

Consideration of Defendant's *exception declinatoire* by which the Defendant seeks to set aside the Service Out Order and/or to stay these proceedings.

[2022]GRC006

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Civil No. 2353

Between:

TALOS INVESTMENTS LIMITED

Plaintiff

-AND-

BANONCIA HOLDING LIMITED

First Defendant

-and-

VLADIMIR ALEXEEVICH POPOV

Second Defendant

Date of hearing: 13 October 2021

Judgment handed down: 14 February 2022

Before: Jessica E Roland, Deputy Bailiff

Counsel for the Plaintiff: Advocate R Fullman

Counsel for First and Second Defendants: Advocate F E Warrilow

Cases, texts & legislation referred to:

The Royal Court Civil Rules, 2007

Tchenguiz v Hamedani [2015] GLR 154

Spiliada Maritime Corporation v Consulex Limited [1987] AC 460

Livingston Properties Equities Inc et al Others (Respondents) v JSC MCC Eurochem and Another (Appellants) [2020] UK PC3

Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited (Royal Court civil action 812) 14 January 2009

Fogarty v St Martin's Cottage Limited Jersey Court of Appeal [2016] JCA 180

Winnetka Trading Corporation v Bank Julius Baer and Company Limited 2009-10 GLR 260

Marubeni Hong Kong and South China Ltd v Mongolian Government [2002] 2 ALL ER (Comm) 873

Donohue v Armco [2002] 1All ER 749

Introduction

1. On 18 December 2020, I granted an application by the Plaintiff for leave to serve a summons (the “Summons”) out of the jurisdiction (the “Service Out Order”). The matter was given a first return date of 23 April 2021. The matter was subsequently adjourned by agreement on a number of occasions to the 28 May 2021 when it was placed *inscribe* with the Defendants reserving their right to raise an *exception declinatoire*. On 25 June 2021, the Defendants lodged their defences, together with an *exception declinatoire*. By this *exception*, the Defendants sought to set aside the Service Out Order and/or to stay these proceedings.

Background

2. The Plaintiff is a company that was incorporated in the BVI on 7 March 2014. Its registered office is in the BVI and, as required by BVI law, it has a registered agent situated in the BVI. The directors of the Plaintiff are Saffery Limited and Champness Limited, which are Guernsey registered companies. The natural directors of those Guernsey companies are all resident in Guernsey. The Plaintiff is part of a Guernsey trust structure known as the Tucana Trust which is administered by Rysaffe Trustee Company (CI) Limited in Guernsey. The Plaintiff is administered in Guernsey and all of its decision-making processes and business activities are centred and controlled in Guernsey.
3. The First Defendant is a Cypriot company and the Second Defendant is a Russian National residing in Switzerland and the beneficial owner of the First Defendant.
4. The underlying dispute relates to a loan by the Plaintiff to the First Defendant in the form of a secured US dollar loan facility of USD11,000,000 (the “Loan”) set out in a loan agreement dated 30 June 2016 (the “Loan Agreement”). It was a term of the Loan that there was a fixed repayment date of 31 December 2017 by which time the First Defendant was to repay the loan, together with all contractual interest accrued during the term. On or around 28 June 2016, the Second Defendant entered into a Guarantee and Indemnity Agreement (the “Guarantee Agreement”) with the Plaintiff, by which the Second Defendant guaranteed the repayment of the Loan to the First Defendant.
5. At Clause 21 of the Loan Agreement there is a governing law and jurisdiction clause, which sets out the following: -

21 Governing Law and Jurisdiction

21.1 This agreement and any dispute or claim arising out of or in connection with it, or its subject matter or formation (including non-contractual dispute or claims) shall be governed by and construed in accordance with the law of the Island of Guernsey.

21.2 Each party irrevocably agrees that, subject as provided below, the courts of Guernsey shall have exclusive jurisdiction over any dispute or claim that arises out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims). Nothing in this clause shall limit the right of the lender to take proceedings against the borrower in any other court of competent jurisdiction. Nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdictions, whether concurrently or not, to the extent permitted by the law of such other jurisdiction.

