EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0036

BETWEEN

MILLICOM TANZANIA N.V.

Appellant

and

[1] GOLDEN GLOBE INTERNATIONAL SERVICES LIMITED
[2] YUSUF MANJI

Respondents

Before:

The Hon. Dame Janice Pereira, DBE	Chief Justice
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Neil Calver, QC for the Appellant
Mr. James Collins, QC and with him, Ms. Tameka Davis for the First Respondent
Mr. David Lord QC and with him, Mr. Renell Benjamin for the Second Respondent

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2016: November 22;
2017: May 10.

Commercial appeal – Stay of proceedings – Forum non conveniens – Whether judge properly exercised his discretion in granting stay based on forum non conveniens – Real risk of injustice test – Whether appellant established real risk of injustice if it were to prosecute claim in natural forum – Cogency of evidence – Service outside of jurisdiction – Whether criteria met for service out

The appellant, Millicom Tanzania N.V. ("Millicom Tanzania") is a company incorporated in Curacao. Millicom Tanzania was the registered owner of shares in MIC Tanzania Limited ("MIC Tanzania"). MIC Tanzania is a limited liability company incorporated under the laws of Tanzania. The parent company of Millicom Tanzania is Millicom International Cellular SA ("Millicom International"). In Tanzania, the Millicom Group operates through MIC Tanzania. Millicom Tanzania owned all but one of the shares in MIC Tanzania which then consisted of 64,229 shares. Millicom International seems to own no shares in MIC Tanzania. The first respondent, Golden Globe International Services Ltd. ("Golden Globe")

is a company that is incorporated in the British Virgin Islands (the "BVI"). The second respondent, Mr. Yusuf Manji ("Mr. Manji") is Golden Globe's director.

One Mr. Bell, a former employee of Millicom International, obtained a default judgment against Millicom International. No default judgment was obtained against Millicom Tanzania. In order to meet the default judgment, Millicom's Tanzania's shares became the subject of a proclamation of sale in which the property to be sold was described as belonging to Millicom International. Golden Globe was apparently the highest bidder and the District Registrar in Tanzania, allegedly and without notice to Millicom Tanzania, ordered that the shares be transferred to Golden Globe.

Millicom Tanzania asserted that it was defrauded and cheated out of its shares and that its shares were sold at a significant under value to meet a debt for which it was not liable. On an ex parte application in the BVI, Millicom Tanzania obtained leave to serve the proceedings outside of the jurisdiction on Mr. Manji together with a worldwide freezing order against both Golden Globe and Mr. Manji. Subsequently, Golden Globe challenged the court's jurisdiction and applied for a stay of the proceedings and to have the worldwide freezing order set aside. Importantly, Golden Globe sought the stay of the BVI proceedings on the basis that the BVI was forum non conveniens. Mr. Manji did not submit to the BVI court's jurisdiction but argued that the judge ought not to have granted Millicom Tanzania leave to serve the claim outside of the jurisdiction since the prerequisites for such leave were not met. Millicom Tanzania urged the judge not to stay the claim but rather to allow the claim to proceed in the BVI on the basis that there was a real risk of injustice if it were to be forced to prosecute the claim in Tanzania.

The learned judge stayed the claim on the basis that the BVI was forum non conveniens and held that the permission that was granted to Millicom Tanzania to serve the claim out of the jurisdiction on Mr. Manji fell away on the basis that Millicom Tanzania had not successfully established that the BVI was the clearly or distinctly more appropriate forum for the determination of the claim and that importantly Millicom Tanzania had not satisfied the real risk of injustice test which would have enabled the court to permit the claim to continue in the BVI.

Millicom Tanzania, dissatisfied with the learned judge's decision appealed. Golden Globe and Mr. Manji counter appealed. It was common ground that Tanzania was the natural forum for the determination of the claim. Thus, the main issue for this Court was whether the judge exercised his discretion improperly in granting the stay on the basis that Millicom Tanzania had failed to provide cogent evidence of a real risk of injustice if it were to prosecute its claim in Tanzania. This Court also had to determine the corollary issue relating to service out of the jurisdiction.

Held: dismissing the appeal, affirming the decision of the trial judge and awarding costs on the appeal to Golden Globe International Services Ltd. and Yusuf Manji fixed at two thirds of the assessed costs in the court below unless costs are agreed by the parties within 21 days of this order, that:

1. The basic principle regarding the forum non conveniens enquiry is that a stay will only be granted where the court is satisfied that there is some available forum,

having competent jurisdiction, which is the clearly or distinctly more appropriate forum for the trial of the claim. 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. In determining whether the local forum is forum conveniens, the court must undertake a three stage inquiry. The first is whether there is another available forum; second, whether that forum is more appropriate than the local court; and third if so, whether there is a risk of injustice if the claim were to be prosecuted there.

Spiliada Maritime Corporation v Consulex Limited [1987] AC 460 applied; **IPOC International Growth Fund Ltd v L V Finance Group Limited et al**, BVIHCVAP2003/0020 and BVIHCVAP2004/0001 (delivered 1st December 2006, unreported) followed; **Nilon Ltd and another v Royal Westminster Investments SA and Others** [2015] UKPC 2 applied; **Altimo Holdings and Investments Ltd and others v Kyrgyz Mobil Tel Ltd and others** [2011] UKPC 7 applied; **SFC Swiss Forfaiting Company Limited v Swiss Forfaiting Limited** BVIHCMAP2015/0012 (delivered 4th July 2016, unreported) followed.

2. Where the defendant, as in this case, is seeking a stay in the local forum, the claimant can resist the stay by establishing that there is a real risk of injustice if it were to be made to prosecute the claim in the natural forum. There must be cogent evidence of the risk of injustice in the specific case. It has long been settled that the threshold to establish a real risk of injustice is not a low one and it must be established based on cogent evidence. Consequently, the claimant's failure to adduce cogent evidence establishing a real risk of injustice is fatal to its opposition to an application for a stay on the basis of forum non conveniens.

   Altimo Holdings and Investments Ltd and others v Kyrgyz Mobil Tel Ltd and others [2011] UKPC 7 applied; **Standard Chartered Bank (Hong Kong) Ltd. v Independent Tanzania Ltd** [2015] EWHC 1640 (Comm) applied.

3. In the case at bar, it is common ground that Tanzania is the natural forum for the trial of the claim and Millicom Tanzania held the burden of establishing, by way of cogent evidence that, there was a real risk of injustice if it were made to prosecute its claim in Tanzania. At its highest, the evidence presented by Millicom Tanzania pointed to corruption in the lower judiciary in Tanzania whereas Millicom Tanzania's claim would be tried in the higher echelons of the judiciary. Generalised reports of corruption and procedural difficulties in the lower judiciary in Tanzania, as adduced by Millicom Tanzania, do not amount to cogent evidence which shows that there is a real risk of injustice. Millicom Tanzania did not adduce any evidence of alleged corrupt acts in the higher courts in which its claim would be determined. Accordingly, the matters that were brought to this Court's attention and which were placed before the learned judge fall short of meeting the threshold requirement of a real risk of injustice. Therefore, the learned judge properly exercised his discretion in granting the stay on the basis that there was no cogent

evidence to show that there was a real risk of injustice being done to Millicom Tanzania if it were forced to prosecute its claim in Tanzania.

