

JERSEY / JUDGMENT

Adeem Investment Holding Company KSCH v Al-Humaidhi and Ors [2022] JRC 038 (10 February 2022)

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judgment

the deputy bailiff: 1. On 12 th and 13 th January 2022 we heard argument in support of the Defendants' summons dated 23 rd July 2021 and reserved our judgment in respect of the relief sought in that summons. 2. The summons sought, inter alia , orders that: the service of the Plaintiff's Order of Justice dated 23 rd June 2021 on the First Defendant ("Najeeb") be set aside pursuant to Rule 6/7 of the Royal Court Rules and that the order of the Royal Court dated 30 th June 2021 giving leave to serve the Order of Justice out of the jurisdiction on Najeeb be set aside; the Court declare that in the circumstances of the case, the Court has no jurisdiction over Najeeb in respect of the subject matter of the claim; the Order of Justice be stayed on the grounds of forum non-conveniens. The grounds for those applications are: as regards the claims against Najeeb, the Royal Court does not have jurisdiction to determine the Plaintiff's claims in the Order of Justice because Jersey is not the proper place in which to bring such claims; and as regards the claims against the Second to Fifth Defendants (which we will call, where referred to collectively, as the "Jersey Defendants") the Court should find that the appropriate forum for those claims is the courts of Kuwait. In default as regards the claims against the Jersey Defendants (and the claims against Najeeb should the Court find that it has jurisdiction to determine the claims against him) a case management stay should be granted staying the proceedings until determination of Kuwaiti civil proceedings, which will decide important issues raised by the Plaintiff's claims in the Order of Justice. 3. We now summarise: (i) the Plaintiff's claims in Jersey; (ii) the Plaintiff's claims in Kuwait, and the proceedings in that jurisdiction; (iii) the expert evidence regarding the Kuwaiti proceedings; (iv) the relevant legal principles; (v) the parties' contentions and the court's conclusions on the relevant factors determining the appropriate forum for the proceedings begun by Order of Justice; and (vi) the competing arguments and court's decision on the Defendants' ancillary application for a procedural stay of the Plaintiff's claim. The Plaintiff's claims in Jersey 4. The Plaintiff ("Adeem") is a Kuwaiti company that operates as an investment holding and investment management company. It is a joint venture between two Kuwaiti families of which Najeeb is a member. Najeeb is a Kuwaiti national living in Kuwait. He was chairman of Adeem from 2007 to 2016. Notwithstanding that he stepped down as

chairman in 2016, he continued to control Adeem's major shareholder through a Mr Mahmoud Bushehri until January 2020, when Najeeb lost all control over Adeem. The Jersey Defendants are Jersey companies which today (this has not always been the case) in the order in which they are named in the heading to the action, own 100% of the shares in each in descending order, i.e., Catalonia Investments Limited ("Catalonia") owns the shares in Nama Investments Limited ("Nama") which in turn own the shares in Primewagon Holdings Limited ("Primewagon Holdings") which in turn owns the shares in Primewagon (Jersey) Limited ("Primewagon Jersey"). Catalonia is beneficially owned by Najeeb and members of his close family. 5. In his judgment dated 31 st August 2021, the Master described the Order of Justice as "not easy to follow" . We agree and during the course of the hearing we needed to repeat the Master's request in that judgment for various diagrams and structure charts, which were provided to us. In any event, the Order of Justice and other documentation allows us to summarise the claims as follows. Adeem had a significant shareholding in a Kuwaiti investment company called The Investment Dar Company KSCC ("TID") which in 2007 purchased a substantial holding in Aston Martin UK. The details of the shareholding do not matter for the purpose of this judgment. Whilst chairman of Adeem, Najeeb became a shareholder in another Kuwait company called Al-Offok United Real Estate Co. KSCC ("Al-Offok"). The shares in Al-Offok were purchased by Adeem through a subsidiary. Najeeb was registered as the 99% shareholder of Al-Offok and Mr Bushehri registered as the owner of the remaining 1% of the shares. A key dispute relates to what is called the "Najeeb declaration", which was executed in Arabic, on Adeem's account no later than July 2012, in which Najeeb declared that he was holding the 99% shareholding in Al-Offok as nominee for Adeem. Mr Bushehri made a similar declaration in relation to his 1% shareholding. The validity and effect of these declarations are a matter of Kuwaiti law. Adeem makes various allegations about the effect of those declarations which we will consider when we turn to the Kuwaiti proceedings. A proportion of the Aston Martin UK shares which Adeem acquired from TID were to be held in Jersey companies beneficially owned by Al-Offok on its behalf. Al-Offok owned 85% of the shares in another Kuwaiti company called International Oasis Holdings Co. KSCC ("International Oasis"), with the balance of the shares being owned by a Jersey company called Al Boom Holding Company (Jersey) Limited. In 2017 Al-Offok acquired Al Boom's interests in International Oasis and at all material times Najeeb was chairman of the Board of Directors of International Oasis and is pleaded as "its controlling mind and will". 6. Initially, International Oasis owned 100% of the shares in Primewagon Holdings and in April 2013 various other Jersey and English companies were incorporated, though it is not necessary to particularise these for the purpose of this judgment. Until March 2017, substantial and valuable shareholdings in Aston Martin UK were owned by Primewagon Jersey. Primewagon Jersey in turn owned Primewagon UK Limited, a company incorporated in England and Wales, which also held a valuable shareholding in Aston Martin from June 2017. In July 2018, certain Aston Martin shares were made subject to a planned initial public offering on the London Stock Exchange. In September 2018 a reorganisation took place affecting the holdings of Aston Martin UK shares by Primewagon Jersey and Primewagon UK: the Aston Martin UK shares were converted into shares in Aston Martin Lagonda Global Holdings Limited ("Aston Martin plc", the holding company which was floated on the LSE the following month). As a consequence of the initial public offering in

