THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0003
Claim No. BVIHC (COM) 2015/0060

In the matter of Tian Li Holdings Limited

and

In the Matter of the BVI Business Companies Act 2004

BETWEEN:

ANJIE INVESTMENTS LIMITED

Appellant/First Defendant

TIAN LI HOLDINGS LIMITED

Second Defendant

and

[1] CHENG NGA YEE
[2] CHENG NGA MING VINCENT

Respondents / Claimants

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster, QC	Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Matthew Hardwick, QC and Mr. Richard Evans for the Appellant/First Defendant
Mr. Matthew Collings, QC and Mr. Mark Rowlands for the Respondents/Claimants

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2016: July 21;
November 24.

Commercial appeal – Forum non conveniens – Fraudulent misrepresentation – Ownership of shares – Whether learned judge erred in holding that BVI was appropriate forum for trial of claim

The respondents filed a claim in the court below against two BVI incorporated companies, Anjie Investments Limited ("AIL") and Tian Li Holdings Limited ("the Company"). By this claim, they sought: (i) a declaration that they (the respondents) were the owners of the entire issued share capital of the Company ("the Disputed Shares"); (ii) rectification of the Company's Register of Members to record them as the owners of the Disputed Shares; and (iii) further or alternatively, damages (together with interest thereon). The respondents alleged that they, through the Company, held a 15.57% interest in Smartpay, an investment holding company primarily engaged in lifestyle payment cards in partnership with banks. The Company was incorporated by the respondents in 2010 for the sole purpose of holding shares in Smartpay. Shortly after November 2011, Smartpay, which had been operating in Thailand only, began to explore opportunities to expand into the PRC.

It is the respondents' case that on various dates between November 2011 and February 2014, the following representations were made to them by a certain group of individuals: (a) that further investment in Smartpay was desirable; (b) there was a wealthy individual in the People's Republic of China ("PRC") who would be willing to assist Smartpay in acquiring assets in PRC and generally in cooperating with Smartpay in respect of business in return for equity in Smartpay; (c) this wealthy individual, for cultural reasons, would only deal with PRC citizens whom he knew and trusted and who were principals with control of the Company and he would only be interested in investing under these circumstances; (d) it would therefore be necessary to sign a number of documents including a share purchase agreement, stock transfer forms and resolutions, in order to be able to demonstrate to this wealthy individual that PRC citizens were effectively in control (or could be in control) of the Company and were the owners (or the potential owners) of the Company, it being a substantial shareholder in Smartpay, and these PRC citizens were therefore in a position to transfer the Company's shareholding in Smartpay (or part of it) to the individual in the event that a deal could be struck as to the terms and in particular the consideration which was to be paid for any such shareholding. The respondents also averred that the group of individuals made a further representation to them, that there was no intention of acting on the documents or putting them into legal effect until such time as the respondents had approved any deal which might be achieved with the wealthy individual.

The respondents pleaded that, in reliance on and having been induced by the above representations, they entered into a number of documents ("the Documents") which included written resolutions concerning the appointment of new directors of the Company, the resignation of the respondents and the transfer of shares in the Company from the respondents to AIL, as well as two sale and purchase agreements for the sale of the respondents' shares in the Company to AIL. The respondents claimed that the Documents were not intended to create legal relations or to be acted upon without their prior consent. They argued that the Documents were of no legal effect and purported reliance on them by AIL and actions taken pursuant thereto were therefore nullities, and accordingly, the Disputed Shares remain the property of the respondents. They further pleaded that the

representations were false and made dishonestly by the group of individuals, and if, contrary to their primary contention, the Documents are of any legal effect, the respondents are entitled to rescission on the ground of fraudulent misrepresentation and to a declaration that they are the rightful owners of the shares in the Company, or alternatively, to damages for fraudulent misrepresentation.

AIL sought to strike out the claim against it, or alternatively, to have all proceedings in the action as against all defendants stayed on the grounds that the claim consisted of a dispute between the respondents and AIL as to which was the lawful holder of the shares in the Company; and that the dispute had negligible connection with the BVI and the Courts of Hong Kong SAR were clearly the more appropriate forum for the resolution of the dispute. The learned judge who heard AIL's application concluded that the BVI was the most appropriate forum for the trial of the claim, ordered that the rectification claim be stayed pending the determination of the substantive dispute and ordered that the application to stay or strike out the claim on grounds of forum non conveniens be dismissed. The appellant appealed the decision of the learned judge.

