[2017] EWHC 2401 (Comm.)

CL-2015-00381 and CL 2015 -000901

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Date 6/10/2017

BEFORE:

LAURENCE RABINOWITZ QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

BETWEEN:

(1) TEAM Y&R HOLDINGS HONG KONG LIMITED
(2) CAVENDISH SQUARE HOLDING B.V.
(3) YOUNG & RUBICAM INTERNATIONAL B.V.
(4) WPP 2005 LIMITED
(5) WPP PLC

Claimants

-and-

JOSEPH GHOSSOUB **Defendant**

AND BETWEEN:

(1) CAVENDISH SQUARE HOLDING B.V.
(2) TEAM Y&R HOLDINGS HONG KONG LIMITED

Claimants

-and-

JOSEPH GHOSSOUB **Defendant**

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Joanna Smith QC & Max Mallin QC (instructed by **Squire Patton Boggs (UK) LLP**) for the **Claimants**
Charles Bèar QC and Edward Levey (instructed by **Holman Fenwick Willan LLP**) for the **Defendant**.

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Hearing dates 6-7 September 2017

JUDGMENT

Introduction

1. There are three applications before the Court relating to two claims arising out of a dispute that has arisen between entities within the WPP group of companies ("WPP") who carry on a global media business, and Mr Joseph Ghossoub, a businessman resident in Dubai. The first claim (CL-2015-000381) is referred to below as the 'anti-suit claim'; the second claim (CL-2015-0009019) is referred to below as the 'defaulting shareholder claim'. I explain the nature of those claims in more detail in what follows.

2. The first application, brought by the claimants to the anti-suit claim, is for an interim injunction seeking to restrain Mr Ghossoub, the defendant to those proceedings, from pursuing related proceedings commenced by him in Hong Kong against four of those claimants until the trial of the anti-suit claim. The second application, brought by Mr Ghossoub as defendant to the anti-suit claim, seeks to set aside two orders made by the Court related to service on him of the anti-suit claim. The first, made by Phillips J dated 20 May 2015, granted permission to serve the anti-suit claim out of the jurisdiction. The second, made by HHJ Waksman QC sitting as a High Court judge dated 8 September 2016, granted permission to serve the claim form and other documents by an alternative method of service. The third application, brought by Mr Ghossoub as defendant to the defaulting shareholder claim, in effect mirrors his application in the anti-suit claim to set aside the service out and service by an alternative method orders.

3. The applications were originally due to be heard by Carr J on 14 June 2017 but for reasons explained below she ordered the matter be adjourned. The hearing before me was therefore the resumed hearing of the applications.

Background

4. As noted above, the claimants in both actions are all WPP companies. The fifth claimant in the anti-suit claim, WPP plc, is the group parent company. It has a primary listing on the London Stock Exchange and a secondary listing on NASDAQ. Prior to 2006, WPP plc, through its Dutch subsidiary ("Y&R"), the third claimant in the anti-suit claim, held a minority stake in a substantial media business based in the Middle East (known as 'Menacom') controlled by Mr Ghossoub and his former business partner Mr Makdessi.

5. In about 2006, WPP wished to increase the holding in Menacom into a majority interest. To this end, it was agreed with Mr Ghossoub and Mr Makdessi that a company would be incorporated for the purpose of holding the business following WPP's stake being increased. On 27 November 2007, Team Y&R Holdings Hong Kong Limited ("TYRH"), the first claimant in the anti-suit claim and the second claimant in the defaulting shareholder claim, the company through which the interests in Menacom were to be held, was incorporated in Hong Kong.

6. Thereafter, by a sale and purchase agreement dated 28 February 2008 (the "SPA"), Mr Ghossoub and Mr Makdessi agreed to sell in the aggregate 47.7% of the shares in TYRH to Y&R. WPP 2005 Limited ("WPP 2005") the fourth claimant in the anti-suit claim was party to the SPA as guarantor of Y&R's obligations. On the same day, TYRH and Mr Ghossoub entered into a service agreement (the "SA") under which TYRH employed Mr Ghossoub as its sole chief executive.

7. By a Deed of Novation entered into the following day, 29 February 2008, another WPP company, Cavendish Square Holding B.V. ("Cavendish"), the second claimant in the anti-suit claim and the first claimant in the defaulting shareholder claim, replaced Y&R as party to the SPA. The SPA was thereafter amended from time to time but none of those amendments are material to the issues with which I am concerned.

8. The net effect of the foregoing arrangements was that WPP came to hold a majority interest in TYRH, with 60% of the shares owned by Cavendish (47.4%) and Y&R (12.6%). Messrs Ghossoub and Makdessi each retained a 20% share.

9. The SPA included the following provisions:

   (1) In accordance with clause 3.1, Cavendish agreed to pay the sellers US$34 million on completion with further consideration to be over a number of instalments up to a total maximum of US$147.5 million.

   (2) In accordance with clause 5.1, a seller whose employment with TYRH was summarily terminated for acts of gross misconduct or who was found to have engaged in a competing business - referred to in the SPA as a 'defaulting shareholder' - would lose his entitlement to any unpaid instalment of consideration to which he would otherwise be due. In addition, in accordance with clause 5.6, Cavendish would in such circumstances also become entitled to exercise an option to acquire the defaulting shareholder's shares at what is referred to in the SPA as the 'defaulting shareholder

option price', calculated by reference to the net asset value of TYRH. This could involve a sale at a value significantly below the actual value of the shares.

(3) In accordance with clauses 13.1 and 13.2, the parties agreed provisions relating to the management of TYRH, including the identification of matters with regard to which Cavendish could not act without the consent of the sellers, such consent not to be unreasonably withheld or delayed.

(4) In accordance with clause 13.4, the sellers and Cavendish agreed to procure that TYRH and its subsidiaries would promptly distribute as dividends the maximum amount of profits lawfully available for distribution at the end of each financial year.

(5) In accordance with clause 14, the parties agreed certain provisions relating to the governance of TYRH and more particularly as to the number and constitution of the board of directors as well as the formalities relating to the conduct of the board. Clause 14.2 provided that each seller was entitled to remain a director for as long as he continued to hold shares in the company.

(6) In accordance with clause 15, each seller was granted an option, in the circumstances and on the terms there set out, to require Cavendish to purchase his TYRH shares from him.

(7) In accordance with clause 21.11, the parties agreed that except as otherwise expressly stated in the SPA, a person not a party to the agreement could not enforce any of its terms under the Contracts (Rights of Third Parties) Act 1999.

(8) In accordance with clause 23.1, the parties agreed the choice of English law.

10. In addition to the foregoing, clause 23.2 of the SPA contains a choice of forum provision, namely that "*The English courts have exclusive jurisdiction to settle any dispute arising out of or in connection with this agreement and the parties submit to the exclusive jurisdiction of the English courts*."

11. So far as concerns the SA, the employment contract made between TYRH and Mr Ghossoub, this too contains a provision dealing with choice of law and jurisdiction. In particular, clause 29.2 of the SA provides that "*This Agreement is governed by and interpreted in accordance with the laws of England and Wales and the parties submit to the exclusive jurisdiction of the English Courts*."

12. Mr Ghossoub thus became chief executive of TYRH, whilst Mr Makdessi became its non-executive chairman and director. However, Mr Makdessi's association with TYRH did not endure. In December 2010, Cavendish and TYRH instituted proceedings in this jurisdiction against him alleging breach by him of the SPA and his fiduciary duty. The details of the wrongdoing alleged against Mr Makdessi can be found in the judgment of the Supreme Court in ***Cavendish Square Holding BV v Talal El Makdessi*** [2015] UKSC 67.

13. It is unnecessary for present purposes to descend too far into the dispute between TYRH and Mr Makdessi, although it is relevant to note that Mr Makdessi at some point amended his defence to admit that he had, since 1 July 2008, been in breach of the SPA and his fiduciary duties. TYRH settled its claim against him by accepting payment of the US$500,000 Mr Makdessi had paid into court. By the same proceedings, however, Cavendish had also sought a declaration that Mr Makdessi was a defaulting shareholder under the SPA and, as such, in accordance with clause 5.6 of the SPA obliged to sell all his TYRH shares to Cavendish at the substantially discounted defaulting shareholder option price. Mr Makdessi resisted this on the basis that the provision constituted a void and unenforceable penalty, an argument ultimately rejected by the Supreme Court.

The breakdown in the relationship between Mr Ghossoub and WPP

14. By 2015, the relationship between WPP and Mr Ghossoub had also begun to sour. So far as concerns Mr Ghossoub, his initial grievance with WPP, as expressed in a letter dated 11 February 2015 from his solicitors, Holman Fenwick Willan ("HFW") to WPP plc, appears to have centred around the failure of WPP as TYRH's majority shareholders to declare and distribute dividends; no distribution had been made since the conclusion of the SPA. At this early stage, Mr Ghossoub framed his complaint in this regard as one involving a breach of the SPA rather than on any wider basis.

15. A response to Mr Ghossoub's complaint came in the form of a letter dated 25 February 2015 from Squire Patton Boggs ("SPB") solicitors acting for WPP plc and Cavendish which indicated that the reason no dividends had been declared was because of concerns that WPP had about the accounts of TYRH and Menacom. In addition to noting that an investigation into Menacom's accounting records and the integrity of its local management, finance and IT teams was then underway, SPB also raised a number of other concerns, including that Mr Ghossoub had been involved in a wide range of businesses competing with Menacom, that shadow bank accounts were diverting Menacom monies to companies unrelated to

Menacom, and that seemingly inappropriate payments had been made to clients or intermediaries, including in Lebanon.

16. On 10 March 2015, HFW wrote to SPB again contending that the failure to declare or pay any dividends involved a breach of the SPA and complaining also about the manner in which the litigation against Mr Makdessi had ultimately been resolved, with Cavendish having obtained a significant advantage but with less benefit having been received by TYRH. According to HFW, Mr Ghossoub had been kept in the dark about the settlement and denied any real involvement in the litigation. After contending that WPP plc had operated TYRH for all practical purposes "*as if it were a 100 per cent subsidiary*" and that Mr Ghossoub had "*no alternative to bring proceedings under the SPA to protect his rights*", the letter went on to say that it was "*difficult to see how any CEO could be expected to remain in post in the face of such behaviour*" and that Mr Ghossoub considered himself to have been constructively dismissed. According to HFW, Mr Ghossoub was entitled to and did accept TYRH's conduct as a repudiation of the SA so that the SA was therefore terminated. The letter concluded by noting that Mr Ghossoub was taking advice about bringing an employment claim in either England or Dubai and that he otherwise *"reserves all his rights whether in connection with his service agreement, the SPA, or otherwise*."

17. Following some further exchanges between HFW and SPB, on 26 March 2015, TYRH wrote to Mr Ghossoub rejecting his suggestion that he had been constructively dismissed or that any conduct on its behalf amounted in any way to a repudiation of the SA. TYRH then went on to say that in light of what was said to have been Mr Ghossoub's own gross misconduct, it was itself immediately terminating the SA. The allegation of gross misconduct, if well founded, would of course have serious consequences for Mr Ghossoub in terms of being treated as a defaulting shareholder under the SPA.

18. There followed further limited exchanges of correspondence leading to Mr Ghossoub instituting the first of the legal proceedings with which I am now concerned.

The Hong Kong Unfair Prejudice Petition

19. On 30 April 2015, Mr Ghossoub presented a petition to the Hong Kong Court (the "HK Petition") pursuant to section 724(1) of the Hong Kong Company Ordinance, Cap 622 seeking relief for what is said to be the unfairly prejudicial manner in which the affairs of TYRH have been conducted. The respondents to the HK Petition are TYRH, as a necessary party thereto, WPP plc, Cavendish and Y&R. It is to be observed that WPP plc is not in

fact a shareholder in TYRH: according to Mr Ghossoub, however, WPP plc is nonetheless complicit because of the de facto control it has exercised over what was done by the other companies in the group.

20. It is necessary to identify in more detail some of the key features of the HK Petition. In particular:

(1) Mr Ghossoub's case, as summarised at in particular paragraph 26 the HK Petition, is that by reason of the provisions in the SPA and the SA and the circumstances in which he sold part of his interest to the WPP group, it was the mutual understanding between all shareholders of TYRH and his own legitimate expectation that:

(a) He would be entitled to participate in and would not be excluded from the management of TYRH and the group;

(b) He would be kept informed and consulted on all major matters concerning TYRH and the group;

(c) Any major decisions affecting TYRH and the group and in particular their financial position would be reserved to him as sole chief executive of the company and/or to the board as a whole;

(d) For so long as he remained a shareholder of TYRH, each of the companies within the group, including TYRH, would promptly distribute as dividends the maximum amount of profits lawfully available for distribution at the end of each financial year; and

(e) As part of or in order to give effect to the foregoing, he would be kept informed and be supplied with information as to the financial and business affairs of each of the companies within the group.

(2) The unfair prejudice said to have been suffered by Mr Ghossoub, as summarised in particular at paragraph 27 of the HK Petition, fell within three categories, namely:

(a) The failure of TYRH at any time to declare or distribute any dividends;

(b) His "*wrongful exclusion*" from the management of the affairs of TYRH; and

(c) The "*improper stewardship*" by WPP plc, Cavendish and Y&R of a "*major corporate asset of TYRH*", namely the claim it had against Mr Makdessi which it

was said to have been settled for a token sum in circumstances where the respondents to the HK Petition were acting in their "*own best interests but contrary to the best interests of TYRH and without reference to Mr Ghossoub"*.