Standard Chartered Bank (Hong Kong) Ltd. v Independent Tanzania Ltd [2015] EWHC 1640 (Comm) applied; **Deripaska v Cherney** [2009] EWCA Civ 849 distinguished.

4. The same basic principles apply where the defendant is served within the jurisdiction as well as where the court is deciding whether to grant leave for service out in order to assume jurisdiction. In both circumstances, the crux of the matter is to locate the trial in the forum that is clearly or distinctly appropriate for the trial of the dispute. The onus is on the claimant who seeks leave of the court to establish that the case is a proper one for service out. The extraordinary nature of the jurisdiction can be outweighed if the applicant can satisfy the local court that justice cannot be obtained in the foreign jurisdiction. In so far as it was common ground that Tanzania was the natural forum, it was not open to the learned judge to grant leave to Millicom Tanzania to serve the claim out of the jurisdiction on Mr. Manji. Additionally, since Millicom Tanzania had failed to adduce cogent evidence required to displace Tanzania which is the clearly or distinctly more appropriate forum, the learned judge ought not to have granted leave for service out of the jurisdiction.

Nilon Ltd and another v Royal Westminster Investments SA and Others [2015] UKPC 2 applied.

5. In the present case, in granting the stay of the claim in the BVI, the learned judge exercised his discretion in accordance with the correct legal tests and in so doing took into account the relevant matters which he should have taken into account and left out of account matters which were irrelevant. The learned judge's decision cannot be said to have been plainly wrong that it must be regarded as outside the generous ambit of the discretion which has been entrusted to the court. Accordingly, there is no basis upon which this Court could interfere with the exercise of the judge's discretion.

The Abidin Daver [1984] AC 398 applied; **SFC Swiss Forfaiting Company Limited v Swiss Forfaiting Limited** BVIHCMAP2015/0012 (delivered 4th July 2016, unreported) followed.

JUDGMENT

Introduction

[1] **BLENMAN JA**: This is an appeal against the judgment of the learned Justice Wallbank in which he stayed a claim brought in the British Virgin Islands (the

"BVI") by Millicom (Tanzania) N.V. ("Millicom Tanzania"), against Golden Globe International Services Ltd ("Golden Globe") and Mr. Yusuf Manji ("Mr. Manji"). As a consequence of having granted the stay, the judge indicated that the permission to serve Mr. Manji outside of the jurisdiction granted to Millicom Tanzania in order to sue him fell away. Also, the judge held that Tanzania was the clearly or distinctly more appropriate forum for the trial of the claim. The stay was granted on the basis that Millicom Tanzania had failed to demonstrate that there was a real risk of injustice if it were to prosecute its claim in Tanzania.

[2] Golden Globe has also filed a counterclaim in support of upholding the decision of the judge on the basis that Millicom Tanzania's claim in any event ought to have been stayed on case management grounds. In addition, Golden Globe asserted that the worldwide freezing order which Millicom Tanzania obtained against it and Mr. Manji ought to have been set aside on the grounds of misrepresentation and material non-disclosure. Mr. Manji has also filed a counterclaim, in which he sought to uphold the judgment on the basis that the judge, having found that the BVI was not the clearly or distinctly more appropriate forum, had no discretion to uphold the service out of the jurisdiction and should have exercised his discretion to set it aside. He also argued that the orders to serve out and the worldwide freezing order ought to have been set aside on the basis of material non-disclosure and misrepresentation.

[3] I will now address the background in some detail.

Background

[4] Millicom Tanzania is a company incorporated in Curacao. Millicom Tanzania was the registered owner of shares in MIC Tanzania Limited ("MIC Tanzania"). The parent company of Millicom Tanzania is Millicom International Cellular SA ("Millicom International") and it is headquartered in Luxembourg. In Tanzania, the Millicom Group operates through MIC Tanzania. MIC Tanzania is a limited liability company incorporated under the laws of Tanzania. Millicom Tanzania owned all but one of the shares in MIC Tanzania which then consisted of 64,229 shares and

the share certificates for them and register of members. Millicom International, the parent company, seems to own no shares in MIC Tanzania.

[5] Golden Globe is a company that is incorporated in the BVI. Mr. Manji is its director.

[6] A gentleman by the name of Mr. Bell, who is a former employee of Millicom International, obtained a default judgment against Millicom International and his initial attempts to enforce that judgment by attaching the shares in MIC Tanzania failed. It seems to be common ground that Mr. Bell had obtained no default judgment against Millicom Tanzania and neither was the latter company a party to any default proceedings brought by Mr. Bell. In fact, Millicom Tanzania said that Millicom International owned no assets in Tanzania and that this was common knowledge to Mr. Bell and the registry officers in Tanzania.

[7] Millicom Tanzania asserted that a plan to carry out a fraud was hatched with the able assistance of the District Registrar of the court and through which its shares became the subject of a proclamation of sale in which the property to be sold was described as belonging to Millicom International. The Tanzania Company Registry apparently correctly indicated that the shares belonged to Millicom Tanzania and not Millicom International. In order to meet the default judgment, Millicom Tanzania's shares were put on auction by a court appointed broker. An advertisement was placed by the broker and the auction was held. It stated that the shares belonged to Millicom International. Golden Globe was apparently the highest bidder at a bid of $6.3 million. Millicom Tanzania's complaint is firstly that it was defrauded and cheated out of its shares and secondly that its shares were sold at a significant under value. This was so even though at the auction one of Millicom Group's lawyers had given the auctioneer a letter in which it was pointed out that the shares were not owned by Millicom International. At the auction, Golden Globe paid a deposit on the $6.3 million. On the same day, Golden Globe wrote to the District Registrar seeking clarification that the shares were owned by Millicom International and indicated that if that was not so they wished to have

their deposit refunded. The District Registrar in response to the letter stated that the shares were the same and indicated that Millicom International was estopped from denying that they, in fact, owned the shares in MIC Tanzania. Four days later, the District Registrar allegedly signed an order in the Bell action directing that the shares owned by "Millicom International Cellular SA/ Millicom Tanzania N.V" sold by public auction should be registered by the Tanzania Registry. Very shortly thereafter, the District Registrar allegedly and without any notice to Millicom Tanzania ordered that the Registrar of Companies sign an instrument transferring the shares to Golden Globe. It seems as though the judgment debt owed to Mr. Bell was US$3.313 million which Millicom Tanzania says is far below the value of its shares. In short, Millicom Tanzania's further complaint is that its shares which were worth millions of dollars were retrospectively declared by the District Registrar to have been sold by auction to meet a debt for which it was not liable.

[8] As a consequence, Millicom Tanzania brought proceedings in the Tanzanian High Court, Commercial Division, in which it sought a declaration that it owned the shares and for correction of the register. On 1st October 2015, Mansoor J dismissed the application as an abuse of process, on the grounds that it called into question the validity of the order of sale, an issue which had to be decided in the Bell action and could not be set aside in the action of an allegation of fraud. That decision is subject to an application for revision before the Tanzanian Court of Appeal, which is pending. It seems as though, thereafter Millicom Tanzania sought a suo motu revision by the Chief Justice on the grounds that the various orders were unfairly and improperly obtained. The Chief Justice summarily refused the application indicating that Millicom Tanzania should appeal.

