

9-04-08

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CIVIL APPEAL NO. 7 OF 2007

GRAND COURT NO. 102 OF 2006

BETWEEN:

BRASIL TELECOM, S.A.

Appellant/Plaintiff

**(A corporation organized under the laws
of the Federative Republic of Brazil)**

AND

OPPORTUNITY FUND

Respondent/Defendant

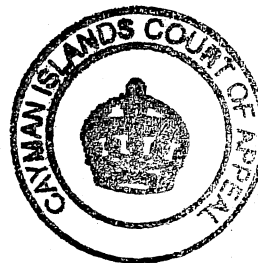
**(A corporation organized under the laws of
the Cayman Islands)**

**Before: The Right Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice Taylor, Justice of Appeal
The Hon. Mr. Justice Mottley, Justice of Appeal**

Appearances: Michael Black, Q.C. and Seamus Andrew instructed by James Kennedy of Samson & McGrath for the Appellant, and Roger Ellis, Q.C. instructed by James Chapman of Bodden & Bodden for the Respondent.

**Heard: 27th – 29th November 2007
2008**

Judgment delivered: 9th April,

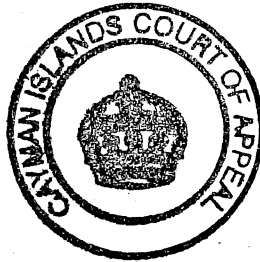


JUDGMENT

ZACCA, P.

I have read in draft the reasons and decisions of Mottley J. A. I agree with these reasons and I would also dismiss the appeal.

Zacca, P.



MOTTLEY, J.A.

[1] On 16 March 2006 Brasil Telecom S.A. (“the appellant”) filed a Writ and Statement of Claim against Opportunity Fund (“the respondent”) in which the appellant alleged that the respondent was the constructive trustee of commercial benefits which had accrued to the appellant and, as such, it would be unconscionable for the respondent to retain such commercial benefit. It was further alleged that the respondent wrongfully disposed of the commercial benefit and, in the alternative, it dishonestly assisted in wrongfully transferring those benefits.

[2] On 21 September 2006, the respondent filed a Summons seeking, inter alia, an Order that the proceedings be stayed on the grounds that the Cayman Islands was not the appropriate forum for the trial of this action. On 13 December 2006, Levers J. granted an Order staying all further proceedings in the action. It is from this order that the appellant has appealed.

[3] The appellant is a corporation organized under the laws of the Federative Republic of Brazil. It was formed about July 1998 when Telecomunicações Brasileira SA, the state telecommunication company, was privatized into separate companies. The appellant is a telecommunications provider and has fixed-line operations in nine States located in the central, western and southern parts of Brazil and the Federal District. It offers mobile telephone service in the Federal District and the nine States. Its principal place of business is Brasilia, Brazil.

[4] The respondent is a corporation organized under the law of the Cayman Islands since 1992. It is a Regulated Mutual Fund and, since 1994, is regulated by the Cayman Islands Monetary Authority. The Registrar and Transfer Agent of the respondent is UBSF Fund Services (Cayman) Limited, a company incorporated in

the Cayman Islands. The sole director and owner of all the voting shares in the respondent is a Cayman Island Company known as Opportunity Asset Management (OAM). OAM operates a security investment business from Cayman Islands. OAM is owned by a company incorporated in the British Virgin Islands known as Opportunity Invest Inc.

[5] In this action, the appellant claims that its former directors and officers abused their position of trust and “caused assets and other things of value” belonging to the appellant to be wrongfully transferred to the respondent, which “knowingly and improperly received” these assets and things of value. The appellant also alleges that the respondent “as a controlling shareholder” of the appellant breached its fiduciary duties to the appellant under Brazilian Corporate Law by engaging in transactions involving the appellants property and funds for the benefit of the respondent. In addition, the appellant alleges that the respondent received the property and funds knowing that they belonged to the appellants. The appellant however pointed out that it is unable to say, at this stage, what was the specific property received. Nonetheless, it asserts that it will be able

to do so after the taking of accounts and the granting of the other relief sought in this action.

[6] The relief sought by the appellant includes the taking of accounts and making of enquiries in order to determine the full extent of the commercial benefit which the respondent received "at the direct or indirect expense" of the appellant. An account is also sought of all sums which the respondent received and which represents income or proceeds from any commercial benefit. Also being sought is an inquiry into what assets in the hand of the respondent represent the commercial benefit lost by the appellants. The appellant seeks an order for all payments found due and owing to it by the respondent together with interest.

[7] The respondent filed its Summons requesting that the Grand Court grant an Order staying the proceedings on the ground that the Cayman Islands was not the appropriate forum for the trial of this action. The respondent contended that the appropriate forum for the hearing was in fact Brazil.

[8] At the hearing of the Summons before Levers J, the respondent contended that the Cayman Islands was not the natural and appropriate forum for the trial of the action. The respondent further contended that Brazil was the more appropriate forum. It was recognized that the jurisdiction in the Cayman Island was founded as of right as the respondent was domiciled in the Cayman Islands. Consequently, it was argued that the burden was on the respondent to prove that the action had the most real and substantial connection with Brazil. During the course of the hearing of the Summons, counsel for the respondent gave the court the undertaking that the respondent will submit to the jurisdiction of the courts of Brazil. In view of this, counsel for the respondent submitted that the burden had shifted to the appellant to show by cogent evidence, that it would not obtain justice in the courts of Brazil.