21. The relief sought by Mr Ghossoub in the HK Petition is a buyout of his 20% shareholding with no discount for the fact that his shareholding represents a minority shareholding.

22. There can be no doubt that the SPA and SA form a significant platform for much of what is alleged in the HK Petition. Thus, for example:

    (1) The provisions of the SPA and the SA are set out in detail from paragraphs 20 to 25. Paragraph 26 of the HK Petition then sets out the basis on which Mr Ghossoub contends he understood and expected the business of TYRH was to be conducted: it says that, "*In view of the above provisions of the SPA and the SA, and the circumstances in which Mr Ghossoub sold part of his interests in the Menacom businesses to WPP, it was the mutual understanding between all shareholders of TYRH and WPP, and certainly the legitimate expectation of Mr Ghossub, that….*"

    (2) The same significant reliance on the SPA and the SA is evident also from paragraph 27 where Mr Ghossoub introduces what he claims to have been the unfair prejudice to which he has been subject. This begins, "*In breach of the SPA, the SA and the mutual understanding and legitimate expectation as described in paragraph 26 above, the affairs of TYRH … have been conducted in a manner unfairly prejudicial to the interests of Mr Ghossoub in that….*"

23. WPP contends that the HK Petition is in truth no more than a dressed-up claim for breach of the SPA and the SA. They say that whilst the HK Petition refers to "*the circumstances in which Mr Ghossoub sold part of his interests…to WPP*" by way of an attempt to expand its scope beyond a dispute about the SPA and the SA, no further detail is given of those "*circumstances*" nor any explanation of what they add to the complaints made by reference to the contractual provisions, making it difficult to see on what basis it is said that the pleaded "*mutual understanding and legitimate expectation*" goes beyond what is contained in the SPA and SA. I will need to return to this point below.

24. Although issued on 30 April 2015, it took some time before the respondents to the HK Petition were all served, the non-Hong Kong respondents - WPP plc, Cavendish and Y&R - having refused to instruct their Hong Kong lawyers to accept service. In the event, WPP

plc was eventually served on 26 August 2015 and Cavendish and Y&R were served on 1 September 2015.

The issue of the anti-suit claim in England and the stay application in Hong Kong

25. By the time the HK Petition was finally served, WPP had already taken a number of steps in relation to their dispute with Mr Ghossoub in this jurisdiction.

26. Thus, on 15 May 2015, the anti-suit claim was issued by TYRH, WPP plc, Cavendish, Y&R as well as WPP 2005 (who although not a respondent to the HK Petition is a party to the SPA) seeking a declaration that the HK Petition involves a breach of clause 23.2 of the SPA and clause 29.2 of the SA; an injunction prohibiting Mr Ghossoub from "*further pursuing, or taking any further steps in, or procuring or assisting in the pursuit of*" the HK Petition or otherwise "*commencing or pursuing, or procuring or assisting in the commencement or pursuit of, any further proceedings*" relating to the "*Disputes*"; and an injunction requiring Mr Ghossoub to discontinue the HK Petition.

27. On the same day, 15 May 2015, the claimants also issued an application for interim injunctions pending the trial of the anti-suit claim. As originally formulated, the application sought an injunction until trial or further order that Mr Ghossoub not pursue or take any further steps in relation to the HK Petition or any other proceedings relating to the "*Disputes*" between the parties – defined so as broadly to correlate to the matters about which Mr Ghossoub complains in the HK Petition -and that Mr Ghossoub should as soon as reasonably practicable and in any event within two months of any order made on the application "*terminate without prejudice or otherwise finally discontinue*" the HK Petition.

28. I should pause here to note that at the outset of the hearing before me, Ms Smith QC, appearing for WPP indicated that she no longer sought the relief in the form originally claimed and at my request produced an amended draft order identifying the different form of relief now pursued. Significantly, this no longer seeks to restrain the HK Petition absolutely nor to require Mr Ghossoub to discontinue or terminate those proceedings. Rather, what is now sought is limited to an order requiring that Mr Ghossoub not pursue or take any further steps in the HK Petition or by way of proceedings anywhere else "*until resolution of all the Claims by the English Court*". The amended draft order describes the "*Claims*" as those made in the HK Petition "*relating to (i) the failure to declare and distribute dividends (ii) exclusion from management and (iii) the Makdessi dispute but excluding the relief in respect of the Claims."*

29. Also on 15 May 2015, the claimants issued an application to serve the claim form and the application for interim relief on Mr Ghossoub out of the jurisdiction at his residence in Dubai. As already noted above, on 20 May 2015 Phillips J made the order permitting service out of the jurisdiction. In the event, as explained further below, material difficulties were encountered in effecting service leading eventually to the claimants applying for and obtaining from HHJ Waksman QC an order permitting service by alternative means. As noted above, these two orders are themselves the subject of applications before the Court and I will therefore need to return to them below when dealing with those applications. In the event, it was only in September 2016 that the claimants were able to serve Mr Ghossoub.

30. On 4 November 2015, the respondents to the HK Petition applied to the Hong Kong High Court to stay those proceedings. I will return to this below.

The issue of the defaulting shareholder claim.

31. On 21 December 2015, SPB wrote to Mr Ghossoub giving him notice pursuant to the SPA that Cavendish considered him a defaulting shareholder and required him to sell to Cavendish his TYRH shares at the defaulting shareholder option price. On the same day, 21 December 2015, Cavendish and TYRH issued the defaulting shareholder claim. The claim form seeks a declaration that Mr Ghossoub is a defaulting shareholder and is obliged to transfer his TYRH shares at the defaulting shareholder option price, together with an order requiring specific performance. It also seeks on behalf of TYRH an account of any profit made by Mr Ghossoub in breach of his contractual and fiduciary obligations as well as damages and/or equitable compensation for such breaches.

32. On 11 March 2016, Cavendish and TYRH issued an application for permission to serve on Mr Ghossoub out of the jurisdiction and on 15 March 2016, Field J made the order sought. In due course, and at the same time as this was done in respect of the anti-suit claim, Cavendish and TYRH also applied for and obtained an order for service by alternative means from HHJ Waksman QC. Again this is something to which I will need to return below.

The hearing of the stay application by the Hong Kong Court.

33. On 18 and 19 May 2016, the application in Hong Kong to stay the HK Petition came before Deputy High Court Judge Le Pichon (formerly Le Pichon JA) in the Hong Kong High Court. On 16 June 2016, Judge Le Pichon handed down her judgment in which she

dismissed the application and refused the stay. Her reasons for this were in summary as follows:

(1) Other than TYRH, Cavendish was the only respondent to the HK Petition who was a party either to the SPA or SA. After considering a number of the same English authorities to which I have been referred in relation to this issue, Judge Le Pichon concluded that none of the other respondents had any entitlement to rely on the exclusive jurisdiction clauses contained in those agreements. See especially paragraphs 37 to 51 of the judgment.

(2) Even in relation to Cavendish - who was a party to the SPA and SA and therefore entitled to the benefit on the exclusive jurisdiction clauses - the complaints made by Mr Ghossoub in the HK Petition either fell outside the scope of the exclusive jurisdiction clauses or at least went beyond simply depending on whether a breach of the SPA had occurred. Thus, according to Judge Le Pichon, Mr Ghossoub's complaint about the failure to pay dividends was a ground for an unfair prejudice petition irrespective of whether it was also a breach of the SPA, whilst his complaints about being excluded from the management of TYRH and about the manner in which the dispute with Mr Makdessi had been handled, both fell outside the scope of clause 23.2 of the SPA. See especially paragraphs 59, 63 and 66 of the judgment.

(3) Furthermore, the grant of a stay would, she decided, constitute a fetter on the statutory right given by the Hong Kong legislature to Mr Ghossoub as a minority shareholder suffering unfair prejudice in a Hong Kong company to approach the Hong Kong court for relief. This raised public policy considerations relevant to whether or not the Hong Kong court should exercise its discretion to grant a stay. See especially paragraphs 68 to 86 and 111 of the judgment.

(4) In addition, if the HK Petition was stayed, Mr Ghossoub would have no effective remedy in England for his complaint of unfair prejudice because the English court would have no jurisdiction to entertain such a claim in relation to a Hong Kong company. See especially paragraphs 87 to 101 and 107 and 110 of the judgment.

(5) It followed that even though Cavendish was a party to the SPA and the complaint about the failure to pay dividends did involve an allegation of breach of that agreement, it was not appropriate to order the HK Petition to be stayed. See especially paragraph 112 of the judgment.

34. On 4 January 2017, the Hong Kong Court of Appeal gave permission to appeal in respect of three of the four grounds on which the respondents to the HK Petition wished to appeal. On 17 January 2017 permission was granted by the Hong Kong Court of Appeal for an oral hearing to reconsider the fourth ground, to take place at the same time as the appeal hearing for the other grounds.

35. The Hong Kong Court of Appeal hearing took place on 23 June 2017. As noted earlier, the present applications were originally due to be heard by the Carr J on 14 June 2017, shortly before this appeal was to take place. It was in these circumstances that Carr J concluded the applications would be better dealt with only after the Hong Kong Court of Appeal had handed down its judgment.

36. On 21 July 2017, the Hong Kong Court of Appeal delivered judgment dismissing the appeal. The reasons given by the Hong Kong Court of Appeal were in summary as follows:

    (1) The Court of Appeal considered it clear beyond reasonable argument that Judge Le Pichon was correct to find that the complaints about Mr Ghossoub's exclusion from management and the handling of the Makdessi Dispute fell outside the scope of the exclusive jurisdiction clauses in the SPA and SA. It reached this conclusion, in summary, first because it considered these complaints not to be based entirely on breaches of contract but to rely also on an allegation based on the mutual understandings and legitimate expectations of Mr Ghossoub, and secondly because, as it saw it, Mr Ghossoub's complaint was directed at WPP plc who was not a party to the SPA. See especially paragraphs 14 to 18 of the judgment.

    (2) The Court of Appeal agreed with Judge Le Pichon that even though the complaint about the failure to pay dividends did fall within the exclusive jurisdiction clause in the SPA, the clause should not be enforced because it would fetter what it considered was Mr Ghossoub's statutory right as a shareholder in a Hong Kong company to petition the Hong Kong court for unfair prejudice. See especially paragraphs 19 to 35 of the judgment.

    (3) The Court of Appeal agreed with Judge Le Pichon that if it were to stay the HK Petition, Mr Ghossoub would not be able to obtain substantial justice in the English court because the English court did not have jurisdiction to grant Mr Ghossoub appropriate remedies consequent on his complaint about unfair prejudice as a shareholder in a Hong Kong company. It also agreed with Judge Le Pichon that major

and serous disadvantage would be caused to Mr Ghossoub if he were only able to rely on the contractual exit mechanism in clause 15 of the SPA for a buyout. See especially paragraphs 36 to 40 of the judgment.

(4) The Court of Appeal rejected the submission that Judge Le Pichon had made any error of law or principle that might have affected her discretion. It also considered that there was a "*jurisdictional tangle*" for which no wholly satisfactory solution could be found because there was no single court in which all the issues could be determined. In this context, the Court of Appeal expressed the view that England was not the natural forum for the whole dispute and it was inevitable that the unfair prejudice complaints would have to be determined in Hong Kong. See especially paragraphs 41 to 49 of the judgment.

37. Ms Smith QC on behalf of WPP has before me advanced and developed a number of criticisms about the Hong Kong Court of Appeal's reasoning and conclusions. I will need to come back to some of those criticisms below.

38. In addition to dismissing the appeal and refusing to stay the HK Petition, the Hong Kong Court of Appeal also made directions for the service of a defence. Lengthy Points of Defence have subsequently been filed, but these are expressly stated by the respondents to be without prejudice to their rights under the SPA and SA to have the issues raised by the HK Petition determined by the English court.

39. Finally in relation to the proceedings in Hong Kong, I was informed that it was the intention of the respondents to the HK Petition to appeal the matter to the Hong Kong Court of Final Appeal: the deadline for the submission of any such appeal was 18 September 2017.

The application for an interim anti-suit injunction

40. I turn next to deal with the issues arising in relation to the application for an interim anti-suit injunction.

41. It is not in dispute between the parties that the Court has power under section 37 of the Senior Courts Act 1981 to grant an anti-suit injunction and that such an injunction might be ordered where a legal right exists not to be sued in the foreign court because for example the foreign proceedings are a breach of a jurisdiction or arbitration clause, and even where there is no such legal right, where the pursuit of proceedings in the foreign court is vexatious or oppressive. See for example ***Kallang Shipping SA v Axa Assurances Senegal***

[2006] EWHC 2825 (Comm) at [20], per Gloster J; ***Highland Crusader Offshore Partners L.P and ors. v Deutsche Bank AG and anor.*** [2009] EWCA Civ 725 at [50]; and ***Impala Warehousing and Logistics (Shanghai) Co. Ltd v Wanxiang Resources (Singapore) Pet. Ltd*** [2015] EWHC (Comm) at [60], per Blair J. It is also not in dispute that at an interlocutory stage the applicant for an anti-suit injunction must show "*a high degree of probability*" that it is entitled as of right to restrain the foreign proceedings. See for example ***Malhotra v Malhotra*** [2012] EWHC 3020 at [68] et seq., per Walker J.