[9] In BVI, Millicom Tanzania, based on an ex parte application, had obtained leave to serve the proceedings outside of the jurisdiction on Mr. Manji together with a worldwide freezing order against both Golden Globe and Mr. Manji. Golden Globe was then served as of right being a BVI company and Mr. Manji was ordered to be served pursuant to the permission granted by the court.

[10] Subsequently, Mr. Manji challenged the jurisdiction of the BVI court to hear and determine the matter and requested a stay of the proceedings. He argued that the court ought not to have granted leave to serve out. He also applied to have the worldwide freezing order set aside. Golden Globe also challenged the BVI court's jurisdiction on the basis that the BVI was forum non conveniens and also sought to have the worldwide freezing order discharged.

[11] Millicom Tanzania, in its proceedings in the BVI against Golden Globe and Mr. Manji, alleged that Golden Globe and Mr. Manji conspired, using corrupt court proceedings in Tanzania, to obtain the material shares which Millicom Tanzania owned in a mobile telephone company.

[12] Subsequently, in February 2016, Millicom filed an application to the Tanzanian Court of Appeal for an extension of time to obtain revision of the orders made in the Bell action.

[13] In June 2016, Mr. Manji commenced proceedings in Tanzania against Millicom Tanzania and various of its English and Tanzanian lawyers and witnesses, complaining about these proceedings. Prior to this, Millicom Tanzania had obtained from a differently constituted court, at first instance, an anti-suit injunction against Golden Globe and Mr. Manji prohibiting them from pursuing their claims in Tanzania.

[14] Golden Globe sought a stay of the BVI proceedings in the court below. As alluded to earlier, the stay application was brought on the basis that BVI was forum non conveniens. The learned Justice Wallbank having heard the application stayed the claim on the basis that the BVI was forum non conveniens. In addition, the learned judge held that the permission that was granted to Millicom Tanzania to serve the claim out of the jurisdiction on Mr. Manji would fall away on the basis that Millicom Tanzania had not successfully established that the BVI is the more appropriate forum for the determination of the claim against Mr. Manji and Golden Globe and that importantly Millicom Tanzania had not satisfied the real risk of

injustice test which would have enabled the court to permit the claim to continue in the BVI even though it was not the natural forum.

[15] In order to provide some context, I propose to briefly refer to the judgment below.

The Judgment below

[16] The crux of the issues before the learned judge was whether the BVI Court should determine Millicom Tanzania's claim and whether the worldwide freezing order should be continued. It was common ground before the judge that Tanzania was the natural forum or prima facie the appropriate forum for the claims and the judge considered it so. It is also common ground before this Court that Tanzania is natural forum for the determination of the claim.[1]

[17] The learned judge having read the evidence adduced in the application and reviewed the pleadings, heard submissions and delivered an oral judgment the following day. The learned judge ruled that the BVI was forum non conveniens for the trial of Millicom Tanzania's claim against Golden Globe and Mr. Manji. The judge therefore ordered the stay of the proceedings against Golden Globe on the ground that Millicom Tanzania had not established the risk of injustice in the natural forum (Tanzania) so as to allow the claim to proceed in the BVI.

[18] For the sake of completeness, it is noteworthy that pending the determination of this appeal, the learned judge having granted leave to appeal, varied the worldwide freezing order so that Golden Globe and Mr. Manji are prohibited from in any way disposing of dealing with or dismissing the value of the shares in: (a) MIC Tanzania Ltd., and (b) shares in Golden Globe, whether or not that interest is in Golden Globe's own name solely or jointly. The learned judge also discharged the anti-suit injunction against Mr. Manji and Golden Globe.

[1] See: para. 28 of appellants skeleton arguments filed on 25th August 2016 and para. 9.2 of first respondent's skeleton arguments filed on 9th September 2016.

[19] In the judgment, the learned Justice Wallbank applied the well-known principles in **Spiliada Maritime Corporation v Consulex Limited**[2] and indicated that the crucial question which ultimately had to be determined was in which forum can the case be "most suitably tried for the interests of all parties and for the ends of justice". The learned judge reviewed Millicom Tanzania's evidence and that provided on behalf of Golden Globe and Mr. Manji and concluded that, whilst there was some evidence of corruption, the evidence fell short of being cogent that there was a real risk the claimant would not obtain justice in Tanzania. Further, the learned judge held that Millicom Tanzania had failed to produce 'cogent evidence that it will not get a fair trial at the echelons higher than the District Registrar level from those judges who would be charged with reviewing this District Registrar's conduct, actions and omissions'.

[20] In applying the first limb of the **Spiliada,** the learned judge emphasised that, not only was the alleged tort committed in Tanzania, but also 'the material documents, such as they are, are in Tanzania. The main witnesses are in Tanzania ...' The learned judge further emphasised that '[t]he BVI Court has no power to compel any of these people to attend here to testify. If the claim were to be tried here the BVI Court would require extensive expert evidence relating to Tanzanian court processes whereas a Tanzanian court would immediately be able to see whether or not aspects of the matter are sufficiently improper or irregular as to infer corruption.'[3] The judge concluded by saying 'I also do not see how this Court could rule upon the proprietary or otherwise of Tanzania court processes and action of a Tanzanian District Registrar in any convenient or cost effective manner ...'.[4] The learned judge went on to examine the second limb of **Spiliada** and acknowledged that **Spiliada** was recognised and applied in the recent decision of **Nilon Ltd and another v Royal Westminster Investments SA and Others**.[5] Indeed, the judge also referred to the principles that were stated in **Nilon** and applied them to the facts. In so doing, the judge reviewed the evidence and the

[2] [1987] AC 460.
[3] See lines 10-25, p.14 of Transcript of Proceedings dated 26th July 2010.
[4] See lines 13-17, p.15 of Transcript of Proceedings dated 26th July 2010.
[5] [2015] UKPC 2.

authorities and concluded that Millicom Tanzania had not produced cogent evidence of the risk of injustice if they were made to prosecute the claim in Tanzania. On this basis, he granted the stay of Millicom Tanzania's claim.

[21] I will now refer to the grounds of appeal.

Grounds of Appeal

[22] In the notice of appeal, Millicom Tanzania had indicated the following grounds of appeal. The learned judge:

(a) erred by requiring specific evidence focused in particular upon the risk of injustice in the higher judiciary in Tanzania;

(b) erred by failing to take into account, adequately or at all, the many ways in which corruption by lower level judges or court officials might create such a risk;

(c) erred by failing to give any or any adequate weight to the procedural and practical difficulties of "curing" on appeal injustice perpetrated in lower courts;

(d) erred in any event in his assessment of the evidence bearing on the question of the risk of injustice in higher courts; the learned judge ought to have held that the evidence sufficiently supported a risk of injustice in this case in all courts;

(e) erred by failing to give any or any adequate weight to evidence demonstrating that the higher courts in Tanzania, if not themselves corrupt, were generally unwilling or unable to carry out or permit effective challenges to decisions by lower courts alleging corruption, such that there is a real risk that this case will not obtain an impartial and fair assessment in Tanzania;

(f) erred by giving weight to the fact that Millicom had in two respects invoked the jurisdiction of the Tanzanian courts;

(g) reached a conclusion which failed to apply the correct legal test because in effect it imposed a standard of proof and/or identified the matter to be proved in a manner inconsistent with the correct legal position as set out by the Privy Council in **Altimo Holdings and Investments Ltd and others v Kyrgyz Mobil Tel Ltd and others**;[6]

(h) was in all the circumstances incorrect in law and/or fell outside the range of discretion open to the learned judge as a matter of law.