6. At Clause 18 of the Guarantee Agreement, there are the following terms:-

18 Governing Law

18.1 *This Guarantee and any dispute or claim arising out of or in connection with it, or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the laws of the Island of Guernsey.*

18.2 *The guarantor irrevocably consents to any process in any proceedings under Clause 19 being served on it in accordance with the provisions of this Guarantee relating to a service of notices. Nothing contained in this Guarantee shall affect the right to serve process in any other manner permitted by law.*

7. At Clause 19 of the Guarantee Agreement, there is the following term as to jurisdiction:

19 Jurisdiction

Each party irrevocably agrees that, subject as provided below, the courts of Guernsey shall have exclusive jurisdiction over any dispute or claim arising out of or in connection with this guarantee or its subject matter or formation (including non-contractual disputes or claims). Nothing in this clause shall limit the right of the Lender to take proceedings against the Guarantor in any other court of the competent jurisdiction, nor shall the taking of proceedings in any one or more jurisdictions preclude the takings of proceedings in any other jurisdictions, whether concurrently or not, to the extent permitted by the law of such of the jurisdiction.

8. The Defendants in their bare defences aver that the Service Out Order should be set aside and/or the proceedings be stayed *sine die*, on the grounds that the matters to which the Summons relate are not properly justiciable before the Court, that the matters to which the Summons relate are not proper ones for service out of the jurisdiction as there are clearly more suitable fora than the Courts of Guernsey for determination of these matters and, that on consideration of the Defendants' submissions, the Royal Court ought not to uphold the Service Out Order and/or ought to stay the proceedings initiated by that Order.
9. The Plaintiff relies on the first and third affidavit of Kirthi Kalyan (a lawyer with the Plaintiff's Advocates' firm) sworn on the 16 December 2020 and 10 August 2021 respectively and first affidavit of Kelvin Mark Hudson, sworn on the 13 August 2021. In accordance with permission given on the 13 August 2021 the Plaintiff also relied on the expert evidence of Alex Hall Taylor QC dated 11 August 2021. The Defendants rely on two affidavits by Zoe Bettina Beer, (a lawyer with the Defendants' Advocates' firm), dated 23 July 2021 and 3 September 2021. Both parties filed skeleton arguments and augmented these in oral argument.

The Law

10. The law on leave to serve out of the jurisdiction is well established and was not in dispute between the parties. The burden is on the Plaintiff to satisfy the Court that leave should be granted.
11. The starting point is Rule 8 of the Royal Court Civil Rules ("RCCR") which states as follows:
- "8.(1) *The court may give leave to effect service of a document out of the jurisdiction.*
(2) *The court shall not make an order under –*
(i) *Unless satisfied (by affidavit or otherwise) that the matter to which the document relates –*
(a) *is properly justiciable before the court and;*
(b) *is a proper one for service out of the jurisdiction.*

- (3) *An order of the court under paragraph (1) shall state –*
 - (a) *the form, manner and time in which and condition subject to which, service is to be effected, and*
 - (b) *the minimum period which must elapse between the date of service and the date upon which the matter may be pursued.*
- (4) *Where the court makes an order under paragraph (1) proof of service in accordance with the order shall be by affidavit or where service was effected by the Sergeant, by the relation of the Sergeant.”*

12. Although leave to serve out of this jurisdiction has been dealt with in a number of judgments, the leading local authority is the Court of Appeal’s decision in *Tchenguiz v Hamedani* [2015] GLR 154 at paragraph 66 – 70:

“66 *It is common ground that the approach to the exercise of discretion to be adopted in the present case was explained by the Deputy Bailiff (as he then was) in Carlyle Capital Corporation Ltd v Conway (Judgment 29/2011). What is “properly justiciable” and “proper” for service out is to be considered in the light of the judgment of Lord Collins of Mapesbury in AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2012] 1 WLR 1804, in particular paragraph 71 of the judgment.....*

67 *.....the guidance given in Kyrgyz Mobil, as explained by the then Deputy Bailiff in the Carlyle Capital case, may give assistance in this Bailiwick as follows. In summary to allow service out of the jurisdiction, the Court must be satisfied:*

67.1 *that there is a serious issue to be tried on the facts (that is a substantial question of fact or law or both), such an issue being one as to which there is a real (as opposed to a fanciful) prospect of success;*