Held: allowing the appeal and ordering that the learned judge's order dismissing the application to stay or strike out the claim on grounds of forum non conveniens be set aside; granting a stay of the substantive claim on grounds of forum non conveniens; setting aside the costs award made by the learned judge to the respondents in the court below; awarding the appellant the costs of its application in the court below, which costs are to be assessed if not agreed within 21 days; awarding the appellant its costs in the appeal but excluding the costs on the fresh evidence application, to be calculated at two-thirds of the costs in the court below; and awarding the respondents costs in this Court in relation to the appellant's fresh evidence application, to be assessed if not agreed within 21 days, that:

1. The resolution of disputes concerning the most appropriate forum for conducting the trial of a claim is pre-eminently a matter for the trial judge and an appeal should be rare and an appellate court should be slow to interfere in such instances. Where, however, the appellate court is satisfied that the learned judge made a significant error of principle or a significant error in the considerations taken or not taken into account and as a consequence thereof the decision exceeds the generous ambit within which reasonable disagreement is possible and is in fact plainly wrong, it may interfere with the decision of the judge.

   Spiliada Maritime Corporation v Cansulex Limited [1987] AC 460 applied; **VTB Capital plc v Nutritek International Corp and Others** [2013] UKSC 5 applied; **Dufour et al v Helenair Corporation Ltd et al** (1996) 52 WIR 188 followed.

2. The place of commission of the alleged tort is a relevant starting point when considering the appropriate forum for a tort claim. It will normally establish a prima facie basis for treating that place as the appropriate jurisdiction.

   VTB Capital plc v Nutritek International Corp and Others [2013] UKSC 5 applied.

3. The learned judge made an error of principle when he found that the alleged primary wrong committed by the respondents was the use of the Documents in the BVI resulting in the entry of the appellant's name on the Register of Members. This amounted to a mischaracterisation of, or a failure to properly identify, the essential and underlying wrong that would engage a court in the trial of this action. The primary wrong in this case was, on the pleadings, related to the fraudulent representations and these were made in Hong Kong and not the BVI. In the circumstances, Hong Kong would be, prima facie, the appropriate forum for the trial of this claim. The learned trial judge's conclusion that the BVI was the most appropriate forum was incorrect.

   VTB Capital plc v Nutritek International Corp and Others [2013] UKSC 5 applied.

4. The residence/convenience of witnesses is a factor which is at the core of the question of the appropriate forum for the trial of a claim. Its importance is not to be diluted by a consideration that BVI incorporators should expect to have to travel to the BVI to attend court proceedings. This is a consideration which would be applicable to matters concerning the membership and administration of such companies, which were not the issues involved in this case. The issues in this case concerned the alleged negotiations and representations which took place in Hong Kong and documents which were signed in Hong Kong. These are not domestic issues in respect of which persons should have to contemplate travel to the BVI.

   VTB Capital plc v Nutritek International Corp and Others [2013] UKSC 5 applied; **Nilon Limited and Another v Westminster Investments S.A. and Others** [2015] UKPC 2 applied.

JUDGMENT

[1] **GONSALVES JA [AG.]:** By a claim form and statement of claim filed in the Commercial Division of the High Court, the respondents, Ms. and Mr. Cheng, claimed against the appellant, Anjie Investments Limited ("AIL"), a company incorporated in the British Virgin Islands (the "BVI"), as well as against Tian Li Holdings Limited ("the Company"), also a company incorporated in the BVI, (i) a

declaration that they, the respondents, are the owners of 1000 shares respectively (the "Disputed Shares") in the Company (being its entire issued share capital), (ii) rectification of the Register of Members of the Company to record them as the owner of the Disputed Shares and, (iii) further or alternatively, damages (together with interest thereon).

[2] The respondents' pleaded case was that they, through the Company, held a 15.57% interest in a company called Smartpay. Smartpay was an investment holding company primarily engaged in lifestyle payment cards in partnership with banks. Smartpay also provided payment and customer relationship management services and operated in the card acceptance business in Thailand. The Company was incorporated by the respondents in 2010 for the sole purpose of holding shares in Smartpay, the respondents having caused the Company, on or about 5th January 2011 to purchase 67% of the issued shares in Smartpay for a consideration of HKD40.2 million. Later, the respondents' interest in Smartpay through the Company expanded to close to 75% of Smartpay's issued shares. Shortly after November 2011, Smartpay, which was then operating in Thailand only, started to look for opportunities to expand into the People's Republic of China ("PRC"). Due to a number of transactions linked to funding and facilitating Smartpay's expansion into the PRC, by April 2015, the respondents' interest in Smartpay through the Company had been reduced to 15.57% of Smartpay's issued shares.

