of clarity. I might be somewhat understating it." (transcript internal p. 98, lines 15 – 17); "And it's the next bit which I accept pleading is not very good." (transcript internal, p. 102 lines 16 – 17.); "The defect in the pleading is that it suggests that the agency relationship was created by the [IMA]…" (transcript internal, p. 103 lines 18 – 20); "The defect in paragraph 4 on 719 is the identification of those clauses…" (transcript internal, p. 105 lines 6 – 7).
[31] See also skeleton argument of the Fund at paras. 26-27 which set out its submissions as to the hopelessness of SFC's pleaded case.

English v Emery Reimbold & Strick Ltd at paragraph 17. Mr. Samek, QC, submitted that it is not the law that the reasons for a decision, especially in an interlocutory matter, are only to be found in the express words of the judgment, all the more so when judgment is given extempore immediately following the hearing. Mr. Samek, QC, advocated that context is everything and said that the Court of Appeal in **Emery Reimbold** made clear that on any appeal based on inadequacy of reasons, the appellate court had to review the judgment 'in the context of the material evidence and submissions'.[32] If once 'all of these are considered' and it is the case that 'the reason is apparent and that it is a valid basis for the judgment',[33] an appeal based on inadequacy of reasons must fail.

[40] Learned Queen's Counsel, Mr. Samek, said that if SFC had any doubt as to why the "strong reasons" test had been rejected, then it was incumbent on it to have raised the matter with the learned judge and referred the Court to paragraphs 24 to 25 of **Emery Reimbold**. He contended that the duty on SFC to raise the matter with the learned judge was all the greater since the learned judge, in refusing permission to appeal, stated:

> "I think if I had found it necessary to apply different test or did apply different test, again, it would be a question of whether I applied the right test. In fact, I don't think there is a question that I applied, I don't think either of you said that this is the wrong test to apply."[34]

[41] Mr. Samek, QC, said that SFC did not so suggest, and it is to be inferred that it did not do so because it perfectly well understood why the learned judge had adopted the test, not least given the extensive submissions on that particular issue which had been made. Mr. Samek, QC, referred this Court to paragraph 118 of **Emery Reimbold** namely that:

> "… an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and

[32] At para. 26.
[33] Ibid.
[34] Transcript of chamber proceedings, hearing bundle, volume 1, tab 2, p. 186, internal page 182, lines 18-23. Which was a recognition that SFC had not pressed the "strong reasons" test in circumstances where it could not establish that the jurisdiction clause was indisputably agreed between the Fund and SFC.

> submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision."

Mr. Samek, QC, therefore submitted that ground 2 should be similarly be rejected and turned his attention to ground 3.

Ground 3: Whichever test was appropriate, the court erred in law and/or principle by failing to apply the domiciliary presumption to which the respondent as a BVI person is subject

[42] Mr. Samek, QC, said that it is trite, and the learned judge knew, that the fact that the Fund is domiciled in the BVI founds jurisdiction here, in the sense that it can be sued here as of right. However, the fact that a defendant is sued in a jurisdiction because it is domiciled there does not displace the application of the **Spiliada** test, nor does it give rise to a "domiciliary presumption". He referred the Court to **Imanagement Services Limited v Cukurova Holdings AS et al**[35] at paragraph 47 which makes clear, referring to the **Bitech Downstream** case, that domicile is just one of a number of factors to be considered.[36] Mr. Samek, QC, argued that the **Banco Atlantico** case cited by SFC is not authority for any proposition that the fact of the Fund's domicile in the BVI displaces in some way the applicability of the test or that it constitutes anything more than a factor (even if a "a strong pointer or connecting factor") to be considered in the exercise of the court's discretion.

[43] Mr. Samek, QC, opined that in truth, this ground of appeal adds nothing since it is accepted by the Fund that it had to establish that on the facts of this particular case, Switzerland was the clearly or distinctly appropriate forum. Mr. Samek, QC stated that the Fund accepts that the fact of the Fund's domicile in the BVI is a factor in favour of maintaining jurisdiction here. But, beyond that, it is not understood (and SFC does not explain) how the Fund's domicile is "relevant to the test that is to be applied on the application for a stay".

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[35] BVIHCVAP2007/0025 (delivered 6th October 208, unreported).

[36] Citing with approval the dictum of Hariprashad-Charles J that "I do not think that the domicile of the company is necessarily the quintessential connecting factor or that it should be so as a matter of public policy. It is, like the law that governs the transaction or the issues for trial, a strong pointer or connecting factor. Like these, it is to be considered with other connecting factors." See also paragraph 51.

[44] Mr. Samek, QC, stated that SFC's criticism of the learned judge for "not giving any consideration to this fundamental points" is unjustified because the point is not, for the reasons above, "fundamental" in the sense contended for by SFC, and also because SFC made no such submission to the learned Judge, whether in written[37] or oral submissions.

[45] According to Mr. Samek, QC, ground 3 should be rejected.

