IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 2018/154

BETWEEN

[1] WILTON TRUSTEES (IOM) LIMITED
[2] FIDUCIANA VERWALTUNGSANSTALT
(As Trustees of the Erica Settlement)

Claimants

and

[1] AFS TRUSTEE LIMITED
[2] AFS DIRECTORS LIMITED
[3] APPLEGATE FS SA
[4] GEORGE ALAN EVANS
[5] DAVID ROMANO
[6] JEAN-NOEL PASQUIER
[7] FIHAG FINANZ-UND HANDELS-AKTIENGESELLSCHAFT
[8] MARKUS JOOSTE
[9] FORMAL HOLDINGS LIMITED
[10]MALCOLM KING
[11]WELLCOURT INVESTMENTS GROUP S.A.
[12]DEAN INVEST &FINANCE INC.
[13]SHANNON PROPERTIES LIMITED
[14]TREGANNA INVESTMENT INCORPORATION
[15]BAILOR INVEST & FINANCE CORP.
[16]FRANKLAND ASSETS INC.
[17]LENA HOLDINGS CORP.
[18]FREELAND INVESTMENT CORPORATION
[19]DORSET INVESTMENT CORPORATION
[20]GEMONA INVESTMENT CORPORATION
[21]LEXINGTON INVESTMENT CORPORATION
[22]MARYLAND INVESTMENT CORPORATION
[23]MYRON INVESTMENT CORPORATION
[24]NAPIER INVESTMENT CORPORATION
[25]NYRA INVESTMENT CORPORATION
[26]PRIMROSE INVESTMENT CORPORATION
[27]WELLSIDE INVESTMENT CORPORATION

Defendants

Appearances:

Ms Camilla Bingham QC with Mr Mark Forte, Mr Matthew Brown and Ms Allana-J Joseph of Conyers Dill & Pearman for the Claimants

Mr Gerard Clarke with Ms Victoria Thomas of Collas Crill for the First, Second, Twelfth and Thirteenth Defendants

Mr Thomas Plewman QC with Mr Shane Donovan of Mourant Ozannes for the Ninth, Fifteenth, Sixteenth and Seventeenth Defendants

---

2019: March 6
2019: April 15

JUDGMENT

Application for stay of proceedings on the grounds of forum non conveniens – whether the Spiliada principles require "the appropriate forum" to be identified – or whether it is sufficient for an applicant to identify one or more jurisdictions that is "a more appropriate forum" – the relevant connecting factors

[1] GREEN QC J. (Ag.): These are applications by eight of the twenty-seven Defendants for a stay of the proceedings under CPR 9.7 on the ground of *forum non conveniens*. They raise the novel point as to whether Lord Goff of Chieveley's classic formulation of the test in the Spiliada[1] by reference to "*the appropriate forum*" should be interpreted to mean, in a multi-jurisdictional case, "*any other more appropriate forum*". There appears to be no authority post-Spiliada where that has been decided and Ms Camilla Bingham QC appearing for the Claimants says that such an interpretation would be breaking new ground.

[2] The Defendants who make these applications[2] are unable to point to one jurisdiction that is "*the appropriate forum*" for the trial of this action. What they say is that the British Virgin Islands ("BVI") is not the appropriate forum but they cannot even agree between themselves as to the other possible contenders for the appropriate forum. Instead they put forward some options and

---

[1] **Spiliada Maritime Corp v Cansulex Ltd** [1987] 1 AC 460 ("the **Spiliada**")
[2] I will call the Defendants who are the applicants, "the **Defendants**"

say that either one or more of them are "*more appropriate forums*" than the BVI. The difficulties with this approach is illustrated by the following (underlining added):

(1) The Notice of Application dated 1 November 2018 of the Second, Twelfth and Thirteenth Defendants who are represented by Mr Gerard Clarke says: "*It would be more appropriate for the trial of the dispute to take place in either <u>England or Switzerland</u>*"; In the second affirmation of Jean-Noel Pasquier dated 2 November 2018 in support of this application, Mr Pasquier says in paragraph 5: "*I am advised and verily believe that the various allegations made by the Claimants in these proceedings are more suitably dealt with in another jurisdiction<u>, possibly England or Switzerland, or alternatively Jersey</u>. I am advised and verily believe that any of those jurisdictions would be more closely associated with the claim.*"

(2) The Notice of Application of the First Defendant, who is also represented by Mr Clarke says: "*It would be more appropriate for the trial of the dispute to take place in <u>Liechtenstein or in England or in Switzerland</u>*"; In the third affirmation of Mr Pasquier dated 28 February 2019 in support of this application, Mr Pasquier says in paragraph 6: "*If the proper law of the trust is the law of Liechtenstein, then <u>Liechtenstein may</u> be the appropriate forum. <u>England or Switzerland may</u> also be suitable venues for the dispute. Any of these jurisdictions would be more closely associated with the claim than the BVI.*"

(3) The Notice of Application dated 1 November 2018 of the Ninth and Fifteenth to Seventeenth Defendants who are represented by Mr Thomas Plewman QC states: "*The forum with which each of these claims, and the dispute as a whole, has their closest and most real connection is <u>either Switzerland or England</u>.*"

(4) At the hearing, while Mr Plewman QC stuck with England or Switzerland, Mr Clarke, in his oral and written submissions, did still suggest Liechtenstein as well.

[3] While England and Switzerland appear on all the lists, the fact that Liechtenstein and Jersey also appear on some is not a very promising start for the Defendants' application, particularly when it is hedged with words such as "*possibly*" and "*may be the appropriate forum*". Is it good enough to say the BVI is certainly not the appropriate forum or must the Defendants prove that one other forum is *the* appropriate forum? That is the legal question to be resolved on these applications.

The Parties

[4] The Defendants, plus the Eleventh Defendant, have all been served with the proceedings. That is because they are all, save for the First Defendant, BVI companies served as of right in the jurisdiction. The First Defendant is a St Kitts and Nevis company which is also subject to the BVI jurisdiction as of right and has been served under CPR Part 5. In respect of the other Defendants, on 17 January 2019, Adderley J made an order permitting service out of the jurisdiction and the process of serving them is ongoing. Adderley J must have been satisfied in making that order on the Claimants' *ex parte* application that the BVI is "*clearly and distinctly the appropriate forum for the trial of this dispute*."[3]

[5] The Claimants are newly appointed co-trustees of the Erica Settlement which is a discretionary trust established by a Declaration of Trust dated 11 December 1996 ("the Trust"). The Trust is governed by the laws of Liechtenstein. The settlor of the Trust is Israel David Sussman ("David Sussman") who is resident in Israel. The potential beneficiaries of the Trust are members of the Sussman family including David Sussman's son, Ryan and his children, all of whom are resident in London, England.