[23] With no disrespect intended, the above grounds of appeal can be helpfully crystallised, into one ground of appeal namely: the learned judge erred in his application of the real risk of injustice test.

[24] I now turn to the relevant arguments on behalf of Millicom Tanzania. Learned Queen's Counsel, Mr. Calver who now appears on behalf of Millicom Tanzania, made it clear that the main thrust of the appeal was that the learned judge erred in his application of the real risk test and in so doing came to the incorrect conclusion that there was no real risk of injustice to Millicom Tanzania if it were to prosecute its claim in Tanzania as distinct from the BVI. For what it is worth, Mr. Calver, QC told the Court that Milicom Tanzania is not simply criticising the Tanzanian courts but what Golden Globe and Mr. Manji have done and continue to do in Tanzania. He argued that based on those things there is a real risk that Millicom Tanzania would not get a fair trial in Tanzania. Learned Queen's Counsel, Mr. Calver said that the trial judge ought to have faithfully applied the principles laid down in **Spiliada**. He argued that had the judge done so he would have exercised his discretion differently by refusing to grant a stay and this would have been in keeping with the principles that are also stated in **Altimo** which developed the **Spiliada** principles. In further arguing that the judge plainly got it wrong, Mr. Calver, QC spent much time highlighting the events that occurred with the District Registrar including her alleged actions and omissions which led to Millicom

[6] [2011] UKPC 7.

Tanzania's shares being improperly sold and ultimately registered in the name of Golden Globe. He also pointed out that the combination of the corruption on the part of the District Registrar and the conduct of Golden Globe and Mr. Manji make it well-nigh impossible for Millicom Tanzania to correct the corruption in Tanzania. Even though Mr. Calver QC accepted that the allegations of corruption of which Millicom Tanzania complained occurred in Tanzania and were in relation to the lower judiciary, i.e. District Registrar, he nevertheless argued that there is no certainty that if her actions/omissions were to be reviewed by the higher courts in Tanzania, that there would not be a real risk of injustice being done to Millicom Tanzania since the higher judiciary does not seem to have the appetite to root out corruption in the lower judiciary.[7]

[25] Mr. Calver, QC also complained that in Tanzania every attempt by Millicom Tanzania to correct what occurred in relation to the District Registrar has been met by challenges from Golden Globe and Mr. Manji so that to date Millicom Tanzania has been unable to secure a hearing on the merits in order to be able to retrieve its shares. In addition, he argued that Golden Globe and Mr. Manji have issued vexatious and meritless lawsuits in Tanzania in order to intimidate MilIlicom Tanzania's witnesses from giving evidence on their behalf. Mr. Calver, QC said all of this was put before the judge who correctly accepted that the real risk test was that as laid down by the Board in **Altimo**. Learned Queen's Counsel, Mr. Calver said that there will be unfairness in compelling Millicom Tanzania to pursue the claim in Tanzania and not in the BVI because if Millicom Tanzania were to fail to obtain the revision order, they would be left without any court remedy in Tanzania as they would be unable to challenge the District Registrar's order. He further argued that the case at bar is much stronger than the case that was before Mr. Justice Flaux in the **Standard Chartered Bank (Hong Kong) Ltd. v Independent Tanzania Ltd**.[8] He posited that in the case at bar, there was cogent evidence on which the judge ought to have found that there was a real risk of injustice being

[7] In launching his appeal, Mr. Calver, QC repeated most of the arguments that were advanced at first instance.
[8] [2015] EWHC 1640 (Comm).

done to Millicom Tanzania if it were forced to prosecute its claim in Tanzania. Firstly, he stated that the judge had cogent evidence that corruption in this case may not be exposed in the Tanzanian courts. Secondly, that there is cogent evidence of Mr. Manji's vexatious behavior, intimidation and harassment of witnesses. Thirdly, he said that there has been a failure to account for no less than $2.75 million which were paid into the Registry's deposit account and all of the efforts to have the District Registrar's order reversed has become marred in procedural challenges to jurisdiction in the courts of Tanzania. Further, to buttress his arguments on corruption in the judiciary in Tanzania, Mr. Calver, QC referred this Court to a Freedom House Report and the East African Bribery Index of Transparency International together with comments that were allegedly made by the then President of Tanzania. He also referred this Court to a High Court of England decision in which comments were made in relation to the corruption amongst the judiciary namely: **Mengi v Hermitage**.[9] Mr. Calver, QC also referred this Court to **Nasser v United Bank of Kuwait**[10] in support of his proposition that the learned judge ought to have found that justice will not be obtained in Tanzania.

[26] Mr. Calver, QC accepted that there is evidence on which the judge correctly held that corruption in Tanzania may not be exposed and that the trial itself may be corrupted, he however argued that the judge went wrong or erred when he concluded that the evidence fell short of being cogent that there is a real risk that Millicom Tanzania will not obtain justice in Tanzania. Mr. Calver, QC reminded this Court that all Millicom Tanzania needed to prove before the judge was that there was a real risk that it would not obtain justice in Tanzania. He submitted that the learned judge placed too high a burden on Millicom Tanzania to provide concrete examples of corruption. He posited that based on the evidence which Millicom Tanzania provided, the judge ought to have concluded that Millicom Tanzania had satisfied the real risk of injustice test. In this regard, Mr. Calver, QC referred this Court to affidavit evidence of a lawyer in Tanzania in relation to corruption in the lower judiciary. This, he posited, coupled with the intimidation of

[9] 2012 EWHC 3445.
[10] [2002] 1 All ER 401.

Millicom Tanzania's witnesses (some of whom fear that if they were to go to Tanzania they would be served with civil proceedings) and the possibility that Millicom Tanzania may never be able to obtain a trial in Tanzania, much less a fair trial, ought to have been sufficient for the judge to exercise his discretion and not grant the stay.

[27] Finally, and in relation to the real risk of injustice test, Mr. Calver, QC submitted that the learned judge in exercising his discretion plainly got it wrong and came to a conclusion that was outside the range of discretion open to him as a matter of law. He therefore urged this Court to set aside the order of the learned judge and to reinstate the worldwide freezing order and the anti-suit injunction that were granted against Golden Globe and Mr. Manji. In support of this argument he relied on **Nilon Ltd v Royal Westminster Investments**.