Ground 4: In seeking to identify the "natural forum" and/or determining whether or not Switzerland was "clearly or distinctly" more appropriate than the BVI, the court erred by taking into account and/or giving too much significance (so that the various factors were not fairly balanced) to the fact that the BVI claim arose out of the same business relationship as the claim in the Swiss Proceedings

[46] Learned Queen's Counsel, Mr. Samek, said that it is important to appreciate the context in which the learned judge placed reliance on the fact that the BVI claim arose out of the "same business relationship" as the claim in the Swiss Proceedings. He reminded this Court that the Swiss Proceedings were already underway and more advanced than the BVI proceedings – the extensive and detailed pleadings (on both sides) with documentary evidence in support attached in the Swiss Proceedings are testament to that. Mr. Samek, QC, said that in the Swiss Proceedings, SFC raised claims against the Fund as part of its defence. These claims were in support of SFC's claim similar to a right of retention under article 434 of the Swiss Code of Obligations ("Article 434") of the monies which the Fund claimed were being wrongly withheld from it. He posited that at an earlier hearing before the learned judge on 22nd July 2015, SFC had accepted that its claims in the BVI action (leaving aside the defects in the particulars of claim) were also raised in the Swiss Proceedings. He referred the Court to the first affidavit of Mr. David Payne sworn to on 11th May 2015 and his second affidavit sworn to on 19th June 2016. Mr. Samek, QC, maintained that there was a complete overlap

[37] See skeleton argument of SFC in the court below (dated 2nd September 2015) under section D "forum non conveniens".

between SFC's claims (or at least what SFC intended here to claim) in the two sets of proceedings. The Swiss law experts were agreed that Article 434 conveys a substantive right which might be invoked as a plea by SFC in the Swiss proceedings. Those rights include a right of retention.

[47] Mr. Samek, QC, further asserted that it was the uncontested evidence of the Fund's independent Swiss law expert (in contrast to SFC's expert who was its lawyer), *inter alia*, that: if the Swiss court concludes the Fund's claims exist, then it will "have to assess whether SFC has the right to retain the sums" which SFC has claimed to be entitled to retain.[38] Prevailing Swiss legal doctrine is that the Swiss court will at trial have to take into account both matters (i.e. the Article 434 plea and the Fund's claim). The Swiss court would do this by making a "Zug un Zug" decision, in effect granting the Fund's claim but making enforcement of it subject to the Fund performing its obligations to SFC in respect of the matters (claims) which are the subject of Article 434. In taking into account both matters, the Swiss court will be required to make findings on the merits of SFC's claims which ground the Article 434 plea.

[48] Next, Mr. Samek, QC, said that the SFC's lawyer's (Dr. Naegeli) only response was not to disagree with Mr. Hofmann, but only to state that the Swiss Proceedings might be suspended by the Swiss court. This was noted by the learned judge who put the matter to SFC's counsel.[39] The learned judge kept pressing SFC's counsel as to whether the Swiss courts would go into the merits of SFC's right of retention claim. The following exchange at the end of the questioning is telling:

> "THE COURT: No. no, don't change the facts. The facts are BVI claim proceeds. Swiss claim proceeds. Swiss claims gets judgment. BVI is still carrying on. Right of retention is claimed. Does the Swiss Court say, we don't care if there is any merit in the right of retention or not, we are going to hold up payment of the Swiss claim or do they look at the right of retention at some stage to some degree?

[38] Expert opinion of Dieter Hofmann, hearing bundle, volume 2, tab 26, at para 35.
[39] See transcript of chamber proceedings, hearing bundle, volume 1, tab 2, pp. 149 – 151, internal pp. 145 – 147.

MR. COLLINS: The expert [SFC's expert] doesn't deal with that specific question."[40]

Mr. Samek, QC, said that SFC did not explain why its expert had not addressed that issue, notwithstanding that the Fund's independent expert had addressed it. In these circumstances, Mr. Samek, QC, maintained that the learned judge was fully justified in approaching the matter as he did, namely, on the basis that the Swiss court would consider the merits of SFC's claims which were part and parcel of its Article 434 right of retention defence and which (on SFC's own case) duplicated the claims which (it believed) it was making in the BVI proceedings.

[49] Mr. Samek, QC, reminded the Court that in **The Abidin Daver**, at page 411H to 412A,[41] Lord Diplock held that:

> "Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or judicial advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it."[42]

Mr. Samek, QC, said that Lord Diplock's dictum was cited with approval by the English Court of Appeal in **Galaxy Special Maritime Enterprise v Prima Ceylon Ltd** ("**The Olympic Galaxy")**[43] and by this Court in **Commercial Bank – Cameroun v Nixon Financial Group Limited**.[44]

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[40] Ibid. at p. 151, internal p. 157.

[41] To which the learned Judge correctly referred: see Transcript internal p. 172, lines 6 – 13.

[42] Mr. Samek, QC, submitted that SFC adduced no such "cogent evidence".

