**OUTER HOUSE, COURT OF SESSION**

**[2024] CSOH 86**

**CA94/23**

OPINION OF LORD SANDISON

In the cause

MEX GROUP WORLDWIDE LIMITED

Pursuer

against

(FIRST) STEWART OWEN FORD; (SECOND) BRIAN ROBERT CORMACK; (THIRD) COLM DENIS SMITH; (FOURTH) MICHAEL GOLLITS; (FIFTH) MELVILLE CONSULTING PARTNERS LIMITED; (SIXTH) MELVILLE CONSULTANCY LIMITED; (SEVENTH) REGAL CONSULTANCY INTERNATIONAL LIMITED; (EIGHTH) CSM SECURITIES SARL; (NINTH) VON DER HEYDT & CO AG; (TENTH) VON DER HEYDT INVEST SA; (ELEVENTH) MEX SECURITIES SARL; and (TWELFTH) VIACHESLAV (known as "SLAVA") VOLOTOVSKIY

Defenders

**Pursuer: Dean of Faculty et J Brown; Levy & McRae**
**First, Second, Fifth, Sixth and Seventh Defenders: No appearance**
**Third Defender: Party**
**Fourth and Ninth Defenders: RG Anderson; Harper Macleod LLP**
**Eighth Defender: K Young; Young & Partners Business Lawyers Limited**
**Tenth Defender: No appearance**
**Eleventh Defender: No appearance**
**Twelfth Defender: No appearance**

12 September 2024

**Introduction**

[1] In this commercial action the pursuer maintains that all of the defenders have engaged in an unlawful means conspiracy directed at injuring its interests by causing

the eleventh defender, Mex Securities SARL, to seek to renege on a lawful and binding agreement recorded in a Consent Order granted by the High Court of Justice of the British Virgin Islands dated 14 December 2020. The claimed unlawful means are set out at length in the summons. The pursuer claims to have suffered losses in consequence of that conspiracy amounting to £85 million, primarily consequential upon the failure of a planned bond issue, which failure is said to have been due to the defenders' actions. Further details of the pursuer's position are to be found in my previous opinion at [2024] CSOH 51, 2024 SCLR 397 and in the judgment of the Court of Appeal of England and Wales in a related action at [2024] EWCA Civ 959. The third, eighth and ninth defenders, none of whom is domiciled in Scotland, have stated objections in various forms to the jurisdiction of this court to entertain some or all of the respective cases against them. I fixed a hearing on fact and law for the purpose of determining the relevant pleas and any issue of relevancy or specification connected with them. Affidavit evidence was provided by the pursuer's Yahya Taher, by the third defender on his own behalf and separately on behalf of the eighth defender, and by Jens Horstkotte on behalf of the ninth defender.

**Background**

[2] For present purposes, the following aspects of the pursuer's case require to be noted. It is, first of all, clear that its core allegation is that all of the defenders engaged in the alleged unlawful means conspiracy against it with the view to furthering the carrying on of substantial volumes of profitable investment business amongst the defenders.

[3] Specifically in relation to the third and eight defenders, declarator is sought that the defenders *inter alia* caused a commercial inducement to be paid to the third defender, Mr Smith, by the transfer of investment funds from the ninth and tenth defenders, the

Von der Heydt companies, in the sum of at least $7m, to the eighth defender, CSM Securities SARL (and thus indirectly to the benefit of the third defender, who is claimed to be the partial beneficial owner of the eighth defender) in order to induce him to cause Mex Securities SARL - which he is said to have controlled - to seek to renege on a supposed agreement and subsequent Consent Order between it on the one hand and Mex Clearing Limited and the pursuer on the other. The first and fourth defenders (Mr Stewart Ford and Mr Michael Gollits respectively) are said to be engaged in business together with the third in the ownership and control of the eighth defender. It is claimed that the third defender has been used by the first defender over many years to assist and conceal the latter's supposed dishonest activity in financial services, and that they were in regular ongoing contact at the same time during the negotiations which ultimately led to the Consent Order.

[4] So far as the ninth defender, Von der Heydt & Co AG, is concerned, the pursuer narrates that on 17 May 2020 those parties entered into a Deed of Affirmation whereby the ninth defender affirmed and undertook various matters. It is claimed that on 2 December 2020 the fourth defender indicated that it had become necessary for the ninth defender to withdraw funds from certain notes issued by the eleventh defender, in anticipatory breach of an undertaking given in the Deed of Affirmation. The pursuer claims that that state of affairs gave rise to a substantial claim for damages for breach of the ninth defender's obligations in terms of the Deed and that one of the aims of the alleged conspiracy was to attempt to insulate the ninth defender from any such claim by *inter alia* fraudulently misrepresenting its reasons for requiring to withdraw the funds in question.