[6] The assets of the Trust comprise:

(1) Shares in Wellcourt Investments Group S.A., the Eleventh Defendant ("Wellcourt") a BVI company that wholly owns the Fifteenth to Twenty Seventh Defendants ("Wellcourt's subsidiaries"); the Fifteenth to Seventeenth Defendants are BVI companies; the other ten of Wellcourt's subsidiaries are incorporated in Liberia; together they own a total of 106 residential properties in England, valued at approximately US$81 million. (The property business is managed by two English companies called Propfurn Limited, of which Ryan Sussman is the director and beneficial owner, and Cedar Lettings Limited, which is run by Darren Yanover, who is also the Protector of the Trust.)

(2) Shares in the Twelfth and Thirteenth Defendants, both companies that are incorporated in the BVI; and shares in the Fourteenth Defendant which is incorporated in Liberia; the Twelfth Defendant holds an English bank account; the Thirteenth Defendant owns the

[3] This is not the issue that I have to decide on these applications – see below.

residential family home of Ryan Sussman in London; and the Fourteenth Defendant owns the residential family home of David Sussman in Israel.

[7] The First Defendant, AFS Trustee Limited ("AFS Trustee") was until almost a year ago the trustee of the Trust. The Second Defendant, AFS Directors Limited ("AFS Directors") was until around 29 April 2018 the sole director of Wellcourt and Wellcourt's subsidiaries. Both companies are ultimately owned and controlled by the Third Defendant, Applegate FS SA ("Applegate") a company incorporated and carrying on business as a provider of corporate and fiduciary services in Switzerland.

[8] Applegate is majority owned and controlled by the Fourth Defendant, Mr George Evans. Mr Evans has links with Jersey, the United Kingdom and Switzerland. The Fifth and Sixth Defendants, Mr Davide Romano and Mr Jean-Noel Pasquier are directors and minority shareholders of Applegate. They are based in Switzerland and they managed, on a day to day basis, between 2012 and 2018, Wellcourt and the Wellcourt subsidiaries. (Together the First to Sixth Defendants are referred to as the "Applegate Parties".)

[9] The Seventh Defendant, FiHAG Finanz-Und Handels-Aktiengesellschaft ("FiHAG") is a company incorporated in Switzerland. It is an investment vehicle that is alleged to be ultimately owned and controlled by the Eighth Defendant, Markus Jooste. Mr Jooste is a South African businessman who was the Chief Executive Officer of Steinhoff International Holdings NV ("Steinhoff NV"), the holding company of the Steinhoff Group which has a large multi-national retail and furniture business. Steinhoff NV is listed on the Johannesburg and Frankfurt Stock Exchanges. FiHAG is a major shareholder in the Steinhoff Group. In December 2017, Mr Jooste resigned as CEO of Steinhoff NV after an accounting scandal came to light. There have since been allegations of fraud levelled against him and he and Steinhoff NV are the subject of criminal investigations in South Africa, Germany and the Netherlands.

[10] The Ninth Defendant, Formal Holdings Limited ("FHL") is a company incorporated in the BVI and carries on business from premises in Jersey. FHL is ultimately owned and controlled by the Tenth Defendant, Mr Malcolm King, who is a Jersey-based British property developer. Until September 2016, FHL had a substantial shareholding in Steinhoff NV.

[11] For many years, Mr Jooste was a close and trusted family friend of the Sussmans. He is also a long-standing associate of both Mr Evans and Mr King.

[12] The current position in relation to the Trust is as follows:

(1) Even though AFS Trustee has been removed as trustee, it has not yet transferred the assets in the Trust, i.e. the shares in Wellcourt as well as the shares in the Twelfth to Fourteenth Defendants, to the Claimants who are the present trustees;

(2) The Trust's shareholding in Wellcourt has been reduced from 100% to 50%, by the issue of 1000 shares in Wellcourt to FiHAG;

(3) As a result of its alleged ownership of 50% of Wellcourt, FiHAG has been allowed to nominate a director to Wellcourt and the Wellcourt subsidiaries; it has nominated Mr King, the Tenth Defendant, who is now the sole director of Wellcourt and the Wellcourt subsidiaries, as AFS Directors has resigned.

[13] The core complaint of the Claimants is that the current position of the Trust as set out above was brought about by a conspiracy between the First to Tenth Defendants to misappropriate the assets of the Trust, including by the issue of new shares in Wellcourt to FiHAG and the appointment of Mr King as sole director to take control of Wellcourt and the Wellcourt subsidiaries. They say that, with FiHAG in full control of the Trust's assets, the affairs of Wellcourt are being conducted unfairly prejudicially to the Trust. These serious allegations have arisen as described in the next section of this Judgment.

Background to the Dispute

[14] The portfolio of properties owned by Wellcourt and the Wellcourt subsidiaries had been built up over time. The properties were rented out to tenants. Wellcourt's funding came from a loan facility from Investec Bank plc ("Investec"). By around late 2010 there was a shortfall between the rental income being generated from the properties and the interest payable to Investec.

[15] At the time, Mr Jooste was a trusted friend of the Sussman family and highly regarded because of his apparent success at the Steinhoff Group. David Sussman had sold his own retail furniture business to the Steinhoff Group in 2012 and had assisted Mr Jooste in the flotation of Steinhoff NV on the Johannesburg Stock Exchange. As a result of this close relationship, there

were discussions between Ryan and David Sussman and Mr Jooste about him using one of his companies or entities to invest or inject funds into Wellcourt.

[16] Those discussions led to Mr Jooste, largely through FiHAG, injecting just under £9 million to reduce the outstanding debt to Investec and to facilitate the much-needed refurbishment of certain of the properties. They had discussed the ways that this funding should be recognised by the Trust, including that Mr Jooste would eventually acquire a 50% interest in the properties ultimately owned by Wellcourt or the setting up of a joint venture or partnership between the Trust and a trust or entity representing Mr Jooste's interests. However, despite these discussions, no contract, joint venture or partnership was entered into and there was no final binding agreement as to the basis upon which the monies were paid. It is accepted that nothing was reduced into writing in such respect. It is the Claimants' case that no agreement was ever reached in the ensuing years although they do accept that the £9 million was not a gift. The Defendants say that everyone considered they were in a joint venture and that FiHAG is entitled to a 50% interest in the joint venture.

[17] On 10 July 2012, AFS Trustee was appointed as trustee of the Trust, replacing Trident Trust Company (I.O.M.) Limited ("Trident"), although that appointment may be invalid.