[43] [2006] EWCA Civ 528, [2006] 2 All ER (Comm) 902 at paragraph 26: "Relying on Dicey and Morris, Conflict of Laws (13th edn, 2000) vol 1, p 400 (para 12–030), Mr Flaux argued that the effect of Lord Diplock's speech in The Abidin Daver had been subsequently diluted by Spiliada…But as I read that passage

[50] Mr. Samek, QC, submitted that it is, as the learned judge correctly concluded, vastly more desirable that the Swiss court should resolve all matters in dispute between the parties in one integral set of proceedings. That would have the effect of avoiding: (i) any risk of conflicting decisions or findings; (ii) any concerns which one court may have about trespassing on issues which would or may be decided in the other court;[45] and (iii) fragmentation of the dispute with the parties having to litigate in two separate jurisdictions with all the attendant expense and time. In passing, Mr. Samek, QC, said that SFC criticises the learned judge for applying Lord Diplock's dictum in **The Abidin Daver** to "different claims – i.e. different subject matter…" This, Mr. Samek, QC, argued, is yet further fallacious reasoning. Just because (theoretically) there are different claims does not entail that the subject-matter of those claims is different. For example, a group of persons including bank employees may agree to rob a bank and then successfully put their agreement into effect. The bank and the depositors may have many different claims; claims in conspiracy; claims in wrongful interference with goods; claims in trespass; claims in breach of employment contract and so on. Different claims, but not different subject matter.

[51] Mr. Samek, QC, underscored the fact that SFC has submitted that the learned judge was wrong to apply Lord Diplock's dictum in **The Abidin Daver** to this case in that he approached the issue of the "same subject matter" too broadly. Mr. Samek, QC, submitted that SFC's submission is wrong because it wrongly engages in a narrow semantic interpretation of Lord Diplock's use of the expression "same matter". All Lord Diplock is intending to refer to is the desirability of avoiding "the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of

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any such dilution is confined to cases where foreign proceedings have not passed beyond the stage of being initiated and have been started merely for the sake of demonstrating that a competing jurisdiction exists."

[44] At paras. 27 – 32.

[45] Highlighted by the adjournment of the conciliation proceedings apparently because of the hearing before the learned judge: see Harneys' letter of 15th August 2015 to Homburger AG, its Swiss lawyers.

the same witnesses required". Further, Lord Diplock did not state that the two actions must be completely about the "same matter", so that the principle has no effect if other matters are raised which are not about the "same matter". Mr. Samek, QC, said that all that is required to engage the principle is "two sets of legal proceedings [being] … pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required" with the result that "additional inconvenience and expense … must result". Mr. Samek, QC, pointed out that SFC submits that the "only connection between the two claims" arises from SFC's right of retention claimed in the Swiss Proceedings; but to describe this as the "only" connection is a substantial understatement which does not correspond to the reality. Furthermore, said Mr. Samek, QC, SFC's submission that it is not seeking to "have the merits of its claims against the Fund determined" in the Swiss Proceedings fails to acknowledge that the Swiss court will make findings on the merits (unless the Swiss proceedings were stayed);[46] nor are "the different fora…being asked to determine different claims."[47] They are being asked to determine the same claims, namely, SFC's claim here and its Swiss right of retention claim.

[52] Accordingly, Mr. Samek, QC, argued that SFC's criticism that the learned judge "did not balance the various factors fairly in the scale" is unjustified. On the contrary, as is apparent from the judgment and a fair reading of the transcript, this is precisely the task which the judge set himself and in which he engaged. He therefore urged this Court that ground 4 should be rejected.

Ground 5: In seeking to identify the "natural forum" and/or determining whether or not Switzerland was "clearly or distinctly more appropriate" than the BVI, the court erred by failing to give sufficient weight to the fact that the BVI claim was governed by BVI law

[53] On this ground of appeal, Mr. Samek, QC, said that contrary to SFC's submission, the learned judge did not "[appear] to accept the argument that SFC's claim was

[46] See paras. [47] to [48] above.
[47] See skeleton argument of SFC at para. 40.

governed by BVI law". This criticism is similar to that made by SFC in relation to the BVI jurisdiction clause. He said that the Fund's response is the same, namely, that SFC is wrong. Rather, all that the learned judge was saying in his extempore judgment was that he took into account the fact that BVI law might apply. He rightly reasoned that, if it were to apply, it would not be a factor which would displace the conclusion he had reached that Switzerland was the clearly or distinctly more appropriate forum. Moreover, the judge in the judgment correctly drew attention to the fact that evidence of foreign law (i.e. BVI law) could be given in the Swiss proceedings, just as the reverse happens here.[48]