October 2018, approximately 40% of the Aston Martin plc shares to which we were referred were sold, resulting in very substantial receipts of moneys into what was described as the "Primewagon structure". 7. The Order of Justice says that by June 2018 at the latest, Najeeb hatched a "plan" whereby he would transfer assets beneficially owned by Adeem into structures beneficially owned by him and/or his immediate family. This led Najeeb to transfer companies including the Fourth and Fifth Defendants to a new company, namely Nama, which was incorporated in Jersey in August 2018 and which was chaired and solely owned beneficially by Najeeb. On 10 th September 2018 International Oasis transferred its shares in Primewagon Holdings (and thereby Primewagon Jersey) to Nama for a consideration of £2. At this time Catalonia was also 100% owned by Najeeb and during mid to late 2018 and early 2019, substantial cash transfers totalling approximately \$150 million were made, (principally after the IPO) from Primewagon Holdings and Primewagon Jersey to Catalonia. It is said that there was " no commercial justification for any of these payments and they were made at the instigation and direction of Najeeb and pursuant to the Plan". In October 2020, Primewagon Jersey also transferred a substantial number of shares in Aston Martin to Catalonia's portfolio held in London, again it is said at the instigation of Najeeb. In December 2020, Catalonia received further shares in Aston Martin and Najeeb transferred 100% of the shares in Nama to Catalonia, again pursuant to the Plan. 8. The Order of Justice pleads a number of duties owed by Najeeb to the Adeem; all said to be owed under Kuwaiti Civil Code, particularly Article 61, Article 62, Article 707 and Article 227. Various transactions, including the transfer of the shares in Primewagon Holdings to Nama described as the "Nama transfer" , the transfer of Primewagon Jersey shares in Aston Martin plc to Catalonia in October 2020 called the "Catalonia transfer", the December 2020 transfer of 100% of the shares in Nama to Catalonia "the December 2020 transfer", and the payments made both to Najeeb personally (and his wife and associates) and Catalonia described as the "Wrongful Payments" are said to have been carried out in breach of Najeeb's duties to Adeem pursuant to various provisions of Kuwaiti law. The claims against the Second, Third and Fourth Defendants are all framed on the footing that at all material times Najeeb was the ultimate sole or beneficial owner of the companies in question; was the " directing mind and will" of each of the companies and that the "knowledge of Najeeb is at all material times to be attributed to" the company in question. Adeem said it has suffered loss and damage as the Primewagon companies and valuable Aston Martin shares were transferred away from Al-Offok and International Oasis and, accordingly, Adeem lost its beneficial interest in the same; wrongful payments were made out of the structure and Adeem is deemed to have been deprived of dividends and/or bonus shares attaching to the shares in Al-Offok and/or Aston Martin. It is said that the Jersey Defendants are liable to "give reparation to Adeem ... pursuant to Article 227 ... and/or Article 229" of the Kuwaiti Civil Code. Paragraph 83 the Order of Justice claims: "The following are principles of Kuwaiti law: 83.1 Fraud nullifies all acts. 83.2 Nullity leads to nullity and whatever is based on or derived from a null and void act is also null and void." 9. It is said that Najeeb's actions in relation to the transfers and payments were fraudulent and part of his plan; and the Order of Justice asks that all the transfers and wrongful payments should be declared null and void and set aside. Further, or in the alternative, that by reason of Article 199 of the Kuwait Civil Code, the Plaintiff is entitled to declaratory relief that (i) it is entitled to be

registered as the lawful owner of the shares in Al-Offok; and (ii) it is the owner of the Aston Martin shares held by Primewagon Jersey and by Catalonia. 10. Further, or in the alternative Adeem seeks an order that Najeeb transfers the shares in Al-Offok to Adeem. It is noted at paragraph 88.1 "This claim is being pursued in Kuwaiti civil proceedings issued on 6 May 2021". Adeem recognises that that is a matter for the Kuwaiti courts and not for the Royal Court and by affidavit in these proceedings says that it no longer seeks the declaration claimed at paragraph 87.1 of the Order of Justice that it is entitled to be registered as lawful owner of the shares in Al-Offok - that too being a matter for the Kuwaiti courts. We will return to this issue below. 11. There are further additional or alternative claims made by Adeem in the Order of Justice, such as claims for damages, equitable compensation and for the repayment of various sums by Najeeb, Nama and Catalonia. 12. Each and every claim in the Order of Justice is made under Kuwaiti law and there are no allegations of Jersey law duties or breaches of Jersey law obligations, as confirmed by counsel for Adeem in the course of argument. 13. Najeeb has not filed an Answer as he is disputing the jurisdiction of the Court. 14. The Jersey Defendants have been required by the Master to file an Answer, which they did on 24 th September 2021. The claims of Adeem are contested in the Answer and it is pleaded that Adeem's claims against the Jersey Defendants will "inevitably fall to be dismissed if the Plaintiff fails to establish its central claim against the First Defendant that, as a consequence of the "Alleged Declaration" the 99% shareholding held by the First Defendant in Al-Offok was from no later than 29 July 2012, owned by the Plaintiff" as alleged by the Order of Justice. The Answer goes on to plead that the validity and effect of the Alleged Declaration is under consideration by the Kuwaiti court in proceedings issued by Adeem against Najeeb. Generally, Adeem's claims are denied or not admitted in the Answer of the Jersey Defendants. 15. As to the service of proceedings on the Defendants, Adeem was entitled to serve the Jersey Defendants as of right as this is their place of incorporation and they are described by Adeem as "anchor" defendants. 16. As to Najeeb, leave to serve out of the jurisdiction was granted on various grounds. The principal ground was that he was a "necessary and proper party" to the claims made against the Jersey Defendants. It is not necessary for us to comment on the merits or otherwise of the basis upon which Adeem sought leave to serve out of the jurisdiction as neither party has advanced detailed arguments as to the merits of the respective grounds and accordingly, we do not comment upon them. The sole question that we need to consider is that of the proper forum for the trial of the claims made in the Order of Justice. Adeem's claim in Kuwait and the proceedings in that jurisdiction 17. Adeem issued proceedings in Kuwait before issuing these proceedings in Jersey. These proceedings were issued on 6 th May 2021 and we had before us a translation of the Kuwaiti Statement of Claim. It is agreed that the authenticity, validity and effect of the Alleged Declaration is a matter for the Kuwaiti court and is a matter of Kuwaiti law. Najeeb and the Jersey Defendants argued that the validity and effectiveness of the declarations is a "threshold issue" and Adeem cannot succeed in Jersey unless it succeeds in Kuwait on that issue. 18. This second "threshold issue" is that Adeem beneficially owns the shares in Al-Offok and profits and proceeds due from them and again, without succeeding on this issue, Adeem cannot succeed in its claims in Jersey. 19. It was ultimately agreed (there was some prevarication from Adeem in the course of the hearing on this point) that it cannot succeed on its claims in Jersey unless and until it proves its case on these two threshold issues, namely the validity and