[3] The respondents assert that on various dates between November 2011 and February 2014, certain representations were made to them by certain persons, namely Dr. Cho, Mr. Lin, Mr. Zhang and Mr. Cao (together with one Mr. Wu who was at least fully aware of events). These representations were that:

(a) Further investment in Smartpay was desirable;

(b) They knew a wealthy individual in the PRC who would be willing to assist Smartpay in acquiring assets in the PRC and generally in cooperating with Smartpay in respect of business in return for equity in Smartpay;

(c) But for cultural reasons, namely this wealthy individual would only deal with PRC citizens whom he knew and trusted and who were principals with control of the Company, it was necessary to demonstrate to that individual that such PRC citizens were in charge of Smartpay, otherwise the wealthy individual would not be interested in investing; and

(d) It would therefore be necessary to sign a number of documents including a share purchase agreement, stock transfer forms and resolutions, which could be shown to the individual to demonstrate that PRC citizens were effectively in control (or could be in control) of the Company and were the owners (or the potential owners) of it, being a substantial shareholder in Smartpay and therefore also being in a position to transfer the Company's shareholding in Smartpay (or part of it) to the individual in the event that a deal could be struck as to the terms and in particular the consideration which was to be paid for any such shareholding.

These representations were described as the "Investment Representation".

[4] The respondents further assert that Mr. Lin, Mr. Zhang, Mr. Cao and Dr. Cho (together with Mr. Wu, who was at least fully aware of events) made the following further representation (the "Representation of Intention") namely, that there was no intention of acting on the said documents or putting them into legal effect until such time as the respondents had approved any deal which could be achieved with the wealthy individual. This is because the documents were solely for the purpose of demonstrating that PRC citizens were effectively in control of (or could be in control of), and were the owners of (or potential owners of) the Company and capable of transferring to the wealthy individual shares in Smartpay held by the Company in the event that suitable terms could be agreed.

[5] The respondents, in reliance on and induced by the two Representations, entered into a number of documents ("the Documents"). These included a written resolution of the Company regarding the appointment of Zhang Zhongyuan ("Ms. Zhang") and Mr. Wu as directors and the resignation of Ms. Cheng as a director, two sale and purchase agreements for the sale of the respondents' respective shares in the Company to AIL, a letter of resignation by Ms. Cheng as a director of the Company, and a written resolution of the Company regarding the resignation of Mr. Cheng and the transfer of shares from the respondents to AIL.

[6] The respondents allege that the Documents were not intended to create legal relations or to be acted upon without their prior consent and were signed by them for the sole purpose of demonstrating to the wealthy individual in the PRC, the position or state of affairs as described in the last sentence of paragraph 4 above. It is the respondents' case that the Documents were of no legal effect as the respondents had not given (and were not asked for) their agreement or consent, that purported reliance on the Documents by AIL and actions taken pursuant thereto were accordingly nullities, and the Disputed Shares therefore remain the property of the respondents.

[7] The respondents also plead that the two Representations were false and were made dishonestly, knowing their respective falsity. The claim continued that, if contrary to the respondents' primary contention, the Documents are of any legal effect, the respondents are entitled to rescission on the ground of fraudulent misrepresentation and to declarations that they are the owners of the shares in the Company, or alternatively to damages for fraudulent misrepresentation.

[8] AIL, by notice of application, sought an order striking out the claim against it, or alternatively, staying all proceedings in the action as against all defendants. The grounds of the application were: that the claim consisted of a dispute between the respondents and AIL as to which was the lawful holder of the shares in the Company and that the dispute has negligible connection with the BVI and the Courts of the Hong Kong SAR being available to the parties for the purpose were

clearly and distinctly the more appropriate forum for the resolution of that dispute. In its notice of application, AIL relied on the following factors: (a) the share purchase agreements that featured in this matter were entered into in Hong Kong and contained a jurisdiction clause under which the parties had agreed to submit to the non-exclusive jurisdiction of the Courts of Hong Kong; (b) all potential witnesses and the natural persons directly involved with the dispute were resident in Hong Kong or the PRC and speak Mandarin or Cantonese as their first and in most cases only language, and where they speak English at all, speak English only as a second language; (c) all documents likely to be disclosed in the case were in Hong Kong or the PRC; and (d) that the claim against the Company seeking rectification of the Register of Members was premature and should be stayed pending resolution of the Dispute.

