Neutral Citation Number: [2021] EWCA Civ 625

Case No: A4/2020/0021

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/05/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE COULSON
and
LORD JUSTICE PHILLIPS

- -

Between :

Pranshant Hasmukh Manek **Sanjay Chandi** **EAGM Ventures (India) Private Limited**	**Appellants**
- and -	
IIFL Wealth (UK) Limited	**1st Defendant**
Ramu Ramasamy **Palaniapan Ramasamy**	**2nd & 3rd Defendants**
Amit Shah	**4th Defendant**

- -

Stephen Midwinter QC (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Appellants**
James Collins QC & Siddharth Dhar (instructed by **Burness Paull LLP**) for the **2nd &3rd Defendants**

No:2

Hearing date : 23 March 2021

- -

Approved Judgment

LORD JUSTICE COULSON :

1 INTRODUCTION

1. In our judgment at [2021] EWCA Civ 264, this court allowed the Appellants' appeal against the judge's conclusion that, under the tort gateway, they had not shown that sufficiently "substantial or efficacious" acts had been committed within the jurisdiction of England and Wales. That conclusion meant that four further issues, which had been argued before the judge but which he had not needed to decide, became material. As advertised at [71] of our earlier judgment, the appeal was then re-listed to address those outstanding matters. That hearing took place on 23 March 2021.

2. The four issues all arise out of the application made by the Respondents (the 2nd and 3rd Defendants who, as before, I shall refer to as Ramu and Palani) to set aside the order of Andrew Baker J, made on 2 February 2018, permitting the Appellants to serve the claim form and Particulars of Claim on them out of the jurisdiction. Those issues (set out in the order with which I shall deal with them in this judgment) are as follows:

    a) Issue 1: Was there a relevant arbitration agreement between the parties? (Section 2 below)

    b) Issue 2: If not, was there an *ad hoc* arbitration agreement between the parties? (Section 3 below)

    c) Issue 3: Was there material non-disclosure by the Appellants when they obtained the order from Andrew Baker J such that that order should be set aside in any event? (Section 4 below)

    d) Issue 4: Is England and Wales the 'natural' forum or proper place for this claim to be heard? (Section 5 below)

3. The relevant facts are set out in our first judgment and are not repeated here. In summary, the Appellants allege that they were the victims of a fraud, pursuant to which Ramu and Palani (the majority shareholders, via their company, GIR) persuaded the Appellants' representatives (Hasu & Jayesh) to sell to them their minority shares in an Indian company called Hermes i-Tickets Private Limited ("Hermes"), on the basis that a good offer of around $40 million had been made for Hermes by a company called EMIF (domiciled in Mauritius). It is the Appellants' case that, unbeknownst to them, Ramu and Palani were involved in an arrangement whereby Hermes was immediately sold on by EMIF to a German company, Wirecard AG, for around €250m plus earn out.

4. The Appellants' claim is in deceit. As set out in our first judgment, Ramu and Palani do not deny the representations that were made at what we have held to be the critical meetings in London. Their case is that they did not know about the onward sale to Wirecard, so they deny that the representations which they made were false. In this way, they maintain that the critical issue in these proceedings is likely to be the falsity or otherwise of the representations that Ramu and Palani made to Hasu and Jayesh, which ultimately induced the sale of the Appellants' shares in Hermes.

5. That dispute cannot be decided at this interim stage. However, it is to be noted that Wirecard's present position appears to be that Ramu and Palani were involved in the onward sale: not only is that the clear inference from Wirecard's evidence in the separate English proceedings referred to below, but in 2019, GIR (the company of which Ramu and Palani are directors) sought an injunction against Wirecard in India, restraining them from representing that GIR or its directors had made any profit from the sale of Hermes to Wirecard. That application was rejected by the High Court at Madras in a judgment dated 26 August 2019.

2 WAS THERE A RELEVANT ARBITRATION AGREEMENT BETWEEN THE PARTIES?

2.1 The SPA

6. The Share Purchase Agreement ("SPA") agreed between the first and second Appellants, as individuals, and GIR was dated 9 September 2015. There was a similar SPA between the third Appellant and GIR dated the same day. Save in one respect, the terms of the two SPAs were identical.

7. GIR was defined in the SPAs as:

> "…a company having its registered office at C9, Thiruvika Industrial Estate, Guindy, Chennai-600032, represented by Director, Mr Ramu Annamalai (referred to as the 'Purchaser', which expression shall, unless repugnant to it to the context of or meaning thereof, be deemed to mean and include its directors, officials, successors, heirs, executors and permitted assigns)…"

8. Clause 1 set out the sale to and purchase of the shares by "the Purchaser" (ie GIR) and the consideration for that sale and purchase. The SPA between the first and second Appellants and GIR included an additional provision at clause 1.8, described as an "Anti-Embarrassment" provision, which referred to "the Purchaser and its promoters". Although "the promoters" are not otherwise defined in the SPA, Mr Midwinter argued that this had to be a reference to Ramu and Palani, because the clause was concerned with the possible appointment of "the promoters" as directors of or to executive positions within Hermes. Mr Collins did not submit to the contrary.

9. Clause 3.2 of the SPAs is in the following terms:

> "3.2 Governing Law:
>
> > 3.2.1 The Agreement shall be construed in accordance with, and governed by the laws of Republic of India.
> >
> > 3.2.2 Any dispute arising out of or in connection with this Agreement including without limitation any question regarding its existence, interpretation, performance, validity, effectiveness or termination of the rights or obligations of any party, shall first

> be settled amicably by the Parties wherever practicable without recourse to litigation.
>
> 3.2.3 If such dispute cannot be resolved amicably by the Parties after a period of thirty (30) days after the receipt by one Party of a notice from the other Parties of the existence of the dispute then it shall be referred to and resolved with the provisions of the Indian Arbitration & Conciliation Act, 1996 as amended from time to time. The Arbitrator shall conduct the Arbitration proceeding in fast track manner and conclude and render binding final award within 6o days from the date of reference. The venue of such arbitrator shall be Mumbai."

