IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLADNS

IN THE HIGH COURT OF JUSTICE

(COMMERCIAL DIVISION)

CLAIM NO.: BVIHC (COM) 83 of 2017

BETWEEN

JHAVERI DARSAN JITENDRA

Claimants/Respondent

-and-

[1] LAKSHMI ANIL SALGAOCAR
(As Administratrix of the Estate of ANIL VASSUDEVA SALGAOCAR, deceased)
[2] MILLION DRAGON WEALTH LIMITED

Defendants/Applicants

CLAIM NO:. BVIHC (COM) 213 of 2017

BETWEEN [1] JHAVERI DARSAN JITENDRA
[2] PD HOLDINGS LIMITED

Claimants/Respondents

-and-

[1] LAKSHMI ANIL SALGAOCAR
(As Administratrix of the Estate of ANIL VASSUDEVA SALGAOCAR, deceased)
[2] WINTER MEADOW CAPITAL INC

Defendants/Applicants

Appearances:

Mr Kenneth MacLean QC of Serle Court and with him Mr Matthew Brown and Dr Alecia Johns of Conyers Dill and Pearmen for the applicant

Mr Toby Landau QC of Essex Court Chambers and with him Mr James Nobel and Stuart Cullen of Harney Westwood and Riegels for the respondents

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2018: November 27-28,
2019: February 28, 1 April

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JUDGMENT

*Forum non conveniens –Stay of proceedings- Issue Estoppel*

[1] ADDERLEY J Ag: On 28 February, 2019 I dismissed the applications in this matter to set aside service outside the jurisdiction, and the application for a stay of the proceedings. I promised to give my reasons at a later date and now do so.

[2] There were four applications before the court. Two of the applications (the set aside applications) in BVIHC(COM) 83 of 2017 ("BVI 83") and 213 of 2017 ("BVI 213") were made by Mrs Lakshmi Anil Salgacor (Mrs Salgaocar) in her capacity as administratrix of the Estate of Mr Anil Vassudeva Salgaocar Deceased ("the Estate") to set aside permission granted by Wallbank J at an ex parte hearing on 26 April 2018 to serve proceedings in both actions out of the jurisdiction on Mrs Salgaocar.

(1) The other two applications (the stay applications) were by two British Virgin Islands ("BVI") companies, Winter Meadow Capital Inc (Winter Meadow) and Million Dragon Wealth Limited (Million Dragon) for a stay of the same proceedings brought against them. Million Dragon and Winter Meadow are special purpose vehicles companies(SPVs) which indirectly hold assets located overseas and do not carry on any trading activities in the BVI or elsewhere.

(2) At all material times Million Dragon was the sole shareholder 22 BVI Subsidiary Companies, each of which owned 1 of 22 apartments in a real estate development in Singapore known as Newton Imperial Condominium development and Winter Meadow indirectly owned marine and shipping assets which were employed in the mining shipping and transportation of iron ore from India to China by a businesses controlled by the claimant and deceased.

(3) The principle ground relied on by the Estate to support the set aside applications was it's contention that the BVI is not clearly and distinctly the appropriate forum to bring the claims and that the claimants failed to discharge their burden at the ex

parte stage to show that it was. The principal ground for the stay applications is that the BVI is not the appropriate forum to bring the claims and Singapore clearly is.

(4) Mrs Salgaocar is the applicant in the set aside application and Million Dragon and Winter Meadow are respectively defendants in the actions, and the applicants in the stay applications.

(5) Mr Jhaveria Darsan Jitendra ("Mr Jitendra") along with PD Holdings Limited (PDH) a special purpose vehicle company incorporated in the United Arab Emerites ("UAE") which Mr Jitendra at all material times controlled , are the co-claimants in the actions and the respondents to the set aside applications

(6) I should point out at the outset that in making my decision on the applications, in accordance with my mandate, I must examined the evidence and the law and exercised my discretion afresh.

