Neutral Citation Number: [2019] EWHC 3361 (Comm)

Case No: CL-2017-000625

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11/12/2019

Before :

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

(1) PRASHANT HASMUKH MANEK
(2) SANJAY CHANDI
(3) EAGM VENTURES (INDIA) PRIVATE LIMITED

Claimants

- and -

(1) IIFL WEALTH (UK) LIMITED
(2)RAMU RAMASAMY
(3) PALANIYAPAN RAMASAMY
(4) AMIT SHAH

Defendant

- -

Mr Stephen Midwinter QC (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Claimants**
Mr James Collins QC and Mr Siddharth Dhar (instructed by **Burness Paul LLP**) for the **Defendants**

Hearing dates: 16 October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC :

Introduction

1. This is the hearing of an application by the 2nd and 3rd defendants under CPR Part 11 for orders (i) setting aside the order of Andrew Baker J made on 2 February 2018 by which he granted permission to serve the claim form and Particulars of Claim on the 2nd and 3rd defendants out of the jurisdiction; (ii) setting aside the purported service of the claim form and Particulars of Claim on the 2nd and 3rd defendants; (iii)declaring that the English Court has no jurisdiction to try the claim brought against the 2nd and 3rd defendants; and (iv) setting aside the worldwide freezing order made on 14 March 2018.

Background

2. The claimants were minority shareholders in an Indian registered company called Hermes I Tickets Private Limited ("Hermes"). The majority shareholder was another Indian registered company called Great Indian Retail Private Limited ("GIR"). GIR was controlled by the 2nd and 3rd defendants, each of whom live in Chennai in India. In 2014, the second and third defendants commenced looking either for investors in or buyers of Hermes. These efforts culminated in a series of transactions by which, in summary, GIR sold its interest in Hermes to a Mauritian domiciled entity called Emerging Markets Investment Fund 1A ("EMIF") and the claimants' minority interest as well, having first purchased that interest from the claimants at a price of approximately €480 per share pursuant to share purchase agreements dated 9 September 2015 ("SPAs"). The SPAs were expressly made subject to Indian law and each contained within it an arbitration agreement. On or about 27 October 2015, EMIF sold its interest in Hermes to a German registered company called Wirecard AG ("WAG") at a price that the claimants allege equated to about €4,150 per share.

3. The claimants' case is that WAG's offer to purchase was received by the second and third defendants prior to the completion of the sales by the claimants to GIR. The claimants maintain that they were induced to enter into the sales to GIR of their shares in Hermes by a series of fraudulent misrepresentations made in the course of a number of phone calls from either India or Singapore, a meeting in Chennai on 4 July 2015 and a series of meetings in London during August 2015 concerning the performance of Hermes, the value of the claimants' shares in Hermes, the attractiveness of the offer being made for the shares and the identity of the ultimate purchaser being EMIF, when on the claimants' case it was not EMIF but was WAG.

4. These proceedings were commenced on 6 October 2017. The proceedings have been served on the first defendant ("IIFL UK") in England and on the 4th Defendant ("AS") in Singapore. AS has not challenged jurisdiction, he and IIFL UK have filed Defences and a Reply to those Defences was served on 18 June 2018. The claimants sought permission to serve the proceedings on the second and third defendants out of the jurisdiction at their last known addresses in Chennai. The gateways relied on were those set out in Para. 3.1(3) (the necessary and proper party gateway) and Para. 3.1(9)(a) (tortious acts committed within the jurisdiction) of Practice Direction 3B ("3BPD"). Andrew Baker J granted permission on 2 February 2018. On 16 March 2018, the claimants applied for and were granted a worldwide freezing order against the 2nd and 3rd defendants. There were difficulties in serving the proceedings which I need not take

up time describing. It is sufficient to say that it was only in February 2019 that the 2nd and 3rd defendants authorised their solicitors to accept service of the proceedings. On 14 March 2019, each of the 2nd and 3rd defendants acknowledged service indicating an intention to contest jurisdiction and, on 25 April 2019, they each filed the application I now have to determine.

Defendants' cases in Summary

5. Both defendants agree to this application being determined on the basis of a presumption that there is a serious issue to be tried as between them and the claimants. This concession is one that is made for the purposes of this application but not otherwise, as is apparent from Burness Paull's letter of 31 May 2019, where it is stated that the 2nd and 3rd defendants *"... do not intend to challenge the Court's jurisdiction on the ground that there is no good arguable case in relation to our clients. ... that is not because our clients accept that [the claimants] have advanced a good arguable case but rather because the underlying claims are fact sensitive and we do not believe that the court will want to consider those issues at this phase of the proceedings ...*".