10. The SPAs were signed by Ramu "on behalf of "the Purchaser"". Ramu and Palani maintain that, because they were directors of GIR, they were within the definition of GIR in the SPA, and were therefore parties to the arbitration agreement. They therefore seek to enforce their right to arbitrate under that agreement. The Appellants submit that Ramu and Palani were not parties to the SPA at all and that, even if they were, they were parties only in their capacity as directors of GIR, whilst the dispute which has arisen, involving allegations of deceit against them personally, does not involve their acts and omissions as directors of GIR. The Appellants therefore submit that the arbitration agreement does not bite on this claim.

2.2 The Law

11. There was a threshold debate as to whether English or Indian law applied to this issue. I have concluded that, save in respect of one matter (where the effect of Indian law is in any event disputed by the parties), there is no material difference between them for the purposes of this appeal.

12. As a matter of English law, it would not be appropriate for the court to grant permission to serve out of the jurisdiction if thereafter the court would grant Ramu and Palani a stay of proceedings in favour of arbitration: see [47] of the judgment of Popplewell J (as he then was) in *The Barito* [2013] EWHC 1240 (Comm); [2013] 2 Lloyd's LR 421. That approach follows logically from s.9(4) of the Arbitration Act 1996, which mandates a stay for arbitration unless the court is "satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

13. As to whether or not the dispute that has arisen falls within the arbitration agreement, that depends on whether, first, the relevant parties have agreed to resolve disputes between them by way of arbitration and second, whether the particular dispute that has arisen is caught by the terms of the arbitration agreement. This latter question is a matter of construction of the agreement: following the change in approach signalled by Lord Hoffmann in *Fiona Trust and Holding Corporation v Privalov* [2007] UKHL 40; [2007] 4 All ER 951, the court will construe the arbitration agreement broadly in order to endeavour to achieve a sensible commercial outcome.

14. There is nothing in the papers to indicate that Indian law differs in any way from the propositions set out at paragraphs 12 and 13 above.

15. As a matter of English law, if there was a binding arbitration agreement between some of the parties to court proceedings, the court will stay the proceedings involving those parties, even if there are other parties who are not caught by the arbitration agreement: again, see s.9(4), and the deliberate framing of the 1996 Act to do away with the old practice of refusing to stay court proceedings if it led to a multiplicity of proceedings, as in *Taunton-Collins v Cromie* [1964] 1 WLR 633 and later authorities. The position as to multiparty proceedings may be different in Indian law but, for the reasons explained at paragraphs 30-32 below, that does not affect the outcome of this appeal.

2.3 Were Ramu and Palani parties to the SPA?

16. The first question is whether Ramu or Palani were parties to the arbitration agreement. If they were not, none of the principles noted above have any application.

17. I deal first with Palani, who did not sign either SPA. It appears to be common ground that, as a matter of Indian law, an arbitration agreement is in writing if it is contained in a document signed by the relevant parties. As a matter of construction, there is nothing on the face of the SPAs which suggested that they were intended to bind non-signatories. As a non-signatory, Palani would not therefore be entitled to rely on the arbitration agreement at all, unless it could be shown that he was in some way claiming this right "under or through" Ramu.[1]

18. At paragraph 35 of his report, the expert relied on by Ramu and Palani, Mr Thambidurai, said that, although there was a principle in Indian law that persons who do not individually sign can be made party to arbitral proceedings, he had insufficient information to form a view as to whether Ramu had authority to bind Palani. There is no other direct evidence on that issue. Although Mr Collins suggested that Palani's consent was in the letters referred to below, they all post-dated the SPA. On that basis, therefore, it seems to me to be impossible to say that Palani, as a non-signatory, was a party to the SPAs and therefore the arbitration agreement. There is no evidential basis for concluding that Palani was claiming "under or through" Ramu (or indeed the other way round).

19. Now let us suppose that, although he was not a signatory, Palani's position was no different to that of Ramu. The next question is whether, on a proper construction of the SPA, Ramu and Palani were themselves parties to the SPA. In my view, the answer to that is in the negative.

20. Mr Collins' argument that they were parties turns entirely on the definition of GIR set out at paragraph 7 above. But it is clear that that provision was only there because the purchaser under the SPA was GIR, a company, which could only act through individuals: hence the deemed inclusion in the definition of "the Purchaser" (where appropriate) of "directors, officials, successors, heirs, executors and permitted

[1] See s.8 of the Indian Arbitration and Conciliation Act 1996 and *Chloro Controls (I) P. Ltd v Severn Trent Water Purification* (2013) 1 SCC 641 at [70]. That is broadly the same as the position in English law: see s.82(2) of the Arbitration Act 1996.

assigns". That is all that the definition section was seeking to do. The mere fact that GIR would act through those individuals does not make them all parties to the SPA.

21. That can be tested in this way. The SPA obliged GIR to pay a large sum of money for the Appellants' minority shareholding in Hermes. If GIR had defaulted on that agreement and not paid the promised sum, would the Appellants have been able to turn to Ramu and Palani (or any other "official" of GIR, for that matter) and ask them personally to make good the deficit? Of course they could not. They were not, as individuals, parties to the SPA. They had no rights and no liabilities thereunder. Because they were not parties to the SPA, they could not be parties to the arbitration agreement.

