

Defendants' application regarding the appropriate forum, and for the Court to exercise its discretion to stay proceedings in Guernsey to allow proceedings to be commenced in a more appropriate forum. Defendants also contended that the proceedings had been issued against the wrong Defendant.

[2021] GRC044

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)
INTERLOCUTORY COURT**

BETWEEN:

FARDELLE HOLDINGS LIMITED

Plaintiff

-v-

(1) IAN PETER ENDRES

First Defendant

(2) JULIETTE ENDRES

Second Defendant

Hearing date: 23 - 24 August 2021

Judgment handed down: 27th September 2021

Before: Jessica E Roland, Deputy Bailiff

Counsel for the Plaintiff: Advocate M G Ferbrache

Counsel for the Defendants: Advocate N J Robison

Cases & legislation referred to:

The Royal Court Civil Rules 2007

Carlyle Capital Corporation limited et al v Conway at Al Guernsey judgment 11/ 2012

Spliada Maritime Corporation v Cansulex Limited [1987] 1 AC 460

Woodbourne Trustees Ltd v Generali Worldwide Insurance Company Ltd judgment 17/2009

Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd 2014 (3) SA 265 (GP) Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party) 2008 (3) SA 355 (SCA)

George Monro Ltd v American Cyanamid and Chemical Corporation [1944] KB 432

Metall & Rohstoff v Donalston (CA [1990] 1 QB 391

Multinational Gas & Petrochemical Co. v Multinational Gas & Petrochemical Services Ltd [1983] Ch 258 1132

Ewing Micdonald & Co Ltd v M & M Products Co 1991 (1) Sa 252 (A).

Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC 219 JDR 1425

The Competition Commission v Bank of America Merrill Lynch International Limited 2020 JDR 0277 (CAC)

Holloway v PADI Emea Ltd 2020 (5) SA 172

Introduction

1. On 21 May 2019, the plaintiff made an ex parte application for a freezing order (the “Freezing Order”) which was granted on 23 May 2019. The plaintiff commenced substantive proceedings on 7 June 2019 and the matter was placed inscrite. The Freezing Order was discharged in respect of the first defendant although he remains subject to a notification order dated 15 August 2019 and set aside in respect of the second defendant. The defendants filed defences on 19 August 2019. Included within those defences were Exceptions de Fond. In a consent order dated 11 September 2020 the Exceptions set out at paragraphs 7 to 9 of the defences in relation to jurisdiction and at paragraphs 14 to 17 of the defences in relation to the incorrect parties were defined as the Preliminary Issues.
2. I had the benefit of extensive affidavits filed in support of the parties’ positions as well as expert evidence filed on behalf of the parties in relation to Cypriot and South African law. During the course of the hearing the first affidavits of Mr and Mrs Endres dated 6th June 2019 were filed along with recent correspondence between counsel on the status of two relevant companies and the transcript from the inter partes hearing before Lieutenant Bailiff Marshall in August 2019 in relation to the Freezing Order. The skeleton arguments filed on behalf of the plaintiff and the defendants were augmented by oral submissions by their respective counsel.

Background

3. This is a matter where there is a high degree of factual dispute between the parties made all the more difficult by the deaths of two of the original beneficial owners of the plaintiff, one of whom Michael O’Neill, played a significant role in the running of the business. The plaintiff is a private company incorporated in Cyprus on 24 August 2010. Since incorporation it has had one nominee director and shareholder William Franklin (“Mr Franklin”) who holds each of the plaintiff’s 1000 issued shares on trust. The underlying business of the plaintiff is an online lottery business which purchases tickets for a fee for the UK lottery and EuroMillions lottery on behalf of customers anywhere in the world and pays the customers the winnings.
4. The defendants are South African citizens who resided in South Africa until early 2016. They now reside in Guernsey.
5. The dispute centres around the defendants’ role within and for the plaintiff. In summary it is alleged that, whether as a de facto director, shadow director, an agent or a senior manager of the plaintiff, the first defendant has breached fiduciary duties owed to the plaintiff; that the first defendant is accountable to the plaintiff as a constructive trustee of the benefits he has obtained as a consequence of the breach of those duties and/or by virtue of retention of funds by him or entities controlled by him from the lottery business to which the plaintiff is entitled. It is also alleged that he holds financial records and confidential information on constructive trust for the plaintiff. The plaintiff says the first defendant was one of the original beneficial owners of the business when it was owned through a previous entity and remains a beneficial owner since the incorporation of the plaintiff in 2010 despite other changes to its beneficial ownership during the plaintiff’s existence. In relation to the second defendant it is pleaded that she has breached fiduciary duties owed to the plaintiff. It is also pleaded in respect of both the defendants that they have diverted the plaintiff’s business, corporate opportunities, intellectual property, goodwill and all funds to Highest Point Services Limited (“Highest Point”) a Cypriot company (currently dissolved) or the first defendant or other persons and have conducted business in competition with the plaintiff and/ or advancing their own business interests in breach of South African unfair competition legislation.
6. In their defences, the defendants have pleaded niances et pretensions which in broad terms deny that the duties which the plaintiff says the defendants owe to the plaintiff are owed or breached

