

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHC(COM) 2023/0021

BETWEEN:

TRANSCIENCE INVESTMENTS LIMITED

Claimant

and

[1] **GREENTOWN HOLDINGS (BVI) INC**
[2] **ASIAPAK INVESTMENTS LIMITED**
[3] **SHAHERYAR ARSHAD CHISHTY**

Defendants

IN CHAMBERS

Appearances: Mr. Tom Lowe KC, and with him Mr. Callum McNeil and Mr. Jamie Gill Guyan instructed by Sterlington (BVI) LP for the Third Defendant/Applicant.
Mr. Andrew Westwood KC, and with him Mr. Jonathan Addo, and Ms. Aurelia Matonis instructed by Harneys for the Claimant/ Respondent to the Application

2026: January 19
July 1.

JUDGMENT

[1] **Mangatal J (Ag.):** This is my judgment arising from the hearing of the Third Defendant Shaheryar Arshad Chishty (“D3”)’s Notice of Application filed on 9 April 2025 which sought orders pursuant to ECSC CPR 9.7 and/or 9.7A and/or 26.1(2)(q) as follows:

1. Service be set aside on the ground that the case is not a proper one for the Court’s jurisdiction;

2. A declaration that the claim is not a proper one for the Court to exercise jurisdiction to try the claim brought by the Claimant against the Third Defendant;
3. An order striking out the Claim Form;
4. Alternatively, a stay of these proceedings pending resolution of the proceedings in Pakistan;
5. Costs; and/or
6. Such further or other orders as the Court deems fit.

[2] During the hearing it was indicated by learned Counsel that the parties had agreed to seek the Court's permission for the admission of and reliance on Expert Reports of Mr. Salman Iqbal Bawaney and Mr. Bilal Shaukat on matters of Pakistani law, pursuant to CPR 2000, r.32.6. A formal order granting permission was subsequently prepared and was signed by me.

D3's Skeleton Argument

Failure to Obtain Leave to Serve D3 Out of the Jurisdiction

(1) Was permission required under the Old Rules?

[3] Mr. Lowe KC, who appeared for D3, argued that the Claimant Transcience Investments Limited ("**Transcience**") failed to apply for permission to serve D3 out of the jurisdiction, which it should have done if the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("**the Old Rules**"), apply to the Claim (Old Rule 7.5).

[4] Under the Old Rules, which Mr. Lowe submitted did apply in the present case, Transcience would have been required to apply for permission to serve D3 out of the jurisdiction under Part 7 under the jurisdictional gateway relating to the ownership and management of companies in Rule 7.7(3). No such application was made.

[5] There has been no submission by D3 to the jurisdiction. It was pointed out that, when taking service on behalf of D3, by letter dated 27 January 2025, Sterlington explicitly provided the following reservation of rights:

“Nothing in this letter should be construed as a submission to the jurisdiction of the Eastern Caribbean Supreme Court of Justice in the Territory of the Virgin Islands by the Third Defendant who expressly does not submit to the BVI Court’s jurisdiction and whose rights to challenge service on him under part 7 of the EC CPR and the court’s jurisdiction under part 9 of the EC CPR are expressly and fully reserved (the **“Reservation of Rights”**).”

[6] It was submitted that that Reservation of Rights is pursuant to the Old Rules Pt 7 which pertains to the service out of the jurisdiction of the BVI on persons not within the territorial limits of the BVI. Accordingly, the said Reservation of Rights includes all matters of service on the Third Defendant including, if relevant, those of full and frank disclosure. At the hearing, the allegations about full and frank disclosure were withdrawn.

[7] Transcience has maintained that it could proceed with service on D3 under the change in the ECSC CPR 2023 (**“the Revised Rules”**), Part 7, Rules 7.2, 7.3. D3’s position is that that is wrong. Mr. Lowe KC commented on the unusualness of the Revised Rules in that he said that there are no other Commonwealth jurisdictions where you can serve a foreign defendant out of the jurisdiction without first seeking the Court’s permission. This provision, I agree with learned Counsel, does not exist in the United Kingdom, and as far as I understand it, a Claimant wishing to serve a foreign defendant out of the jurisdiction must seek the Court’s permission. Whilst I indicated to learned King’s Counsel that in my view, the Revised Rules are indeed unusual, I indicated my understanding that BVI may have followed rules in New Zealand to do with the certificate of service referred to in revised Rule 7.6. My understanding was gleaned at a Conference of judges of the Eastern Caribbean Court, where a session to discuss the Revised Rules was held in 2023.

[8] Originally, D3 had asserted that Transcience had in any event not filed a certificate for service out of the jurisdiction, as is required under Revised Rule 7.6. Accordingly,

even if it is right about service out under the Revised Rules being possible, Transcience had not complied with the applicable procedure therein.

- [9] However, during the course of the hearing, Transcience's legal team produced the certificate of service and thus that point was withdrawn, albeit it was stated that the Certificate ought itself to have been served.
- [10] It was D3's stance that Transcience has inconsistently applied the Court Rules amongst its various Extension of Time to Serve the Claim Form Applications ("**EOT**") documents (in particular the Notices of Application), for example, the first EOT was brought under Old Rule 8.13, whilst the Second and Third EOTs were brought under the equivalent provision in the Revised Rules (Revised Rule 8.14).
- [11] D3's position is that the Revised Rules were introduced (31 July 2023) after the Claim was issued, and that the Old Rules apply. Mr. Lowe KC further submitted that, based upon the Transition Provisions in Part 75 of the Revised Rules, since no trial date, and no Case Management Conference ("**CMC**") have been set to date, the Old Rules apply.

(2) Consequences if Transcience failed to obtain permission

- [12] Originally, in the Skeleton Argument ("**SKA**") on behalf of D3, it was suggested that if no service took place, D3 had not been joined to the proceedings and the proceedings against him should be dismissed/struck out. That argument was abandoned at the hearing, and what was in essence argued is that the Court should find that there had been an irregularity and declare that to be so. Thereafter, Transcience must satisfy the old test, i.e. that in obtaining permission to serve, Transcience would have to establish that the elements of the test in **Nilon Ltd v Royal Westminster Investments SA**¹ are satisfied, i.e.:

¹ (2015) BCC521 at [13]

“...on an application for permission to serve a defendant outside the jurisdiction the claimant must satisfy the court of three things: (1) that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both; (2) that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context ‘good arguable case’ connotes that one side has a much better argument than the other; and (3) that in all the circumstances the forum which is being seized (here the BVI) is 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 of the proceedings out of the jurisdiction.”

- [13] On a service out application, argued Mr. Lowe, the application falls to be determined by reference to the position at the time permission is granted. Reference was made to **Erste Group Bank AG v JSC VMZ Red October**², **Vauxhall Motors v Denso Automotive**³ and **WWRT Ltd v Carosan Trading Ltd**⁴.

- [14] It is D3’s case that the date is significant because as of the date of this hearing there are limitation issues both under BVI and Pakistani law.

Question as to what D3 is really applying for

- [15] The application is a bit confusing because it seems that D3 is also saying in the SKA referred to above that service was irregular and that is not stated in the Notice of Application. However, it seems that Mr. Lowe KC is saying that it is an irregularity that can be cured by the Court treating it as if it was an application for permission to serve out of the jurisdiction and that would be subject to the date at which that application is considered. During the hearing, he abandoned any suggestion that service had not taken place or that service was invalidated such that the Court should strike out the proceedings against D3.

Transcience’s position on what it considers a late submission

² (2015) CLC 706, at (44)-(45)

³ [2025] EWHC 213

⁴ BVIHCMAP 2022/0002

- [16] Mr. Westwood KC, who appeared for Transcience, although he went on to deal with the substance of the point, at the outset opined that it is not open to D3 to take a point about service irregularity at this stage because it was not in his application, and no relief arising therefrom was sought in the application. Learned Counsel explains that it is for that reason that this point was not addressed in Transcience's SKA for the hearing. Mr. Westwood KC therefore addressed it in oral submissions.
- [17] In expanding upon that point Mr. Westwood KC submitted that in circumstances where D3 has expressly accepted service on him and acknowledged service as though it were service out, subject only to his right to challenge under CPR Parts 7 and 9, then the question of which Rules applied simply does not arise because he has acknowledged service, subject only to the reservation of rights to make the jurisdiction application, which he has made.
- [18] However, maintains Transcience, it was entitled to serve under Part 7 of the Revised Rules and that was good service. The instant proceedings were issued on 15 February 2023. Reference was made to the transitional provisions in Part 75, which Counsel commented, (and this Court agrees), are somewhat opaque. Reference was made to Rule 75.3(1) which indicates that the Revised Rules do not apply to proceedings commenced before the commencement date in which a trial date has been fixed unless it is adjourned.
- [19] Mr. Westwood submitted that clearly, that sub-rule is not applicable because no trial date has been fixed. However, it was argued that there is nothing in the Revised Rules that expressly says that the Revised Rules do not apply to proceedings commenced before the commencement date in which a trial date has not been fixed. Learned Counsel submitted that it is clear, however, from sub-rule (1) and sub-rule (2), and in any event it accords with common sense, and the purpose of the introduction of the Revised Rules, that the Old Rules were only intended to continue

to operate in cases where a trial date had been fixed, so as to avoid confusion in those cases about which set of rules apply.

[20] It was further submitted that where, as here, a trial date has not been fixed in proceedings commenced before the commencement date, sub-rule (a) states that the court office must fix a date, time and place for a CMC after a defence has been filed. A Defence has been filed by the 2nd Defendant, but there has been no CMC. Mr. Westwood points out that sub-rule (b) expressly provides that the Revised Rules apply from the date of the CMC. It was submitted that this does not preclude the application of the Revised Rules in such a case where the CMC has not been fixed.