[28] For his part, Mr. Collins, QC took issue with some of the assertions that were made by Millicom Tanzania. He argued that the picture that Millicom Tanzania has painted does not accurately reflect what transpired. Mr. Collins, QC referred this Court to evidence which he says indicates that when Mr. Bell had tried to enforce the default judgment on several occasions and that he was unsuccessful in the High Court of Tanzania. This, Mr. Collins QC said is indicative of the court system in Tanzania working, in particular the High Court. He said that it must be recognised that Golden Globe only got involved in the matter as a consequence of having purchased the shares at the auction. It had nothing to do with the prior events.

[29] Mr. Collins, QC indicated to this Court that Millicom Tanzania had told the judge at the ex parte hearing that they were unaware of the auction until six months after it had occurred, in order to have been able to obtain the worldwide freezing order. However, he argued that the evidence before this Court is quite contrary to that since it clearly confirms that Millicom Group and their lawyers were aware of the court proceedings and participated in the steps that led to the auction. He referred this Court to the evidence which he says substantiates this point. He said Mr.

Kapinga (who is Millicom Group's lawyer) and other members of his firm actually attended hearings in May and June 2014 and were served with the resulting orders. Mr. Collins, QC says that Millicom Tanzania misrepresented the situation to the learned judge in order to obtain the ex parte freezing order and the order to serve out of the jurisdiction. He says that the only reason why Millicom Tanzania was forced to resile from the falsehoods is because Golden Globe was able to provide the Court with evidence from witnesses which attested to the fact that, Millicom's lawyer, in Mr. Kapinga's firm, had been served with the relevant documents and their representatives attended the auction which clearly indicates that the Millicom group was aware of the auction. In fact, they instructed lawyers to attend and caused a letter to be delivered by one of its lawyers to the broker before the auction had been completed. He reminded this Court that Millicom International is just a holding company so in terms of knowledge, it is impossible to distinguish between it and Millicom Tanzania. Mr. Collins, QC reiterated that Millicom Tanzania misrepresented the correct state of affairs in order to obtain the ex parte orders and this is a sufficient basis to set them aside.

[30] Learned Queen's Counsel, Mr. Collins also said that it is incorrect for Millicom Tanzania to state that Golden Globe did not serve them with the application in the Tanzanian matter and yet the judge went ahead and made an order. Mr. Collins, QC referred the Court to a copy of the judgment in the Tanzanian case which he said paints a very different picture. It shows that on the first occasion, Golden Globe's application to the judge was refused. Indeed the judge had declined to entertain an ex parte application and directed that the parties should be served. On the second occasion, the judge refused to grant Golden Globe the order it sought on the basis that there was no proof of service. Mr. Collins, QC said all of this demonstrates that the High Court system in Tanzania is working. Mr. Collins, QC submitted that Golden Globe's case was then adjourned and subsequently at an inter partes hearing at which Mr. Kapinga represented Millicom, the Court in its judgment stated:

> "After hearing both sides, I made some interim orders to the effect that the status quo of the first respondent's company be maintained pending the hearing and determination of the application".

[31] Mr. Collins, QC maintained that the above indicates that the court system in Tanzania was working well since the judge in the High Court in Tanzania was fair and careful in treating with the claim that was before him.

[32] Turning specifically to the judgment below, Mr. Collins, QC reminded this Court that what is on appeal is a decision on the exercise of discretion by the court below. Mr. Collins, QC reminded this Court that it is settled law that an appellate court can only interfere with the exercise of the judge's discretion in very limited circumstances. He further reminded this Court that there are several English authorities that have made similar pronouncements such as **The Abidin Daver**.[11] He also referred to **Nilon Ltd v Royal Westminster Investments**. Mr. Collins, QC acknowledged that the principles of forum non convenienes are those set out in **Spiliada** and applied in **IPOC International Growth Fund Limited v LV Finance Group Limited et al**.[12]

[33] Mr. Collins, QC said that some of the difficulties that Millicom Tanzania experienced in challenging the District Registrar's order are based on the incorrect procedure they employed in Tanzania. He pointed to the Mansoor J's ruling where the judge said that the court has no jurisdiction to make an order which will in effect cancel the share certificate issued by a competent court of law, when there is no irregularity or fraud pleaded and the sale certificate could only be cancelled by the court executing the decree in the manner and mode prescribed. Mr. Collins, QC said that it is not that Millicom Tanzania cannot bring the case for the tort in Tanzania but rather they used the wrong procedure which the judge correctly held amounted to an impermissible collateral attack since no fraud or irregularity was pleaded.

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[11] [1984] AC 398.

[12] BVIHCVAP2003/0020 and BVIHCVAP2004/0001(delivered 19th September 2005, unreported).

[34] Next, Mr. Collins, QC said that the rule in **The Abidin Daver** had been faithfully followed by courts for in excess of 30 years now. It was in fact confirmed by the Board in **Altimo**. Learned Queen's Counsel, Mr. Collins submitted that the judge correctly applied the test in **Altimo** and concluded that Millicom Tanzania had failed to produce cogent evidence of a real risk of injustice. He said that the judge was entitled to take into account the fact that the allegations of corruption related to District Registrar and that the appeal from her orders would be heard by the higher echelons of the Tanzanian judiciary and there is no evidence of corruption at the higher echelons. Mr. Collins, QC said that it is the law that generalised or anecdotal evidence will not be sufficient. He referred this Court to **Standard Chartered Bank (Hong Kong) Ltd. v Independent Tanzania Ltd** in support of his proposition. He also said that the evidence required must relate to the particular case and not to other unrelated cases.

[35] Mr. Collins, QC argued that the judge did not misdirect himself with regard to the relevant principles. He said that the judge referred to the correct authorities and applied them, chief of which were those stated in **Altimo** and there is no basis for this Court to interfere with the judge's decision. Mr. Collins, QC submitted that the evidence that is required must point to a real risk of injustice in the particular case. In support of this proposition he referred this Court to **Standard Chartered Bank (Hong Kong) Ltd. v Independent Tanzania Ltd** in which Flaux J observed that the '[Transparency International reports] … which in any event seem to be directed at the lower echelons of the judiciary are not cogent evidence of a real risk of SCBHK [Standard Chartered Bank (Hong Kong) Ltd.] being unable to obtain a fair trial in Tanzania.'[13] Mr. Collins, QC maintained that the judge applied the correct tests as laid down in **Spiliada** and the real risk test as enunciated in **Altimo**. The judge, having found that Millicom Tanzania had not provided cogent evidence of a real risk of injustice in Tanzania and that the BVI was not an appropriate forum, exercised his discretion correctly in granting the stay of Millicom Tanzania's claim.

[13] At para. 174.

[36] Mr. Collins, QC agreed that the judge did not have to address the worldwide freezing order based on the fact that he made an order to grant a stay; the worldwide freezing injunction effectively fell away. For what it is worth, Mr. Collins, QC reminded this Court that Golden Globe had filed a counter notice of appeal which indicated that Millicom Tanzania's claim ought to have been stayed on case management grounds. In conclusion, Mr. Collins, QC advocated that the judge did not misdirect himself or make any error that permits this Court to interfere with the exercise of his discretion. He reiterated the fact that Tanzania is the forum conveniens and the BVI is not. He therefore urged this Court to dismiss the appeal and to award costs to Golden Globe.