by the defendants and deny that either of them had the relationships which the plaintiff says existed between them and the plaintiff. They say that they were both employees of a South African company Street Spirit 219 (Pty) Ltd (“Street Spirit”) (currently de-registered) which in turn contracted with the plaintiff. Before being employed by Street Spirit, the first defendant says he was employed by the predecessor to the plaintiff to develop software (which in his affidavit although not in the defences he says that he owned and subsequently sold to Street Spirit). The first defendant denies that he was or ever has been a beneficial owner of the plaintiff or any previous entity owning the lottery business. The first defendant admits in his second affidavit dated 21 June 2019 that Highest Point may hold funds to which the plaintiff may be entitled by virtue of constructive trust principles. The first defendant denies he is in possession of any financial records or confidential information of which the plaintiff is not in possession. Both parties deny that they have acted in breach of the unfair competition legislation and deny that the plaintiff is entitled to the relief claimed.

Forum Non Conveniens

7. The Royal Court of Guernsey has jurisdiction over these proceedings by virtue of the defendants’ residence in the island and the proceedings having been validly served upon them. By their application in relation to forum, the defendants are effectively asking the court to exercise its discretion to stay the Guernsey proceedings in order that proceedings can be commenced elsewhere, either South Africa or Cyprus.
8. As has been reinforced on a number of occasions (see in particular *Carlyle Capital Corporation limited et al v Conway at Al Guernsey judgment 11/ 2012*) the test for stay of proceedings instituted within the jurisdiction on grounds of forum non conveniens is set out in the judgment of Lord Goff in *Spiliada Maritime Corporation v Cansulex Limited* [1987] 1 AC 460. At p 476B – G Lord Goff stated:

“(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, eg, the Société du Gaz case 1926 SC (HL) 13 at 21 per Lord Sumner and Anton Private International Law (1967) p 150). It is, however, of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see para (f) below).

(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where 'the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favor of the defendant' (see Scoles and Hay Conflict of Laws (1982) p 366, and cases there cited); and also in Canada, where it has been stated that 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum

should rarely be disturbed' (see *Castel Conflict of Laws* (3rd edn, 1974) p 282). This is strong language. However, the United States and Canada are both federal states; and, where the choice is between competing jurisdictions within a federal state, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff on which jurisdiction has been conferred by the constitution of the country which includes both alternative jurisdictions.

A more neutral position was adopted by Lord Sumner in the *Société du Gaz* case 1926 SC (HL) 13 at 21, where he said:

'All that has been arrived at so far is that the burden of proof is upon the defender to maintain that plea. I cannot see that there is any presumption in favour of the pursuer.'

However, I think it right to comment that that observation was made in the context of a case where jurisdiction had been founded by the pursuer by invoking the Scottish principle that, in actions in personam, exceptionally jurisdiction may be founded by arrest of the defender's goods within the Scottish jurisdiction. Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions (see, eg, *European Asian Bank AG v Punjab and Sind Bank* [1982] 2 Lloyd's Rep 356), or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that in all the leading English cases where a stay has been granted there has been another clearly more appropriate forum: in *The Atlantic Star* [1973] 2 All ER 175, [1974] AC 436 (Belgium), in *MacShannon's case* [1978] 1 All ER 625, [1978] AC 795 (Scotland), in *Trendtex Trading Corp v Crédit Suisse* [1981] 3 All ER 520, [1982] AC 679 (Switzerland) and in *The Abidin Daver* [1984] 1 All ER 470, [1984] AC 398 (Turkey). In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see *MacShannon's case* [1978] 1 All ER 625 at 636–637, [1978] AC 795 at 819–820 per Lord Salmon); and there is the further advantage that on a subject where comity is of importance it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) 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] 1 All ER 625 at 630, [1978] AC 795 at 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 Lord Keith in *The Abidin Daver* [1984] 1 All ER 470 at 479, [1984] AC 398 at 415 when he referred to the 'natural forum' as being 'that with which the action has 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 SLT 131), and the places where the parties respectively reside or carry on business.

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

(f) If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction: see The Abidin Daver [1984] 1 All ER 470 at 476, [1984] AC 398 at 411 per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage."

9. If the defendants are successful on the jurisdiction preliminary issue, then the defendants' counsel agreed that it would not be appropriate for me to consider the incorrect party issue as that would be for the forum seized of the proceedings to deal with. However, if they are unsuccessful, it will be necessary for me to consider their application.