[21] Mr. Westwood KC then went on to refer to Rule 75.4, which it was submitted provides that if a proceeding is commenced before the commencement date, the court has to exercise its discretion. Further, that this discretion is in any case, whether a trial date has been fixed or not, even when the Old Rules apply and that the Court may take into account the principles set out in these Rules, and in particular Parts 1 and 25. Learned Counsel submitted that therefore the clear intention behind these transitional provisions and their scheme, is that save in proceedings which are well advanced and where a trial date has been fixed, these Revised Rules and their principles should apply as soon as possible. That, he submitted, corresponds with common sense. The whole point of introducing the Revised Rules was to provide a different, and what is thought to be, a more efficient and effective set of procedural provisions.

[22] Thus, argues Mr. Westwood, the Revised Rules are not precluded. That it would be surprising if they were, because one would have a situation where there are proceedings which are going to be managed in accordance with the Revised Rules, but they have to be served under the Old Rules, only to then switch to the Revised Rules once the CMC takes place.

- [23] That, it was submitted, would make little sense, and that Transcience took the position in all three of its EOT Applications that the proceedings were to be served under the Revised Rules. Reference was made to the supporting Affidavits of Mr. Adedeji, one of the legal practitioners who then had conduct of the matter. It was pointed out that on all three occasions the Court granted the extension of time for service of the Claim Form, and at no time did the Court refuse or even question the extensions of time sought on the basis that to do so would be irregular because service was required to be made under the Old Rules. Mr. Lowe countered that the Court on what were necessarily *ex parte* applications could not have been expected to take a point which was obviously not brought to its attention.
- [24] Accordingly, Transcience submits that service under the Revised Rules was permissible, and that therefore there is no irregularity in service in any event.
- [25] However, if that is wrong and D3 is allowed to take the point, Mr. Westwood summarized his understanding of D3's position to be that the irregularity can be cured by the Court treating the matter as if an application to serve out is before me today, and to decide by reference to the relevant criteria, the only applicable one being the question of forum, whether or not there should be service out. Further, that D3's position is that the Court should undertake the exercise by reference to the date when a proper regular application would have come before the Court, in July 2023.
- [26] Mr. Lowe KC submits that in the circumstances, the burden is on Transcience to demonstrate that as at that date, the BVI was clearly or distinctly the appropriate forum for the trial of the action.
- [27] Mr. Westwood submits that the burden is on D3 to show that there is another forum which is clearly or distinctly the available forum.

[28] Mr. Westwood KC makes the point, that although in the letter accepting service, there was a reservation of a right to challenge service on D3 under Part 7 and the Court's jurisdiction under Part 9, at the end of the day the Notice of Application was filed only under Part 9. He points out that Transcience seeks a declaration from this Court that this claim is not an appropriate one for the court's jurisdiction.

Ruling on Irregularity Point and on Part 75 of the Revised Rules

[29] In my judgment, although Mr. Lowe KC is correct that in the 2nd Affidavit of Mr. Chishty at paragraphs 21-23 (page101), he did raise the issue of whether he was properly served, the Notice of Application did not spell out that there was any application under Part 7 of the Old Rules to set aside service or raising the issue that service was irregular. I am therefore of the view that D3 ought not to be allowed to raise the point at this stage, and this application really is about an application by D3 for a declaration and a stay under Part 9 of the Revised Rules.

[30] However, even if I am wrong on that, I think there is an important point that has arisen, and that is the question of what is the exact relationship between the Old Rules and the Revised Rules and the proper interpretation of Part 75 of the Revised Rules, headed "Transitional Rules." I will address this point in this judgment since I think that not only is it an important issue, but the question may arise from time to time, and in various different contexts.

[31] It is important to start with a consideration of how the Revised Rules came into being. By Statutory Instrument 2023 No. 44, the Revised Rules were brought into effect on 31 July 2023. However, it is to be noted that not only did the Instrument indicate the date from which the Revised Rules would take effect. It also repealed the ECSC CPR 2000 (the Old Rules), "subject to the transitional provisions contained in Part 75 of these [the Revised Rules] Rules."

- [32] Rule 1.1 of the Revised Rules, speaks to the overriding objective of “dealing with cases justly”.
- [33] Rule 1.1(2) provides, that dealing with cases justly, includes a number of matters, and at (d) and (e) provides:
- “(d) ensuring that it is dealt with expeditiously; and
(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”
- [34] Rule 1.2, “Application of overriding objective by the court” provides as follows:
- “1.2 The court must seek to give effect to the overriding objective when it-
(a) exercises any discretion given to it by the rules; or
(b) interprets any rule.”
- [35] It is useful to set out Part 75 of the Revised Rules in its entirety. I agree with both King’s Counsel that this Part is unfortunately not as clear as desirable, or to use Mr. Westwood’s word; it is somewhat “opaque”. Part 75, “Transitional Provisions”, provides as follows:
- “Scope of this Part**
- 75.1 (1) This Part deals with the way in which actions, matters and other proceedings in existence at the commencement date become subject to these rules.
(2) In this Part-
“**commencement date**” means the date on which these Rules come into force.
- New proceedings**
- 75.2 These rules apply to all proceedings commenced on or after the commencement date.
- Old proceedings**
- 75.3 (1) These rules do not apply to proceedings commenced before the commencement date in which a trial date has been fixed unless that date is adjourned.
- (2) In proceedings commenced before the commencement date, an application to adjourn a trial date is to be treated as a pre-trial review and these rules apply from the date that such application is heard.

(3) If a trial date has not been fixed in proceedings commenced before the commencement date-

(a) the court office must fix a date, time and place for a case management conference under Part 27 after a defence has been filed and give all parties at least 28 days' notice of the conference; and

(b) these rules apply from the date of the case management conference.

Exercise of discretion

75.4 If in proceedings commenced before the commencement date the court has to exercise its discretion, it may take into account the principles set out in these rules and, in particular, Parts 1 and 25. “

[36] Part 8 of both the Old Rules and the Revised Rules, Rule 8.1, is identical and indicates that a claimant starts proceedings by filing in the court office the claim form and the statement of claim, or if any rule or practice direction so requires, an affidavit or other document.

[37] In my judgment, Part 75 leaves a number of lacunae. Unfortunately, this case falls into one such. What happens if in a case commenced before the commencement date, the court office has not fixed a CMC, what rules apply if the ECSC CPR 2000 have been repealed? Is it to be implied that ECSC CPR 2000 apply until then? Even when a CMC has been fixed, what Rules apply in the interim if circumstances or an application arises in the meantime? It is not as if the world stops spinning, or developments stop happening in a matter until a defence is filed or indeed, until a CMC. Whilst the 2nd Defendant has filed a Defence, it is not the only party in the case. Under the Old Rules and the Revised Rules, the Court office (Rule 27.2) is to fix a CMC immediately upon the filing of a defence to a claim.

[38] It appears to me that the Rules Committee will have to consider some amendments to this Part of the Rules, and possibly others, if even for the purposes of clarity and to remove any ambiguity. However in any event, in my judgment, the Revised Rules as currently drafted must be given a purposive construction. There are no express words in the Revised /Transitional Rules dealing with the instant situation. I therefore

have to consider which interpretation best reflects the overriding objective. I have to bear in mind that Rule 1.2 requires the Court to give effect to the overriding objective of dealing with cases justly in interpreting any rule. This includes dealing with cases expeditiously and ensuring that an appropriate share of the court's resources is dedicated to each case, bearing in mind the need to allocate resources to other cases. An underlying thread woven through the Rules consists of very practical considerations, such as use of resources, indeed in the BVI Commercial Court, it is scarce resources at that. The concept well-known in economics of "opportunity cost" is also there. The principle of proportionality is expressly incorporated in Rule 1.1 (c). The new approach shies away from over-technicalities. It is concerned with substance more than form, and the CPR has refocused civil courts on the fact that their primary focus must be on doing justice.

[39] In my judgment, the better view is that taken by Transcience, and that service under the Revised Rules was not precluded under Part 75. Indeed, it would seem to me that the spirit of the Revised Rules is as characterized by Mr. Westwood and Learned Counsel is correct that the clear intention behind these transitional provisions and their scheme, is that save in proceedings which are well advanced and where a trial date has been fixed, these Revised Rules and their principles should apply as soon as possible. That, he submitted correctly, corresponds with common sense. The whole point of introducing the Revised Rules was to provide a different, and what was thought by the Rule makers to be, a more efficient and effective set of procedural provisions. This is particularly so in relation to the perceived benefit of the Revised Rules as to service out of the jurisdiction.

[40] In my judgment, the Rules Committee need to consider re-wording substantial parts of Part 75 in order to avoid further confusion. It is also plain that Rule 75.4 is not accurately worded where it says "if in proceedings commenced before the commencement date the court has to exercise a discretion" since that suggests that the Rule is addressing where in the Old Rules, the Court is required to exercise a discretion. What in my view Rule 75.4 was really intended to say and mean is that

in categories of matters not covered by the scenarios/circumstances in Rule 75.3, the Court must exercise its discretion in sorting which Rules apply, bearing in mind the tenor of the Revised Rules, particularly Parts 1 and 25.

[41] When the approach I set out in paragraphs [38] and [39] above is combined with the fact that D3's application is less than clear as to raising any point about irregularity of service, this Court would not be dealing with the matter justly if it was to require Transcience to set about making an application to serve out of the jurisdiction, or the Court was to now examine the matter on the basis of whether proper service out took place under the Old Rules. It would in my view in the circumstances, also be wrong to place the burden on Transcience in relation to the forum question. Service irregularity was not properly raised, and I would not be dealing with the matter expeditiously, proportionately, or allocating a proper share of the Court's resources if I were to deal with the matter on that basis.