The questions for resolution were fairly summarized as follows:

(a) whether the Estate should be allowed to relitigate issues that have already been decided by the Singapore High Court in in Anti Suit Injunction Proceedings ("ASI Proceedings")

(b) whether, in any event, BVI 83 and BVI 213 should be stayed against the BVI defendants under the *forum non conveniens* principle

(c) whether service of BVI 83 and BVI 213 on the Estate should be set aside on the basis that the BVI is no the natural forum

(d) whether BVI 83 and BVI 213 should be stayed on "case management" grounds

Background

[3] The Deceased was a successful businessman who amoung other things had mining interests in Goa and Karnataka, India.

[4] Mr Jhaveria Darsan Jitendra (Mr Jitendra) is an Indian Businessman with residency in Hong Kong with close connections in Singapore who at some point engaged in the diamond trade in India. The Deceased and Mr Jitendra were long-standing business partners before his death, however this relationship subsequently unraveled.

[5] In the events which happened there was disagreement in their business dealings. The Deceased claimed that Mr Jitendra held a substantial amount of assets in trust for him and had failed to account for all of those assets despite his written demand that he do so. Consequently in 2015 he issued proceedings in the High Court of Singapore Suit No. HC/S821/2015 (Suit 821) against Mr Jitendra.

Suit 821

[6] In the Statement of Claim (Amendment No. 3) of Suit 821 at paragraph 2 (a – e), the Deceased alleged that an Oral Agreement was struck in or around December 2003 ("the 2003 Agreement") in Honk Kong in the Marco Polo Hong Kong Hotel whereby:

(a) the Deceased would set up special purpose vehicles ( SPV's) for the conduct of businesses and the holding of assets/investments. In particular, establishing SPV's which would be international business companies incorporated in the British Virgin islands for selling iron ore into China. It should be noted that none of these SPVs referred to Million Dragon and Winton Meadow.

(b) the Deceased would be responsible for the provisions of all funds required for the SPVs including for the capitalization making of investments, acquisition of assets, and for all operating and trading expenses. At the same time the Deceased would have complete and unrestricted control of all aspect of the operation of the SPVs' businesses and finance insofar as he desired it

(c) Mr Jitendra would be shareholder and/or director of the SPV's and would hold the shares in the SPV's as the Deceased's nominee shareholder and /or fiduciary and/or alternatively, Mr Jitendra was to hold his positions within the SPVs (including his position as shareholder and/or director and/or bank signatory of the

SPVs) as a nominee and/or fiduciary and/or otherwise for the benefit of or to act on the instructions of the Deceased. Mr Jitendra would act in accordance and comply with any and/ or all instructions from the Deceased as to any actions to be taken on connection with the SPV's (including all monies and/or investments and/or other assets held by the SPV's.

(d) The Deceased would be the sole beneficial owner of all the shares issued in the SPV's (including but not limited to the SPV-BVI Companies) and all monies and/or investments and/or other assets held by the SPVs. Mr Jitendra would hold any interest he may have in the SPV Assets on trust for the Deceased.

(e) In consideration, the Deceased agreed to pay Mr Jitendra US$0.50 for each wet metric ton (WMT) of cargo sold by an SPV-BVI Trading Company on a C&F basis.

[7] In support of his claim, the Deceased entered caveats on the land title register of various properties in Singapore that were owned by Mr Jitendra, his wife, and/or some SPVs. The Deceased claimed that trust monies had been used to purchase those properties, and that he accordingly had a proprietary interest in them. However, in the Caveat Removal Proceedings, initiated by Mr Jitendra, the Singapore Court of Appeal held that the Deceased claim in Suit 821 is only for the shares in the SPV's incorporated in Singapore and not their assets.

[8] Mr Jitendra did not contest the jurisdiction of the Singapore High Court to adjudicate on Suit 821. In a 145 paragraph defence Amendment No 1 dated 30 October 2015 he denied that there was a " 2003 trust agreement", and outlined that he, not the Deceased, funded the SPVs, trading and investment companies.

[9] Mr Salgaocar died intestate on 1 January 2016 before Suit 821 could progress to trial. His death sparked a dispute that arose between Mrs Salgaoar, and Chandana Anil Salgoacar Mr Salgaocar's daughter, over who should be appointed administratrix of the estate. Such litigation was long and protracted and due to the passage of time Mr Jitendra sought to have Suit 821 discontinued but was unsuccessful.