The Independence of the Experts

10. One of the issues raised by the defendants was whether or not the experts put forward by the plaintiff should be considered sufficiently independent in circumstances where they have provided reports earlier in the action. Counsel for the defendants submitted that this goes to the weight that I should place upon those expert reports. In response, Counsel for the plaintiff submitted that the limit of the experts' involvement in these proceedings (prior to the provision of the expert reports in accordance with the leave given to file expert reports for the hearing of the Preliminary Issues), were reports that had been provided by the respective experts earlier in the proceedings and which were contained with the affidavit of Mr Brian Shaw plus a company search. Further, it was evident from looking at these reports that they were not opinions or reports based on facts of this case or information pertinent to these proceedings but general advice on the respective jurisdictions not containing issues of controversy.
11. Having considered these reports it does appear to me that there is nothing in those documents which indicates a lack of independence or partiality such that it impacts upon the weight that I should place upon their expert evidence. I therefore consider that I should place equal weight upon the expert reports of the plaintiff and of the defendants.

The Arguments

12. It is the defendants' case that there are two other available fora for this dispute to be heard. The primary submission made on their behalf is that South Africa would be the forum which is clearly or distinctly the more appropriate forum. It is argued that I should exercise my discretion to stay proceedings in Guernsey and that South African proceedings can be issued by the plaintiff. Their secondary position is that Cyprus fulfils the necessary test. They say that Guernsey ranks third in terms of the ranking of the natural forum for these proceedings.

13. The South African law experts, Advocate WJ Scholtz and Advocate Bremridge, agree that in a money claim such as this where the defendants are not domiciled or resident in South Africa (and are thus foreign *perigrini*), there are two necessary conditions for the South African courts to accept jurisdiction: there must be (a) a recognised *ratio jurisdictionis* and (b) an attachment of the defendants' property (the effectiveness test).
14. The experts do not agree that the first part (or leg) of the test is satisfied in this case. Advocate Bremridge points to elements of the defendants' case which he opines appear to cast doubt on the cause arising in South Africa however Advocate Scholtz's evidence is that it would pass this limb of the test.
15. On the second part of the test, Advocate Scholtz opines (and with which Advocate Bremridge agrees) that the defendants' property to be attached need not bear any relation to the amount claimed but must have some value and not be merely illusory. Advocate Scholtz takes the view in his first report that there is sufficient property in South Africa for each of the defendants for attachments to be made. He does so on the basis of the first affidavits of the defendants both sworn on 6 June 2019. In his report he sets out the procedure for obtaining the attachment. Advocate Bremridge disagrees that this conclusion in relation to the defendants' property can be reached. The information is 2 years old, and in relation to the first defendant there are only two assets in his name. There is no information as to the value of Webteller CC and the unidentified account at Nedbank is or was of minimal value (Advocate Ferbrache suggested a value of under £5 from which Advocate Robison did not demure). In relation to the second defendant, whilst if she still owns the assets then they appear to be suitable for attachment, but there was no up-to-date evidence that she still does.
16. Further Advocate Bremridge argues that in any event if the attachments were made (the onus being on the plaintiff) the defendants would be entitled to challenge jurisdiction and whether the property attached or to be attached is susceptible to attachment as well as challenging the prima facie case alleged by the plaintiff.
17. Advocate Bremridge also opines that whilst the doctrine of *forum non conveniens* is not clearly established in South Africa nevertheless following the cases of *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) and *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA) the South African courts may be open to challenges on jurisdiction including on the basis for *forum non conveniens*.
18. In his second report Advocate Scholtz relies on these same cases to support what he says is a broadening of the approach of the South African courts in relation to the significance of attachment. Advocate Bremridge disagrees that the cases are authority for the particular circumstances of this case. Advocate Scholtz also refers to the possibility of a practical expedient which the court might accept as a substitute for an attachment although no example is suggested by him.
19. In his third report Advocate Scholtz develops his arguments on the expansion of the principle of attachment, by reference to recent cases where he says the South African courts have departed from the strict requirement of attachment. Advocate Scholtz notes that in *Strang* (ibid) the court referred to the possibility of other practical expedients if there was no property on which to secure an attachment. The example that Advocate Scholtz gives is the submission to the jurisdiction by the defendant. He does however go on to conclude that the attachment of a "*foreign peregrine's property remains the safest and correct route to confirm or found jurisdiction in a South African Court. From the above quoted case law however it appears that the South African courts are recognising that strictly applied historical principles may not in*

modern times achieve what was intended with the principles and this position requires developing”.