[54] Mr. Samek, QC, said that SFC's reference to the old case of **The Eleftheria** is misplaced because in that case (unlike in the case at bar) the contracting parties had agreed to refer their disputes to a foreign court, thus, the English court was addressing the issue of whether there were "strong reasons" to depart from the parties' jurisdiction agreement. Further, Mr. Samek, QC, stated the matters mentioned in that case are commonplace considerations. Mr. Samek, QC, said that the learned judge did consider the issue of BVI law and came to the decision which he did, and to which he was entitled. Mr. Samek, QC, reminded the Court that the fact that another judge or even this Court might come to a different view does not entitle this Court, with respect, to disturb the learned judge's exercise of his discretion. Mr. Samek, QC, said that an appellate court should only interfere where it is clear that an error of principle has been made or that the result falls outside the range of potentially "right" answers, and it should not "re-assess the weight to be given to the matters which the judge was entitled to take into account in exercising his own discretion" and referred the Court to **Cherney v Deripaska (No 2)**.[49] Mr. Samek, QC, said contrary to SFC's submission, the learned judge did not fail to "balance the various factors fairly in the scale". Accordingly, he submitted that ground 5 should be rejected.

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[48] Transcript of chamber proceedings, hearing bundle, volume 1, tab 2, p. 177, internal p. 173, lines 173 lines 18 – 25.

[49] [2009] EWCA Civ 849; [2010] 2 All ER (Comm) 456 at para. 68

[55] In conclusion, Mr. Samek, QC, maintained that the learned judge was correct to apply the **Spiliada** test. He said the judge exercised his discretion in accordance with that test and there is no proper justification for interfering with or disturbing his exercise of discretion and his evaluation of the evidence before him. The suggestion that the learned judge failed to give adequate reasons should be rejected. Accordingly, Mr. Samek, QC, submitted that the appeal should be dismissed with costs to the Fund.

Analysis and Conclusion

[56] I have given deliberate consideration to the very helpful arguments that have been advanced by both sides. I propose to address each ground of appeal as identified by the parties and in the sequence in which the grounds have been argued.

Ground 1: The court erred in law and/or principle by applying the wrong test for a stay

[57] The law is well settled in relation to jurisdiction clauses and the applicability of the "strong reasons" test. In **Donohue v Armco** the House of Lords stated:

> "[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 (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 … **the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it**. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case…" (My emphasis).

[58] In oral submissions, SFC sought to rely on a services agreement and a management agreement to show the existence of a jurisdiction clause to which the

Fund should be held. However, the Fund is not a party to either agreement. It is therefore clear to me that there is no written agreement between the Fund and SFC on which SFC's claim in the BVI is based.[50] Mr. Collins, QC, in his opening statement conceded this much; however, despite the valiant efforts of SFC to show that there exists a written agreement, when pressed during the oral submissions, learned Queen's Counsel, Mr. Collins, was unable to point to any document from which it could be said that a written agreement was in existence. In fact, Mr. Collins, QC, conceded that the pleadings did not point to any specific written agreement on which the BVI's claim is based. I would have expected him to have pointed the Court to a specific written agreement to which SFC and the Fund are parties since it was seeking to rely on an alleged jurisdiction clause. It is trite law that in order to be able to pray in aid of not granting a stay on the basis that the "strong reasons" test applies, there must be in existence a written agreement from which the Court can glean as to the existence of an exclusive or non-exclusive jurisdiction clause. In so far as there was no written agreement between the Fund and SFC on which the BVI claim is based, and to which Mr. Collins was able to point to, quite apart from his circuitous attempt to point to reference in a brokerage agreement and the management agreement which he says indicates that the Fund was the principal, his argument rests on very shaky grounds. I accept that the law is well settled and that the question of non-exclusive or exclusive jurisdiction clause cannot arise. I agree with the arguments that were advanced by Mr. Samek, QC, to the effect that there can be no question of the "strong reasons" test being applicable in the absence of a written agreement between the Fund and SFC. The whole basis of the strong reasons test is the need for the courts to keep the parties to the choice of jurisdiction which they have made unless there is some strong reason for not doing so. Mr. Collins, QC, accepted that SFC's pleaded case did not state that there was a written agreement between SFC and the Fund, yet he argued for this orally. What is very strange is the fact that even though SFC was forced to concede that its pleadings

[50] It should be noted that the only agreement between SFC and the Fund is a Trust agreement which is the basis of the Swiss Proceedings.

did not indicate that there was an agreement, no steps were taken to amend the pleadings even though a considerable amount of time had elapsed before SFC had advanced the same arguments before the court below and this Court – namely SFC's pleadings are not clearly drafted.

[59] Even before this Court, the arguments that were advanced on behalf of SFC fall very short on meeting the threshold of establishing that there was a written agreement between the Fund and SFC. I do not accept learned Queen's Counsel, Mr. Collins' submission that the learned judge accepted that there was a written agreement between the Fund and SFC. There is no indication that this is so. In any event, the mere fact that SFC seemed to have been relying on a clause in the Services Agreement could not have assisted SFC since the Fund was not a party to that agreement. Critically, there is nothing in the extempore judgment from which I can conclude that the judge held that there was in existence a written agreement between SFC and the Fund. In any event, SFC's pleadings, and accepted by Mr. Collins, QC, were deficient in asserting that there was a written agreement.