[42] In my judgment, what the Court now has to focus on is the application as set out in the Notice, which is two-pronged. The first is on the basis of an alleged lack of jurisdiction on the part of the Court to try the Claim against D3, and in respect of which D3 seeks orders: (a) declaring that "*the Court is not a proper forum for the Court to exercise jurisdiction to try the claim*" against him, and (b) setting aside service. The second basis seeks a stay on "*forum non conveniens*" grounds, D3 alleging that Pakistan is plainly the appropriate forum for determination of the claim, or a case management stay. D3 in its application filed in April 2025 had as an alternative sought a case management stay pending resolution of proceedings in Pakistan. However, the proceedings in Pakistan are no longer extant, as on 15 May 2025, Mr. Faruqui discontinued the Pakistan Court Proceedings.

[43] It should be noted that since I have ruled that service under the Revised Rules was not precluded, the application seeking a declaration, and/or a stay should also have been filed pursuant to the Revised Rules. However, Rule 9.7 remains the same, and

Revised Rule 9.8 is now the equivalent of what was Rule 9.7A of the Old Rules, thus nothing of substance will turn on that.

Background

- [44] Before turning to the Application, it is useful to examine the Claim and some material facts. This matter is fairly complicated and has quite a procedural history. I have gratefully adopted some of the summary of the parts of the SKA's of both parties that deal with these matters. There are also some preliminary matters in respect of which Transcience has made observations in its SKA and I intend to discuss those also.

The Claim (As summarized in D3's SKA)

- [45] Transcience is a BVI incorporated company. It has brought claims against Greentown Holdings (BVI) Inc ("**D1**") and Asiapak Investments Ltd ("**D2**"), which are two BVI incorporated companies, as well as against D3.
- [46] As appears from the Statement of Claim, it is Transcience's case that since May 2014 it has been a minority shareholder in D1, holding 28.7% of the issued shares.
- [47] D1 is a holding company in a group of companies ("**the Group**") which is involved in the provision of long-distance bus and transportation services to major cities in Pakistan and various other, travel, logistics and related services.
- [48] D1 is the majority shareholder of Greentown Holdings Korea Inc ("**Greentown Korea**"), a company incorporated in the Republic of Korea. Greentown Korea is a shareholder in Daewoo Pakistan Express Bus Service Limited ("**Daewoo Pakistan**"), a public limited liability company incorporated in Pakistan. In turn, Daewoo Pakistan holds a number of subsidiaries, largely incorporated in Pakistan, which carry out certain other business activities.

- [49] D2 is the majority shareholder of D1. Since May 2014 D2 has held 53% of the issued shares in D1.
- [50] D3 is a resident of Pakistan and holds dual Pakistani and Swiss nationality. He is the founder, CEO, a director and ultimate beneficial owner of D2. In addition, he is and has since at least October 2011 been a director of D1 and he is also a director of Greentown Korea and Daewoo Pakistan.
- [51] Transcience became a member of D1 pursuant to a novation agreement entered into on 30 May 2014 between it, D2 and Telia Holdings Limited ("**Telia**"), whose shares in D1 were transferred to Transcience ("**the Telia Novation Agreement**"). The governing law of the Telia Novation Agreement is English law.
- [52] The effect of the Telia Novation Agreement was that, among other things, Transcience became a party to and entitled to exercise all the rights of Telia under a Share Purchase Agreement between Telia and D2 dated 10 September 2012 ("**the Telia SPA**"), which included the right to appoint: (i) two directors to an expanded board of directors of D1; (ii) together with the other minority shareholders in D1, a representative to the board of Greentown Korea; and (iii) one third of the directors of Daewoo Pakistan and the CFOs of that company, following the departure of the incumbents appointed by the lenders of Greentown Korea. The governing law of the Telia SPA is English law.
- [53] At all times Transcience understood that in addition to its entitlement to have representative directors on the various boards, including that of D1, in order to ensure it had proper insight and input into the Group's business and operations, it would maintain its significant minority interest.
- [54] However, Transcience avers that it has by reason of the failure to hold meetings of the board of directors of D1 and/or the deliberate exclusion of its representatives

from such meetings, been systematically excluded from the management of D1, Greentown Korea and Daewoo Pakistan and denied access to critical information about those companies.

[55] In the absence of any input or oversight from Transcience, D1 and/or D3 have used their control of the Group to, among other things, procure a series of illegitimate transactions that had the effect of significantly diluting the interest of Greentown Korea in Daewoo Pakistan and increasing those of D3 and parties related to him. The obvious consequential effect was the dilution of D1's direct interest in Greentown Korea and its indirect interest in Daewoo Pakistan. Similarly, the obvious consequential effect of that on Transcience was that its investment in D1, both in percentage and value terms, was significantly reduced. Those (and other) matters constitute unfairly prejudicial conduct of the affairs of D1.

[56] In acting in the manner alleged, D3 acted in breach of duties owed by him to D1 under the BVI Business Companies Act ("**BCA**"), ss. 120-121. In particular, he: (i) engaged in transactions which substantially diluted the value of D1's shareholding in Greentown Korea and its indirect interest in Daewoo Pakistan; (ii) favoured the interests of certain shareholders and his associates over those of the other shareholders; (iii) failed to hold regular board meetings of D1; and (iv) failed to allow and/or provide Transcience access to due diligence information to which it was entitled.

[57] Transcience alleges that the Defendants conspired together to cause loss to Transcience by unlawful means, by entering into transactions which had the effect (among other things) of significantly diminishing the value of Transcience's shares in D1.

[58] The Claim Form and Statement of Claim plead three causes of action:

- (1) Section 184I of the BCA: the basis for this claim is that the affairs of D1 are being and/or have been conducted in a manner that is oppressive,

unfairly discriminatory or unfairly prejudicial to Transcience in its capacity as a member of D1.

- (2) Section 184B of the BCA: this claim is made on the basis that D3 has engaged in conduct that contravenes the BCA, specifically the duties owed by him as a director of D1 under s.120 of the BCA and the requirement in section 121 of the BCA that as a director of D1 he exercised his powers as such for a proper purpose.
- (3) Unlawful means conspiracy: the basis for this claim is that the Defendants agreed to combine together to cause loss to Transcience by unlawful means by: (i) entering into transactions which had the effect of substantially reducing the size and value of D1's (and thus Transcience's) indirect interest in Daewoo Pakistan; (ii) D3 using his control of D1 and/or Greentown Korea and/or Daewoo Pakistan and the inability of Transcience to have any oversight or information to misappropriate funds. The loss and damage claimed by Transcience includes the diminution of the value of the shares in D1.
(emphasis provided by D3)

Some Material Facts and Proceedings in Pakistan (According to D3's SKA)

Daewoo Express and the Parties

- [59] These proceedings concern the ownership of Daewoo Pakistan which was incorporated in 1997 and commenced the operation of an inter-city bus service in Pakistan in 1998.
- [60] In 2004, Sammi Corporation a company incorporated in the Republic of Korea, acquired 100% of Daewoo Express's shares. In 2010 Sammi Corporation sought to sell Daewoo Express and Mr. Chishty was tasked with assisting it to find buyers and investors. At that time Mr. Chishty was presented with the opportunity for a leveraged buyout of Daewoo Pakistan.

- [61] The acquisition vehicle that was to purchase Daewoo Pakistan was Greentown Holdings Limited ("**Greentown Korea**"). Greentown Korea was incorporated in Korea on 14 June 2011. Greentown Korea was in turn wholly owned by D1. The buyout of Daewoo Pakistan was completed in October 2011.
- [62] Upon completion of the Daewoo Pakistan buyout by Greentown Korea, the shareholders of Greentown BVI, the intermediate holding company, were:
- (1) Asiapak holding 72.5 % of the issued share capital;
 - (2) Clear Future holding 17.5% of the issued share capital;
 - (3) Ms. Min Soo Jin holding 10% of the issued share capital.
- [63] After the buyout of Daewoo Pakistan, Mr. Chishty nominated his cousin, Mr. Saad Faruqui ("**Mr. Faruqui**"), Transcience's ultimate beneficial owner, as a director of Daewoo Pakistan. D3 asks the Court to note that Mr. Chishty already had the substantial controlling stake in Daewoo Pakistan by the time Mr. Faruqui had any involvement.
- [64] Separately, Mr. Faruqui was also close personal friends with Mr. Ali Jahangir Siddiqui ("**Mr. Siddiqui**"). Mr. Siddiqui is heir to a wealthy Pakistani family that own a large brokerage house called Jahangir Siddiqui and Co, which in turn had acquired the JS Bank Ltd and established Jahangir Siddiqui Ltd. an investment company (the individuals, family and companies hereafter referred to collectively as the "**JS Group**").
- [65] At Mr. Chishty's request, Mr. Faruqui brokered an investment into Daewoo Pakistan by the JS Group. Mr. Chishty wanted the JS Group to be involved in the Daewoo Pakistan operation due to their significant financial depth and presence in Pakistan.
- [66] The JS Group invested in Greentown BVI through their entity Telia in September 2012 and thereafter the shareholders in Greentown BVI were:
- (1) Asiapak, holding 53.039% of the issued share capital;

- (2) Clear Future, holding 11.602% of the issued share capital;
- (3) Ms. Min Soo Jin, holding 6.630% of the issued share capital, and
- (4) Telia, holding 28.729% of the issued share capital.