[18] In December 2016, a further £25 million was invested into Wellcourt and its subsidiaries. [There are sharply divergent views as to the true source of the £25 million loan and whether it was effectively made in part on behalf of the Sussmans and in part on behalf of Mr Jooste, or just by FiHAG] A loan agreement was signed on 2 December 2016 between FiHAG and the Wellcourt subsidiaries ("the FiHAG loan"). That agreement provided for it to be subject to English law and exclusive English jurisdiction.

[19] On the basis that FHL had allegedly provided the funds for FiHAG to make the FiHAG loan, Mr King has claimed that FiHAG has assigned the benefit of the FiHAG loan to FHL. FiHAG and FHL have started proceedings in the Circuit Commercial Court in Leeds, England against the Wellcourt subsidiaries for repayment of the FiHAG loan. However, because Mr King now controls the Wellcourt subsidiaries, as well as FHL, those proceedings are unlikely to be properly defended.

[20] Following the publicity surrounding the scandal at Steinhoff Group and Mr Jooste, the Sussmans decided that they wished to distance themselves and Wellcourt from Mr Jooste.

Discussions were held to try to arrange a fair and equitable means of securing Mr Jooste's exit from Wellcourt.

[21] However, in March 2018, the Sussmans feared that Mr Jooste was directing Messrs Romano and Pasquier and thereby was seeking to take effective control of the Trust. Accordingly, they requested the resignation of AFS Trustee and for the former trustee, Trident, to take over. They requested that AFS Trustee transfer the Trust's assets to Trident. However, this did not happen. Instead, in a deed dated 26 March 2018, AFS Trustee was removed by the Protector of the Trust, Mr Darren Yanover, who also asked for the assets to be transferred to Trident.

[22] The transfer did not take place. On 5 April 2018 Mr Pasquier informed Trident that the previous trustees had procured the issue of 1000 shares in Wellcourt to FiHAG thereby diluting the Trust's shareholding to 50%. On 27 April 2018, AFS Trustee announced that as 50% shareholder in Wellcourt, FiHAG would be nominating its own director to the Wellcourt board and invited Trident to nominate its own director on behalf of the Trust, as AFS Directors was resigning. FiHAG's new director was then revealed to be Mr King. No new director was appointed by or on behalf of the Trust.

[23] By deeds dated 4 June and 17 July 2018, the Claimants were appointed as trustees. AFS Trustee has refused to transfer the assets to the Claimants because it is insisting that, as a pre-condition of the transfer, it should be granted indemnities to cover its own potential wrongdoing in and since January 2018.

[24] Perhaps unsurprisingly in applications of this sort, the parties emphasise different aspects of the claim in order to strengthen their arguments on appropriate forum. Thus Ms Bingham QC preferred to focus on the relief the Claimants seek in the Amended Statement of Claim to characterise the issues as follows:

(1) The recovery of "*ownership of the Trust assets*" by way of rectification of Wellcourt's share register to show the Claimants as 100% owners of Wellcourt;
(2) The recovery of "*control of the Trust assets*" by removing Mr King as a director of Wellcourt and the Wellcourt subsidiaries and appointing the Claimants' nominee instead;
(3) Whether the Claimants are entitled to damages for breach of trust, dishonest assistance, knowing receipt and conspiracy;

(4) Whether the Claimants are entitled to recover under section 184I of the Business Companies Act ("the Act") on the grounds that the affairs of Wellcourt are being conducted unfairly prejudicially to the interests of the Trust;

(5) Whether the Claimants are entitled to relief in respect of alleged fraudulent misrepresentations made by Mr Evans and Mr Jooste in respect of the FiHAG loan.

[25] By contrast Mr Plewman QC identified the "*real issues between the parties*" as being:

(1) The validity of the appointments of trustees from time to time and the obligations arising from those appointments or their termination;

(2) The relationship between the Sussmans and FiHAG/Mr Jooste and whether they had agreed that 50% of the equity in Wellcourt was to be issued to FiHAG or another entity;

(3) The FiHAG loan and whether it should be set aside for misrepresentation and the consequences thereof.

[26] Mr Clarke submitted that while there are a number of BVI companies as Defendants and therefore shares in those BVI companies are in issue, the decisions upon which the claims are based all took place outside the BVI.

[27] I will come on to deal in detail with the matters in issue, but it seems to me that the factual issues can be divided up as follows:

(1) The terms upon which FiHAG/Mr Jooste provided the initial £9 million in 2011;

(2) The basis upon which the FiHAG loan was made in 2016;

(3) The propriety and validity of the issue of 1000 shares of Wellcourt to FiHAG and the appointment of Mr King as director of Wellcourt and the Wellcourt subsidiaries;

(4) The reasons why the Trust assets have not been passed to the Claimants.

The Legal Principles

(a) "The appropriate forum" or "any more appropriate forum"

[28] The starting point for consideration of the Spiliada principles must be the House of Lords decision in the Spiliada itself.[4] The important point to note is that the Spiliada was a contest between only two jurisdictions: England and British Columbia, Canada. It was also an appeal on an application to set aside leave granted *ex parte* to serve the proceedings out of the jurisdiction, although the House of Lords decided that that did not make any difference to the principles involved.

[29] Lord Goff of Chieveley referred to "*the appropriate forum*" on a number of occasions (underlining added):

> "(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 action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice." [p.476C]
>
> "Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action…"[p.476E]
>
> "The question being whether there is some other forum which is the appropriate forum for the trial of the action…" [p.476F]
>
> "It seems to me inevitable that the question in both groups of cases must be, at bottom, that expressed by Lord Kinnear in *Sim v Robinow*, 19 R. 665, 668, viz. to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice." [p.480G]

The Scottish case of Sim v Robinow, referred to in the above quote, was relied on quite heavily by Lord Goff who held that it also represented the law of England and Wales. Lord Goff quoted from Lord Kinnear's judgment in the case [at p.474C-D] materially as follows:

[4] [1987] 1 AC 460.

"the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."

[30] Where it is a competition between just two jurisdictions, one is likely to be "*more appropriate*" than the other, and this phrase was also used by Lord Goff. Also where one of two jurisdictions is more appropriate, that will be "*the most appropriate forum*" as between the two. The question is whether the test is a relative/comparative one as between two or more forums or whether it is an absolute test where it is necessary to identify the one forum that is "*the appropriate forum*".

[31] Lord Goff touched on a multi-jurisdictional case:

> "Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions (see, e.g., *European Asian Bank A.G. v Punjab and Sind Bank* [1982] 2 Lloyd's Rep. 356), or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum – in *The Atlantic Star* [1974] A.C. 436 (Belgium); in ***MacShannon's*** case [1978] A.C. 795 (Scotland); in *Trendtex* [1982] A.C. 679 (Switzerland); and in the *The Abidin Daver* [1984] A.C. 398 (Turkey). In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum." [p.477C-E]

And at p.478B-C, Lord Goff said:

> "(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay: see, e.g. the decision of the Court of Appeal in *European Asian Bank A.G. v Punjab and Sind Bank* [1982] 2 Lloyd's rep. 356. It is difficult to imagine circumstances where, in such a case, a stay may be granted."