**Relevant statutory provisions**

[5] Paragraph 2 of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 *inter alia* provides:

> "2. Subject to rules 3 (jurisdiction over consumer contracts), 4 (jurisdiction over individual contracts of employment), 5 (exclusive jurisdiction) and 6 (prorogation), a person may also be sued—
>
> …
>
> (o)
>
> (i) where he is one of a number of defenders, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings; …"

**Submissions for the eighth defender**

[6] On behalf of the eighth defender, counsel noted that the sole ground of jurisdiction ultimately asserted in relation to that defender was the ground set out in paragraph 2(o)(i) of Schedule 8 to the 1982 Act, and submitted that the claim against it was not so closely connected with the claims against those defenders domiciled in Scotland that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. Indeed, on the pursuer's pleadings, there was no prospect at all of its claim that the eighth defender had participated in a conspiracy against it being made out. Since there was no possibility of any judgment being given against the eighth defender, the risk of irreconcilable judgments simply did not arise, no ground of jurisdiction over it existed, and the action as directed against it fell to be dismissed.

[7] The pursuer's position was that the eighth defender was a vehicle through which a bribe or financial inducement was paid to the third defender. No blameworthy conduct was

averred on the part of the eighth defender. Applying the definition of the tort of conspiracy to injure by unlawful means set out by the Court of Appeal in *Kuwait Oil Tanker SAK* v *Al-Bader (No 3)* [2000] 2 All ER (Comm) 271 at [108], namely that the tort was committed

> "where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so",

the pursuer's pleadings directed at the eighth defender were irrelevant.

[8] It was accepted that the decision of the European Court of Justice in *Freeport Plc* v *Arnoldsson* (C-98/06) [2007] ECR I-8319 established that there was no requirement for the legal bases of the causes of action against all defenders to be identical in order to fall within the principle expressed in paragraph 2(o)(i) of Schedule 8 to the 1982 Act. However, that decision also made clear at [41] that:

> "It is for the national court to assess whether there is a connection between the different claims brought before it, that is to say, a risk of irreconcilable judgments if those claims were determined separately and, in that regard, to take account of all the necessary factors in the case file, which may, if appropriate yet without its being necessary for the assessment, lead it to take into consideration the legal bases of the actions brought before that court."

[9] In *Freeport*, the court affirmed the rule set out in *Roche Nederland BV* v *Primus* (Case C-539/03) [2006] ECR I-6535 at [26] that: "It is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact." In the present case, there was no real risk of such an outcome in respect of the eighth defender. Nowhere was it alleged that the eighth defender had undertaken positive steps to further any type of conspiracy. All of the averments relating to positive steps taken in furtherance of a conspiracy related to other parties. At its highest, the eighth defender was said to be a mere conduit rather than a wrongdoer.

**Submissions for the ninth defender**

[10] On behalf of the ninth defender, counsel submitted that the court had no jurisdiction to hear claims based on a breach of, or non-contractual claims in relation to, the Deed of Affirmation. The pursuer's averments relating to claims under the Deed were irrelevant and should be excluded from probation. The introductory words of paragraph 2 of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 stipulated that paragraph 2(o)(i) was "subject to … rule 6 (prorogation)". The content of rule 6 reflected the terms of Art 17 of the 1968 Brussels Convention, as amended on the UK's accession to that regime in 1978. Further, section 22(2) provided that:

> "(2) Nothing in Schedule 8 affects the operation of any enactment or rule of law under which a court may decline to exercise jurisdiction because of the prorogation by parties of the jurisdiction of another court."

[11] The Deed of Affirmation bore to be between the pursuer and the ninth defender. It contained a prorogation clause. Clause 6, the choice of law and jurisdiction clause in the Deed, provided:

> "6.1 This Deed and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by, and construed in accordance with, the laws of Luxembourg and/or Germany.
>
> 6.2 Each Party irrevocably agrees that the courts of Luxembourg and/or Germany shall have exclusive jurisdictions to settle any dispute or claim arising out of or in connection with this deed or its subject matter or formation (including noncontractual disputes or claims)."

[12] Germany and Luxembourg were each member states of the European Union. The EU instruments which prior to implementation completion day formed part of Scots law applied in respect of choice of law. Evidence of German law was provided in an affidavit by Jens Horstkotte, a lawyer at a firm which had acted for the ninth defender. The short propositions set out by Mr Horstkotte - that Germany is a Member State of the EU and that

the Rome I/Rome 3 II and Brussels I regimes apply there - were not controversial. His evidence was formal in nature. That Germany was a member state of the EU to which Brussels I applied was a factual proposition that the court could and should readily accept. The content of the law under Brussels I Recast was the law of Scotland, of which the court had judicial knowledge, until the end of IP completion day at 11.00pm on 31 December 2020: European Union (Withdrawal Agreement) Act 2020, section 39; European Union (Withdrawal) Act 2018, section 1A(6). The Deed of Affirmation bore to be dated 17 May 2020, ie prior to IP completion day. Any gaps in the adequacy of the evidence could be filled by the application of that judicial common sense which was characteristic of the court's modern approach to foreign law. In this context, that meant interpreting the case law of the EU with which the court was well familiar, it having formed part of Scots law prior to IP completion day: cf *Advocate General for Scotland* v *Murray Group Holdings Ltd* [2015] CSIH 77, 2016 SC 201, 2015 SLT 765 at [49] - [50]; and *FS Cairo (Nile Plaza) LLC* v *Lady Brownlie* [2021] UKSC 45, [2022] AC 995 at [148], [150]. The evidence as to German law was clear that the German courts would give effect to the choice of law and jurisdiction clause.