6. Where jurisdiction is in issue and jurisdiction is claimed by reference to the grounds set out in 3BPD, Para. 3.1 the claimant must satisfy the court that:

    (a) there is a good arguable case that the claim against the foreign defendant falls within one or more of the of the gateways set out in 3BPD, Para. 3.1;

    (b) in relation to the foreign defendant to be served, there is a serious issue to be tried on the merits of the claim; and

    (c) in all the circumstances (i) England is clearly and distinctly the appropriate forum for the trial of the dispute and (ii) the court ought to exercise its discretion to permit service out of the jurisdiction.

    - see Altimo Holdings and Investment Limited and others v. Kyrgyz Mobil Tel Limited and others [2011] UKPC 7 [2012] 1 WLR 1804 *per* Lord Collins JSC at [71]. The effect of the concession referred to in paragraph 5 above is to eliminate the need to consider further the issue referred to in sub-paragraph (b) above.

7. The 2nd and 3rd defendants submit that their application should succeed because:

    (a) there is no real claim as between the claimants and IIFL UK, the defendant who is alleged by the claimants to be the anchor defendant for the purpose of its reliance on the 3BPD Para. 3.1(3) gateway;

    (b) no tortious acts were committed in England so that the 3BPD Para. 3.1(9)(a) gateway is of no application;

    (c) the claims are ones that the parties have agreed to submit to arbitration by the arbitration agreements contained within each of the SPAs and it is not appropriate for the court to grant permission to serve out of the jurisdiction if thereafter the court would grant the defendants so served a stay under Section 9 of the Arbitration Act 1996 – see Golden Ocean Group Limited v. Humpuss Intermoda Transportasi Tbk Ltd [2013] EWHC 1025; [2013] 3 All E.R. (Comm) 1025 at [47]; and

(d) England is not the most appropriate forum for the trial of the action.

Gateway Issues

Necessary or Property Party Gateway

8. Para. 3.1(3) of 6BPD provides that:

> "A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and—
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

This formulation requires that the claimants demonstrate to the required standard that there is a real issue between the claimants and the anchor defendant (being " … *a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph* …") that it is reasonable for the court to try.

9. Generally, when considering gateway issues the required standard is:

> "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

– see Brownlie v. Four Seasons Holdings Inc [2018] 1 WLR 192 at para. 7, where the statement was strictly *obiter,* Goldman Sachs International v. Novo Banco SA. [2018] UKSC 34; [2018] 1 WLR 3683 at para. 9, where the Brownlie formulation was adopted by all five JSCs and Kaefer Aislamientos SA de CV v. AMS Drilling Mexico SA de CV [2019] EWCA Civ 10; [2019] 3 All E.R. 979 at para. 62, where the Court of Appeal held that the dispute about whether the Brownlie test was obiter had vanished following the judgment in Goldman Sachs (ibid.). In relation to limb (i), the "… *reference to "a plausible evidential basis" ... is a reference to an evidential basis showing that the Claimant has the better argument*" – see Kaefer Aislamientos SA de CV v. AMS Drilling Mexico SA de CV (ibid.) at para. 73 – and the onus rests on the claimant to establish it has the better argument - see Kaefer Aislamientos SA de CV v. AMS Drilling Mexico SA de CV (ibid.) at para. 75. Limb (ii) "*is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with "due despatch and without hearing oral evidence""* – see Kaefer

Aislamientos SA de CV v. AMS Drilling Mexico SA de CV (ibid.) at para. 78. Limb (iii) applies " … *where the Court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument*" see Kaefer Aislamientos SA de CV v. AMS Drilling Mexico SA de CV (ibid.) at para. 79 – which "… *introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits* ..." see Kaefer Aislamientos SA de CV v. AMS Drilling Mexico SA de CV (ibid.) at para. 80.

10. In relation to the necessary or proper party gateway, where the issue is whether there is a real issue as between the claimant and anchor defendant, there is substituted for the good arguable case test the lower summary judgment test – see Lungowe v. Vedanta Resources PLC [2019] UKSC 20; [2019] 3 All E.R. 1013 *per* Lord Briggs JSC at paragraph 42, where he said that "... *the single task of the judge ... was to decide whether the claim against Vedanta could be disposed of and rejected summarily without the need for a trial. This is because ... the assertion by a foreign defendant seeking to set aside permission to serve out of the jurisdiction under the necessary or proper party gateway that the claim against the anchor defendant discloses no real issue to be tried involves ... a summary judgment test* ".

The Real Issue Question

11. The claimants' case is that IIFL UK was represented by AS in two telephone conversations (which he made from Singapore) on 21 and 22 August 2015 during which it is alleged that AS made a series of fraudulent misrepresentations on behalf of IIFL UK.