67.2 *that the cause is properly justiciable (the Court being able, should it think fit, to draw assistance as to this from the approach taken by the courts in neighbouring jurisdictions in relation to the available “gateways” prescribed by their rules of court for service out of the jurisdiction);*

67.3 *that Guernsey is in the circumstances of the case clearly and distinctly the appropriate forum; and*

67.4 *that in the circumstances the Court should exercise its discretion (given by Rule 8(1) of the RCCR to allow service out.*

68 *..... r8(2) of the RCCR requires that court to be satisfied as to the two matters stated in para (a) and (b) of the rule (namely that the matter to which the document relates is properly justiciable and that it is a proper one for service out of the jurisdiction) before it can exercise the discretion given to it by r 8(1) of the RCCR to allow service out of the jurisdiction.”*

The Parties’ Contentions

13. The Defendants accept (without prejudice to any future substantive defence), that the Plaintiff’s case meets the serious issue limb and the jurisdictional gateway limb identified at paragraphs 67.1 and 67.2 of *Tchenguiz v Hamedani* (*supra*). However, the Defendants submit that the Plaintiff fails to meet the third limb of the test at paragraph 67.3 of *Tchenguiz v Hamedani* that is to say, that Guernsey is not in the circumstances of the case, clearly and distinctly the

appropriate forum and/or that the Court should not exercise its discretion in this case to allow service of the Summons out of the jurisdiction (see paragraph 67.4 of *Tchenguiz v Hamedani*).

14. The first affidavit of Kirthi Kalyan sworn in support of the original ex parte application for leave sets out the background of the matter in detail and the correspondence that preceded proceedings being issued in this jurisdiction. This includes a statement that the Plaintiff decided not to issue proceedings in Switzerland due to the time it would take to conclude the proceedings. In considering the appropriate forum limb, the Plaintiff also relies on the affidavit sworn by Mr Kelvin Hudson. Mr Hudson is a director of both the corporate directors of the Plaintiff. He sets out the decision-making process of the Plaintiff when it chose to commence proceedings against the Defendants in Guernsey. As set out above, the Loan Agreement and the Guarantee Agreement have clauses providing Guernsey as the exclusive jurisdiction over any dispute for the Defendants but allows the Plaintiff to commence proceedings in any other jurisdiction to the extent permitted by law. Despite the possible availability under these clauses of other jurisdictions for the Plaintiff, the Plaintiff considers that Guernsey is the most appropriate jurisdiction. It is accepted by the Plaintiff that this is a matter which engages a number of jurisdictions due to amongst other things: the First Defendant being a Cypriot company, the Second Defendant being a Russian national whose place of residence is Switzerland and the Plaintiff being registered in the BVI. Whilst the Plaintiff is registered in the BVI, all of its administration is undertaken in Guernsey and the Plaintiff came to the conclusion that Guernsey, given the jurisdiction interplay, was the most appropriate and natural forum. It considered that that balance of factors pointed towards issuing proceedings in Guernsey in relation to the dispute founded on the Guernsey law agreements.
15. In order to counter the averment in the defence “*that even if (which is not accepted) the English language predominates in this matter, it is an Anglophone jurisdiction, BVI, in which the Plaintiff company is registered. This makes BVI very clearly a more appropriate forum for this matter*”, the Plaintiff relies on the expert evidence of Alex Ford Taylor QC dated 11 August 2021. In that evidence, Mr Taylor QC, sets out the test in the BVI which mirrors the principles set out above in Guernsey. He opines that in BVI, in contract claims such as this one, the principle jurisdictional gateways are usually that the contract was made, formed, or breached in the jurisdiction (or made through an agent residing or trading in the jurisdiction) or that it contains express or implied choice of law and jurisdiction clauses.
16. He also refers to the recent Privy Council decision in *Livingston Properties Equities Inc et al Others (Respondents) v JSC MCC Eurochem and Another (Appellants)* [2020] UK PC3 which held that issues such as place of incorporation are given less weight as a connecting factor and although choice of law/jurisdiction clauses might be displaced where you have parties to the claim who were not party to the relevant contract—clauses (which is not the case here), they are likely to be determinative. His opinion is that this matter involves numerous jurisdictions (and splits across jurisdictions) which he presumes includes Guernsey, the BVI, Cyprus and Switzerland. However, his opinion is that the BVI is not clearly and distinctly the most appropriate forum or even an appropriate forum for determination of the dispute.
17. He opines that the significance of the Plaintiff having a BVI registered agent has no real bearing. Although leave was given to the Defendants to file expert evidence, the Defendants did not file any.
18. The Defendants’ argument is that a number of fora are alternatives to Guernsey. As set out above, the Second Defendant is a Russian National resident in Switzerland, the First Defendant is registered in Cyprus and the Plaintiff in the BVI. According to Ms Beer, none of the Defendants own assets which are situated or held in Guernsey and the convenience of the directors of the Plaintiff the Defendants argue, is not “*a very relevant factor*”. Whilst the contracts are governed by Guernsey law, the Defendants assert this is not a determining factor and this can be dealt with by means of adducing expert evidence as to the relevant Guernsey