[32] In my view, these extracts indicate quite clearly that the House of Lords considered that the burden was on a defendant to establish that there was another jurisdiction that was both "*available*" and was "*the appropriate forum*" for the trial of the action. There is sometimes reference to the "*natural forum*" as though it is interchangeable with the "*appropriate forum*". Lord Goff said that the "*natural forum*" was "*that with which the action had the most real and*

substantial connection." That is the task of the court, with the burden on the Defendants, to find *the* natural or appropriate forum.

[33] Ms Bingham QC took me to the case of European Asian Bank A.G. v Punjab and Sind Bank[5] which was referred to by Lord Goff, apparently with approval (it was a case decided at first instance by Lord Goff as Robert Goff J). It was a letter of credit case in which the proceedings had been served as of right on the defendant, an Indian bank with a branch within the jurisdiction. The underlying issues had connections with both India and Singapore. In upholding Robert Goff J's judgment, Stephenson LJ said as follows (p.365)(underlining added):

> "I can find no misdirection or error of law to vitiate the Judge's judgment. Indeed he would have erred in law if he had regarded himself as bound to grant a stay once he had decided that England was not the natural forum unless the plaintiff had satisfied him of a real advantage in suing the defendant here. He was right to look for a natural forum, or a clearly more appropriate forum in India or Singapore, and the only questions are whether he was plainly wrong either in rejecting India or Singapore as the natural forum or in rejecting them as not clearly more appropriate than this country. He was, in my judgment rightly, not addressing his mind exclusively to the question whether one of those countries was the natural forum, but whether it was the appropriate or more appropriate, forum, or "the more natural forum" as I think Miss Heilbron, junior Counsel for the defendant, rightly understood his judgment."

Ackner LJ (as he then was) also dealt with this point (p.367):

> "The learned Judge held that this was not a case in which it could be said that either England, India or Singapore was the natural forum in the sense that the case had an overwhelming connection with any of those jurisdictions. This is not in itself surprising, since there are many cases, particularly collisions at sea or where international commercial transactions are involved, where there is no particular jurisdiction which can be classed as the natural forum…He therefore asked himself whether the Punjab Bank had established that there was some other jurisdiction, other than England, which was clearly more appropriate for the trial of the action. He concluded, for the reasons which he gave, that there was not."

[34] Mr Plewman QC took me to the two leading textbooks on private international law. Briggs on Civil Jurisdiction and Judgments (6th Ed.) ("Briggs") deals, in passing, with a possible multi-jurisdiction case (para.4.22):

[5] [1982] 2 Lloyd's Rep 356.

> "First, it is clear that there may be cases in which there is *no* forum which can be said to be the most appropriate forum: this is not fatal to the application for a stay. In an international commercial dispute, there may be points of contact with a number of courts, but distributed in such a way that no single court can be said to be *the* most appropriate forum. That, however, is not what the first limb of the *Spiliada* test requires to be identified. The defendant applying for the stay is required to show that the court to which he points is "clearly or distinctly more appropriate than England" for the trial of the action. If he cannot do so, there will be no stay of the proceedings.[6] But it also follows that, if the other forum *is* clearly or distinctly more appropriate than England, a stay should be granted, or should not be ruled out, even though that forum could not be described as *the* most appropriate forum. At least, it would appear to follow; one can, however, understand that a court might conclude that the defendant had not sufficiently discharged the burden of proof upon him by showing the foreign court to be something less than *the* appropriate forum. To put it another way, although the *Spiliada* test is expressed in comparative terms, it may be understood in more absolute terms.
> Second, it is not obvious that if the defendant can show a court to be clearly more appropriate than England for the trial of the action, he will have identified 'the natural forum'. That expression would suggest that the search is for, and only for, a court which can be shown to be most appropriate for the trial of the action; but in almost every case in which the issue arises for decision, the question is whether the defendant has shown the court outside England, in favour of which he seeks the stay, to be the natural forum.
> Third, there may be cases in which the foreign court is the natural forum, at least when this expression is assessed in terms of the strength of connection between the facts of the particular case and the court or country in question, but where it cannot be said that the foreign court is clearly more appropriate than England for the trial. This may be because the particular dispute is part of a larger picture, which alters the impression. It may also be argued, that the foreign court cannot be more appropriate than England if the foreign country is one in which a fair trial is not possible, for how could it be more appropriate that the trial take place in a corrupt court?
> The terminology of the 'natural forum' has become so embedded in the language of the law that it is useless to object to it. But that does not alter the law: the test is a comparative one, not an absolute one."

[35] With all due respect to a distinguished expert in this field, I find that passage a little difficult to follow. Briggs is attempting to apply the reasoning of the Spiliada to a multi-jurisdiction situation, even though the Spiliada was not such a case. He says on the one hand that if one can rely on Lord Goff's phrase "*clearly or distinctly more appropriate than England*" then it is a comparative test; but that it is also possible to argue that the burden of proof requires the defendant to point to "*the appropriate forum*", which would be an absolute test. He does not actually decide the answer to the question he poses, but he does seem to suggest, perhaps inconsistently, at the end of the passage, that the test is comparative rather than absolute.

---

[6] There was reference made to the **Spiliada** and **European Asian Bank.**

[36] I consider that where Lord Goff refers to a "*more appropriate forum*" it is because he is comparing the other forum just with England. Furthermore, the phrase from Lord Goff's judgment that Briggs relies upon is actually preceded by the words "*to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum*" – i.e. one other forum and this was in the context of considering a multi-jurisdiction case.

[37] In Dicey, Morris and Collins on The Conflict of Laws (15th Ed.) ("Dicey") in footnote 138 to paragraph 12-030, the learned authors state:

> "If there are two such *fora*, both more appropriate than England, a stay may be granted: there is no requirement that one be more appropriate than the other."

However, no authority is cited for that proposition.

[38] Mr Plewman QC took me to a recent decision of Popplewell J in Fundo Soberano de Angola and ors v Jose Filomeno Dos Santos and ors[7] which concerned an application for leave to serve the proceedings out of the jurisdiction and a number of other jurisdictions were put forward as the appropriate forum, including Angola, Mauritius and Switzerland. However, the question before the Court was whether the Claimants could show that England was "*the appropriate forum*" rather than whether any other jurisdiction was. It is therefore of limited assistance.