22. Further support for that conclusion can be found in clause 1.8, which is unique to the SPA between the first and second Appellants and GIR: see paragraph 8 above. There is a reference there to "the promoters" of GIR. That clause envisaged the possibility that GIR's promoters might be appointed to a significant role within Hermes after the sale. Such a role could only be fulfilled by an individual, not a corporate entity. That would appear to confirm Mr Midwinter's proposition that Ramu and Palani were "the promoters", as opposed to somehow being interchangeable with GIR itself.

23. For these reasons, I conclude that Ramu and Palani were not parties to the SPAs and therefore not parties to the arbitration agreement.

2.4 If Ramu and Palani were parties to the SPA, in what capacity were they parties?

24. If that was wrong, and Ramu and Palani were parties to the SPA, it is plain that they could only be parties in their capacity as directors of GIR. As noted above, they had no personal rights or liabilities as a result of the SPA, so they could not be parties as individuals.

25. That then raises the question of whether the claim for deceit against Ramu and Palani in the Commercial Court in London concerns them in their capacity as directors of GIR. On this hypothesis, if it did, then a dispute "arising out of or in connection with" the SPA would have arisen, and so would be caught by the arbitration agreement. But it does not. Ramu and Palani are not being sued in deceit in their capacity as directors of GIR. They are being pursued as individuals who, on the Appellants' case, personally made false representations in order to perpetrate this fraud. So even if Ramu and Palani were parties to the SPA as directors of GIR, that would make no difference, because the disputed claim against them in deceit does not arise out of or in connection with their role as directors of GIR, and so does not trigger the arbitration agreement.

26. That seems to me to be the reality of this claim. On the Appellants' case, it was in their personal capacity that Ramu and Palani were able to persuade Hasu and Jayesh to sell them the minority shareholding in Hermes at an undervalue, and then sell on all the shares in Hermes to Wirecard (via EMIF) at a very much greater figure. It was not in their capacity as directors of GIR: indeed, on this basis, GIR were as much a victim of the alleged fraud as the Appellants, because the onward sale to Wirecard demonstrated that the shares in Hermes were worth much more than GIR received from EMIF.

27. On any view, therefore, Ramu and Palani's role as directors of GIR was irrelevant to the claim now being brought against them. Thus, since the only conceivable way in which it might be argued that Ramu and Palani were parties to the SPA (and therefore parties to the arbitration agreement) was as directors of GIR, the claim now being made does not give rise to a dispute that triggers clause 3.2.2 of the SPA.

28. Accordingly, I conclude that there is no binding arbitration agreement between the parties which extends to the claim in deceit in the Commercial Court in London. There is therefore no basis – in either English or Indian law – to stay these claims for arbitration under the SPA, or to allow the arbitration provision to justify setting aside the order of Andrew Baker J.

2.5 Other Matters

29. Although, for the reasons I have already given, I would reject Ramu and Palani's purported reliance on the arbitration agreement within the SPA, I should address two other matters to which we were referred during the course of argument.

30. In support of his submission that the arbitration provision was irrelevant, Mr Midwinter maintained that, as a matter of Indian law, an arbitration provision cannot apply to a multi-party dispute (the old approach in England and Wales before the 1996 Act). He relied on the expert evidence of Mr Dhond, in particular paragraphs 45-46 of his report, which in turn relied on the decision of the Supreme Court of India in *Sukanya Holdings (P) Ltd v Jayesh H Pandya & Another* (2003) 5 SCC 531.

31. Mr Thambidurai, Ramu and Palani's expert, appeared to take a different view in his second report: see in particular paragraphs 4.4-4.7. Rather oddly, the cases to which Mr Thambidurai referred all predated *Sukanya*, except one, and that decided (uncontroversially, in my view) that a claimant who joined a number of parties to court proceedings deliberately to circumvent the arbitration provision should not be allowed to do so. There is no convincing explanation as to how or why Mr Dhond's recitation of the key passage in *Sukanya* was somehow incomplete or misleading.

32. Accordingly, if I was obliged to decide this issue as a matter of Indian law, I would decide it in favour of the Appellants, albeit with considerable reluctance, because the experts' reports are not sufficiently focussed to allow a certain conclusion as to whether Indian law differs from English law on the issue of multi-party disputes. But it is not necessary to decide the point at all because, for the reasons already given, I have concluded that the arbitration agreement is of no application to the present dispute in any event.

33. The second matter concerns the anti-suit litigation commenced by Ramu and Palani in the High Court at Madras, which sought to prevent the continuation of the Commercial Court proceedings in London[2]. The Madras litigation was based on the alleged right of GIR to arbitrate the dispute with the Appellants. Ramu and Palani said expressly in those proceedings that, as individuals, they were *not* parties to the SPA and that the joinder of Ramu and Palani as defendants in these proceedings "in their

[2] This was a separate action to that referred to in paragraph 5 above, although from Ramu and Palani's perspective, it was equally unsuccessful.

individual capacity…is completely misconceived since they have always acted for and on behalf of GIR and not in their individual capacity".

34. Although Mr Midwinter fairly accepted that this was something of a forensic point, it seems to me that it is not without significance. Ramu and Palani were saying to the High Court at Madras that, on their understanding of the SPA, they had no liability to the Appellants in their individual capacity. That is, of course, precisely how I have interpreted the SPA. I also note that, in the subsequent judgment dated 24 January 2019, the High Court at Madras rejected Ramu and Palani's application for an anti-suit injunction, saying that the claims against them in the Commercial Court in London were "more in the private and personal nature and it is not in their capacity as directors" of GIR [11].