12. The starting point is paragraph 13 of the Particulars of Claim where it is pleaded that:

> "… A meeting was then held between the Claimants' representatives and Amit and Sarju at the offices of the Claimants' representatives at 135 Greenford Road, Harrow … Amit introduced himself as the founder of "IIFL Wealth" and made a presentation to them on IIFL's business. Amit explained that he had set up IIFL UK and that they were in the process of being authorised by the …FCA … and establishing their London office. Amit wanted to explore opportunities with the Claimants' Representatives given their business was also in financial services and particularly considering their interest in Indian related investments. Amit's conduct, as pleaded below, is to be attributed to IIFL UK and/or IIFL UK is vicariously liable for that conduct."

The first of the conversations relied on is that referred to in paragraph 57 of the Particulars of Claim in which AS is alleged to have stated that "… *EMIF, which he said IIFL had helped to establish and raise funds for, was purchasing Hermes* … ". It is pleaded at paragraph 59 of the Particulars of Claim that both EMIF and IIFL Private Wealth (Mauritius) Limited were registered at the same address in Mauritius. The other telephone conversation relied on (which it is alleged took place on 22 August 2015) is

pleaded at paragraph 60 of the Particulars of Claim in which it is alleged that AS stated that the offer by the 2nd and 3rd defendants was a good deal and the claimants should sell their shares to GIR and that the first and second claimants could not sell to EMIF directly because they were non-residents. This in turn leads to paragraph 101 of the Particulars of Claim where it is pleaded that various express or implied representations "*... were made by Amit or IIFL UK ...*". It is alleged that the representations were false at paragraph 103 of the Particulars of Claim, and at paragraph 104 of the Particulars of Claim that all the defendants including both AS and IIFL UK acting by AS knew the representations were false or they were reckless as to whether they were true or false and thus it is alleged they were made fraudulently.

13. As is apparent from the summary set out above, the key foundation issue on which the claimants must show that there is at least a real issue to be tried is whether what AS is alleged to have said in the two phone calls is properly attributable to IIFL UK. If that is not the evidential result then the claimants cannot pass through the Para. 3.1(3) gateway.

14. There are a number of difficulties about this from the claimants' perspective. The claimants have not provided any evidence relevant to this issue other than that which I have summarised already. None of this material creates a realistic case on the key foundation issue. This is so not least because at all material times AS was a director not merely of IIFL UK but of nine other companies within the IIFL group. It is not suggested that AS was introduced as acting for IIFL UK at any stage or even that he held himself out as doing so. Paragraph 57 of the Particulars of Claim does not assert that IIFL UK helped raise funds for EMIF. Where IIFL UK is referred to that is what it is called throughout the pleading and if the understanding of the claimants concerning what AS is alleged to have said was that it was said on behalf of IIFL UK, then that would have been alleged. The implication that arises from paragraph 59 is that it is IIFL Mauritius that is being referred to in paragraph 57. There was no other reason for pleading the allegation. It is not alleged that AS was introduced in either of the two phone calls as acting for IIFL UK nor can that be inferred from the circumstances. The phone calls were made from Singapore and the emails that followed the conversations (which though not referred to in the Particulars of Claim are part of the evidence for the application) were signed by AS as Executive Director of IIFL Capital Pte Ltd, which is a Singapore entity, and all the contact details given are those appropriate for Singapore – see the emails from AS dated 25 August 2015 timed at 03.51 and 12.50.

15. The claimants did not assert a claim against IIFL UK until relatively late in the day and in circumstances that suggest that it was only when it had been decided to attempt commencing proceedings in the English Courts that such a claim was considered. The initial letter of claim dated 4 April 2017 was addressed to the 2nd and 3rd defendants and GIR. It continued:

> "3. This letter is sent to notify you of the existence of a dispute pursuant to clauses 3.2.2 and 3.2.3 of the Share Purchase Agreements ("SPAs") dated 9 September 2015 …
>
> If this dispute cannot be resolved amicably by the parties within 30 days of the date of this letter, the Investors will pursue all available remedies including but not limited to those set out in

> the SPAs. In this regard the Investors have consulted Indian, German, Mauritian and Singaporean Counsel and fully intend to pursue each and every remedy available to them in those jurisdictions …"

Two clear points emerge from this letter – first that a claim was being pursued only against the 2nd and 3rd Defendants and GIR and secondly that no claim was being contemplated in England. The reference to the clauses within the SPAs was to the dispute resolution provisions within each, which included an arbitration agreement. No claim was intimated against AS much less IIFL UK. The only mention of AS occurs in paragraph 76 of the letter, where it is stated that:

> "76. …on 21 August 2015, Amit Shah ("Amit") of IIFL Private Wealth ("IIFL") telephoned Hasu and Jayesh. IIFL, the parent group of IIFL Wealth UK Limited, is an international wealth Mauritius, and India. Amit was known to Hasu and Jayesh, having been introduced to them several years previously when IIFL was establishing its London office. Amit is a director of IIFL Wealth UK Limited, and a founder director of IIFL Wealth International. He was identified in his email signature block as an "Executive Director" of IIFL Capital Pte Ltd., a Singapore entity. IIFL Holdings is listed on the National Stock Exchange in India and has a market capitalisation of around US$1.7 billion.
>
> 77. IIFL Wealth (UK) Limited, as a UK registered financial services firm, is subject to regulation by the UK Financial Conduct Authority ("FCA"). We note that Amit and Sarju Vakil ("Sarju") are both listed as "approved persons" for certain functions on the FCA website. In particular, Sarju is listed as a Director, Chief Executive, Money Laundering Reporter and Customer in relation to IIFL Wealth (UK) Limited."

None of this leads to any allegation being made against AS anywhere in the letter nor does it even arguably support the proposition that what it is alleged AS said in the course of the phone calls referred to was said on behalf of IIFL UK. Indeed, the tenor of the letter is to suggest that AS was acting on behalf of the 2nd and 3rd defendants not any of the various companies within the IIFL group. In paragraph 97 it is alleged that "*through the sale process [the 2nd and 3rd defendants] aided at various times by [AS] Sarju and IIFL represented …*" in broadly the terms noted already. This suggests that AS was alleged to be acting on behalf of the 2nd and 3rd defendants and on behalf of IIFL UK's parent, not IIFL UK. That this is the correct understanding of what was being alleged is apparent from paragraphs 103 and 104 because there the allegations of misrepresentation are levelled exclusively at the 2nd and 3rd defendants. Finally, in paragraph 112, it was asserted on behalf of the claimants that they were "... *continuing to investigate the roles of IIFL, Amit and Sarju in relation to this matter"*. Again, there is no mention of IIFL UK, which receives only the passing mention referred to earlier.

16. The claimants' solicitors first made contact with IIFL UK by letter dated 10 May 2017. In that letter it was alleged that:

> "We understand that IIFL Wealth (UK) Limited and its affiliates were involved in the sale of Hermes shares by our clients. We expect that documents in your possession or control may be relevant to our clients' claims or the investigations of regulators and any law enforcement agencies.
>
> We accordingly request that IIFL Wealth (UK) Limited as well as its employees, subsidiaries and affiliates, maintain and preserve any information, documents or files stored in any form or location that relate to the work that they performed in relation to the sale and purchase of the shares in Hermes. …"

Again, there was no suggestion either that a claim was being pursued against anyone other than the 2nd and 3rd defendants or GIR – see the first paragraphs of the letter where it is stated on behalf of the claimants that they intended to pursue claims against the 2nd and 3rd defendants and against GIR. There is no mention of any claim being made against the two persons to whom the letter was addressed – AS and IIFL UK. The first time any allegations were made against AS and IIFL UK was by a letter dated 6 October 2017 – see paragraph 2 of the letter. The sole formulation of the claim against IIFL UK is set out in paragraph 36 of that letter in these terms:

> "… on 21 August [AS] telephoned Hasu and Jayesh. [AS] was known to Hasu and Jayesh, having been introduced to them several years previously in London. The IIFL Group has subsidiaries and /or branches in various countries including the UK, Singapore, Mauritius and India of which IIFL UK is one. Amit is a director of IIFL UK and was at all material times acting on their behalf. Moreover, IIFL UK is vicariously liable for [AS's] conduct."

This is mere assertion. It does not explain for what reason it is alleged IIFL UK would be interested in any of the transactions that give rise to the claim, or how (having regard to what is set out above) it is realistically arguable that in making the alleged misrepresentations AS was acting on behalf of IIFL UK as opposed to acting individually on behalf of the 2nd and 3rd defendants or on what basis it was said that IIFL UK would be vicariously liable for the representations it is alleged that AS made.

17. The evidence filed by the claimants does not support the proposition that AS's alleged acts should be attributed to IIFL UK. Jayesh Manek is described by their solicitor as one of the claimants' "*representatives*" – see paragraph 16 of Mr Gadhia's first witness statement in these proceedings – and in paragraph 5 of the Particulars of Claim as one of two persons who represented the claimants throughout the negotiations in respect of the Hermes shares. He is resident in the UK, a director of Manek Investment Management Limited and is regulated by the FCA, by whom he is an "*Approved Person*". He is the uncle of the first claimant. The second claimant is his first cousin. In paragraph 27 of his statement, Mr Manek refers to him knowing AS in his capacity as a director of Emerging India Fund Management Limited and as a director of IIFL Inc. At paragraph 41 he refers to having met AS "*… in our office in London when Amit and Sarju were establishing IIFL UK and setting up an office in London*". At Paragraph 45 he states:

> "During the call on 21 August 2015, [AS] said that a Mauritius fund called EMIF was purchasing Hermes along with four similar businesses with a view to consolidating them. [AS] told me that IIFL had helped to establish and raise funds for EMIF …"

He adds at paragraph 48:

> "… Amit sounded genuine and convincing as some of the details he provided matched with what Ramu had told us and I felt reassured as I believed I was speaking directly to the buyer and to somebody who I already knew from past acquaintance and who was involved with financial services in the UK and acting on behalf of a UK regulated company …"

The buyer was EMIF – see paragraph 45 quoted above - and the only reason that Mr Manek could have thought that he was speaking to EMIF when he was speaking to AS was because, as he says in paragraph 27 of his statement, his understanding was that Emerging India Fund Management Limited "*...was the holder of the management shares in EMIF...*" and AS was a director of Emerging India Fund Management Limited. All this is entirely contrary to the suggestion that what AS said in the conversation on 21 August was said on behalf of IIFL UK or that IIFL UK was vicariously liable for what AS is alleged to have said on that occasion. There is nothing within this section of Mr Manek's statement concerning the conversation on 22 August 2015 that suggests anything different from what I have said so far and what he says in paragraph 53 within that section is directly supportive of the view that Mr Manek considered AS to be acting as a director of Emerging India Fund Management Limited which he understood to own EMIF. In that paragraph he states that AS said in the course of that call that " *... if the Claimants did not sell their shares to [GIR] and if RBI approval for a direct sale to EMIF was delayed, then he would buy the remaining shares from [GIR] and the 2nd and 3rd defendants and then transfer the assets of Hermes into a new vehicle leaving the Claimants' shares worthless."*. The reference to "*… a direct sale to EMIF…"* is to what the claimants were then seeking, which was to sell their shares directly to EMIF rather than to GIR. On the basis that what Mr Manek states is an accurate summary of what AS said (AS denies this to be so), his understanding could only have been that what AS allegedly said was said in his capacity as a director of Emerging India Fund Management Limited, the entity that controlled EMIF.

18. If and to the extent that the claimants rely on the involvement of Sarju (AS's fellow director of IIFL UK) that does not assist either. His only involvement is alleged to have occurred on 24 August 2015 – see paragraph 58 and following of Mr Manek's statement – that is after the conversations relied on. It is not alleged that Sarju did anything material except deliver the documents referred to in paragraph 62. IIFL UK was not a party to any of the relevant documents and it is not asserted that Sarju was doing anything other than couriering the papers – see paragraph 58 of Mr Manek's statement.

19. The claimants rely on the fact that at the meeting on 24 August 2015, the first claimant was asked to sign a non-disclosure agreement that named IIFL UK as one of the parties. It stated that IIFL UK and the first claimant were exploring "*... a possible business opportunity of mutual interest ..."*. In my judgment that does not assist on the issue I

am now considering for the following reasons. First, the agreement makes no sense in the wider context because it is nobody's case that there was to be any form of agreement as between IIFL UK and the first claimant. The only agreement being discussed was the sale by all the claimants of their shares in Hermes to either GIR or EMIF. Secondly, this event took place on 24 August. By then Mr Manek's understanding could only have been that AS was acting in his capacity as a director of Emerging India Fund Management Limited, the entity that controlled EMIF. This is so for the reasons set out in paragraph 17 above. It is clear that the only reason why the NDA was signed was because Mr Manek wanted the documents that Sarju had brought to the meeting to be left with him and the first claimant so that they could review them properly. Sarju did not want to leave the documents but then said he would if the first claimant signed a non-disclosure agreement - see paragraph 65 of Mr Manek's first statement. All that leads me to conclude that the precise terms of the NDA and the fact that one of its parties was IIFL UK takes the issues I have to resolve no further.

20. The claimants rely on the fact that AS has not challenged jurisdiction. In my judgment that is immaterial for a number of reasons. First, the test that is applied to questions such as that I am now considering must be satisfied on the evidence relating to the position as at the date when the proceedings commenced – see Kaefer Aislamientos SA de CV v. AMS Drilling Mexico SA de CV (ibid.) at para. 70. Secondly, both AS and IIFL UK deny "*... that [AS's] actions at the material time are "attributable to" IIFL UK or that it is vicariously liable for his actions ...*" – see paragraph 12.2 of their Defence – and plead that " *... IIFL UK had no involvement in the transaction whatsoever"* – see paragraph 13 of their Defence. Thus, there is nothing in the conduct of either AS or IIFL UK in relation to these proceedings that provide any support for the claimants' case that there is a real issue between them and IIFL UK. The existence of such an issue depends upon the material that I have so far considered and on whether what is alleged by the claimants against IIFL UK would pass a reverse summary judgment application by IIFL UK had one been made.