[9] On 29th January 2016 Mr. Justice Farara, QC [Ag.] handed down his judgment. According to the learned judge, a determination of whether the BVI or Hong Kong was the most appropriate forum, involved not just an application of the principles of forum non conveniens as expounded by Lord Goff of Chieveley in **Spiliada Maritime Corporation v Cansulex Ltd**,[1] but also a consideration of the effect of the Hong Kong non-exclusive jurisdiction clause and the forum non conveniens waiver clauses that were contained in the Share Holder Agreements which formed part of the suite of documents that the respondents had executed and handed over to the representatives of the appellant. The learned judge, in the exercise of his discretion, concluded that the BVI was the most appropriate forum for the trial of the claim. He ordered that the claim for rectification be stayed pending the determination of the substantive dispute, and that the application to stay or strike out the claim on the grounds of forum non conveniens be dismissed. He summarised the reasons for his decision at paragraphs 70 through 72 of the judgment as follows:

> "[70] Having taken into account the various factors, in my judgment the BVI is the most appropriate forum for the trial of this claim. The weightiest factor is that the Claimants have founded jurisdiction in

[1] [1987] AC 460.

BVI as of right. The BVI court ought not to lightly disturb jurisdiction so established. This is a claim against a BVI defendant company concerning the disputed ownership of shares in a BVI company. It concerns on [sic] alleged wrong committed in BVI, that is, the wrongful submission and registration of documents which are said to be null and void and wholly ineffective in law. The changes effected to the Register of Members and Register of Directors, based on these Documents, took place in BVI. It is by these steps that the Claimant complains they were deprived of their shares in the Company.

"[71] The BVI has personal jurisdiction over the alleged wrongdoer and the disputed shares are in a BVI Company. Issues concerning whether: (a) the documents are null and void and of no effect, and (b) the First Defendant, or persons on behalf of the First Defendant, made fraudulent misrepresentation [sic] to the Claimants as to why the Documents were required to be signed by the Claimants, while they likely will involve issues of Hong Kong law, they can, in my view, be properly address [sic] by this court, in the BVI. Furthermore, the laws of Hong Kong relating to these issues are unlikely to be substantially different from the corresponding laws of the BVI.

"[72] In all the circumstances, BVI is the most appropriate forum or jurisdiction for the trial of this dispute. It is clearly and distinctly more appropriate than Hong Kong."

[10] It is from the learned judge's refusal to grant the stay AIL has appealed.

Forum Non Conveniens

[11] In any consideration of the principles that a trial judge should apply in exercising a discretion whether to stay proceedings on the grounds of forum non conveniens, the exercise properly commences with **Spiliada Maritime Corporation v Cansulex Limited**. The principles emanating from **Spiliada** were restated by this Court in **IPOC International Growth Fund Limited v LV Finance Group Limited et al**[2] at paragraph 27 by Gordon JA, who paraphrased Lord Goff of Chieveley's summary thereof as follows:

"(i) The starting point, or basic principle, is that a stay on the grounds of *forum non conveniens* will only be granted where the court is satisfied that there is some other available forum, having

[2] BVIHCVAP2003/0020 & BVIHCVAP2004/0001 (delivered 19th September 2005, unreported).

competent jurisdiction, which is the appropriate forum for the trial of the action. In this context, appropriate means more suitable for the interests of all of the parties and the ends of justice.

(ii) The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once the defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction. Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of a claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that "where there can be pointers to a number of different jurisdictions" there is no reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that that alternate jurisdiction is clearly or distinctly more appropriate than this jurisdiction.

(iii) When considering whether to grant a stay or not, the court will look to what is the "natural forum" as was described by Lord Keith of Kinkel in **The Abidin Daver**[7] [*[1984] AC 398*], "that with which the action has the most real and substantial connection". In this connection the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions might be subject, in the case of actions in tort where it is alleged that the tort took place and the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of considerations a court should have in exercising its discretion.

(iv) If the court determines that there is some other available and prima facie more appropriate forum then ordinarily a stay will be granted unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in the Abidin Daver made it very clear that the burden of proof to establish such a circumstance was on the claimant and that cogent and objective evidence is a requirement."