[13] Art 17 of the Brussels Convention had been superseded by the Brussels I Recast Regulation Art 25 (1215/2012/EU) and that was the law that applied in Scotland until IP completion day. The decisions of the CJEU, in particular Case 23/78 *Meeth* v *Glacetal Sarl* [1978] ECR 2134, [1979] 1 CMLR 520 at [5], followed in Case C-387/98 *Coreck Maritime GmbH* v *Handelsveem BV* EU:C:2000:606, [2000] ECR I-9362 at [14], supported the view that the courts of Germany and Luxembourg would consider the jurisdiction clause in the Deed of Affirmation to be a valid and enforceable exclusive jurisdiction clause in terms of Art 25 of Brussels I Recast which, like Art 17 of the Brussels Convention, was based on the

recognition of the force of the independent will of the parties to a contract in deciding which courts were to have jurisdiction to settle disputes falling within the scope of the Regulation: Recital (19) of Brussels I Recast.

[14] Art 31 of Brussels I Recast envisaged the possibility of more than one court having exclusive jurisdiction. That was reflected in the position adopted in the standard UK commentary on Art 25 of Brussels I, A Dickinson and E Lein (eds) *Brussels I Recast Regulation: A Commentary* (Oxford: OUP, 2015) at paragraph 9.85: "although the provisions refer to 'the court or courts of a Member State', parties can choose two or more courts for the purpose of settling their disputes".

[15] On the pursuer's hypothesis that the Deed of Affirmation was relevant to its claim, it was subject to a jurisdiction clause which prorogated the jurisdiction of the courts of Luxembourg and/or Germany. That clause was effective to exclude the jurisdiction of other courts as a matter of EU law. Accordingly, to the limited extent that the pursuer's case against the ninth defender was based on an alleged breach of the Deed of Affirmation, those averments ought not to be remitted to probation. Their clear purpose was to permit the court to make findings of fact about such an alleged breach. That was a dispute in relation to which the pursuer and ninth defender had prorogated the exclusive jurisdiction of the courts of Luxembourg and/or Germany. In *Fiona Trust and Holding Corporation* v *Privalov* [2007] UKHL 40, [2007] 4 All ER 951 Lord Hoffmann had observed at [13] that:

> "In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: 'if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.'"

[16] Lord Hope of Craighead had further noted:

"[26] … No contract of this kind is complete without a clause which identifies the law to be applied and the methods to be used for the determination of disputes. Its purpose is to avoid the expense and delay of having to argue about these matters later. It is the kind of clause to which ordinary businessmen readily give their agreement so long as its general meaning is clear. They are unlikely to trouble themselves too much about its precise language or to wish to explore the way it has been interpreted in the numerous authorities, not all of which speak with one voice. Of course, the court must do what it can to provide charterers and shipowners with legal certainty at the negotiation stage as to what they are agreeing to. But there is no conflict between that proposition and the guidance which Longmore LJ gave in paras 17–19 of the Court of Appeal's judgment about the interpretation of jurisdiction and arbitration clauses in international commercial contracts. The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly. Otherwise they will be taken to have agreed on a single tribunal for the resolution of all such disputes.

[27] The overall purpose of clause 41 is identified in the two opening paragraphs. These are the choice of law and jurisdiction clauses. There is no sign here—leaving aside the question of arbitration for a moment—that the parties intended that the disputes which were to be determined in accordance with the laws of England and be decided by the English courts were not to include disputes about the charter's validity. The simplicity of the wording is a plain indication to the contrary. The arbitration clause which follows is to be read in that context. It indicates to the reader that he need not trouble himself with fussy distinctions as to what the words 'arising under' and 'arising out of' may mean. Taken overall, the wording indicates that arbitration may be chosen as a one-stop method of adjudication for the determination of all disputes. Disputes about validity, after all, are no less appropriate for determination by an arbitrator than any other kind of dispute that may arise. So I do not think that there is anything in the owners' point that it must be assumed that when the charters were entered into one party was entirely ignorant that they were induced by bribery. The purpose of the clause is to provide for the determination of disputes of all kinds, whether or not they were foreseen at the time when the contract was entered into.

[28] Then there are consequences that would follow, if the owners are right. It is not just that the parties would be deprived of the benefit of having all their disputes decided in one forum. The jurisdiction clause does not say where disputes about the validity of the contract are to be determined, if this is not to be in the forum which is expressly mentioned. The default position is that such claims would have to be brought in the jurisdiction where their opponents were incorporated, wherever and however unreliable that might be, while claims for breach of contract have to be brought in England. But why, it may be asked, would any sensible businessmen

> have wished to agree to this? As Bingham LJ said in *Ashville Investments Ltd* v *Elmer Contractors Ltd* [1989] QB 488, 517, one should be slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings. If the parties have confidence in their chosen jurisdiction for one purpose, why should they not have confidence in it for the other? Why, having chosen their jurisdiction for one purpose, should they leave the question which court is to have jurisdiction for the other purpose unspoken, with all the risks that this may give rise to? For them, everything is to be gained by avoiding litigation in two different jurisdictions. The same approach applies to the arbitration clause."