21. The sole question I have to decide at this point is whether the claim against IIFL UK could be rejected summarily. This depends on the claimant adducing evidence that demonstrates its case against IIFL UK is more than merely fanciful or imaginary but must have about it some degree of conviction. On the material that is available when viewed in the round I am satisfied that the claimants have failed to show that they have such a case against IIFL UK. That case depends upon them having a more than fanciful case that AS was acting on behalf of IIFL UK when making the representations it is alleged he made during the course of the two telephone conversations or that IIFL UK is vicariously liable for what AS is alleged to have said in the course of those conversations. In my judgment they have failed to do so. In those circumstances it is not necessary that I consider further the logically and legally distinct issues of whether it is reasonable for the court to try the alleged issue between the claimants and IIFL UK or whether the 2nd and 3rd defendants are necessary or proper parties to that claim.

The Tort Gateway

22. 6BPD, para. 3.1(9) provides:

> "(9) A claim is made in tort where—

…

(b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction."

The claimant has not sought to advance any positive case on this issue in relation to the either the conspiracy claim, other than to the extent that it is dependent on the alleged misrepresentations, or the intimidation claim, so the focus of this part of the application is on the deceit claim.

23. It is common ground that in order to be able to pass through this gateway the claimants must establish a good arguable case by plausible evidence that the losses claimed to have been suffered by the claimant " ... *resulted from substantial and efficacious acts committed within the jurisdiction* ..." by the relevant defendants – see Metall und Rohstoff v. Donaldson [1990] 1 QB 391 *per* Slade LJ at 437F-G. In this context the place where the harmful event giving rise to the damage occurs in a case concerning misrepresentations is the place where the representations were made – see Domicrest Limited v. Swiss Bank Corporation [1999] QB 548; Alfred Dunhill Limited v. Difission Internationale Maroquinerie de Prestige SARL [2002] 1 All E.R. (Comm) 950; ABCI v. Banque Franco-Tunisienne [2003] EWCA Civ 205; [2003] 2 Lloyds Rep 146 at [41] and Newsat Holdings Limited v. Zani [2006] EWHC 342 (Comm) [2006] 1 All E.R. (Comm) 608 *per* David Steel J at [44].

24. The events on which the claimants rely are:

(a) the meeting in London on 8-9 August 2015 pleaded in paragraphs 46-52 of the Particulars of Claim;

(b) the meeting in London on 24 August 2015 pleaded in paragraphs 66-68 of the Particulars of Claim;

(c) the meeting on 20 September 2015 between the 1st claimant and the 2nd defendant, pleaded in paragraph 83 of the Particulars of Claim; and

(d) the subsequent sale of the Hermes shares to WAG on or about 27 October 2015 – see paragraphs 168-170 of Mr Gadhia's first statement dated 26 January 2018 made in support of the application for permission to serve the Claim Form on the 2nd and 3rd defendants out of the jurisdiction.

I refer to these events below as respectively Events 1, 2, 3 and 4.

Event 1

25. The claimants' case concerning this meeting is pleaded in paragraph 46 the Particulars of Claim. The only allegation that is material to the deceit claim is that pleaded in paragraph 46(3), where it is alleged that in the course of the meeting the second defendant represented to the claimants and their representatives that the sales figures for Hermes in 2014/15 "... *were not that great and as a result the buyer's offer was particularly attractive"*. That this is the only allegation material to the deceit claim is apparent from paragraph 100 of the Particulars of Claim, where the representations

alleged to be relevant to the deceit claim are set out. The only one that is attributable to Event 1 is that pleaded at sub-paragraph (5) being the one that I have set out above. All the other representations referred to in paragraph 100 are derived either from prior or subsequent statements, all of which are alleged to have been made at meetings in, or in emails or telephone calls emanating from, India or Singapore. In context, 12 representations are set out in paragraph 100.

26. However, nothing material resulted from the discussions at the Event 1 meeting because at paragraph 50 it is pleaded by the claimants that despite what was said at the meeting referred to in paragraph 46 and two follow up meetings, the claimants told the 2nd defendant that "*... they wished the shares to be sold to the end purchaser as part of the main transaction*" rather than them being sold by the claimants to GIR and then by GIR to EMIF. The issue between the parties was not the sale of the claimants' shares but to whom they were to be sold. As is apparent from paragraph 27 of the Particulars of Claim no objection was being taken by the claimants to the sale of the shares in principle from 23 March 2015.