[10] On 16 May 2017 Mr Jitendra issued BVI 83 against the Estate and Million Dragon. On 7 June 2017 Mrs Salgoacar issued an anti suit injunction (OS 627") in Singapore pertaining to BVI 83 in her personal capacity seeking to stop BV183 from proceeding.

[11] On 27 July 2016 Receivers were appointed ex parte over Million Dragon in an unrelated matter. They were discharged from office in October 2018.

[12] On 3 December 2017 Mr Jitendra issued BVI 213 against the Estate and Winter Meadow. Both Million Dragon and Winter Meadow filed an acknowledgement of service but reserved their right to make a jurisdictional challenge which is the subject matter of these applications.

[13] On 22 February 2018 Mrs Salgoacar, the wife of the deceased was appointed by the BVI Court administrator *ad collogenda bona* of the Deceased's estate in the BVI which consisted of shares in Million Dragon and Winter Meadow.

[14] In BVI 83 the claimant claims under an alleged oral agreement ("June 2014 Agreement 1") whereby the deceased agreed to pay back a 'shareholder's loan' made by him through his daughter, the sole shareholder of Million Dragon who at all material times was acting as his nominee. The loan was in the sum of US$41,500,000 and SGD$1,400,000 and the repayment of the loan less amounts that have been received for rent of units in the Newton Imperial Condominiums would serve as the consideration for the purchase of the 22 apartment units located in Singapore he of which was owned by one of the 22 a SPV subsidiaries of Million Dragon. The transfer of the share itself would state a consideration of $1 to avoid stamp duty on the transaction.

[15] In anticipation of the payment of the shareholder's loan, on 8 July 2014 Mr Jitendra's daughter, Jhaveri Pooji Darsan, made the transfer of the 1 share in Million Dragon to the Deceased. However he died before the alleged debt was repaid. Mr Jitendra now seeks a declaration that he is the beneficial owner of the 1 share and an order to rectify the register of Million Dragon to place his name on the Register of members instead of the Deceased's Estate.

[16] The Receivers of Million Dragon who had been appointed on 27 July 2016 have filed a bare denial to the claim.

[17] In BVI 213 Mr Jitendra seeks a declaration that he is the sole beneficial owner of the 2 issued shares in Winton Meadow. The second claimant, P.D. Holdings Limited ("PDH"), seeks a accounting of income received from the portfolios of freighters, tugs, barges, and cranes originally acquired by the first claimant between mid-2006 and the end of 2009 received since 2014, and as against the first defendant, payment of the first claimant's share of the outstanding sum of US$64,673,845.38, and alternatively payment of his share of the Outstanding Sum (as defined in the pleadings) in the sum of US$64,673,845.38 or payment of the PDH's share of the outstanding sum in the sum of US$40,003,948.19.

[18] These amounts arose from monies pleaded to have been spent by Mr. Jitedra to third parties.

[19] As for the claim to the beneficial ownership of the 2 issued shares in Winton Meadow, this also arose out of an alleged oral agreement ("June 14 Oral Agreement 2") entered into in early June 2014 in a telephone call conducted in Hindi whereby:

(a) Legal ownership (but not beneficial ownership) in the 2 shares in Winton Meadow would be transferred to the Deceased for nominal consideration US$1 in total, payable by the Deceased to Mr Jitendra

(b) The Deceased would discharge Mr Jitendra's outstanding debts and PDH's outstanding debts, all of which had been incurred in acquiring assets for the business.

(c) On payment in full of the outstanding sum (US$64,673,845.38 plus US$40,003,948.10 totaling US$104,677,793.57) the beneficial interest would pass from the Mr Jitendra to the Deceased.

[20] According to the pleadings, on 8 July 2014 in accordance with the oral agreement, the legal ownership in the 2 shares in Winton Meadow were transferred to the Deceased in good faith and on the basis of the June 14 Oral agreement. In breach of the oral agreement the Estate has failed to make any payments despite written demand to do so.