law principles in another jurisdiction. Further, it is not accepted that the contracts were “made” in Guernsey, nor that any hypothetical breach of contract occurred within the jurisdiction.

19. The Defendants also rely on the fact that the Second Defendant’s mother tongue is not English and assert that the key witnesses will not be native or even competent English speakers and the majority of documents will not be in English. In her affidavit of 23 July 2021, Ms Beer asserts that even if English predominates the matter, BVI would be more appropriate although in her second affidavit of 3 September 2021 she makes clear that this does not mean that BVI is the more appropriate, it is just one of a number of alternative fora that are “*clearly more suitable fora than the courts of Guernsey*” as set out in the defences.
20. With regard to the exclusive jurisdiction clauses themselves, the Defendants argue that there is a question of enforceability which undermines the Plaintiff’s argument that these clauses secure Guernsey as clearly and distinctly the appropriate jurisdiction. The jurisdiction clauses are asymmetrical. This means that whilst the Defendants are limited to commencing proceedings in Guernsey, the Plaintiff in both the Loan Agreement and the Guarantee Agreement is able to commence proceedings in other jurisdictions to the extent permitted by the law in that jurisdiction.
21. Whilst asymmetric jurisdiction clauses are enforceable under English law (which the Defendants accept), clauses in the form contained in the Loan Agreement and the Guarantee Agreement are not prima facie enforceable in France. Thus, if this Court were to look to French law, the clauses would fail for a lack of certainty and fairness in respect of the Defendants' side of the bargain. This Court can look to modern French law as was made clear in the comments of Sir Richard Collas sitting in the Jersey Court of Appeal in the case of *Fogarty v St Martin’s Cottage Limited Jersey Court of Appeal [2016] JCA 180*, where he said:

“We are grateful to the parties’ Advocates for their learned research into the origins and development of the customary principles involved in this appeal. We agree that where a customary principle has been incorporated in the code civile and remains part of modern French law, it is appropriate to look, not only at the customary authorities, but also at modern French authorities, to see how the customary principles have evolved and are to be applied in modern Jersey law. To do so is no different from looking to the development of English common law in those areas where Jersey law has followed those developments”.
22. The Defendants also submit that the principle of *équité* is a recognition that Guernsey law is founded on a principle of fairness and justice (see *Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited (Royal Court civil action 812) 14 January 2009* at paragraph 84) which reflects the French position on this type of clause and thus Advocate Warrilow urged me to find that French law is persuasive in this case. If the clauses in question should fail under Guernsey law for a lack of certainty and fairness, the Defendants argue that this makes the other factors upon which the Defendants rely in relation to Guernsey not being clearly and distinctly the appropriate forum all the more compelling. The Defendants further submit that, as long as there are other fora notionally available to the Plaintiff, that is all the Defendants need to do.
23. Mr Hudson sets out in his affidavit his own understanding of the Second Defendant’s fluency in English, in particular that the parties have communicated at length in English over the relevant period and the Guarantee Agreement and the Loan Agreement are in English. He also highlights that the Defendants have not identified what documents in a foreign language will be relevant to the proceedings and his belief is that the key documents are in English. He brings to my attention that the Defendants have not identified (other than the Second Defendant) what witnesses would be required to attend the hearing of the claim and who would need a translator. To the extent that a translator is required this is not uncommon in trials in this jurisdiction.