[12] As far as the forum non conveniens aspect of this appeal is concerned (grounds 2 through 7), and AIL's dissatisfaction with the identification and treatment of the connecting factors, it is against these principles that the learned trial judge's

decision is to be examined and AIL's appeal falls to be tested. AIL's 7 grounds of appeal can be summarised as follows:

(1) That in relation to the Hong Kong jurisdiction and FNC waiver clauses, that the judge was wrong to find that the appellant did not have the better of the argument; that the judge should have found that the respondents could only override the Hong Kong jurisdiction clause where "especially strong reasons" were identified; yet no such reasons had been identified by the respondents;

(2) The judge should have found that (1) the "wrong" complained of was a tort committed in Hong Kong, with the result that (2) (in accordance with Lord Mance's speech in **VTB Capital plc v Nutritek International Corp and Others**[3]) Hong Kong was prima facie the appropriate forum;

(3) The judge was wrong to accept the respondents' contention that the wrong was done by a person in the BVI, namely the appellant, and to conclude that this was an important and strong factor. The judge should have held (for the purposes of the forum non conveniens analysis) that the alleged wrong (namely the tort of misrepresentation) was committed by the 5 identified individuals in Hong Kong;

(4) That the shares being in a BVI company was not an important factor and the judge was wrong to identify the fact that the shares were in a BVI company as an important connecting factor; that the judge should have held that the fact that the shares were in a BVI company was a connecting factor of little or minimal weight;

(5) The judge was wrong to find that the inconvenience and cost related to having witnesses come to the BVI for trial was a consideration, but one which must not be overstated and that the judge should have held that, in accordance with the speeches of Lord Mance in **VTB Capital plc v**

[3] [2013] UKSC 5.

Nutritek International Corp and Lord Collins in **Nilon Limited and Another v Westminster Investments S.A. and Others**,[4] the location of the witnesses was a factor at the core of the question of the appropriate forum;

(6) The judge was wrong to find that the potential importance of the location of witnesses as a connecting factor was to be balanced against the consideration that persons who incorporate in the BVI must contemplate that they may be required, in the event of disputes over or involving such companies, to have to travel to BVI to attend court proceedings. The balancing consideration mentioned by the judge was applicable to matters concerning the membership and administration of such companies, while the issues in this case were not about the organisation, or administration or internal management of a company. The judge should have found that the issues in this case (alleged negotiations/representations which took place in Hong Kong and documents which were signed in Hong Kong) were not domestic issues in respect of which persons should have to contemplate travel to the BVI to attend court proceedings; and

(7) The judge was wrong to find that the weightiest factor was that the respondents had founded jurisdiction in the BVI as of right. This was not a factor of special weight and/or which outweighed the plethora of other connecting factors to Hong Kong.

[13] The immediate question is whether this Court has any right to interfere with the decision of the learned trial judge. The approach that an appeal court should take on a forum non conveniens appeal is well established. Firstly, as Lord Templeman observed in **Spiliada**, the solution of disputes about the relative merits of trial in the instant jurisdiction and trial abroad is pre-eminently a matter for the trial judge and an appeal should be rare and the appellate court should be slow to interfere. In **VTB Capital plc v Nutritek International Corp**, at paragraph 43,

[4] [2015] UKPC 2.

Lord Mance phrased the question this way: 'The first question is whether there is any basis for regarding the judge's … conclusion as flawed in any way which would require this Court as [an] … appellate court to revisit the exercise of the discretion …'. His Lordship observed further at paragraph 69: '[A]n appellate court should refrain from interfering, unless satisfied that the judge made a significant error of principle, or a significant error in the considerations taken or not taken into account.' Lord Neuberger in that case expressed the function of the trial judge slightly differently (which in our opinion does not alter the parameters of the appellate function) when His Lordship observed at paragraph 97: 'It is worth emphasising that, as Lord Wilson says, the exercise carried out by the judge and by the Court of Appeal on the first question was not the exercise of a discretion but an evaluative, or a balancing, exercise, with which, as Lord Goff said in Spiliada at 465 an "appellate court should be slow to interfere." In **Lubbe and Others v Cape Plc**[5], at page 1556, Lord Bingham of Cornhill said in the context of an application for a stay of proceedings on grounds of forum non conveniens, that:

> "This is a field in which differing conclusions can be reached by different tribunals without either being susceptible to legal challenge. The jurisdiction to stay is liable to be perverted if parties litigate the issue at different levels of the judicial hierarchy in the hope of persuading a higher court to strike a different balance in the factors pointing for and against a foreign forum."