[39] It is clear that the Spiliada principles have been adopted in the BVI. In IPOC International Growth Fund Limited v LV Finance Group Ltd[8], Gordon JA summarised the Spiliada principles as follows (para.27):

> "(i) The starting point, or basic principle, is that a stay on the grounds of *forum non conveniens* will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In this context, appropriate means more suitable for the interests of all of the parties and the ends of justice.
>
> (ii) The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once the defendant has discharged that burden, the burden shifts to the claimant to show any special

[7] [2018] EWHC 2199.

[8] BVIHCVAP2003/0020.

circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction. Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of a claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that "where there can be pointers to a number of different jurisdictions" there is no reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternative available jurisdiction, and, secondly, to show that that alternate jurisdiction is clearly or distinctly more appropriate than this jurisdiction."

Although this was a two-jurisdiction case between the BVI and Russia, Gordon JA highlighted the passage from the Spiliada dealing with multi-jurisdictions apparently with approval.

[40] In Livingston Properties Equities Inc and ors v JSC MCC Eurochem and another[9] ("Eurochem"), there was again a contest between the BVI and Russia. Webster JA [Ag], after quoting from the IPOC case above, summarised the position further:

> "Briefly stated, when a defendant seeks a stay of an action on the ground of forum non conveniens the court should determine whether there is another available forum (stage 1), and whether that forum is more appropriate for the trial of the case (stage 2). If there is another forum that is more appropriate, a stay should be granted unless there is a risk that the claimant will not receive justice in the more appropriate forum (stage 3). The burden of proof in the first two stages is on the defendant seeking the stay, and on the claimant at the third stage."

This was, of course, a two jurisdiction case and there was no need to consider a multi-jurisdiction situation. I should add that there is no issue between the parties that this is the correct way of dealing with these applications and the burden is on the Defendants at stages 1 and 2 (as defined in Webster JA [Ag]'s judgment but commonly referred to as the first limb) and the Claimants at stage 3 (or the second limb).

[41] In Millicom Tanzania N.V. v Golden Globe International Services Limited and Manji[10], Blenman JA again summarised the applicable principles (underlining added):

> "[45] …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. Spiliada has become the locus classicus on the application of

[9] BVIHCMAP2016/0042-0046.

[10] BVIHCMAP2016/0036.

the principle of forum conveniens in English law. This has indeed been recognised to be the law applicable in the BVI.

[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."

Blenman JA was clearly of the view that the guiding principle is to find "*the appropriate forum*". In the final sentence of paragraph 47, the learned Justice of Appeal was only comparing two jurisdictions when she asked which was the more appropriate. These three judgments from the Court of Appeal are binding on me and, although none of them were dealing with a multi-jurisdictional case, they were clear that the underlying principle is to find "*the appropriate forum*" after having established that it is also available.

[42] That is therefore the basis upon which I intend to approach this case, namely that the authorities establish that unless the Defendants can prove that another forum is available and that it is "*the appropriate forum*" for the trial of this action, I will be refusing to grant a stay. As Ms Bingham QC put it: the Defendants must nail their colours to the mast of one jurisdiction which they can prove is the appropriate forum, otherwise their applications must fail. It will be insufficient for the Defendants to point to a number of alternative forums, each of which they say are "*more appropriate*" than the BVI for the trial of the action. A failure to identify another jurisdiction that is "*the appropriate forum*" means that the Defendants have not discharged the burden on them, leaving the default position to be that the proceedings started as of right in the BVI will continue.

(b) The relevant factors for determining "the appropriate forum"

[43] The foreign court must itself have jurisdiction to try the claim. If it does not, then it is not an "*available*" jurisdiction. If the foreign court does not have jurisdiction against the defendants as of right, then availability may be satisfied by an undertaking from the defendants to submit to the jurisdiction of the foreign court: see Lubbe v Cape plc[11]. It was only at the hearing that both sets of Defendants offered to submit to either England or Switzerland if a stay is granted. Ms Bingham QC says that the fact that the Defendants have to submit to whichever foreign jurisdiction turns out to be the appropriate forum provides further evidence that that jurisdiction is unlikely to be the appropriate forum. In my view this does add to the problems facing the Defendants in this case.

[44] In determining the factors that are relevant to the appropriateness of a jurisdiction, it is helpful to go back to the Spiliada, at p.477H where Lord Goff said this:

> "…I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in *The Abidin Daver* [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction … and the places where the parties respectively reside or carry on business."

[45] It is recognised by the Claimants that international commercial disputes often do not have a single or natural centre of gravity. The main factors to consider in this respect are always: the location of witnesses and documentary evidence; language; the place(s) where the matters at issue took place; the law governing the claims; and other factors affecting convenience and expense.

[46] Just because the ultimate relief can only be granted in the BVI does not necessarily mean that the BVI is the appropriate forum. For example, in Nilon Ltd v Royal Westminster

[11] [2000] 1 WLR 1545.

Investments SA[12], ("Nilon") there was a claim brought in the BVI for rectification of the share register under s.43 of the Act (as in this case). The claim for rectification involved consideration of the underlying dispute between the parties which concerned whether an oral joint venture agreement had been entered into which included a promise to allot shares in the BVI company, Nilon Ltd. Lord Collins, giving the Judgment of the Board, held that there was no right to bring proceedings for rectification until the underlying dispute had been resolved. That disposed of the appeal but Lord Collins did go on to consider the subsidiary question of *forum non conveniens* and he held that the BVI was not the appropriate forum for trying the underlying dispute (this arose on an application for leave to serve out and so the burden was on the Claimant to prove that the BVI was the appropriate forum). At para. 66, Lord Collins said this:

> "66. The reality of the matter is that, apart from the fact that the claim is that Mr Varma made a promise to allot shares in a BVI company, and that if they are successful the Mahtani parties may obtain an order that Mr Varma procure the allotment or transfer to them of shares in Nilon, the issues have nothing to do with the BVI at all. The alleged contract was made in England, the company was to be managed from Jersey, the underlying business was concerned with Nigeria and India, the operating companies would be in Nigeria, the witnesses (including Mr Mata and Mr Surana, the managing director and secretary of Nilon, and who were said to be involved in the formation and performance of the Joint Venture Agreement) would be mainly in England. The documents are in England or Jersey. There is no suggestion that there are any witnesses or documents in the BVI, or that there is any connection with the BVI other than as the place of Nilon's incorporation."