20. Advocate Robison argues that in relation to the second limb of the test, the jurisdiction of the South African courts is available on two bases, the first, that an attachment is possible for both defendants and second, that the recent South African jurisprudence permits that jurisdiction can be exercised without an attachment.
21. Advocate Robison argues that it is not for the defendants to show that the alternative forum will accept jurisdiction without question rather that it is possible for the alternative forum to accept jurisdiction. If the alternate jurisdiction refuses jurisdiction then as proceedings have only been stayed, the plaintiff is able to return to this jurisdiction and recommence proceedings here with the inconvenience of this process being dealt with by orders as to costs.
22. The defendants accept that following on from *Spiliada (ibid)* in a case where jurisdiction has been founded in Guernsey as of right, that the burden resting on the defendants is not just to show that Guernsey is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than Guernsey.
23. Advocate Robison argues that the cause pleads a series of claims for which South African law would be applicable: for example, the claims based on the law of agency and/or employment of the defendants. Absent any express or implied term as to the governing law, the law of the alleged agreement would be the place where it had its closest and most real connection. Between the formation of the plaintiff and the time of the defendants’ emigration to Guernsey, this would have been South Africa. Further intrinsically involved in these claims is Street Spirit which is a South African company. The plaintiff has specifically pleaded South African law in relation to the unfair competition. Where it is not South African law it will be Cypriot (and not Guernsey law). Further, many elements of the claim arose in South Africa. Given the allegations and the facts, all of these point, the defendants say, to South Africa being the natural forum. The connection to Guernsey is limited at best he argues. None of the witnesses are in Guernsey save for the defendants all the more so if the defendants were successful in showing that Street Spirit is the right defendant.
24. Advocate Ferbrache argues that the defendants have failed to demonstrate that South Africa is in fact an alternative jurisdiction and that the defendants have not shown that if it is an alternative that it is clearly or distinctly more appropriate. The expert evidence before this court is that the defendants have failed to discharge the burden that there is an available alternative forum which will accept jurisdiction of the proceedings. Relying on the expert evidence of Advocate Bremridge he says that there is a question over whether the South African court would find that the first part of the test is met in a case where there is substantial factual dispute and that this would be vulnerable to challenge by the defendants. The defendants have not shown that the requirement for an attachment for a case where there is a foreign plaintiff and a foreign defendant has been obviated. The defendants have not undertaken to submit to the jurisdiction of the South African courts which could, on the *Strang (ibid)* case have been a possible available alternative to an attachment to found jurisdiction in South Africa. He also argues that the defendants have not shown that they have property in South Africa which would be attachable today. The evidence filed by the defendants in relation to their South African property is 2 years old. Nor is there any security for the plaintiff that if the property is there now that it will not be transferred out prior to the plaintiff commencing proceedings in that jurisdiction and the defendants, in any event, are able to object to an order for attachment.
25. Further, even if the defendants have shown that South Africa will accept jurisdiction of the proceedings, the defendants have failed to show that South Africa is clearly or distinctly the

more appropriate forum than Guernsey which has been founded as of right and therefore the court should not grant a stay.

26. Whilst there are some factors which point to South Africa, such as it being the place where the lottery business was originally operated from and some of the alleged breaches occurring whilst the defendants were in South Africa and South African law being applicable to the claims that the defendants breached their duties as agents and/or employees of the plaintiff as well as the law in relation to the claim for unfair competition; nevertheless these are outweighed by those that connect the proceedings to Guernsey and not to South Africa. In addition to the defendants, who will also be witnesses, being resident in Guernsey since early 2016; the ongoing breaches alleged have either taken place or continued in Guernsey (and the constructive trust claim as drafted is a Guernsey law issue). However, the full picture of the jurisdictions in which the alleged wrongs took place will only be properly ascertained by virtue of disclosure and the evidence given at trial. The other main witnesses are in the UK and the documents on the defendants' own evidence are accessible from Guernsey. This is a case where some factors point to different jurisdictions, but none are more appropriate than Guernsey.
27. In relation to Cyprus which the defendants place as the next best alternative to South Africa and higher than Guernsey, the defendants rely on the three reports setting out the expert evidence of Ms Niovi Petridou.
28. Ms Petridou and Mr Loizides, the expert for the defendants and plaintiff respectively, agree the basic test which is required under Cypriot law to determine jurisdiction where the defendant is out of the jurisdiction. Order 6 Rule 1 of the Cyprus Civil Procedure Rule provides that leave for service out of the jurisdiction "*may be allowed by the Court*" where "*the action is founded on a civil wrong committed in Cyprus*". Rule 4 provides that the plaintiff must demonstrate a good prima facie case against the defendants.
29. The experts disagree on the importance of section 21 of the Courts of Justice Law 1.14/1960. In her second report Ms Petridou opines that this section is only relevant in determining which one of the different district courts has jurisdiction and if the leave to serve test is fulfilled then logically one of the district courts will have jurisdiction. Whereas Mr Loizides says that it is the first step to the courts establishing whether they have jurisdiction over foreign defendants.
30. By reference to the case of *George Monro Ltd v American Cyanamid and Chemical Corporation* [1944] KB 432 Ms Petridou states that there must be clear evidence that the tort was committed within the jurisdiction notwithstanding where the damage or loss has occurred. Her conclusion on this is that Order 6 Rule 1 will "most probably" be satisfied. She then opines that under Cypriot law it is also possible to rely on the "*substantial and efficacious*" tests found in *Metall & Rohstoff v Donalston* (CA [1990] 1 QB 391 i.e. it is necessary to look at the tort alleged in a "*common sense way and ask whether damage has resulted from substantial and efficacious acts committed within the jurisdiction*". It is Ms Petridou's conclusion that substantial and efficacious acts of the alleged breaches of the fiduciary duties that the first defendant is alleged to have owed to the plaintiff took place in Cyprus, which means that leave may be given by the Cypriot courts to serve out of the jurisdiction. She concludes that the Cypriot courts would have jurisdiction to hear the dispute along with the courts of South Africa and this is not dependant on the defendants having been physically present in Cyprus at the time of the acts. She concludes that Cyprus would not have jurisdiction to deal with the unfair competition claim as pleaded but that there is a Cypriot equivalent. However, this would be on the basis of a claim against Highest Point the Cypriot company beneficially owned by the first defendant which is said at paragraph 37 of the cause to have been one of the alleged recipients of the plaintiff's business, corporate opportunities, intellectual property goodwill and/or funds.