42. In ***Donohue v Armco Inc*** [2001] UKHL 64, Lord Bingham, with whom a majority of their Lordships agreed, set out the approach to be taken where a claim is brought in breach of an exclusive jurisdiction clause as follows (at [24]):

> "If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in *The Eleftheria* [1970] P 94, at pp. 99–100, Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion, and his judgment has been repeatedly cited and applied. …"

See also for example ***Ust-Kamenogorst Hydropower Plant JSC v Ust-Kamenogorst Hydropower Plan LLP*** [2013] UKSC 35 per Lord Mance at [24-28].

43. As already noted above, both the SPA and the SA contain an exclusive jurisdiction clause requiring disputes falling within the scope of those clauses to be submitted to the jurisdiction of the English court. It follows that if the disputes raised by the HK Petition come within the scope of those provisions then an anti-suit injunction should be granted unless, of course, there is a strong reason (or more than one) sufficient to displace the prima

facie entitlement of the applicant to enforce the contractual bargain requiring that the dispute be submitted to the English court.

44. WPP contend that the disputes raised by the HK Petition do indeed fall within the scope of in particular clause 23.2 of the SPA and that since Mr Ghossoub is plainly a party to that contract there is a prima facie entitlement that the contractual bargain should be enforced against him. They contend also that Mr Ghossoub cannot identify any strong reason sufficient to displace that entitlement.

45. Mr Ghossoub disputes this analysis. He contends, first, that the disputes raised by the HK Petition are outside the scope of clause 23.2 of the SPA; secondly that since Cavendish alone of the respondents to the HK Petition is a party to the SPA, even if the disputes raised by the HK Petition were within the scope of clause 23.2, there is no reason why he cannot claim against the other respondents outside of England, there being no contract between him and them that inhibits him doing so; and third, that even if clause 23.2 of the SPA does apply to any dispute raised by the HK Petition so as to give rise to a prima facie entitlement on behalf of any or all of the respondents to an anti-suit injunction, other strong reasons exist why I should nonetheless decline such relief.

46. WPP dispute this. They say that all or substantially all of the real issues in dispute raised by the HK Petition do fall within the scope of in particular clause 23.2 of the SPA. They say further that since Mr Ghossoub, by concluding the SPA, agreed with Cavendish that all disputes falling within clause 23.2 of the SPA should be submitted to the English court, Cavendish itself is entitled to enforce this obligation, not only in relation to claims against itself but also in relation to claims brought against other persons, including in particular the other respondents to the HK Petition so that the fact those other persons are not themselves party to the SPA is neither here nor there. WPP also say that there are no strong reasons why anti-suit injunctive relief should not be granted in the circumstances of this case.

47. I would observe that whilst the key arguments in this part of the case were in the main framed by reference to the SPA I understood WPP to advance the same or similar points in relation to the SA. It is however perhaps fair to observe that if WPP succeed with their submissions in relation to the SPA it would be unnecessary to consider the position in relation to the SA; equally, if those submissions fail with regard to the SPA, it is unlikely WPP would fair better in relation to the SA (although I am conscious that in some respects the analysis of the position under the SA would involve slightly different issues). This may explain why the arguments before me were largely advanced by reference to the SPA and

the position in relation to the SA was not much developed orally. It is for this reason that I too have focussed on the SPA and not the SA.

48. Given the issues identified above, it is necessary for me to consider the following issues:

    (1) Do disputes raised by the HK Petition fall within the scope of clause 23.2 of the SPA?

    (2) If so, would Mr Ghossoub be in breach of the SPA by pursuing the HK Petition against TYRH, WPP plc and Y&R despite them not being parties to the SPA?

    (3) If Mr Ghossoub is in breach of clause 23.2 of the SPA so that a prima facie entitlement to an anti-suit injunction arises, are there any strong reasons why I should not grant any such relief in the circumstances of the present case?

    I consider each of these issues below.

Do disputes raised by the HK Petition fall within the scope of clause 23.2 of the SPA?

49. As noted above, clause 23.2 provides that "*The English courts have exclusive jurisdiction to settle any dispute arising out of or in connection with this agreement and the parties submit to the exclusive jurisdiction of the English courts*."

50. Mr Ghossoub advances the following argument: in circumstances where WPP appears to accept - having regard to the amended relief they seek - that the English court lacks jurisdiction to grant relief in respect of a petition brought by a shareholder alleging the affairs of a Hong Kong company to have been conducted unfairly, it is most unlikely that the parties to the SPA would have intended that such a claim was required to be submitted "*to the exclusive jurisdiction of the English courts*". Put differently, Mr Ghossoub's contention is that the parties should not be taken to have agreed to submit to the exclusive jurisdiction of the English court a dispute in respect of which the English court had no jurisdiction to grant a remedy.

51. In support of this argument, Mr Ghossoub relies on what was said by Lord Scott in his speech in ***Donohue*** (above). The choice of forum clause in ***Donohue*** provided that "*the parties hereby irrevocably submit themselves to the exclusive jurisdiction of the English courts to settle any dispute which may arise out of or in connection with this agreement*". Lord Scott, after noting (at [63]) the need for careful analysis of the nature of the claims made in the New York complaint to see which were caught by the exclusive jurisdiction clause, then turned (at [68]) to an allegation in the New York complaint that the defendant's

conduct constituted racketeering, wire fraud and mail fraud for the purpose of the Federal Racketeer Influenced and Corrupt Compensations Act (the RICO Act) under which a claim for triple damages was sought. He said:

> "In so far as the RICO Act claims are based on conduct in connection with the transfer agreements or the sale and purchase agreement, it might seem that they, too, fall within the language of the exclusive jurisdiction clause. But it is common ground that a RICO Act claim could not be brought in an English court. It cannot, in my opinion, be supposed that in submitting to the exclusive jurisdiction of the English courts the parties had in mind claims which an English court would have no jurisdiction to entertain. The contractually expressed purpose of the submission to the English courts was "to settle any dispute which may arise", etc. How can this language be sensibly thought apt to cover a dispute that the English courts would be jurisdictionally unable to settle? ..."

52. I consider that there is force in the point made by Mr Ghossoub. In particular, I would accept that absent clear language to the contrary it is most unlikely that contracting parties will have intended to agree to submit to the English court a dispute in respect of which the English court would have no jurisdiction to resolve or grant a remedy.

53. But it does not seem to me that this can be the end of the analysis. More particularly, even where as here it is possible to conclude having regard to the characterisation of the overall nature of the dispute that it is one the parties cannot have intended should be submitted to the English court - because the English court lacked jurisdiction over a dispute of that character – does it follow that the parties must also be taken to have agreed not to submit to the English court matters about which they are in dispute arising in the context of that overall claim over which the English court plainly could exercise jurisdiction and resolve?

54. Put differently, if in characterising what is being litigated in Hong Kong it is the overall nature of the claim that is to be considered, namely the petition for unfair prejudice, then it is not difficult to conclude that the parties could not have intended such a dispute to fall within clause 23.2: the parties are unlikely to have agreed to submit to the English court a dispute in respect of which the English court would have no jurisdiction to resolve or grant a remedy. By contrast, if the focus of the Court's attention is instead on the material allegations on which that petition is based, that is to say the underlying disputes raised by the HK Petition, the position might be very different. That is because, as noted above, the HK Petition rests very substantially, even if not exhaustively or exclusively, on allegations of breach of provisions of the SPA and SA.

55. WPP naturally contend that it is the latter rather than the former approach that I should take and the fact that the English court does not have jurisdiction to entertain and grant relief in respect of an unfair prejudice petition involving a Hong Kong company does not mean that the English court does not have, and should not exercise, jurisdiction over the particular disputes that might arise between the parties in that overall context.

56. WPP refers in this context to the general approach that English law adopts to the interpretation of exclusive jurisdiction clauses. This was succinctly summarised by Asplin J in ***Black Diamond Offshore Limited and Ors v Fomento De Construcciones y Contratas S.A***. [2015] EWHC 1035 (Ch) where she said (at [19]):

> "There is no dispute that the relevant principles which apply to the construction of jurisdiction provisions can be derived from *Donohue v. Armco Inc [2001] UKHL 64 and [2002] Ll Rep 45*; *Fiona Trust and Holding Corporation v. Privalov [2007] EWCA Civ 20, [2007] 2 Ll Rep 267* and *Satyam Computer Services Limited v. Upaid Systems Limited [2008] EWCA Civ 487 and [2008] 2 AE (Comm) 465* . It is accepted therefore, that jurisdiction clauses must be construed "widely and generously" with a presumption in favour of "one-stop shopping" for dispute resolution."

57. In seeking to apply these principles to clause 23.2 in the context of the present matter, however, it might be observed that even if one construes that clause widely and generously, it is difficult to see how this meets the argument that the parties are unlikely to have agreed to bind one another to refer and submit themselves to the "*exclusive jurisdiction*" of the English courts a claim in relation to which the English court would have no jurisdiction to entertain and provide a remedy.

58. There is also some difficulty in ascertaining how the presumption in favour of "*one-stop shopping*" referred to Asplin J in ***Black Diamond*** assists in the present context. The principle underlying that presumption proceeds on the basis that reasonable businessmen who have agreed a regime for dispute resolution in connection with their contract are unlikely to have intended that some disputes, depending on their nature, might fall to be treated by different tribunals; hence the idea that they are much more likely to have intended a 'one-stop shop'. Application of that principle is however less straightforward in a case such as the present where the chosen forum can exercise no jurisdiction over the claim as a whole so as to make it inevitable that some parts of the dispute will have to be conducted in a different forum. In such a situation, if a 'one-stop shop' outcome is to result this can

only be by accepting that all aspects of the dispute arising in the context of the overall claim should also be resolved in that different forum.

59. In other words, applied to the context of the present case, the 'one-stop shop' presumption - viz. that the parties are unlikely to have intended disputes to be resolved in a fragmented way before more than one forum - may suggest that where a particular type of claim is brought which, because of its nature, the parties cannot have intended should be resolved overall by the English court, it follows that one must also conclude that the parties cannot have intended the English court to resolve any of the particular disputes arising in the context of that claim and that this is so even if it is plain that - looked at in isolation – those particular disputes fall squarely within the exclusive jurisdiction clause and are disputes which the English court would have jurisdiction to resolve.

60. On the other hand, it is not clear to me that the presumption really can assist much in a case such as the present where the parties have in fact expressly agreed that the English court should have a wide exclusive jurisdiction over disputes arising but the Court is faced with a claim which, at least when looking at its overall nature, cannot have been intended to come within the provision for the reasons already identified.

61. I turn back therefore to the question whether in seeking to characterise the dispute for the purposes of clause 23.2, one should focus only on the overall nature of the claim or whether, rather, it is appropriate also to consider the particular disputes that arise in the context of that overall claim.

62. Approaching the question as one must, giving the language in clause 23.2 a wide and generous interpretation, I consider that it would be wrong to treat the word "*dispute*" as it appears in that provision as limited so as to apply only to a consideration of the overall nature or type of the claim. Rather, it is my view that the fact that a particular dispute arises only as an aspect or element of that claim does not make it any the less a dispute for the purposes of clause 23.2. Not only does this interpretation appear to me to be in line with the language used by the parties in clause 23.2, it is also one that accords with commercial common sense. Were the position otherwise, it would be much open to abuse: it would allow a party to construct artificial forms for proceedings, when the real or substantial issues in dispute are plainly contractual, simply as a means of seeking to evade the application of the provision. That is most unlikely to have been what reasonable commercial parties would have intended.

63. Whilst I recognise that this might introduce, or perhaps exacerbate, the risk of bifurcation of proceedings and in this way appear to offend against the presumption in favour of 'one-stop shopping', I have already explained why in the context of the present case I do not find that presumption of much assistance; put shortly, where the express choice of the parties is, as here, for English jurisdiction, I consider it most unlikely that the presumption could have been intended to operate so as to increase, as it would here, the scope of matters taken away from that expressly chosen jurisdiction.

64. In short, whilst Mr Ghossoub is in my view correct to say that the parties could not have intended to be obliged to submit to the English court a petition for unfair prejudice in respect of which the English court would have no jurisdiction to entertain and provide a remedy, I nonetheless find that clause 23.2, properly interpreted, would cover within its scope disputes raised by the HK Petition that are related or connected to the SPA.

65. It therefore remains necessary to consider whether and to what extent disputes raised by the HK Petition fall within the scope of clause 23.2 of the SPA.

66. It is in this context necessary to deal with the further argument advanced by WPP, already alluded to above, to the effect that, properly considered, there are in truth no disputes of substance in the HK Petition that go beyond allegations of breach of the SPA or do not otherwise arise out of or are not connected to the SPA. This being so, contends WPP, even if Mr Ghossoub is not contractually bound to submit the HK Petition itself to the English court, he is obliged to submit to the English court substantially the whole of the dispute that forms the basis of that petition.