[60] By way of emphasis, I say that it is trite law that a party who wishes to rely on a jurisdiction clause must do so on the basis of the existence of a written agreement with clear terms to that effect. I agree with Mr. Samek, QC, that **Donohue v Armco** is clearly distinguishable from the case at bar since in that case both parties had signed the written agreement which contained the jurisdiction clause. While I do not wish to pre-empt the second ground of appeal, it is pellucid to me that the judge applied the **Spiliada** test in granting the stay and he said so in his ex tempore judgment. It was done on the basis that there was no written agreement between the parties. Accordingly, it would be illogical to speak about reliance on a jurisdiction clause in the absence of a written agreement between the Fund and SFC. I have no doubt that there simply could have been no bargain to which the parties could have been held in relation to the forum in which to litigate their dispute.

[61] Also, it is very interesting that as pointed out by Mr. Samek, QC SFC, in its defence in the Swiss proceedings that were commenced by the Fund, had asserted as follows:

> "Since the parties have not agreed in the present on any express or implied choice of law the applicable law must be determined by the relevant Swiss Code."

This information was drawn to the judge's attention and I have no doubt that he was alive to all of its implications when he rendered his judgment.

[62] It was clear that Mr. Collins, QC, in his oral arguments before this Court, had an uphill if not an impossible task of pointing to the pleading which addressed the existence of a written agreement between the Fund and SFC and which contained a jurisdiction clause. He sought to explain this deficiency by saying it was bad pleadings and that the pleadings should have indicated the different roles of the Brokerage Agreement and the Investment Management Agreement which gave rise to the agreement. I do not for one moment accept this since he had several months to correct this. If it simply was a case of bad pleading, the question is why has SFC not sought to correct the pleadings. In any event, Mr. Collins' oral arguments were unpersuasive and I cannot accept them. He was unable to point to any document which allowed the SFC to sue the Fund for services and to which SFC was a party and with the greatest of respect to Mr. Collins, QC, his arguments were circuitous and unattractive. I cannot accept them.

[63] In all of the circumstances, and based on the transcript, I do not for one moment accept that the judge must have concluded that the jurisdiction clause applied. It is true as Mr. Samek, QC, conceded that the extempore judgment was not a model of clarity and the judge did not expressly say so, but one thing that is certain is that there is no basis for the conclusion that the judge accepted that the jurisdiction clause in any agreement to which the Fund was not a party could have bound the Fund. Accordingly, the learned judge, having concluded that the "strong reasons" test did not apply, proceeded to consider the forum non

conveniens point. I am therefore not persuaded that the judge erred in applying the **Spiliada** test for the stay in the absence of a jurisdiction clause. In view of the totality of circumstances, SFC's appeal on this ground fails.

[64] I now turn to ground 2.

Ground 2: If the court (sub silentio) rejected (a) the argument that the claim was covered by the jurisdiction clause or (b) the argument that, if covered by the jurisdiction clause the "strong reasons" test applied, the court erred by failing to give any reasons for doing so

[65] In my view, this appeal presents a good opportunity to encourage judges to plainly and clearly provide reasons for their decision. In this regard, I accept Mr. Samek, QC's, concession that judge did not expressly provide reasons for applying the **Spiliada** test. However, it must be remembered that the judgment was extempore and the learned judge did not seem to have prepared a written structured ruling which would have been desirable to guide his thoughts. However, this is not the end of the matter. I accept and I am guided by the helpful and well-known principles that were enunciated in **Emery Reimbold** and can no more than apply them. Further, I accept the principles that were enunciated in **Emery Reimbold** to the effect that if a party to a judgment is unclear as to the reasons for the judge's decision, the party has an obligation to seek to ascertain from the judge the reasons.

[66] It must also be borne in mind that the judge commenced hearing the application at 2:35 pm and sat until 6:30 pm and immediately gave his ruling at the invitation of counsel. Perhaps unwisely so since his thoughts were not expressed in a very structured and logical manner. This can be excused in all of the circumstances of the case; however, the need for pre-writing at least the outline of the ruling is underscored by what has transpired in the case at bar.

[67] Also, I accept and I am guided by the very helpful principles that were enunciated in **Emery Reimbold** that:

> "…an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence and the submissions that were made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision."[51]

It is indeed the law that where there is an appeal based on the inadequacy of reasons, the appellate court has to review the judgment 'in the context of the material evidence and submissions'[52] to determine whether, when all of these are considered, it is the case that the reason is apparent and that it is a valid basis for the judgment.[53]

[68] With those principles in mind, I have given deliberate consideration to the pleadings and submissions that were before the judge, the exchanges between the bench and Queen's Counsel together with the extempore judgment. My perusal of the judgment of the learned judge in the transcript indicates very clearly that the judge rejected the "strong reasons" test as being inapplicable in the absence of a written agreement between the Fund and SFC. While the judge did not say that expressly, it is clear that a services agreement and management agreement upon which SFC sought to rely could not avail as the basis for the application of the strong reasons test since the Fund simply was not a party to any written agreement on which the claim in BVI was based. Mr. Collins, QC, was forced to concede during oral submissions that the pleadings needed to be amended in order to allege the written agreement, if any. Accordingly, I am not persuaded that SFC genuinely is unaware of the reasons for the judge's decision. It is clear to me that its complaint may well be in relation to the clarity of the judgment, that is, it was not set out with the degree of clarity that is to be expected. With respect to the judge, this is by no means a criticism of the judgment since it must be borne in mind that it was an extempore judgment.