[67] On 15 May 2014, all 1.3 million shares owned by Telia in Greentown BVI were transferred to Transcience. The JS Group explained that the reason for the transaction was an internal reorganization of the investment. It did not suggest that Mr. Faruqui had any beneficial interest. Despite Mr. Faruqui saying he had been “an investor” in 2012, it was Telia that transferred the shares to Transcience. D3 asserts that:

- (1) it was not intimated, explicitly or otherwise, at any point in the transaction that Telia’s investment was being made on behalf of Mr. Faruqui. Nor was it disclosed in 2014 when the investment was transferred from Telia to Transcience that this was in any way done to change the UBO of the shares in Greentown BVI (to Mr. Faruqui).
- (2) it was Mr. Chishty’s understanding at all times that Telia, and then latterly Transcience, was wholly owned by the JS Group. This view was always supported by the register of members of Transcience which records that JS Investment Holdings Limited was the sole shareholder of Transcience. Mr. Faruqui does not explain this.
- (3) the purpose of allowing Telia to invest in Greentown BVI was to establish a business relationship with the JS Group. It would have defeated the purpose of admitting the JS Group as an investor to have transferred beneficial ownership to Mr. Faruqui.

[68] Four years later, in 2018, Mr. Chishty was surprised to learn that Transcience was wholly owned by Mr. Faruqui. He claims it was incorporated solely for himself. Mr. Faruqui’s own case involves him asserting that Transcience was not his alter ego. Moreover, he hid his identity through Transcience and avoided putting himself on its register of shares and claims that there was a conspiracy directed at him.

[69] Until the end of 2015, Greentown Korea owned 100% of the shares in Daewoo Pakistan. The complaint is that in 2015 and 2017, Greentown Korea's investment in Daewoo Pakistan and its interest was improperly diluted. D3 points out that these transactions are alleged to have occurred in 2015 and 2017. Thus, these complaints in the Claim relate to acts which occurred more than six years ago. D3 argues that Transcience seeks to obscure his limitation problems by taking a snapshot as at 30 April 2021.

The proceedings in Pakistan

[70] It is common ground that prior to filing the Claim herein, Mr. Faruqi initiated the following proceedings:

- (1) In December 2017, Mr. Faruqi filed a complaint against Daewoo Pakistan before the Securities and Exchange Commission of Pakistan ("**SECP**") disputing a number of transactions and asking for them to be reversed ("**the SECP Complaint**"), complaining about a course of conduct. The SECP complaint was dismissed in March 2020.
- (2) In March 2018, Mr. Faruqi filed a petition against Daewoo Pakistan and 18 other respondents, including D3, Greentown Korea and a Pakistani company DW Pakistan (of which D3 is the UBO) ("**the Lahore Petition**"), seeking that a number of transactions be declared a sham and a fraud and that the company's register of members be duly rectified.

[71] It is D3's position that the course of conduct described in the BVI Claim is the same as the SECP Complaint and the Lahore Petition. Some if not all, it is asserted, of the transactions that are the subject of the BVI Claim, were also the subject of the SECP Complaint and the Lahore Petition. D3 gives examples such as a) the transfer of 28 million shares of Daewoo Pakistan owned by Greentown Korea to Elahi Electronics on 29 December 2015; and b) the issuance of 8 million shares to Tundra Sustainable Frontier Fund in early 2017. The relief sought, it is alleged, in the SECP

Complaint and in the Lahore, Petition is in substance the same as in Transcience's BVI Claim.

The SECP Complaint

[72] On 11 December 2017, Mr. Faruqui filed his SECP Complaint alleging that Daewoo Pakistan was engaged in various illegal and fraudulent activities, which included, amongst others: a) Daewoo Pakistan being utilized as a vehicle to defraud/cause losses to its shareholders; b) that funds were being siphoned off from Daewoo Pakistan; and c) that Daewoo Pakistan was engaged in various non-compliances and/or violations of good corporate governance.

[73] D3 points out that in his SECP Complaint, Mr. Faruqui sought the following relief:
"1) to reverse the share transfers and share issuances conducted after December 31st 2015; 2) procure a forensic audit of the Company; and 3) appoint an administrator to oversee the affairs of the Company."

[74] In response to Mr. Faruqui's SECP Complaint, the SECP appointed an inspection team to conduct an inspection of Daewoo Pakistan. Daewoo Pakistan immediately challenged the assumption and exercise of jurisdiction by the SECP in the Lahore High Court. Mr. Faruqui successfully applied to be joined in the proceedings as a respondent on the ground he was a proper and necessary party, as he was the complainant to the SECP.

[75] Ultimately, the Lahore High Court gave judgment dated March 2020, wherein it accepted Daewoo Pakistan's arguments on the assumption and exercise of jurisdiction by the SECP. As a result of the judgment, the steps taken by the SECP were set aside as being void or of no legal effect.

The Lahore Court Proceedings

[76] On 7 March 2018, while the SECP Complaint was still pending, Mr. Faruqui filed the Lahore Petition against Daewoo Pakistan and 18 other respondents, including D3.

- [77] Included in the relief sought in the Lahore Petition, Mr. Faruqi sought a reversal of the share transfers by seeking rectification of the Daewoo Pakistan register of shareholders on the grounds that a number of share transfers in the Daewoo Pakistan structure were allegedly a sham and a fraud committed on Daewoo Pakistan and its shareholders.
- [78] Mr. Faruqi contended that he was a shareholder and was also a director of Daewoo Pakistan at the relevant time. His alleged grievance was that without any notice and/or in the absence of a meeting of the Board of Directors, 28 million shares were transferred to Elahi Electronics, D3 and Greentown Korea, by way of the Asset Purchase Agreement dated 29 December 2015 executed between D3 and Elahi Electronics.
- [79] Mr. Faruqi alleged that this transaction is in violation of Article 11 of Daewoo Pakistan's Articles of Association, as well as contravening sections 76,77 and 196 of Pakistan's Companies Act. Mr. Faruqi further contends that clause 2.2.10 of the Asset Purchase Agreement specifically contends that a board meeting ought to have been but was not held to sanction the transfer of shares. He maintained that the entire transaction was a sham and applied to the Lahore High Court to have it set aside.
- [80] On 15 May 2025, approximately one month after D3 filed his Jurisdiction Challenge Application, Mr. Faruqi discontinued the Lahore Petition. The reasons given were the prospects of extreme delay. However, says D3, Transcience's Expert Report is unsupported, inherently incredible and disputed by D3's Expert Report.

The BVI Proceedings-D3's take on them

- [81] In early 2023, Mr. Faruqi filed the Claim in the BVI through his wholly owned BVI company/alter ego, says D3, i.e. through Transcience, despite the Lahore Petition

pending at the time which, D3 contends, amounted to abuse of process and unacceptable forum shopping.

[82] D3 asserts that the BVI Proceedings a) arise out of the same facts as Mr. Faruqui's SECP Complaint and the Lahore Petition; and b) seek the same relief in practical terms. Further, that Transcience seeks to reverse the effect of the transaction by means of an order for the purchase of its Greentown BVI shares and/or compensation for the alleged loss of value of its shares. If successful, Transcience would be placed, says D3, in exactly the same position financially as Mr. Faruqui would have been had he been successful in the SECP Complaint or the Lahore Petition.

[83] In either case, continues D3, Mr. Faruqui by himself or through Transcience would either recover Daewoo Pakistan shares or have received payment in lieu. Accordingly, in both actions by Mr. Faruqui by himself or through Transcience, he has sought to litigate the same facts and achieve the same outcome.

[84] D3 concedes that, save for D3, the parties to the BVI Proceedings are different to those in the SECP Complaint/Lahore Petition. However, D3 maintains that they are nonetheless substantially the same.

[85] D3 further asserts that D1 and D2 are being used in the BVI Proceedings as anchor Defendants, given their place of incorporation in the BVI. D3 reiterates that D3 is D2's UBO.

[86] It is further posited that the Claim is a spinoff of the SECP Complaint/the Lahore Petition, which has been dressed up slightly differently in hopes of persuading the BVI Court that it has jurisdiction to determine the dispute.

The BVI Claim-Transcience's Position

- [87] I will in due course return to the parties' submissions in more detail under the various limbs of the Application. But for now, I just wanted to summarize the opposing positions as to the nature of the claims, and their relationship with the proceedings in Pakistan.
- [88] Transcience in its SKA has argued that D3's assertion that the BVI Claim seeks to litigate the same facts and achieve essentially the same outcome and relief as the proceedings in Pakistan, is simply wrong.
- [89] Firstly, Mr. Westwood KC argues that two of the three claims made by Transcience are specific claims given by the BVI legislature to members of companies incorporated in the jurisdiction. They are governed by BVI law and they are claims which can only be brought in the BVI and are not available otherwise than in the BVI.
- [90] Secondly, Transcience asserts that the Pakistan proceedings were concerned with claims made by Mr. Faruqi, not Transcience. (Learned Counsel's emphasis). Transcience brings these proceedings to vindicate its separate rights. The fact that Transcience and Mr. Faruqi have separate legal rights and separate legal personality cannot simply be ignored.
- [91] It was submitted further that the focus of the proceedings in Pakistan and in BVI is not the same and nor would the outcome or relief secured be the same.

Procedural History (taken from Transcience's SKA)

- [92] The Claim Form was issued on 15 February 2023 and the Statement of Claim was filed on the same date.
- [93] On 24 October 2023 D2 acknowledged service, indicating an intention to defend the claim. D2 filed a Defence on 16 November 2023. The Certificate of Truth on D2's

Defence was signed by D3. No point was taken in either the Acknowledgement of Service or the Defence about the suitability of the BVI as the appropriate forum for the Claim.

[94] On 22 November 2023 D1 acknowledged service, indicating an intention to defend the Claim. The SKA indicates that a draft Defence was provided to Transcience's legal practitioners on 8 January 2026. In that draft Defence D1 denied engaging in an unlawful means conspiracy and relied on D2's Defence in that regard "and any other allegations relating to [D1]". Beyond that, the Defence states that D1 is the subject matter of the proceedings and has therefore adopted a position of neutrality, notwithstanding which it goes on to deny that Transcience has grounds for any of its claim and that it is not entitled to any of the relief claimed or any relief. The Certificate of Truth appended to the draft Defence provides for it to be signed on D1's behalf by D3.