67. There is in my view force in this submission. In particular, I agree that allegations of breach of the SPA constitute at the very least a central and substantial basis of the complaint made by way of the HK Petition. I agree also that the allegations purporting to go further are as currently formulated thin and lacking in particularity. On the other hand, it cannot be disputed that there are matters expressly pleaded in the HK Petition that, however un-particularised, do raise disputes that may well extend beyond those within the ambit of clause 23.2 and I do not consider that it would be appropriate, at this stage of those proceedings, simply to disregard those allegations on the basis that they are pointless or entirely without substance. The fact the Hong Kong court –who, it is not disputed, will be the court required finally to determine the question of unfair prejudice raised by the HK Petition – having been asked to consider the position takes a similar view, is to my mind a further reason for caution in this regard.

68. Even so, the fact remains that Mr Ghossoub is in breach of clause 23.2 in respect of a very substantial part of the matters in dispute submitted to the Hong Kong court by way of the HK Petition. I will need to return in due course to whether in these circumstances, it would be appropriate to grant an anti-suit injunction.

Can the obligation contained in clause 23.2 be enforced in relation to proceedings against persons who are not party to the SPA?

69. It is necessary next to consider whether the obligation contained in clause 23.2 can be enforced in relation to proceedings brought against persons who are not a party to the SPA. This question arises because, as noted above, of the respondents to the HK Petition only Cavendish is a party to the SPA. Thus, whilst, as I have found, Mr Ghossoub is in breach of clause 23.2 by submitting for resolution by the Hong Kong court a number of disputes properly falling within the scope of that clause, in the context of his having pursued the HK Petition against Cavendish, has Mr Ghossoub also acted in breach of that clause in respect of the claims he has made in those proceedings against the non-parties to the SPA, namely TYRH, WPP plc and Y&R?

70. A similar question has been considered in a number of earlier authorities.

71. In ***Credit Suisse First Boston (Europe) Ltd v. MLC (Bermuda) Ltd*** [1999] 1 All ER 237, the claimant bank (CS Europe) had entered into a contract with the defendant hedge fund (MLC) containing, at clause 5.2, an exclusive jurisdiction provision to the effect that the "*courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with this Agreement*…." Rix J held that CS Europe could not seek an anti-suit injunction against MLC restraining it from bringing proceedings in New York against the bank's US affiliate (CS US) or Swiss affiliate (CS Switzerland). He said (at 252a):

> "….it seems to me to be far-fetched to regard 'any disputes' as covering disputes between MLC and any one other than MLC's contract partner under the purchase agreements, namely CS Europe. Clause 5.2 is part of a bilateral agreement between a seller and a buyer, and the disputes to which such an agreement may give rise are prima facie bilateral disputes. Indeed, it is I would have thought axiomatic that, at any rate in the absence of plain language to the contrary, a contract seeks neither to benefit nor to prejudice non-parties: even where such plain language is used, it is black-letter law that the non-party can himself neither take the benefit nor suffer the burden of the contract. In the present case there is nothing in the language of cl. 5.2 to suggest that it is intended to have an ambit beyond the parties to the purchase agreements themselves. While it is true that the agreements mention CS affiliates, there is nothing in the express language of cl. 5.2 to

> suggest that the clause is intended to bind MLC as to where it is entitled to sue such affiliates…."

72. By contrast, in ***Donohue (supra)***, Lord Scott, dealing with a clause in similar terms, which provided that the "*parties …irrevocably submit themselves to the exclusive jurisdiction of the English courts to settle any dispute which may arise out of or in connection with this agreemen*t", said this (at [60] – [61]):

> "It is accepted that the clause is not restricted to contractual claims. A claim for damages for, for example, fraudulent misrepresentation inducing an agreement containing an exclusive jurisdiction clause in the same form as that with which this case is concerned would, as a matter of ordinary language, be a claim in tort that arose "out of or in connection with" the agreement. If the alleged fraudulent misrepresentation had been made by two individuals jointly, of whom one was and the other was not a party to the agreement, the claim would still be of the same character, although only the party to the agreement would be entitled to the benefit of the exclusive jurisdiction clause. The commencement of the claim against the two alleged tortfeasors elsewhere than in England would represent a breach of the clause. The defendant tortfeasor who was a party to the agreement would, absent strong reasons to the contrary, be entitled to an injunction restraining the continuance of the foreign proceedings. He would be entitled to an injunction restraining the continuance of the proceedings not only against himself but also against his co-defendant. The exclusive jurisdiction clause is expressed to cover "*any dispute* which may arise out of or in connection with" the agreement. It is not limited to "any claim against" the party to the agreement. To give the clause that limited construction would very substantially reduce the protection afforded by the clause to the party to the agreement...
>
> In my opinion, an exclusive jurisdiction clause in the wide terms of that with which this case is concerned is broken if any proceedings within the scope of the clause are commenced in a foreign jurisdiction, whether or not the person entitled to the protection of the clause is joined as defendant to the proceedings."

73. Lord Scott's dictum in ***Donohue***, albeit obiter, was followed by Norris J in ***Winnetka Trading Corporation v Julius Baer International Ltd*** [2008] EWHC 3146, [27]-[29].

74. WPP naturally rely both on what was said by Lord Scott and on the decision of Norris J in ***Winnetka*** in support of their contention that Mr Ghossoub's claims against each of TYRH, WPP plc and Y&R are as much a breach of contract as his claim against Cavendish.

75. Whilst great respect must of course be accorded to Lord Scott's analysis, it should however be noted that none of the other Lordships in ***Donohue*** gave any consideration to the issue

on which Lord Scott expressed this obiter view. Nor it appears (see below) was the point even argued. At the same time, it is clear that the decision of Rix J in ***Credit Suisse***, which might be said to indicate an approach contrary to that taken by Lord Scott, was before their Lordships (see Lord Bingham at [28]) without any suggestion by any of their Lordships that they considered what was said on this issue by Rix J was wrong.

76. In ***Morgan Stanley & Co. International Plc v China Hasihen Juice Holdings Co. Ltd.*** [2009] EWHC 2409 (Comm), a similar question came before Teare J. The claimant bank (MSIP) sought to enforce an exclusive jurisdiction clause contained in a contract between itself and the defendant holding company (CH) to stop proceedings instituted by CH against MSIP and a Hong Kong affiliate of MSIP (MSAL) in the People's Republic of China. The clause, 13(b)(i)), provided among other things that, "*With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement ("Proceedings"), each party … (1) irrevocably submits to the exclusive jurisdiction of the English courts*". It was argued by MSIP that the clause obliged CH to bring the proceedings it had instituted against both MSIP and MSAL in England despite MSAL not being a party to the contract; MSIP contended that the scope of the clause applied to "*any suit, actions or proceedings relating to any dispute arising out of or in connection with*" the contract and was not restricted to proceedings against it, MSIP, the other contracting party.

77. Teare J rejected this submission. After referring to earlier authorities on the approach taken by English law to the interpretation of dispute resolution clauses, including ***UBS AG v HSH Nordbank AG*** [2009] 2 Lloyd's Rep 272, at [82]- [83] (Lord Collins) and ***Premium Nafta Products Ltd v Fili Shipping Co Ltd*** [2008] 1 Lloyd's Rep 254 (***The Fiona Trust***), and also to ***Donohue***, ***Winnetka*** and ***Credit Suisse***, Teare J noted (at [21]) that the resolution of the issue in relation to any particular contract must depend upon the terms contained in that contract taken as a whole and could not be limited to a consideration of the exclusive jurisdiction clause alone.

78. In analysing the clause and the contract before him, Teare J regarded the following matters as significant. First, the contract contained a number of provisions that expressly addressed the position of third parties. In this context, he considered that the absence of any reference to the position of third parties in the exclusive jurisdiction clause might support the conclusion that the parties did not intend to affect the position of third parties by that provision. See in particular [23]. Secondly, Teare J noted that if the clause was to be interpreted as obliging the contracting party not to bring proceedings against any non-contracting party otherwise than in England as the chosen forum, this would produce a

situation of real imbalance since there was nothing to stop the non- contracting party from bringing proceedings against the contacting party outside of England. Similarly, as Teare J noted, since the non-contracting party had not agreed – as the contracting parties had done - to submit to the jurisdiction, this could result in a situation in which the English court did not actually have jurisdiction over that non-contracting party, a factor that again might indicate that the parties had not intended to compel that any proceedings against that non-contracting party should be brought in England. See in particular [24].

79. Having regard to these matters, Teare J noted (at [25]) that "*it is not clear that the parties, as rational businessmen, would be likely to have intended that any dispute with a third party arising out of the relationship into which they had entered with each other should be decided by the same court which decides disputes between the same parties*".

80. Teare J also noted (at [28]) the difficulty associated with interpreting the contract in a way that found an agreement to oblige any and all proceedings in relation to issues connected to the contract to be brought within the chosen jurisdiction regardless of whether the defendant to such proceedings was a party to the contract. There was, he considered, an obvious difficulty in the suggestion that the clause was intended to apply so as to benefit wholly non-connected third parties without any limit as to the third parties who might benefit. The position would have been different if the contract contained language that indicated, for example, that the clause was to operate for the benefit of affiliates of the contracting parties.

81. Teare J then went on to observe (at [30]) that his conclusion was consistent with the approach of Rix J in ***Credit Suisse*** and, further, that it was not inconsistent with the obiter comments of Lord Scott in ***Donohue*** because the contract in that case did not include provisions touching on the position of third parties; the same point of distinction, he considered, applied also to the analysis of Norris J in ***Winnetka***. Teare J also noted that none of the other Lordships in ***Donohue*** had expressed a view on this issue and that, as he had been informed by counsel in ***Donohue*** who was also before him in ***Morgan Stanley***, the point was not the subject of argument before the House.

82. In light of the consideration given to this question by earlier authorities, it seems to me possible to make the following observations:

    (1) Whether an exclusive jurisdiction clause should be understood to oblige a contractual party to bring claims relating to the contract in the chosen forum even if the claim is

one against a non-contracting party, requires a consideration of the contract as a whole including not just the language used in the exclusive jurisdiction clause but also all other terms in the contract that may shed light on what the parties are likely to have intended.

(2) The principle that rational businessmen are likely to have intended that all disputes arising out of or connected with the relationship into which they had entered would be decided by the same court cannot apply with the same force when considering claims brought by or against non-contracting third parties. More particularly, whist it is well established that the language of an exclusive jurisdiction clause is to be interpreted in a wide and generous manner, the starting position in considering whether disputes involving a non-contracting third party might come within the scope of the clause must be that, absent plain language to the contrary, the contracting parties are likely to have intended neither to benefit nor prejudice non-contracting third parties.

(3) Where it is clear from the express terms that the contracting parties have turned their minds to the position of third parties and more particularly whether such third parties are to benefit or bear the burden of rights and obligations agreed between the contracting parties, the absence of any express language in the exclusive jurisdiction clause that provides for the application of that term in relation to claims brought by or against third parties may be an indication that the clause was not intended either to benefit or prejudice such third parties.

(4) Where the exclusive jurisdiction clause is silent on the question, the fact that any provision in the contract dealing with third parties indicates an intention that third parties should not acquire rights as against the contracting parties by virtue of the contract, may be a further indication that the clause was not intended either to benefit or prejudice such third parties.

(5) Where a particular interpretation of the exclusive jurisdiction clause produces a material contractual imbalance because for example it results in one party to a dispute relating to the contract being subjected to an obligation to bring proceedings in the chosen jurisdiction in circumstances where the other party to the dispute is not similarly obliged, or where that interpretation would require a claim against a non-contracting third party to be brought in the agreed jurisdiction even where the chosen forum may not actually have jurisdiction over such a claim against that party, this too may be an indication that the clause was not intended to so apply because such a result

is unlikely to be what the contracting parties as rational businessmen would have agreed.

(6) The fact that there is nothing in the contract that might indicate a rational limit in terms of the identity of non-contracting third parties whose rights and interests might be affected by the application of an exclusive jurisdiction clause might provide a further indication that the clause was only intended to affect the rights and interests of the contracting parties.

(7) It follows that where contracting parties intend that any claim relating to the contract be subject to the exclusive jurisdiction clause even where it is one brought by or against a non-contracting party, clear words should be used expressly setting out this intention, the parties to be affected and, if relevant, the manner in which submission of any non-contracting parties to the jurisdiction of the chosen court is to be ensured.

83. How then do these observations apply to the SPA? More particularly, are WPP correct to contend that clause 23.2 requires that Mr Ghossoub pursue any claim he may have relating to or connected with the SPA in this jurisdiction even where the claim is one brought against non-contracting third parties, in this case TYRH, WPP plc and Y&R? As to this:

(1) As noted above, clause 23.2 provides that the English court is to "*have exclusive jurisdiction to settle any dispute arising in connection with this agreement and the parties submit to the exclusive jurisdiction of the English courts*". Whilst the opening words of the clause, by which the parties agree the English court should have "*exclusive jurisdiction to settle any dispute arising in connection with this agreement*", are in my view wide enough to apply to "*any dispute*" relating to the SPA regardless of the identity of the parties to that dispute, it is notable that the remainder of the clause is concerned only with the conduct of the parties to the SPA, referring as it does to "*the parties*" submitting to the exclusive jurisdiction of the English court. The fact that the clause expressly considers only the position of the parties to the SPA, in my view provides a clear indication that the parties did not intend or anticipate that the clause would apply also to claims against non-contracting third parties over whom the jurisdiction of the English court might or might not extend.