[37] For his part, Mr. David Lord, QC took strong objection to Millicom Tanzania's contention that Mr. Manji was in any way implicated in the alleged fraud. He pointed out that at the time of the purchase of the shares it was Mr. Manji's wife who had owned the shares in Golden Globe; however since then Mr. Manji has become a director of Golden Globe.

[38] So as to prevent repetition and in so far as was relevant, Mr. Lord, QC adopted the submissions that were advanced by Mr. Collins, QC even though he too had addressed them in his written submissions. However, in so far as Mr. Manji was not served as of right, Mr. Lord, QC in his oral arguments concentrated on the issue of whether the permission to serve ought to have been granted. Mr. Lord, QC argued that Millicom Tanzania misled the judge below in order to obtain the worldwide freezing order. He underscored the point that Millicom Tanzania misinformed the court below that it was unaware of the auction and that it was as a result of that misinformation that Millicom Tanzania improperly obtained the worldwide freezing order that led Mr. Manji to commence the claim in Tanzania. Learned Queen's Counsel, Mr. Lord said what is even more interesting is that Millicom Tanzania has provided false information to the court in order to obtain the worldwide freezing order yet they were able to obtain an anti-suit injunction against Golden Globe. Mr. Lord, QC argued that Mr. Manji is the victim of Millicom

Tanzania having misled the court. He further argued that these non-disclosures and misinformation were sufficient bases to set aside the service out.

[39] Learned Queen's Counsel, Mr. Lord adverted this Court's attention to Mr. Manji's counter notice of appeal in which it is stated that the judgment below should be upheld because the learned judge should have set aside the service out of the jurisdiction proceedings against Mr. Manji. Mr. Lord, QC submitted that the learned judge, having found that the BVI was not the more appropriate forum where justice could be done between the parties, had no discretion to uphold the service out proceedings against Mr. Manji. Alternatively the learned judge should have set aside the service out proceedings in the exercise of his discretion. Mr. Lord, QC also relied on **Spiliada** in support of the proposition that in cases where permission is sought to serve out of the jurisdiction, the burden rests on the claimant to satisfy the court that the local forum is the most appropriate one. He also reminded this Court that where permission is granted to serve out, as obtained by Millicom Tanzania in relation to Mr. Manji, the court ought to have been satisfied that the BVI was the clearly or distinctly more appropriate forum. In this regard he referred to **Nilon** as authority for this proposition. He said that failure to so satisfy the court should have resulted in the judge refusing to grant permission to serve out of the jurisdiction.

[40] Mr. Lord, QC also argued that the learned judge applied the correct test in granting a stay. Like Mr. Collins, QC, Mr. Lord, QC argued that the learned judge properly applied the tests set out in **Spiliada** as recognised in **Nilon**. He said that when one reads the judgment there can be no doubt that the learned judge applied the correct tests and exercised his discretion correctly. Also, the learned judge assessed all of the evidence and also held that the BVI was not the clearly or distinctly the more appropriate forum. Mr. Lord, QC pointed out that the learned judge also applied the test in **Altimo** and held that Millicom Tanzania did not satisfy the test of real risk of injustice since it had failed to furnish the court with cogent evidence of that. Mr. Lord, QC urged this Court not to interfere with the decision of the judge. He argued that in accordance with Mr. Manji's counter

notice of appeal, the learned judge, having found that the BVI was not the clearly or distinctly more appropriate forum where justice could be done between the parties, had no discretion to uphold the service out of jurisdiction proceedings on Mr. Manji. Alternatively, the learned judge should have set aside the service out of those proceedings in the exercise of his discretion even if there was a real risk of injustice in Tanzania on the basis that the BVI was not the appropriate forum.

[41] In addition, Mr. Lord, QC submitted that since the orders to serve out of the jurisdiction and to grant the worldwide freezing order against Mr. Manji were made ex parte, they should have been set aside on the basis of material non-disclosure and/or misrepresentations by Millicom Tanzania.

[42] In further support of the counter notice, Mr. Lord, QC also said that the judge in the exercise of his discretion should have placed greater weight on:

(a) The fact that Millicom Tanzania has brought and is pursuing proceedings in the Tanzania High Court Commercial Division seeking a declaration that it owned the shares and the correction of the register, which raise identical issues to those sought to be raised in the present proceedings, and that Millicom Tanzania made an application to the court in Tanzania for an extension of time to obtain revision of the orders made in the proceedings that led to the auction of the shares.

(b) The fact that Millicom Tanzania had been successful in Tanzania in the past.

(c) The finding of Flaux J in **Standard Chartered Bank (Hong Kong) Ltd. v Independent Power Tanzania Ltd**. that there was no risk of injustice if those proceedings went ahead in Tanzania.

[43] Finally, Mr. Lord, QC reiterated that based on the material that was before the court it was open to the judge to find that there is no cogent evidence of a real risk

of injustice. He said **Deripaska v Cherney**[14] is distinguishable from the case at bar since in that case no proceedings would have been pursued in the natural forum unlike the case at bar in which Millicom Tanzania is pursuing proceedings in Tanzania which is the clearly or distinctly more appropriate forum in relation to the same shares. Mr. Lord, QC relied on the decision of this Court in **SFC Swiss Forfaiting Company Ltd. v Swiss Forfaiting Ltd.**[15] as authority for the proposition that permitting Millicom Tanzania to sue in the BVI should not be a countenanced since there is a real possibility of obtaining two inconsistent judgments in relation to the same issue. Mr. Lord, QC urged this Court to dismiss Millicom Tanzania's appeal and allow Mr. Manji's cross appeal with costs.

Discussion

[44] In **Spiliada**, Lord Goff, giving the leading judgment of the Court, emphasised that the same basic principles apply where the defendant is served within the jurisdiction as well as where the court is deciding whether to grant leave for service out in order to assume jurisdiction. This principle was given judicial recognition in the recent case of **Nilon**.

[45] It is well established that where jurisdiction is founded as of right, that is, where a defendant has been served with proceedings within the jurisdiction, that defendant could still apply to the court to decline to exercise that jurisdiction on the ground of forum non conveniens.[16] Learned author of the textbook, **Caribbean Private International Law**, Honourable Mr. Justice Winston Anderson, in addressing both the application for the stay and leave to serve out of the jurisdiction, stated that in both circumstances, the heart of the matter was to locate the trial in the forum that was most appropriate for the litigation of the dispute.[17] **Spiliada** has become the

[14] [2009] EWCA Civ 849; [2010] 2 All ER (Comm) 456.
[15] BVIHCMAP2015/0012(delivered 4th July 2016, unreported).
[16] See: The Hon Mr Justice Winston Anderson, PhD: Caribbean Private International Law (2nd edn., Sweet & Maxwell 2014) 207.
[17] See also: Nilon Ltd and another v Royal Westminster Investments SA and Others [2015] UKPC 2.

locus classicus on the application of the principle of forum conveniens in English law. This has indeed been recognised to be the law applicable in the BVI.[18]

[46] It is the law that in relation to forum non conveniens the overarching question is, which is the forum where the case can be most suitably tried in the interests of all parties and the ends of justice.

