Neutral Citation Number: [2018] EWHC 380 (Comm)

Case No: CL-2017-000542

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21st February 2018

Before :

Mrs Justice Cockerill

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Between :

UCP Plc	**Claimant**
- and -	
Nectrus Limited	**Defendant**

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- -

Mr Huw Davies QC, Mr Felix Wardle (instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) for the **Claimant**
Prof. Dan Sarooshi, Mr Andrew Legg (instructed by **Hugh Cartwright & Amin**) for the **Defendant**

Hearing dates: 21st February 2018

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Approved Judgment

MRS JUSTICE COCKERILL Wednesday, 21st February 2018

(11.54 am)

Ruling by MRS JUSTICE COCKERILL

1. This is a hearing to determine the application of the defendant, "Nectrus", under CPR 11(b). Nectrus seeks an order either that this court should not exercise its jurisdiction over the claim brought in this court or that the court should stay the proceedings under CPR 11.(6)(d) or CPR 3.12(f) pending resolution of a claim which is currently proceeding in the Isle of Man and to which I will generally refer as "the Manx claim".

2. Nectrus asks the court to decline its jurisdiction in this case because it says, firstly, that the courts of the Isle of Man are the most appropriate forum to determine the matters in dispute and/or secondly that the courts of the Isle of Man were first seised in relation to the proceedings and the claimant has indicated its intention to rely on the same issues raised in the present proceedings as a defence to the Isle of Man proceedings.

3. The claimant, "UCP", opposes the application. It submits that the application should be dismissed for, in summary, the following reasons: firstly, that the claim underlying this application is made pursuant to a contract which contains a non-exclusive jurisdiction clause in favour of the English courts which falls within the scope of Article 25 of Brussels 1 Regulation Recast. It therefore submits that the court has no jurisdiction under the Regulation or otherwise to stay or decline jurisdiction in favour of the Isle of Man in these circumstances, and it says that the operation of Brussels I Regulation Recast requires the application to be dismissed.

4. It then says, secondly, that even if the common law applied, the parties have agreed via the non-exclusive jurisdiction clause that the English court should have jurisdiction over disputes arising out of the Investment Management Agreement dated 14 December 2006 ("the IMA") which is the subject matter of the claim in this court. It therefore says that UCP is to be treated as having founded jurisdiction here as a matter of right. As a consequence of that, it says that as a matter of law, Nectrus is required to identify overwhelming, or at least very strong reasons for departing from the usual rule that parties should be held to their contractual choice. It says that the reasons relied on do not meet this test, and therefore the application would fall to be dismissed on this basis as well.

5. Thirdly, it says that the normal *Spiliada* test is not appropriate to this application as a result of the previous points, but even if it were and the court were to apply the *Spiliada* test, the application would still fall to be dismissed. This is on the basis firstly that Nectrus has not identified another forum that is available to hear the English claim; on the contrary, it argues that the forum it has identified as more appropriate is not available, and that is fatal to the argument that the court should stay the English claim or decline jurisdiction in favour of the Manx courts. Secondly, it says even if the Manx courts were available, it is not correct that Nectrus can pass the hurdle of saying that the Isle of Man is clearly a more appropriate jurisdiction for the English claim, taking into account, inter alia, that the IMA is an English law governed contract with non-exclusive jurisdiction clause.

The factual background

6. The starting pointing here is the factual background, which is somewhat complicated. In summary, both parties say that they have good claims against the other, and that the other has been guilty of tactical fancy footwork in the history of the dispute to date. I express no views about either of these points.

7. UCP is an Isle of Man company which is and was in the business of investing in the Indian real estate sector and in the IT sector through its subsidiary, Candor, a company incorporated in Mauritius. Pursuant to the IMA, UCP and Candor engaged Nectrus, a Cyprus-based company, to provide Candor - and thus, it is said, UCP - with real estate investment advisory services and related advice. Under the IMA, Nectrus received management and performance fees, a portion of which were required, following an amendment to the IMA in 2009, to be used by Nectrus to purchase UCP shares. Consequently, it holds a 13.62 per cent beneficial shareholding in UCP through some nominee companies known as Luna and Lynchwood, both of which are incorporated in England and which are not contracting parties to the IMA.

8. The IMA is an English law-governed contract which contains a non-exclusive jurisdiction clause in favour of the English courts by virtue of clause 10, which provides:

> "Governing law and dispute resolution procedure
> 10.1 This Agreement shall be governed by and construed in accordance with the laws of England.
> 10.2 The courts of England shall have non-exclusive jurisdiction to settle any claim or dispute arising out of or in connection with this Agreement or the legal relationships established by this Agreement."

9. As I have already noted, the IMA was amended by a Deed of Amendment dated 25 August 2009. That deed also is governed by English law; it also contains a non-exclusive jurisdiction clause in favour of the English courts in clause 5.2, which says:

> "The courts of England shall have non-exclusive jurisdiction to settle any claim or dispute arising out of or in connection with this Amendment Deed or the legal relationships established by this Amendment Deed."

10. It is UCP's case that between 2012 and 2014, certain funds known as "the Stranded Deposits" that belonged to UCP's subsidiaries in India and which were managed and/or monitored by Nectrus, and which ought to have been the subject of its reporting, monitoring and advice under the IMA, were improperly invested within entities in India and not returned to UCP's subsidiaries on maturity or when called for. UCP contends that Nectrus is responsible for the Stranded Deposits by virtue of its breaches of the IMA. It is this claim which forms the basis of UCP's claim against Nectrus in the proceedings underlying this application.