(2) Even allowing for a wide and generous interpretation of the opening words in clause 23.2 (which are in my view directed towards identifying the scope of disputes to be covered, rather than the identity of the persons whose rights and interests are to be

affected by the clause), there is nothing in the clause to rebut the prima facie starting point suggested by Rix J in ***Credit Suisse***, namely that parties to a contract containing a dispute resolution clause are likely to intend only to regulate disputes between themselves and not disputes involving third parties. On the contrary, as already noted at (1) above, there is language in clause 23.2 that supports the conclusion suggested by that prima facie starting point.

(3) As in ***Morgan Stanley*** - and in contrast to the contracts under consideration in ***Donohue*** and in ***Winnetka*** - the SPA contains a term dealing with the position of third parties. Thus, as noted earlier, clause 21.11 provides that, "*Except as otherwise expressly stated in this agreement, a person who is not a party to this agreement may not enforce any of its terms under the Contracts (Rights of Third Parties) Act 1999".* It is thus clear that the parties to the SPA did consider how the provisions of the contract might affect third parties but notwithstanding this one finds no wording in the contract to suggest the parties thereto intended the position of third parties to be affected by the choice of jurisdiction provision. If anything, clause 21.11 suggests an intention that third parties should, save where the contrary expressly appears, be unaffected by anything contained in the SPA.

(4) The absence of any language to delineate in a rational way the identity of non-contracting third parties whose rights and interests might be affected by clause 23.2 were it to apply other than to the contracting parties –for example by limiting its application to claims brought by or against companies associated with or affiliated to the contracting parties - is a further indication that the parties did not intend clause 23.2 to have this wider application.

(5) So too, as noted above, the fact that if given this wider reach clause 23.2 might operate to compel claims against non-contracting third parties to be brought in England even where the English court had no jurisdiction in respect of such parties and might result in a situation in which one party to a dispute that might arise in connection with the SPA might be obliged by clause 23.2 to pursue that dispute in England but the other party to the same dispute would not be similarly obliged. This, as Teare J observed in ***Morgan Stanley***, might be said to be anomalous and if the parties had intended so curious a result, one would have expected them to use clear words to indicate such an intention.

84. For the reasons identified above, I conclude that the scope of clause 23.2 does not extend to claims against non-contracting third parties. I therefore further conclude that Mr Ghossoub was not in breach of contract by virtue of his pursuit of the HK Petition against TYRH, WPP plc and Y&R.

85. It is convenient at this point to turn to the submission made by WPP by way of an alternative argument to the effect that, if Mr Ghossoub's pursuit of the HK Petition against TYRH, WPP plc and Y&R does not involve a breach of contract, it nonetheless involves vexatious or oppressive conduct which should, for this reason, be restrained by the Court in any event. More particularly, contends WPP, Mr Ghossoub's bringing of the HK Petition against those parties was abusive because the pursuit of the petition against those parties was contrived or artificial and simply designed to evade the effect of the exclusive jurisdiction clause.

86. I am unable to accept this submission. In particular, I am not satisfied, on the evidence before me, that it can properly be said that Mr Ghossoub's pursuit of the HK Petition against those parties was not bona fide, or is being pursued for purposes wholly collateral to the subject matter of those proceedings. More particularly, whether or not Cavendish should be or is the primary target in any such petition, it does not seem to me possible to say, on the evidence before the Court, that Mr Ghossoub could not have come to believe, whether or not as a result of legal advice, that there were real and legitimate reasons for wishing to include the other WPP group parties as respondents to the petition.

87. In addition, it is relevant to note in this context that the Hong Kong courts, following full and careful consideration, did not consider the HK Petition as brought against all respondents thereto, to be abusive or an obvious device. In circumstances where that petition involves a claim governed by a Hong Kong statute, and where it is accepted that the Hong Kong court is to have jurisdiction to decide the ultimate issue it raises against all respondents, I am not willing to conclude absent some very strong reason for doing so that a petition to the Hong Kong court, which those courts considered to be properly founded against all respondents thereto- at least in terms of not constituting an abuse of their processes – in fact lacked any proper foundation. I am not aware of any strong reason for so concluding.

88. I turn next to consider whether it would be appropriate in the circumstances of this case to grant an anti-suit injunction against Mr Ghossoub to restrain his breach of the SPA having regard to the fact, as I have concluded above, first that no breach is committed by the HK Petition to the extent that it is pursued against persons other than Cavendish, and secondly,

that even as against Cavendish, the bringing of the HK Petition only in part constitutes a breach of the SPA.

Is it appropriate in the circumstances to grant an anti-suit injunction?

89. As already noted above, Lord Bingham in his classic formulation in ***Donohue*** of the English law response to a breach of an exclusive jurisdiction clause emphasised the fact that an English court in such circumstances should ordinarily be willing to exercise its discretion in favour of the grant an injunction to restrain the foreign proceedings unless the contract breaker is able to show 'strong reasons' why the foreign proceedings should be permitted to continue. See also, e.g., ***Star Reefers Pool Inc v JFC Group Co Ltd*** [2012] EWCA, per Rix LJ at [25].

90. It is important to observe that Lord Bingham, at this part of his speech in ***Donohue,*** was addressing the straightforward case where the foreign proceedings in breach of an exclusive jurisdiction clause involve only the contracting parties so that the interests of no other parties are involved. Reflecting this, Lord Bingham said, at [25], that "*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*."

91. The position may however be otherwise where the interests of third parties are involved or indeed where the foreign proceedings include claims not within the ambit of the exclusive jurisdiction clause. Thus, at [27], Lord Bingham continued by observing that, "*The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions*." It is clear from Lord Bingham's consideration of the earlier authorities, as well as the approach taken by their Lordships in ***Donohue*** itself, that these matters might, but need not, constitute a strong reason for not granting injunction. See especially [27] to [36].

92. Mr Ghossoub, naturally enough relies on these passages from Lord Bingham's speech and the fact, as I have found, that the HK Petition will be allowed to continue in Hong Kong as against TYRH, WPP plc and Y&R and, indeed, against Cavendish in part as well, as

constituting a strong reason for declining to grant the injunction. He also relies on other matters which he says constitute further strong reasons, in particular, (1) that the injunction would deprive him of what he says is his inalienable statutory right to bring a claim for unfair prejudice in Hong Kong and would leave him without an effective remedy for the complaints made in the HK Petition in circumstances where an English court would not have jurisdiction to entertain and grant relief in such a petition, TYRH being a Hong Kong company; and (2) that WPP has delayed unduly in seeking the anti-suit injunction and that this raises comity issues. I deal with each of these arguments below.

93. I turn first to deal with the suggestion that no injunction should be granted because this would deprive Mr Ghossoub of an inalienable statutory right to bring a claim for unfair prejudice in Hong Kong or otherwise leave him without an effective remedy for those complaints.

94. It is difficult to see how these arguments any longer arise given the findings I have already made. In particular, I have found that an unfair prejudice claim which the English court would not have jurisdiction to hear does not come within the scope of clause 23.2 of the SPA so that any injunction granted would not stop Mr Ghossoub maintaining his claim of unfair prejudice before the Hong Kong court for its ultimate resolution. This position, of course, also reflects the amended form in which WPP now seeks relief; they no longer ask that Mr Ghossoub be denied the ability to ask the Hong Kong court to decide the unfair prejudice petition, seeking only that all the underlying disputes on which that petition depends be required to be determined by the English court.

95. These matters therefore cannot constitute a strong reason why an injunction should not be granted. Whilst this is perhaps sufficient to dispose of these arguments, it may be worth noting the following.

96. First, whilst the more limited form of injunction now in issue may mean that the arguments above cannot carry much weight, it is on the other hand worth observing that once one accepts that, even against Cavendish the courts of two jurisdictions will need to be taxed with entertaining (parts of) and having to resolve disputes arising in connection with the HK Petition, this highlights the jurisdictional tangle that will result should any such injunction be granted. The position becomes all the more complex once regard is had to the fact, as I have found, that the Hong Kong court would also be required to adjudicate on the whole of substance of the HK Petition in relation to the other respondents thereto and,

in addition, in relation to Cavendish, also on those parts of the underlying disputes raised by the HK Petition which did not come within the scope of clause 23.2 of the SPA.

97. Secondly, it will be recalled that the contention that Mr Ghossoub has an inalienable statutory right to bring a claim for unfair prejudice in Hong Kong is an argument that finds some support in the reasons given by both Judge Le Pichon and the Hong Kong Court of Appeal for refusing to stay the HK Petition, relying for this on mostly English authority including ***In re Peveril Gold Mines Ltd*** [1898] 1 Ch 122 (Ch and CA) and ***Fulham Football Club (1987) Ltd v Richards*** [2012] EWCA Civ 855 (CA). I have already explained why the argument simply does not arise. However, had it been necessary to deal with the point, I should make clear that I would have rejected Mr Ghossoub's submission on this issue. In particular:

    (1) In ***Fulham***, the most recent English case relevant to the point, the Court of Appeal was faced with the submission that English law did not permit an agreement between contracting parties to refer to arbitration any dispute between them about whether the affairs of the company had been conducted in a manner unfairly prejudicial to the petitioner's interests as one of its members. The Court of Appeal rejected the argument that such disputes were non-arbitrable.

    (2) The view taken by Judge Le Pichon, (at paragraph 84 of the judgment) and accepted by the Hong Kong Court of Appeal (at paragraph 30 of the judgment) is that the decision of the English Court of Appeal in ***Fulham*** should be understood as concerned only with the question of the arbitrability of such disputes and that ***Fulham*** has no wider significance to other dispute resolution provisions such as exclusive jurisdiction clauses.

    (3) With great respect to the Judge Le Pichon and the Hong Kong Court of Appeal, I would respectfully disagree with this conclusion, certainly as a matter of English law. To my mind, the Court of Appeal's analysis of this issue in ***Fulham*** has a wider impact than that which they have recognised and strongly suggests that, certainly so far as concerns English law, no bar exists to parties agreeing that unfair prejudice disputes relating to the affairs of an English company are to be resolved by a tribunal other than the English court.

    (4) In particular, whilst it is plainly correct, as the Hong Kong courts noted, that the issue of arbitrability was at the core of ***Fulham*** and therefore may have coloured the

approach taken by the Court of Appeal to the issues before it, the key issue before the Court in ***Fulham***, as it seems to me, was whether effect could be given to any dispute resolution provision that removed from the English court the ability to entertain and provide relief in respect of a dispute about unfair prejudice in relation to an English company, in particular where the relief sought did not include a winding up order. If, as the Court of Appeal concluded, it was open to contracting parties to agree that such a dispute should be removed from the jurisdiction of the English court and should be referred to arbitrators for determination, I find it difficult to see why contracting parties should not also be able to agree that the matter should be referred for resolution to some other (non-arbitration) tribunal.

(5) That is not to say that the other tribunal will necessarily regard itself as having jurisdiction to entertain and provide remedies in relation to such a dispute; but that, I would suggest, is a rather different point.

98. I turn next to Mr Ghossoub's contention that WPP have been guilty of undue delay in prosecuting the application for an anti-suit injunction and that this provides a strong reason why no injunction should be granted. Related to this, Mr Ghossoub contends, is the question of comity and in particular comity towards the Hong Kong court.

99. I was referred in this regard to the decision of the Court of Appeal in ***Ecobank Transnational Inc v Tanoh*** [2015] EWCA Civ 1309. That was a case where the application in relation to the foreign proceedings, for an anti-enforcement injunction, had not been issued until after judgment by the foreign (Togo) court. At [127] of his judgment, Christopher Clarke LJ emphasised that the need to avoid delay was important for a variety of reasons "*including the avoidance of prejudice, detriment, and waste of resources; the need for finality; and considerations of comity*". He went on (at [129]-[130]:

> "Further the tenor of modern authorities is that an applicant should act promptly and claim injunctive relief at an early stage; and should not adopt an attitude of waiting to see what the foreign court decides. In *The Angelic Grace* Leggatt LJ said that it would be patronising and the reverse of comity for the English court to decline to grant injunctive relief until it was apparent whether the foreign court was going to uphold the objection to its exercising jurisdiction and only do so if and when it failed to do so. Whilst those observations related to the approach of the court it seems to me that they are a guide to what should be the approach of a would-be applicant for anti-suit or anti-enforcement relief.
>
> The proposition that delay in this field is immaterial in the absence of prejudice and that there is necessarily no prejudice if the respondent is

aware of the challenge to the jurisdiction of the foreign court which is being pursued there would have curious consequences. Firstly it would revolutionise the approach that has previously been taken in respect of the need for applicants to act promptly. Secondly it would mean that applicants could have two bites at the cherry. They could, without seeking or threatening any injunctive relief in this country, resist the foreign proceedings on the ground that the issue should be arbitrated and, provided they had not submitted to the jurisdiction, they could then, if the challenge failed, seek an anti-enforcement injunction. The impunity which Mance J had thought "*never [to have] been the law*" or something very like it would have arrived."