effect of the Alleged Declaration and the ownership of the shares in Al-Offok. At a preliminary hearing in this case, in considering the question of leave to serve out, on 28 th June 2021 the Master observed that Adeem's claims were "all launched from the same diving board" . This is an accurate assessment. In the Statement of Claim filed in Kuwait (we have a translation of all relevant pleadings and court orders before us), we note that the Plaintiff has brought proceedings against Najeeb, Mr Bushehri (the legal owner of the other 1% in Al-Offok) and the claim is that the 99% of the shares should be registered in the name of Adeem, the Plaintiff in the Kuwaiti proceedings, the 1% should be registered in the name of the third defendant to those proceedings (Mr Essa Al Shamlan) and that the fourth, fifth and sixth defendants take various action necessary to ensure that as a matter of Kuwaiti law the shares are appropriately registered. 20. The Kuwaiti Statement of Claim states that "the shares registered in the name of [Najeeb] numbering 99 shares are in reality purely owned by the claimant company; however by virtue of contract and declaration of fictitious ownership, these shares registered in the name of [Najeeb] as trust to be in conformity with the conditions and laws of the Ministry of Commerce related to the establishment of [Al-Offok]. [Najeeb] has explicitly declared his fictitious ownership of the shares and the pertaining proceeds and the real ownership is by the claimant company which has the right to recover them whenever it wishes." A similar claim is made in relation to the other share and reference is made to Article 199 of the Kuwaiti Civil Law to the effect that "If a fictitious contract is concluded, the consideration is given to the reality for both the parties and the public, as the dormant contract - when its elements are available - shall be effective rather than the apparent contract." The evidence of the Kuwaiti Law expert, to which we will turn in more detail, is that the concept of "fictitious contract" is akin to our idea of nomineehip. The Kuwaiti Statement of Claim then goes on to plead references to key Kuwaiti authorities from their Court of Cassation before setting out the relief claimed. 21. Three criminal complaints were made to the relevant Kuwaiti authorities in approximately March 2021 and were all dismissed, reasonably swiftly in the course of last year. 22. A defence has been filed by Najeeb to the Kuwaiti proceedings. He denies the claims made against him. We were told that in those proceedings, Najeeb has said that he does not dispute that the alleged declaration is genuine but claims to be the beneficial owner of the shares in Al-Offok. It is not for this Court on this application to consider the merits of the parties' claims either in Jersey or indeed in Kuwait. 23. Hearings have taken place in the Kuwaiti civil proceedings and the next hearing is listed in February 2022. 24. Neither party could say when the Kuwaiti proceedings will be determined, but counsel for Adeem drew to my attention similar Kuwaiti proceedings where allegations had been made that Najeeb held shares as a mere nominee. Those proceedings have been resolved by way of a reasoned judgment, the translation of which was made available to us. Najeeb was unsuccessful in defending those proceedings. Both Adeem and Najeeb and the Jersey Defendants (i.e., all the parties to these proceedings) accept that the Jersey Defendants could be joined to the Kuwaiti proceedings and the matters pleaded in the Order of Justice could be determined by the Kuwaiti court. Further, the Jersey Defendants have stated in writing in these proceedings that they are prepared to undertake not to object to the Kuwaiti court's jurisdiction should the Plaintiff issue proceedings against them in Kuwait in relation to the claims covered by the Order of Justice in these proceedings. 25. The affidavit sworn on behalf of Adeem on 23 rd June 2021 in support of

the application to serve Najeeb with these proceedings, accepted that "the allegations made against the other defendants hinge on the knowledge and actions of Najeeb." As noted above, paragraph 88.1 of the Order of Justice specifically pleads that Adeem's claim, that Najeeb should transfer the shares in Al-Offok to Adeem, is being pursued in the Kuwaiti proceedings issued on 6th May 2021. In her affidavit sworn in these proceedings for the purpose of this application Ms Shah, on behalf of Adeem, confirmed at paragraph 22 that Adeem will "not be pursuing that declaration as part of the Jersey proceedings; it is being pursued and falls to be determined in the Kuwaiti civil proceedings"