[14] It is the respondent's submission, correct in my view, that the appeal is not AIL's opportunity to have another go, with more evidence, and that AIL must demonstrate that the learned judge erred in such a way that it is proper for this Court to interfere. The respondents submitted and the appellant accepted, both correctly, that the principles upon which this Court is entitled to interfere with a judge's exercise of discretion are explained in **Dufour et al v Helenair Corporation Ltd et al**[6] by Sir Vincent Floissac CJ:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle by failing to take into

[5] [2000] 1 WLR 1545.
[6] (1996) 52 WIR 188.

account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."[7]

[15] This passage was cited with approval by this Court in **Chemtrade Limited v Fuchs Oil Middle East Limited**[8]. The respondent also relies on **Edy Gay Addari v Enzo Addari**[9] where Gordon JA explained it this way:

> "The first condition was explained by Viscount Simon LC in ***Charles Osenton & Co v Johnson*** [1941] 2 ALL ER 245 page 250. There, the Lord Chancellor said:
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> > 'The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.'
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> The second condition was explained by Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 ALL ER 343 in language which was approved and adopted by the House of Lords in **G v G** [1985] 2 ALL ER 225 and which I have gratefully adopted in this judgment. Asquith LJ said ([1948] 1 ALL ER at page 345):
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> > '…We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact plainly wrong, that an appellate body is entitled to interfere.'"

[16] The appellant accepts as correct the principles in **Dufour**, **Chemtrade** and **Edy Gay Addari**, set out above, but contends that it is not simply seeking to have another go, with more evidence. The appellant contends that the learned judge

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[7] At p. 190-191.
[8] BVIHCVAP2013/0004 (delivered 18th September 2013, unreported).
[9] BVIHCVAP2005/0002 (delivered 27th June 2005, unreported) at para. 10.

made errors of principle by (a) giving too little or too much weight to relevant factors or considerations; (b) taking into account or being influenced by irrelevant factors or considerations, and (c) that the degree of error does in fact exceed the generous ambit within which reasonable disagreement is possible. While accepting the admonition by Lord Templeman in **Spiliada** that '[a]n appeal should be rare and the appellate court should be slow to interfere',[10] the appellant suggests that the identification of the forum conveniens in any particular case is a complex and multi-factorial exercise which involves the weighing of a raft of often competing factors, and that there is ample scope for falling into error in the carrying out of that exercise and even experienced commercial court judges do so.

[17] The onus therefore lies on the appellant to convince this Court that this is more than an invitation merely to re-evaluate all of the relevant factors for and against the forum, but that errors in principle were made and, that the learned judge, in concluding that the BVI was the most appropriate forum, was plainly wrong. If the appellant is successful in surmounting that first hurdle, the second question is what conclusion this Court should reach on the issue of the appropriate forum.[11]

The Grounds of Appeal

Ground 1: The Hong Kong Jurisdiction and FNC waiver clauses

[18] In relation to ground 1, the appellant's submission was that in the ordinary course the force of law would be that the combination of a Hong Kong jurisdiction clause and a FNC waiver would all but guarantee a stay of proceedings brought in the non-contractual forum (here the BVI). This, it submitted, was the inexorable result of a long line of jurisprudence including the House of Lords authority in **Donohue v Armco Inc and Others**[12] to the effect that a contractual bargain contained in such clauses can only be displaced by 'very strong or exceptional' circumstances which were unforeseeable and unforeseen at the time of contracting. The respondent's approach in the court below was to challenge the validity of the contractual agreements (the First and Second SPAs) which contained the

[10] At p. 465.
[11] VTB Capital plc v Nutritek International Corp and Others [2013] UKSC 5 at para. 43.
[12] [2001] UKHL 64.

jurisdiction clauses and the FNC waivers. The appellant submitted that in view of that challenge the correct (and agreed) legal approach was, that in accordance with the statement in **Dicey**[13] at 12-113 and 12-114 (as noted by the judge) the appellant was required to demonstrate that it had the better of the argument as to the validity of the underlying contractual agreements.

[19] In its submission that it had the better of the argument, the appellant relied on:

(a) The undoubted existence of the First and Second SPAs as formal contract documents (by contrast for example with an alleged undocumented oral agreement);

(b) The existence of the jurisdiction clause and the FNC waiver at clause 11.2 of each of those SPAs;

(c) The fact that the respondents accepted that they had signed the SPAs;

(d) The fact that the respondents accepted that they had entered into the suite of other documents; and

(e) The suggested well established starting position at common law that a signatory to a document is bound by its contents (whether or not he has read or understood the same) as explained in **Peekay Intermark Limited and Another v Australia and New Zealand Banking Group Limited**.[14]

[20] The appellant stated that in contrast, the respondents relied on assertions that the SPAs were of no legal effect by reason of alleged, undocumented and vigorously disputed oral representations.