100. Having made the points above about delay and its consequences, Christopher Clarke LJ then continued (at [132]-133] and [137]):

> "Comity has a warm ring. It is important to analyse what it means. We are not here concerned with judicial *amour propre* but with the operation of systems of law. Courts around the free world endeavour to do justice between citizens in accordance with applicable laws as expeditiously as they can with the resources available to them. This is an exercise in the fulfilment of which judges ought to be comrades in arms. The burdens imposed on courts are well known: long lists, size of cases, shortages of judges, expanding waiting times, and competing demands on resources. The administration of justice and the interests of litigants and of courts is usually prejudiced by late attempts to change course or to terminate the voyage. If successful they often mean that time, effort, and expense, often considerable, will have been wasted both by the parties and the courts and others. Comity between courts, and indeed considerations of public policy, require, where possible, the avoidance of such waste.
>
> Injunctive relief may be sought (a) before any foreign proceedings have begun; (b) once they have begun; (c) within a relatively short time afterwards; (d) when the pleadings are complete; (e) thereafter but before the trial starts; (f) in the course of the trial; (g) after judgment. The fact that at some stage the foreign court has ruled in favour of its own jurisdiction is not *per se* a bar to an anti-suit injunction: see *AES*. But, as each stage is reached more will have been wasted by the abandonment of proceedings which compliance with an anti-suit injunction would bring about. That being so, the longer an action continues without any attempt to restrain it the less likely a court is to grant an injunction and considerations of comity have greater force.
>
> Whilst a desire to avoid offence to a foreign court, or to appear to interfere with it, is no longer as powerful a consideration as it may previously have been, it is not a consideration without relevance. A foreign court may justifiably take objection to an approach under which an injunction, which will (if obeyed) frustrate all that has gone before, may be granted however late an application is made (provided the person enjoined knew from an early stage that objection was taken to the proceedings). Such an objection is not based on the need to avoid offense to individual judges (who are made of sterner stuff) but on the sound basis that to allow such an approach is not a sensible method of conducting curial business.

…

> In short, both general discretionary considerations and the need for comity mean that an applicant for anti-suit relief needs to act with appropriate despatch. In *Transfield Shipping* at [78] I observed that "*...comity, which involves respect for the operation of different legal systems, calls for challenges … to be made promptly in whatever is the appropriate court*". Whilst recognising that delay is not necessarily a bar to relief, and the importance of upholding the rights of those who are the beneficiaries of exclusive jurisdiction agreements, I do not regard the cases subsequently decided by this court as rendering that statement inaccurate."

101. As already noted, in ***Ecobank*** the relief sought was against enforcement rather than, as in the present case, the pursuit of the claim itself. Be that as it may, it is plain that the points about delay and comity made therein are relevant in anti-suit proceedings as well. See in this regard Phillips J's helpful survey of the position in ***ADM Asia-Pacific Trading PTE. Ltd v PT Budi Semesta Satria*** [2016] EWHC 1427 (Comm).

102. Mr Ghossoub contends that the vices warned against by Christopher Clarke LJ in ***Ecobank*** are all present in the present case. Thus, he says WPP have been guilty of delay. He says also that in circumstances where the matter has now been considered both by the Hong Kong High Court and the Hong Kong Court of Appeal, WPP's request that this Court consider what are in effect the same issues, i.e. whether the HK Petition should be permitted to proceed before the Hong Kong court notwithstanding clause 23.2 of the SPA, constitutes an illegitimate attempt by WPP to have a 'second bite at the cherry'. Mr Ghossoub says further that given the time and resources already expended by the courts in Hong Kong in dealing with this matter, questions of comity also arise.

103. It is necessary to return to the facts in order to evaluate this contention. It will be recalled that the HK Petition was issued on 30 April 2015 and that WPP lost little time in responding: the anti-suit claim and the application for an interim anti-suit injunction were issued on 15 May 2015, just over two weeks later. On the same date, WPP issued the application for permission to serve out of the jurisdiction, obtaining such permission on 20 May 2015. It was at this point that there was substantial delay. This related to the attempts to serve Mr Ghossoub in Dubai. As already noted, this was only successfully accomplished in September 2016, after obtaining permission for service by alternative means. It will be necessary to look more closely at some of the facts relevant to this below.

104. At the same time as WPP sought to progress the present application before the English court, on 10 November 2015, the HK Petition respondents applied in Hong Kong for a stay, the HK Petition having only been served on all parties thereto in September 2015.

105. It is clear from the foregoing that the issue of the anti-suit claim and the application for an interim injunction took place without any delay and long preceded the issue of the stay application in Hong Kong. The fact that the Hong Kong stay application came to run ahead of the application to the English court appears to be entirely down to the delay that attended service of the English proceedings on Mr Ghossoub in Dubai.

106. Mr Ghossoub contends nonetheless that WPP have been guilty of undue delay. He points to the following matters. He notes that although the order permitting service out was made on 20 May 2015, it was only three months later, on 14 August 2015, that SPB, WPP's solicitors, wrote to the Foreign Process Section of HM Courts and Tribunal Service (HMCTS) requesting that the process required to effect service in Dubai be implemented. He complains also that between this point and June 2016, WPP made no attempt to liaise with HMCTS or indeed any authorities in Dubai to find out the status of the proceedings or to discover why the proceedings had not been served. Finally, he points to the fact that even after being told, in June 2016, that the attempt to serve Mr Ghossoub had not been successful, WPP waited until 8 September 2016 before making the application for the Alternative Service Order.

107. Mr Ghossoub complains that this adds up to a six-month period of inactivity that has not been adequately explained. He says that WPP have not shown the necessary urgency in wishing to have this application determined and indeed that this is consistent with WPP being content to leave matters in the hands of the Hong Kong courts.

108. WPP produced witness evidence in response to these allegations of delay from Mr Paul Oxnard of SPB. It suffices to say that I accept Mr Oxnard's evidence about these matters and reject the suggestion that WPP have been guilty of any failure to prosecute the present application with sufficient urgency. I also reject the suggestion that WPP have adopted any deliberate 'two bites at the cherry' strategy, waiting to see how the Hong Kong stay application was resolved before making any real effort to pursue the current application. On the contrary, even if there were periods where it is possible to imagine matters might have been progressed more quickly, I do not regard this as suggesting in any way that WPP

were doing other than seeking to get this matter before the English court as quickly as they could.

109. This is not therefore a situation such as for example that in ***Ecobank***, where no application for anti-suit relief was made until after judgment was given in the foreign (Togo) court. Nor is it comparable to the position in ***ADM Asia Pacific Trading*** where ADM had been aware of the foreign (Indonesian) proceedings for over two years and indeed participated in those proceedings for over a year before making the application for anti-suit relief.

110. Furthermore, whilst the fact that resources of both the Hong Kong and the English court have been taken up dealing with this matter is regrettable, in the circumstances of this case - where the only matter with which the Hong Kong court has had to deal is the stay application itself and the proceedings have not progressed much further substantively - I do not accept that this should count as a factor against the grant of anti-suit relief if that would otherwise be appropriate.

111. Put shortly, I reject Mr Ghossoub's contention that delay or issues of comity, in the sense described in ***Ecobank*** provide a strong reason in the present case why an injunction should not be granted given Mr Ghossoub's breach of contract.

Conclusion in relation to the existence of strong reasons

112. I come back therefore to the question whether Mr Ghossoub is able to identify any factor that either alone or in combination with other factors provides a strong reason why I should not grant an anti-suit injunction to restrain his continuing breach of clause 23.2 of the SPA in the manner I have described above.

113. In my view, having considered the matters referred to above, strong reason does exist for not granting injunctive relief. In particular:

(1) It is plain that it is impossible to disentangle matters in a way that will ensure that the whole dispute can be resolved against all parties in this jurisdiction.

(2) This follows from the fact that there is no basis for restraining the HK Petition in so far as it is brought against TYRH, WPP plc and Y&R. Inevitably therefore, to require

any part of that dispute to be litigated in England will bring about duplication and indeed the risk of conflicting decisions that might otherwise be avoided. I am of course conscious that there are already also proceedings in this jurisdiction in the form of the defaulting shareholder claim, but the allegations in those proceedings do not cover the same territory as the HK Petition and are focussed on a rather different dispute the resolution of which need not overlap with the matters the subject of the HK Petition.

(3) The fact that, as I have found and as WPP themselves accept, it must be for the Hong Kong court alone to determine whether or not there has in fact been unfair prejudice such as to entitle Mr Ghossoub to a remedy (and if so what remedy), and, further, that there are additional, albeit probably limited, aspects of the underlying disputes relied upon in the HK Petition which fall outside the scope of clause 23.2, are also matters of significance. This is because, even in relation to Cavendish, it is therefore inevitable that the dispute, or at least some parts thereof, will need to be substantively considered by the Hong Kong court.

(4) Whilst it is of course nonetheless possible to require Mr Ghossoub to bring to the English court for resolution those disputes arising in the context of the HK Petition which do come within the scope of clause 23.2 at the same time as the whole of the HK Petition as against the respondents other than Cavendish and parts of the claim against Cavendish are before the Hong Kong courts, this does not strike me as a desirable outcome.

(5) In particular, it seems to me to be preferable that the court that is ultimately to determine the HK Petition and consider whether relief is appropriate, viz. the Hong Kong court, should be able to do so after having itself adjudicated in relation to the underlying disputes with regard to all parties without having to wait until some of the matters likely to be relevant to its determination have been adjudicated upon by a (for it) foreign court.

114. It follows that I have concluded that I should not grant an interim anti-suit injunction against him in the terms sought by WPP. I reach this conclusion with some reluctance given that Mr Ghossoub is in my view guilty of breach of contract in the way I have described above.

The applications to set aside service

115. I turn next to deal with Mr Ghossoub's applications to set aside service of both the anti-suit claim and also the defaulting shareholder claim.

116. It will be recalled that this involves an attack on two orders made by this Court, first, the order made by Phillips J on 20 May 2015 granting WPP permission to serve the anti-suit claim out of the jurisdiction, and secondly, the order made by HHJ Waksman QC on 8 September 2016 granting WPP permission to serve both the anti-suit claim and also the defaulting shareholder claim by an alternative method.

117. Put shortly, Mr Bèar QC on behalf of Mr Ghossoub submits that both orders should be set aside because, as he contends, the applications which led to those orders were in each case tainted by a failure to comply with the obligation to make full and frank disclosure and/or as a result of misrepresentations. He further submits in relation to the order for service by alternative method that this should be set aside because no power existed under CPR 6.15 to make such an order in the absence, as he contends, of any 'good reason' for permitting service in the circumstances of the present case by an alternative method.

118. Before dealing with Mr Ghossoub's arguments in this regard, it is helpful first to refer again to the facts relevant to these matters.

119. As already noted, the anti-suit claim was issued on 15 May 2015 and the application for permission to serve the claim on Mr Ghossoub in Dubai was made that same day, supported by a witness statement made by Mr Oxnard of SPB. On 20 May 2015, Phillips J made the order sought.

120. The manner in which service of proceedings in this jurisdiction is to be effected on a person resident in the UAE is the subject of a treaty dated 7 December 2006 made between the UK and the United Arab Emirates on Judicial Assistance in Civil and Commercial Matters (the "Service Treaty"). It is unnecessary for present purposes to get into the detail of the Service Treaty, save to note that in accordance with Article 5 thereof, for service to be effected in the UAE, a request must be made by via what is referred to in the Service Treaty as the "*Central Authorities and be transmitted through Diplomatic Channels*".

121. On 14 August 2015, WPP's solicitors, SPB, wrote to the Foreign Process Section of HMCTS providing copies of the relevant documents and requesting that service be effected on Mr Ghossoub at his residence in Dubai in accordance with the Service Treaty. HMCTS at this time provided SPB with an information sheet relating to service in Dubai that indicated that the process was likely to take six months. It also made clear that the UAE authorities would make only a single attempt at service; if this was unsuccessful the relevant documents would be returned.

122. It is worth observing at this point that the address given for Mr Ghossoub in the documentation provided to HMCTS by WPP referred to this as "*Villa E1 55, Jasmin 2 Street, Emirates Hills, Dubai*". This reflected the address Mr Ghossoub's own solicitors had given for him in the HK Petition. However, a slightly different address was given for him in other documents, including for example the SPA and SA, which recorded this as "*Villa E155*" rather than "*Villa E1 55*".

123. On 18 August 2015, HMCTS wrote to SPB confirming receipt of the request for service on Mr Ghossoub in Dubai and informing SPB that the documents to be served had been dispatched to Dubai. A further slight modification in Mr Ghossoub's address appears to have be made in the documents submitted to the authorities in Dubai; this was now recorded as "*Villa E1-55*".

124. Since WPP understood that service via the Service Treaty was likely to take some time, it sought to expedite matters and, on 20 November 2015, SPB wrote to Mr Ghossoub's solicitors, HFW, referring to the anti-suit claim and asking whether HFW would accept service. Three days later, on 25 November 2015, SPB sent HFW copies of the relevant documents. WPP's attempts to expedite matters in this way came to nothing when, on 9 December 2015, HFW wrote to SPB informing them that the anti-suit claim would need to be served in the UAE in the ordinary way. Mr Ghossoub was of course perfectly entitled to decline to instruct HFW to accept service on his behalf but it is pertinent to note that he would from this point have been aware that the claim had been issued and that steps were being taken to serve him. He would also have been aware of the details of that claim.