- this is reference to the prayer for relief which was originally sought at paragraph 87.1 of the Order of Justice, that Adeem be registered as the lawful owner of the shares in Al-Offok. In the same affidavit, Ms Shah acknowledges at paragraph 38 "There are no reasons why Adeem would not obtain justice in the Kuwaiti court and it is possible to bring the claim set out in the Order of Justice against the second to fifth defendants in Kuwait ..." The expert evidence regarding the Kuwaiti proceedings 26. The Defendants obtained expert evidence from Dr Husain Buaraki of Kuwait contained in an affidavit sworn on 20th July 2021. His evidence was unchallenged. He is the chair of the criminal law department at Kuwait University and spent six years practicing as an assistant public prosecutor at Kuwait's Public Prosecution Office. He described the Kuwaiti civil proceedings, analysing the Order of Justice and, as mentioned above, clarified in respect of the Statement of Claim that "the literal translation of the word used in the Kuwaiti Civil Proceedings is "fictitious". However, the practical nature of the Plaintiff's allegation is that the First Defendant owned Al-Offok as nominee for the Plaintiff." Dr Buaraki confirmed that all the claims in the Kuwaiti proceedings are to be dealt with pursuant to provisions of Kuwaiti law given the provisions of the Kuwaiti Foreign Relations Law, the domicile of Adeem and Najeeb, both being Kuwait, and the fact that they are both Kuwaiti nationals. In any event, Kuwaiti law was applicable to the determination of the authenticity of the Alleged Declaration. Dr Buaraki confirms that the alleged declaration is "at the crux of [Adeem's] case" and that the Kuwaiti court is asked to find that the alleged declaration is authentic, valid and has the legal effect attributed to it by Adeem. He also went on to explain that Article 115 of the Kuwaiti Pleadings Law 1980 requires that "A judgment must be pronounced verbally in a public hearing. And judgments must include the reasons they were based on or they shall be void ...". Article 116 provides " ... the judgment must include a presentation of the facts of the claim followed by the demands of the parties and a brief summary of their motions and material defence ... followed by the reasons and pronouncement of the judgment." Dr Buaraki also examined the Order of Justice and noted that the "findings of the Kuwaiti court are very likely to overlap with the factual assertions made by the Plaintiff in the [Order of Justice], especially the Plaintiff's assertions in paragraphs 1 and 7 - 17." He also noted that Adeem's claims in the Order of Justice "focus primarily on the alleged breaches of Kuwaiti law; specifically Article 61, 62, 707 and 227 of the Civil Code which form a basis for the alleged breach of Najeeb's fiduciary obligations and Najeeb's fault. In the Kuwaiti [Statement of Claim] the basis of [Adeem's] claim against [Najeeb] is Article 199 of the Kuwaiti Civil Code, which forms the basis for the [Najeeb's]

alleged fictitious ownership of Al-Offok." 27. He also went on to say "Although [Adeem] makes a passing reference to [Najeeb's] alleged fictitious ownership of Al-Offok at paragraph 87 of the [Order of Justice] it is a necessary prerequisite for the ownership of Al-Offok to be determined first, before a Jersey Court can determine the legal issues raised by [Adeem] in the [Order of Justice]. The determination of whether [Najeeb's] ownership of Al-Offok is fictitious is already being pursued by [Adeem] in the Kuwaiti civil proceedings. There will be no relevance or operation of, or liability arising pursuant to Articles 61, 62, 707 and 227 of the Civil Code as cited by [Adeem] in the [Order of Justice] if the Kuwaiti court has not first found that [Najeeb's] ownership of Al-Offok is fictitious." 28. He went on to say at paragraph 28 of his opinion "I do not see any reason whatsoever which would prevent [Adeem] from obtaining justice in Kuwait. This is supported by the fact that [Adeem] has chosen to bring Kuwaiti civil proceedings." He went on to explain that the Kuwaiti court would have jurisdiction over the Jersey Defendants pursuant to Article 24 of the Pleadings Law because of the allegations of Kuwaiti law and because Najeeb is domiciled in Kuwait. The relevant legal principles 29. As noted above, Najeeb has not conceded that the threshold requirements for service out of the jurisdiction were met in this case, in particular that Najeeb was a necessary and proper party under the Service of Process Rules, but the Court does not need to determine this matter as Najeeb (and the Jersey Defendants) dispute jurisdiction on the basis that Jersey is not the proper or appropriate forum for trial of this case - Kuwait is. 30. As he complied with the procedure for disputing jurisdiction as set out in the Royal Court Rules, the burden is on Adeem having regard to Najeeb's challenge to show that Jersey is clearly the natural and appropriate forum for the trial of this case. 31. As the Royal Court said in *Campbell -v- Campbell*

[2014] (2) JLR 465 at paragraph 21 under the title "Applications to stay and applications to set aside leave for service out: "Where an order has been made granting leave to serve a defendant out of the jurisdiction, the defendant may apply to set that order aside. Both on the original application for leave and on the hearing of any application to set aside, the burden lies on the plaintiff to show that Jersey is clearly the natural or appropriate forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice (see *Spiliada Maritime Corp. v. Cansulex Ltd.* (5) ([1987] A. C. at 481, per Lord Goff of Chieveley))." 32. However, in the case of the Jersey Defendants who were served as of right, the burden is upon them to show that there is another available forum which is clearly more appropriate. As Birt, Bailiff said when giving the judgment of the Royal Court in *Campbell* in the following paragraphs: "22. Conversely, in cases of an application to stay proceedings on the grounds of forum non conveniens, the burden lies on the defendant to show that there is another available forum which is clearly or distinctly more appropriate than the Jersey forum (see Lord Goff in *Spiliada* (ibid., at 477))." 33. Accordingly, presumably for tactical reasons, in this case counsel for Adeem argued that the Court should start its deliberations by considering whether or not the Jersey Defendants had discharged the burden upon them; whereas counsel for Najeeb suggested that the Court should commence its deliberations by beginning with considering whether Adeem had

discharged the burden upon it in proving that Jersey was the appropriate forum for the trial of this action. As to the matters which ought to be taken into account when considering questions such as this, we note that in *Federal Republic of Brazil -v- Durant International Corporation*