[17] The application of those principles, common to jurisdiction and arbitration clauses, ought to result in the clear conclusion that clause 6.2 of the Deed of Affirmation excluded the jurisdiction of the Scottish courts in relation to any matter with a reasonably direct connection to the content of the Deed. That included, at the very least, the question of whether the ninth defender was in breach of its terms, whether or not a conclusion on that issue was a necessary element of the pursuer's case against the ninth defender. There was no discretion to disregard the prorogation agreement in a case falling within the ambit of Schedule 8 of the 1982 Act. If there was such a discretion, it should not be exercised in this case. Rather, the court should sustain that defender's first plea-in-law, or at any event reserve it for determination after proof before answer.

**Submissions for the third defender**

[18] As a party litigant, the third defender was afforded the privilege of addressing the court after the other defenders. He spoke to a note of argument previously lodged by him setting forth his position as to why the court had no jurisdiction over him. He was, firstly, not domiciled in Scotland, as the pursuer had latterly accepted. He vehemently denied having been involved in any conspiracy, challenged in his oral submissions and in affidavits lodged by him the veracity or accuracy of many of the matters of fact relied upon by the pursuer as supportive of its conspiracy hypothesis - setting forth his own detailed version

of events - and referred to various passages in the English Court of Appeal judgment in the related proceedings which were critical of the pursuer's candour and conduct of its litigations.

[19] The claims made by the pursuer against those defenders not domiciled in Scotland, including himself, were not so closely connected with the claims against those who were domiciled in Scotland that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, in terms of paragraph 2(o)(i) of Schedule 8 to the 1982 Act. On the pleadings, the pursuer's position was that the eighth defender was a vehicle through which a bribe was paid to the third defender. The third defender did not receive any inducements or bribes in any form from any party. He had taken no active part in any conspiracy. There was no ground of action which could be raised that would lead to conflicting judgments.

[20] In any event, Scotland was *forum non conveniens* in respect of the dispute. An action was live in the British Virgin Islands, which was capable of resolving the present dispute. Further reference was made to passages supportive of that proposition in the Court of Appeal judgment already referred to. This court ought to decline jurisdiction in favour of that forum, which was clearly more appropriate to hear the case than were the Scottish courts. It would not be contrary to the interests of justice for the case to be tried in that forum. The basis of the pursuer's action was that the various defenders conspired to cause the eleventh defender to breach the terms of a Consent Order issued by the BVI court. The proceedings in the BVI had as their object the question of whether that Consent Order had itself been obtained by fraud. That was an entirely prior question to that which the pursuer sought to have determined in the current action. Continuing with the present action risked causing entirely unnecessary expense. The third defender was not a party to the BVI

proceedings, but understood that they involved no question of Scots law and would settle the question of whether the Consent Order was entered into by fraud on the basis of the law of the BVI. Given the parties' business interests and activities in the BVI - in contrast to the lack of such activities in Scotland - the BVI was the most appropriate forum. In any event, Luxembourg (as the place of his domicile) was a more appropriate form for proceedings against him than Scotland, and a judge there could be expected to be familiar with the legal framework underpinning the activities of the eighth defender.

[21] The court should dismiss the action so far as directed against him.

**Submissions for the pursuer**

[22] On behalf of the pursuer, the Dean of Faculty confirmed that the sole ground of jurisdiction now asserted against the third and eighth defenders was that set out in paragraph 2(o)(i) of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982. It was also the sole ground of jurisdiction asserted against the fourth and ninth defenders, who appeared to accept that jurisdiction had been made out against them on that ground. There was no dispute that the first, second, fifth, sixth and seventh defenders were domiciled in Scotland. From the point at which they lodged defences they had admitted the pursuer's averment that the court had jurisdiction. The necessary "anchor defenders" were therefore present, and the action against them here would continue regardless of the jurisdictional position concerning the other defenders. The first question for the court was whether the claims against the third and eighth defenders were so closely connected with the claims against the other defenders that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

[23] The assessment required in that connection was one that could in most cases be carried out by the court on the basis of a general review of the pleadings, and it was not usually necessary to have averments specifically directed at the issues of close connection, expediency or irreconcilable judgments: *Compagnie Commercial Andre SA* v *Artibell Shipping Co Ltd* 1999 SLT 1051 at 1058, 1999 SCLR 349 at 358. The statutory wording did not require that irreconcilable judgments be inevitable, merely that there be a risk of such an outcome. It was reasonable to proceed on the basis that such a risk must be greater than *de minimis*. Similarly, the court need only find it expedient that the claims should be tried together to avoid such a risk, and need not apply any higher test, such as necessity. All of this was to be assessed on

> "a broad commonsense approach….bearing in mind the objective of the article, applying the simple wide test set out…. and refraining from an over-sophisticated analysis of the matter.":

*Sarrio SA* v *Kuwait Investment Authority* [1999] 1 AC 32 at 41, [1997] 3 WLR 1143 at 1149, per Lord Saville, cited with approval in *Compagnie Commercial Andre SA*. As Lord Saville had pointed out, assessing whether there was a risk that a future judgment to be issued by one court might be irreconcilable with another future judgment to be issued by a different court was a more difficult and uncertain exercise than considering whether two issued judgments were in fact irreconcilable.