24. In response to the arguments on the exclusive jurisdiction clauses, the Plaintiff argues first, that the argument put forward by the Defendants has not been properly pleaded and therefore it is not open for the Defendants to raise the arguments that they have on the jurisdiction clauses and second, that in this jurisdiction there is not any reason not to enforce them. This is not an area where this Court should look to French law for authority as there is no basis to do so. The Guernsey Court of Appeal case of Winnetka Trading Corporation v Bank Julius Baer and Company Limited 2009-10 GLR 260 is binding upon the Royal Court and that when considering jurisdiction clauses, this Court is bound to follow common law position in England.

Discussion

25. It is common ground that the principles as set out in Spiliada Maritime Corp v Consulex Limited [1987] AC 460 should be considered on the issue of whether this jurisdiction is clearly and distinctly the appropriate forum. The appropriate forum is the one which Goff L.J at page 480G describes as the one in which the case “*may most suitably tried for the interests of all the parties and the ends of justice*”. Further at p481E Lord Goff states that:

“The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so”

He noted (p 481F-482B) that the circumstances in which permission to serve out may be granted:

“are of great variety, ranging from cases where, one would have thought, the discretion would normally be exercised in favour of granting leave (e.g., where the relief sought is an injunction ordering the defendant to do or refrain from doing something within the jurisdiction) to cases where the grant of leave is far more problematical. In addition, the importance to be attached to any particular ground invoked by the plaintiff may vary from case to case. For example, the fact that English law is the putative proper law of the contract may be of very great importance; or it may be of little importance as seen in the context of the whole case. In these circumstances, it is, in my judgment, necessary to include both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff as factors to be considered by the court when deciding whether to exercise its discretion to grant leave; but, in so doing, the court should give to such factors the weight which, in all the circumstances of the case, it considers to be appropriate.”

26. The starting point for this balancing exercise is the jurisdiction clauses. The leading case on the English court’s approach to forum clauses is Donohue v Armco [2002] 4LRC 478 which was cited by the Guernsey Court of Appeal in Winnetka (ibid) and by the Deputy Bailiff as he was then in Carlyle Capital Corporation Limited and Four Others v Conway and Nine Others [2011-12 GLR 371]. Both cases cite paragraph 24 of the speech of Lord Bingham of Cornhill where he says:

“24. If contracting parties agree to give a particular Court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English Court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum.”