- [2010] JLR 421, the Court said at paragraph 19: "The applicable test when considering an application of this nature is well established in Jersey and is summarized in the speech of Lord Goff in *Spiliada Maritime Corp. v. Cansulex Ltd.*, *The Spiliada*. The court is concerned to establish which is the appropriate forum for the trial of the action, i.e. that in which the case may be tried most suitably in the interests of all the parties and the ends of justice. Lord Goff also approved use of the expression "the natural forum" as being that with which the action had the most real and substantial connection. Thus, one is looking for connecting factors which will include matters such as convenience or expense (such as availability of witnesses); the law governing the relevant transaction; and the places where the parties respectively reside or carry on business. In a case such as this, where the defendants have not been served as of right, the burden lies on the plaintiffs to show that Jersey is the appropriate forum." 34. In *Spiliada Maritime Corporation -v- Cansulex Ltd*
- [1987] 1 AC 460 at 477G, subparagraph (d), Lord Goff said: "Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in *MacShannon's case* [1978] A. C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the *Société du Gaz* case, 1926 SC (HL) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in *The Abidin Daver*
- [1984] A. C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Crédit Chimique v. James Scott Engineering Group Ltd.*, 1982 S. L. T. 131), and the places where the parties respectively reside or carry on business." 35. A more recent elaboration of the principles is to be found in the judgment of the Supreme Court in *Lungowe -v- Vedanta Resources Plc*
- [2020] AC 1045 in which Lord Briggs, giving the judgment with which other members of the court agreed, said (my emphasis added): "Is England the proper place in which to bring the claim against KCM?"

66. I have found this to be the most difficult issue in this appeal. It does raise an important question of law. CPR 6.37(3) provides that: "The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales is the proper place in which to bring the claim." (my emphasis) The italicised phrase is the latest of a series of attempts by English lawyers to label a long-standing concept. It has previously been labelled *forum conveniens* and appropriate forum, but the changes in language have more to do with the Civil Procedure Rules' requirement to abjure Latin, and to express procedural rules and concepts in plain English, than with any intention to change the underlying meaning in any way. The best known fleshed-out description of the concept is to be found in Lord Goff of Chieveley's famous speech in the *Spiliada* case, summarised much more recently by Lord Collins in the *Altimo* case at para 88 as follows: "The task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; ..." That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred.
67. Thus far, the search for these connecting factors gives rise to no difficult issues of principle, even though they may not all point in the same direction. The problems thrown up by this appeal all arise from the combination of two factors. The first is that the "case" involves multiple defendants domiciled in different jurisdictions. [The second consideration has no application in Jersey].
68. There can be no doubt that, when Lord Goff originally formulated the concept quoted above, he would have regarded the phrase "in which the case can be suitably tried for the interest of all the parties" as referring to the case as a whole, and therefore as including the anchor defendant among the parties. Although the persuasive burden was reversed, as between permission to serve out against the foreign defendant and the stay of proceedings against the anchor defendant, the court was addressing a single piece of multi-defendant litigation and seeking to decide where it should, as a whole, be tried. The concept behind the phrases "the forum" and "the proper place" is that the court is looking for a single jurisdiction in which the claims against all the defendants may most suitably be tried. The *Altimo* case also involved multiple defendants. Although it was decided after *Owusu v Jackson*, it concerned the international jurisdiction of the courts of the Isle of Man, so that the particular problems thrown up by this appeal did not arise.
69. An unspoken assumption behind that formulation of the concept of *forum conveniens* or proper place, may have been (prior to *Owusu v Jackson*) that a jurisdiction in which the claim simply could not be tried against some of the multiple defendants could not qualify as

the proper place, because the consequence of trial there against only some of the defendants would risk multiplicity of proceedings about the same issues, and inconsistent judgments. But the cases in which this risk has been expressly addressed tend to show that it is only one factor, albeit a very important factor indeed, in the evaluative task of identifying the proper place. For example, in *Société Commerciale de Réassurance v Eras International Ltd (The Eras Eil Actions)* [1992] 1 Lloyd's Rep 570, Mustill LJ said this, at p 591: "... in practice the factors which make the party served a necessary or proper party ... will also weigh heavily in favour of granting leave to make the foreigner a party, although they will not be conclusive." 36. On the facts of that case, the claimants failed to demonstrate that England was the proper place for the trial of the claim against the defendants, having regard to the interests of the parties and the interests of justice. However, under the title "Substantial justice" Lord Briggs said at paragraph 88: "Even if the court concludes (as I would have in the present case) that a foreign jurisdiction is the proper place in which the case should be tried, the court may nonetheless permit (or refuse to set aside) service of English proceedings on the foreign defendant if satisfied, by cogent evidence, that there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction. The same test was, prior to *Owusu v Jackson*, applicable in the context of an application for a stay of English proceedings against a defendant served within the jurisdiction. The question whether there is a real risk that substantial justice will be unobtainable is generally treated as separate and distinct from the balancing of the connecting factors which lies at the heart of the issue as to proper place, but that is more because it calls for a separate and careful analysis of distinctly different evidence than because it is an inherently different question. If there is a real risk of the denial of substantial justice in a particular jurisdiction, then it seems to me obvious that it is unlikely to be a forum in which the case can be tried most suitably for the interests of the parties and the ends of justice." 37. It is agreed by both parties in this case that whether one is considering the question of jurisdiction (over Najeed) where the burden is on Adeem, or the argument run by the Jersey Defendants that Kuwait is the proper forum (where the burden is on them), there is no question that the Kuwaiti courts would provide justice to all and properly consider the arguments in the case as a whole, so the court need not consider the question of "substantial justice" as Lord Briggs described it. 38. Having noted what was said by Lord Goff and Lord Briggs in *Spiliada* and *Lungowe* respectively about the "connecting factors" and the need for a "summary examination" of the same, as Lord Briggs called it, it is worth emphasising the limited nature of the exercise which the Court undertakes. In *Spiliada*, Lord Templeman said at page 465: "In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. ... I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere." 39. Birt, Commissioner said in *MB and Services Limited and Golovina -v- United Company Rusal Plc*

[2020] JRC 034 at paragraph 8: "This sentiment was echoed in VTB Capital Plc -v- Nutritek International Corporation