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[51] At para. 118.
[52] English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605 at para. 26.
[53] See also Flannery and another v Halifax Estate Agencies Ltd [1999] All ER (D) 159.

[69] It is passing strange that as was helpfully pointed out by Mr. Samek, QC, that in refusing to give permission to appeal, the learned judge indicated that it was not a case in which either party was saying that he had applied the wrong test and even at that stage SFC did not indicate that it was unclear as to the reasons. In any event, the exchanges between learned counsel and the judge as seen in the transcript clearly indicate the reasons why the strong reason test was rejected even though the judge did not state the reasons expressly.

[70] More recently, the Privy Council underscored the point that there is no need to provide a written judgment if the reasons for the decision can be gleaned from the extempore judgment. I can do no more than apply the very helpful approach that was adopted in **Nelson and Others v First Caribbean International Bank (Barbados) Ltd**.[54] In **Nelson**, the Board accepted that there was no need for our Court of Appeal to have provided a written reasoned judgment in circumstances where an extempore judgment was given, the Court having read the submissions before and engaged counsel during the appeal.

[71] In any event, the legal principles on forum conveniens are well known to both sides and it is noteworthy that eminent Queen's Counsel, Mr. Collins also appeared for SFC before the court below. I therefore have no doubt that learned Queen's Counsel, Mr. Collins, being fully aware and knowledgeable of the pleadings, the submissions that were advanced by both sides at some length and having read the transcript of the application must be acutely aware of the reasons for the judgment. The application was not complex and the principles are settled, which I have already indicated, in relation to the first ground of appeal and will not repeat.

[72] In my respectful opinion therefore that there is no force to this ground of appeal that the learned judge failed to give reasons. Accordingly, this ground of appeal also fails.

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[54] 2014 UKPC 30 at para. 17.

Ground 3: Whichever test was appropriate, the court erred in law and/or principle by failing to apply the domiciliary presumption to which the respondent is subject

[73] There is no domiciliary presumption in private international law in relation to commercial law matters. It is trite law that the fact that the Fund is domiciled in the BVI founds jurisdiction in the sense that the BVI court is an available forum. However, a court that applies the **Spiliada** case must go on to determine whether in light of the other connecting factors, the forum is clearly or distinctly the appropriate forum for the trial. Further, it is noteworthy that **Bitech Downstream Limited v Rinex Capital Inc** is not authority for the proposition that was advanced by Mr. Collins, QC, namely, that the domicile of a company in the forum places a heavy burden on the defendant to show why the claim in the forum should be stayed. In fact, to the contrary, Rawlins J quite correctly made it clear that domicile is simply one of the connecting factors to be considered in the determination of the clearly appropriate forum. Also, I agree with Mr. Samek, QC when he argued that **Banco Atlantico** is not authority for any proposition that the fact of the Fund's domicile in the BVI displaces the applicability of the **Spiliada** test or that it constitutes any more than a connecting factor to be considered by the court in the exercise of its discretion. It is settled law that the private international law domicile has more relevance in family law matters than in commercial law matters. With greatest respect to the arguments advanced by SFC on this ground, I have no doubt that there is nothing to this point. I therefore accept the submissions that were made by Mr. Samek, QC, without repeating them and hold that the judge did not err by not giving pre-eminence to the domicile of the Fund in his determination of the clearly or distinctly appropriate forum.

[74] Accordingly, the appeal fails on this ground as well.

[75] I come now to the fourth ground of appeal.

Ground 4: In seeking to identify the "natural forum" and/or determining whether or not Switzerland was clearly or distinctly more appropriate than the BVI, the court erred by taking into account and/or giving too much significance to the fact that the BVI claim arose out of the same business relationship as the claim in the Swiss Proceedings

[76] Professor Winston Anderson, in the scholarly treatise, **Caribbean Private International Law**,[55] has quite helpfully provided much needed guidance on the application of the principles in **Spiliada** and forum non conveniens. At paragraph 9-006 Professor Anderson stated as follows:

> "With regard to the forum non conveniens enquiry, the basic principle is that a stay will only be granted:
>
> "where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial."
>
> Such a forum must be a court where the case may be tried more suitably for the interests of all the parties and the ends of justice."

[77] At page 208 Professor Anderson further explains that

> "Caribbean Law affirms that a three-stage inquiry is mandated. The first is concerned with whether there is another available foreign forum; the second with whether that forum is more appropriate than the local court; and if so, the third is whether justice would be served allowing the prosecution of the action there."