11. The dispute about the Stranded Deposits has been live since 2014. On 17 September, a letter was sent to Nectrus on behalf of UCP and Candor setting out Nectrus' obligations under the IMA and asserting that Nectrus had breached those obligations in respect of the Stranded Deposits. In particular, that letter said:

> "[Y]our obligations to UCP and Candor under the IMA are to monitor and advise (...); to provide asset management advice in relation to the Portfolio; to monitor compliance with Investment Policies and Procedures; to review borrowing terms and to consider and

> identify financing options. In breach of these obligations, you allowed funds of the Investee Companies to be improperly placed on deposit (or invested) such that those funds (the Stranded Deposits) now cannot, apparently, be returned. Had you complied with your obligations, we would not have permitted such conduct."

12. Nectrus was informed that its breaches of the IMA as at that date had, in the view of UCP and Candor, caused loss in the amount of 60 per cent of the Stranded Deposits. In November 2014, shortly thereafter, UCP sold Candor to a third party, Brookfield Strategic Real Estate Partners India Office Holdings Pte Limited ("Brookfield"). The total price paid by Brookfield is said to have been reduced by £15.8 million to reflect Candor's 60 per cent interest in the Stranded Deposits.

13. The shareholders of UCP approved a declaration on 22 December 2014 to distribute the proceeds of sale of Candor. Nectrus says that it, through Luna and Lynchwood, prima facie had become entitled to payments in excess of £24 million as a result, and this is not in dispute. However, because of the position regarding the Stranded Deposits, UCP notified Nectrus on 24 December 2014 that its losses had crystallised, and it said that it put Nectrus on notice that the purchase price paid was impaired in the amount of the Stranded Deposits plus interest at the amount of £15.8 million. In January 2015, UCP made a shareholder distribution arising from the sale of Candor to Brookfield. On 16 January and 23 January 2015, UCP notified Luna and Lynchwood that it would be withholding c. £18 million from the shareholder distribution to reflect the value of the Stranded Deposits, plus an estimate of the costs of recovery of the Stranded Deposits plus interest.

14. So far relevant, the letter of 16 January which was sent to Luna stated:

> "We have outstanding claims against Nectrus Limited with respect to significant damages resulting from breaches by Nectrus Limited of an Investment Management Agreement (...) We have notified Nectrus Limited of such claims and of the fact that as a result of such breaches, the Company suffered a loss which, as of 19 December 2014, represented an amount in excess of (...) with contractual and commercial interests and costs (...) continuing to accrue.
> In the light of the amount of our outstanding claim against Nectrus Limited, we hereby inform you that we are withholding the entire distribution of Cash Return payable to you, as a nominee for Nectrus Limited."

15. I should note here that, so far as concerns the difference between the £24 million and the £18 million, that sum was distributed, and it is simply the question of the £18 million withheld which forms the dispute which Nectrus has subsequently raised.

16. Nectrus, as I have indicated, does not accept that UCP is entitled to withhold payment to Luna and Lynchwood. UCP itself, in the first instance, decided to assist its former subsidiaries in India with their attempts to recover the Stranded Deposits directly. I am informed that those former subsidiaries have pursued arbitration proceedings in India against those entities which are said to have the Stranded Deposits, and these proceedings are known as "the Indian Arbitrations".

17. Meanwhile, Nectrus commenced proceedings against UCP in Cyprus on or about 26 May 2015. It sought to recover the same £18 million of distributions which is now sought in the Manx claim, which is the £18 million withheld from the distribution.

18. In July 2015, Nectrus applied to the Indian courts for a permanent injunction to prevent UCP from recovering the Stranded Deposits, either through the Indian Arbitrations or otherwise, and that was an application premised on preserving the status quo in India in the light of foreign "anchor" proceedings, which were the Cyprus proceedings. That Indian injunction application, I am informed, has not really proceeded; there has been no hearing on the merits and no interim relief has been put in place.

19. In April 2016, the proceedings in the Cyprus action were served. UCP challenged the jurisdiction of the Cypriot courts, including on the basis of the non-exclusive jurisdiction clause. After that challenge was made, Nectrus withdrew the claim by consent in December 2016.

20. There was then an issue as to the fate of the Indian injunction proceedings, given the absence of any "anchor" proceedings. The Indian court was due to consider whether the application should be dismissed in late July 2017. On 25 July 2017, Nectrus issued proceedings in the Isle of Man seeking to recover the £18 million withheld previously sought in the Cypriot action. Luna and Lynchwood were named as defendants to the Manx claim. Nectrus accepts that the Manx claim was instigated effectively as a new anchor for the Indian injunction application, although it is, of course, a substantive claim in its own right.

21. In the Indian proceedings, an issue has subsequently arisen as to whether the Manx claim can be substituted for the Cypriot action, and that question has been adjourned first until November 2017 and then again to March 2018.

22. In the Manx claim, UCP has disputed jurisdiction. UCP indicated in Mr Macaulay's witness statement that, in the event that the Manx claim proceeds, UCP will raise the cause of action relied on in the English claim in defence of the Manx claim by way of equitable set-off. In the Manx claim, there have been arguments between the parties as to the timetable for the application, but that dispute is now due to be heard on 15 May of this year.

23. So far as these proceedings are concerned, UCP has brought this claim against Nectrus for breach of the IMA that underlies this application on 31 August 2017. In this action, UCP claims damages of not less than £19.2 million plus interest, arising out of Nectrus' alleged breaches of the IMA which, it is said, led to the loss of the Stranded Deposits and the reduction in the purchase price of Candor. UCP also separately seeks a declaration that it is entitled to set off such amounts as are found due to it in this claim against any sums otherwise due to Nectrus through its nominees by way of shareholder distributions, and that applies to past or future shareholder distributions. UCP says that it brought these proceedings because, in the light of the Manx proceedings, it effectively had no choice but to bring the English claim to give effect to the non-exclusive jurisdiction agreement.