[2013] 2 AC 337 , where Lord Neuberger, whilst accepting that Lord Templeman's observation was perhaps rather optimistic, nevertheless emphasised the limited nature of the role undertaken by the court when he said at [83]: "There is little point in going into much detail; when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial." 40. We agreed that the appropriate approach for us to adopt was to consider the relevant connecting factors in this case, as drawn to our attention, and the affidavit evidence before us and to evaluate the same and, having done so, identify which jurisdiction was clearly the more appropriate for the trial of this case. As counsel for Adeem observed, if at the end of the exercise the balance between the two jurisdictions was equal and it was not possible to prefer one to the other, the effect would be that Adeem had failed to discharge the burden upon it, the Jersey Defendants had failed to discharge the burdens upon them and in consequence the effect would be that the Jersey proceedings would continue against the Jersey Defendants only. The parties' contentions and the Court's conclusions on the relevant factors determining the proper or appropriate forum for these proceedings 41. It was agreed by the parties that it was for the Court to identify the relevant considerations and to decide what weight to give to each. 42. We deal with each factor in turn. Witnesses 43. We note that Lord Mance said in VTB Capital plc -v- Nutritek International Corpn and others

[2013] UKSC 5 at paragraph 62: "This is a factor at the core of the question of appropriate forum..." 44. Adeem produced a list of witnesses during the hearing entitled "Adeem's list of potential key witnesses." These were: (i) Najeeb

- who is located in Kuwait; (ii) Rezam Al Roumi - an Adeem shareholder who lives in Kuwait; (iii) Amr El Seoud - who was a director of various underlying companies including Nama and Primewagon Jersey - he is located both in Egypt and in England; (iv) Tara Ferguson - who was a director of various of the Jersey Defendants and the lead director from JTC (Jersey Trust Company), the service providers for much of the relevant period. From the paperwork we have seen it appears that she was based in Dubai at the relevant times, but she now lives in Ireland; (v) Stephen McCormak - who was also a director of JTC at the time, although he now works for another company. He is the only witness who now lives in Jersey; (vi) Antar Gad -a former director of Primewagon Jersey, who lives in Egypt. (vii) Mahmoud Samy -a director of Primewagon Jersey at the relevant time, who lives in Egypt. To this list could reasonably be added in our view: (viii) Waleed Al Humaidhi, Chairman of Adeem, brother of Najeeb and deponent of his first affidavit sworn in prior, related proceedings for injunctive relief on 14 th April 2021 (which affidavit was before the Court on the hearing of the Defendants' summons in these proceedings) on behalf of Adeem. It was his son who is said to have discovered the Alleged Declarations and he draws various conclusions about the

contents. He also lives in Kuwait. Waleed Al Humaidhi also swore a second affidavit, in the aforementioned proceedings for injunctive relief, commenting on the disclosures and the individual claims made by Adeem against Najeeb and the Jersey Defendants in June 2021. 45. Adeem says that the location of the witnesses is a "largely neutral factor". The Jersey Defendants argue that the key parties to the dispute are Kuwaiti individuals or entities, and that witnesses connected to Kuwaiti companies, such as Al-Offok and International Oasis, are likely to be resident in Kuwait and that all the current directors and beneficial owners of the Jersey Defendants are Kuwaiti individuals. 46. In our view, most of the current directors of the Jersey Defendants were appointed in early 2020 after the facts complained of and accordingly are unlikely to be significant witnesses. However, having regard to the list of witnesses identified above and the fact that all parties agree that Najeeb is essential to the determination of this case, the identity of the likely witnesses and their place of residence points to Kuwait as being the natural forum for this case. Documents 47. Adeem argues that this is a factor in favour of Jersey, as the written material disclosed by the Jersey Defendants has been in English. Such material relates to the transactions that are impugned in the Order of Justice. Various further undisclosed books and records are likely to be held in Jersey. 48. The Defendants say that the alleged declaration was executed in Arabic, was found in Kuwait and is located in Kuwait. While this may be true, the matter of the validity and effect of that document is being determined in proceedings in Kuwait and will not be determined in Jersey. It is said in the affidavit sworn by Mr Marsh on behalf of the Defendants that many of the relevant documents relied upon by the parties, and potentially relevant for disclosure, are likely to be in Arabic and having to translate the documents from Arabic to English would significantly increase the costs and complexity of these proceedings. It is said it is preferable for the court in Kuwait to consider the documents in their native form and language. 49. We do not yet know to what extent there will be disclosure of documents in Arabic or indeed English including correspondence between Adeem and other Kuwaiti companies or individuals in Kuwait. 50. Having considered the matter, we regard the location of the documents as a neutral factor. We do not know what additional documentation will be produced on disclosure. It appears from the email traffic between various potential Kuwaiti witnesses and the directors of JTC that all relevant persons could communicate in English and it would not be difficult, if necessary, to translate documents into Arabic. Although the decision in *Spiliada* was made only 35 years ago, there have been significant changes in the way that litigation is conducted in the modern age, as the events of the last two years have amply illustrated. It may be that certain considerations that were of significance decades ago are of less significance now, owing to the speed with which documents can be transmitted and translated. Proper law 51. Adeem accepts that the claims pursued in the Order of Justice are governed by Kuwaiti law and the Court will need to be assisted by expert evidence on these issues in resolving any disputed issues of Kuwaiti law. It is striking that there is not a single issue of Jersey law raised in the lengthy Order of Justice which relies on six provisions of the Kuwaiti Civil Code and other principles of Kuwaiti law. Adeem's claim rests on Kuwaiti law in its entirety. 52. In our view, and on any view, this is a factor which points strongly in favour of Kuwait being the proper forum for