[21] According to the appellant, the question for the judge was whether on the basis of the evidence the appellant had the better of the argument as to the validity of the SPAs. The better of the argument test does not require proof on a balance of

[13] Lord Collins of Mapesbury, Dicey, Morris and Collins on The Conflict of Laws (15th edn., Sweet & Maxwell 2012, vol. 1).
[14] [2006] 2 Lloyd's Rep 511.

probabilities – it simply involves the requirement to make a preliminary and comparative evaluation of the parties' respective arguments on their current evidence.[15] . It requires the court to consider that one side has a much better argument on the material available.[16]

[22] The appellant pointed out that the judge, in its opinion, correctly accepted 'the obvious force' of the appellant's position, 'whereby they were provided with these fully executed documents, which were unquestionably signed by the [respondents], and which, on their face, evidence the transaction of the sale of the disputes [sic] shares'.[17] Equally, according to the appellant, the judge correctly observed that 'there is no written agreement or correspondence produced by the [respondents] to back up their contention that these documents were not intended to be used at all or only with their consent'[18]. The appellant concluded that consequently the judge should have found that the appellant had the better of the argument. The appellant complained that the judge appeared to have been influenced by the fact that the appellant's affirmation evidence did not engage with the assertions in the respondents' affirmations that no consideration was paid for the shares. The appellant's answer to this was that it is not unusual for commercial parties in public documents to elect not to disclose sums paid and that the fact that consideration was paid for the shares was recorded in the signed First SPA, the signed Second SPA, each of the 3 signed Sold Notes and Bought Notes and each of the 3 signed Instruments of Transfer. The appellant submitted that the documentary evidence was a much more reliable guide to the question of which party on the evidence had the better of the argument and that prior even to the filing of the defence the judge was wrong to have attached such forensic importance to obviously incomplete affirmation evidence.

[15] See Canada Trust Co. and Others v Stolzenberg and Others (No. 2) [1998] 1 WLR 547.
[16] See Bols Distilleries BV (trading as Bols Royal Distilleries) and Another v Superior Yacht Services Ltd. [2007] 1 WLR 12; [2006] UKPC 45; Global 5000 Ltd v Mr Sarang Wadhawan [2011] EWHC 853 (Comm).
[17] At para. 53.
[18] At para. 53.

[23] The respondents' answer was simply that the appellant's argument was selective and did not do justice to the judge's full and careful evaluation set out in paragraphs 37 to 55 of the judgment.

[24] In the judgment, the focus of the judge's consideration of which party had 'the better of the argument' appears at paragraph 50. There the judge considered the appellant's arguments that the respondents had executed each of the Documents, and in short, had signed and handed over all the documents necessary to effect the change in ownership of the Disputed Shares in the Company, and they did so with full knowledge of the implications and effect of such documents, and of the valuable interest in the company Smartpay. The judge recognised, that by contrast the appellant's counsel categorised the respondents' case as being nothing but pure conjecture.

[25] At paragraph 51 of the judgment, the learned judge then proceeded to consider the factor on which the respondents had focused in responding to the appellant's argument. This was the lack of plausibility of what the appellant and Mr. Wu had said in their respective affirmations. The judge noted that the first respondent had zeroed in on the issue of consideration and the assertion by Mr. Kei and the first respondent in their respective affirmations that no consideration was paid or received for the alleged sale and transfer of the shares and that the SPAs and other documents merely stated that 'fair value has been paid by the Purchaser to the Vendors'. Likewise for the instruments of transfer and the "Sold Note" and the "Bought Note", these also merely stated 'fair value'. The judge noted the respondents' contention that it would have been a simple matter for the appellant in its Second Affirmation in reply to the second respondent's Affirmation in which he (the second respondent) had made the assertion that no consideration had been paid, to produce documentary proof of the actual payment or payments but instead he remained altogether silent on this issue. The judge further noted the

respondents' submission that having regard to the value interest[19] which the Company held in Smartpay, any consideration paid for the Disputed Shares would have run into the millions of dollars.