35. The High Court at Madras went on to find that Ramu and Palani's "real intention is to prevent the Appellants to go on with their claim and thus not to facilitate arbitration proceeding" [25]. That also seems to me to be a finding to which this court should pay some heed, not least because it means that one senior Indian court has already considered whether or not Ramu and Palani's attempt to rely on the arbitration agreement to defeat these proceedings was genuine and effective, and found that it was not.

2.6 Summary

36. In my view, Palani was never a party to the SPA. Even if he was in the same position as Ramu, neither were parties to the SPA because the definition of GIR cannot be read as imposing any rights or liabilities upon them as individuals. This was a point which they themselves emphasised to the High Court at Madras. And if, contrary to those views, one or both of them were parties, they were parties simply because they were directors of GIR, and the deceit claim (which is brought against them in their personal capacity and not as directors of GIR) is therefore not caught by the arbitration agreement.

37. For those principal reasons, I have concluded that the order of Andrew Baker J should not be set aside because of the arbitration agreement in the SPAs.

3 WAS THERE AN *AD HOC* ARBITRATION AGREEMENT?

38. On behalf of Ramu and Palani, Mr Collins' alternative submission was that, even if the arbitration agreement in the SPA did not bind them, or did not catch the dispute which has now arisen between them, there was an *ad hoc* agreement to arbitrate the dispute which is currently before the Commercial Court. He maintained that this agreement could be found in the claim letter of 4 April 2017 and the response letter of 17 May. He accepted that if there was no agreement at that stage, there was no other basis on which the alleged *ad hoc* agreement could be advanced: in view of the disputatious terms of the later letters, I consider that this concession was rightly made.

39. The claim letter of 4 April 2017 was sent on behalf of the three Appellants to GIR, Ramu and Palani. Paragraphs 3 and 4 of that letter read as follows:

> "3. This letter is sent to notify you of the existence of a dispute pursuant to Clauses 3.2.2 and 3.2.3 of the Share Purchase

> Agreements (the "SPAs") dated 9 September 2015 between a) Sanjay and Prashant and GI Retail Private Limited ("GIR"), Ramu Pamasamy ("Ramu") and Palaniapan Ramasamy ("Palani") (LBA/192-193); AND b) between EAGM Ventures Private limited ("EAGM") and GIR, Ramu and Palani (LBA/199-204).
>
> 4. If this dispute cannot be resolved amicably by the parties within 30 days of the date of this letter, the Investors will pursue all available remedies including but not limited to those set out in the SPAs. In this regard, the Investors have consulted Indian, German, Mauritian and Singaporean Counsel and fully intend to pursue each and every remedy available to them in these jurisdictions, including to seek disclosure, and if necessary to involve regulators and law enforcers and the Office of the Prime Minister of India."

The letter concluded at paragraph 112 by saying:

> "Our clients and we have carried out an intensive and rigorous investigation into this matter and are continuing to gather information and documentation, liaising with counsel in Germany, India, Mauritius and Singapore. Without limitation, our clients are continuing to investigate the roles of IIFL, Amit and Sarju in relation to this matter. Our clients will pursue all rights and remedies available to them in every jurisdiction in which elements of the fraud perpetrated against them were committed…"

40. The response letter of 17 May 2017 was as lengthy as the claim letter. The relevant paragraphs for present purposes are paragraphs 3 and 53 as follows:

> "3. At the further outset, our Clients state the claims of your clients in relation to alleged breach of trust and diversion of crucial business assets does not fall within the purview of the Share Purchase Agreements dated September 9, 2015 executed between your clients and our Clients,("SPAs"). It is pertinent to note that the said SPAs only govern your clients' exit from Hermes by sale of their shares in Hermes to our Clients. Further, any claim in relation to any alleged Breach of Trust and diversion of crucial business assets falls squarely within the ambit of the letter dated March 29, 2008 issued by the Board of Directors of Hermes to your client, Sanjay Chandi, ("Confirmation Letter") at the time of their initial investment in Hermes. Our Clients wish to further bring on record the fact that the said Confirmation Letter sets out no obligation on our Clients other than that of a right of first refusal in favour of your clients with respect to additional shares for USD 250,000 in the next round of funding at the valuation to be decided by the Board of Directors of Hermes, based on the valuation of incoming investors. Therefore, our Clients state that your

> clients' claims in relation to any alleged breach of trust and diversion of crucial business assets under the SPA's is not only infructuous but also baseless and without merit. Nonetheless, for the sake of good order and to set right the factual inaccuracies, our Clients wish to place on record the correct facts as set out below. Annexed hereto and marked as "Annexure I" is a copy of the Confirmation Letter.
>
> …
>
> 53. In light of the abovementioned facts, our Clients refute all the Claims raised by your clients as frivolous, baseless and bad in law. Our Clients state that the subject matter of most of your clients' claims do not even fall within the ambit of the SPAs owing to which our Clients state that your clients' claims in relation to the alleged breach of trust and alleged diversion of critical assets are infructuous. Further, with respect to your clients exit claims, our Clients vehemently refute the same and call upon your clients to forthwith withdraw the Notice. Further, our Clients state that in relation to your alleged exit Claim the same is governed by Indian laws and provides for a dispute resolution under the Arbitration and Conciliation Act, 1996 in Mumbai. Therefore, your clients' threat of initiating action in other jurisdictions is in violation of the provisions of the SPAs. "

3.2 The Law

41. It was common ground that, as a matter of both English and Indian law, parties can agree to arbitrate their dispute whether or not there was a prior arbitration agreement see Devlin J in *Westminster Chemicals and Produce Limited v Eichholz & Loeser* [1954] 1 Lloyd's LR 99 at 105-106. The same approach, for the same reasons, has been adopted more recently in the closely-related field of adjudication: see *Parsons Plastics (Research and Development) Limited v Purac Limited* (CA) [2002] BLR 334.