31. Mr Loizides accepts that prima facie some of the acts referred to in the claim can be associated with Cyprus and that Article 21 is satisfied. However, he takes a different view from Ms Petridou in relation to the Order 6 (1) criteria. His conclusion is that there is “a very good likelihood” that the Cypriot courts when examining the events “holistically” will conclude that the breach of fiduciary duties by the two defendants took place outside of Cyprus. Likewise, the Cypriot courts would not have prima facie jurisdiction in relation to the claims based on breach of contract, unfair competition and constructive trust.
32. He disagrees with Ms Petridou’s conclusions on the *Metall & Rohstoff v Donalston* (*ibid*) case. He does so on the basis that this English case was decided after a change of language in the English rules which changed the English rule whereas the Cypriot rules use the old test which focuses on where the “damage-causing act” took place. He considers the *George Monro* (*ibid*) as well as *Multinational Gas & Petrochemical Co. v Multinational Gas & Petrochemical Services Ltd* [1983] Ch 258 1132 to be the cases which are the source of primary guidance of the Cypriot courts. Thus, where it can be argued a tort occurs in several places, the courts will focus on the question of where the defendants were physically located when performing the act, which includes where the directors were when making the alleged decisions, giving rise to the tort regardless of where the damage occurs.
33. Ms Petridou confirmed that even if the Cypriot courts gave leave to serve outside the jurisdiction under Order 6 it would still be open for there to be a challenge on the basis of *forum non conveniens* using the *Spiliada* test. She states that there is no indication that the Cypriot courts when deciding the particular issue of the most convenient forum for the case to be adjudicated give a greater weight to the factor of the domicile of the defendants compared to the other connecting facts. The court considers all of the circumstances of the case and examines convenience and expense, applicable law in relation to the civil wrong committed, place of residence or carrying on of business of the parties and the forum with which the action/civil wrong has the most real and substantial connection. She accepts that the court proceedings would need to take place in Greek or Turkish with the necessary interpreters and translations these would require although usually English documents do not need to be translated. Mr Loizides is in agreement with Ms Petridou with regard to the possibility and the test in relation to a *forum non conveniens* challenge. However, his analysis of the facts of this case leads him to conclude that the Cypriot court would decline jurisdiction including by giving greater weight to the fact that the first and second defendant are domiciled in Guernsey.
34. The analysis of the pleadings by Advocate Robison and reliance on the reports of his expert leads he says to the conclusion that Cyprus is an available jurisdiction. He argues that even on the plaintiff’s own case there is not a single act which if it is a breach of duty (which is denied) occurred in Guernsey rather the acts, if any, occurred in South Africa or Cyprus. If there has been for example a rival website set up in breach of duties owed, that website is owned by a Cypriot company and there is no Guernsey connection. Even in relation to the acceptance of the first defendant of the retention of funds which may be subject to constructive trust (formed of dividends), these are funds retained by Highest Point which is a Cypriot company and therefore is not a Guernsey connection. Further that if Cyprus is an available jurisdiction, then for those same reasons it is also clearly or distinctly more appropriate than Guernsey.
35. Advocate Ferbrache relying on the expert evidence of Mr Loizides argues that as with South Africa the defendants have failed to show that Cyprus is an available forum. Further the fact that both experts conclude that the unfair competition claim is not one that can be heard in Cyprus also supports his argument that Cyprus is not an available jurisdiction. The submission in relation to the Cypriot equivalent legislation should be disregarded as Highest Point is not a defendant, and in any event has been dissolved. The constructive trust claim is a Guernsey law claim as drafted. Mr Loizides’s conclusion on the *forum non conveniens* challenge further supports his argument that Cyprus is not an available jurisdiction.

