(1) TERRE NEUVE SARL
(a company incorporated in France)
(2) LARGELY INVESTMENTS SA
(a company incorporated in Panama)
(3) LAURENT ZAHUT

Claimants

and

(1) YEWDALE LIMITED
(2) REDS LLC
(a company incorporated in the State of New York, USA)
(3) GPF SA (in liquidation)
(a company incorporated in Switzerland)
(4) MEYER EL MALEH
(5) JUDAH LEON MORALI
(as executor of the estate of the late Ernest Sasson)
(6) SARA SASSON
(7) CAROLE SASON-EL MALEH
(8) LAURE VASARINO
(9) AMANDINE JOSEK
(10) ROBERT NAGGAR
(11) JUDAH EL MALEH
(12) NESSIM EL MALEH
(13) HSBC PRIVATE BANK (SUISSE) SA
(a company incorporated in Switzerland)
(14) DRISS MRIOUAH

CASE SUMMARY

Bryan J gave judgment in a consolidated hearing of three applications challenging the court's jurisdiction made by defendants in an ongoing dispute concerning the misappropriation of monies paid pursuant to a tax optimisation scheme. The Third Defendant ("GPF") unsuccessfully challenged jurisdiction pursuant to Article 23 Lugano Convention, based on choice of court agreements contained in written agreements ancillary to the oral main tax optimisation arrangements: it was found that those clauses did not cover the present dispute. The challenges brought by the Fourth, Sixth, Seventh and Tenth Defendants (domiciled in Switzerland) based (inter alia) on the "so closely connected" requirement in Article 6 Lugano convention were also dismissed. The Eleventh Defendant'("Judah El Maleh") unsuccessfully challenged permission given to serve him out in Israel: the Claimants' case against him did raise serious issues to be tried on the merits (the required test under CPR r.6.37(1)(b)), and he was a proper party to the dispute pursuant to PD 6B para 3.1(3).

Factual Background

1. These proceedings arise out of a tax optimisation scheme allegedly created by a Mr. Sasson (now deceased) for the ultimate benefit of the Third Claimant ("Mr. Zahut"), through Mr. Zahut's beneficially-owned companies ("Terre Neuve" and "Largely"), pursuant to a series of Oral Agreements. The final version of the alleged arrangement agreed in 2008 was for the Second Defendant ("REDS") to invoice Terre Neuve for work done by Mr. Zahut; Terre Neuve would pay the monies to the First Defendant ("Yewdale"), who would remit the monies to the Second Defendant ("REDS"), who would transfer the monies (less 3% commission) to Largely, which was held for the ultimate benefit of Mr. Zahut and controlled by the Third Defendant ("GPF"). Further, several Written Agreements were entered into between GPF and Largely or Mr. Zahut. The

Claimants allege that €10.6 million transferred from Terre Neuve to Yewdale between 2009 and 2012 was misappropriated, with the knowledge/involvement of or for the benefit of the Fourth, Sixth, Seventh and Tenth Defendants. The Claimants also allege that the monies were laundered through accounts at HSBCPB with the knowledge of the Thirteenth Defendant ("Judah El Maleh") as head of the relevant department.

GPF's Application - Written Jurisdiction Agreements

2. Bryan J held that GPF did not have the better of the argument that the Claimants' claims fell within the scope of the jurisdiction clauses for Switzerland contained in the Written Agreements. He concluded that the *Fiona Trust principle* in favour of generously interpreting the scope of jurisdiction agreements normally only covers disputes arising out of that particular contract. He then considered the criteria pursuant to which courts determine that jurisdiction clauses in contracts (Contract A) cover disputes arising out of a different contract (Contract B), in light of *Etihad Airways PJSC v Prof. Dr Lucas Flother* [2019] EWHC 3107 (Comm), *Sapinda Invest v Altera* [2017] EWHC 871 (Comm), and *Emmott v Michael Wilson* [2009] 1 Lloyd's Rep 233. The Written Agreements failed to meet the following applicable criteria.
3. Firstly, the Written Agreements had different parties from the alleged Oral Agreements pursuant to which the Claimants claimed. Jurisdiction clauses in Contract A normally only extend to disputes arising out of Contract B where all parties to both contracts were the same, and clearer words would be required to reach GPF's preferred construction. The jurisdiction clauses in Contract A would not bind all Contract B parties, leading to the fragmentation of dispute resolution arising out of the same agreement (and in this case, the same obligations): the very menace against which *Fiona Trust* purported to guard. Secondly, the Written and Oral Agreements had different subject-matters: the Written Agreements covered the management of monies held by Largely, and the Oral Agreements (pursuant to which the claims were brought) governed the *transfer* of monies to Largely, and constituted the 'tax optimisation scheme'. Further, the two sets of Agreements were not interdependent or in the same package of measures (they were not discussed together). Thirdly, in this context, the Written Agreement jurisdiction clauses themselves only referred to disputes arising out of each individual agreement: not disputes arising out of overarching oral agreements.