this trial. Residence of the parties/where they carry on business 53. Two of the parties are based in Kuwait - Adeem and Najeeb - and four are Jersey companies. Accordingly, two of the parties reside in Kuwait and four reside in Jersey. The Order of Justice pleads that all four Jersey Defendants were the creations of Najeeb and that he, inter alia, constituted their "directing mind and will". 54. Adeem says the residence of the parties' points in favour of Jersey. The Defendants argue that the "key parties" are Kuwaiti based and refer not merely to the participants in the proceedings, but also Al-Offok and International Oasis Holdings as being of central importance, both being Kuwaiti companies. They say that the Jersey Defendants are "purely ancillary to and wholly dependent on the alleged actions of [Najeeb]" . They argue that all the actions pleaded in the Order of Justice were "allegedly done by a Kuwaiti national, in Kuwait, in alleged breach of Kuwaiti law obligations owed to a Kuwaiti company" . Nonetheless, whilst noting that Lord Goff said in *Spiliada* that in certain circumstances a party's place of residence may be a matter to which "no great importance should be attached" in our view this is a factor which does, on balance, point in favour of Jersey being the proper forum. Where the acts complained of occurred 55. The Alleged Declaration was executed, it appears, in Kuwait but that is being determined by the Kuwaiti courts. It is said by Mr Marsh on behalf of Najeeb that the majority "if not all" of the actions complained of by Adeem were carried out by persons in Kuwait and he lists in his affidavit two and a half pages of actions which he says were carried out in Kuwait. It is said on behalf of Adeem that this is "not a factor at all" and, in any event, that many of the actions were carried out by directors of the Jersey Defendants in Jersey, where they were carrying on business. 56. Having regard to this factor and the nature of international transactions and banking transfers, we regard this as a neutral factor. Language 57. It is argued on behalf of the Defendants that many key individuals speak Arabic as their first language and indeed that would appear to be the case. They said this is a factor which points heavily in favour of Kuwait. 58. However, it is said on behalf of Adeem that so far as can be identified at this stage, most if not all of the key witnesses speak English well and accordingly this is a "neutral point". 59. We agree with Adeem and accept that it appears that most of the key witnesses in this case have a good command of the English language, and in any event the point we make above about the ease of translation applies to language as much as it applies to documents. The likely place of enforcement/location of assets 60. Adeem argues that this is a factor in favour of Jersey as the assets in respect of which Adeem seeks relief include shares held by two Jersey companies which are located in Jersey and shares in Aston Martin plc, which are owned by two Jersey companies and are deposited in London and Zurich respectively. Monies paid to or from the Jersey Defendants and connected entities are said to have been paid to bank accounts in Switzerland. 61. In our view, the assets in this case which may be the subject of enforcement are all over the place. There are shares of uncertain value in Jersey; a portfolio of assets held in London and apparently other assets/shares held in Europe. There are bank accounts in Switzerland and, it appears, other places including Lebanon. We regard the likely place of enforcement as a neutral consideration. We were concerned about recognition of a Kuwaiti judgment by the Jersey court. Those concerns were alleviated by confirmation by email sent to the court on behalf of the Defendants after

the hearing which confirmed that: "(a) Our clients recognise there are limited grounds on which a party can object to the enforcement of a foreign judgment in Jersey at common law. These include:

- (i) If the judgment was obtained by way of fraud on the part of the party in whose favour the judgment was given; (ii) If the judgment was obtained by way of fraud on the part of the court who handed down the judgment; (iii) If the enforcement of the judgment would be against Jersey public policy; and (iv) If the foreign proceedings in which the judgment was obtained were opposed to natural justice.
- (b) At this stage, the Plaintiff has not brought a claim in Kuwait against the Second to Fifth Defendants and those parties have no visibility as to the claims which will be brought and how they will be framed. That being the case, it would not be prudent for them to confirm that they would not, in any circumstances, raise objections to a Kuwaiti judgment being enforced against them in Jersey.
- (c) However, if the Plaintiff: (i) pursues parallel and identical claims in Kuwait, framed in the same way, and seeking the same relief, as are currently being pursued against the Second to Fifth Defendants in these proceedings before the Royal Court; (ii) obtains a judgment by a court in Kuwait which is final and conclusive; and (iii) none of the very limited grounds on which a party can object to the enforcement of a foreign judgment pertain, the Second to Fifth Defendants confirm that they would be unlikely to have, and in any event assert, any grounds of challenge to enforcement of that judgment in Jersey." 62. Such an approach is consistent with the decision of the Royal Court in *Brunei Investment Agency and Bandone - v- Fidelis Nominees Limited*

[2008] JLR 337, where the Court held (paragraph 35 of the judgment) that it had a discretion to enforce non-monetary judgments but it is a discretion that needs to be exercised cautiously. On the facts of that case, the Court elected to enforce the foreign judgment. 63. At paragraph 60, the court confirmed that in the exercise of discretion, the Court would grant the orders having the effect of recognising and enforcing the judgment of the Brunei court. Bearing in mind the recognition by the Plaintiff in this case that it could dispose of these proceedings in Kuwait; the fact that it has issued its own proceedings seeking relief in Kuwait and the various confirmations given by the Defendants, without predicting the response of the Royal Court to an application to recognise and enforce a judgment of the Kuwaiti court in this case, there are good grounds to believe that such a judgment would be enforced. 64. We concluded, having regard to all the material before us and the submissions made by the parties, that the Defendants have discharged the burden of showing that Kuwait is distinctly or clearly the proper forum with which this action has the most real and substantial connection and in which this case as a whole may be tried most suitably in the interests of the parties and the interests of justice. 65. On balance, we find that this is a case where the centre of gravity is Kuwait. The dispute relates predominately to events which originated in Kuwait or, in the words of the Master, were the launch pad or springboard for the same. The majority of key witnesses live in Kuwait