[9] Counsel for the appellant, in opposition to the application, submitted that the respondent had to show not only that Cayman Islands was not the natural or appropriate forum but it had to establish that there is another forum which is clearly or distinctly more appropriate. He further submitted that the Court had to look at all the factors to ascertain which forum had the most real and substantial

connection with the action. These factors included convenience or expense (the availability of witnesses) the law governing the transaction which is the subject matter of the action, and the place where the parties reside or carry on business. Counsel accepted that if the courts were to conclude that there was another available forum which prima facie was more appropriate it would grant a stay unless there are circumstances by reason of which justice requires that the stay should not be granted. Counsel also submitted that, in the context of the Cayman Island, public policy considerations had to be taken into account. For this proposition he relied upon what was said by this Court in **Contadon Enterprises SA v. Chile Holding (Cayman) Ltd. 1999 CILR 194.**

[10] This is an appeal against the exercise of the judge's discretion. This Court is mindful of what was said by George JA in **Lhasa Inos Ltd. v International Credit Invs. (Overseas Ltd. 1994 – 95 CILR 293 at 307:**

“It should be borne in mind that the Court of Appeal is only entitled to intervene and interfere in limited circumstances with the decision of a judge of first instance based on the exercise of discretion. It must be shown that (a) the trial judge had misdirected himself with

regard to the principle in accordance with which the discretion had to be exercised; (b) he had taken into account matters which he ought not to have taken into account or failed to take account of matters which he ought to have taken into account; or (c) the decision was plainly wrong. The appellant tribunal should not merely substitute its view for that of the trial judge.”

[11] It is useful to set out the principles governing the grant of a stay of proceedings on the basis of *forum non conveniens*. These principles were set out by Lord Goff of Chievely in **Spiliada Maritime Corporation v Cansulex Ltd.** [1987] 1 AC 460 at p. 476:

“In my opinion, having regard to the authorities (including in particular the Scottish authorities) the law can at present be summarized as follows:

(a) the basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other more available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action i.e. in

which the case may be tried more suitably for the interest of all the parties and the ends of justice.

(b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rest on the defendant to persuade the court to exercise its discretion to grant a stay.....It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretions in his favour, and that in respect of any such matter the evidential burden will rest on the party who assert its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action the burden will shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country.....

(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, found

jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English Court will not lightly disturb jurisdiction so established.....In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right.....

(d) Since the question is whether there exist some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described in *MacShannon's case* [1978] AC 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expenses".....I respectfully consider that it may be more desirable, now that the English and

Scottish principles are regarded as being the same, to adopt the expression by my noble and learned friend, Lord Keith of Kinkel, in the *Abidin Daver* [1984] 398, 415, when he referred to the “natural forum” as being “that with which the action had the most real and substantial connection”...So it is for connecting factors in this sense that the court must first look, and these will include not only factors affecting convenience or expense (such as availability of witnesses) but also other factors such as the law governing the relevant transaction.....and the places where the parties respectively reside or carry on business.

- (e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.....
- (f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the

court will consider all the circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such fact can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction. See *The Abidin Daver* [1994] 384, 411 per Lord Diplock, a passage which now make plain that, on this inquiry, the burden of proof shifts to the plaintiff.....”

I set out these principles in extenso as I shall return to them later when dealing with the question of whether public policy is a factor which the judge may take into a consideration.

[12] Before dealing with the claims of the appellant, in this action it is necessary to understand the corporate structure of the parties. As stated earlier, the appellant is a company incorporated in Brazil. One investor in the appellant is Citibank NA by way of an investment fund formed in December 1997 in the Cayman Islands and formerly known as CVC/Opportunity Equity Partners, L.P. now known as Citigroup Venture Capital International Brazil L.P. This is called “the Offshore Fund”. Another investor through an investment fund formed in

December 1997 in Brazil, is Investidores Institucionais Fundo de Investimento Em Ações formerly known as CVC/Opportunity Equity Partners Fundo de Investments Em Ações Carteria Livre. This fund, called “the Onshore Fund”, consist of Brazilian Pension Funds, OAM and the respondent form part of an asset management group known as Opportunity Group (Opportunity). Opportunity was founded and is controlled by Mr. Daniel Dantas (Mr. Dantas), a citizen of Brazil who lives in Brazil. The Offshore Fund and the Onshore Fund were formed to take advantage of investments upon the privatization of the state – owned industries in Brazil. In 1998 Opportunity arranged for the Onshore Fund and the Offshore Fund to form a consortium to bid for and acquire the fixed line telephone assets that became the appellant. Opportunity obtained controlled over the appellant and thereby installed directors on the board of the appellant and its direct parent Brazil Telecom Parliapacoes SA (BTP). Opportunity also installed a management team to manage the appellant including Ms. Carlos Cico, an Italian who resided in Brazil, as the Chief Executive Officer, she remained the Chief Executive Officer at the material times up until September 2003.

The ultimate controlling company of the appellant is a Brazilian Company Opportunity Zain SA (Zain). Zain is owned by the Onshore Fund, the Offshore

Fund, and the respondent of. Zain does not conduct any business in the Cayman Islands. Ms. Veronica Dantas, a Brazilian national and resident in Brazil is a director of OAM. She is the sister of Mr. Dantas.