Anti-Suit injunction Proceedings

[21] On 7 June 2017, after issue if BVI 83 on 16 May 2017, the Estate of Mr Salgoacar instituted ASI Proceedings in respect of the case BVI 83. As part of its determination of the application Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra [2018] SGHC 90, the High Court of Singapore had to determine whether BVI was the proper forum to hear the issues in BVI 83.

[22] Ramesh J, after hearing detailed written and oral arguments from the parties on *forum non conveniens,* on 1 December 2007 gave a comprehensive judgment with the aid of the familiar authorities on jurisdiction in which he concluded that Singapore was not the natural forum to hear the BVI 83 claim. He said this at [56]

> "*My conclusion on Natural Forum*
> 56. To conclude the analysis on the natural forum element, I held that Lakshmi did not establish that Singapore is the clearly more appropriate forum for the resolution of BVI 83"

[23] He therefore dismissed the ASI Proceedings. An appeal from that judgment was filed with the Court of Appeal of Singapore and was due to be heard in March 2019.

[24] I now turn to the current applications before the court.

The set aside applications

[25] In support of its case to set aside the Order of Wallbank J, the applicants have outlined the following arguments. The court notes in reviewing the judgment of Ramesh J these were the very same arguments submitted to him for consideration, namely:

(a) BVIHCM 83 and 213 have no connection of any substance with the BVI other than the fact that Million Dragon and Winter Meadow are incorporated in the BVI. A dispute between non-residents which is concerned with the ownership of shares in a company registered in the BVI does not, by that fact alone, make the BVI an appropriate forum in which to resolve such disputes (Nilon)[1];

[1] Nilon Ltd v Royal Westminster Investments SA [2015] UKPC 2

(b) Mr Jitendra failed to identify a single material witness who has any connection to the BVI or who is subject to the BVI court's power of compulsion;

(c) Mr Jitendra failed to identify a single material document that is or might be present in the BVI or which might be subject to the BVI court's power of compulsion;

(d) Mr Jitendra failed to explain the overlap between issues raised in BVIHC 82 and 213 and Suit 821;

(e) There are multiple connections between the issues between the parties and their dispute in Singapore, which is the appropriate forum for trial of all the issues;

(f) Mr Jitendra failed to identify any material fact or event which is alleged to have occurred in the BVI and which is alleged to have any bearing on the matters in dispute;

(g) It is not in the interest of the parties, nor the interests of Justice, for there to be parallel proceedings in Singapore and the BVI with the attendant duplication of costs and the risk of inconsistent findings.

## Analysis

### Preliminary issue

[26] As a preliminary issue the respondent argued that as it relates to forum non convieniens these applications contain the same submissions made to and considered by the Singapore Court and therefore are an attempt to "get two bites at the cherry".

[27] He contends that the applicant is estopped from pursuing the forum challenge on the principle of issue estoppel.

[28] It is settled that the judgment of a foreign court can give rise to an issue estoppel (Semnar [No 2] [1985] 1 WLR 490). Issues of fact or law that necessarily were concluded in favour of one party in the foreign proceedings cannot be reopened in further proceedings between the same parties , and the issues may be procedural or interlocutory (Desert Sun Loan Corp v Hill [1996] 2 ALL ER 847).

[29] The forum issues and arguments in BVI 83 and 213 are materially identical to those argued in the Singapore High Court.

[30] In order to create an estoppel the foreign judgment must be:

(a) from a court of competent jurisdiction;

(b) final and conclusive in that is can only be reversed on appeal;

(c) on the merits;

(d) the parties must be the same; and

(e) the issues must be the same.

[31] There is no doubt that the Singapore High Court is a court of competent jurisdiction, indeed Mr Salgaocar initiated the ASI proceedings in Singapore, submitting to the jurisdiction of the court. The judgment of the ASI proceedings was final and conclusive; it could only be reversed on appeal a fact confirmed by the pending appeal initiated by the applicant. The judgment also considered the merits of the issue, as the learned judge considered all the relevant facts, and applied the appropriate principles of law to reach a conclusion. Further, the substantive parties in the ASI proceedings were the same, Mrs Salgaocar and Mr Jitendra.