[47] In relation 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 available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. 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. In determining whether the local forum is forum conveniens, the court must undertake a three stage inquiry. The first is whether there is another available forum; the second is whether that forum is more appropriate than the local court; and third if so, whether there is a risk of injustice if the prosecution of the claim were to be allowed to proceed there.

[48] In the case at bar, there is the common ground that Tanzania is the natural forum for the trial of the claim. Where the defendant is seeking a stay in the local forum the enquiry does not end there. Indeed, given that Tanzania is accepted as the natural forum, the claimant who is resisting the stay in the local court has the burden of establishing that there is a real risk of injustice if it were to be made to prosecute the claim in Tanzania. This burden is discharged by the claimant providing cogent evidence to establish the real risk.[19] Since Millicom Tanzania was resisting the application for the stay, it held the burden to establish that there was a real risk of injustice if the claim were to proceed in Tanzania.

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[18] See: IPOC International Growth Fund Ltd v L V Finance Group Limited et al, BVIHCVAP2003/0020 and BVIHCVAP2004/0001 (delivered 1st December 2006, unreported).

[19] See: Altimo Holdings and Investments Ltd and others v Kyrgyz Mobil Tel Ltd and others [2011] UKPC 7 in which the Board has definitively established that nothing short of cogent evidence would suffice.

[49] It is clear from the judgment that Mr. Justice Wallbank was at all times alive to these principles as he referred to and applied them in his oral judgment.[20] The learned judge acknowledged that he had an obligation to identify the forum where the case could most suitably be tried for the interests of all the parties and the ends of justice. I will look a bit further at the forum non conveniens and in particular the judge's treatment of the real risk of injustice factor. In **Spiliada**, Lord Kerr indicated the salutary principle on the grant of a stay on the basis of forum non conveniens. He stated at page 476 as follows:

> "(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum having competent jurisdiction, which is the appropriate forum for the trial of the auction, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."
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> "(b) … [I]f the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country."

[50] In relation to the service out of the jurisdiction, it has long been regarded as an extraordinary jurisdiction which the local court should exercise with circumspection. The onus is on the claimant who seeks leave of the court to establish that the case is a proper one for service out. However, it has long been accepted that the extraordinary nature of the jurisdiction would be considered and can be outweighed if the applicant can satisfy the local court that justice could not be obtained in the foreign jurisdiction.[21] In order to enable the court to exercise its discretion to allow service out, Millicom Tanzania must, as in a case of a stay based on forum non conveniens, satisfy the Court that the BVI is clearly or

[20] The learned judge particularly referred to and applied the cases of Spiliada Maritime Corporation v Consulex Limited [1987] AC 460, Altimo Holdings and Investments Ltd and others v Kyrgyz Mobil Tel Ltd and others [2011] UKPC and Nilon Ltd and another v Royal Westminster Investments SA and Others [2015] UKPC 2.

[21] See: Spiliada Maritime Corporation v Consulex Limited [1987] AC 460 at p. 479.

distinctly the forum in which the case could most suitably be tried for the interests of all the parties and the ends of justice.[22]

[51] I agree with Mr. Collins, QC and Mr. Lord, QC that the real risk of injustice factor is one of the matters that the court takes into account in determining how to exercise its discretion. It is a factor upon which the court determines whether or not the claim should be stayed, for the interests of the parties and the interests of justice.

[52] I remind myself that an appellate tribunal should resist the temptation to subvert the principle that it should not substitute its own discretion for that of the judge by a narrow textual analysis which enables it to claim that the judge misdirected himself. It is no part of an appellate court's function to do so.

[53] I am mindful also that the exercise of the discretion involves an evaluation of the evidence put forward to show the likelihood that justice will not be achieved; however, it was clear to me that the evidence that Millicom Tanzania provided pointed to allegations of corruption by the District Registrar. There is no cogent evidence which indicates that the alleged corrupt acts permeate the higher echelons of the judiciary in Tanzania (which are the courts in which Millicom Tanzania's claim will be determined). I have no doubt that the learned judge was entitled to take this into account in his determination of the issue of the stay and in so holding that Millicom Tanzania had not discharged the burden for displacing Tanzania which is the natural forum in which the case should be tried. It is clear to me that the learned judge faithfully applied the relevant principles in **Altimo**.

[54] In my view, it is no part of an appellate court's function to go through the whole exercise again or to re-assess the weight to be given to the matters. Assessment of the evidence falls within the purview of the judge unless it can be proven that the judge acted outside of his discretion or got it plainly wrong. This Court in **SFC Swiss Forfaiting Company Ltd. v Swiss Forfaiting Ltd.** at paragraph 86 stated as follows:

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[22] See: Spiliada Maritime Corporation v Cansulex Ltd. [1987] AC 460. See also: Nilon Ltd and Another v Royal Westminster Investments SA and Others [2015] UKPC 2.

> "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."[23]

[55] A review of the careful oral judgment indicates that the judge analysed and assessed the evidence in seeking to determine whether Millicom Tanzania had established that there was a real risk of injustice. It is noteworthy that Mr. Collins, QC reminded this Court that the appeal has nothing to do with the quality of evidence as raised by Mr. Calver, QC, but rather the exercise of discretion. It is settled law that the question of the appropriate forum is a matter within the discretion of the judge. The appellate court cannot interfere simply because its members consider themselves that if they were sitting at first instance, may have reached a different conclusion. It can only interfere in three cases:

(1) Where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised.

(2) Where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or failed to take into account; or

(3) Where his decision is plainly wrong.[24]

[56] In any event, in so far as it is common ground that Tanzania is the natural forum; in my view it was not open to the learned judge to grant leave to Millicom Tanzania to serve the claim out of the jurisdiction on Mr. Manji. In this regard, I accept Mr. Lord, QC's very attractive and persuasive submissions on this point. In fact it has long been established in **Spiliada** and accepted in **Nilon** that in order to determine

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[23] See also Cherney v Deripaska [2009] EWCA 849 at page 10 in which it was held that the assessment of evidence is a matter for the judge.

[24] See: The Abidin Daver [1984] AC 398. The above principles have been confirmed by the Board in Altimo Holdings and Investments Ltd and others v Kyrgyz Mobil Tel Ltd and others [2011] UKPC 7; see also the pronouncement of the Board in Nilon Ltd and Another v Royal Westminster Investments SA and Others [2015] UKPC 2 at para.16.

whether a case was a proper one for service out of the jurisdiction the court had to identify in which forum the case could most suitably be tried for the interest of all the parties and for the ends of justice. Even though this is not the basis of this Court's determination of the appeal, Mr. Lord, QC's complaint on the permission to serve out is well founded, in relation to the counter notice of appeal.

[57] In **Nilon,** the Board stated at paragraph 13:

> "The applicable principles relating to service out of the jurisdiction were set out, with references to the prior authorities, in *AK Investment CJSC v Krygyz Mobil Telecom Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, at para 71, per Lord Collins. On an application for service out of the jurisdiction, three requirements have to be satisfied. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connoted that one side has a much better argument than the other. Third, the claimant must satisfy the court that in all the circumstances the forum which is being seised (here the BVI) is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all of the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

[58] In **Altimo** Lord Collins further pointed out at paragraph 97 that:

> "Comity requires that the court be extremely cautious before deciding that there is a real risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required.