[95] Orders extending the time for service of the claim against D3 were made on 22 February 2024, 16 August 2024 and 20 January 2025. Ultimately, service was effected on D3 through his BVI legal practitioners on 28 January 2025.

[96] D3 filed an acknowledgement of service on 26 February 2025, indicating an intention to defend the Claim. The Acknowledgment of Service stated that D3 reserved the right to challenge the jurisdiction of the Court on forum non conveniens grounds and that nothing in the Acknowledgment was to be taken as a submission to the jurisdiction of the Court by D3.

[97] The Application was filed on 9 April 2025.

Ground (A) of the Notice of Application: Alleged Lack of Jurisdiction

[98] By the first part of the Application, described in the Notice of Application as "Ground A" D3 applies for, (having at the hearing indicated that neither a setting aside of

service nor a striking out of the Claim Form are now sought), a declaration that the claim is not a proper one for the Court to exercise jurisdiction to try the claim brought against D3.

[99] In so far as relevant, the Old Rules CPR Rule 9.7, under which I think that D3 applied, provides as follows (in any event the equivalent in the Revised Rules is also to be found as Rule 9.7 and is in the same terms):

“Procedure for disputing court’s jurisdiction

9.7 (1) A defendant who disputes the court’s jurisdiction to try the claim may apply to the court for a declaration to that effect.

.....

- (6) An order under this Rule may also-
 - (a) discharge an order made before the claim was commenced or the claim form served;
 - (b) set aside service of the claim form; and
 - (c) strike out a statement of claim.
- (7) If on an application under this Rule the court does not make a declaration, it-
 - (a) may-
 - (i) fix a date for a case management conference; or
 - (ii) treat the hearing of the application as a case management conference; and
 - (b) must make an order as to the period for filing a defence.”
- (8) Where a defendant makes an application under this Rule, the period for filing a defence is extended until the time specified by the court under paragraph 7 (b) and such period may be extended only by an order of the court.”

Ground (B) of the Notice of Application -Stay-Forum Non Conveniens-Case Management

[100] Under Ground B, D3 relies on Rule 9.7 A of the Old Rules (it is in the same terms as Rule 9.8). Although initially, D3 also sought a case management stay under Rule 26.1(2)(q) of the Old Rules, as I understand it, this has been abandoned since the proceedings in Pakistan are no longer on foot.

[101] In so far as relevant, Rule 9.7 A provides as follows:

“Procedure for applying for a stay etc. where defendant served out of jurisdiction

9.7A (1) A defendant who contends that the court should not exercise its jurisdiction in respect of any proceedings may apply to the court for a stay and a declaration to that effect.

.....

(3) An application under paragraph (1) of this Rule may be made at any time.

.....

(5) If on application under this Rule the court does not make a declaration, it-

(a) May-

- (i) fix a date for a case management conference; or
- (ii) treat the hearing of the application as a case management conference; and

(b) must make an order as to the period for filing a defence if none has yet been filed.

(5) Where a defendant makes an application under this Rule, the period for filing a defence (where none has yet been filed) is extended until the time specified by the court under paragraph (5)(b) and such period may be extended only by an order of the court.”

[102] In relation to Ground (A), D3 in its Notice of Application, under the heading **“Forum Non Conveniens-the BVI is not clearly or distinctly the appropriate forum”**, argued that the burden is on Transcience to satisfy the Court that BVI is clearly or distinctly the appropriate forum. D3 relies on the decision in **Joint Stock Company “BTA Bank” v Timur Sabyrbaev et al**⁵ (at [203] by reference to **Nilon**).

[103] However, I agree with Transcience in its SKA (paragraph 21), that the passages in the judgment in **BTA Bank** relied on were expressly concerned with the burden on an application to set aside an order for permission to serve out of the jurisdiction. This is not, however, an application to set aside an order for service out of the jurisdiction under CPR 7.7. (Old Rules) or 7.8 (Revised Rules). The application is made under CPR 9.7(Old Rules) and/ or 9.7A (Old Rules). I accept Transcience’s submission that in such a case the burden rests on D3, as a party asking the Court to make a declaration, to satisfy the Court that the case is an appropriate one for the declaration sought under Rule 9.7(1) and any additional order under CPR 9.7(6).

⁵ BVIHCM2021/0171 and at [202] and [121]-[124]

[104] As I understand it, it is common ground that whether the burden is on D3 to show that another forum (here, Pakistan) is clearly or distinctly more appropriate than the BVI or on Transcience to show that the BVI is clearly or distinctly the appropriate forum, the principles to be applied are the same. Those principles are to be found in the classic judgment of Lord Goff in **Spiliada Maritime Corporation v Cansulex Ltd**⁶. As stated by Lord Collins in **Altimo Holdings v Kyrgyz Mobil Tel Ltd**⁷, cited by D3:

“...in both stay cases and in service out of the jurisdiction cases, the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice...”

[105] Statements to similar effect can be found in another case emanating from the BVI, **Livingston Properties Equities Inc v JSC MCC Eurochem**⁸. At paragraphs 10 and 11, Lady Arden stated:

“10. In exercise of its discretion [to set aside service out] 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.”

[106] Lord Goff outlined some of the factors that are relevant to the Court’s consideration of the appropriateness of a jurisdiction in **Spiliada** at 477G-H as follows:

“Since the question is whether there exists 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.

⁶ [1987] 1 A.C. 460 at 476B-478E

⁷ [2011] UKPC 7, [2012] 1 WLR 1804 at [88]

⁸ [2020] UKPC 31

These are the factors which Lord Diplock described in MacShannon's case [1978] A.C. 795,812, as indicating that justice can be done in the other forum at 'substantially less inconvenience or expense'....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 used by my noble and learned friend, Lord Keith of Kinkel, in The Abidin Daver [1984] A.C. 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 the 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."

[107] In **Livingston**, Lady Arden also gave guidance as follows:

"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 be tried in the country whose law applies."

[108] As stated at paragraphs 26 and 27 of Transcience's SKA, in considering the connecting factors, what matters is the weight to be given to each connecting factor in the light of all the circumstances of the case. The factors are not to be analysed in a vacuum but must be examined, and weighed, in the context of the dispute between the parties: **Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK**⁹.

[109] Further, the process is not a simple arithmetic exercise of counting the connecting factors and finding which forum has the greater number: Webster J(Ag) in **Abdul-Massih v Jarvis**.¹⁰

D3'S Submissions on both Grounds A and B of the Notice of Application- Forum Non Conveniens

⁹ [2016] SGHC 229 at [106]-[107]

¹⁰ BVIHC(COM) 2023/0243.

- [110] D3's SKA does not follow the order set out in the Notice of Application, and seems to have amalgamized the submissions in relation to Grounds A and B, i.e. the SKA seems to deal with both Rules. In D3's SKA at paragraph 54, Mr. Lowe KC comments that this appears to be the first case where a stay would be sought following the introduction of the Revised Rules Part 7. He submitted that although the exercise for a stay no longer involves the first two limbs of the Nilon test, the BVI Court should on a stay application allow the Defendant to show that there is no "serious case". Otherwise, asserts learned King's Counsel, the Revised Rules "will have brought about the unwarranted effect that exorbitant jurisdiction can be exercised in frivolous cases. The Defendant should not have to apply to strike out the claim because that would jeopardise the stay application."
- [111] It was D3's submission that the interests of justice require there to be a stay of proceedings because, Pakistan is an "available" forum which is clearly and distinctly more "appropriate" than the BVI for the determination of the issues that need to be resolved.
- [112] Mr. Lowe KC argued that, as D3's Expert Report shows, the Companies Act of Pakistan provided Transcience grounds to challenge the improper share issue and to obtain an order to set it aside. Further, the Pakistani Court is not unduly slow, as suggested by Transcience's Expert Report-see D3's Expert Report, paragraphs 50-54.
- [113] D3's stance is that Pakistan is the forum with which the action has a closer and more real connection than the BVI.
- [114] D3 states that the claim against him is for a wrong alleged to have been done to the Company and as with torts, the natural forum is where the wrong actually occurred.

- [115] Although the claim can be said to be about the internal management of a company, the company was not managed in any sense in the BVI but was managed in Pakistan.
- [116] D3 also posits that Pakistan is an available forum because Mr. Faruqui was able to bring proceedings for rectification of the Register via the Lahore Petition and he can do so again.
- [117] Mr. Chishty can be served in Pakistan and is resident there. Of note, the SKA at paragraph 58.6 indicates that Asiapak and Greentown BVI agree to submit to the jurisdiction of the Pakistani Court if a stay is granted.
- [118] According to D3, in both BVI and Pakistan there are now time bar issues. As regards the limitation issues, D3 asserts that Transcience is to be blamed for allowing the limitation to occur; he could have continued his proceedings in Pakistan. Reference was made to **Vauxhall Motors v Denso**¹¹. It is stated that in Pakistan, Transcience and Mr. Faruqui are also faced with the consequence of the discontinuance of the proceedings. It was submitted that in the circumstances, the potential effect of the limitation period and discontinuance each represent a legitimate juridical advantage of which D3 should not be deprived.

Specific Forum Conveniens Factors

The Claim Does Not Concern Management and Control of a BVI Company

- [119] D3 describes Mr. Faruqui's evidence on this point as being that (a) the Claim ultimately concerns "(i) the administration, management and conduct of the affairs of and (ii) the management and control of Greentown BVI"-Faruqui 1 paragraph 2 (b) "Transcience's primary complaint is that it was deliberately shut out of the management of Greentown BVI", and (iii) "the way in which Greentown BVI was managed and controlled is the key issue at the foundation of the Claim".