[32] Mr MacLean QC argued that the parties are different because in the application before the Singapore High Court Mrs Salgaocarwas suing in her personal capacity as she had not yet obtained letters of administration in the BVI. These were not obtained until 22 February 2018. He also argued that the fact that the application is being made at a different time, in November 2018 and not in April 2018 is significant. In my judgment neither argument has merit.

[33] With respect to the parties being different in Johnson v Gore and Wood [2002] 2 AC 1. Lord Bingham outlined the correct approach to take when considering issue estoppel:

> "The correct approach is that formulated by Sir Robert Megarry V-C in *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 where he said, at p 515:
> "Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a

> sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest.' " (underline added)

[34] On the question of the application being made at a different time, the underlying causes of action had already accrued before the first application in April 2018, and have not changed: BVI 83 and BVI 213 are still based on the alleged June 2014 oral contracts, and Suit 821 is still based on the alleged 2003 oral trust.

[35] I am persuaded, following Johnson v Gore, that for the purpose of issue estoppel there was sufficient privity of interest between Mrs Salgaocar suing in her personal capacity in Singapore in April 2008 and now in her capacity as Administratrix of the Estate namely to protect and preserve the assets. The fact that she applied for Letters of Administration *ad colligenda bona* makes that evident.

[36] Having regard to all the circumstances, although an abuse of process does not necessarily give rise to an estoppel, I find that the applications to set aside services outside the jurisdiction in this case are an abuse of this court's process which gives rise to an estoppel on the issue of *forum conveniens*. I therefore dismiss the application on that ground of issue estoppel.

[37] However, if I am wrong I consider the merits of the applications below.

THE THREE STAGE TEST APPLICABLE TO A STAY

[38] In Livingstone Properties Equities Inc v JSC MCC Eurochem (BVIHC MAP 2016.0042-0046) ("Eurochem") the EC Court of Appeal per Webster, JA helpfully set out a three stage test to guide the court in exercising its discretion whether or not to grant a stay of proceedings on *forum non*

*conveniens* grounds. They have been set out, correctly I think, by Mr Landau QC in his written submissions as follows:

(a) The burden is on the party seeking a stay

(b) the first stage: a stay will only be granted if there is another available forum with competent jurisdiction

(c) the second stage: If there is another available forum with competent jurisdiction, it must be shown that that forum is clearly more suitable for the interests of all the parties and the needs of justice. In assessing whether another jurisdiction has the most real and substantial connection, the court will seek to identify which jurisdiction has the most real and substantial connecting factors to the dispute. Where there are pointers to a number of different jurisdictions, there is no reason to grant a stay if jurisdiction in the BVI is founded as of right.

(d) the third stage: Even if another jurisdiction is *prima facie* more appropriate, the court may nevertheless refuse to grant a stay if the justice of the case requires it. In this enquiry, the court will consider all the circumstances of the case, including circumstances which transcend those taken into account when considering connecting factors.

[39] The respondent gave six main reasons to support its contention that BVI is the natural forum to hear and decide BVI83 and 213 to counter those given by the applicant:

(a) Singapore is not an available forum.

The Singapore High Court has ruled (Ramesh, J) that Singapore is not the proper forum for BVI 83 and the same applies to BVI 213. In a situation where there are admittedly only 2 realistic contenders that leaves the BVI. If the court concluded that there was no other available forum which was more appropriate than

the English court it would normally refuse a stay (Spaliada[2]). Likewise this principle should apply to the BVI court.

(b) BVI is the place of performance/breach.

[40] At [40] of Eurochem, Webster, JA following VTB Capital plc v Nutritek[3] identified the place where the torts and breaches were committed as a convenient starting point in deciding on the appropriate forum. In this case the breach in failing to rectify the register of the defendant companies is the BVI.