[24] On the question of whether the actions were closely connected, all of the defenders were alleged to be co-conspirators, and were sued jointly and severally for the same wrong. The essence of the pursuer's case was that the third defender agreed the settlement with the pursuer and then acted to further his own interests and those of, in particular, the first, fourth, ninth and tenth defenders by seeking to prevent the implementation of the settlement. The pursuer's case was that these defenders acted as they did to protect the

fourth, ninth and tenth defenders from what would otherwise be the consequence of them having lost their clients' money, and to preserve and further their mutual commercial interest in the ongoing business activity primarily conducted through the medium of the eighth defender. The pursuer further averred that, despite the protestations of the first defender that he had no beneficial interest in the eighth defender and limited business involvement with it, the true position was very different and he had both a substantial beneficial interest in it and exercised a substantial degree of control over it. A single indivisible delictual claim against a combination of joint wrongdoers might be thought to be the paradigm example of a case in which claims against various defenders were closely connected. If the present case did not involve closely connected claims it was difficult to conceive of a type of case that would. The present case involved a very substantially closer connection between the claims than existed in *Compagnie Commercial Andre SA*, in which jurisdiction was established.

[25] So far as the risk of irreconcilable judgments was concerned, the third and eighth defenders made no averments on the matter, but it appeared that they contended that they should be sued in Luxembourg. That would require the proceedings to be conducted in French, notwithstanding all of the communings giving rise to the action having been conducted in English and none of the parties or material witnesses being a native French speaker. The position could be stated very shortly: the action against the other defenders, who all accepted jurisdiction and were said to be part of a single conspiracy, would proceed in Scotland. The third and eighth defenders contended that they should be sued, for the self-same conspiracy, in the courts of Luxembourg. The two jurisdictions would be asked to decide the very same issue. The risk of irreconcilable judgments was obvious and substantial. As to expediency, if, as the pursuer contended, the risk of irreconcilable

judgments following from separate proceedings was obvious and substantial it would inevitably be expedient to avoid that risk by hearing the claims against all defenders in a single process, particularly when the claims were as closely connected as those in the present case. Although the test was a unitary one, the closer the connection and the greater the risk of irreconcilable judgments, the more obvious it would be that it was expedient to hear the claims together. That the other defenders accepted the jurisdiction of the court was a factor weighing heavily in favour of the conclusion that it would be expedient to hear all claims together. In this regard, one might refer, by analogy, to the case of *Evans Marshall & Co Ltd* v *Bertola SA and Another (No 1)* [1973] 1 WLR 349, in which the Court of Appeal declined to give effect to an exclusive jurisdiction clause invoked by one of two separate defendants. Sachs LJ said (at 377):

> "I would, moreover, refer to one further factor which in my judgment has considerable weight. The conspiracy allegations, which we were told are definitely being pursued and are supported by evidence *prima facie* fit to be left to a jury, sound in tort … It would seem odd indeed, even if such a tort exists, or alternatively is recognised, in Spain (as to which no evidence has been put before us), were we, in all the circumstances, to adopt a course which necessitated separate trials of this cause of action in Spain and in England."

[26] It was also helpful to consider the observations of Lord Bingham of Cornhill, quoting Sachs LJ with approval, in *Donohue* v *Armco Inc* [2001] UKHL 64, [2002] CLC 440 at [27]. His Lordship went on to say:

> "33. [There is] the prospect, if an injunction is granted, of litigation between the Armco companies on one side and Mr Donohue and the PCCs on the other continuing partly in England and partly in New York. What weight should be given to that consideration in the circumstances of this case?
>
> 34. I am driven to conclude that great weight should be given to it. The Armco companies contend that they were the victims of a fraudulent conspiracy perpetrated by Donohue, Atkins, Rossi and Stinson. Determination of the truth or falsity of that allegation lies at the heart of the dispute concerning the transfer agreements and the sale and purchase agreement. It will of course be necessary for any court making that determination to consider any contemporary documentation

> and any undisputed evidence of what was said, done or known. But also, and crucially, it will be necessary for any such court to form a judgment on the honesty and motives of the four alleged conspirators. It would not seem conceivable, on the Armco case, that some of the four were guilty of the nefarious conduct alleged against them and others not. It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice."

[27] Similar considerations were here apparent.