[59] The situation is different where the defendant is served as of right. Once a defendant is served in the jurisdiction as of right, the local forum is by law regarded as an appropriate forum. However, the issue of forum conveniens or non conveniens arises to be determined where the party, who is served as of right in the local forum, in this case the BVI, asserts that there is a clearly or distinctly a more appropriate forum in which the claim should be tried. In seeking to answer that question the court at first instance has to examine the connecting factors.[25]

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[25] See: SFC Swiss Forfaiting Company Limited v Swiss Forfaiting Limited BVIHCMAP2015/0012 (delivered 4th July 2016, unreported) where this Court addressed these matters.

[60] As indicated earlier, it is common ground that Tanzania is the clearly more natural forum. This is also the point of determination made by the judge at the first instance. In the application for the stay, where prima facie a foreign forum is the appropriate forum as has been established in the case at bar to be Tanzania, the burden of proof shifted to Millicom Tanzania which seeks to litigate in the local court to establish that the court should not grant the stay but rather should allow the claim to proceed in the local forum. One of the recognised bases on which the court would grant a stay is where there is a real risk of injustice were the claimant to be forced to litigate in the foreign forum, in this case Tanzania. This real risk of injustice was recognised in **Altimo** at paragraph 95 as follows:

> "The better view is that, depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption."

At page 17 of the judgment below the judge faithfully applied the **Altimo** test referred to above and further stated that:

> "The rule is that considerations of international comity will militate any such finding in the absence of cogent evidence."[26]

[61] The learned judge correctly referred to the applicable principles in **Altimo** and **Nilon** and applied them to the case at bar.[27] He also gave due regard to the decision of Flaux J in **Standard Chartered Bank (Hong Kong) Ltd. v Independent Power Tanzania** and indicated that there must be cogent evidence of the risk of injustice in the specific case. At page 12 of the judgment, the judge referred to the applicable principles. In fact it is an unfair criticism to assert that the learned judge did not properly apply the test in **Nilon** and **Altimo**. To the contrary, one thing is pellucid, that is, that the learned judge showed fidelity to those principles and applied them to the letter. The learned judge focused on the real risk of injustice test and in holding that Millicom Tanzania did not satisfy the test, the learned judge correctly stated as follows:

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[26] See lines 15-17, p.17 of Transcript of Proceedings dated 26th July 2010.
[27] See pp.13-17 of Transcript of Proceedings dated 26th July 2010.

> "That comes back to the point that a claimant who wishes this Court to make a finding that another foreign Court will not produce justice needs to bring **cogent** evidence of a real risk that such justice will not be obtained."[28]

[62] The learned judge further stated that:

> "There is general evidence that the Tanzanian judiciary are not politically independent and thus that at all levels partisan decisions are liable to be rendered. However, the Claimant does not advance evidence that this is in any way such a case here."[29]

[63] Critically, the judge stated at page 21 of the judgment that:

> "Where the Claimant's position does fail, in my humble opinion, is in failing to produce cogent evidence that it will not get a fair trial at the echelons higher than the District Registrar level from those judges who would be charged with reviewing this District Registrar's conduct, actions and omissions."[30]

At page 19 of the judgment the judge indicated that the corruption pointed out was not in the higher judiciary.

[64] I am fortified in the above view based on the pronouncements made in **Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd.** that it would have been difficult for the bank there to have succeeded in arguing that there was a real risk of injustice in the higher Courts in Tanzania since several previous decisions had gone in its favour. Millicom Tanzania on its own case has had some measure of success in the High Court as Mr. Collins, QC has correctly pointed out.

[65] Indeed, I find very instructive and helpful the pronouncements that were made in the above case, and can do no more than apply them to the case at bar. Indeed, Justice Flaux at paragraph 174 of the judgment stated:

> "… generalized reports of corruption of this kind, which are no doubt produced in relation to many countries, and which in any event seem to be directed at the lower echelons of the judiciary are not cogent evidence of

[28] See lines 6-10, p.18 of Transcript of Proceedings dated 26th July 2010.
[29] See lines 1-5, p.20 of Transcript of Proceedings dated 26th July 2010.
[30] See lines 2-7, p.21 of Transcript of Proceedings dated 26th July 2010.

real risk of [Standard Chartered Bank (Hong Kong) Ltd] being unable to obtain a fair trial in Tanzania".

[66] As urged by Mr. Collins, QC and Mr. Lord, QC I have no doubt that the learned judge applied the correct test as stated in **Spiliada** and recognised in **Nilon** and **Altimo**. He exercised his discretion in accordance with the correct tests as indicated in **Nilon** and **Altimo** and in so doing took into account the relevant matters which should have been taken into account and left out of account matters which are irrelevant. Further, it cannot be said that the decision of the learned judge was so plainly wrong that it must be regarded as outside the generous ambit of the discretion which has been entrusted to the Court.[31]

[67] In my judgment, there was no cogent evidence presented to the judge to indicate that there is corruption in the higher echelons of the judiciary which is where Millicom Tanzania's claim against the acts or omissions of the District Judge will be ventilated. I am ineluctably driven to the conclusion that the learned judge faithfully and correctly applied the principles that were enunciated in the **Spiliada** as recognised and applied in **Nilon** and **Altimo** in holding that Millicom Tanzania could only have resisted the stay by providing cogent evidence of the real risk of injustice and that it had failed to do so.

[68] It has long been settled that the threshold to be attained is a not a low one. The real risk of injustice must be established in relation to the case at bar, and not in relation to a hypothetical case, based on cogent evidence and even procedural difficulties in the natural forum may not suffice. Also, it is trite law that the claimant's failure to establish the real risk of injustice by adducing cogent evidence is fatal to its opposition to an application for a stay on the basis of forum non conveniens and an application to set aside the service out proceedings.

[69] En passant and for what it is worth even though I am cognisant of the fact that in this case, this Court is not exercising its discretion afresh, it is useful to reiterate

[31] See: Nilon Ltd and another v Royal Westminster Investments SA and Others [2015] UKPC 2 at para.16.

that the matters that were brought to this Court's attention and which were placed before the judge fall woefully short of meeting the threshold requirement of a real risk of injustice. The case at bar is clearly distinguishable from **Deripaska v Cherney.**

[70] Accordingly, Millicom Tanzania has failed to satisfy this Court that the learned judge erred in exercising his discretion to grant the stay. The appeal is therefore dismissed and the leave to serve out and the worldwide freezing orders fall away, as was correctly indicated by the learned judge.

[71] In view of the above disposition of the appeal it has become unnecessary to address the counter notices of appeal.

Conclusion

[72] For the reasons above, I would dismiss Millicom (Tanzania) N.V.'s appeal against the decision of Mr. Justice Wallbank and I would affirm the decision of the trial judge. I would award costs on the appeal to Golden Globe International Services Ltd. and Yusuf Manji fixed at two thirds of the assessed costs in the court below unless costs are agreed by the parties within 21 days of this order.

[73] I gratefully acknowledge the assistance of all learned counsel.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar