Michaelmas Term
[2020] UKPC 31
Privy Council Appeal No 0026 of 2019

JUDGMENT

Livingston Properties Equities Inc and others (Respondents) *v* JSC MCC Eurochem and another (Appellants) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Reed
Lord Carnwath
Lady Black
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

30 November 2020

Heard on 5 March 2020

Appellants
Justin Fenwick QC
George Spalton
Jonathan Addo
Christopher Pease

(Instructed by Harney Westwood & Riegels LP (British Virgin Islands))

Respondents (10th-13th)
Hefin Rees QC
Scott Cruickshank
Jonathan Child

(Instructed by Alan Taylor & Co)

Respondent (16th)
Stephen Moverley Smith QC
Paul Griffiths
(Instructed by Edwin Coe LLP)

Respondents:-

(1) [Livingston Properties Equities Inc]
(2) [Nimati International Trading Ltd]
(3) [Nautilus Services Ltd]
(4) [Global Med Services Inc]
(5) [Sevan Properties Management Ltd]
(6) [Rumbay Assets Corp]
(7) [Banter Industries Ltd]
(8) [Valery Rogalskiy]
(9) [Dimitry Pomytkin]
(10) Nedjet Baysan
(11) Kopist Holding Ltd
(12) Itrade Fertilisers SA
(13) Fabio Scalambrin
(14) [Darlow Enterprises]
(15) [Darlow Investment LP]
(16) Dearborn Enterprises Ltd
(17) [Gianthill Management Ltd]
(18) [Dreymoor Fertilisers Overseas Pte Ltd]

LADY ARDEN:

Appeal concerns service of the proceedings arising out of alleged frauds

1. This appeal is from the order of the Eastern Caribbean Court of Appeal (the ECCA) dated 18 September 2018, on appeal from Wallbank J sitting in the High Court of Justice (Commercial Division) of the British Virgin Islands ("the BVI"). The two appellants (collectively, "Eurochem") commenced these proceedings in the BVI in 2015 to recover bribes alleged to have been paid to or for the benefit of the 8th and 9th defendants ("the Russian defendants"). They are Russian nationals. They were formerly senior executives of Eurochem, and had service contracts containing Russian choice of law clauses. They live in Russia but according to Eurochem at the material times they travelled abroad regularly and negotiated sales outside Russia.

2. There are sixteen other defendants, of whom nine (the first seven, the 11th and, by amendment of the pleadings, the 17th defendants) are companies registered, and so able to be served, in the BVI ("the BVI defendants"). By order dated 19 November 2015, Farara J (Ag) gave permission to serve the proceedings out of the jurisdiction on all the non-BVI defendants ("the foreign defendants") in Switzerland, Singapore, Scotland and Panama. At the time of that order, the 17th defendant was understood to be a Panamanian company but Eurochem has amended its proceedings to show that the 17th defendant is a BVI company. The Russian defendants have not entered an appearance, although the 8th defendant has challenged the jurisdiction of the court, a challenge which has been stayed pending the determination of this appeal.

3. Eurochem comprises a Russian and a Swiss company trading in mineral fertilisers. Eurochem alleges that the Russian defendants set up and beneficially owned companies registered in the BVI, Panama, Cyprus, Singapore, Switzerland and Scotland (that is, the corporate defendants to these proceedings) for the sole purpose of receiving, concealing and laundering the proceeds of over US$45 million in secret commission payments made by Eurochem's trading partners and their associates, including the 18th defendant, Dreymoor Ltd. Eurochem alleges that the 10th and 13th defendants, who are Turkish nationals living in Turkey and Monaco respectively, were involved in the payment and receipt of the bribes.

4. Eurochem alleges in the proceedings that the defendants are liable for, among other matters, paying or receiving secret commissions amounting to bribes, knowing receipt, dishonest assistance and unlawful means conspiracy. It alleges that they are liable also to compensate Eurochem for the losses incurred by it and that the recipients of the bribes are liable to account for them to Eurochem as constructive trustees.

Eurochem estimates that as a result of the secret commissions it also incurred losses, including loss of profits, currently estimated to be in excess of US$135m. The bribes are alleged to have been paid to bank accounts in Cyprus and Singapore.

5. In these proceedings, Eurochem alleges that there were five secret commission schemes with different distributors. The alleged way in which the schemes worked was that the Russian defendants, in breach of their duties to Eurochem, agreed contracts of sale with Eurochem's trading partners at well below market value and in return the Russian defendants were paid substantial secret commissions through the BVI defendants, which accordingly knew of their breach of duty.

6. The re-amended statement of claim is almost completely silent about when, where and how the defendants made the alleged wrongful arrangements and payments. Eurochem's case is that none of the defendants was in Russia at the relevant time and that the events occurred outside Russia. Foreign law is not pleaded.

7. Following service, the 10th, 12th, 13th, 16th and 18th defendants applied to the court to set aside the order for service on them. The 2nd to 5th, 11th and 17th defendants applied to stay the proceedings against them on the basis that Russia was a more convenient forum. Wallbank J dismissed these applications, but the ECCA reversed his decision by the order now under appeal.

More convenient forum: the relevant principles summarised

8. The principles which the judge had to apply are well-known and are not in dispute. They are to be found in the well-known case of *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460 ("the *Spiliada*") and the cases which follow it, in particular *VTB Capital plc v Nutritek International Corpn* [2013] 2 AC 337 ("*VTB*") and *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804, PC.

9. In seeking leave to serve out, Eurochem had firstly to show in relation to the foreign defendants that there was a serious issue to be tried on the merits, that is, a substantial question of fact or law. That is not in dispute. Secondly, Eurochem had to show that there was a good arguable case that the claim against the foreign defendants fell within the classes of case for which permission to serve out may be given and that is also not in dispute in this case. Thirdly, Eurochem had to show that the BVI was clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service out of the jurisdiction. This third requirement reflects the doctrine of forum non conveniens, which before the *Spiliada* existed in Scottish law and American law but only doubtfully in the law of England and Wales (see, for example, Dicey & Morris on The Conflict of Laws, 8th edition (1967), p 1081, n1, a passage not found in the current edition of this

work cited elsewhere in this judgment). It is compliance with that third requirement that is now in issue on the applications to set aside service out of the jurisdiction.

10. In exercise of its discretion the court will consider whether the BVI is a more appropriate forum than any other foreign forum in the interests of all parties and the ends of justice, and, if not, whether justice nevertheless requires that the case should be tried in the BVI.

11. The same principles apply where the defendants seek to obtain a stay of proceedings properly served within the jurisdiction on the basis that there is a more appropriate forum. The onus, however, is on the defendants seeking a stay, and not the claimants, unless the claimants seek to show that, despite the fact that there is another available forum which is prima facie the appropriate forum, there are special circumstances why justice requires that the trial should nevertheless take place in the BVI.

12. When assessing whether there is another more appropriate forum, the court will consider what connecting factors exist in relation to that forum, such as the place where the alleged wrongs were committed and the governing law of the pleaded claims. The governing law is an important factor because it is generally preferable that a case should be tried in the country whose law applies (*VTB* per Lord Mance at [46]). If there is no other available forum which is clearly more appropriate the court will ordinarily refuse a stay. In general, the assessment of the factors relevant to forum conveniens is a matter for the trial judge: see per Lord Templeman in the *Spiliada* at p 465.

13. With that introduction, the Board turns to the judgment of Wallbank J.

Wallbank J concludes that Russia was not shown to be an available alternative forum and rejects the applications

14. For present purposes, the two key findings of the judge, in his impressive ex tempore judgment, relate to the availability of the Russian courts as a forum for the claims made by Eurochem in these proceedings, and to the governing law of those claims. In summary on these points, the judge found that the defendants had failed to prove that the claims could be brought in Russia and that he could not make any finding as to the governing law of the claims. Having considered all the relevant issues, the judge concluded that the BVI was the most appropriate forum to determine the claims.

15. Taking first the availability of the Russian courts as an alternative forum, the judge noted that the expert evidence on Russian law called by the claimants on the one hand and that called by the defendants on the other was conflicting on the issue whether

the Russian courts would assume jurisdiction over the claims against the non-Russian defendants. There are two courts in Russia which might have jurisdiction: the courts of general jurisdiction and the arbitrazh (commercial) courts. The expert as to Russian law called on behalf of Eurochem, Professor Anton Asoskov, took the view that no Russian court would assume jurisdiction against the non-Russian defendants. However, the defendants' expert, Mr Maxim Kulkov, considered that the arbitrazh courts could exercise jurisdiction over them if the courts of general jurisdiction could not do so provided that some of the alleged wrongs and some of the alleged loss occurred in Russia. There was a difference of view between the experts as to whether if the proceedings were heard in different courts in Russia they could be consolidated so that they could be heard together. The judge held that, as there was no cross-examination, it was impossible for him to tell which evidence to prefer and he declined to make any finding as to Russian law. Therefore, he concluded that the BVI defendants seeking a stay had not discharged their burden of proof of showing that there was some other available forum with competent jurisdiction to try the claim. So, he rejected their applications.

16. In the judgment of the judge, Eurochem had satisfied the first two requirements. The defendants did not suggest that the claims against them had not been properly pleaded and the judge dissected in detail the ingredients of each of the various claims relied on. For instance, in relation to conspiracy, he found that the claimant had to plead and prove:

> "1. A combination or agreement between two or more individuals;
>
> 2. An intent to injure;
>
> 3. Pursuant to which combination or agreement and with that intention certain acts were carried out;
>
> 4. Resulting in loss or damage to the Claimant…" (transcript p 28)

17. The judge was satisfied that there was a serious question to be tried as to whether the foreign defendants had paid bribes to the BVI defendants, and the foreign defendants were clearly necessary or proper parties to the claims made against the BVI defendants in respect of those bribes for the purposes of Rule 7.3(2)(a)(ii) of the Eastern Caribbean Supreme Court Civil Procedure Rules ("CPR").

18. The judge then considered the third question, which involved considering the connecting factors. As to the governing law of the claims, the judge held that, there was no satisfactory evidence of foreign law, and that in those circumstances, under Rule 25 (in error described as Rule 18) of Dicey, Morris & Collins on The Conflict of Laws, 15th ed, ("Dicey") the court should apply BVI law to the claim. Foreign law did not have to be pleaded unless it was relied on. Rule 25 provides:

> "(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.
>
> (2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case."

(Rule 25(2) is conventionally treated as creating a presumption of similarity, but as Dicey points out at para 9.025 that there are difficulties in this terminology but they are not material to this appeal).

19. The judge held that there was no evidence showing with which country the claims had their closest and most real connection. Mr Moverley Smith had submitted that the court should assume that the Russian defendants were the de facto directors of the BVI defendants and that accordingly the decisions of those defendants were made in Russia, but the judge rejected that argument. It was not clear on the evidence who the directors of the BVI companies were. The non-BVI defendants were necessary and proper parties to the claims brought against the BVI defendants. Therefore, in the judgment of the judge, this was a proper case for an order giving permission to serve the proceedings out of the jurisdiction on the foreign defendants.

20. On the question whether the BVI was the appropriate forum, the judge held that it was for Eurochem to show that the BVI was clearly and distinctly the appropriate forum for trial of a dispute. That went beyond the mere availability of another forum though the judge was prepared to assume for this purpose that Russia might be an available forum. Looking at all the circumstances, the judge held that the BVI was clearly and distinctly the more appropriate forum. The judge noted that Eurochem had no connection with the BVI but they had chosen to litigate in the BVI and held that their choice should be respected. In addition, the alleged bribe takers made a deliberate choice to use the BVI defendants to carry out the scheme. In the judgment of the judge, the Russian defendants could not therefore simply ask the court to ignore those companies and apply the law of their employment contracts. The Russian defendants clearly wanted the perceived advantages and benefits from using BVI companies. The judge considered that there was much to be said for holding them also to the less convenient aspects of their choice of BVI law. In particular, "they should expect that if

they use[d] BVI vehicles to perpetrate their frauds the BVI courts [would] hold their companies and them to account." (page 38).

21. The judge rejected the argument that the case should be heard in the Russian courts because there was a one-year limitation period against employees which they would need to apply. The judge pointed out that limitation may be a procedural matter.

22. In any event, the judge considered that a further factor favouring the BVI was that proprietary remedies were not available in Russia. The BVI was distinctly the more suitable forum on account of the breadth of remedies available in the circumstances where the Russian national defendants deliberately decided to use a preponderance of BVI companies to perpetrate their fraud.

23. The judge considered other issues, such as the location of witnesses and the language of documents, and the fact that none of the defendants had advanced any positive defence to the claims, save possibly in relation to the 11th defendant. Nothing, however, turns on these matters for the purposes of this appeal.

The key differences in the ECCA's approach, and the Board's conclusions thereon

24. On appeal the ECCA (Pereira CJ, Webster and Gonsalves JJA (Ag)) reversed the decision of Wallbank J. The ECCA accordingly stayed the proceedings on the basis that Russia was a more appropriate forum and set aside the service out orders granted in the proceedings in relation to the foreign defendants. In addition, it discharged the worldwide freezing orders that had been made in the proceedings.

25. Webster JA gave the first judgment, with which Pereira CJ and Gonsalves JA concurred. The judgment of Webster JA was comprehensive, but the Board needs only to focus on the aspects of his judgment differing materially from that of the judge and leading to the conclusion that his judgment should be set aside.

(1) ECCA: judge in error for not concluding that Russia was an available forum

26. The first significant departure by the ECCA from the judge's approach was on the question whether Russia was an available forum for the purposes of the first stage of the *Spiliada* analysis. Webster JA noted that expert evidence as to Russian law was disputed. As explained above, Mr Kulkov, whose evidence was adduced by the defendants, opined that the Russian courts of general jurisdiction could take jurisdiction against both the Russian and non-Russian defendants. The claimants adduced the evidence of Professor Asoskov, who disagreed with Mr Kulkov on this point and opined

that a Russian court of general jurisdiction would not take jurisdiction over a non-Russian defendant and that there was no court in Russia which would take jurisdiction over all the claims in these proceedings. Mr Kulkov responded that if the courts of general jurisdiction did not take jurisdiction over the non-Russian defendants the claims against them could be brought in the arbitrazh courts or at least they could if some part of the wrongs were committed in Russia or if some part of the losses were suffered in Russia. Professor Asoskov did not agree with Mr Kulkov's response: the arbitrazh court would only have jurisdiction if both the tortious actions and the losses occurred in Russia.

27. Webster JA noted that the judge had held that it was not possible for him to make findings about the availability of Russia as an alternative forum. Webster JA considered that in general the judge's approach to the expert evidence was correct. Webster JA considered that the judge had adopted an approach similar to that adopted by Arnold J in *VTB Capital v Nutritrek International Corp* [2011] EWHC (Ch) 3107, [2012] BCLC 437, para 201, where the judge had held that where he could not make findings about foreign law without cross-examination, he was "both entitled and obliged to consider the quality of the evidence, taking into account factors such as the experience of the experts, the cogency of their reasoning and the materials relied upon to support it." Arnold J had been prepared, therefore, to proceed on the basis of his assessment of the cogency of the evidence, even though there had been no cross-examination.

28. Webster JA went on to hold that the judge had been prepared to assume that Russian law applied for a different purpose in his judgment, so he ought to have made the same assumption in the present connection. In the judgment of Webster JA, the judge had found, albeit in the different context, that the claims could be brought in the Russian courts. Therefore, he accepted that the evidence as to Russian law showed Russia might be an available forum for the trial of all the claims. The judge could not draw inconsistent conclusions about the availability of the Russian courts:

> "[38] In my opinion, the judge's approach to the expert evidence was correct. He found that he could not resolve conflicts between the experts at this stage, but he went on to consider the cogency of the evidence and made preliminary findings to guide him in considering the issues in the case without actually preferring one expert's evidence over the other. One such finding was that Russia might be a competent forum for the purposes of the service out applications. I would go one step further and draw from the conflicting evidence that, depending on the evidence before the courts in Russia there could be either a single trial of the defendants before the Russian court of general jurisdiction, or, if the claims could be split, separate trials with the foreign defendants being tried before the Arbitrazh Court. The latter part of this

> finding (split trials) is very similar to the judge's observation at page 23 of the transcript cited in the preceding paragraph.
>
> [39] In the circumstances, I find that on the state of the expert and factual evidence, and in all the circumstances of the case, that Russia is an available forum with competent jurisdiction that is available for the trial of the action."

(2) The Board: judge justified in concluding that Russia was not shown to be an available forum

29. The Board is, with respect to the ECCA, unable to follow its reasoning here. The judge had made it clear that the evidence about the availability of Russia as an alternative forum was disputed and that he could not make findings. Moreover, when he came to the question of whether there should be a stay of the proceedings as against the BVI defendants, he recognised that it was not enough that there should be an alternative forum in Russia: it had also to be shown that Russia was clearly and distinctly the more appropriate forum. To shorten matters, the judge was prepared on the stay application to assume that Russia could be an alternative forum. But non constat that this undermined his finding that on their challenge to leave to serve out the defendants had not proved that Russia was an available alternative forum.

30. In contradistinction to the ECCA, who did not consider that it was open to the judge to adopt a different approach in relation to the stay applications, the Board considers that, as those were separate applications, all the judge was doing at that stage was making an assumption (not a finding or conclusion as to cogency) in favour of the defendants, and that he was entitled to proceed as he did. In the circumstances the Board is satisfied that the judge did not make an error in this respect, and that the ECCA was wrong to hold that he did.

(3) ECCA: judge should have held that Russian law governed the underlying dispute

The next important difference in the approach of the ECCA from that of the judge was in relation to the governing law of the claims. No foreign law had been pleaded and the judge proceeded on the basis that the applicable law was to be taken to be the same as that of the law of the forum, applying Rule 25(2) of Dicey. In the judgment of Webster JA, the judge could not presume that the law of the forum governed the underlying claims. Webster JA considered that Eurochem was under a positive obligation to plead and prove any applicable foreign law, and that on the evidence the judge should have found that Russian law governed the underlying dispute. The judge should not have relied on the absence of a pleaded case on foreign law as that would enable a party to gain an advantage by not pleading foreign law. In any event, Dicey's Rule 25(2) only

applied if there was insufficient evidence of foreign law, which was not the situation before him (para 49). However, Webster JA rejected the argument that the judge was wrong in relation to inability to identify the place of the commission of the torts (para 47).

31. In the judgment of Webster JA, it fell to the ECCA to make a finding on the issue of governing law as the judge had not done so. Webster JA held that, as the claims were tortious, the double actionability rule would normally have applied. That common law double actionability rule normally means that a tort committed outside the jurisdiction is not actionable within it unless it is actionable both under the law of the forum and under the law where the tort was committed. However, that rule could not apply because as the judge had held the place where the tort was committed was not proved. On that basis, Webster JA held that the exception to the common law double actionability rule applied and that meant that the law which applied was the law which, with respect to that issue, had the most significant relationship with the occurrence and the parties. The most significant relationship was with the law of Russia as the source of the disputes was the employment relationship between Eurochem and the Russian defendants. The choice of law clauses in the service contracts of the Russian defendants expressly provided that the parties' mutual relations arising from the contract but not regulated by it were to be governed by Russian law. The claims against the Russian defendants were governed by Russian law and so (without the need for further elaboration) "Russian law is the governing law of the claims in the action." (para 60). The respondents seek to uphold this reasoning.

(4) The Board: the judge's approach to be preferred as governing law(s) unclear

32. The Board agrees with the ECCA that the judge was wrong to rely on the presumption in Dicey's Rule 25(2) in this context but agrees with the judge that foreign law did not have to be pleaded. However, the Board does not consider that any harm was occasioned by the judge's error. The judge was clearly of the view that he could not make any finding as to the governing law. In the opinion of the Board, that finding was unassailable. The judge was faced with numerous claims for dishonest assistance, conspiracy and so on. Each has several ingredients which had to be considered in relation to each claim separately. The Board therefore has much sympathy with the judge's approach that the governing law was not knowable at that point in time and was therefore a neutral factor. The Board does not agree that the ECCA could find the governing law by applying the exception to the double actionability rule because there was no factual material on which to ascertain the law with which each of the torts had their most real and closest connection.