[28] The plea of *forum non conveniens* was taken by the third defender. The forum in question was said to be the BVI. The third defender made no averment that he was subject to the jurisdiction of the BVI court, or even that he would voluntarily submit to it. The test for a Scottish court to decline to deal with the matter on the basis of *forum non conveniens* was that it should be persuaded that there was a foreign court having jurisdiction which was "clearly more appropriate": *Royal Bank of Scotland plc* v *Davidson* [2009] CSOH 134, 2010 SLT 92, citing *Spiliada Maritime Corp* v *Consulex Ltd* [1987] AC 460, [1986] 3 WLR 972 and *Sim* v *Robinow* (1892) 19R 665. The onus was on the party taking the plea to make it out. There was no averment that the present dispute could be litigated in the BVI, or that all of the present defenders could be convened there. It was suggested that there was an existing litigation in the BVI which had some degree of overlap, but the parties were not the same and the grounds of action were different. The BVI proceedings were narrowly focused on the Consent Order pronounced by the BVI court. There were obvious practical consequences of litigating in the BVI. None of the parties to the present action was domiciled there and the only connection any party had to that jurisdiction was that the pursuer had a wholly owned BVI subsidiary. The pursuer was incorporated in Hong Kong and had its head office in the UAE. All of the defenders were domiciled in either Scotland,

Luxembourg or Germany. The third defender could not force the other parties to the action to litigate in the BVI, and so the plea of *forum non conveniens* suffered the same problems regarding the risk of irreconcilable judgments as had already been canvassed. In this regard, the case was in a similar position to that discussed in *Al-Aggad* v *Al-Aggad* [2024] EWHC 673 (Comm), [2024] 4 WLR 35. There, a claim was made against three defendants - referred to as "Lama" and "the Brothers". Cockerill J having found jurisdiction against Lama established (at [130]), went on to say:

> "133. … The argument only progresses to this stage if the arguments in favour of [the proper forum being Saudi Arabia] fail. If that is the case Lama has been served as of right in a forum where Rana can achieve substantial justice and— absent a case management stay—the dispute with Lama proceeds here. In those circumstances it is simply illogical to conclude vis-à-vis the Brothers that Jordan is the *forum conveniens*, given that the factual and legal issues on the claim against Lama almost entirely overlap with those in the claims against the Brothers. It is the same breaches of contract and the same conspiracy. While some of the acts within the conspiracy are said to have been committed by the Brothers alone, others are said to have been committed by all three."

[29] Her Ladyship went on, under reference to *Donohue*, to say:

> "142. In my judgment the risk of multiplicity of proceedings and irreconcilable judgments is properly to be regarded in this case as an important factor. Some further weight is added by the point rightly made by Mr Shane Sibbel in his very clear submissions that there is authority to the effect that the court is to be particularly vigilant on this score where the claim alleged is one in conspiracy—and the more so where (as here) the case seems likely to stand or fall against all or none."

[30] Finally in this regard, reference might be made to *Lakatamia Shipping Co Ltd* v *Su* [2023] EWHC 1874 (Comm), [2024] 1 WLR 746, in which one of three alleged co-conspirators sought to argue *forum non conveniens*. Bryan J observed at [178]:

> "…(2) Lakatamia's claims against Mr Su and Mr Chang will be determined at trial in this jurisdiction. Both Mr Su and Mr Chang are subject to this court's jurisdiction ... The fact that the proceedings will continue against Mr Su and Mr Chang in relation to a conspiracy claim in this jurisdiction is, and has long been recognised as, another very powerful factor. As Lord Briggs JSC said in *Vedanta Resources* [i.e. *Lungowe v Vedanta Resources plc* [2019] UKSC 20; [2020] AC 1045; [2019] 2 WLR 1051], para 70:

> '70. In cases where the court has found that, in practice, the claimants will in any event continue against the anchor defendant in England, the avoidance of irreconcilable judgments has frequently been found to be decisive in favour of England as the proper place, even in cases where all the other connecting factors appeared to favour a foreign jurisdiction …'

(3) It makes obvious sense, when the central claim is of a conspiracy, for all the co-conspirators to be tried in the same jurisdiction, and in the jurisdiction that is at the heart of the claims which is England in the context of the Blair Freezing Order and Cooke Judgments, and which is where the claims against Mr Su and Mr Chang will inevitably proceed. It would make little sense for two co-conspirators (jurisdictionally anchored here) to be tried in England and another co-conspirator (Maître Zabaldano) to be tried separately in Monaco. Quite apart from the obvious risk of irreconcilable judgments, it would be wasteful in terms of costs, and potentially prejudicial, for Lakatamia to be expected to pursue parallel litigation in two separate forums, in relation to one of which (Monaco) there are little or no connecting factors at all (as further addressed below).

(4) It would be unattractive, and inappropriate, to pursue parallel proceedings in Monaco against Mr Su, Mr Chang and Maître Zabaldano to the proceedings that will continue in any event in England. Whilst it is said on Maître Zabaldano's behalf that such a claim could be brought in Monaco (from a jurisdiction perspective) this ignores the inherent uncertainties of whether or not, in fact, jurisdiction could be achieved and maintained against Mr Su and Mr Chang (and whether any judgment there obtained would be enforceable). Not only would requiring Lakatamia to bring its claims against Maître Zabaldano in Monaco give rise to the risk of irreconcilable judgments, it would also be wasteful in costs and potentially prejudicial to expect it to pursue parallel litigation in two jurisdictions when proceedings are already extant in this jurisdiction."