¹¹ [2025] EWHC 213 Ch

[120] However, says D3, this contradicts Transcience's own evidence in Adedeji 2 dated 13 August 2024 where it stated that (a) a dispute has arisen between Transcience and Asiapak and D3 concerning "the management and affairs of Daewoo Pakistan", (b) as a consequence of certain transactions entered into or facilitated by D3, "Transcience's indirect interest in Daewoo Pakistan has been significantly diluted...", and (c) D3 used his control of Daewoo Pakistan to both prevent Transcience from having any oversight or information over the company and moreover, to misappropriate funds from the company.

[121] The SKA (at paragraph 62) comments that, in formulating the allegation that there was a scheme against Transcience, Greentown BVI's role in the alleged scheme is so unimportant that its name is not even mentioned.

[122] Reference was made to Faruqui 1, paragraph 29, where it is stated:

"Mr. Chishty and/or Asiapak were able to use their control of the Group to take various other steps to the detriment of Transcience, including entering into illegitimate transactions, procuring Daewoo Pakistan to enter into transactions which caused losses to Daewoo Pakistan, unlawfully replace the management of Greentown Korea and Daewoo Pakistan with their own nominees and associates and misappropriate funds from the Group."

[123] It is D3's contention that it is notable that Greentown BVI is not a party to the SECP Complaint/the Lahore Petition (neither is Asiapak) (where D3, Daewoo Pakistan, and Greentown Korea are all listed defendants), which arise out of the same facts as the Claim and seek the same relief in practical terms. Mr. Lowe KC argues that this suggests that Greentown BVI and Asiapak are merely being used as anchor defendants in the BVI Proceedings.

[124] Further, D3 says that Mr. Faruqui alleges that Asiapak and D3 unlawfully replaced the management of Greentown Korea and Daewoo Pakistan with nominees and associates of their own. Again, no reference is made to Asiapak's Board here, which

once again suggests that the management of D3 is not an issue, despite Transcience suggesting otherwise.

[125] D3 argues that D1 appears to have been named as a defendant in the BVI Proceedings, in the place perhaps of Greentown Korea, purely to take advantage of its place of incorporation.

[126] It is D3's case that, in any event, to the extent that the administration, management and conduct of D1's affairs are relevant, those affairs undoubtedly took place outside of the BVI and more frequently in Pakistan, as most of its directors were/are based in that jurisdiction.

[127] D3 contends that the alleged exclusion of Transcience from the management of D1 in alleged breach of the terms of the SPA is a matter for the Courts of England and Wales, and not the BVI Courts. Therefore, the argument continues, Transcience's main complaint/ the key issue at the foundation of the BVI Proceedings, according to its own evidence, is not a matter for the BVI Courts in any event.

The BVI Defendants were never managed from the BVI

[128] D3 avers that D1 and D2 do not have any directors in the BVI, nor have they conducted any element of the BVI companies affairs from the BVI. D3 says that he has never visited the BVI. Therefore, these entities did not conduct any "acts" in the BVI. Therefore, Transcience has failed to show that damage has resulted from substantial and efficacious acts committed within the BVI.

[129] It is asserted that D1 and D2 were merely incorporated in the BVI without any operational offices or staff in the BVI. Instead, these entities rely on the services of a third party BVI Registered Agent and it is to be inferred that the Agent simply acts as a post box for the respective companies.

The BVI was not a “special feature” of the BVI Defendants

- [130] It was submitted that the fact of D1 and D2's incorporation in the BVI is incidental and unimportant in the context of the alleged scheme. Further, that there is no significance of BVI as a jurisdiction or its laws which led to D1 and D2 being incorporated in this as opposed to some other (offshore) jurisdiction.

No evidence of funds flowing through the BVI

- [131] The 3rd Defendant states that he is not aware of the existence of any BVI bank accounts held by D1 and D2 and he also does not hold a BVI Bank Account.
- [132] It is further averred that D1 is an empty shell company with no assets, and (therefore) no assets in the BVI.

No Witnesses in the BVI

- [133] D3 maintains that D1 and D2 rely on the services of a third party BVI Registered Agent and that Registered Agent has no operational role. On that basis, D3 assumes that the BVI Registered Agent is not a relevant witness. Therefore, whilst witnesses are likely to be based in different jurisdictions, it seems unlikely that there will be any witnesses located in the BVI.
- [134] Mr. Faruqi states that he is resident in Dubai and, in Faruqi 1 at paragraph 39 he states that “the various other individuals involved in the Claim who may be called as witnesses are located in Pakistan, Korea, the United Kingdom and the United Arab Emirates.” Therefore, submits Mr. Lowe KC, Pakistan would be more convenient for all witnesses as the flight distance between those other countries and Pakistan is much shorter than with BVI (and those flights are much cheaper).

Governing Law

[135] Mr. Lowe contends that none of the relevant agreements to which the Defendants, or connected entities were party to are governed by BVI Law.

- (1) The Share Purchase Agreement between Greentown Korea, D1 and Sammi Corporation entered into on 27 June 2011 is governed by the laws of Korea. Disputes between the parties arising out of or in connection with this agreement are required to be resolved by arbitration in front of a sole arbitrator in Hong Kong pursuant to the arbitration rules of the International Chamber of Commerce. This agreement was amended on 13 October 2011, but its governing law and dispute resolution clause remain unchanged.
- (2) The Share Purchase Agreement entered into on 10 September 2012 between Telia and D2 is governed by English law, and both parties irrevocably submitted to the jurisdiction of the English Courts.
- (3) The IFC Loan Agreement entered into 27 March 2014 between D1 and the International Finance Corporation is governed by English law. Any legal action, suit or proceeding arising out of or relating to this agreement may be brought in the Courts of England.
- (4) The Asset Purchase Agreement, entered into on 29 December 2015 between D3 and Elahi Electronics, is governed by Pakistani law. This agreement does not contain a dispute resolution clause. On 16 May 2016 this agreement was novated. The parties to the novation agreement were D3, Elahi Electronics and Mr. Sohail Elahi and they agreed not to change the governing law clause in the original agreement.
- (5) The Escrow Agreement entered into on 29 February 2016 between D3, Elahi Electronics and Meezan Bank Limited is governed by the laws of Pakistan and contains a dispute resolution clause which provides that any court of competent jurisdiction at Karachi shall have non-exclusive jurisdiction.

- (6) The Musharaka Agreement between Daewoo Express and Meezan Bank Limited, entered into on 9 September 2016, is governed by the laws of Pakistan. The Courts at Karachi shall have non-exclusive jurisdiction with regards to all matters arising thereunder.
- (7) The Share Subscription Agreement between Daewoo Express, Tundra Pakistan Fund, Tundra Frontier Opportunities Fund and Tundra Sustainable Frontier Fund, entered into on 27 September 2016, is governed by the laws of Pakistan. The Courts at Lahore shall have non-exclusive jurisdiction with regards to all matters arising thereunder.
- (8) The IFC Loan Agreement entered into on 9 February 2022 between Greentown BVI, D3 and the IFC is governed by English law. This Agreement provides that disputes between the parties shall be referred to and finally settled by arbitration in accordance with the London Court of International Arbitration Rules.

[136] According to D3, the agreements listed in the above paragraph are the only agreements identified by the parties in their evidence, that the majority of the agreements are governed by the laws of Pakistan (four), whilst three of them are governed by the laws of England and Wales, and one is governed by the laws of the Republic of Korea. It is D3's position that Mr. Faruqi is wrong when he states that the majority of the agreements are in fact governed by the laws of England and Wales.

Language

[137] All of the relevant agreements are written in the English language. It is D3's contention that both BVI and Pakistani Courts operate in English, and that therefore this should not be a determining factor in respect of which of these Courts is clearly or distinctly more appropriate to determine this dispute.

Currency

[138] According to D3, the agreements above concern either US Dollars, Pakistani Rupees or Korean Won. It was submitted that the use of US Dollars is unsurprising given the international nature of the transactions and, in light of the prominence of US Dollars in global markets, this does not make the BVI a distinctly more appropriate forum for the claims to be tried.

Unique Remedy

[139] D3's next step in the SKA filed on his behalf, was to deal with Mr. Faruqui's evidence that two of the three claims by the Claimant are claims brought pursuant to the BVI Business Companies Act, specifically sections 184I and 184B, and therefore these claims are unique to the BVI and cannot be brought or determined elsewhere.

[140] In that regard, D3 asserts that the Claim is based out of the same facts and seeks the same relief in practical terms as the SECP Complaint/ the Lahore Petition. Further, that the relief sought by Mr. Faruqui in the Lahore Petition (i.e. that the transfer of shares in Daewoo Express is declared a sham and a fraud and that the company's register of members be duly rectified) is not a remedy available in the BVI for Transcience in this instance.

[141] In the BVI, Transcience seeks a forced purchase of the Greentown BVI shares and/or compensation for the alleged loss of value of the shares. If successful, Transcience would, submits Mr. Lowe, be placed financially in the same position as it would be if it were successful in the Lahore Petition. In either case, Transcience would either be the UBO of Daewoo Pakistan shares or have received payment in lieu of being the UBO of Daewoo Pakistan shares.

[142] Accordingly, both actions by Mr. Faruqui (in Pakistan) and Transcience (in BVI) seek to litigate the same facts and achieve the same outcome. Meaning that the first two

claims of Transcience are not specific to the BVI save that they have been brought under a BVI statute.

[143] As to the third claim, which is a claim for unlawful means conspiracy. D3 says that the relevant considerations in determining where to bring these claims include (a) the place where the damage occurred; and (b) the place where the event giving rise to the damage occurred.