42. Since arbitration is intended to be a consensual process, the court has to be careful in deciding that a party who is now unwilling to participate, previously agreed to an *ad hoc* reference to arbitration. The courts have been anxious to stress that an agreement to such an *ad hoc* jurisdiction, which will usually have to be spelled out of correspondence, must be clear and unqualified: see Dyson J (as he then was) in *The Project Consultancy Group v The Trustees of the Grey Trust* [1999] BLR 377.

3.3 Offer and Acceptance

43. The conventional analysis must be one of offer and acceptance. On behalf of Ramu and Palani, Mr Collins had to demonstrate that the claim letter of 4 April 2017 constituted an unequivocal offer by the Appellants to arbitrate the present dispute in India, and that such an offer was unequivocally accepted by Ramu and Palani in the reply of 17 May 2017.

44. It is certainly right that paragraph 3 of the claim letter, viewed in isolation, would appear to assert that Ramu and Palani were parties to the SPA, and that the existing arbitration agreement was therefore relevant to the claims. But since they were not parties as a matter of law (for the reasons explained in Section 2 above), an incorrect assertion to the contrary by the Appellants' solicitors cannot, without more, be of any legal effect. Moreover, in my view, the incorrect assertion was immediately contradicted by paragraph 4, which made it plain that the Appellants were not limiting themselves to the arbitration agreement and would instead pursue "all available remedies including but not limited to those set out in the SPA". It is clear that the letter envisaged at least potential proceedings in India, Germany, Mauritius and Singapore. That is confirmed by paragraph 112. None of that is consistent with an offer to submit to a new *ad hoc* arbitration.

45. The language of the letter is not always precise (regrettably, long letters written by lawyers rarely are), but in my view its overall intent was plain. The Appellants were indicating a potentially wide-ranging series of claims around the world against GIR, against Ramu and Palani as individuals, and against others. GIR were one of the addressees and proposed defendants, so the letter needed to refer to the arbitration agreement between the Appellants and GIR: it was accepted by the Appellants and their solicitors that any claim against GIR would be caught by that agreement in the SPA. That explains the reference in paragraph 3 of the claim letter, even if, for the reasons previously noted, there was an obvious error in the additional description of Ramu and Palani as parties to the SPA.

46. Accordingly, I do not accept that the claim letter of 4 April 2017, when taken as a whole, was, or could be read as being, an unqualified offer by the Appellants to submit their dispute with Ramu and Palani personally to fresh, *ad hoc* arbitration. Furthermore, I consider that that is confirmed by the response letter of 17 May 2017.

47. There is no unqualified acceptance in the response letter of an alleged offer to submit to *ad hoc* arbitration. Although it restates the point that the claims in respect of the sale of the shares were governed by the arbitration agreement, and that therefore there would be a dispute about other claims in other jurisdictions, that simply takes us back to the issue which I have decided in Section 2 above, namely that Ramu and Palani could not in law rely on the arbitration agreement in the SPA. I also note that at paragraph 52 of the letter, Ramu and Palani's solicitor accused the Appellants of violating the SPA (and the arbitration agreement). It is difficult to see how, at the same time as making that accusation, he was apparently accepting a fresh offer from the Appellants to arbitrate the dispute.

48. In short, the letter of 17 May adds nothing to whether there was a new and binding agreement to submit the claims against Ramu and Palani to *ad hoc* arbitration. A clear and unqualified agreement, as per *Project Consultancy*, simply cannot be identified from these exchanges.

49. Finally, it is worth looking at the detail of what this *ad hoc* agreement would comprise. It is not said that there was a separate agreement as to the nuts and bolts of any future arbitration, independent of the detail of clause 3.2 of the SPA. Instead it is suggested that there was an agreement to use the arbitration process set out in that clause. That is not only at odds with the letters noted above, but it is also contrary to common sense. The Appellants' solicitors in the claim letter envisaged detailed claims

of fraud and deceit against numerous parties from many different jurisdictions. By contrast, the arbitration clause requires a 60 day fast track arbitration. Such a process may be suited to straightforward commercial disputes, but it would be wholly inappropriate for the complex claims of dishonesty made here.

50. Accordingly, taking all these points together, I do not consider that these letters can be read as an agreement between the parties that the claims against Ramu and Palani personally would be the subject of an *ad hoc* arbitration. That this was never the intention of the parties can be seen from the subsequent letters exchanged between the solicitors, including the further letter from Ramu and Palani's solicitors dated 14 December 2017.

3.4 Estoppel by Convention

51. During the course of his oral submissions, Mr Collins indicated that, if he was wrong about there being an agreement to submit to *ad hoc* arbitration, the letters gave rise to a common understanding that, because Ramu and Palani were parties to the SPA, the claim against them would be dealt with in arbitration, and that the Appellants were now estopped from resiling from that position.

52. I reject that argument. It appears to be designed to turn the Appellants' solicitors' erroneous assertion in paragraph 3 of the claim letter, that Ramu and Palani were parties to the SPA, into a binding agreement to that effect, regardless of the rest of the letter, let alone the proper construction of the SPA itself. On a proper analysis of the claim letter as a whole, there was in truth no common understanding, for the reasons that I have given.