36. If contrary to his primary submission, Cyprus was found to be an available forum, Advocate Ferbrache asserts that it is not a clearly more appropriate forum and thus the Guernsey proceedings should not be stayed in favour of the Cypriot courts. He relies on many of the reasons relied on in support of the lack of availability of the Cypriot court. He also relies on the relative difficulty and expense of the enforceability of the judgments in Cyprus and Guernsey. It is also evident that the first defendant can access the documents in other jurisdictions. Whilst he accepts there are some connecting facts pointing to Cyprus there are some which point to South Africa others to England and others to Guernsey. The international aspect of these proceedings means he says that it cannot be said that Cyprus is clearly more appropriate than Guernsey.

Discussion

37. The difference between a “service out” and “service in” *forum non conveniens* challenge must not be forgotten. As Lord Goff identified in *Spiliada (ibid)* the plaintiff starts with the advantage of having achieved a legitimate basis for jurisdiction without leave, and it is for the defendants to show that some other country is the more appropriate forum. The first limb of the *Spiliada* test requires it to be shown that the foreign forum is “available”. In oral argument Advocate Ferbrache was clear that the test was “will” accept jurisdiction rather than the mere possibility. Advocate Robison urged me to take the view that available meant only that it was possible. In considering the first limb of the *Spiliada* test it seems to me that the burden of proof on the defendants is on the basis of the balance of probabilities that the alternative jurisdiction will accept the jurisdiction of the proceedings in the normal course. If the defendants get over this hurdle only then is it necessary for me to consider the second limb of the test which requires the defendants to show that the alternative available forum is clearly or distinctly the more appropriate forum than Guernsey.
38. The experts in South African law agree the principles to be applied when considering whether the courts of South Africa have prima facie jurisdiction over this claim are: (a) whether there is a recognised ground of jurisdiction (the *ratio jurisdictionis*); and (b) if so, whether the courts of South Africa have power to give effect to the judgment sought. It appears to me that having considered both the experts’ reports that the defendants’ have established that on a prima facie basis there appears to be a cause arising in the jurisdiction even if this could be subsequently challenged. However, the effectiveness test must also be satisfied for jurisdiction in South Africa. Both experts agree that the traditional method of demonstrating effectiveness in circumstances where there are two foreign *perigrini* is by attachment to the defendant’s property (see for example *Ewing Micdonald & Co Ltd v M & M Products Co 1991 (1) Sa 252 (A)*).
39. The first difficulty the defendants have under this part of the test is that they have not demonstrated that there is, at the time of this application for a stay, property which can be attached in that jurisdiction. They rely on affidavits which are 2 years out of date. Further in relation to the first defendant, whether there was sufficient value in the assets in 2019 is in question. Advocate Bremridge highlighted these issues in his first report dated 29 January 2021 but the defendants have not taken any steps to show the value of their susceptibility to attachment in August 2021. It is not enough to rely on this out of date evidence and then to argue that attachment is possible. Whilst the attachment application would be for the plaintiff to make in South Africa, given the defendants in this jurisdiction are attempting to persuade me on the balance of probabilities that South Africa is an available jurisdiction, the defendants have failed to demonstrate in relation to the traditional test of effectiveness by way of attachment that South Africa is an available jurisdiction.
40. As set out above, in the second report of Advocate Scholtz, he opines on a possible alternative that may be available to these defendants based on the *Strang (ibid)* and the apparent loosening

of the rules on the requirement for attachment. Both counsel refer to the possibility of other practical expedients however the only example I have been given is submission to the jurisdiction by the defendant. However, despite the fact that it is their application to stay on the basis of the matter being heard in South Africa the defendants have been unprepared to confirm that they would accept service of South African proceedings.

41. The South African cases which Advocate Scholtz relies on to demonstrate the departure from the strict rule can, in my view, all be distinguished from this one. For example, in the Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC 219 JDR 1425 whilst both parties were foreign *peregrini*, the parties had specifically chosen Johannesburg as a seat of an arbitration. The judge found that it was the choice of arbitration clause which created sufficient connection with the court to give it jurisdiction in circumstances where there was common cause that the South African court would have jurisdiction to hear this matter if it related to a dispute as envisaged in the shareholders' agreement. He said:

“I am of the view that the choice of the seat of an arbitration is akin to an exclusive jurisdiction clause.”