[144] Mr. Faruqi argues that the loss and damage caused by the tort was sustained in the BVI (where Transcience is located). According to D3, there are two answers to that. Firstly, Transcience is Mr. Faruqi's alter ego. Mr. Faruqi is located outside of the BVI. Secondly, loss on any common-sense view was sustained in Pakistan, where Mr. Faruqi was located during the relevant period. Reference was made to **Metal und Rohstoff AG v Donaldson Lufkin & Jenrette Inc** ¹². This damage is sustained because of the dilution of shares in Daewoo Pakistan.

[145] D3's position is that the events giving rise to the damage occurred in Pakistan. The alleged co-conspirators include D2. D3 is resident in Pakistan and manages D2 from Pakistan, and that, although it is incorporated in the BVI, it focuses on business in Pakistan.

Foreign Law

[146] Mr. Lowe submitted that whilst plainly the BVI Court is well accustomed to hearing expert evidence on matters of foreign law, and the laws of England and Wales are more closely aligned to the laws of the BVI than to the laws of Pakistan, the Courts of Pakistan are equally well accustomed to hearing expert evidence on matters of foreign law, including as to rules of interpretation as to agreements in question.

¹² [1990] 1 QB 391

[147] It was again pointed out that the majority of the agreements are governed by the laws of Pakistan and that in any event, the Pakistani Courts conduct litigation in English language. The point was made that the fact that not all of the agreements are governed by the laws of Pakistan should not weigh against Pakistan being clearly and distinctly the appropriate forum to determine the Claim. It was submitted that the majority of the agreements are governed by the laws of Pakistan, and that makes the Courts of Pakistan best suited to deal with those agreements.

[148] Further, it was pointed out that whilst Mr. Faruqi makes reference to the Memorandum and Articles of Association of D1, which are governed by BVI law, to the extent that they are relevant, D3 asserts that they are likely to be the only relevant documents governed by BVI law/located in the BVI in the entire BVI Proceedings. Most documents relevant to the Claim are located outside of the BVI and, where applicable, are not governed by BVI law. It was submitted that this could cause disclosure-related issues if a trial was to be held in the BVI.

Ground A of the Application: Alleged Lack of Jurisdiction

[149] Mr. Westwood KC cited the cases referred to at paragraph [104] –[109] above. He submitted that on any proper consideration of the relevant factors in the present case the BVI is obviously the natural forum for the trial of the claim and, as such, it is clearly and distinctly the appropriate forum.

Pakistan not an available forum

[150] It is D3's position that Pakistan is plainly the appropriate forum for the trial of the claim. Pakistan, however, says Transcience, is not and never was an available forum for the trial of this action. The short point, argues Mr. Westwood KC, is that the Pakistan Court does not have jurisdiction to try Transcience's claims under BCA ss. 184B and 184I. As such, referring to **Wilton Trustees**, at paragraph [43],

Pakistan is not an available forum. This is so, the submission continues, for the following reasons:

- (1) Two of the claims made in the proceedings, namely those under BCA ss. 184B and 184I, can only be brought in the BVI: **Wilton Trustees** at [88].
- (2) Further, it is clear from the expert evidence that Transcience cannot bring a claim in Pakistan in respect of the matters which are the subject of the claims under the BCA. Reference was made to the Report of Mr. Bawaney at [106]-[108],[114],[136].
- (3) It is striking that the expert report of Mr. Shaukat does not address, because he was not asked, the question of whether Transcience could bring proceedings in Pakistan seeking essentially the same relief as it seeks by its claims under BCA, ss 184B and 184I. Rather, says King's Counsel, Mr. Shaukat's report focuses on the question of whether Mr. Faruqui could take proceedings under s.286 of Pakistan's Companies Act, 2017 ("**PCA**", broadly speaking, Pakistan's statutory unfair prejudice remedy) in respect of the affairs of Daewoo Pakistan. Even then, Mr. Shaukat's clear opinion is that Mr. Faruqui could not take such proceedings because he does not hold 10% or more of the shares of Daewoo Pakistan, as required under s.286(1) of the PCA.
- (4) Further, although D3 claims that the present proceedings seek the same relief in practical terms as the Pakistan proceedings, it is his position that Mr. Faruqui did not have locus standi to bring the proceedings issued in Pakistan. In other words, it is D3's position that Pakistan is not an available forum even to Mr. Faruqui.
- (5) Although Mr. Shaukat goes on to suggest that the fact that Mr. Faruqui could not take proceedings under s.286 PCA does not mean that he was not entitled "to approach the Company Court in respect of certain aspects of his complaint", that is no answer, not least because the issue in the present case is whether Pakistan is an available forum for Transcience. The separate legal personality of Transcience, cannot

simply be ignored, as D3 seeks to do. The Court is here concerned with the question of whether Pakistan is an available forum for Transcience, a BVI company, to pursue remedies which the BVI legislature has expressly seen fit to confer on it, as a member of a BVI company. The clear answer, suggests Mr. Westwood, is that it is not.

- (6) In any event, there is no suggestion that D1 and/or D3 could be sued in Pakistan in respect of the subject matter of the claims made under the BCA.

[151] Transcience then turned to address the proceedings which were previously on foot in Pakistan. The following points about them are made:

- (1) These proceedings were not brought by Transcience. As set out above, Pakistan is not an available forum in respect of its claims as a member of D1.
- (2) Rather, those claims were brought by Mr. Faruqui.
- (3) As explained in Faruqui paragraph 44, the claims in the Pakistani Proceedings related to corporate actions at Daewoo Pakistan, including Mr. Faruqui's removal as a director of that company, the transfer and issue of shares in that company, the approval of its accounts and forging of his signature on documents required to give effect to some of those matters.
- (4) The proceedings did not seek remedies, financial or otherwise, for prejudice caused to him as a shareholder in Daewoo Pakistan. As the expert evidence on Pakistan law makes clear, he had no standing to bring any such claims.
- (5) On any basis, the Pakistani proceedings did not concern the vindication of Transcience's rights as a member of D1, which is the subject of the present claims under BCA ss. 184B and 184I.
- (6) In any event, the Pakistan proceedings, which were issued in 2018, were discontinued by Mr. Faruqui on 15 May 2025.

According to the expert in Pakistani law instructed by D3, following discontinuance Mr. Faruqui cannot take out fresh proceedings.

- [152] Transcience's central point in this context is that, irrespective of other considerations, Pakistan is not an available forum for the trial of the action and therefore cannot be the natural forum for the trial.

In any event, BVI not Pakistan plainly the appropriate forum

- [153] In any event, even were Pakistan an available forum for the trial of the action, Transcience submits that any proper consideration of the connecting factors establishes that Pakistan is and was not clearly a more appropriate forum but that, on the contrary, the BVI is the forum with which the action has the most real and substantial connection and, as such, is the natural forum for trying the claim.

The nature of the claims

- [154] Two of the three claims by Transcience are specific claims given by the BVI legislature to members of companies incorporated in the jurisdiction. They are governed by BVI law and they are claims which can only be brought in the BVI and they are not available otherwise than in the BVI. That, it was submitted, is a strong factor in favour of the BVI as the correct forum. Reference was made to **Shallan** at [26] (ii).
- [155] Mr. Westwood opines that the position in respect of the forum conveniens for claims under s.994 of the Companies Act 2006, the English statutory equivalent of s.184I of the BCA, is helpfully summarized in **Hollington on Shareholders' Rights**¹³ as follows:

¹³ 10th ed. (2024) at 12-04

“An English Court will also generally need little persuasion that it is the convenient forum to hear and determine a claim for relief under s.994, an English statute, in respect of an English company.”

- [156] Learned Counsel maintains that the position is similar in Singapore, where applications to stay on *forum non conveniens* grounds claims for oppression of a minority shareholder under its relevant statutory provisions (s. 216 of the Companies Act 1967) have been rejected. Reference was made to the Singapore judgment of Steven Chong J in **Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK** [2016] SGHC 229 at [99]:

“Attempts to stay claims for oppression of a minority shareholder under s.216 of the Companies Act have been rejected on a similar basis. In *Transtech Electronics Pte Ltd v Choe Jerry and others* [1998] 1 SLR (R) 1014, Judith Prakash J(as she then was) held that the action was based on a Singapore statute which concerns a Singapore company subject to that statute. Even if the action could be brought in the foreign court, it would not be the most appropriate court to resolve a dispute which turned on the meaning and scope of a Singapore statute (at [19]). This point was amplified in *Fan Heli v Zhang Shujing and others* [2016] 1SLR 1457 by Aedit Abdullah JC, who noted that the “predisposition” should be to regard the Singapore court as the natural forum (at [26]). The s.216 claim is necessarily premised on events which take place between the shareholders of a Singaporean company. The law governing the affairs of the Singapore company would necessarily be Singapore law. Consequently, the “centre of gravity” of such a claim would be Singapore (at [25]). In any event, the unavailability of s.216 remedies in the foreign court would constitute grounds to refuse a stay under the second stage of the *Spiliada* test (at [45]).”

- [157] Transcience submits that the position is the same in the BVI and that the BVI Court should need little persuasion that it is the appropriate forum to hear and determine a claim for relief under s. 184I of the BCA. The position is *a fortiori* where the proceedings also involve a claim under s.184B of the BCA for compensation for breaches of duty owed under the BCA by D3 to D1 as a director of that BVI company.
- [158] Transcience refers to the fact that D3 asserts that the fact of the incorporation of D1 (and D2) is “*incidental and unimportant*” in the context of the matters on which the

claim is based. The submission is that this, however, is fundamentally to misunderstand the importance of the fact that D1 was incorporated in the BVI in the present context.