24. On 25 September 2017, Nectrus served an acknowledgement of service indicating an intention to dispute the jurisdiction of the court. On 6 November 2017 Nectrus served its application notice and evidence for the jurisdictional dispute. So the matter has not to date proceeded substantively. I should however point out that it has been made very clear to me

this morning that, were this matter to be proceed here, or to the extent that it proceeds elsewhere, Nectrus will dispute the validity of the claim wherever it is brought, in particular on the basis that the only party to whom Nectrus has ever contracted to provide services is Candor, and that the IMA only refers to provision of services to Candor and that is done repeatedly. It will also allege that the claims have been settled by a deed of termination between Nectrus and Candor dated 30 March 2015, which, by clause 2.3, is said to provide a complete defence to any action bought by Candor against Nectrus. So it is submitted that I should bear well in mind that it is Nectrus' case that the proceedings brought in this court are effectively doomed to failure. It is also asserted on behalf of Nectrus that the particulars in this action proceed on the basis of assumptions, in particular as to what advice was given and are consequently insubstantial.

25. But turning to the matter which is actually in issue today, Nectrus says that this is not the convenient forum for this dispute to be heard, and that the court should decline jurisdiction. It points to a number of matters as indicating that the Isle of Man is the forum conveniens. In particular, it particularly headlines three factors: firstly, the existence of proceedings in the Isle of Man relating to the "dividend claim" (as Nectrus describes it) which is also referenced in this action; secondly, the fact that UCP is an Isle of Man company and the claim for the dividend is said to arise as a matter of Isle of Man law; thirdly, the fact that Nectrus says that UCP has indicated an intention to rely on the same claim it now makes by way of set-off to the claim in the Isle of Man, or possibly as a counterclaim.

26. Ultimately, there have been before me three witness statements of Mr Amin for Nectrus, and two witness statements from Mr Macaulay for UCP.

27. There are effectively four headings to consider: Brussels I Regulation Recast; the approach to non-exclusive jurisdiction clauses as a matter of common law; the approach more generally to the common law test; and, finally, lis alibi pendens.

Brussels I Regulation Recast

28. Turning first, then, to Brussels I Regulation Recast, the first issue is the consequence of the non-exclusive jurisdiction clause in the IMA contract under the Brussels I Regulation Recast, otherwise known as Regulation EU No. 1215/2012 of the European Parliament and of the Council, dated 12 December 2012. This recast Regulation of course removes the previous domicile limitations on the applicability of the Regulation so that it is capable of applying to parties wherever they are domiciled.

29. UCP says that this claim falls within Article 25 of the Regulation, which provides, insofar as material:

> "If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise (...)."

30. UCP says that there is no reason for this provision not to apply, and that that being so the court has jurisdiction. UCP submits that it follows from that that the court actually has no jurisdiction to stay proceedings under the Regulation. It submits that, while there are provisions in the Brussels I Regulation Recast that permit a Member State court to stay proceedings because there are proceedings on foot in a third state involving the same cause of action between the parties (Article 33), or allowing the Member State court to stay proceedings because of a related action (Article 34), those are premised on the existence of certain conditions which do not arise in this case and so are not applicable. It says that those would be the relevant provisions here if there were an opportunity for a lis pendens argument because effectively, in a situation where you have proceedings taking place in a Member State and proceedings taking place in the Isle of Man, one is talking about lis alibi in a third party state.

31. UCP says that the correct approach is that as set out in Joseph, *Jurisdiction and Arbitration Agreements* (3rd ed) at paragraph 10.80. It submits that this is authority for the proposition that these provisions, Art.33 and 34, do not apply if the English court has jurisdiction pursuant to a jurisdiction clause within the scope of Article 25, and that, in those circumstances, the Member State court has no discretion to stay proceedings. The quote from the book states:

> "These provisions do not apply to jurisdiction asserted on the basis of an art.25 jurisdiction agreement. Therefore, the position appears to be that if such proceedings are brought based on an art.25 jurisdiction agreement, there is no residual power of discretionary stay based on lis pendens (...)."

32. UCP notes that this passage was recently considered and approved *obiter* in *Citicorp Trustee Company Ltd v Al-Sanea* [2017] EWHC 2845 (Comm) (Peter MacDonald Eggers QC, sitting as a Deputy High Court judge). In that case, the court was considering a non-exclusive jurisdiction clause in favour of England, and by reference to that same passage in Mr Joseph's book concluded that no objection could realistically be taken to jurisdiction given the non-exclusive jurisdiction agreements which are given mandatory effect pursuant to Article 25, and he concluded that Article 25 requires the court to assume jurisdiction given the existence of a prescribed jurisdiction agreement and that the provisions of Article 33 or Article 34 did not apply there.

33. I am also pointed to the authority of Popplewell J in *IMS SA v Capital Oil and Gas Industries* [2016] 4 WLR 163 at paragraph 44, where the learned judge says:

> "Where article 25 applies, the court is left with no discretion to exercise on forum non conveniens or other grounds; it must give effect to the relevant agreement and assume jurisdiction."

34. Nectrus dealt with the point very briefly in its skeleton argument, alluding to the recast Regulation and saying that ordinarily the English court could proceed to exercise its jurisdiction under this Article. It did not suggest why that Article was not applicable. Orally, it submitted that the Article was prima facie applicable, but pointed very strongly to the provision "unless the parties have agreed otherwise", and to the distinction between that and some of the other mandatory jurisdiction provisions such as Article 25.3 where there is no

provision for "unless the parties have agreed otherwise". So Nectrus say that this case is one which falls within the scope of the "unless the parties have agreed otherwise" proviso.