27. In his 2nd witness statement dated 25 April 2019, Mr Crockett, the 2nd and 3rd defendants' solicitor, addressed the claimants' case in relation to the tort gateway. In relation to Event 1, Mr Crockett asserted that there was nothing in what occurred at the first London meeting that could be described as substantial or efficacious and that there was no causal link pleaded between what was said at that meeting and the loss which it is alleged the claimants had suffered. The only response to this came in Mr Gadhia's statement of 5 July 2019 where, at paragraph 70, he repeated what had been said by Mr Jayesh Manek in his statement of 5 July 2019. That evidence – see paragraph 30-33 – simply repeats at slightly greater length what has been pleaded in the Particulars of Claim. He states that the purpose of the meeting was for the defendants to try to persuade those attending that the claimants should sell their shares "*urgently*" to GIR. The defendants were not successful in persuading the claimants to do this, as is apparent from the narrative that follows in both the statements and the Particulars of Claim.

28. I return to the statement of legal principle referred to above. As the Court of Appeal emphasised in Metall und Rohstoff v. Donaldson (ibid.) at 437E, it would contravene the spirit and the letter of the rule if jurisdiction was assumed on the strength of some relatively minor or insignificant act having been committed here. That involves not merely assessing the intrinsic potency of the particular event relied on but also assessing its significance in the context of all the other facts and matters relied on by the claimants. In my judgment applying both these aspects of the relevant test leads to the conclusion that the claimants cannot establish jurisdiction by reference to what happened at the first London meeting. This is so because it is clear on the claimants' own case that nothing happened and no decisions were taken as a result of what was said at that meeting. It is apparent from both the Particulars of Claim and Mr Jayesh Manek's statement that it was what happened thereafter that led to the claimants entering into the sale to GIR, which is said to be what caused the loss allegedly suffered by the claimants. What was said at the meeting was at best of minor importance and can properly be characterised as insignificant. That is all the more the case when what is alleged to have happened at the meeting is viewed in the context of all the other allegations made by the claimants, each of which are more important, and in the case of the impact of what AS is alleged to have said, much more important, than what was

said at the first London meeting. That this is so is clear from paragraph 78 of Mr Jayesh Manek's statement where he states:

> "Following Amit's and Ramu's … call and email … on 26 August 2015, we had a long discussion amongst us. Based on the overall consideration of the threat by Amit, review of the documents provided by Sarju, representations made by Ramu and Amit and the further explanations and assurances provided by Ramu and Palani on 31 August and 1 September 2015, my view was that the claimants had little choice but to proceed with the sale of their shares to GIR, which Sanjay and Prashant decided to do. … I genuinely believed at the time that Ramu and Amit would proceed with the transaction without the claimants' shares if they did not agree to sell to GIR and Amit would transfer out the assets from Hermes as he had threatened. …"

This reflects the impact on the thinking of the claimants on their own case of the threats that it is alleged AS made during the telephone call on 22 August 2015 referred to in paragraph 53 of Mr Jayesh Manek's statement. In comparison with what is alleged to have happened at the first London meeting it was obviously substantial and efficacious and emphasises the insignificance of what was said at the first London meeting.

Event 2

29. What the claimants allege happened is pleaded at paragraphs 66-68 of the Particulars of Claim. This Event does not assist the claimant on the issue I am now considering because it is not alleged that any representations much less any relevant representations were made in the course of the meeting. It is not alleged that the 2nd or 3rd defendants were present at or otherwise participated in the meeting. It is not mentioned in paragraph 78 of Mr Jayesh Manek's statement as being a relevant consideration in the decision by the claimants to sell their shares to GIR. Although Mr Gadhia asserted in his first statement that this event was "*... a key component of the overall fraudulent scheme ...*" he does not explain how that could be in relation to the deceit claim which is the only element of the claim relevant to the gateway I am now considering. As is submitted by the 2nd and 3rd defendants, this issue was not considered relevant when Mr Gadhia wrote the 4 April 2017 letter of claim referred to earlier. In that letter (which was 25 pages in length) Event 2 is mentioned in passing at paragraph 83 and is not alleged to have played any part in the decision by the claimants to sell the shares to GIR, which it is alleged at paragraph 95 was the result of "*... (a) the threats to asset strip Hermes if the Investors did not sell their shares; and (b) the various representations concerning the transaction made by [the 2nd and 3rd defendants] and [AS]...* ".

30. Event 2 was not in any sense anything other than a minor or insignificant act occurring within the jurisdiction. In those circumstances it is not a basis upon which the claimants can establish jurisdiction under the tort gateway.