33. The fact that there were Russian choice of law clauses in the service contracts of the Russian defendants and that these were drafted in wide enough terms to include the claims made in these proceedings cannot mandate that Russian law is the law governing

the individual torts relied on as against the other defendants. They were not parties to those contracts.

(5) Other differences of approach between the ECCA and the judge, particularly with regard to the relevance of the place of incorporation of the BVI defendants

34. Webster JA declined to interfere with the judge's findings on witness availability or language and the need to translate some documents. As to the place of incorporation of the BVI defendants, the judge had correctly noted that this was insufficient of itself for the BVI to be the appropriate forum. The judge then went on to attach too much importance to incorporation in the BVI when he said that they must therefore expect to be sued in the BVI. Incorporation in the BVI was a connecting factor but not a strong one as there was no evidence that the BVI companies had conducted any activities in the BVI. Likewise, the judge was wrong to attach any importance to the claimants' choice of the BVI in bringing these proceedings.

35. Webster JA held that the fact that the remedies were less beneficial under Russian law did not mean that they would be left without a viable claim and they had to take the Russian legal system as they found it.

36. In conclusion, Webster JA was satisfied that the judge had erred by not making a specific finding as to the governing law of the claims and held that, had he done so, he would have found that the claims had their closest connection with Russian law and therefore the governing law of the claims was Russian law. Likewise, the judge erred because he should not have relied on Dicey's Rule 25 to find that BVI law applied to the claims. Thirdly, the judge erred because he attached too much weight to the use by the Russian defendants of BVI- incorporated companies and to the fact Eurochem chose to sue in the BVI. These were neutral considerations in a forum application. Therefore, the judge's finding that the BVI was the most appropriate forum should be set aside. Webster JA considered that the appropriate forum was Russia.

37. As to the question whether a stay should be refused on the ground that the claimants would not receive substantial justice in Russia, Webster JA rejected Eurochem's contention that it could rely on the fact that the remedies in Russia would be less far-reaching as the remedies of the constructive trust and tracing of assets were not available in Russia. Eurochem had to take the available forum as they found it. On the evidence, the commencement of proceedings would not be barred by limitation in Russia. The judge did not take the appropriate approach.

38. As to the service out defendants, Webster JA held that there was a serious issue to be tried against them and that the judge was correct to decide that issue in favour of the claimants. However, this did not affect the more important and overarching finding

in his judgment that the BVI was not the more appropriate or natural forum in which the case might be tried more suitably in the interests of all parties and the ends of justice.

(6) The Board: the issues of alternative forum and proper law determine this appeal and so the Board does not need to deal with the miscellaneous factors

39. Having reached its conclusions on the issues of alternative forum and proper law as explained above, it is not necessary for the Board to go into these further matters. The defendants had failed to show that Russia was an available forum competent to hear Eurochem's claims and their jurisdictional challenges failed. As to the stay applications, it would be odd to conclude on the facts of this case that the BVI was not the most appropriate forum for the adjudication of the claims against the BVI companies given the absence of a finding that there was an alternative forum. True, the judge attached weight to their incorporation in the BVI which was unrealistic: the mere fact that an overseas person incorporates a company in the BVI does not of itself mean that he submits to the jurisdiction of the BVI courts. That is a matter to be dealt with on the usual principles. But the Board considers that the judge did not give this matter any great weight. The judge was influenced by other matters, particularly the international character of the secret commission schemes, the absence of an alternative forum and so on.

40. It is not necessary for the Board to consider the weight to be given to matters such as the effect in the circumstances of this case of the possible expiry of the short limitation period allowed in Russia for claims arising out of employment contracts (a matter considered by Lord Goff in the *Spiliada* at pages 483-484), or the absence in Russian law of an effective equivalent to tracing remedies. Given the nature of the proceedings, however, the remedies are a crucial part of the claims in the proceedings and, applying by analogy the approach of Lord Goff at the passage just cited, practical justice might well not be done if the claims had to be brought in a jurisdiction which did not have equivalent remedies.

The Board's conclusion

41. In the circumstances the Board will humbly advise Her Majesty that this appeal should be allowed, and the order of Wallbank J restored.