35. With that in mind, it says that the IMS case is irrelevant because that was an exclusive jurisdiction provision, and pointed me instead to a paragraph at 10.77 of Mr Joseph's book, which says that:

> "[T]here is an important difference between exclusive and non-exclusive jurisdiction agreements. In the case of the former, the parties have agreed to bring their disputes before an identified court and no other. This is not the case in relation to a non-exclusive jurisdiction agreement. Indeed, as a matter of community law, the non-exclusive jurisdiction is simply treated as making provision for additional jurisdiction. (...) The position in relation to non-exclusive jurisdiction agreements therefore remains uncertain."

36. That is effectively where their submission lies: the position in relation to non-exclusive jurisdiction clauses is unclear. It was submitted that the *Al-Sanea* case failed to give proper weight to those passages, the "unless agreed otherwise" and the relevant provision in Mr Joseph's book; and, although I asked for a submission as to how the relevant provisions of Articles 33 and 34, and indeed Articles 29 and 31, played into Article 25, Mr Sarooshi for Nectrus said that that was not a matter on which he advanced any positive submission because of the fact that we are talking about the Isle of Man.

37. He relied, however, on *Highland Crusader Offshore Partners LP v Deutsche Bank AG* [2010] 1 WLR 1023. That was a case decided on the common law rules, where the Court of Appeal, expressly placing the position under the previous regulation to one side, acknowledged at [64] that a non-exclusive jurisdiction clause self-evidently leaves open the possibility that there may be another appropriate jurisdiction.

38. UCP's position as to paragraph 10.77 of *Joseph* is that that is simply the wrong paragraph to look at because that paragraph deals with proceedings in an EU court in breach of a choice of court agreement in favour of a third party state, which is a very different state of affairs. It submitted that if the point which is made there was considered relevant in the circumstances of a non-exclusive jurisdiction agreement and proceedings in a third party state, that would have been dealt with in the appropriate place, which is the passage on which it relies. It says that the question which is dealt with in relation to 10.77 is that forum non conveniens is a concept which simply does not sit comfortably with the Regulation, and that if there is a discretion for it to be brought into the regime it is a matter for the defendant to explain why, and in the light of the structure which they have outlined they say that the defendant has done nothing to do that and to support the exercise of such a discretion.

39. So far as this issue is concerned, I unhesitatingly endorse the approach contended for by UCP. The starting point here is that this court has jurisdiction under Article 25. That cannot sensibly be disputed and was not disputed. The second key point is that this is a court in a Member State country, and the Isle of Man court is not such a court. Accordingly, this does not fall within the ambit of Article 29 or 31 of the recast Regulation, which do maintain a distinction between an exclusive and non-exclusive jurisdiction agreement (see Article 31(2) and Mr Joseph's book at paragraph 10.56).

40. Here, therefore, we are in the territory, if we are anywhere, of Articles 33 and 34 if we are looking at obligations or powers to refuse jurisdiction; and Articles 33 and 34 simply do not contain any such provisions. Article 33 says:

> "Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seized of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if (...)"

41. It then sets out various conditions. Article 34 is to similar effect, but relates to related proceedings and has differences in the conditions. They therefore proceed solely by reference to the domicile and special jurisdiction regime set out in Article 4 and Articles 7, 8 and 9. There is no mention of a reservation in the event jurisdiction is established under Article 25. This carries with it, in my judgment, an inference that there is intended to be no discretion to decline jurisdiction in other cases, in particular where the jurisdiction is founded under Article 25.

42. I should add that this seems to me to be consistent with one of the aims of the redrafting exercise in relation to the Regulation which was to deal with what was perceived to be an insufficient recognition of party autonomy. That is a position which is recognised in paragraph 19 of the recital to the Regulation, which highlights:

> "The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation."

43. It is also, it seems to me, consistent with the slightly different regime which is put in place in relation to lis alibi pendens in relation to Member States.

44. Accordingly, I conclude that this court not only has jurisdiction but it has no power or discretion to decline that jurisdiction. It follows that this application must fail at the first hurdle.

45. I shall, however, consider the other points which arise as briefly as possible in the interests of completeness.

The Common Law approach to non-exclusive jurisdiction agreements

46. There is a very marked, or fairly marked, division between the approaches of the parties on this issue. At least in writing, Nectrus submitted that, absent a Regulation approach, this is effectively a simple matter of *Spiliada* principles, though it advances a supplementary lis alibi pendens argument. It principally drew my attention to the judgment of the Court of Appeal in *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808; [2012] 2 CLC 431, and in particular in relation to what that judgment has to say as to the appropriate approach where the claimant has served proceedings on a defendant in England as of right as giving rise to a two-stage test. That is set out at paragraph 129 as follows:

> "[Lord Goff in Spiliada] concluded that, at the first stage, it is for the defendant to satisfy the court that there is another forum which is prima facie the "appropriate" forum for the trial of the action. If the defendant did so, then the second stage is to decide whether there are special circumstances by reason of which justice required that the trial should, nevertheless, take place in England."

47. In writing, Nectrus did not specifically consider the common law position with relation to the non-exclusive jurisdiction clause and simply relied on the fact that the Court of Appeal in *Highland Crusader* noted that a non-exclusive jurisdiction clause self-evidently leaves open the possibility that there may be another appropriate jurisdiction clause, and said that this was effectively a minor point which came in at the second part of the two-stage test.

48. Orally, Nectrus said that, while it would concede that the existence of a non-exclusive jurisdiction clause was a strong indication, it did maintain an argument that UCP's submissions put the point too high and did not give enough weight to the dictum of the Court of Appeal in *Highland Crusader*, both the part that I have just quoted and also later in paragraph 64, where it says:

> "The degree of appropriateness of an alternative jurisdiction must depend on all the circumstances of the case. In addition to the usual factors, the wording of the non-exclusive jurisdiction clause may be relevant, because of the light which it may throw on the parties' intentions. Another possibly relevant factor (...) may be whether the choice of non-exclusive jurisdiction was specially negotiated or was contained in a standard form of contract."