125. On 21 December 2015, the defaulting shareholder claim was issued. On 15 January 2016, SPB wrote to HFW again asking whether they would accept service of this claim and a little later, on 7 March 2016, also provided HFW with the claim form and particulars of

claim. On 3 April 2016, HFW wrote to inform SPB that Mr Ghossoub had again declined to instruct them to accept service. Mr Ghossoub was, again, perfectly entitled to take this position, but it is again pertinent to note that he would from this point have been aware that this claim also had been issued and that steps were being taken to serve him. He would here also have been aware of the details of the claim.

126. On 11 March 2016, Cavendish and TYRH applied to serve the defaulting shareholder claim on Mr Ghossoub out of the jurisdiction, permission for which was granted by Sir Richard Field on 16 March 2016. Cavendish and TYRH were then required to follow the same process for service as had been followed in relation to the anti-suit claim.

127. The delays in being able to serve the claims led to multiple applications having to be made to court for extensions of time. By the end of August 2016, it had been necessary to make three applications for an extension of time in relation to the anti-suit claim and two in relation to the defaulting shareholder claim.

128. So far as concerns the progress made with service of the anti-suit claim into Dubai, by early 2016, WPP had yet to receive any news of progress. They therefore decided to explore other alternatives in terms of effecting service in the UAE taking advice from local lawyers in the UAE. They were advised that it was possible under UAE law to serve foreign court proceedings via the Dubai Court Notary Public and, following this, WPP took steps to seek to effect service via what they understood to be this alternative route.

129. It was in this context that on 21 June 2016, SPB received a letter from HMCTS enclosing evidence of non-service of the anti-suit claim documents. It was apparent from the documents provided to SPB at that time that the attempt to serve had been made some time earlier, in early October 2015. Also provided to SPB at this time was a letter from the Foreign & Commonwealth Office to HMCTS indicating that no service had taken place because Mr Ghossoub's exact address could not be located; a note made at the time by the Dubai court bailiff who had attempted service recorded that the bailiff was unable to "*find a villa under the number of E1-55*" at the address provided. The same point was made in other documents provided to SPB in June 2016. In particular, a letter dated 17 November 2015 from the UAE Ministry of Foreign Affairs to HMCTS enclosed a letter from the UAE Ministry of Justice dated 21 October 2015 returning the relevant documentation; this also

explained that the "*official…when visiting the address stated on the judicial documents did not locate a villa which carried the number E1-55 and, therefore, did not serve the notice*".

130. Following this notification that service via the request to the UAE authorities had failed, SPB continued to explore serving Mr Ghossoub in Dubai by way of the Dubai Court Notary Public. However, this too came to nothing: following three failed attempts to effect service by this route in August 2016, the advice SPB received from its advisers in Dubai was that they should serve through diplomatic channels, which was of course what they had unsuccessfully attempted around a year earlier. (There is a dispute between the parties' Dubai law experts as to whether service by way of the Dubai Court Notary Public was in fact a permitted route to service: Mr Galadari on behalf of WPP contends that it is whereas Mr Al Heloo on behalf of Mr Ghossoub says that it is not. This was not however an issue developed at the hearing and it is not in my view necessary to come to a conclusion as to which of the two experts was correct.)

131. And so it was that eleven months on, WPP, having sought to follow the diplomatic route for service contemplated by the Service Treaty, as well as other methods, had made no real progress. WPP became concerned that - in addition to the obvious difficulties this failure to serve caused for progress of the claims in England - the delay this involved might prejudice the stay application being pursued in Hong Kong.

132. It was in these circumstances that, on 8 September 2016, WPP made a without notice application pursuant to CPR 6.15 and 6.27 for permission to serve both the anti-suit claim and the defaulting shareholder claim, as well as the application for an interim anti-suit injunction, by alternative means, namely by sending the relevant documents to HFW's Dubai offices. A witness statement made by Mr Oxnard supported the application. This expressed the view that, "[*i]n short, having been granted permission to serve anti-suit proceedings and, subsequently, proceedings seeking substantive relief against [Mr Ghossoub] (who resides in Dubai), despite taking substantial steps to effect service, that has proved impossible*".

133. As already noted above, the order sought was made on the same day, 8 September 2016, by HHJ Waksman QC. On the following day, 9 September 2016, SPB wrote to HFW enclosing by way of service all relevant documents in relation to both claims.

CPR 6.15 and service of a claim form by an alternative method

134. CPR 6.15 (1) provides that "*Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place*." CPR 6.27 provides further that "*Rule 6.15 applies to any document in the proceedings as it applies to a claim form and reference to the defendant in that rule is modified accordingly*."

135. In ***Societe Generale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS & Ors*** [2017] EWHC 667 (Comm), Popplewell J, reviewed a number of the earlier authorities relevant to CPR 6.15 and CPR 6.16. In summarising the principles relevant to CPR 6.15, he said (at [49]):

> "… (2) In deciding whether to authorise service by an alternative method under CPR Rule 6.15, whether prospectively or retrospectively, the Court should simply ask itself whether there is "a good reason": *Abela* at [35]. This is the same test as whether there is good reason (without the indefinite article): *Barton* at [19(i)]. The Court must consider all the relevant circumstances in determining whether there is a good reason for granting the relief; it is not enough to identify a single circumstance which taken in isolation would be a good reason for granting relief (e.g. allowing the claimant to pursue a meritorious claim) if it is outweighed by other circumstances which are reasons not to grant the relief…
>
> (3) A critical factor is whether the defendant has learned of the existence and content of the claim form: *Abela* at [36], *Barton* at [19(ii) and (iii)]. If one party or the other is playing technical games, this will count against him: *Abela* at [38]; *Barton* at [19(vii)]. This is because the most important function of service is to ensure that the content of the document served is brought to the attention of the defendant: *Abela* at [37]). The strength of this factor will depend upon the circumstances in which such knowledge is gained. It will be strongest where it has occurred through what the defendant knows to be an attempt at formal service. It may be weaker or even non-existent where the contents of the claim form become known through other means. It is well known that sometimes issued claim forms are sent to a defendant "for information only" because the claimant does not want for the time being to trigger the next steps. Sometimes a claim form may be sent in circumstances which although less explicit do not suggest that the sending is intended to amount to service…
>
> (4) However the mere fact that a defendant learned of the existence and content of the claim form cannot of itself constitute a good reason; something more is required: *Abela* at [36], *Barto**n*** at [19(ii)];
>
> (5) There will be a focus on whether the claimant could have effected proper service within the period of its validity, and if so why he did not, although this is by no means the only area of inquiry: *Abela* at [48], *Kaki* at [33], *Barton* at [19(iv)]; generally it is not necessary for the claimant to

show that he has taken all the steps he could reasonably have taken to effect service by the proper method: *Barton* at [19(v)]; however negligence or incompetence on the part of the claimant's legal advisers is not a good reason; on the contrary, it is a bad reason, a reason for declining relief: *Hashtroodi* at [20], *Aktas* at [71].

(6) Delay may be an important consideration. It is relevant whether the application for relief has been made promptly and, if not, the reasons for the delay and any prejudicial effect: …"

136. Later in the same paragraph, Popplewell J went on to refer to additional considerations that might be relevant where the Hague Convention or, as here, a bilateral service treaty governs service in the particular jurisdiction:

"(9)(a) Where service abroad is the subject matter of the Hague Convention or a bilateral treaty, it will not normally be a good reason for relief under CPR 6.15 or 6.16 that complying with the formalities of service so required will take additional time and cost: *Knauf* at [47], *Cecil* at [66], [113].

(b) It remains relevant whether the method of service which the Court is being asked to sanction under CPR 6.15 is one which is not permitted by the terms of the Hague Convention or the bilateral treaty in question. For example, where the country in which service is to be effected has stated its objections under Article 10 of the Hague Convention to service otherwise than through its designated authority, as part of the reciprocal arrangements for mutual assistance on service with this country, comity requires the English Court to take account of and give weight to those objections: see *Shiblaq* at [57]. In such cases relief should only be granted under Rule 6.15 in exceptional circumstances. I would regard the statement of Stanley Burnton LJ in *Cecil* at [65] to that effect, with which Wilson and Rix LJJ agreed, as remaining good law; it accords with the earlier judgment of the Court in *Knauf* at [58]-[59]; Lord Clarke at paragraphs [33] and [45] of *Abela* was careful to except such cases from his analysis of when only a good reason was required, and to express no view on them (at [34]); and although Stanley Burnton LJ's reasoning that service abroad is an exercise of sovereignty cannot survive what was said by Lord Sumption (with unanimous support) at [53] of *Abela*, there is nothing in that analysis which undermines the rationale that as a matter of comity the English Court should not lightly treat service by a method to which the foreign country has objected under mutual assistance treaty arrangements as sufficient. That is not to say, however, that there can never be a good reason for ordering service by an alternative method in a Hague Convention case: *Bank St Petersburg* at [26]."

137. It is worth noting that, even where service abroad is the subject matter of the Hague Convention or a bilateral treaty, the test remains whether there is 'good reason' for permitting service by an alternative method and I do not regard anything said in ***SocGen*** by Popplewell J as having been intended to suggest that any different test is to apply to

such cases. This is not to say that the Court's approach in such cases will be precisely the same as those in which the Hague Convention or a bilateral treaty have no application: on the contrary, as reflected in Popplewell J's analysis in ***SocGen*** it is clear from ***Abela and ors v Baadarani and Anor*** [2013] UKSC 44, ***Knauf UK GmbH v British Gypsum Ltd.*** [2001] EWCA Civ 1570 and ***Bayat and Ors v Cecil and Ors*** [2011] EWCA Civ 125 that additional considerations may arise.

138. In ***Cecil***, Stanley Burnton LJ (at [65]-[67]) expressed the view that where the Hague Convention applied, service by an alternative method under CPR 6.15 "*should be regarded as exceptional, to be permitted in special circumstances only*"; it is however apparent from what he then went on to say that his purpose in so describing the position was simply to make clear that the Court in such cases must take care not to permit the service by an alternative method under CPR 6.15 to become either "*normal*" or "*optional*" because this would subvert the provisions agreed by the UK in the Hague Convention or bilateral treaty. It was to this end that, as he explained, in general the desire of a claimant to avoid the delay inherent in following the processes for service stipulated by the Hague Convention or bilateral treaty, would not of itself justify an order for service by an alternative method; nor would reliance on the Overriding Objective justify such an order in such cases. Were the position otherwise the stipulated processes "*would be optional; indeed, service by alternative means would become normal*".

139. I would note that this understanding of what was said in ***Cecil*** is consistent with the analysis of the Court of Appeal in ***Knauf***, which, again, reflects a concern not to subvert any treaty or convention: see, esp Henry LJ, giving the judgment of the Court, at paragraphs 47 and 59.

140. In ***Bill Kenwright Ltd v Flash Entertainment FZ LLC*** [2016] EWHC 1951 (QB) Haddon-Cave J (at [47]-[55]) found there to be good reason to allow service by an alternative method on the defendant at its UAE address having regard to the fact that service in the UAE via diplomatic channels could take up to eight months; that proper attempts had been made to serve the proceedings on the defendant; that the defendant was aware of the dispute but had said that it would not accept service by fax or email; that the proposed method of service was not contrary to UAE law; that there had been no inordinate delay on the claimant's part; and that in circumstances where the defendant had been aware of the proceedings for a long time and had engaged with London solicitors it would be pointless

to make the claimant re-serve the proceedings. In reaching this conclusion Haddon-Cave J had to deal with a submission that the making of an order for service by an alternative method would subvert the application of the Service Treaty. It is notable that Haddon-Cave J, whilst accepting the proposition that the application of the Service Treaty was a matter to be taken into account, plainly still regarded the relevant test as being whether there was a good reason to make such an order. I respectfully agree.

Were WPP entitled to an order under CPR 6.15 on the facts of the present case?

141. Mr Ghossoub advances the following arguments in support of his contention that no good reason exists in the context of the present case that could properly support an order for service by an alternative method under CPR 6.15.

(1) There was, he says, no evidence before the Court to suggest that requests to serve foreign proceedings in the UAE via the diplomatic channels as required by the Service Treaty do not ordinarily result in the proceedings being served successfully. In this context, he notes that there is no suggestion on the part of WPP that the failure to serve Mr Ghossoub was anything other than unusual.

(2) Moreover, he contends, the reason service through the diplomatic channels provided for by the Service Treaty failed, was because the address identified for Mr Ghossoub was incorrect: the documents provided to the UAE authorities gave this as *"Villa E1-55"* whereas his address was in fact *"Villa E155"*. Mr Ghossoub relies in this regard on the opinion expressed by Mr Omar Al Heloo, a UAE lawyer from whom expert evidence on the service issues under UAE law was adduced. It was, says Mr Ghossoub, therefore WPP's own negligence that led to service in Dubai not being effected.

(3) Furthermore, says Mr Ghossoub, once WPP were informed that service had not been effected, the appropriate course for WPP was to have made a fresh request for service via diplomatic channels as contemplated by the Service Treaty, but this time taking additional steps to ensure that the Dubai officials had no difficulty in locating Mr Ghossoub's residence including by using the correct address, by providing detailed instructions and/or maps, by appointing local lawyers to assist and, further, by including a request that the proceedings be served by officials in the UAE but using alternative methods of service.