42. There is no equivalent in this case. In The Competition Commission v Bank of America Merrill Lynch International Limited 2020 JDR 0277 (CAC) jurisdiction was founded on the very particular circumstances of the purpose of the underlying statute, not a situation that has any application on this fact. The Holloway v PADI Emea Ltd 2020 (5) SA 172 case is not authority for this court to find that South Africa is an available jurisdiction where in that case one of the crucial elements was that the plaintiff had been able to serve the defendant in South Africa.
43. It is not enough to show that it is possible that the South African courts may extend the recognition of effectiveness in that jurisdiction beyond that which they appear to have been prepared to do previously. Whilst the South African jurisprudence may be developing in this area, in the absence of evidence before this court that in a case similar to these proceedings South African courts have expanded the rule on effectiveness in the absence of an attachment, the defendants have not demonstrated, on the balance of probabilities, that the South African court is an available jurisdiction for these proceedings.
44. Having come to the conclusion that the defendants have not demonstrated South Africa is an available jurisdiction it is not necessary for me to consider the second part of the test, i.e. that it is clearly or distinctly more appropriate than Guernsey.
45. Cyprus is the second choice of the defendants, but they say nevertheless a jurisdiction which is available and clearly or distinctly more appropriate than Guernsey. The plaintiff is a Cypriot company and thus, as in this jurisdiction, the plaintiff would need to apply for leave to serve on the defendants. The first step in applying for leave is for the plaintiff to show that the action is founded on a civil wrong committed in Cyprus. Given that Mr Loizides concludes that there is a good likelihood that Article 21 (which is a less stringent test than Order 6(1)(f)) will be fulfilled, it is not necessary for me to decide which of the expert's evidence I prefer on the issue of Article 21.
46. Ms Petridou confirms in her first opinion that the Cypriot procedural rule is the same as the old test under the English rules as it uses the same words. Under Order 6(1)(f) service out of the jurisdiction may be allowed with the leave of the court if the action is found on a tort committed within the jurisdiction. The judgment of Metall & Rohstoff v Donaldson Inc (CA) [1990] 1 QB 391 which Ms Petridou opines extends the test to the “substantial and efficacious act” refers to the fact that in 1987 the English rule was changed which widened the jurisdiction under Order 11 r 1 (a) (f) (see paragraph A page 437). However, it is evident from the judgment in Metall

& Rohstoff, the development of the “*substantial and efficacious act*” principle had commenced prior to the change of the English rules.

“In none of the six cases last cited did the court suggest that the phrase ‘tort committed within the jurisdiction’ bore any special meaning in the context of the former Ord 11, r 1(1)(h). And in none of them did it pay any regard to the law of the relevant foreign country in ascertaining the place of commission of the tort. In our judgment, two points thus emerge fairly clearly from those cases. First, in deciding whether an alleged tort has been committed in this country or in some other country, our courts will look back over the series of events constituting it and ask themselves: where in substance did this cause of action arise? Second, in answering this question, the courts will apply exclusively English law (para E page 443 Metall & Rohstoff).”

47. The reference to “*where in substance did this cause of action arise*” in the excerpt I have set out above is echoed in the Multinational Gas and Petrochemical Co Multination and which both parties have relied on as authoritative in Cyprus. This in my view is the test I must apply when considering the availability of Cyprus as a jurisdiction.
48. As I have highlighted above one of the issues of this case is that there is a very high degree of factual dispute even to the extent of doubt being expressed by the first defendant about the authenticity of emails. This means that the full extent of where the alleged torts took place is likely only to be ascertainable in due course, however on balance I prefer the expert evidence of Mr Loizides and his analysis of the pleadings.
49. Whilst acting as a de facto director or a shadow director or as an agent or employee, it is alleged that the first defendant and/or the second defendant breached fiduciary duties owed to the plaintiff. None of the allegations involve the defendants coming to Cyprus to perform the acts which are said to be in breach of the obligations, but at all times when the defendants were situated in either South Africa or from early 2016 Guernsey and therefore it will have been these jurisdictions where the substance of the cause of action arose, for example, the alleged conduct in relation to the Wirecard process. The acts as Mr Loizides opines did not “*originate*” in Cyprus. Further I must assess this on the basis of the parties to this action and the case pleaded i.e. that it is the acts of the defendants.
50. Further and in any event, as Lawton J in Multinational Gas and Petrochemical Co Multination [1983] Ch 258 makes clear:

“Following what Lord Pearson said in Distillers Co (Biochemicals) Ltd v Thompson [1971] 1 All ER 694 at 700, [1971] AC 458 at 468 I look back over the series of events alleged to constitute the tort and ask myself the question: where in substance did this cause of action arise? The answer is clear: wherever the plaintiff’s directors made the relevant alleged decisions. In my judgment, the plaintiff has not established that its action is founded on a tort committed within the jurisdiction.”