49. It therefore submitted that the test as set out in *Highland Crusader* does not say that the touchstone is very strong or overwhelming, and it emphasises that the appropriateness of the forum must depend of the wording of the particular non-exclusive jurisdiction clause and the circumstances of the case.

50. They also drew my attention to the judgment of the late, great Colman J in *BP Plc v AON Ltd* [2006] 1 Lloyd's Rep 549 at paragraph 23, where he said:

> "There can be no doubt that it is implicit in a non-exclusive jurisdiction clause that both parties accept when they agree to it that it will be appropriate for that court in the interests of justice, as distinct from obligatory to exercise jurisdiction over all disputes which may reasonably be envisaged as arising in relation to their agreement. That, however, does not go as far as saying that it is agreed that in all circumstances that may in future arise the designated court will necessarily be the court where the case may most suitably be tried for the interests of all parties and the ends of justice. If that were so, the effect of such a clause would be indistinguishable from that of an exclusive jurisdiction clause. The forum non conveniens test would be deployed not as a flexible comparative exercise but so as to impose an inflexible constraint analogous to that imposed by a contract."

51. I was also directed to the judgment of Peter Smith J in *Secret Hotels 2 Ltd v EA Traveller Ltd* [2010] EWHC 1023 (Ch), where what was in issue was a clash of jurisdiction between non-exclusive jurisdiction in England and a Cyprus domicile.

52. Nectrus says that in any event it would pass the higher test because this is not a simple dispute arising out of the IMA which was obviously foreseeable. They say that the decision to withhold dividends otherwise due takes it out of the range of the usual kind of dispute before the court under the IMA because of the inextricable link between the dividend claim and the IMA claim and that itself makes the Isle of Man more suitable.

53. In relation to the appropriate tests, UCP by contrast submits that there are specific common law principles to be applied when a challenge is made to the English court's jurisdiction in circumstances where there is a non-exclusive jurisdiction agreement in favour of the English courts, and that a simple *Spiliada* approach is not appropriate. It points in particular to the judgment of Gloster J (as she then was) in *Antec International Ltd v Biosafety USA* [2006] EWHC 47 (Comm) at paragraph 7:

> "(i) The fact that the parties have freely negotiated a contract providing for the non-exclusive jurisdiction of the English courts and English law, creates a strong prima facie case that the English jurisdiction is the correct one. In such circumstances it is appropriate to approach the matter as though the Claimant has founded jurisdiction here as of right, even though the clause is non-exclusive; ...
> (ii) Although, in the exercise of its discretion, the court is entitled to have regard to all the circumstances of the case, the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule; ...
> (iii) Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard Spiliada balancing exercise. The Defendant has to point to some factor which it could not have foreseen at the time the contract was concluded. Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain; .... In particular, the fact that the Defendant has, or is about, to institute proceedings in another jurisdiction, not contemplated by the non-exclusive jurisdiction clause, is not a strong or compelling reason to relieve a party from his bargain, notwithstanding the undesirability of parallel proceedings. Otherwise a party to a nonexclusive jurisdiction clause could avoid its agreement at will by commencing proceedings in another jurisdiction (...)"

54. I was also referred to the judgment of Stuart-Smith J in *Cuccolini SRL v Elcan Industries* [2013] EWHC 2994 QB. In that judgment he considered the various authorities on the point at the time. He expressly adopted Gloster J's principles including the requirement that an applicant must establish overwhelming or very strong reasons to succeed on a jurisdiction challenge in the face of a non-exclusive jurisdiction clause, and he concluded at paragraph 22:

> "...I note three points. First, while recognising that both 'overwhelming' and 'very strong' are elastic terms, I respectfully agree with and adopt Gloster J's use of those words in formulating the test that Elcan must satisfy. Second, I respectfully agree with and adopt Moore-Bick J's clear explanation [in Mercury Communications Ltd v Communication Telesystems International [1999] 2 All ER (Comm) 33] why 'particular weight should ... attach to the fact that the defendant has freely agreed as part of his bargain to submit to

> the jurisdiction', which justifies the principled conclusion that he should be held to his bargain unless there are overwhelming reasons to the contrary. Third, I respectfully agree with and adopt the observations of Waller J [in British Aerospace plc v Dee Howard Co [1993] 1 Lloyd's Rep 368] and Moore-Bick J [in Mercury Communications] about the weight to be attached to the existence of proceedings brought in another jurisdiction. For the reasons they gave it seems to me that, where a party has freely agreed that the English Courts shall have jurisdiction, the fact that there are proceedings in another jurisdiction should of itself be afforded little weight since that state of affairs must have been within the reasonable contemplation of the contracting parties when they entered into their agreement, particularly where the agreement was that the English courts should have non-exclusive jurisdiction."

55. And he went on to note that:

> "The difficulties facing a party that requests the English courts to decline jurisdiction are increased where, as here, the parties have chosen England as a neutral forum with which neither is connected."

56. I was also referred to the judgment of Flaux J, as he then was, in *Standard Chartered Bank Hong Kong v Independent Power Tanzania* [2015] EWHC 1640 (Comm); [2016] 1 All ER (Comm) 233. In this case Flaux J said a number of relevant things. At paragraph 109 he said that "in such cases the bargain which the defendant makes is that he will not seek to argue that England is not an appropriate forum in relation to forum non conveniens grounds which were foreseeable at the time the relevant agreement was made". He was dismissive of the submission that a stay should be granted in the case of a non-exclusive jurisdiction clause in that case, where the applicant was relying on what he referred to as "conventional *Spiliada* factors", and those included parallel proceedings raising the same core issue. He also said that weight had to be give to the fact that the parties have entered into a non-exclusive jurisdiction agreement vesting this court with jurisdiction when it was foreseeable that proceedings elsewhere might arise, and that thus those proceedings should be given little weight.