(4) He contends also that WPP's attempts to serve through the Dubai Court Notary Public were always futile and that WPP failed to utilise other methods that might have been available under UAE law.

(5) He points to the failure even to attempt to serve the defaulting shareholder claim in accordance with the procedures laid down in the Service Treaty.

142. Having considered with care the arguments advanced by Mr Ghossoub, I am satisfied that, contrary to what he contends, there was good reason for an order under CPR 6.15 permitting service by an alternative method in the present case. In particular:

(1) Mr Ghossoub was well aware of both claims, including the details thereof, from an early stage. He was also well aware that WPP were seeking to serve those claims on him. This being so, the most important function of service, "*to ensure that the contents of the document served… is communicated to the defendant*" (***Abela***, at paragraph 37), had long been accomplished by the time the application was made.

(2) There can be no dispute that WPP did attempt to serve the anti-suit claim in accordance with the Service Treaty. Whether or not it is the case that the provisions of the Service Treaty will ordinarily result in service being satisfactorily accomplished, that did not occur in the present case.

(3) This is not therefore a case where a party has sought simply to avoid compliance with the service requirements stipulated, or to use CPR6.15 to subvert the application of a treaty. On the contrary, the evidence indicates that WPP took substantial steps in attempting to serve Mr Ghossoub in accordance with what they understood to be the procedures required and allowed by the law of Dubai.

(4) The net effect of the failure (for whatever reason) to serve in accordance with the Service Treaty was that no service had been effected nearly a year after the WPP Parties had instituted the stipulated processes and despite the attempts by WPP, on advice, to identify an alternative way to accomplish service on Mr Ghossoub in Dubai.

(5) Whilst an error as to Mr Ghossoub's precise address may well have been the cause of the failure to serve through diplomatic channels in accordance with the Service Treaty, the error appears on its face to have been fairly minor, and it is quite understandable

that WPP and its agents might have failed to appreciate its significance. As noted above, it appears that a similar, if not precisely the same, error was made by Mr Ghossoub's own advisers on documents produced by them on his behalf. Consistently with the error and its significance being easily overlooked, I note also that despite having had sight of the relevant service documentation, it appears that no-one acting for Mr Ghossoub spotted the error or its significance either, at least prior to Mr Al Heloo producing his report in May 2017.

(6) In the circumstances of the present case, the fact that measures may have been available to WPP in the UAE that might have meant that some further attempt to serve in Dubai would have met with more success than the attempts already made, does not seem to me to be a factor that should negative the existence of a strong reason for service by an alternative method.

(7) Whilst it is correct to note that WPP did not even attempt to serve the defaulting shareholder claim in accordance with the Service Treaty, this was, on the basis of what they understood at the time, entirely understandable given the experience encountered with the (non) service of the anti-suit claim. In the circumstances, I would not regard the approach taken by WPP in relation to the defaulting shareholder claim as involving an attempt simply to avoid compliance with the service requirements stipulated or to use CPR 6.15 to subvert the application of the treaty.

(8) There was no possible prejudice of which Mr Ghossoub could legitimately complain consequent upon an alternative method of service being permitted.

(9) There was no delay, inordinate or otherwise, on the part of WPP in making the application for service by alternative means.

143. It follows from the foregoing that I reject Mr Ghossoub's application to set aside the order permitting service by an alternative method.

Failure to make full and frank disclosure

144. As noted above, by way of a second prong to the attack he makes on service, Mr Ghossoub also contends that the orders made, first permitting service of the anti-suit claim out of the jurisdiction and, later, permitting service of both claims by an alternative method,

are both infected by failures to make full and frank disclosure and that both should be set aside for this reason as well.

145. According to Mr Ghossoub, the application under CPR 6.15 for permission to serve by an alternative method was accompanied by the following failures to make full and frank disclosure.

(1) WPP failed to draw the Court's attention to the applicability of the Service Treaty and the fact that this meant that additional considerations might need to be taken into account in deciding whether to make the requested order.

(2) WPP, through Mr Oxnard, provided the Court with an inaccurate description of the means by which it was possible to serve proceedings in Dubai.

(3) WPP, again through Mr Oxnard, gave the Court the impression that more than one attempt had been made to serve the claims through the normal diplomatic channels provided for by the Service Treaty when in truth only one such attempt had been made.

(4) WPP failed to draw the Court's attention to the likely reason why service in Dubai had not been effected, namely that an incorrect address had been provided for Mr Ghossoub. Moreover, given that this was the likely reason for the failure of service, it was wrong of Mr Oxnard to have suggested that service in Dubai had proved impossible when the problem was in fact specific and remediable.

(5) Related to this, it was also wrong of WPP to have suggested that there was no purpose in requiring a further attempt to serve Mr Ghossoub at his residence because, so they suggested, they knew of no better details that could assist in finding that residence when these details were in fact ascertainable by them.

(6) WPP failed properly to draw the Court's attention to the material distinction between the position in relation to the anti-suit claim, where an attempt at service in accordance with the Service Treaty had been made, and the position in relation to the defaulting shareholder claim, where there had been no such attempt.

146. According to Mr Ghossoub, the application to serve the anti-suit claim out of the jurisdiction was accompanied by the following failures to make full and frank disclosure.

(1) WPP failed to draw the Court's attention to the fact that, of the claimants in the anti-suit claim, Cavendish alone was a party to the SPA and only Cavendish and TYRH were parties to the SA. The Court was therefore not specifically alerted to the material issues around whether Mr Ghossoub could properly be said to be in breach of contract in relation to his pursuit of the HK Petition against TYRH, WPP plc and Y&R.

(2) The particulars of claim shown to the Court included the allegation that the Contracts (Rights of Third Parties) Act 1999 was applicable, a matter that might be relevant to whether Mr Ghossoub's pursuit of the HK Petition against TYRH, WPP plc and Y&R but WPP failed to draw the Court's attention to the fact that the operation of that Act was expressly excluded from the SPA by clause 21.11 and might have no application to an employment contract such as the SA.

(3) The particulars of claim shown to the Court included the allegation that TYRH, WPP plc and Y&R had an "*equitable right*" to enforce the exclusive jurisdiction clauses but, contends Mr Ghossoub, the Court was not informed that there was in reality no conceivable basis upon which it might be said that those parties had any such equitable right.

147. In terms of principles relevant to whether there has been a failure to provide full and frank disclosure, useful guidance is to be found in ***Arena Corporation Ltd v. Schroeder*** [2003] EWHC 1089 where Alan Boyle QC sitting as a Deputy High Court Judge said this (at paragraphs 113 - 116):

> "113. The starting point in all such cases is now the judgment of the Court of Appeal in *Brink's Mat Ltd v Elcombe* [1988] 1 W.L.R 1350. Ralph Gibson LJ said this at p 1356:
>
> > "In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me in to include the following.
> >
> > (1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see *Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 515 per Scrutton L.J.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1859) 2 Mac. & G. 231, 238 and Browne-Wilkinson J. in *Thermax v. Schott Industrial Glass Ltd*. [1981] F.S.R. 289, 295.

(3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc. v. Robinson* [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 92–93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in *Bank Mellat v. Nikpour*, at p. 91 citing Warrington L.J. in the *Kensington Income Tax Commissioners'* case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient, materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded". per Lord Denning M.R. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

"When the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant … a second injunction

if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed" per Glidewell L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc*., ante, pp. 1343H—1344A."

114. The primary duty is to make full and fair disclosure of the material facts. This duty was explained by Lord Denning M.R. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 89 in the following terms:

"I would like to repeat what has been said on many occasions. When an *ex parte* application is made for a Mareva injunction, it is of the first important that the plaintiff should make full and frank disclosure of all material facts. He ought to state the nature of the case and his cause of action. Equally, in fairness to the defendant, the plaintiff ought to disclose, so far as he is able, any defence which the defendant has indicated in correspondence or elsewhere. It is only if such information is put fairly before the court that a Mareva injunction can properly be granted."

In the same case Donaldson J. said this (at p 90):

"This principle that no injunction obtained *ex parte* shall stand if it had been obtained in circumstance s in which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed, it is so well enshrined in the law that it is difficult to find authority for the proposition; we all know it; it is trite law. But happily we have been referred to a dictum of Warrington L.J. in *R. v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486 at 509. He said:

'It is perfectly well settled that a person who makes an *ex parte* application to the court - that is to say, in the absence of the person who will be affected by that which the court is asked to do - is under an obligation to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.'"

Slade L.J. said this (at p 92):

"I think it is of the utmost importance that on any *ex parte* application for an interim injunction the applicant should recognise his responsibility to present his case fully and fairly to the court and that he should support it by evidence showing the principal material facts upon which he relies. Most particularly, I think that this duty falls on an applicant seeking a Mareva injunction which, if granted, may have drastic consequences for a defendant, by freezing assets in this country which are not necessarily even the subject matter of the action."

115. In *Siporex Trade S. A. v. Comdel Commodities Ltd* [1986] 2 Lloyd's Rep. 428, 437, Bingham J. said this:

"The scope of the duty of disclosure of a party applying *ex parte* for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the

> protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for the applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the Court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure..."

116. In *Memory Corporation Plc v Sidhu (No. 2)* [2000] 1 WLR 1443, 1459, Mummery L.J. said this:

> "It cannot be emphasized too strongly that at an urgent without notice hearing for a freezing order, as well as for a search order or any other form of interim injunction, there is a high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case."

148. In ***DSG Retail Ltd. v. MasterCard Inc.*** [2015] CAT 7 at [44], Roth J, dealing with a submission that there had been a failure to make full and frank disclosure in the context of an application to serve out of the jurisdiction made without notice, summarised the position as follows:

> "… As on any application without notice, the applicant is under a duty to make full and frank disclosure of matters material to the application. That means not only that care needs to be taken in setting out the factual basis for the application, but also that the Tribunal's attention should be drawn to any significant objections to the application that the defendants could reasonably be expected to raise if they were before the Tribunal. The duty does not require disclosure to the same degree as on an application for a without notice injunction, such as a freezing order, where granting the application has immediate and potentially serious consequences for the defendant. The factors relevant to an application to serve out are only those which relate to the limited inquiry the Tribunal carries out in determining whether to grant such permission. Nonetheless, within the limited scope of that inquiry, if the claimant is aware of such factors as might cause the Tribunal to doubt whether permission should be granted, they should be clearly disclosed".

149. I consider there to be force in a number of the complaints made by Mr Ghossoub about the manner in which matters were presented to the Court in relation to both the application to serve out and the application to serve by an alterative method. In particular:

(1) In relation to the application for service by an alternative method, WPP ought in my view to have brought the applicability of the Service Treaty to the Court's attention. They ought also to have brought to the Court's attention the fact that no attempt had been made to serve the defaulting shareholder claim in accordance with the methods provided for by that treaty. WPP ought also to have taken additional steps to ascertain and ensure that the Court understood more precisely the likely cause of the difficulties encountered in serving Mr Ghossoub in Dubai. They ought also not to have suggested to the Court that it was impossible to serve in Dubai but should instead have explained that a great deal of time had already been lost and there was no guarantee that a further attempt would be successful.

(2) In relation to the application for service out, WPP could and should have been clearer in the explanation given to the Court about the difference between the position of Cavendish as a party to the SPA on the one hand, and, on the other, the position of TYRH, WPP plc and Y&R. They ought also to have drawn to the Court's attention the non-applicability of the Contracts (Rights of Third Parties) Act 1999.

150. Whilst these failures to comply with the important requirement to make full and frank disclosure are troubling I do not consider it would be appropriate in the circumstances of this case to set aside either the service out order or the order allowing service by an alternative method. In reaching this conclusion, the following matters seem to me to be of particular significance:

(1) WPP's failure to draw these matters clearly to the attention of the Court was in my view plainly inadvertent. I also note in relation to some at least of these matters, for example the fact that not all the WPP Parties were party to the SPA, that the position was in any event reasonably clear from other materials provided, and submissions made, to the Court.

(2) Although it might be said that WPP should have been clearer in explaining to the Court precisely why service in Dubai had been unsuccessful, and should also have explained to the Court that it was possible a further attempt at service might be successful albeit that it would result in further potentially substantial delay, I accept that WPP did not at the time themselves appreciate either the fact or significance of the error made that had been made in relation to Mr Ghossoub's address. This was in my view entirely understandable and I do not attach any culpability either to WPP or their advisers in this regard.

(3) Whilst a clear identification of the matters I have highlighted above was likely to have brought to the attention of the Court matters it would have wished to consider, I do not believe, in the case of either application, that the result is likely to have been different. Nor do I consider that any advantage was obtained by WPP of which it would be appropriate that they should be deprived.

(4) This being so, and in light of the matters identified above, I consider that setting aside either order would be a disproportionate response to the failings I have identified. I am, moreover, conscious that these proceedings have already been seriously delayed by problems affecting service and I see no benefit in making any order that would exacerbate still further that state of affairs.

Conclusions

151. In short, and for the reasons set out above:

(1) I decline to grant an interim anti-suit injunction in relation to the HK Petition;

(2) I decline to set aside service of the anti-suit claim or the defaulting shareholder claim on Mr Ghossoub.