[47] Similarly, in Anjie Investments Ltd v Tian Li Holdings Ltd[13] ("Anjie Investments") the claim was for rectification of the register of a BVI company following on from a declaration as to the ownership of the shares which was itself based on allegations of fraudulent misrepresentations that had led the claimants to appoint new directors and to transfer shares. The claimants argued that the relevant wrong was the removal of the claimants from the share register in the BVI. The Court of Appeal overturned the first instance Judge and ordered a stay of the proceedings on the grounds of *forum non conveniens*. Gonsalves JA [Ag] said at para. 41:

> "[41] …The substantive dispute that will engage a court in a trial of this action will center on whether the Documents executed by the respondents in Hong Kong are null, void and of no effect, and if they are of any legal effect, whether the respondents are

[12] [2015] UKPC 2.
[13] BVIHCMAP2016/0003.

entitled to rescission on the ground of fraudulent misrepresentation. Very little if anything at all will turn on the respondents' identified "wrong" constituted by the acts of removal of the respondents from the Company's Register of Members and the entry of the name of the appellant therein (the "register entry wrong"). The "register entry wrong" would have, at best, constituted a resultant or ancillary wrong. It would not have encapsulated, from a trial perspective, the primary wrong relative to the substantive dispute for determination by the court."

[48] The same point was succinctly made by Lord Collins in another Privy Council appeal from the BVI in Texan Management Ltd v Pacific Electric Wire and Cable[14]:

> "[90] There is nothing in the point that only the BVI court could make orders with regard to the shares in BVI companies. It is true that only the BVI court can make an effective order for rectification of the share register, but if PEWC succeeds in Hong Kong it is certain that there will be issue estoppels which will enable it to obtain any necessary relief in the BVI."

[49] These principles also apply to unfair prejudice applications, which is part of the relief sought by the Claimants in this case. In Re Harrods (Buenos Aires) Ltd[15] there was a claim of unfair prejudice in an English company that operated solely in Argentina. Leave to serve out was given at first instance but an appeal from that decision was allowed by the Court of Appeal on the basis that the Argentine court was a more appropriate forum notwithstanding that the particular cause of action and relief would not be available in Argentina. It was held that the petitioner could get "*substantial justice*" in Argentina. This decision was applied in the BVI in Febvre Company Limited v Grape Expectations SA[16].

[50] As to convenience and the interests of the parties, it is clear that the location of witness is a central consideration in many cases. In paragraph 61 of Eurochem, Webster JA [Ag] said:

> "[61] The importance of the availability of witnesses in a forum application cannot be underestimated. In Nilon Limited and others v Royal Westminster Investments SA, a Privy Council decision on appeal from the BVI, Lord Collins said of the issue of witnesses:
>
> > "In the search for the appropriate forum the question of the location of witnesses will be an important factor and has been described as a

[14] [2010] 4 LRC 1.
[15] [1992] Ch 72.
[16] BVIHCV2006/0168.

core factor: VTB Capital Plc v Nutritek International Corporation [2013] UKSC 5 at para 62, per Lord Mance."

[51] This was also emphasised in paragraph 63 of Anjie Investments, where Gonsalves JA [Ag] said:

> "[63] …The location of the witnesses was not simply a factor but was a core factor and its importance was not to be diluted by a consideration that BVI incorporators should expect to have to travel to the BVI to attend court proceedings, as the context of that latter consideration was inapplicable to the nature of the underlying claim in these proceedings…"

The latter point as to BVI incorporators was also dealt with by Lord Collins in paragraphs 59 and 60 of Nilon.

[52] Finally, although disputes about the internal management of companies would normally have the place of incorporation as the appropriate forum for resolution of those disputes, nevertheless it is necessary to analyse the claims carefully to determine if that is what the real disputes are about – see generally three judgments of Lord Collins (or Lawrence Collins J as he was in the first two) Konameni v Rolls Royce Industrial Power (India) Ltd[17]; Republic of Pakistan v Zaidari[18]; and Nilon. It is therefore necessary to identify what is the real substantial dispute between the parties, to which I now turn.

The substantial dispute between the parties

[53] Mr Plewman QC submitted that there are three real issues between the parties, the first one being the "*validity of the appointments of trustees of the Trust from time to time*". (The other two related uncontroversially to the alleged joint venture between the Sussmans and FiHAG and the FiHAG loan.) Mr Clarke, who is acting for the original trustees, does not identify this as a core issue.

[17] [2002] 1 WLR 1269.

[18] [2006] EWHC 2411.

[54] Mr Plewman QC took up 14 paragraphs (6 pages) of his skeleton argument and a substantial portion of his oral submissions explaining the intricacies surrounding the various appointments of trustees over the years and the potential invalidity of some or all of those. I imagine that this was because unquestionably these issues would not be governed by BVI law, but he could not say whether it would be governed by Liechtenstein, Manx or Jersey law. He does not put forward any of these jurisdictions as the appropriate forum. He also submitted that all relevant witnesses and documents are outside the BVI and so the BVI is "*not remotely an appropriate forum*". He concluded that "*Orders against trustees (or erstwhile or ostensible trustees) are made in personam, and the forum where they are domiciled is the natural and appropriate forum"*. I am not sure which forum is being identified in that last quote as although the individuals behind AFS Trustee may be located in Switzerland, AFS Trustee itself is a St Kitts and Nevis company.

[55] In any event, I do not consider that this issue is one of the real substantive issues as disclosed by the Amended Statement of Claim. It would seriously mischaracterise the claim to conclude that the validity or invalidity of the appointments of trustees is a core issue. Unquestionably breaches of trust in 2018 around the issue of Wellcourt shares and the appointment of Mr King are core issues. But Mr Plewman QC's first core issue is not one, in my judgment.

[56] Ms Bingham QC says that the "*heart of the dispute is ownership and control of shares in a BVI company*", namely Wellcourt. She goes on to say that as the shares are located in the BVI (see s.245 of the Act) the "*central aspect of the dispute concerns the ownership of property in the BVI*".

[57] Mr Plewman QC and Mr Clarke by contrast say that the underlying claims in respect of the shares in Wellcourt involve the determination as to whether a joint venture was entered into by the parties and, if so, the terms agreed. The claims to rectify the register or to transfer the shares to the Claimants; to remove Mr King as a director; to bring derivative proceedings under s.184I of the Act; and a number of other claims are all in reality dependent on the determination of the central issue as to the terms upon which £9 million was injected into the structure by or on behalf of Mr Jooste in 2011. Also the key decisions made by the trustees in relation to the issue of the Wellcourt shares to FiHAG and the appointment of Mr King which form the subject matter of the breach of trust claims all took place outside the BVI and are similarly dependent on the resolution of the joint venture issues.

[58] On this, I prefer the characterisation of the issues as submitted on behalf of the Defendants. It is similar to the point made by Lord Collins in Nilon, that while the ultimate goal is to get ownership and control of shares in BVI companies, the only means of achieving that is by a trial that resolves the underlying dispute as to the existence and terms of the joint venture. That is not to say that BVI is not the appropriate forum for a trial of that action but it is to recognise that the real substantive dispute between the parties concerns the basis upon which some £9 million was injected into Wellcourt and the Wellcourt subsidiaries.