57. At paragraph 115 he said:

> "If the relevant contracts did not contain non-exclusive jurisdiction clauses and FNC waivers, those factors might well have considerable force in pointing to Tanzania as the most convenient forum for the determination of the dispute. However, where there is a non-exclusive jurisdiction clause and an FNC waiver, they have little if any force as factors. ..."

58. Regarding the submissions which were made on behalf of Nectrus, UCP said that nothing changes the weight of the modern authority, that Gloster J had all the appropriate principles well in mind when she made her decision in *Antec*, and that the Colman decision should effectively be regarded as against the weight of authority and a case where he was essentially producing a slightly anomalous result, doing his best to deal with the particular factual circumstances.

59. Dealing with this preliminary point in relation to the approach on the common law test, again it seems to me that Nectrus' argument really fails to grapple with the thrust of the authority to

date. The authorities make clear how significant a non-jurisdiction clause is in this context and those authorities are thick on the ground. They actually include the *Highland Crusader* case on which Nectrus relies.

60. There, in a passage which Nectrus did not cite, the Court of Appeal says this:

> "61. A non-exclusive jurisdiction agreement precludes either party from later arguing that the forum identified is not an appropriate forum on grounds foreseeable at the time of the agreement, for the parties must be taken to have been aware of such matters at the time of the agreement. For that reason an application to stay on forum non conveniens grounds an action brought in England pursuant to an English non-exclusive jurisdiction clause will ordinarily fail unless the factors relied upon were unforeseeable at the time of the agreement....
> 64. It stands to reason that by agreeing to submit to the non-exclusive jurisdiction of State X the parties implicitly agree that X is an appropriate jurisdiction, and therefore either party should have to show a strong reason for later arguing that it is not an appropriate jurisdiction."

61. Further, in Mr Joseph's book at paragraph 10.36 the authorities are summarised thus:

> "It can be stated as a matter of general principle that in the ordinary run of cases unless strong cause is shown, no stay will be granted with respect to proceedings brought in England and Wales pursuant to a non-exclusive jurisdiction agreement in favour of England on the grounds that England is not the appropriate forum... A non-exclusive jurisdiction agreement creates a strong prima facie case that the identified forum is the forum conveniens."

62. Accordingly, although I would hesitate to say that there is any formal exception to the *Spiliada* principles, what has to be shown needs to be viewed against this perspective, and the authorities would at least seem to justify considering the existence on a non-exclusive jurisdiction clause at the first stage as being essentially a strong personal connection on the part of both parties, and being a strong factor which weighs heavily against the exercise which has to be performed there. I certainly have no hesitation in rejecting Nectrus' submission advanced in their written skeleton that this case involves a simple *Spiliada* exercise and that a non-exclusive jurisdiction clause is a minor factor weighing slightly at stage 2 only. That, it seems to me, plainly flies in the face of authority.

63. Passing on to the two-stage exercise, Nectrus submits that in relation to the first stage the Isle of Man is a forum which is prima facie appropriate for the trial of the action, and it then goes on to say that there are no special circumstances at stage 2 which mean that justice requires that a trial should nevertheless take place in England. It says that bearing in mind the issues which are likely to arise, Isle of Man is manifestly the most appropriate forum.

64. It says the foremost reason is that UCP, an Isle of Man company, decided to declare dividends and then withheld this substantial sum from Luna and Lynchwood on the basis of allegations relating to the IMA. Although it accepts that disputes relating to the IMA would generally be resolved in England in accordance with the jurisdiction clause, it says in these circumstances the allegations raise complex questions of Isle of Man company law and entitlements to set-off, and that that points in favour of the Isle of Man court. It says that the

question of set-off is highly relevant and that this will require the Isle of Man court to assess both the extent to which set-off is available in relation to the dividend payment and, essentially, the merits of the claim.

65. It says that if UCP were a company incorporated in a Member State of the EU such a dispute would be the subject of Article 24(2) of the Brussels I Regulation Recast, and suggests by reference to the judgment of Andrew Smith J in *Ferrexpo AG v Gilson Investment Limited* [2012] EWHC 721 (Comm); [2012] 1 CLC 645 at 154 to 155 that this is a case where effectively reflexive effect should be given to the Regulation. In that case Andrew Smith J followed that approach in a case where the dispute concerned the validity of the decisions of the organs of a company situated outside the EU. And so it is submitted for Nectrus that the court should effectively proceed on the basis that the dividend claim and defences to it fall within the exclusive jurisdiction of the Isle of Man court.

66. But it also says that outside of that there is a strong reason within the reliance on equitable set-off which points in the direction of the Isle of Man because it will require the Isle of Man court to decide if the claims arise out of the same transactions and whether the claims are successful. It says that given the positions taken by UCP in the Isle of Man and the English proceedings, they cannot resile from that stated position in both sets of proceedings, and now say that they do not seek to link the IMA claim with the dividend claim. It also says that the attempt to make a distinction between the two is false, it is said, in the light of the claim for the declaration in the English proceedings as to the validity of the set-off. So it is said the Isle of Man is more appropriate. There are proceedings already on foot there and these issues will be determined.

67. So far as the submission that the resistance on the part of Nectrus to the equitable set-off is somehow fatal to the application, it is submitted that the Isle of Man nonetheless is an available forum, and it says on the contrary it would be contrary to the interests of justice to allow these proceedings to go on and leave the courts of the Isle of Man hamstrung.