or the vicinity, and importantly Adeem has chosen to advance its claims in Jersey exclusively by reference to issues of Kuwaiti law upon which this Court has no experience and would require to be assisted by expert evidence which may well conflict as to the meaning and effect of those principles. 66. The real connection with Jersey is the fact of the Jersey Defendants being incorporated here. There is only one potential witness residing in Jersey whose evidence may not be critical, and there are no issues of Jersey law to be determined. 67. Accordingly, we grant the relief sought by the Defendants, in particular we: (i) Order that the service of Adeem's Order of Justice on Najeeb be set aside; (ii) Declare that the Court has no jurisdiction over Najeeb in respect of the subject matter of this claim; (iii) Declare that Kuwait is the proper place for Adeem to bring its claims against the Jersey Defendants and stay the proceedings against those Defendants. The Defendants' application for a procedural stay of Adeem's claims in Jersey 68. This final issue does not strictly arise for our determination in view of our conclusions on the proper forum for the trial of these proceedings. However, as we have heard extensive argument, it is appropriate for us to deal with the Defendants' application for a temporary stay of the Jersey proceedings on case management grounds, until the conclusion of the Kuwaiti proceedings, that is a stay, to allow the Kuwaiti court to rule on the validity and effect of the declarations before further steps are taken in Jersey. 69. It is accepted that the Royal Court has, pursuant in its inherent jurisdiction, the power to make such an order. As the Court of Appeal said in *Finance and Economics Committee -v- Bastion Offshore Trust*

[1994] JLR 370 at 382: "Practitioners in these courts and in the courts of Guernsey are familiar with the maxims "La cour est toute puissante" and "The court is master of its own procedure." The better known a proposition is, the harder it is to find authority for it and so it turns out if one seeks judicial statements of these two maxims (though in Guernsey the Court of Appeal relied on the second maxim in *Cherub Invs. Ltd. v. Channel Islands Aero Club (Guernsey) Ltd.*). Both maxims are expressions of the inherent jurisdiction of the court. So far as English law is concerned, the inherent jurisdiction of the court has been said to be - "a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." (37 Halsbury's Laws of England, 4th ed., para. 14, at 23). Reference is there made to a lecture on the topic, Jacob, *The Inherent Jurisdiction of the Court*, 23 *Current Legal Problems*, 23 (1970). The definition quoted above first appeared in that erudite and authoritative lecture and it has been approved judicially in Canada and New Zealand. One feature of the inherent jurisdiction is that it can exist alongside an identical or similar rule of court. The court does not lose its power because a rule is made (though there may be many cases where the court will have no need to look outside the text of the rule)." 70. It was argued on behalf of the Defendants that it is just and equitable for the Royal Court to exercise its inherent jurisdiction to order a stay of the Jersey proceedings, because it is accepted that unless Adeem prevails in those

proceedings, the Jersey proceedings will fail. Adeem needs to succeed in the Kuwaiti proceedings in order to get off the ground in Jersey. Accordingly, the matters before the Kuwaiti court are not ancillary to those in Jersey, they are central, and absent success in those proceedings, there is no necessity for the Jersey proceedings at all. 71. Adeem opposed the application for a stay and said that the equivalent power which the English High Court possesses is only available in limited circumstances. Our attention was drawn to Rule 6.37 of the Supreme Court Practice which deals at paragraph 6.37.23 with "Forum non-conveniens - court's power to stay proceedings on case management grounds." It is said: "The usefulness of the court's power to stay proceedings as referred to in r.3.1(2)(f) in circumstances where its exercise would not be inconsistent with the Judgments Regulation was noted in *Reichhold Norway ASA v Goldman Sachs International*

[1999] 2 Lloyd's Rep 567 (Moore-Bick J) where it was explained (at p.571) that the court has an interest in deciding the order in which concurrent proceedings in the same or different jurisdictions should be tried, not only because the existence of concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions, but also because the outcome of one set of proceedings may have an important effect on the conduct of the other. The power to stay proceedings for this purpose is not readily exercised, and should be exercised only in "rare and compelling circumstances" and account is always taken of the legitimate interests of claimants which are to be prejudiced no more than the interests of justice require..." 72. Adeem submitted that the application for a case management stay was premature where, *inter alia*, Najeeb has yet to file an Answer addressing the validity of the Alleged Declarations and that a fundamental flaw in the analysis of the Defendants, is that the Jersey Defendants are not parties to the Kuwaiti civil proceedings and will therefore not be bound by their outcome. However, when considering this point the Master's instinctive reaction to such a suggestion was that it would be a "very high threshold for the Jersey parties to assert otherwise" and in view of the written confirmation provided by the Jersey Defendants referred to above, such a concern can be practically mitigated, if not excluded. 73. It was also argued that a stay would cause a delay to the current proceedings and the terms of stay would cause "uncertainty". Having said this, it was accepted on behalf of the Defendants that any case management stay would only be until the conclusion of the Kuwaiti proceedings at first instance only, and not until all avenues of appeal are exhausted. 74. Whether or not the Court's jurisdiction to exercise a case management stay is limited to "rare and compelling cases" only, is not a matter that we need to determine for the purpose of this application. Nonetheless, even if that was the test, we hold that this is a case where a stay would be appropriate and we would have stayed the proceedings until the conclusion of the determination of the Kuwaiti civil proceedings at first instance, noting that if those proceedings were unreasonably prolonged or derailed for any other reason, then we would give liberty to Adeem to apply to this Court to have the stay lifted. Authorities Rule 6/7 of the Royal Court Rules. Kuwaiti Pleadings Law 1980. *Campbell -v- Campbell*

[2014] (2) JLR 465. Republic of Brazil -v- Durant International Corporation

[2010] JLR 421 . Spiliada Maritime Corporation -v- Cansulex Ltd

[1987] 1 AC 460 at 477G. Lungowe -v- Vedanta Resources Plc

[2020] AC 1045 . MB and Services Limited and Golovina -v- United Company Rusal Plc

[2020] JRC 034 . VTB Capital plc -v- Nutritek International Corpn and Others

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[1994] JLR 370 at 382. Supreme Court Practice. Page Last Updated: 02 Mar 2022 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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Prepared on 22 October 2026 · Esheria