Fourth, Sixth, Seventh and Tenth Defendants' Application — Article 6 Lugano

4. Bryan J held that each of these Defendants' jurisdiction challenges failed. Firstly, the court had jurisdiction pursuant to Article 6(1) Lugano Convention: the claims against these Defendants were sufficiently closely connected to the claims against the Anchor Defendant (Yewdale) because they all involved investigating how and to whom the monies were transferred. Therefore, it was expedient to determine these claims together to avoid the risk of irreconcilable judgments: the fact that it may be inconvenient for these Defendants to attend trial in England was a forum non conveniens factor irrelevant to the application of Article 6, due to the effect of *Owusu v Jackson*. Secondly, bringing this claim in England against these Defendants was not an abuse of EU law: the Claimants had a sustainable claim against the Anchor Defendant and the relevant defendants, and there was no evidence of collusion or fraud in bringing these claims (*Lungowe and ors v Vedanta Resources Plc* [2019] UKSC 20 considered). Fourthly, Article 5 Lugano Convention did not assist these Defendants, as it did not *require* the Claimants to sue in the place of contractual performance. Fifthly, the removal of these Defendants from their 'home' jurisdiction did not breach Article 6 ECHR: it was not suggested that the English judicial system was itself unfair, and the practical difficulties raised could be fairly addressed by established court procedures. Finally, these defendants' reliance on an arbitration clause in a separate agency agreement could not defeat the English courts' jurisdiction.

Eleventh Defendants' Application - CPR r.6.37(1)(b) and PD 6B para 3.1(3).

5. Where claimants wish to serve out of the jurisdiction on a necessary or proper party, they must satisfy three criteria: (1) the person they wish to serve to serve meets all the requirements of a 'necessary' or 'proper' party under PD 6B para 3.1(3); (2) there is a serious issue to be tried on the merits as between the claimants and the person they wish to serve, to the standard of summary judgment; (3) England is the proper place to hear the claim. Judah El Maleh disputed the application of the first and second criteria.
6. Bryan J found that there was a serious issue to be tried as between the Claimants and Judah El Maleh, in connection with two Swiss law actions.
7. The first action was a tort by unlawful act claim under Articles 41 Swiss Code of Obligations ("SCO"), where the unlawful act was money laundering, contrary to Article 305bis Swiss Penal Code ("SPC). As to each requirement of Article 305bis SPC, there was at least a serious issue to be tried.
   (1) There was a serious issue to be tried as to whether Judah El Maleh knew or suspected that monies were being laundered, having regard, in particular, to documentary and witness evidence (covert recordings and testimony in related French criminal proceedings) in the context of potential inferences that may be drawn from Judah El Maleh's senior role at HSBCPB. The decisions of the Swiss/French authorities not to prosecute, and the Swiss First Instance Court to overturn an attachment order in related proceedings on the basis that the claim could not there succeed did not determine the existence of a serious issue to be tried.
   (2) There were serious issues to be tried as to the scope of Articles 305bis SPC and 41 SCO, and causation. Judah El Maleh relied on the decision of the Swiss Appeal Court in the attachment proceedings as correctly applying Swiss law, and on each ground provided; the Claimant contested the correctness of the decision and the grounds on the basis that the court misunderstood their case as being about something other than misappropriation of monies. This issue could not be determined in the absence of expert evidence on the content of Swiss law, and the correctness and interpretation of the Swiss Appeal Court decision. Further factual evidence was also required on the issue of whether the Claimants 'benefitted' from the money laundering scheme. The Swiss courts' conclusions on causation were made in the absence of evidence which was before Bryan J, and contained issues requiring Swiss Law expert evidence for determination.
8. The second action pursuant to which Claimants sought to recover for Judah El Maleh's purported breach of fiduciary duty under Article 754 SCO. This squarely raised two issues of Swiss Law which required expert evidence to be determined: whether the Claimants were "creditors" within the meaning of Article 754, and whether they suffered direct damage.
9. Further, Bryan J concluded that Judah El Maleh was a proper party to these proceedings within PD 6B para 3.1(3). An examination of his state of mind for the purposes of the Claimants claims against him under Article 41 SCO and 305bis would overlap with investigations against the other defendants (whose claims will inevitably be heard in England), including the covert recordings referred to above; further, many of the allegations are against him and other defendants as principals and accomplices. Further, the fact that Judah El Maleh played a relatively small role in the alleged money laundering is no barrier to him being joined: it is not uncommon in the Commercial Court for defendants to have a self-contained role in much larger proceedings, and it is accepted that such parties will limit their participation accordingly.