53. In any event, an estoppel by convention could only arise if Ramu and Palani had somehow acted to their detriment on the basis of the alleged common understanding. But they have not. Nor is any such detriment alleged. They have taken no steps to arrange an arbitration, whether under the SPA or by way of some sort of *ad hoc* agreement, so it is not possible to see what the detriment might be. And when GIR sought to assert their right to arbitrate under the SPA, the High Court at Madras rejected that case, as being merely a ruse to avoid the Commercial Court proceedings in London from going ahead.

3.5 Summary

54. For the reasons I have given, I am satisfied that there was no *ad hoc* agreement to arbitrate and no common understanding that that is how this claim would be resolved. This second ground advanced by Ramu and Palani for setting aside the order of Andrew Baker J is therefore rejected.

4 WAS THERE MATERIAL NON-DISCLOSURE?

4.1 Ramu and Palani's case

55. It is now said that, at the hearing before Andrew Baker J on 2 February 2018, when permission was given *ex parte* to serve out of the jurisdiction, material information was not disclosed to him by the Appellants. On that occasion, the principal evidence in support of the application was the first witness statement of the Appellant's

solicitor, Mr Gadhia. This ran to 43 pages and 200 paragraphs. It also exhibited a large amount of documentation, including the claim letter of 4 April 2017 (paragraph 39 above) and the letters from Ramu and Palani's solicitors of 17 May (paragraph 40 above) and 14 December 2017 (paragraph 48 above).

56. Despite the breadth of the information provided, Mr Collins complained that paragraphs 192 and 193 of Mr Gadhia's witness statement comprised an unfair presentation of the position between the parties. In particular, the complaint was that Mr Gadhia made no reference to his own assertion of the arbitration agreement at paragraph 3 of the claim letter, or the reference to it in the response. He also submitted that, even if the court concluded that there was no binding arbitration agreement, and no agreement to submit to *ad hoc* arbitration, this failure comprised material non-disclosure in any event, such that the order for service out should still be set aside.

4.2 Analysis

57. It is trite law that a party who is seeking an *ex parte* order is required to provide the court with full disclosure of all material information, including the potential defences or points of opposition that the other side would have been likely to raise if they had been present: see the cases summarised at paragraph 25.3.5 of Volume 1 of The White Book 2021 and, for a useful distillation of the relevant principles, the judgment of Carr J (as she then was) in *Tugushev v Orlov* [2019] EWHC 2031 (Comm) at [7].

58. In my view, that is precisely what Mr Gadhia's witness statement sought to do. Paragraphs 188-196 are set out under the heading 'Other potential defences'. Amongst other things, Mr Gadhia dealt there with the arbitration agreement and how that would bind GIR, and the debate (resolved above) about whether or not it also bound Ramu and Palani. In my view, that was an entirely fair and accurate representation of the likely disputes about the arbitration agreement which could then have been foreseen. There is no reference to any *ad hoc* agreement to arbitrate, but that is because no such agreement had been asserted by Ramu and Palani at that point, and it was not reasonable to expect Mr Gadhia to anticipate such a suggestion (which I have in any event found to be baseless) in February 2018.

59. It is right that, although he exhibited the claim letter of 4 April 2017, Mr Gadhia made no express reference to paragraph 3 of the letter. But there was no need for that to be separately raised because, as his witness statement accepted, the SPA and the arbitration agreement caught any claims against GIR, and the only issue was whether it caught the claims against Ramu and Palani as well.

60. Accordingly, I reject the suggestion that Mr Gadhia's statement did not provide full and accurate information to Andrew Baker J on the issue of Ramu and Palani's position under the SPA and the arbitration agreement, and the extent to which that was relevant to any potential opposition by Ramu and Palani to the order for service out. There was no material non-disclosure.

5 IS ENGLAND THE PROPER PLACE FOR THESE CLAIMS TO BE HEARD?

5.1 Introduction

61. The last point which arises is the question of natural forum: the proper place for this claim to be heard. I set out the law and then apply that to the facts of the present case.

5.2 The Law

62. In *Spiliada Maritime Corp. v Cansulex Limited* [1987] AC 460, the House of Lords said that this issue fell to be resolved by way of a two stage test. The first stage in this case requires the Appellants to establish that England and Wales is clearly or distinctly the proper place for their claims against Ramu and Palani to be heard. Although that typically requires analysis of the competing connecting factors as between England and the foreign forum being promoted (in this case, India), the court must always bear in mind that the burden is on the Appellants: see *Altimo Holdings v Kyrgyz Mobil* [2012] 1 WLR 1804.

63. If at the first stage it is established that a foreign forum is the proper place for the claim to be heard, then the Court will grant a stay (or, in this case, set aside the order for service out), subject only to the second stage. That would require the Appellants to establish that "there are circumstances by reason of which justice requires that a stay should nevertheless not be granted". Here, the second stage has come down to a debate about the potential delays if the claim was to be heard in India.

64. A number of different courts have endeavoured to summarise what the investigation into 'the proper place' is designed to achieve. Whilst these comments are useful guidance, there is a danger in investing them with too much significance, and to lose sight of the *Spiliada* test itself. Mr Collins referred to the judgment of Gloster LJ in *Erste Group Bank AG v JSC 'VMZ Red October' and others* [2015] EWCA Civ 379 (at 149) where she criticised the judge below for failing to stand back and ask "the practical question where the fundamental focus of the litigation was to be found". That is a little loose as a test. Perhaps of more assistance, Lord Briggs said at [68] of his judgment in *Vedanta Resources v Lungowe* [2019] 2WLR 1051:

> "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."