[59] The relief that is sought in relation to the FiHAG loan claims are:

(1) Rescission for fraudulent misrepresentation;
(2) An anti-suit injunction against the Leeds proceedings; or
(3) A declaration that FiHAG and FHL hold the FiHAG loan on trust as to 50% for the Claimants or alternatively that they are liable as constructive trustees in respect of it.

[60] There is no dispute that this depends on the facts surrounding the source of the £25 million and in particular what was said at a meeting between the Sussmans and Mr Jooste and his son at an Italian restaurant in London on 23 October 2016 and then a meeting on 18 October 2017 in Israel between the Sussmans, their accountant and Mr Evans. At the latter meeting a one-page document was produced by Mr Evans in relation to the proceeds of the sale of Steinhoff shares but there are divergent interpretations of that document and Mr King has since said that the document was false. The loan agreement itself was subject to English law and jurisdiction and the alleged fraudulent misrepresentations were made outside the BVI.

[61] The claims for damages for breach of trust, dishonest assistance, knowing receipt and conspiracy are all to a certain extent dependent on the resolution of the underlying substantive issues referred to above. I draw attention to the fact that two of the five entities sued for damages are BVI companies (AFS Directors and FHL); and one is a St Kitts and Nevis company (AFS Trustee).

The Connecting Factors

[62] There is no doubt that there are a number of jurisdictions with which parts of the claims are connected. As I have said above, I need to be persuaded by the Defendants that there is one jurisdiction which has sufficient relevant connecting factors to make it the appropriate forum. I will deal with the connecting factors in the following order:

(a) The location of witnesses and language;
(b) Place of commission of alleged wrongs;
(c) Governing Laws;
(d) Other matters of convenience.

(a) The location of witnesses and language

[63] On behalf of Mr King and the Fifteenth to Seventeenth Defendants, Ms Saraid Taylor made a witness statement dated 1 November 2018 in support of their application (**"Ms Taylor's** witness statement"). In that she said:

> "The witnesses will be located in Switzerland, England and Jersey (and possibly Israel and South Africa)."

[64] Ms Bingham QC accepted that this is a relevant factor but somewhat dismissively called it an "air miles point", meaning that most of the witnesses are going to have to travel somewhere from their home location, so going to BVI simply means they have to go further. Furthermore, she says that the fact that most witnesses are based in Europe rather than the Caribbean is irrelevant as "Europe" is not a relevant jurisdiction for the purposes of considering the *forum non conveniens* doctrine. However, this is a matter of convenience for the parties generally and I do consider it to be relevant that the witnesses are concentrated in Europe, within which is located all of the suggested appropriate jurisdictions for the trial.

[65] I do also consider that it is of relevance that English is a common language for all potential witnesses. In fairness, Mr Plewman QC conceded that this was a disadvantage of Switzerland as the appropriate forum, as not only would most of the witnesses require translators into French but also all the inevitably voluminous documentation would have to be translated into

French. This would all add considerably to the length and expense of the proceedings which is not in the interests of any of the parties.

(b) Place of commission of the alleged wrongs

[66] The wrongs alleged in the Amended Statement of Claim are:

(i) Breaches of trust, dishonest assistance, knowing receipt and conspiracy;

(ii) Deceit or fraudulent misrepresentation;

(iii) Unfair prejudice under s.184I of the Act.

[67] Ms Taylor's witness statement said in this respect:

> "Any breach of trust will have occurred in Switzerland where those providing the relevant trust administration were based."

In relation to the tort claims, she said:

> "The place of commission of the alleged torts will have been Switzerland, Jersey or England, where the relevant individuals were based."

[68] It seems to me that this is pure speculation and that it is not safe to assume at this stage that relevant decisions were necessarily and substantively taken in the place where the individuals who took those decisions reside. In paragraphs 44 to 45 of Eurochem the Court of Appeal made the same point.

[69] The Claimants plead that the decisions for and on behalf of AFS Trustee were part of the conspiracy between Mr King, Mr Jooste and the Applegate Parties, including Mr Evans. Mr King and Mr Evans are predominantly based in Jersey, Mr Jooste is South African and Messrs Pasquier and Romano are in Switzerland. But they all obviously travel regularly and it cannot be said where they all were (they could have been in different places) when the impugned decisions were taken. What can definitely be said is that the result of those decisions was the issue of shares in Wellcourt to FiHAG and the appointment of Mr King as a director of Wellcourt

and the Wellcourt subsidiaries and all those actions had to take place in the BVI.

[70] As to the claims based on deceit/fraudulent misrepresentations in relation to the FiHAG loan, the representations were said to have been made at the meetings in England and Israel. The loan agreement was actually signed in Geneva, Switzerland.

[71] The claim under s.184I of the Act is based on alleged unfair prejudice in the conduct of Wellcourt's affairs by AFS Directors in issuing 1000 shares to FiHAG and allowing Mr King to be appointed as the sole director of Wellcourt and the Wellcourt subsidiaries. AFS Directors is a BVI company as is Wellcourt. Where Wellcourt's affairs were managed and where decisions were made on its behalf is unclear.

[72] Therefore, the place of the commission of the alleged wrongs is inconclusive and there appears to be no single jurisdiction where it can be said that the wrongs were committed.

(c) The Governing Laws

[73] While governing laws may not turn out to be a significant feature of the disputed issues at trial, it is relevant to consider this question to see if that inquiry yields a predominant jurisdiction that may be a strong connecting factor.

[74] Breach of trust claims are governed by the law of the Trust, which is Liechtenstein – see Rule 168 of Dicey. This was the basis for Mr Clarke's suggestion that Liechtenstein was the appropriate forum – "*the jurisdiction of the proper law of the trust must be a strong contender as an appropriate forum*". Mr Plewman QC did not endorse that statement. Obviously Liechtenstein would have the same substantial defects as Switzerland, although it operates in another language, German.

[75] The Claimants obtained short opinions from a Liechtenstein lawyer, Mr Andreas Schurti of Walch & Schurti and from a Swiss lawyer, Professor Andrew Garbaski of Bar & Karrer. These opinions show that the Liechtenstein law of trusts is similar to that of the BVI, meaning that issues that may arise in the course of these proceedings in relation to the Liechtenstein law of trusts would be able to be resolved by the BVI judge with the benefit of expert evidence. By contrast, there is no specific domestic law on trusts in Switzerland, even though it has ratified

the Hague Convention on the Law Applicable to Trusts and their Recognition. Therefore, if these claims had to be tried in Switzerland, there could be substantial problems with the court having to grapple with alien concepts of Liechtenstein trust law and the claims that flow from breach of trust, such as knowing receipt and dishonest assistance. Accordingly, the fact that Liechtenstein is the governing law for breach of trust claims would be a factor against Switzerland being the appropriate forum.