[41] The claimant argues that the defendant is obliged to return the shares in Million Dragon and Winter Meadow. The place of performance is where the shares are located. The Claim in both Million Dragon and Winter Meadow is the ratification of the share registers. On the authorities this is not a determinate connecting factor and admittedly does not carry much weight, nevertheless, their registered agents are based in the BVI, hence, enforcement would have to be in the BVI because the assets are located in the BVI by virtue of ownership by BVI companies.

(c) The choice of law governing the legal issues likely to arise is BVI law.

[42] At [46] of Eurochem the governing law applicable to the claim was identified as "…an important consideration in determining the most appropriate forum for the trial of the claim…". To conclude that requires a consideration of the issues to be decided. This can be determined from a perusal of the pleadings. It is discussed in more detail below under "Law governing Legal Issues".

(d) the location of witnesses and documents is of limited weight

[43] On the authorities the location of witness is a "core factor" in determining the proper forum. In relation to location of the witnesses and parties in this case it was noted by Ramesh J, and I adopt that view, that:

[2] Spiliada Maritime Corp. v Cansulex Ltd [1987] AC 460
[3] [2013]UKSC 5, [2013] 2 AC

> [52] "There are no strong connections between the parties who might be involved in BVI 83 and Singapore. Mrs Salgacar and Mr Jitendra are Indian nationals who are resident in India and Hong Kong respectively. Million Dragon is a BVI incorporated company."
>
> [53] " …the fact that several potential witnesses are in Singapore is not material." First, the evidence was that BVI law allowed for witnesses to be examined by way of video link. It is settled law that if a forum allows for evidence to be taken by video link, the location of the witnesses may carry little weight in determining the natural forum….

[44] On potential witnesses it was also noted that it was evident that the potential evidence to be given by witnesses was not related to the issue in Suit 821 or the existence and effect of the 2014 Agreement.

[45] For example, of the identified witnesses such as the architects of Newton Imperial and the Deceased's lawyer there is nothing to show that they would have anything relevant to say about the alleged 2014 oral agreements. The only surviving witness in relation to those agreement is Mr Jiterdra and he is willing and able to give evidence in the BI court.

[46] Witnesses from the registered agents Eqiom and Nerine both located in the BVI as required by BVI law are likely to be able to give relevant evidence, and other witness may give evidence by video link which is accepted as well established in the BVI.

[47] As to documents, wherever they are located they would have to be produced to the BVI court during the discovery process.

[48] The location of witnesses and documents are therefore of limited weight.

(e) Both claims concern the beneficial ownership of shares in BVI companies;

This is discussed under “the proper law”.

(f) other factors point to BVI being the natural forum to determine BVI 83 and BVI 213.

[49] These other factors included the central legal issues, the Cambridge shire factor and the existing of parallel proceedings.

Law Governing Legal issues

[50] Mr MacLean QC for the applicant expressed the view that issues of law are unlikely to be of central importance to this case. This is the way he put it in his submissions: “The key issues are likely to be factual rather than legal and in that context the governing law in this case is not a significant factor in the court’s evaluation of the appropriate forum,” Nevertheless he submitted that if the June 2014 oral agreements were entered into it could be inferred that they would have been subject to Singapore law as the *lex* causa because agreements signed by the parties on behalf of Sino Ling and Winton Meadow, and the shareholder’s loan between Mr Jiterdra’s daughter dated 27 March 2014, were expressly stated to be governed by Singapore Law.

[51] Mr Landau QC for the respondents takes a different view. He argued that not only were Mr Jitendra and the deceased not parties to the documents to which Mr MacLean QC referred, but sought to show that on the key issues raised in BVI 83 and BVI 213 one is factual, namely whether or not the deceased and Mr Jiterdra concluded the two oral agreements, and the remaining issues arising out of the statement of claim namely whether the deceased retained the beneficial interest in the shares , and if not, whether he has a restitutionary claim are all governed by BVI law because they are claims in property against the beneficial interest of shares in two BVI companies, and the applicable law regarding title to shares is the *lex situs* (Macmillan Inc v Bishopgate Investment Trust PLc (No. 3) [1996] 1 WLR 387, 405 and 411.