27. In this case, the Plaintiff relies on the respective clauses in the two agreements as exclusive jurisdiction clauses. The Defendants' argument in this regard as set out above is that the jurisdiction clauses, as drafted, are unenforceable. The defence says, at 3(a): "*While the [Loan Agreement] and [Guarantee Agreement] may have clauses which cite the jurisdiction and law of Guernsey, these clauses are conflicting as against each other and do not in fact clearly present Guernsey as the exclusive jurisdiction or forum for disputes arising therefrom.*"
28. I do consider that this pleading is wide enough (just) to include the argument advanced in the skeleton argument and the hearing by the Defendants that the clauses are unenforceable in this jurisdiction due to their asymmetry. In any event even if I am wrong on that, if the Defendants are right that the relevant clauses are unenforceable in this jurisdiction, then it would not be an appropriate exercise of my discretion to allow the Service Out Order to stay in place if the decision was fatally undermined by an unenforceable jurisdiction clause.
29. The Defendants' argument by reference to *équité* is that as a matter of principle this Court should not uphold what the Defendants say is an unfairness with the asymmetrical nature of the jurisdiction clauses. Contained within this argument on *équité* by the Defendants is a presumption that it would be nevertheless fair for this Court not to hold these parties to their bargain. This ignores the principles of Guernsey contract law which were most recently examined in *Roy Smith & Carey Olsen (Guernsey) LLP [2020] GRC62* i.e., that "*the maxim la convention fait les lois des parties*". I do not consider that the maxim of *équité* is of assistance to the Defendants in this case.
30. With respect to following modern French case law on asymmetrical jurisdiction clauses, even if I had been persuaded on the *équité* principle as a route to French law in this regard, the Defendants have failed to unpick the extent to which the French cases which they urge me to follow are based on conventions to which this jurisdiction is not a signatory, regulations that play no part in Guernsey law or indeed concepts that are not part of Guernsey law. In any event the case of *Winnetka Trading Corporation v Bank Julius Baer and Company Limited (ibid)* is binding on the Royal Court and it is to English common law that the Court of Appeal considers Guernsey should look for authority on jurisdiction clauses where the English courts have held that asymmetrical jurisdiction clauses are valid and enforceable. It would be at odds with the *Winnetka* decision if this Court took the view that in relation to asymmetrical jurisdiction clauses that the Royal Court should look to France.
31. In *Vaudin v Hamon (1973) O en C XXIV*, page 154 Lord Wilberforce considered when it is appropriate to look by analogy at other systems of law. He said, at page 164:
- "If an argument based on analogy is to have any force, it must first be shown that the system of law to which appeal is made in general, or the relevant portion of it, is similar to that which is being considered, and then that the former has been interpreted in a manner which should call for a similar interpretation in the latter."*
32. This principle is echoed in the case of *Fogarty v St Martin's Cottage Limited*. Looking at modern French authorities is of assistance where a customary principle has been incorporated into the Code Civil and remains part of modern French Law. However, as Sir Richard Collas made clear "*To do so is no different from looking to the development of English common law in those areas where Jersey Law has followed those developments*".
33. Thus, the Defendants have failed to persuade me that the clauses are unenforceable, however it is necessary for me to consider whether these jurisdiction clauses should be considered an exclusive or non-exclusive jurisdiction clause. The starting point is the assumption that the parties intended for the clause to be asymmetrical i.e., including both an exclusive and a non-exclusive element. On the facts of this case the Plaintiff is suing in the contractual forum even though the clauses allow it to sue in other jurisdictions. As regards the position of the

Defendants, they agreed to be bound exclusively to the jurisdiction of Guernsey and therefore should be held to their contractual bargain only to be displaced “if strong reasons” are established for so doing; one such reason can be the avoidance of duplicated or fragmented litigation. I take the phrase “strong reasons” to include “manifest injustices,” but judicial phraseology must not be construed as a statute.” (See Carlyle Capital Corporation Limited and Four Others v Conway and Nine Others [2011-12 GLR 371])

34. It is not enough in these circumstances for the Defendants simply to say that there are other fora notionally available to the Plaintiff. Aikens J in Marubeni v Mongolian Govt (*supra*) is helpful at paragraph 64 where he says:

“64. The court will still have to consider all the circumstances of the case before reaching a decision. But one of the most important factors it has to bear in mind is that the parties have effectively agreed that England is the proper place to try cases. That is why the defendant will have to show “strong reasons” why despite the agreement to English jurisdiction, England is not the proper place to try the claim. In these circumstances the usual discussion of Spiliada factors such as the connection of the parties with this or that jurisdiction; there whereabouts of witnesses and documents; the prospects for a speedy trial and the punitive proper law of agreement in dispute and so forth, are all far less powerful than they would be without the agreement as to jurisdiction (see the British Aerospace case [1993] 1 Lloyds Rep 368 at 376 per Walker J; the Mercury Communications case [1999] 2 All ER (Com) 33 at 41 per Moore-Bic J).

35. Continuing the quotation from paragraph 24 in Donohue v Armco (*ibid*):

I use the word “ordinarily” to recognize that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party’s prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in The Eleftheria, [1969] 1 Lloyd’s Rep. 237 at p. 242; [1970] P.94 at pp. 99-100, Mr. Justice Brandon helpfully listed some of the matters which might properly be regarded by the Court when exercising its discretion and his judgment has been repeatedly cited and applied. Mr Justice Brandon did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material. (I am mindful that the principles governing the grant of injunctions and stays are not the same: see Aérospatiale at p. 896. Considerations of comity arise in the one case but not in the other. These differences need not, however, be explored in this case.)

25. *Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A’s claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause.”*

36. The relevant part of the passage (as this is not a case where the Plaintiff is suing in breach of an exclusive jurisdiction clause) in Brandon J’s judgment in The Eleftheria referred to by Lord Bingham is as follows:

“..... the following matters, where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. (b) Whether the law of the foreign Court applies and, if so, whether it differs

from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a timebar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.”