65. In my view, that observation has a particular resonance in the present case. This was, on the Appellants' case, an international fraud. It arose out of critical misrepresentations made in England about the onward sale of the shares in an Indian company (Hermes) to a company (EMIF) domiciled in Mauritius, without revealing the fact that the ultimate purchaser, a German company (Wirecard) was going to pay much more for the same shares. There was never going to be one jurisdiction which would emerge as the only candidate for the hearing of this claim. The issue is whether, in all the circumstances, and taking a realistic approach to the numerous jurisdictions that might potentially be involved, the Appellants have demonstrated that England and Wales is clearly the place where the claims against all the Defendants may most suitably be tried.

5.2 The First Stage

66. The Appellants' claims in the Commercial Court are based on the tort of deceit. As set out in our earlier judgment, for the purposes of satisfying the tort gateway, that tort occurred in England. That is a very significant factor when considering the first stage of the *Spiliada* test. As Lord Mance observed *in VTB Capital Plc v Nutritek Interntional* [2013] 2AC337:

> "51. The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors."

67. Although Mr Collins sought to argue that there were other misrepresentations made elsewhere in the world, that does not properly acknowledge the findings in our earlier judgment about the significance of what happened in England, in particular the meeting in London on 8/9 August 2015. For the reasons set out in [37]-[65] of that judgment, the events in England can, on the evidence currently available, be seen as the critical element of the evolving fraud. That is therefore, in accordance with *VTB Capital*, a powerful pointer to England being the most suitable place for the resolution of these claims.

68. The second factor which points to England as the most suitable forum is the position of the First and Fourth Defendants. The First Defendant (IIFL UK Limited) is a company registered in the UK, so in other circumstances it could have insisted on being sued here, regardless of the position of the other Defendants: see *Owusu v Jackson* (Case C-281/02) [2005] QB 801. In any event, both the First and the Fourth Defendants have acknowledged the jurisdiction of the English courts. That means that this claim is going to be litigated in London anyway, so that any decision to remove the particular claims against Ramu and Palani to another jurisdiction would automatically lead to a duplication of proceedings and the risk of conflicting judgments.

69. I accept at once that this is not of itself a trump card (see Lord Briggs at [84] of *Vedanta*) but it is still, as he made clear, an important factor when considering the question of the natural forum. I also accept that the presence of the First and Fourth Defendants in these proceedings, and the risk therefore of duplication and irreconcilable judgments, is not as strong a factor as it can be in other cases, given that HHJ Pelling QC concluded that the Appellants had not made out the assertion that the

First Defendant was a necessary or proper party (a finding in respect of which permission to appeal was refused), and that it was the Appellants' choice to pursue the Fourth Defendant in England.

70. However, even taking those points into account, it seems to me that the fact that there are ongoing claims against the First and (particularly) the Fourth Defendants in England, which neither have sought to strike out (on the merits or on any other basis), provides support for the proposition that England is the proper place for these claims to be heard. In particular, on the Appellants' case, the Fourth Defendant (AS) was an important participant in the relevant events and made some of the critical representations to persuade the Appellants to sell their minority shareholding in Hermes to GIR. His role is set out at paragraphs [57]-[64] of our earlier judgment. It would be most unsatisfactory if the claims against Ramu, Palani and AS were not considered together in the same forum.

71. The third factor, namely a consideration of the domiciles of the relevant personnel, also firmly favours litigation in England. Both of the Appellants' representatives, Hasu and Jayesh, who were the critical recipients of what they say was the false information, are domiciled in England. So is one of the Appellants. So is Sarju who, on the Appellants' case, is implicated through his involvement in the second meeting in London (see [60]-[63] of the earlier judgment). Furthermore, although AS is a resident of Singapore, he is an international businessman who has not contested the jurisdiction of the English court. For the rest, one of the other Appellants is a resident of Kenya, and Ramu and Palani are domiciled in India. These considerations therefore also support the proposition that England is the proper place for this claim to be heard.

72. Beyond these three factors, I consider that everything else is broadly neutral. That is unsurprising given the international nature of this dispute. The relevant law would not seem to matter because, whether the dispute was heard in England or elsewhere, there would be a recognition that any fraud which took place should result in legal redress. As to the documentation relevant to this case, that will have been generated in a large number of countries, including England, India, Switzerland, Singapore and Germany. It would have been sent to, and doubtless stored in, these and perhaps a number of other countries across the world.

73. Mr Midwinter suggested that the developments in the Wirecard litigation also pointed to England as the natural forum. However, in my view, the Appellants' possible claim against Wirecard is a largely neutral factor. I accept that, although there was no separate claim against Wirecard at the time that the application was made to Andrew Baker J (which matters because, in accordance with *Erste,* the court has to consider the situation at the time that permission was originally granted), a possible claim involving them had been expressly referred to in Mr Gadhia's witness statement. But the claim against Wirecard has been struck out. The fact that David Richards LJ has recently given permission to appeal the striking out means that the claim might potentially be resuscitated, and if it is, there may eventually be an application to join that claim to these proceedings. But it is difficult to see that any real weight should be given now to those speculative events in the future. Furthermore, Wirecard are a German company and the documents they generated in their dealings with Ramu, Palani, AS, EMIF and GIR will probably be in Germany. None of that shows that England is the natural forum for this dispute.