Event 3

31. This event is pleaded at paragraph 83 of the Particulars of Claim in these terms:

> "The SPAs were signed by the parties in Abu Dhabi on 9 September 2015. However, as there was a procedural issue in relation to the mechanism by which [the 3rd claimant] would sell its shares, [the 2nd defendant] considered that it was necessary to have new versions of the SPAs executed by the parties. As a result [the 2nd defendant] flew to London for a few hours on 20 September 2015 to get [the 1st claimant] to sign the first SPA... "

32. In my judgment this is not a substantial or efficacious event occurring in the jurisdiction that enables the claimants to pass through the tort gateway. My reasons for reaching that conclusion are as follows. First, the SPAs had already been signed and it is not alleged that they were void or of no effect by reason of the unidentified procedural issue to which reference is made in the Particulars of Claim. It is not suggested that any changes were made to the text of the agreements. In those circumstances it seems probable that the parties were all bound on 9 September 2015.

33. Secondly, it is not alleged that anything material happened on 20 September 2015. This application is concerned with a deceit claim. None of the representations relied on are alleged to have been made at the 20 September meeting.

34. Thirdly, it is not even alleged that either the 2nd or 3rd defendants did anything within the jurisdiction on 20 September, much less anything that can properly be characterised as substantial or efficacious. This gateway is concerned with damage that is caused by an act committed within the jurisdiction. That focuses attention on acts by or on behalf of the defendant against whom the claimant is attempting to assert jurisdiction. Mr Gadhia says in paragraph 70 of his fifth statement that the events described in paragraph 83 of the Particulars of Claim are "*... a critical part of the conspiracy by which the claimants were defrauded since signature of the final SPA was a crucial step without which [the 2nd and 3rd defendants] could not have carried out the fraud.*". However, it is not alleged that the 3rd defendant did anything at all and it is alleged that all the 2nd defendant did was to fly to London and ask for the signature of another version of a document that had already been signed and by which the claimants were bound. Even if it could be said that by flying to London and requesting a signature of another copy of the relevant SPA the 2nd defendant committed an act in the jurisdiction that caused the claimed loss, it is difficult to see how that could be regarded as a substantial and efficacious act because the decision to sell the shares had been taken days earlier in the circumstances summarised in paragraph 78 of Mr Jayesh Manek's statement, quoted above. In my judgment the acts said to have been committed in England by the 2nd defendant as part of this event were on any view minor or insignificant and were acts that it was entirely fortuitous took place in England.

Event 4

35. The final event relied on is summarised by Mr Gadhia at paragraph 168(e) of his statement as being:

> "… the transaction between EMIF and [WAG] seems to have been effected from either EMIF's London office or the London office of Linklaters LLP, acting on their behalf."

In his subsequent statement, Mr Gadhia attempted to explain the relevance of this allegation to the issue I am now determining at paragraph 71 as being that it was "*... a crucial step without which [the 2nd and 3rd defendants] could not have carried out the fraud*". I accept the defendants' submission that "*... subsequent acts by different parties cannot possibly constitute substantial and efficacious acts by [the 2nd and 3rd defendants] resulting in loss to the Claimants*". EMIF and GIR are not parties to this litigation, much less are they alleged to have been parties to the fraudulent misrepresentations that are the sole basis on which jurisdiction is asserted against the 2nd and 3rd defendants under the tort gateway. In those circumstances, what is alleged is immaterial because "*... the acts to be considered must be those of the putative defendant, because the question at issue is whether the links between him and the English forum are such as to justify his being brought here to answer the plaintiff's claim*" – see Metall und Rohstoff v. Donaldson (ibid.) at 437G.

Conclusion

36. As will be apparent from what has gone before, I have so far looked at the events relied on by the claimants individually. It will be appropriate in at least some cases to look at all the facts and matters relied on in the round. However, such an approach does not assist the claimants on the facts of this case. Each of Events 2 and 4 are immaterial for particular reasons that I have set out above. I have not concluded that they are immaterial simply because they are not sufficiently substantial or efficacious. Had that been the case it would have been necessary to weigh the effect of those events together with Events 1 and 3 in order to see whether together they were sufficiently efficacious. In my judgment, Events 1 and 3 are minor or insignificant events when looked at individually and they gain no greater weight when they are considered together. The reality is that the really substantial acts relied on all took place outside England and Wales.

Remaining Issues

37. In light of the conclusions that I have so far reached it is both unnecessary and undesirable that I should attempt to resolve the remaining issues that were argued – the arbitration issue, the non-disclosure issue and the *forum conveniens issue.* The issue concerning the scope and effect of the arbitration clause can and should be resolved by the courts of India if and to the extent that it is necessary for those issues to be resolved in the future. It is not possible to resolve the non-disclosure issue without resolving the arbitration issue and the issue is an academic one in light of the conclusions I have reached on the gateway issues. The *forum conveniens* issue is academic for similar reasons. Attempting to resolve that issue would involve a counter-factual assumption that I had decided the gateways issues other than I have. It is also a question that is likely to depend in part on the outcome of the arbitration issue.

Conclusions

38. I will hear the parties at the hand down of this judgment as to the terms of the order that should follow from these conclusions.