37. This case engages as least four jurisdictions: Guernsey, BVI, Cyprus and Switzerland. The only link to the BVI is that the Plaintiff is a BVI company and has a BVI registered agent, although its administration is undertaken in Guernsey and Guernsey based directors are all in Guernsey. There is no direct evidence supporting the Defendants’ submission on where the contracts were made or allegedly breached. However, it would seem most likely that the Plaintiff’s part of the contracts was ‘made’ in Guernsey (because that is where its officers, the Guernsey-based directors, would have executed them) and the other parties where they are based. The performance of the contacts will presumably involve numerous jurisdictions (and splits across jurisdictions) presumably including at least Guernsey, Cyprus and Switzerland. Likewise the location of the parties, mostly balance off against one another, but the Loan Agreement and Guarantee Agreement are Guernsey law documents. Even if not all the documentation is English in the evidence before me the vast majority is in English (and none in Greek or Turkish save the documents relating to service). Counsel for the Defendants accepted that there was no evidence before the Court that either the First or Second Defendant required translation of the Loan Agreement and Guarantee Agreement into other languages before executing the relevant documents. It is clear from the correspondence that up until now, the First and the Second Defendants have been able to communicate in English to the Plaintiff and its Advocates, although given that English is not the first language of the Second Defendant he may need a translator for the Court hearing. There was no evidence before the Court in relation to the First Defendant’s position in relation to language or indeed whether the natural directors behind the corporate directors will appear as witnesses. The natural directors of the corporate directors of the Plaintiff are all in Guernsey. Inevitably, in relation to speed towards trial, all estimates are ‘a finger in the air’. However, it does appear that it is more likely given my prima facie view of the facts in this matter that when the parties have received this judgment that matters should progress towards trial with reasonable speed. It is clear from the expert evidence of Mr Taylor QC that BVI as an alternative jurisdiction does not provide a strong reason. There was no proper evidence before me as to the availability of Cyprus as an alternative forum in relation to the Second Defendant. Counsel for the Defendants accepted that this would be something that would need to be looked into. The Defendants did not provide any evidence on Switzerland, the residence of the Second Defendant as a jurisdiction. Further given that Advocate Warrilow on behalf of the Defendants did not have instructions to accept service of proceedings for either Defendant in any other jurisdiction, given the multiple jurisdictions involved, issues of service out of the jurisdiction will be present in any of the potential jurisdictions. The Defendants have not provided any evidence on issues arising from remedies in other jurisdictions on Guernsey law documents or prejudice that they might suffer if the matter is heard in Guernsey. Even in a case where permission is required to serve out of the jurisdiction, so that the burden is on the Plaintiff to show that Guernsey is the appropriate forum, there is still a requirement for there to be another candidate with the requisite jurisdiction. Where the Defendants have failed to put forward adequate evidence to balance that of the Plaintiff, inevitably the scales will weigh towards the Plaintiff’s argument particularly where this is a claim based on allegations of breaches of contracts where Guernsey has been selected by the parties as the forum for such disputes and thus strong reasons are required to depart from this.

38. Having considered all the arguments made, I have come to the conclusion that the Plaintiff has satisfied the third limb of the test from *Tchengui v Hamedani* (*ibid*) that Guernsey is clearly and distinctly the appropriate forum for the trial of this case.

39. The Plaintiff having satisfied the first three limbs of the test for leave to be granted to serve the Summons out of the jurisdiction, it is still necessary for me to consider whether to exercise my discretion to allow the Plaintiff to do so. Having considered all the circumstances of the case as set out in detail above, I do consider it an appropriate exercise of my discretion to grant leave to serve the Summons out of the jurisdiction on the Defendants.
40. The Plaintiff have been successful in persuading me that I was right to grant leave to serve the Summons out of the jurisdiction. This is a matter which should now proceed in the normal way without delay. I can see no justification for staying these proceedings sine die as submitted by the Defendants or at all.

Conclusion

41. For the reasons I have given the Plaintiff's action is able to proceed in this jurisdiction.
42. 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.