[52] As to the proper law of the two 2014 oral agreements, even though on their face the agreements, if entered into, occurred in Hong Kong or India, in the absence of evidence that the parties agreed to a choice of law to govern the agreement, it would have to be determined by considering the law which has the closest connection to the two agreements. In addition to where the Agreements were concluded, the place of incorporation of Million Dragon and Winter Meadow (BVI), the place of performance being where the deceased was obliged to pay Mr Jitendra (Hong Kong where Mr Jitendra resides), and where the deceased was obliged to return the shares (BVI) also had to be considered. The respondents view on the signed documents expressly adopting Singapore as the proper law is that they did not sign as parties and there is no evidence that the deceased was aware of the law governing the shareholder's loans and it ought not be the premise for imputing the law to the Million Dragon oral agreement.

[53] In summary the proper law of the oral agreements can be said to be the BVI but at worst inconclusive.

The Cambridgeshire factor and Case management

[54] As submitted by the applicant the 'Cambridgeshire' factor is derived from Staughton J's judgment in Spiliada[4] and refers to the potential waste in talent, expert witnesses, effort and money which is inherent when a later complex case is commenced dealing essentially with the same complex matters as an existing prior case and could take advantage of all the preparation and learning from the case started before it. In Spiliada Lord Goff stated that in deciding whether or not to grant a stay it is a matter which should properly be taken into account in appropriate cases in the interest of justice. That factor does not appear to apply here. It does not matter which proceedings were started first. All three of the cases BVI 83, BVI 823 and Suit 821 are at their early stages before discovery. Even though Suit 821 began in 2015, pleadings and discovery had not been completed at the time of these applications. Furthermore in light of the cases having a different focus with different issues there is less likelihood of conflicting judgments.

[4] Spiliada Maritime Corp. v Cansulex Ltd [1987] AC 460

[55] In my judgment the quote from the claimant's skeleton arguments a [101] from the English Court of Appeal case of Racy v Hawila [2001] EWCA Civ as approved by the EC Court of Appeal in Brilla Capital Investment Master Fund SPC Limited v Leeward Isles Resorts and others AXAHCVAP 2013, is apposite: a case management stay should only be allowed in rare and compelling circumstances. In my judgment this is not one of those circumstances. Having regard to all the circumstances a stay would place the claims in BVI 83 and BVI 213 in an indeterminate state of postponement of adjudication.

THE SERVICE OUT APPLICATION

[56] The principle ground relied on by the Estate to support the set aside applications was it's contention that the BVI is not clearly and distinctly the appropriate forum to bring the claims and that the claimants failed to discharge their burden at the ex parte stage to show that it was.

[57] An application for a stay and an application to serve outside the jurisdiction are only two different sides of the same coin of principles. In other words the same principles apply. However, in the case of service-out the burden shifts to the Claimant to show that leave should be granted. In such case the court must consider both the residence or place of business of the defendant and the relevant grounds invoked by the plaintiff when deciding whether to grant leave. In so doing the court is entitled to rely on the nature of the dispute, the legal and practical issues involved and such questions as local knowledge, availability of witnesses and their evidence and expense[5].

[58] The court has given separate consideration to these issues in relation to the defendant for the purpose of deciding whether or not leave should be given to serve out, separate and apart from whether or not a stay should be granted. The discussion under the six reasons, (a) to (f), discussed earlier in this judgment apply with equal force to the application to serve out. Furthermore, the defendant is already an Administratrix appointed by this court, and there is nothing peculiar to the situation of the defendant or of her business relevant to the claims in this case that would tilt the balance in her favour or in that of the Estate (it my well save expenses) to negative the circumstances which show that the BVI is clearly and distinctly the proper forum for the trial of BVI 83 and BVI 213.

[5] Spiliada op cit

## Conclusion

[59] For all the above reasons I dismissed the application to set aside Walbank J's judgment dated 26 April 2018 whereby he found that the BVI was clearly and distinctly the proper forum and gave leave to serve the defendants outside the jurisdiction, and I also dismissed the application to stay the proceedings in BVI actions 83 and 213.

Hon K Neville Adderley
Commercial Judge, Ag,

By the Court

Registrar