[31] These observations were highly pertinent here. Not only could it not be said that the BVI was "clearly more appropriate" for trial of the case of conspiracy against the third defender: one could go further and say that it very clearly would not be, given the commonality of the issues arising and the fact that the case against the other defenders would proceed in Scotland. Essentially the same points could be made about the secondary suggestion that Luxembourg would be a more appropriate forum.

[32] The ninth defender maintained that by contract it and the pursuer had prorogated the jurisdiction of the courts of Germany and/or Luxembourg in respect of certain issues. It

recognised that that plea would exclude only some elements of the present action and would not entitle the ninth defender to have it dismissed.

[33] The clause in question was clause 6.2 of the Deed of Affirmation dated 17 May 2020. Jurisdiction clauses, like arbitration clauses, were generally to be construed in accordance with the guidance given in *Fiona Trust*. The issue was whether the present dispute was one falling within the scope of the words "any dispute arising out of or in connection with this deed or its subject matter or formation (including non-contractual disputes or claims)". It was acknowledged that the words chosen in the Deed were wide and that that choice might be presumed to have been deliberate. Nevertheless there had to be a sensible limit. The present claim was not founded on the Deed. Nor did it concern a breach of it or a dispute as to its validity. At its highest the Deed, and the antecedent dealings recorded in it, formed part of the background to the settlement that the pursuer reached with the eleventh defender in Dubai in December 2020, and which was subsequently embodied in the Consent Order in the BVI. The present action concerned claims in delict arising from what were alleged to be concerted acts by the defenders to seek to deprive the pursuer of the benefit of that settlement and to present knowingly false claims against the pursuer. The fact that the Deed of Affirmation formed one part of the background to the Dubai settlement was insufficient to engage the jurisdiction clause: cf *Sea Master Special Maritime Enterprise* v *Arab Bank (Switzerland) Ltd* [2022] EWHC 1953 (Comm). That seemed to be recognised by the ninth defender, since the clause was not relied upon to found a plea of "no jurisdiction", and merely to found an argument that the pursuer's averments relating to the Deed should be excluded from probation. That argument was baseless. The Deed was not founded upon as a cause of action. Rather, it was the subject of averment as part of the background context

to, and one of the reasons for, the averred conspiracy. Excluding it from probation would make no sense, and was not warranted by the clause in question.

[34] In any event, the court had a residual discretion not to give effect to a prorogation agreement. In *Donohue*, Lord Bingham had observed at [24]:

> "If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in *The Eleftheria* [l9701 P 94, at pp. 99-100, Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion, and his judgment has been repeatedly cited and applied. Brandon J did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material …"

[35] If the prorogation clause in the Deed of Affirmation did bite in the circumstances of the present case, there were strong reasons for departing from it, and the court should exercise its discretion to do so.

**Decision**

[36] The matters requiring determination on the present motion may be dealt with in relatively short order. The relevant legal principles are not in serious dispute and their application in this case appears to me to be quite straightforward. It is important to stress

at the outset - particularly for the benefit of the third defender as a party litigant - that the only question I have to address is whether the court has jurisdiction to hear and decide the case put forward in the pursuer's pleadings. That I proceed, as I must, on the basis of those pleadings in no way infers any view on the part of the court that they will at proof be established in whole or in part.

**Relevancy of case against eighth defender**

[37] The eighth defender accepted that proof of the alleged conspiracy was highly likely to depend on the court's willingness after enquiry to draw from the primary facts then made out the necessary inferences in support of the pursuer's allegations. I note in that connection that the pursuer clearly avers that the eighth defender is a vehicle owned and controlled by the first, third and fourth defenders, and that it received funds in furtherance of an arrangement amongst all the defenders whereby the third defender sought to renege on an agreement which led to the BVI Consent Order and which had been made by him on behalf of the eleventh defender, with a view to providing commercial benefit in various forms to all of the defenders. It is certainly not possible to say that the pursuer's claim against the eighth (or any other) defender will succeed at proof, but more to the point for present purposes, nor is it possible to say that it is bound to fail. Put another way, it is not inconceivable that the evidence to be led in support of the pursuer's averments will allow or even compel the inference to be drawn that the eighth defender was a participant in the alleged conspiracy and is jointly and severally liable with the other conspirators for the damage caused by the conspiracy to the pursuer. The principal objection advanced to the prospect of the eighth defender being found liable in damages for conspiracy consisted in the observation that it was not alleged it had itself actively committed some wrongful act against the pursuer. That

objection is misplaced. Liability in the form of conspiracy here alleged depends on being party to a combination having as one of its purposes the taking of unlawful action by one or more of the conspirators to the detriment of another. The precise role played by each conspirator, whether active or passive, in itself wrongful or lawful, is not the true touchstone of liability. In these circumstances the eighth defender is in no different position from the other defenders for the purposes of assessing the application of the jurisdictional test set out in paragraph 20(o)(i) of Schedule 8 to the 1982 Act.