68. In relation to personal connections, it says in addition to the main points there are no personal connections between UCP and this jurisdiction. Nectrus points to Mr Amin's submission in his evidence that there are no connections between the parties and this jurisdiction, and that in fact UCP's activities are positively required to take place outside of the UK. It says in relation to factual connections there are much greater factual connections to the Isle of Man in that UCP is based there, the fact that the IMA is governed by English law is of much lesser significance and it points me to the *Navigators' Insurance* case, indicating that unless a novel or complex issue of English law is raised, the question of the governing law is not necessarily a factor of particular weight, and that is particularly the case where domestic law is similar.

69. In relation to the lis alibi pendens issue, Nectrus cites the requirement in *McShannon v Rockware Glass* for a personal or juridical advantage to maintain proceedings where there are lis alibi pendens. It says that here there will be a duplication of proceedings if these proceedings go ahead, and that there is no personal juridical advantage which can be pointed to, and that, again, it says that the proceedings in the Isle of Man will determine all the disputes and judicial comity therefore requires the court to decline jurisdiction.

70. As to the second stage, it goes on to submit that there are no special factors which would go to suggest that the Isle of Man is not the most appropriate forum. Again, it says that the

choice of law clause and non-exclusive jurisdiction clauses are not significant and that in the current case allowing the proceedings to go ahead would contravene the requirements of practical justice.

71. UCP submits that this *Spiliada* argument does not bear scrutiny. Firstly, it says that it fails to address a key factor at stage one, which is availability. It is trite law, it says, that the forum which the defendant proposes must be available for the trial of the action and that this is fundamental. If the proposed forum is not available there is no basis to stay, and it points me to authorities which reinforce this in the context of cases where there is doubtful availability, such as *Mrs Daad Sharab v HRH Prince Al-Waleed Bin Talal Bin Abdal-Aziz Al-Saud* [2009] EWCA (Civ) 353 at 61. In this connection UCP points to the fact that Nectrus argues, in the Isle of Man proceedings, that UCP is not entitled to raise this claim in the response to the Manx claim, and that the defence of set-off is not available as a matter of law. It says that if that is correct the Isle of Man is emphatically not an available forum, regardless of how appropriate it might be.

72. Secondly, it submits that it is not clearly or more distinctly more appropriate than England for the resolution of a dispute. UCP pointed me to the summary of factors to be taken into account, which are summarised by Briggs at 4.23 of *Civil Jurisdiction and Judgments* (6th ed):

> "Whether the forum to which the defendant points is referred to as 'natural' or 'appropriate', the factors which help to identify it depend on the circumstances of the individual case: many may be listed, but the weight of any of them depends on he context in which it arises. Their evaluation in a particular case is a matter of evaluation (rather than discretion), for the judge hearing the application for a stay.
>
> The factors which have been found to be relevant can probably be organised under five points, through this is for convenience of exposition only. For just as the Spiliada test comprises one question which is initially analysed in two limbs, the first limb of Spiliada comprises one question which may be initially examined under five points. Insofar as these are separate, they are: first, the personal connections which the parties to the litigation have with particular countries; second, the factual connections which the events which make up the story have with particular places; third, the question of which law should or will be applied to resolve the substantive issues in the dispute; fourth, the possibility of there being a lis alibi pendens in another court; and fifth, the possibility that other persons may become party to, and affect the overall shape of, the litigation.
>
> Of course, it is for the applicant (or defendant) to identify the specific issues which arise for decision and which show it, as he says, to be more appropriate that the trial take place in another forum; it will not usually be enough for him to allege generally that the foreign court is more appropriate than England and to hope that this will suffice. The test is more specific than that; it requires the defendant to show that the foreign court is more appropriate than England for the investigation and the adjudication of those particular issues which need to be resolved in the case."

73. It says that even without considering these factors Nectrus can get nowhere close to the level they need on the first limb. They point to the non-exclusive jurisdiction agreement and the high bar which that puts in place, whether one characterises it as overwhelming, very strong

or simply strong; secondly, it submits that the reasons or factors relied upon by Nectrus to support its application do not reach that hurdle and also suffer from problems in relation to foreseeability. So, such matters as the operation of UCP from the Isle of Man; the fact that the claim in the Isle of Man is a debt claim against UCP as an Isle of Man company raising questions of company law; the decision to establish UCP in the Isle of Man meaning that company law issues would raise questions subject to Isle of Man jurisdiction; the question of the set-off which, it is said, may raise questions of Isle of Man law; the competence of Deemsters of the Isle of Man High Court and the fact that it was foreseeable at the time of the concluding the non-exclusive jurisdiction clause that if UCP were to raise the IMA claim as a defence to a distribution payment it would be likely to be determined by courts in the Isle of Man. All of these, UCP says, are either irrelevant or of very slight import.

74. It says that much of Nectrus' evidence as well as its skeleton argument has focused on why it considers that the Manx claim should be heard in the Isle of Man and that that misses the point. The issue for this court is not whether the Manx claim should be heard in the Isle of Man; it is whether this court should decline to exercise jurisdiction over this claim under the IMA agreement.

75. So far as the submissions that England is not a more appropriate forum because the parties do not reside or carry on business here, UCP says that this harms rather than helps since it is established that where the parties have agreed a neutral forum for the resolution of disputes the English court is less likely to decline jurisdiction. It rejects the reflexive effect argument, submitting that the Manx claim is not within Article 24 of the Brussels I Regulation Recast, and says that the scope of Article 24 is very limited and only engaged where the claim at issue is that the company did not have the power to act in the way it did.

76. It joins issue with the argument which has been repeatedly made that UCP has somehow elected to bring the English claim in the Isle of Man. It submits that it is plain that it is only if the Isle of Man claim proceeds that UCP has indicated its intention to raise the cause of action relied upon in the English claim amongst its points of the defence, and further that that does not necessarily entail the consideration or determination of the substantive issues. It merely raises that as a potential set-off subject to determination, not necessarily in the Isle of Man, of the merits of that underlying claim.