[13] The appellant claims that its former directors and officers abused their position of trust with respect to the appellant and caused its assets and other things of value belonging to it to be wrongfully transferred to the respondent which knowingly and improperly received those assets and other things of value. The appellant further alleges that the respondent, which was the controlling shareholder within the meaning of the Brazilian Corporation Law, breached fiduciary duties owed to it. These breaches occurred when the respondent engaged in transactions which involved the appellant's property and funds being used for the benefit of the respondent. The respondent knowingly received the property and funds in breach of its fiduciary duties.

[14] The appellant also alleges that Ms. Cico and the other former officers of the appellant "owed and continues to owe fiduciary duties of loyalty and good faith" to the appellant. In addition, it is being alleged that the former board of directors

in their individual capacities owed fiduciary duties to the appellant, four of the former directors being affiliated to Opportunity. It is contended that the board of directors of the appellant owed a duty to oversee and supervise the former officers to ensure that they acted in the best interest of the appellant. It is further alleged that they were required to act in good faith and not to profit at the expense of the appellant.

[15] In respect of the wrongful transfers of assets and other unspecified things of value belonging to the appellant, the appellant alleged that the former management caused, procured and/or allowed the respondent to gain commercial advantage at the expense of the appellant. The appellant asserts that certain of its former directors “were complicit in and/or aware” of the wrongful acts of the officers of the appellant and of the respondent. The appellant alleges that these “wrongful transfers” were caused and facilitated by the conduct of the respondent while acting as the majority shareholder of the appellant. To this end, it relies on four transactions, referred to as the Highlake, Alcatel, Lucent Technologies and Telecom Italia. It is necessary to briefly examine these claims.

[16] In respect of the Highlake claim, the appellant alleges that the respondent wrongfully obtained substantial indirect interest in two cellular communication companies with financing largely provided by the appellant. This was achieved by the respondent by using a company known as Highlake International Business Company Ltd. to acquire stakes in the telecommunications using forty three million dollars provided by the appellant. The appellant asserts that the acquisition represented a profitable and advantageous business opportunity for the respondent. It is alleged that the respondent was able to seize this opportunity as a result of breaches of the fiduciary duties owed to the appellant by the former officers and directors and by Opportunity. The appellant complains that it was denied the opportunity to purchase the two companies. Mr. Rodrigo Behering Andrade, the President of Highlake and Ms. Maria Amalia Delfion de Melo Coutrim also a director of Highlake were also directors of the appellant and BTP. In June 2002, the former management of the appellant caused an offshore investment fund, Telecom Capital Fund ("TCF") to be established in Curaçao, in the Netherland Antilles. This fund, managed by a newly-formed asset

management company, was operated by the employees of the appellant but was in fact under the control of Opportunity. It is alleged that in January 2003 the respondent caused the sum of forty million dollars (United States currency) to be transferred to TCF which immediately transferred the money to Highlake. Subsequently, a further sum of three million dollars (United States currency) was also transferred from the appellant to TCF and then to Highlake.

[17] In these circumstances, the appellant claims that its former management, who it alleges were under the control of Opportunity, colluded with the respondent effectively to send the forty three million dollars to Opportunity in such a way as to hide the transaction with Highlake from the shareholders and directors not associated with Opportunity by stating that it was an investment in TCF.

[18] In respect of the claim relating to Alcalet, it is stated that Alcalet was a supplier of telecommunication equipment and services to the appellant. In August 2004 the former management of the appellant without any explanation ordered that the service and maintenance contracts for four of the nine states in which the

appellant operated be transferred to Alcaet. This action greatly increased Alcatel's share of the service work which it carried out for the appellant. Alcatel is a substantial investor in the respondent. The appellant alleges that its former management acted in breach of their fiduciary obligations owed to the appellant in granting contract to Alcatel in return for Alcatel making substantial investment in the respondent. The appellant further alleges that the respondent wrongfully received these substantial sums as a purported investment at the time when Alcatel was supplying goods and service to the appellant pursuant to a lucrative contract with the appellant. In these circumstances, it is alleged that the respondent knowingly received the benefit of the breaches of fiduciary duties of the directors of the appellant. It is also alleged that the respondent dishonestly assisted in a scheme to obtain benefits for Opportunity as a result of the appellant giving Alcatel the lucrative contracts. The appellant asserts that the respondent is therefore the constructive trustee for the appellant of these benefits.

[19] As regards to Lucent Technologies, (Lucent) it is said that the respondent wrongfully received substantial funds as an investment at a time when Lucent was also supplying telecommunications services and equipment to the appellant. These

services ended in August 2004 when the former management transferred the contract to Alcatel. It is alleged that the respondent is also the constructive trustee for the appellant of the benefits which it received from the investment by Lucent.

[20] It is alleged that the respondent received funds as compensation for “orchestrating the execution of an agreement” whereby the mobile telecommunication assets of the appellant were merged into a subsidiary of Telecom Italia. The appellant asserts that the Cellular Acquisition Agreement by which this was achieved is null and void on the ground that it is ultra vires as it did not have the required approvals and was in breach of the former management of the appellant fiduciary duties. It is also alleged that the Cellular Acquisition Agreement was against the commercial interests of the appellant. It is further alleged that the appellant’s former management deliberately avoided obtaining from the various entities within the appellant’s “holding structure” the necessary approval for the Cellular Acquisition Agreement. These included approval under the by-laws of Zain, under BTP Voting Agreement and BTP by-laws. The appellant states that the respondent is liable to account for the proceeds it received in breach of fiduciary duty and its liability for knowing receipt of the benefits of

breach of the former management of the appellant and the dishonest assistance in the scheme which stripped the appellant of its cellular assets which were transferred to Telecom Italia.

[21] The appellant alleges that it was and still is unconscionable for the respondent to retain the commercial benefits which are held on constructive trust for the appellant. In relation to the wrongful transfer the appellant alleges that the respondent disposed of the commercial benefit in breach of the fiduciary duties owed to the appellant by its former officers, its former board of directors and the respondent. In addition, it is said that the respondent beneficially received the commercial benefit which it knew was traceable to breaches of fiduciary duty by the appellant's former management and its board of directors and by the respondent as a controlling shareholder. Having regard to these matters the appellant states that the respondent behaved dishonestly when it received and retained the commercial benefit. The respondent is also said to have procured and assisted the appellant's former management and board of directors to make the wrongful transfer.

[22] In her judgment Levers J, observed:-

“The crux of the case is the breaches of duty to the Plaintiff. There may be no specific evidence to show inconvenience but there is sufficient evidence by the Defendant to show that all the witnesses are in Brazil, that the witnesses are not compellable in Cayman and that the majority of their documents will be in Brazil. It is difficult to see how the Plaintiff argues that there is no connection to Brazil on the facts of this case. There is evidence before me which is undisputed that the company was formed to conduct business in Brazil on behalf of non-residents of Brazil and that in fact the investments undertaken by the Company are predominately in Brazil. Cayman is the formal headquarters and domicile of the Company. There is no business undertaken in the Cayman Islands. The assets may or some of them may be in the Cayman Islands but save and except for that the actual day-to-day running of investment in Brazil takes place in Brazil. I agree with Mr. Ellis that it is absurd to suggest that the Brazilian Courts cannot have jurisdiction over a Brazilian Company such as the plaintiff. The placement Memorandum that is before the Court does show a connection to Brazil and the Court

must look objectively at the cause of action and the facts needed to establish a case. Without looking at the Defence, the Plaintiff's cause of action stems from breaches of fiduciary duty and it is not unreasonable to think that all the actions having taken place in Brazil that the document, the persons who undertook these various steps and who partook in the duty activities will be needed to establish the plaintiff's case. It is Brazilian law that is going to decide what remedy the plaintiff has. It is the Brazilian law that governs the action of the parties. The various contracts and decisions to invest in the Defendant and the sort of investments that was required to be made by the Defendant will one can reasonably assume be coming from the Brazilian witnesses in Brazil Telecom."

[23] Levers J concluded:

"Weighing all the factors into account, the Plaintiff being a Brazilian Company, the Defendant having substantial business interest in Brazil and the fact that Brazilian law will govern the breaches of fiduciary duty, I find that Brazil is the most appropriate forum with which this case has a real and substantial link. I also find that

availability is proven by the undertaking given by the Defendant's attorney Mr. Ellis.

Levers J. went on to state that the respondent had displaced the burden placed upon it and overcome the factor that the respondent had been sued as of right in the Cayman Islands. The judge indicated however that the appellant had not discharged the burden which had shifted to it to prove that there were special circumstances which required that a stay should not be granted.

[24] In an effort to establish whether Brazil is the forum with which the action has the most real and substantial connection, it is necessary to ascertain whether the respondent would have discharged its burden having regard to the fact that appellant issued the writ against the respondent as of right. In determining the forum with which this action has the most real and substantial connection, it is necessary to have regard to a number of factors. In order to establish that the respondent, as controlling shareholder of the appellant under the Brazilian Corporation Law, it will be necessary for the Court at the trial of this action to consider the meaning and implication of Article 116 of the Brazilian Corporation Law. On the appellant's case as pleaded breach of the fiduciary duties owed to the

appellant by the respondent as the controlling shareholder of the appellant falls to be determined under the Brazilian Corporation Law. In addition, the fiduciary duties of the former management of the appellant including that of the officers and the former board of directors will also have to be determined according to Brazilian law.

[25] In his affidavit, Mr. Darwin Correa stated that he and other high level officers of the appellant speak English and are available to travel to the Cayman Islands. He also asserts that Mr. Dantas and Ms. Dantas also speak English. However, in view of the allegation of breach of fiduciary duties, the directors, officers and employees of the appellant and Opportunity will be required to give evidence relating to the transaction and their reasons for the making any decision which led to these transactions. These witnesses will also be required to testify in relation to the allegations that they were influenced or coerced by Opportunity. While there is no doubt that the corporate documents relating to the respondent are in English, from the allegations made in the Statement of Claim it would appear that many of the documents which the court at trial would have to examine are in Portuguese as those documents were made or created in the day to day

management or operations of the appellant. It would also appear that the majority of witnesses would be in Brazil and would not be compellable as witnesses if the action were to be tried in the Cayman Islands.

[26] Since the appellant was entitled as of right to institute proceedings against the respondent in the Cayman Islands, the burden of proving “that there is another available forum which is prima facie the appropriate forum for the trial” of this action, is on the respondent. It is for the court to decide whether Brazil is a ‘natural forum’, as the forum with which this action has the most real and substantial connection. In deciding this issue the court is entitled to have regard to various factors.

[27] Most, if not all of the events leading to the causes of action would have taken place in Brazil. It will be necessary, at the trial, to consider the conduct of the directors, officers and employees of the appellant in order to ascertain whether such conduct constituted or led to the breaches alleged in the Statement of Claim. Such conduct would have to be considered in the light of the relevant corporate laws in force in Brazil at the time when the breaches were alleged to have occurred. This would probably require that many of the witnesses including directors, officers and other staff members of the appellant will be called as witnesses. If the trial took place in the Cayman Islands it would not be possible to compel the witnesses to attend the trial and give evidence. Documents which will be used in evidence are likely to be in Portuguese. If the trial is conducted in the

Cayman Islands expert witnesses will have to be called to give evidence as to the Brazilian law as it relates to companies and the impact of the allegations under Brazilian law. If the trial takes place in the Cayman Islands, all the Portuguese documents would have to be translated into English. So also, the evidence of most witnesses may have to be given through interpreter. These factors would no doubt greatly impact on the length of the trial and would likely involve additional costs and expenses. Another factor which the Court must consider is the discovery exercise which from the nature of the allegation made would appear to involve the review of a large number of Brazilian documents in Portuguese to determine whether the documents are relevant.

[28] During the course of the hearing, Mr. Ellis gave the Court an undertaking on behalf of the respondent that the respondent will submit to the Brazilian jurisdiction. In Dicey Morris & Collins, the Conflict of Laws (14th Edition) (2003) at paragraph 12-028 it is stated:

“It follows that an undertaking by the defendant to submit to the jurisdiction of a foreign court can make the foreign court available even though it would not have been so without his undertaking.”

[29] In **Lubbe v Cape** [2000] 1 WLR 1545 the House of Lords considered the validity of a defendant’s undertaking to submit to the jurisdiction of a foreign

Court. Lord Hope of Craighead after reviewing a number of authorities said at p. 1565:

“In the light of these authorities I would have regarded the undertakings which were offered by the defendant in this case as sufficient to satisfy the requirement that the alternative forum in South Africa was available because it had undertaken to submit to the jurisdiction of the court of that country. Nothing turns on the time when the undertakings were given. It is sufficient that they were before the judge when he was considering the question of forum non conveniens. As for the suggestion that the defendant was choosing its jurisdiction and thus indulging in a kind of forum shopping, this overlooks the fact that the issue as to forum non conveniens is for the court itself to resolve. It is not a matter that is left to the choice of the defender. Furthermore the court resolves the issue by looking to the interest of all parties and the ends of justice. As the Lord Justice – Clerk, Lord Alness said in *Société du Gaz de Paris v Société Anonyme de Navigation “Le Armateurs Français”* 1925 S.C. 332, 347, it does not do so from the point of view of the defendant only.

The only purpose of the undertaking is to satisfy the requirement that the other forum is available. The ground on which the jurisdiction of the courts in the other forum is available to be exercised is of no importance either one way or the other in the application the case of the Spiliada principle.”

[30] Placed therefore in its proper perspective the undertaking by Mr. Ellis to submit to the jurisdiction of the Brazilian courts was an attempt by the respondent to satisfy the requirement of the Spiliada principle that there is an alternative forum. The court is required to consider whether the respondent has satisfied it that there is another forum having competent jurisdiction which is the appropriate forum being the forum with which the action has the most real and substantial connection for the trial of the action in the interest of the respondent and the appellant and the ends of justice. In order to arrive at a decision it was necessary for the judge to analyze the nature of the action brought by the appellant.

[31] The judge considered the relevant factors and in my opinion correctly concluded that, notwithstanding that the appellant sued the respondent in this

jurisdiction as of right, the respondent had nonetheless discharged the burden of proving that Brazil was the most appropriate forum with which this action had the most real and substantial connection.

[32] Having found that Brazil was the natural forum being the forum with which this action has the most real and substantial connection, the judge went on correctly to find that the burden of proof shifted to the appellant to show that there are special circumstances which nonetheless required that the trial of the action should take place in the Cayman Islands. In order to do this, the appellant was required to establish by cogent evidence that it could not obtain justice in Brazil. The judge, in my view, rightly determined that the appellant had failed to discharge that burden.

[33] Before the judge, Mr. Black submitted that the defendant had been organized in the Cayman Islands in such a way as to take the substantial benefit of such incorporation, yet it is unwilling to submit to the jurisdiction of the Cayman Islands Courts. In dealing with this submission the judge said:

“That even if I were to take public policy into account I do not believe that any of the Cayman authorities states that of the interest of all the parties and the ends of justice outweigh the question of public policy then the court must make a decision to exercise its discretion in favour of refusing a stay.”

[34] Mr. Black in his written Memorandum of Grounds submitted that “the judge recognized that the decision of the Grand Court in **KTH Capital Managements Ltd. v China One Finance Ltd. and Others (2004-05) CILR 212** and the decision of the Cayman Court of Appeal in **Contadora Enterprises SA v Chile Holding (Cayman) Ltd. CILR [1997]** required public policy considerations to be taken into account when assessing a forum non conveniens argument but failed to take such policy consideration into account adequately or at all”. Mr. Ellis on the other hand submitted that the judge should not have taken into account public policy considerations. However he suggested that the judge cannot be faulted as the direction she gave herself and the conclusion reached showed that the ends of justice outweighed any public policy consideration.

[35] In **Contadora Enterprises S.A. v Chile Holding (Cayman) Limited**

[1999] CILR 194 Collett JA said:

“There is one further factor not specifically mentioned by the learned judge but which, by reason of the somewhat robust language of his judgment, must, I think, have been well at the fore front of his mind when considering the exercise of his discretion. Here is a case of the alleged fraudulent mismanagement of a Cayman International Company. The reputation of Cayman International businesses is to some extent at issue in these proceedings furthermore, a judicial system which perceived itself as powerless to intervene effectively to prevent the proceeds of such a fraud from disappearing overseas would inevitably invite disparagement from the international financing community. There are, therefore, strong public policy consideration here which, in my judgment, were rightly taken into account by the learned trial judge.”

[36] The approach adopted by Collett JA would tend to suggest that the judge should take public policy consideration in to account in reaching his decision.

Collett JA observed that “a judicial system which perceived itself as powerless to intervene effectively to prevent proceeds of such a fraud from disappearing overseas would inevitably invite disparagement from the international financial community”. Allegations of fraud must of necessity involve the state and state machinery including the Courts. But the consideration in respect of an application for a stay based on a plea of forum non conveniens are not the same as those which would be involved in an application to prevent the proceed of fraud from disappearing overseas.

[37] In my view, the observation by Collett JA must be taken as being obiter as the Justice of Appeal did not provide any reasons for reaching this conclusion. The principles applicable to forum non conveniens were developed by the House of Lords after accepting the principles set out by Lord Kinnear in **Sim v Robinow (1892) 19 R C Ct of Ses. 655 at 668** where he said:

“.....the plea can never be satisfied unless the Court is satisfied that there is some other tribunal having competent jurisdiction in which the case may be tried more suitably for the interest of all parties and for the ends of justice.”

[38] In **Spiliada** case (supra), Lord Goff reviewed the authorities including the Scottish authorities summarized the law relating to forum non conveniens as set out earlier. In so doing, his Lordship was in fact laying down certain principles of the common law albeit that it developed from principles of Scottish Law.

[39] In **Lubbe** case (supra) which was decided by the House of Lords in 2000. Lord Hope of Craighead, in a decision with which all the other Law Lords agreed, dealt with the issue of public interest and public policy as relevant factors in considering whether a court should grant a stay on the grounds of forum non conveniens. In a comprehensive judgment Lord Hope, said at p. 1566:

“In my opinion, the principles on which the doctrine of forum non conveniens rest leave no room for consideration of public interest or public policy which cannot be related to the private interest of any of the parties or the ends of justice in the case which is before the Court.”

His Lordship went on to say:

“The proper approach therefore is to start from the proposition that a claimant who is able to establish jurisdiction against the defendant as of right in this country is entitled to call up on the courts of this country to exercise that jurisdiction. So, if the plea of forum, non conveniens cannot be sustained on the ground that the case may be tried more suitably in the other forum, in the words of Lord Kinnear in **Sim v Robinow 19 R. 665, 668** “for the interest of all the parties and for the ends of justice”, the jurisdiction must be exercised – however desirable it may be on grounds of public interest or public policy that the litigation should be conducted elsewhere and not in the English Courts. Can the other hands of the interest of all parties and the ends of justice require that the action in this country should be stayed, a stay ought to be granted however desirable it may be on grounds of public interest or public policy that the action should be tried here.”

[40] His Lordship expressly declined to follow the judgment in the United States which decide the issue as to where cases should be tried on the broad ground of

public policy. His Lordship agreed with the observation of Deane J in **Oceanic Sun Line Special Shipping Co. Inc. v Fay (1988) 165CLR 1957, 255** “that the Court is not equipped to conduct the kind of inquiry and assessment of the international as well as the domestic implications that would be needed if it were to follow that approach”. Lord Hope reiterated that the issues should be determined by an examination of the interest of the parties who are before the Court and securing the ends of justice. His Lordship concluded that so long as consideration of policy cannot be dealt with the context of the interest of the parties and the ends of justice it must not be taken into account in applying the *Spiliada* principles to the case before the court.

[40] In his judgment in **Lubbe’s** case (*supra*) Lord Bingham of Cornhill had earlier said at p. 1561:

“Both the plaintiffs and the defendant place reliance on public interest considerations as strengthening their contentions that these proceedings should be tried in the forum for which they respectively contended. I agree with my noble and learned friend Lord Hope of Craighead, for the reasons which he gives that public interest

considerations not related to the private interest of the parties and the ends of justice have no bearing on the decision which the court has to make.....

It is important that the focus should remain on the principle so clearly stated by Lord Kunnear: in applying this principle questions of judicial armour propre and political interest or responsibility have no part to play.”

[41] With respect, I decline to follow the earlier statement expressed by Collett JA on the ground that it was obiter. I accept the ruling and reasoning of Lord Hope in Lubbe’s case.

[42] To take account of the public policy considerations contended for by the appellant would, in my view, be another way of placing additional weight to the factor that jurisdiction to institute proceeding in the Cayman Island has been founded as of right because the respondent is incorporated and is domiciled in the Cayman Islands. To do so, would make more onerous, the burden which is on the defendant to show that Cayman Islands is not the natural forum but that Brazil

is the appropriate forum as having the most real and substantive connection with the action. It would be giving undue weight to one factor at the behest and interest of the appellant to the detriment of the respondent. Such public policy considerations cannot co-exist in this case with the interest of the parties and the ends of justice, or fall within the *Spiliada* principles.

[43] Collett J.A. rejected the idea that the Court of Cayman Islands would be powerless to intervene to prevent the proceeds of fraudulent mismanagement of the Cayman International Company from disappearing overseas. I share the concerns of the Justice of Appeal about the effect on Cayman's reputation overseas in the International business community should the Courts in the Cayman Islands be perceived to be powerless to act where fraudulent conduct is being alleged. However, in my opinion, should fraudulent mismanagement of a Cayman Islands International business company occur in circumstance in which the reputation of the Cayman International business is called into question, the Courts would likely claim jurisdiction on the basis that there is no other forum which is considered to be appropriate forum within the *Spiliada* principles, and not on the basis of public policy considerations.

[44] In the circumstances, I hold that the judge was correct in not taking into account public policy considerations in coming to the conclusion that, in the interest of the parties and the ends of justice, a stay should be granted on the ground that the Cayman Island is a forum non conveniens and that Brazil is the appropriate forum being the forum with which the action has the most real and substantial connection. As stated earlier I also agree with the conclusion by the judge that the appellant had failed to satisfy by way of cogent evidence the burden that had shifted to it that it would not obtain justice in the courts of Brazil.

[45] In the circumstances, the appeal is dismissed and the order made by the judge below is affirmed. The respondent is to have its costs of the appeal to be taxed if not agreed.

Mottley, J.A.



TAYLOR, J.A.

The claims made in this action, and the background to the appeal, are stated in detail in the reasons for judgment below and of my colleague Mr. Justice Mottley.

The Plaintiff (Appellant), a Brazilian telephone company, alleges that the Defendant (Respondent), a Cayman Islands company operating mutual funds in Brazil for foreign investment in Brazilian enterprises, participated in and profited from a fraudulent scheme in which members of the former management of the telephone company, said to have been acting in the interests of the corporate group to which the Defendant belongs and by whom they were appointed, are alleged to have betrayed the company's interests by causing it to enter into improvident contracts, refrain from potentially profitable dealings, favour suppliers, and in other ways, in return for investment being made in the Defendant's funds by those who benefited thereby.

Conventional indicia of appropriateness for the purpose of forum choice clearly point to Brazil, and not the Cayman Islands, as the forum most suited for adjudication of these claims. Both parties conduct businesses in Brazil and have

most of their assets there. The scheme is alleged to have principally been directed from Brazil, by Brazilian nationals or residents who had charge of the telephone company's affairs, in breach of Brazilian law. The losses are alleged to have been suffered by the telephone company in Brazil. Most of the relevant documents are in Brazil, many in the Portuguese language. The key witnesses are in Brazil, and speak Portuguese at least as their first language. The Defendant, through its counsel, undertook before the trial court judge that the Defendant would submit to the jurisdiction of the Brazilian court. The Plaintiff has not argued that substantial justice would not be done if the matter were tried in Brazil. The only connection with the Cayman Islands is that the Defendant is a Cayman-incorporated entity having a share register and transfer agent here. The Defendant employs no other personnel here, carries out no management functions here and has no investments in the Cayman Islands, funds subscribed to it being held in New York until invested by it in Brazilian enterprises. No part of the dishonest scheme alleged is said to have been carried out in the Cayman Islands, nor is there said to be anyone in this jurisdiction who could provide evidence regarding the alleged scheme. The alleged "enrichment" is not said to have been brought about

by anything done in the Islands, nor is it alleged that any ill-gotten gain, monetary or otherwise, has been brought here.

The principal basis on which the Appellant contends that a stay ought not to have been granted is that the Defendant is sued “as of right” in the Cayman Islands, its place of incorporation, and the relief sought is equitable relief, in the form of constructive trust, “tracing” and an accounting remedy under Cayman law. The Appellant says that the Defendant has not shown that such relief is available in Brazil, or indeed what relief a Brazilian court would grant, and has thus failed to demonstrate that Brazil is an “available” forum. Seven points are taken by the Appellant in support of its contention that the trial court judge erred in concluding that the Defendant’s undertaking to submit sufficed to render the courts of Brazil “available” as a “clearly and distinctly more appropriate forum”, within the meaning of these well-known phrases from the decision in *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460.

The first, third and fourth points advanced by the Appellant properly state that the Defendant’s voluntary submission cannot suffice to oblige, or indeed permit, a Brazilian court to accept a claim which falls for other reasons outside its jurisdiction. By its second point the Appellant asserts that the judge did not

appreciate that the claim was for constructive trust and accounting relief in the Cayman Islands and that no such relief would be available in any court in Brazil.

Asked whether Brazilian or Cayman law would apply as the law of the dispute, counsel for the Appellant responded before us that both apply.

We were referred to no authority that might assist us in resolving this conundrum, one in an area of law considered in depth by Professor T.M. Yeo, in his recent work, *Choice of Law for Equitable Doctrines*. Counsel appeared content that the matter be decided on the basis of general principle governing forum-choice.

If no wrong were committed under the law of Brazil, it is difficult to conceive on the facts alleged in this case that a claim for equitable relief could succeed in the Cayman Islands. There are no illicit funds alleged to be held here, none of the acts complained of is said to have occurred here. But it seems inevitable that the conduct complained of would constitute a wrong, under any system of law, in what might be described for the purposes of private international law, as delict, civil obligation or restitution. The Appellant contends that it involved breaches of the law of Brazil. Brazil is not a signatory to the 1968 Hague Convention on the Law Applicable to Trusts. The law of Brazil must nevertheless

provide relief, should the Appellant's allegations of breach of Brazilian law be proved, and the Appellant does not suggest otherwise.

Choice of the proper law of the dispute, or *lex causae*, and choice of proper forum for its resolution are different matters, but it would be wrong to say that they are unconnected. The chosen law of the dispute will necessarily be an important factor considered in deciding on choice of forum, and particularly where, as here, courts of the 'competing' jurisdictions have different law and legal systems, apply different procedures, and use different languages. In this case the "connecting factors" for both purposes point clearly to Brazil, rather than the Cayman Islands.

The Appellant says that there is no evidence a Brazilian court would "recognize the Plaintiff's cause of action", that is to say its claim framed in English equity law, and that there is no evidence that a Brazilian court has "jurisdiction to award the remedies claimed". To give effect to the Appellant's argument, that this points to the Cayman Islands as the appropriate forum, would be to acknowledge that where the cause of action pleaded or remedy sought is known only to English equity law the claim is one that can only be tried in a jurisdiction that applies that law. In the context of modern conflict-of-laws principles, it does not seem proper

that resolution of a forum-choice dispute should turn on the way in which the plaintiff chooses to frame its case. Forms of action and remedies available in the jurisdiction most closely connected to the matters in issue will in many cases differ from those recognized in English equity law, and this is inevitable where the other jurisdiction is one that has adopted the Roman or civil-law system. If the other jurisdiction recognizes the facts alleged as establishing an actionable wrong – the Plaintiff says that is the case here, as would indeed appear obvious – and the foreign jurisdiction is shown *prima facie* to be clearly or distinctly the most appropriate jurisdiction for the trial of the action, the proper remedies must necessarily be those available in the foreign forum. To avoid a stay in such a case it would be necessary for the Plaintiff to demonstrate that the remedies available there are so inadequate as to result in justice not being done. No such plea is advanced in this case.

The fact that a stay is granted does not mean that the Plaintiff cannot seek interim protective relief here in aid of foreign proceedings. Relief in aid of a foreign judgment can also be granted here, normally in summary proceedings. Should the Defendant fail in fact to submit to the foreign court, or should that court for any other reason decline jurisdiction to hear a claim based on the facts

pleaded but framed under the foreign law and for relief available under that law – both of which seem in this case most unlikely – the Plaintiff would, of course, be entitled to apply to the Grand Court to have the stay lifted, and for the present action to proceed.

While the issues raised do not appear to have been authoritatively settled, and the complexities involved were barely touched on in argument before us, the contention that a claimant may, simply by invoking English equity, foreclose the possibility of trial in an otherwise clearly or distinctly more appropriate foreign forum seems inconsistent with fundamental modern conflict-of-law principles, which favour reciprocity and appropriate deference to foreign courts and foreign law, where these are clearly more closely connected with the matters in issue. For this reason, the Appellant's first four points cannot be said to raise valid objection to the stay granted.

The Appellant's fifth point is an assertion that the trial judge failed to appreciate that staying the present action would compel a "duplication of proceedings", were the Brazilian court to accept jurisdiction and grant relief in Brazil. In order to obtain equitable relief in the Cayman Islands following success in a Brazilian action, the Plaintiff would, of course, have to bring further

proceedings here. But that is true whenever a plaintiff successful abroad seeks to enforce a foreign judgment here. It is not a factor that distinguishes this case from others in which stay is granted on forum non conveniens grounds, and cannot outweigh the advantage of disposing of the central issues by a trial in Brazil, which is clearly at the “centre of gravity” in this case. Should the Plaintiff be successful in Brazil, any enforcement proceedings necessary in the Cayman Islands would in all likelihood be capable of summary disposition.

The sixth point made by the Appellant, that concerned with “public policy”, is dealt with in the judgment of Mr. Justice Mottley, with which I agree. The Appellant asserts a “reasonable expectation” on the part of those dealings with Cayman companies that the Cayman Island courts would “resolve disputes involving those entities in an efficient and just manner”. I agree that public policy will rarely be a factor today in forum choice. It is certainly not in the present case. Neither efficiency nor justice would be served by bringing to this jurisdiction a dispute with which the Cayman Islands has no significant connection, when all conventional criteria for forum choice point clearly to another jurisdiction, that in which the conduct complained of principally occurred, the alleged loss was suffered, most witnesses reside, in whose language relevant documents are written,

where both parties principally carry on business, and against whose laws the alleged wrongs must have been committed.

The Appellant's seventh point is that the judge failed to consider factors "linking the case to the Cayman Islands and jurisdictions other than Brazil". The judge was aware of the corporate connection between the Defendant and the Cayman Islands, and rightly regarded that as of no relevance to the actual issues in the case. Parties in seven or eight jurisdictions other than Brazil and the Cayman Islands feature in the facts alleged, but nothing said in argument suggested that there are connections to any of these that would render Brazil other than clearly or distinctly the most appropriate forum, or suggest the Cayman Islands to be an appropriate one.

For the above reasons I agree that the appeal should be dismissed, with the Respondent having its costs, to be taxed if not agreed.

M.R. Taylor, J.A.