[159] Mr. Westwood argues that D3 pursues the same theme in stating that: “Any offshore jurisdiction would seemingly have sufficed to pursue the corporate objective for which these companies were formed” and the “fact that only BVI was used does not point in favour of BVI positively being an appropriate jurisdiction.” However, Transcience submits that the combination of the fact that the BVI was used and the fact that the BVI legislature has seen fit to give members of BVI companies incorporated under the BCA particular rights and remedies under a specific statutory framework does point-and point strongly- in favour of the BVI as being the natural, and thus appropriate, forum. Further, Transcience maintains that D3 is an individual who, through D1 and D2, has chosen to use and make significant investments and assume the responsibilities of an officeholder in companies incorporated in the BVI.

[160] Mr. Westwood describes D3’s dispute that “the administration, management and conduct of the affairs” of D1 are relevant to the claims, as yet further attempt to distance the claim from the BVI. Learned Counsel submits that, in the context of claims under BCA s. 184B and s. 184I, that is both surprising and unsustainable. Further, those claims clearly concern questions about the administration, management and conduct of the affairs of D1. It was the submission that, indeed, they are fundamental to them:

- (1) The claim under s. 184B of the BCA is made on the basis that D3 has engaged in conduct that contravenes the BCA, specifically the duties owed by him as a director of D1 under s.120 of the BCA, and the requirement in s. 121 BCA that as a director of D1 he exercise his powers as such for a proper purpose. In determining that claim, the Court will therefore be concerned with D3’s conduct as a director of D1 and, specifically, whether and to what extent he has engaged, in

that capacity, in conduct which contravenes the BCA. Mr. Westwood comments that it is hard to think of a clearer example of a case which is concerned with the management and conduct of the affairs of D1.

- (2) Likewise, the claim under s.184I BCA is made on the basis that the affairs of D1 are being and/or have been conducted in a manner that is oppressive, unfairly discriminatory or unfairly prejudicial to Transcience in its capacity as a member of D1. Again, in determining that claim the Court will be concerned with the conduct of the affairs of D1.

[161] Transcience submits that it is well-established that the courts of the place of incorporation are “very likely indeed” to be the appropriate forum for decisions on the exercise of powers of management or the conduct of the affairs of a company- **Konamanemi v Rolls Royce (India) Ltd**¹⁴ and **Shallan** at [37]-[38].

[162] Transcience also submits that the Pakistan proceedings would not have resulted in the same outcome as the BVI proceedings. So, for example they would not (and could not) have resulted in an acquisition of Transcience’s shares in D1 or the award of compensation to Transcience in respect of breaches of duties owed by D3 to D1. It was pointed out that, as pleaded in paragraph 89 of the Statement of Claim, the damage sustained as a result of the conspiracy included the diminution of the value of Transcience’s shares in D1, which would be loss sustained within the jurisdiction.

[163] As regards the claim in the tort of unlawful means conspiracy, Transcience submits that:

- (1) In circumstances where the other two claims are claims under BCA ss. 184B and 184I, whether the governing law of the conspiracy claim is ultimately found to be the law of the BVI or some other jurisdiction such as Pakistan, that does not materially affect the location of the natural forum for

¹⁴ [2002] 1 WLR 1269 at [55]

the trial of the action. For the reasons previously argued, the natural forum of two of the three claims is preeminently the BVI and the fact that there is an additional claim in unlawful means conspiracy does not alter that. Accordingly, the natural forum for the trial of the action as a whole is the BVI.

(2) Further, and although it does not affect the primary point made in the sub-paragraph above, it is noted that the Defence of D2 (signed by D3) and the draft Defence of D1 (apparently to be signed by D3) take no point that the governing law of the conspiracy claim is that of some jurisdiction other than the BVI.

[164] Mr. Westwood seeks to persuade the Court that none of the other factors relied on by D3 as establishing Pakistan as a plainly more appropriate jurisdiction (D1 not being managed from the BVI, the location of D3 and Mr. Faruqi, other witnesses and documents; the absence of evidence of funds flowing through the BVI; language; currency) point to Pakistan and not the BVI as the natural forum for the determination of the claim. Weighed in the context of the issues which the Court has to determine in the action, it is submitted that none of those factors, whether individually or collectively, is of particular dispositive weight in identifying the natural forum for the trial of the action.

[165] Transcience therefore submits that the first part of the Application based on Ground A should be dismissed.

Ground B of the Application: Forum Non Conveniens

[166] It was submitted that for the foregoing reasons, D3 cannot establish, as he must, that Pakistan: (i) is an available forum for Transcience's claims; and (ii) in any event, is not clearly or distinctly a more appropriate forum than the BVI. Transcience submits that the application for a stay on forum non conveniens grounds should be dismissed.

- [167] As regards the allegations of forum shopping, Transcience insists that it is not guilty of any forum shopping, let alone any “impermissible” forum shopping. It says it cannot be. This is because the only forum in which Transcience can bring the claims under the BCA, ss.184B and 184I is in the BVI.
- [168] As to the allegations of abuse of process, Transcience avers that it is, in two of the three claims in the proceedings, pursuing remedies as a member of D1 which the BVI legislature has seen fit specifically to confer on members of BVI companies and which can only be brought in the BVI.
- [169] It was submitted that the fact that Mr. Faruqui might be the ultimate business owner of Transcience is nothing to the point. This is yet a further attempt by D3, for his own purposes, to conflate Transcience and Mr. Faruqui. To do so, however, is to ignore their separate legal personalities, the separate rights and remedies available to them and the specific statutory framework which the BVI provides for members of companies incorporated under the BCA to assert those rights. In the circumstances, says Transcience, the pursuit of the current proceedings in the BVI does not involve any abuse of process.
- [170] As regards Ground (B), Transcience accordingly submits that Pakistan is not clearly and distinctly the appropriate forum for the trial of the proceedings and the second part of the Application should be dismissed accordingly.

Discussion and Analysis

Some Preliminary Matters

- [171] Before addressing the two alternative bases upon which the Application is made, Transcience referred the Court to some preliminary matters which it considers important. I also consider them important:

(1) The first part of the Application, (Ground A), does not concern the claims against D1 and D2. There is indeed no question that the Court has jurisdiction to try the claims against those defendants.

(2) Although it appears from the terms of the draft order that under Ground (B) D3 seeks a stay of the proceedings as a whole, i.e. not just the proceedings against him, neither D1 nor D2 has applied for a stay nor suggested at any stage that the BVI is not the appropriate forum for the trial of the claims against them nor is any positive case advanced as to why it would be appropriate to stay the proceedings against D1 and D2 in such circumstances. That is the case notwithstanding the fact that they are both intimately connected with D3, the Defence of D2 has been signed by D3 and each of them acknowledged service more than two years ago

Ground A: Alleged Lack of Jurisdiction

[172] I accept Mr. Westwood KC's argument that the Pakistan Court does not have jurisdiction to try Transcience's claims under BCA ss. 184B and 184I. This is supported by the reasoning in **Wilton Trustees**, at paragraph [43], Pakistan is not in my judgment an available forum for the trial of two of the three claims brought by Transcience for the reasons set out at paragraphs [150] – [162] above.

[173] Although the factual matrix of this case has been somewhat complicated by the proceedings that were filed in Pakistan by Mr. Faruqi, I am of the view that the separate legal personality of Transcience, cannot simply be ignored, as D3 seeks to do. The Court is here concerned with the question of whether Pakistan is an available forum for Transcience, a BVI company, to pursue remedies which the BVI legislature has expressly seen fit to confer on it, as a member of a BVI company. It is clear that Pakistan is not an available forum to try those claims.

[174] As regards the claim in the tort of unlawful means conspiracy, I accept Transcience's submission that:

In circumstances where the other two claims are claims under BCA ss. 184B and 184I, whether the governing law of the conspiracy claim is ultimately found to be the law of the BVI or some other jurisdiction such as Pakistan, that does not materially affect the location of the natural forum for the trial of the action. The natural forum of two of the three claims is preeminently the BVI and the fact that there is an additional claim in unlawful means conspiracy does not alter that. Accordingly, the natural forum for the trial of the action as a whole is the BVI.

[175] As stated at paragraphs 26 and 27 of Transcience's SKA, in considering the connecting factors, what matters is the weight to be given to each connecting factor in the light of all the circumstances of the case. The factors are not to be analysed in a vacuum but must be examined, and weighed, in the context of the dispute between the parties: **Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK**¹⁵ .

[176] Further, the process is not a simple arithmetic exercise of counting the connecting factors and finding which forum has the greater number: Webster J(Ag) in **Abdul-Massih v Jarvis**.¹⁶

[177] Thus, although Mr. Lowe KC made some powerful points about connecting factors, the factors as to the governing law of relevant agreements, location of witnesses and other factors referred to by D3, these factors cannot be analysed in a vacuum. Further, the BVI Court is well-accustomed to dealing with English law and foreign law and technology has also made the location of witnesses a point to which less weight may need to be given.

¹⁵ [2016] SGHC 229 at [106]-[107]

¹⁶ BVIHC(COM) 2023/0243.

[178] In my judgment, D3 has not established a basis to dispute the BVI Court's jurisdiction and thus I refuse the Declaration sought.

Ground B of the Application: Forum Non Conveniens

[179] In my judgment, for the reasons referred to and discussed above, D3 cannot establish, as he must, that Pakistan: (i) is an available forum for Transcience's claims; and (ii) in any event, has not established that it is clearly or distinctly a more appropriate forum than the BVI. Accordingly, the application for a stay on forum non conveniens grounds also stands to be dismissed.

CMC and Filing of Defence

[180] The Commercial Court Registry will now have to fix a date for a CMC in accordance with the Revised Rules 9.7 and 9.8. D3 is to file and serve his Defence within 21 days of the date of delivery of this Judgment.

[181] Costs of the application are awarded to Transcience against D3 to be assessed if not agreed within 21 days.

[182] It just remains for me to thank Leading Counsel and their teams for the very helpful and interesting submissions.

Ingrid Mangatal
High Court Judge (Ag.)



BY THE COURT

Registrar