[78] It is indisputable that the Fund, in seeking a stay, had clearly to satisfy the learned judge that there was another available forum. It is obvious that it did so since Switzerland was so regarded and there is no complaint in relation to this aspect. The gravamen of SFC's complaint in this appeal is whether or not the learned judge erred by accepting that the Fund had demonstrated that the other available forum is clearly or distinctly more appropriate than the BVI forum. Here again, the pronouncements of Professor Anderson are instructive. At paragraph 9-008, page 209 of the book, the learned Professor said:

> "In practice the defendant discharges the burden of proof by establishing that the foreign jurisdiction is the natural forum in the sense of being the country with which the action that has the most real and substantial

[55] (2nd edn., Sweet & Maxwell 2014) at p. 207.

> connection. The locale with the preponderance of connecting factors may assist in identifying the natural and appropriate forum in that they indicate the place where justice can be done at "substantially less inconvenience or expense"."

[79] Professor Anderson further enunciates that:

> "The real assignment is to isolate that forum which, from a quantitative and qualitative assessment, comprises the "center of gravity" of the dispute. The whole factual and legal nature of the case must then be considered."

[80] With those principles as they relate to the application of forum conveniens clearly in mind, I will move on to examine whether the criticisms that are made of the judge's approach on his determination of the clearly or distinctly appropriate forum have any merit. It is trite law that on an application for a stay of jurisdiction on the basis of forum non conveniens, it is usual for the judge to examine the connecting factors in seeking to arrive at a decision. It is unfortunate that the learned judge seemed not to be inclined to use the forensic language one would have expected to have seen in an application of this nature. Here again the circumstances in which the extempore judgment was given is brought into focus. The learned judge did make reference to the "one business relationship" and despite the different aspects to it, it is logical, efficient and sensible to use the concept that was discussed in **Abdin Daver**.

[81] I accept Mr. Collins, QC's, observation that the **Abidin Daver** is an application of the principles in **Spiliada** and not an exception. This however does not assist Mr. Collins, QC's position in so far as the judge referred to **Abidin Daver**. There is no doubt in my mind that the language the judge used as referred to was a bit unfortunate. However, I accept Mr. Samek, QC's, submission that given the context in which the judge made those observations which is revealed from the transcript, the pleadings and the helpful submissions from both sides, it is clear that there was no dispute before the judge, that: there were ongoing Swiss Proceedings that were very advanced between the same parties; in the Swiss

Proceedings SFC had raised claims against the Fund as part of the defence; the claims were in support of SFC's claim to a right of retention under article 434 of the Swiss Code of Obligations of monies which the Fund claimed were being wrongly withheld from it; SFC had accepted before the judge that its claims in the BVI action were also raised in the Swiss Proceedings; there was an overlap of the issues between the Swiss proceedings and the BVI claim.

[82] In my mind it would have been more desirable if the judge had referred and relied on the helpful principles that were enunciated in **Spiliada** and specifically identify the connecting factors in detail but I am unable to conclude that the principles that were enunciated by Lord Diplock in **Abidin Daver** are inapplicable. I agree with Mr. Samek, QC that SFC in criticizing the judge gives a too narrow interpretation of Lord Diplock's use of the expression "same matter". I have no doubt that as urged by Mr. Samek, QC, that all that Lord Diplock intended was to refer to the desirability to avoid 'the additional inconvenience and expense which must result from allowing two sets of legal proceedings from being pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required.'[56] I also agree with Mr. Samek, QC that Lord Diplock did not intend that the two actions must be completely about the same matter. Neither does the jurisprudence that has developed in relation to the stay of proceedings require that the subject matter in the two sets of proceedings should be the same. I totally accept Mr. Samek, QC's, view on this point. In fact, contemporary application of the doctrine of forum non conveniens seeks to ensure litigation is resolved in the country with which it is most closely connected. What is required is that there be a close connection between both sets of litigation, namely, the local and the foreign claim – this much was present in the case at bar.

[83] I am reluctant to criticize the learned judge's use of the language "same business relationship" since Mr. Collins, QC, and Mr. Samek, QC, also used this language in the court below; therefore, this seemed to be the approach of both sides in

[56] Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460 at pp. 470 – 471.

addressing the connecting factors. It must be remembered that at the heart of an application for the stay of proceedings on the basis of forum non conveniens is a request that the court exercises its discretion to not hear the case before it on the basis that there is clearly or distinctly a more appropriate foreign forum. My review of the detailed submissions and the pleadings that were placed before the learned judge for the exercise of his discretion does not reveal that he attached a lot of weight to the fact that the BVI claim arose out of the same business relationship as the claim in the Swiss proceedings. I have no doubt that the learned judge was fully alive to the connecting factors that were present in the case and addressed them in his exchanges with both sides. There is no doubt in my mind that given the totality of the circumstances there is no basis upon which it could properly be said that the judge attached too much weight to what he loosely referred to as the "same business relationship" in exercising his discretion to grant the stay of the proceedings. There is no concept of same business relationship that can be utilized in a vacuum. However, when I look at the transcript in the round, it is clear to me that both the judge and counsel when they used that concept were addressing the connecting factors relevant to the two claims that are closely related.