**"Close connection"**

[38] The proper approach to be taken to the assessment of the test put forward in that paragraph was clearly set out in *Compagnie Commercial Andre SA* and *Sarrio SA*. An allegation that a number of defenders engaged together in a single conspiracy must be the paradigm, or close to the paradigm, of a case where claims against those defenders are closely connected in the relevant sense. In that regard it is not possible to fault, or usefully to add to, the observations of Sachs LJ in *Evans Marshall* already set out, or those of Lord Bingham in *Donohue* at [33] - [34]. It follows that jurisdiction is established against the third and eighth defenders on the proper application of paragraph 20(o)(i).

***Forum non conveniens***

[39] The question to be asked and answered in relation to a plea of *forum non conveniens* is clearly established by the Scottish authorities cited. It is whether the party taking the plea has made out a case that a forum other than the courts of Scotland is clearly more appropriate for the adjudication of the dispute. Neither of the other candidate jurisdictions, namely the BVI and Luxembourg, appears to me to be clearly more appropriate than

Scotland in that regard. There are certainly connections between what is said to have occurred and the judicial organs of the BVI, but those connections are not so pervasive in the overall context of the conspiracy allegations as to render that a clearly more appropriate forum. The nature and incidents of the alleged conspiracy extend far beyond the shores of the BVI and it is far from obvious that the courts there would have jurisdiction to deal satisfactorily with the various issues which are likely to arise. The allegations which the pursuer wishes to have tried have very little substantial connection with Luxembourg, and although it might be convenient in the narrow sense of that word for the third (and eighth) defenders to be sued there as the place of their domicile, that does not render it a clearly more appropriate forum than Scotland. Most tellingly of all, however, in relation to both the BVI and Luxembourg as potential alternative *fora*, given that the anchor defenders are being, and will continue to be, sued in Scotland, any declinature of jurisdiction over the third defender here would result in the prospect of irreconcilable judgments, the potential for which in itself renders those alternatives clearly inappropriate. The reasoning and conclusions of Cockerill J in *Al-Aggad* and of Bryan J in *Lakatamia Shipping* in this regard cannot sensibly be gainsaid. The third defender's plea of *forum non conveniens* must be repelled.

**Prorogation agreement**

[40] Applying the liberal principles of construction noted as appropriate in *Fiona Trust* for application to jurisdictional prorogation clauses, it is clear that this court has no jurisdiction to entertain any claim or dispute arising out of or in connection with the Deed of Affirmation. It does not matter that the present action is not founded on that Deed, or that reference to it is said merely to form part of the background to the pursuer's actual claim.

The applicable yardstick is precisely that set out in the clause in question itself; put at its widest, is the court being asked to decide a matter of dispute arising in connection with the Deed? The existence and terms of the Deed are not matters of controversy between the pursuer and the ninth defender and so do not fall within the scope of the prorogation clause. Further, I am prepared to accept that what anyone thought about the significance of the Deed, even if that is in dispute, is not in itself something that directly arises in connection with the Deed within a sensible commercial reading of the prorogation clause; the resolution of that matter would not impinge in any way upon the question of the true import of the Deed. However, the stark questions of whether the ninth defender's intimated intention to withdraw funds from notes issued by the eleventh defender constituted a breach by it, present or anticipatory, of the terms of the Deed, and what the legal consequences of any such breach might be, cannot reasonably be regarded as anything other than a matter of dispute arising in connection with the Deed and thus, whether as an end in itself or as a stepping-stone to some further and more significant goal of the pursuer, as a matter which the pursuer and the ninth defender have validly agreed was not to be the proper subject of this court's adjudication. The pursuer's averments that the ninth defender's actions amounted to a breach of the terms of the Deed, and its averments depending upon that suggestion, will accordingly be refused probation.

[41] For the avoidance of doubt, I reject the submission that the Scottish courts have a common law discretion to refuse to give effect to a prorogation clause complying with the requirements of the 1982 Act in a case falling within the ambit of Schedule 8 thereof. The terms of the statute provide no support whatsoever for such a submission and the common law of England as it relates to circumstances not falling within the ambit of the Act provides no proper basis for any different conclusion.

**Disposal**

[42] I shall repel the third defender's first plea-in-law. I shall repel the eighth defender's first plea-in-law, as well (for want of insistence) as its second and third such pleas. I shall sustain the ninth defender's first plea-in-law to the extent of refusing probation to the first sentences of Articles 12 and 13 of Condescendence, and to the words "settlement of the ninth defender's liabilities to the pursuer" in the latter Article. The ninth defender's second plea-in-law will be repelled for want of insistence. Although the tenth defender's first three pleas-in-law concern the jurisdiction of this court, its bankruptcy supervisor has stated that its defences as a whole are not insisted upon. I shall also refuse probation to the wording in Article 3 of Condescendence (relating to the eighth defender) "and on that hypothesis is domiciled at that place of business amongst others" on the basis that the pursuer's argument that the court has jurisdiction over that defender on the basis of its domicile was abandoned by it shortly before the diet of debate.