77. UCP submits that the proceedings in the Isle of Man are particularly unimportant given a number of factors: the challenge to the jurisdiction; the very early stage of that claim; the possibility that parallel judgments could be avoided if there was a stay of the Manx claim or a withdrawal of the Manx claim and/or the dividend claim arguments being moved here; as well as the fact that Nectrus argues that UCP is not entitled to raise the English claim in the Isle of Man. I should also mention that it submits that the fact that it was foreseeable that there would be proceedings in the Isle of Man is significant. All of these, it says, go to make the proceedings in the Isle of Man not important.

78. By way of belt and braces, UCP submits that even if Nectrus could establish that the Isle of Man is available and it is clearly more appropriate, it would be unjust for UCP to be deprived of its right to a trial in this jurisdiction bearing in mind the fact that Nectrus has said that UCP essentially cannot as a matter of law raise the matters raised in the English claim by way of equitable set-off and that Nectrus, on UCP's case, commenced its claim in the Isle of Man for

tactical reasons and that militates against the suggestion that the interests of justice require the English claim to be heard in the Isle of Man.

79. So far as the common law jurisdiction argument is concerned, this also seems to me to be very clear. At all times such an argument requires an applicant to demonstrate that there is an available alternative forum which is clearly more appropriate that this court. In this case, even setting aside arguments about how one deals with the question of a non-exclusive jurisdiction clause, Nectrus faces a significant problem. That is that the proceedings as currently constituted in the Isle of Man do not concern this claim under the IMA, and it is apparently Nectrus' position in that Manx claim that this claim cannot as a matter of law form a set-off so as to be part of the claim. It is not suggested that free-standing proceedings in the Isle of Man could be begun. No offer is made to waive any arguments as to set-off. Accordingly the first hurdle, available forum for this claim, is not cleared, and so it would seem that this argument could not sensibly proceed.

80. Even if it did, one cannot, for the reasons I have already given, sweep the question of the non-exclusive jurisdiction clause to one side. Even if the Isle of Man is an available forum for this claim, Nectrus can get nowhere close to reaching the most charitable interpretation of the authorities "strong reason". As to this my view, though this does not matter, is that the authorities perhaps tend more to say that the non-exclusive jurisdiction clause requires "very strong" reasons to be displaced.

81. Even on the basis of strong reason Nectrus cannot reach that hurdle in establishing reasons for departing from the lead given by the existence of the jurisdiction clause; by which it must always be recalled that the parties agreed that they would submit to this jurisdiction. The fact of proceedings in a different claim, albeit one with some factual cross-over, cannot in this case provide more than a minimal basis. The fact that UCP is based in the Isle of Man is at best an irrelevant factor which I am precluded on authority from considering as being foreseeable. At worst this is a factor which pushes against the parties' joint determination of a neutral forum. The fact that the Manx claim raises issues of Manx law is completely irrelevant when what is in issue in trying this claim are issues of English law, because it is a claim for breach of an English law contract. To the extent that there are Manx law issues this would not be a significant factor.

82. The existence of the Manx claim itself carries very little weight, given the position in the authorities which indicate that where something is foreseeable it should not be given much weight, and the fact that it is conceded that such proceedings were foreseeable. There are also the questions of the very early stage of those proceedings.

83. As for the possible defence of set-off in those proceedings, there is no basis for saying that UCP had elected to run this point in the Isle of Man. On the contrary, it is quite plain that the jurisdiction there is disputed. It is therefore a considerable overreach to suggest that the contingent indication that such a defence might be raised if that challenge did not succeed can provide any basis for making the Isle of Man the forum conveniens.

84. As for the other matters raised, those are matters of even less weight than those which formed the main points of Nectrus' arguments. In particular, the factual arguments which have been raised are of very little weight indeed.

85. So far as concerns the reflexive effect, I was not persuaded that this was a point which had any real content; I did not consider that Article 24 would be applicable in this case or that any argument on reflexive effect could have any chance of succeeding.

86. So, taking all these matters into account I have concluded that Nectrus cannot come close to the hurdle of overcoming the (at least) strong reasons which it would need because of the non-exclusive jurisdiction clause. It could not actually come close to the hurdle of establishing that there was a clearly more appropriate forum. So even were there no "steer" at all given by the authorities in relation to non-exclusive jurisdiction clauses, I would have considered that the burden upon the applicant of demonstrating a clearly more appropriate forum would not have been discharged.

Lis alibi pendens

87. The final argument which was effectively slightly subsumed into the forum conveniens argument was lis alibi pendens. Nectrus said that it is generally a policy of the English court to avoid the multiplicity of proceedings with the risk of inconsistent judgments, and it essentially relies, again, on its submission that the Isle of Man proceedings will by way of UCP's defence, raise the issues that are advanced by UCP in the current proceedings, and if the Isle of Man court accepts the jurisdiction and if the present application fails there is a risk there will be duplication of proceedings with the unfavourable consequences that that brings with it.

88. My answer to this point will be anticipated. Nectrus' argument proceeds on a false basis. There is no cross-claim in the Isle of Man proceedings. Nectrus' repeated assertions that the issues in those proceedings will be determined in proceedings before those courts is without any substantial foundation. Further, the case upon which they relied, the *Secret Hotels* case, is a case under the Brussels Convention dealing with lis alibi, in a proper form and between two Convention states. This, of course, brings one back full circle to the Brussels I argument where we started. Lis alibi pendens, under the Regulation, is dealt with specifically under a particular code. There is no reason why it would not be dealt with in a case where Brussels Convention jurisdiction has been established in relation to that, and the articles in relation to lis alibi pendens under the Convention are clear. They do not apply here.

89. In the light of the conclusions which I have reached, therefore, I would dismiss that argument and I would say that it follows that the backup argument in relation to stay which was raised by Nectrus cannot arise.