[84] I accept Mr. Samek, QC's submissions and I have no doubt that the judge was alive to the fact that he had to undertake a balancing of quantitative and qualitative factors in order to determine the forum that was most appropriate for the litigation of the dispute. I agree with Mr. Samek, QC, that even though the judge spoke about "same business relationship" he did so against the backdrop of carrying out the requisite task of determining clearly or distinctly the appropriate forum in which SFC's claim should have been litigated. The judge spoke about the scale tilting which showed that he was balancing the factors.

[85] In so far as this appeal challenges the judge's exercise of discretion, the law is well settled as to when an appellate court will interfere with the judge's exercise of discretion. I can do no more than refer to the helpful pronouncements of

Sir Vincent Floissac in **Dufour and Others and Others v Helenair Corporation Ltd and Others**[57] where he said:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."[58]

[86] In exercising his discretion one way or the other, it is open to the judge to determine the weight to be attached to the various connecting factors on either side's case. The modern jurisprudence does not tell the judge the amount of weight that should be attached to the connecting factors and there is very good reason for this. This is unsurprising, for to do otherwise would be to improperly fetter the judge's discretion. A close reading of the transcript of the proceedings below reveals that the learned judge spent a considerable amount of time examining and balancing the connecting factors and discussing them with both Queen's Counsel. Indeed, chief among the factors that point to the BVI that were present in the case are follows:

(a) the documents are in English;

(b) SFC is domiciled in BVI – SFC has filed a claim in BVI;

(c) the SFC claim is based on a Services Agreement. (It must be borne in mind that the Fund is not a party to the Services Agreement on which the BVI claim is based).

[87] The other connecting factors which point to Switzerland are as follows:

(a) there is a credit Swiss account in Switzerland;

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[57] (1996) 52 WIR 188.
[58] At pp. 189 – 190.

(b) the Fund is a Swiss Company, pleadings are in German, the case is far advanced in the Swiss proceedings and is based on the Trust Agreement;

(c) SFC submitted to Swiss jurisdiction and has filed a retention claim which is a part of the defence and counterclaim in Swiss Proceedings;

(d) the Swiss Court will have to assess the SFC claim (serious overlap; possibility of obtaining conflicting judgments);

(e) it was accepted that a lot of Swiss speak good English;

(f) in the Swiss Proceedings SFC's defence raises similar issues as a counter claim;[59]

(g) SFC, if it wished, could have counterclaimed fully for said sums in the Swiss Proceeding but has specifically indicated that it does not intend to do so;

(h) The Court was addressed on the issue that the burden was on the defendant to establish that the foreign court was clearly the more appropriate forum;

[88] I have no doubt from reading the transcript of the proceedings that the learned judge assessed the connecting factors and attached the relevant weight to them and came to the conclusion that the SFC claim had the most real and substantial connection with Switzerland or to put it another way, Switzerland was clearly or distinctly the more appropriate forum. Even though the judge did not express himself in that way, it is clear from the overwhelming quantitative and qualitative connecting factors which point to Switzerland as the forum that is clearly and distinctly more appropriate.

[89] I also accept the very helpful principle that was stated in **Cherney v Dempaska**,[60] namely, that an appellate court should only interfere with the judge's exercise of

[59] This may well raise the issue of impermissible forum shopping.

discretion where it is clear that an error of principle has been made or that the result falls outside the range of potentially "right" answers and it should not reassess the weight to be given to the matters which the judge was entitled to take into account in exercising his own discretion.

[90] It is not open to this Court to simply seek to impose any view that it may have for that of the proper exercise of the judge's discretion. In addition, I am guided by and apply the helpful principles that were enunciated by Sir Vincent Floissac in **Dufour v Helenair**. Accordingly, I have no doubt that the learned judge committed no error of principle in granting the stay but rather exercised his discretion quite properly.

[91] In view of the totality of circumstances, this ground of appeal also fails.

[92] This brings me now to ground 5.

Ground 5: In seeking to identify the "natural forum" and/or determining whether or not Switzerland was "clearly or distinctively more appropriate" than the BVI, the court erred by failing to give sufficient weight to the fact that the BVI claim was governed by BVI law

[93] In view of everything that I have indicated in relation to grounds 3, and 4, ground 5 has become otiose. It is therefore unnecessary to address this issue.

Conclusion

[94] SFC has not prevailed in its challenge to the judge's decision in which the stay of its proceedings was granted on the basis of forum non conveniens. Its appeal is therefore dismissed.

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[60] [2012] EWCA Civ 1235.

Costs

[95] The Fund has succeeded in the appeal and is entitled to its costs to be assessed, if not agreed within 21 days of this order.

[96] I gratefully acknowledge the assistance from all learned counsel.

Louise Esther Blenman
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal

I concur.

Paul Webster
Justice of Appeal [Ag.]