51. The lottery business was either operated from South Africa or England or possibly Guernsey but not Cyprus. The Cypriot corporate entities including the plaintiff involved in this claim are owned by nominee directors and shareholders with the decision-making being undertaken outside of Cyprus including by the defendants as the alleged shadow directors/de facto directors/agents/employees. Highest Point is not a party, however, whilst money may have been placed in accounts in Cyprus and/or ownership/control diverted from one Cypriot entity to another i.e. Highest Point, the alleged wrongful acts directed by the defendants occurred outwith Cyprus. Both experts agree under the test in Cyprus it is not where the damage occurs that grounds jurisdiction.

52. The defendants agree that the claims in relation to the agency and employment are South African law and I prefer the evidence of Mr Loizides that the Cypriot courts will conclude the acts giving rise to these causes of action occurred outside Cyprus, in relation to unfair competition both experts agree that the Cypriot courts would not have jurisdiction to adjudicate this claim regardless of who the defendant is. I agree with the plaintiff that whether or not there is an equivalent claim under Cypriot law is of no relevance to whether Cyprus is an available forum for this claim as pleaded. The constructive trust as pleaded is a matter of Guernsey law.
53. I have therefore come to the conclusion that the defendants have failed on the balance of probabilities to show that Cyprus is an available forum.
54. I therefore refuse a stay on the basis of *forum non conveniens*.
55. As I have decided that the defendants have not shown on the balance of probabilities that either South Africa or Cyprus are available fora it is not necessary for me to decide if either is clearly or distinctly more appropriate than Guernsey. However, it is my view that in any event this case has the appearance of one that falls into the category of cases referred to by Lord Goff in *Spiliada (ibid)* at (c) in his list of principles (page 476) where he says:

“no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions (see, eg, European Asian Bank AG v Punjab and Sind Bank [1982] 2 Lloyd’s Rep 356), or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right.”

56. I have also reminded myself that the defendants must show that the alternative jurisdiction is clearly or distinctly the more appropriate venue for *“the trial of the dispute”* (see Lord Goff at (c) above) rather than the individual issues within the dispute and that I am doing this at a very early stage in these proceedings (despite the length of time since the cause was filed). Here the defendants have proffered two alternatives to Guernsey; South African or Cyprus. The residence of the witnesses, the places where the parties carry on business, the applicable laws depending on the issue, the jurisdictions where the alleged torts arose in accordance with my conclusions above, the ongoing nature of the allegations, the possibility of fragmentation where particular parts of cause cannot be dealt with in a jurisdiction, the consequences of the language of the proceedings not being in English, the availability of documents are all factors when weighed up do not readily identify a clear or distinct jurisdiction more appropriate than Guernsey.

The Wrong Defendants

57. Having refused the stay on the basis of *forum non conveniens* it is therefore necessary for me to consider the second preliminary issue which is that the proceedings have been issued against the wrong defendants. The defendants argue that the cause should have been issued against Street Spirit and/or Highest Point. Further, that the claims which have been articulated by the plaintiff as claims against the defendants are really claims against the corporate entities.
58. As I noted from the outset of the hearing, if it is the case that the plaintiff has no real prospect of succeeding on the claim or has disclosed no reasonable grounds for bringing the proceedings against the defendants, then in the normal course the defendants should bring an application for summary judgment and/or striking out with their attendant procedural safeguards. The defendants have not taken this step. I was not referred to any authorities in support of the defendants’ application. The general rule is that the plaintiff may choose the persons against whom he wishes to litigate. It is not a case where the defendants have, for example,

demonstrated that the defendants are not necessary or proper parties under rule 37(1) (a) of The Royal Court Civil Rules 2007.

59. As I have set out above, this is a case where there is a high degree of factual dispute between the parties. Deputy Bailiff Collas (as he was then) in Woodbourne Trustees Ltd v Generali Worldwide Insurance Company Ltd judgment 17/2009 reminded parties about the dangers of dealing with preliminary issues which are based on disputed facts. The plaintiff's case is that it is the defendants who owed duties to the plaintiff. It will be a matter for trial as to whether the plaintiff has chosen the correct defendants and is entitled to relief from them as pleaded and not a case management decision.

Conclusion

60. For the reasons I have given the defendants' applications have not succeeded and the plaintiff's action is able to proceed in this jurisdiction.
61. Costs would normally be ordered to follow the event and I hope that the parties can agree the terms of any costs orders arising from this judgment, but if there are any applications, I direct that they be submitted to me in writing for consideration and/or directions at an early sitting of the Interlocutory Court.