[76] The dishonest assistance and knowing receipt claims are treated in the BVI as restitutionary claims for the purposes of choice of law rules. Restitutionary claims are normally governed by the laws of "*the country with which the obligation has its closest and most real connection*" – see paragraphs 51 and 54 of Eurochem. That could be the BVI because of the situs of the Wellcourt shares; alternatively it could be said that FiHAG received those shares in Switzerland which is where FiHAG was incorporated.

[77] The governing law of the tort claims is also not straightforward. In paragraph 52 of Eurochem, Webster JA [Ag] referred to the double actionability rule and the exception to it, originating in Philips v Eyre[19], and as explained by the House of Lords in Boys v Chaplin[20]. I do not need to decide whether, as a result of double actionability, the BVI court will apply BVI law or whether it may, under the exception, look to the country which has the most significant relationship with the occurrence and the parties. There is no reliable evidence as to where the alleged conspiracy was hatched and the alleged misrepresentations were made in England and Israel and apparently acted on in Switzerland. Any damage sustained as a result of the torts was possibly sustained in Liechtenstein as the seat of the Trust.

[78] The unfair prejudice claims are brought under the Act and are therefore governed by BVI law.

[79] Accordingly, there is not much assistance to be gained from looking at the governing law or laws as such laws cannot be determined at this stage and, in any event, there are likely to be a number of different governing laws in respect of the issues arising in the proceedings. It therefore does not provide a connecting factor with any particular jurisdiction.

[19] (1870) LR 6 QB 1.
[20] [1971] AC 356.

(d) Other matters of convenience

[80] Ms Bingham QC also points to the fact that the Claimants and the Defendants who make these applications have already marshalled legal teams in the BVI and have invested significant sums in getting those lawyers up to speed on the proceedings. The Claimants applied in September 2018 for the appointment of a receiver over Wellcourt's shares. After a contested hearing, Adderley J adjourned the application. Mourant Ozannes acted for FiHAG, FHL, and Mr King and filed detailed evidence on their behalf in the receivership application. Collas Crill similarly acted for the Applegate Parties and the Twelfth and Thirteenth Defendants and they filed their own extensive evidence on the receivership application.

[81] While this is a relevant factor, I do not think it is a particularly strong one, as they were effectively forced to do this.

Conclusions

[82] Mr Plewman QC said in his skeleton argument that:

> "there are (at least) two alternative forums for the trial of this dispute, both of which are available and either of which would be more appropriate for trial than the BVI: England and Switzerland."

That is clearly insufficient to identify one jurisdiction that is "*the appropriate forum*". I asked Mr Plewman QC what the factors were in favour of each of England and Switzerland and he said the following:

In relation to England, his list was:

- The properties are there
- Ryan Sussman is resident there
- The misrepresentations were made there
- The FiHAG loan is subject to English law and jurisdiction
- The Leeds proceedings
- English language and easily accessible for all witnesses

In relation to Switzerland, his list was:

- FiHAG is Swiss
- The directors and managers of AFS Directors are based there
- All relevant decisions and breaches of trust etc took place there
- It is accessible for witnesses (although language was a problem).

[83] As against that Mr Plewman QC said that the only connection with the BVI is that the alleged breach of trust concerned shares in a BVI company, Wellcourt.

[84] Mr Clarke was also advocating for Liechtenstein on the basis that it is the proper law of the Trust. He too said that there is no real or substantial connection with the BVI and the case law shows that the mere fact that some Defendants are incorporated in the BVI and that the claim concerns shares in a BVI company are insufficient to make the BVI the appropriate forum.

[85] Ms Bingham QC says that the more the Defendants identify factors favouring one jurisdiction, the more it detracts from the other. There is something in that. The application seems to me to have been fatally flawed from the start because of the Defendants' inability to point to a jurisdiction other than the BVI that was "*the appropriate forum*". It is clear that there are connections with a number of jurisdictions but that does not mean that one of them must be "*the appropriate forum*".

[86] This case can be distinguished from cases such as Nilon, Eurochem and Anjie Investments in which the BVI connection was tangential to the real underlying dispute, which was a claim of breach of contract, fraud or misrepresentation. The subject matter of the dispute may have been shares in a BVI company, whose register might ultimately have to be rectified as a consequence of the resolution of the main dispute but, if that is the only connection with the BVI, it is a weak one.

[87] In my view this case is different in that it is not just about rectification of Wellcourt's register. The underlying claims of breach of trust are made against AFS Trustee, a St Kitts and Nevis company, in respect of AFS Directors, a BVI company. In other words, there is a serious and substantial claim made against a BVI and St Kitts company for damages and an account. Furthermore, the breach consisted of carrying out acts in the BVI by issuing shares in Wellcourt and arranging for the appointment of Mr King as a director of Wellcourt and the Wellcourt subsidiaries. That is not a weak connection with the BVI.

[88] AFS Trustee and AFS Directors are also alleged to be parties to the conspiracy and to be liable for dishonest assistance. This is together with another BVI company, FHL. So again, there are substantive claims brought against BVI defendants. FHL is also subject to the FiHAG loan claims and obtaining an anti-suit injunction from the BVI Court may be the only way to stop the Leeds proceedings. The unfair prejudice and trust derivative claims under s.184C and 184I of the Act can only be brought in the BVI and concern the conduct of the affairs of a BVI company, Wellcourt.

[89] I accept, of course, that much of the actual decision-making took place outside the BVI but, as the Defendants have demonstrated, there is no one place they can point to as the appropriate forum. In the circumstances, it seems to me to be perfectly credible to conclude that the BVI is the natural and appropriate forum for the trial of these claims, particularly because, so far as the Claimants are concerned, these proceedings are about regaining ownership and control of the Trust assets, which are shares predominantly in BVI companies.

[90] BVI proceedings are conducted in English which is convenient for everyone involved and in particular the witnesses. I think, in the end, that Ms Bingham QC was right that the only reason the Defendants really had for objecting to a trial in the BVI was the "air miles point" and that, in my view, is not a very strong reason.

[91] For all of the reasons I have set out in this judgment, I find that the Defendants have not discharged the burden on them to show that there is another jurisdiction that is "*the appropriate forum*" for the trial of this action and accordingly their applications are dismissed.

[92] I am grateful to all Counsel for their helpful written and oral submissions.

Hon Mr Justice Michael Green QC
Commercial Court Judge [Ag]

By the Court

Registrar