74. Mr Collins submitted that the natural forum for these claims is India. I disagree with that, primarily because the three factors identified above (namely location of the tort, the desirability of the claims against all four Defendants being heard together, and the domiciles of most of the relevant individuals) point clearly to England, and certainly do not suggest India as the natural forum. I note that neither the First nor the Fourth Defendant has offered to submit to Indian jurisdiction. Moreover, although Mr Collins relied on the fact that Hermes is or was an Indian company, it does not seem to me that the deceit claim will require extensive investigation into Hermes beyond that which can be done by anyone, anywhere in the world, on a consideration of the relevant documentation. As to the allegedly false representations themselves, I have already said that, in my view, the submission that India is the natural forum for the claim based on those misrepresentations fails to take account of the criticality of the events in London.

75. At the hearing of the appeal, Mr Collins' main argument in support of India as the natural forum was his submission that the real issue between the parties was whether or not the representations which were made were in fact false. This goes to Ramu and Palani's defence that they were not involved in and had no knowledge of the onward sale of Hermes to Wirecard. Mr Collins' submission was that the focus of whether or not the representations were untrue – the evidence as to falsity - would be in India.

76. I do not accept Mr Collins' proposition as a matter of principle. It seems to me to be wrong to say that an alleged tortfeasor can come to England and make critical representations, on which English-domiciled parties rely and which subsequently give rise to a large claim in deceit, and then suggest that the investigation into the falsity of his representations requires the entire claim to be heard in a different jurisdiction.

77. Moreover, I do not accept his submission as a matter of fact. Ramu and Palani's knowledge (which on the Appellants' case would be guilty knowledge) is not susceptible of better or different investigation in India than it would be in London. It was in London that Ramu made the representations about Hermes and its possible sale which, on the Appellants' case, he would have known was false. There is no evidential basis to support the suggestion that India is the natural place for an investigation as to whether or not he did in fact know that they were false.

78. From a practical perspective, whether or not Ramu and Palani knew about the onward sale to Wirecard (which appears to be Wirecard's case as well as that of the Appellants, at least at the moment) is likely to turn on the documents. Those documents, as I have said, will be in various companies' electronic archives all over the world, but particularly in Wirecard's archive in Germany. Moreover, the evidence is that at least one of the relevant bank accounts was in Switzerland. None of that points to India as the natural forum for this dispute.

79. Standing back from the detail for a moment, it seems to me that there has to be a degree of realism when considering the proper place for a claim of this sort to be heard: see paragraph 65 above. It cannot be enough for the defendant(s) to such a claim to point to other jurisdictions round the world where the case might be heard and then say that, because the situation is complicated and involves so many different countries, the claimant has not discharged the necessary burden of proof. That could give rise to a never-ending carousel of unsuccessful applications across the world.

80. In my view, the first stage of the *Spiliada* test presupposes that, despite the competing claims of different jurisdictions, a consideration of all the relevant evidence will indicate one jurisdiction as the proper place for the claim to be heard. For the reasons that I have given, I consider that the Appellants have successfully discharged the burden of showing clearly that England and Wales is the proper place for this claim to be heard.

5.3 The Second Stage

81. Because of my conclusion under the first stage, it is unnecessary to say very much about the second stage of the *Spiliada* test. However, given that it was the focus of much of counsel's submissions, it is necessary to address it briefly.

82. Originally, the expert evidence supporting the Appellants' position was that, if this claim was heard in the Indian Courts, it would take between 15-18 years to resolve. The expert evidence put forward by Ramu and Palani suggested that the delay would be between 7 to 8 years. Both experts referred to a new Commercial Court Act in India designed to speed up the process there, but the only reference to its possible effect was in Mr Thambidurai's report of April 2019 at [46], where he said that, in his experience, Commercial Court proceedings under the new Act were taking at least 2 years to be concluded. That tentative view is now itself 2 years' old but there is no other evidence on this topic.

83. I accept Mr Midwinter's submission that the reason for this was because the entire focus of the Respondents' argument, as set out in the second witness statement of Mr Crockett [125], was that the delays in the Indian Court system were irrelevant to this application because of the Respondents' reliance on the arbitration agreement. Of course, as a result of my earlier findings, it is the arbitration agreement that is irrelevant.

84. But that has left this court with evidence about the potential delays in the Indian Court system which is, on any view, cursory and unsatisfactory. There is nothing that addresses whether this claim would fall under the new Act, or how long in practice such claims are taking. Delays in the Indian Court system have been the subject of findings in other cases in the past, such as *Konamaneni v Rolls Royce International Industrial Power (India) Limited* [2002] 1WLR 1269 at 1300, but they are too old to be of any reliable guidance to the current situation there.

85. I would therefore be most reluctant to reach any conclusion as to the likely delays in the Indian Court system, given the unsatisfactory evidence to which I have referred. In any event, that is generally an inappropriate approach for this Court to take on grounds of both comity and caution: see *Konamaneni*, *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 at [97] and more recently, Fraser J in *HRH Okpapi v Royal Dutch Shell Plc* [2017] EWHC 89 (TCC) at [121].

5.4 Summary

86. For the reasons set out above, I have concluded that, under the first stage of the *Spiliada* test, the Appellants have demonstrated that England is clearly or distinctly the proper place for this claim to be heard. I do not accept Mr Collins' submissions

that India is the more appropriate forum. I reach no conclusions as to the second stage of the *Spiliada* test by reference to the alleged delays in the Indian Court system.

6 DISPOSAL

87. For the reasons set out above, if my Lords agree, I would dismiss the application to set aside the judgment of Andrew Baker J of 2 February 2018 on the remaining grounds advanced by Ramu and Palani before the judge below which, until now, have remained undecided.

LORD JUSTICE PHILLIPS

88. I agree

LORD JUSTICE UNDERHILL

89. I also agree