[26] The essence of the appellant's complaint here is that the unequivocal documentary evidence was a much more reliable guide to the question of which party, on the current evidence, had the better of the argument. The appellant concludes that in these circumstances the judge should then have concluded that: (1) the appellant *was* entitled to rely on the (Hong Kong) Jurisdiction Clauses and FNC Waivers; with the further result that (2) (in accordance with the judge's (correct) summary of the law (at paragraphs 37 to 46) the respondents could only displace the contractual jurisdiction of Hong Kong where "especially strong reasons" were identified; yet (3) no such reasons had been identified by the respondents.

[27] The reasons for the judge's disagreement with the appellant on this issue are explained in paragraphs 54 and 55 of his judgment:

> "[54] However, the matters identified by Mr. Collings certainly raises [sic] suspicions, especially the peculiar way in which the consideration has been stated in the documents, the absence (at least thus far) of any statement of what exactly the consideration was in terms of amount and currency, and of any proof of its payment. Concerns are also raised by the Affirmation of Mr Kei, in response to the First affirmation of the [sic] Mr Wu, whereby he refutes or seeks to refute each and every material factual matter relied on by Mr. Wu concerning the negotiations leading up to, and the execution of, the Documents.
>
> "[55] Having taken all these matters into account, I am not satisfied that either party has 'the better of the argument' in this matter. These issues will have to be properly aired, examined and scrutinised at a trial, through the benefit of disclosure and cross examination of the witnesses on both sides. Accordingly, I conclude that neither party has the better of the argument. I must now go on to consider the matter based upon principles of *forum non conveniens*."

[19] The term "value interest" used by the learned judge in paragraph 51 of his judgment is understood to mean "the value of the interest".

[28] Having reviewed the judge's analysis, I do not agree with the appellant on this point. Firstly, it is accepted that defendants at this stage may have no obligation to advance a positive case to support their denial of any involvement in any alleged unlawful activity – a defendant is entitled to keep his powder dry.[20] But certainly, if a defendant is reticent about a particular issue in his case, he can have no complaint if the court does not take into account what points he may make, or evidence he may call at the trial.[21] Likewise he cannot complain if his reticence on a particular issue, considered in a proper context even at this stage, also raises concerns with the court. The judge was certainly entitled to scrutinise the material which was before him in the process of coming to his conclusion. In this case, the concern of the judge was not simply the recording of the consideration as "fair value", but the very fact that there was an affirmation alleging that no consideration had been paid, the failure of the appellant's affirmation evidence to engage with the assertions in the respondents' affirmations that no consideration had been paid for the shares. This was not an irrelevant factor and the judge was not wrong in considering it. Further, this did not stand on its own. At paragraph 52 of the judgment the judge referred to the affirmation of Mr. Cheng Hong Kei, the lawyer in Hong Kong, who categorically denied any involvement whatsoever in the negotiations, and in advising the respondents in relation to this purported transaction of the sale of their shares in the Company. That lawyer also averred that he never met Ms. Zhang or Mr. Wu, and no meetings took place in his office in Hong Kong relating to this alleged transaction, nor were any of the documents signed in his office.

[29] The judge analysed and considered the evidence or points in favour of each party and concluded that neither party had the better of the argument. The appellant is really asserting that the judge applied too much weight to the material in favour of the respondents and too little weight to the material in favour of the appellant. The evaluation of those matters and the final determination thereon was a matter

[20] VTB Capital plc v Nutritek International Corp and Others [2013] UKSC 5 at paras. 39 and 90.
[21] VTB Capital plc v Nutritek International Corp and Others [2013] UKSC 5 at para. 91

entirely within the province of the judge and the appellant has not identified any error committed by the judge. It is quite possible that a different judge might very well have preferred the evidence and arguments of the appellant over those of the respondents. But it is not possible to state that the judge committed an error of law in his comparative evaluation or that his conclusion here was plainly wrong. By finding that neither party had the better of the argument, the judge was in essence finding that the appellant, on whom the burden lay, did not convince him that it had a much better argument based on the material before him. Consequently the appellant fails in relation to ground 1.

Ground 2: "Wrong" not done in the BVI

[30] The appellant's position on ground 2 is that the judge was wrong to accept the respondents' contention that the wrong was done in this jurisdiction so the cause of action arises in this jurisdiction, and to conclude that the acts or wrong complained of all took place in the BVI. According to the appellant, this error arose out of the respondents' fundamental mischaracterisation of their own pleaded claim. The appellant submitted that the real wrong that was done as set out in detail in the statement of claim at paragraphs 16 and 17 was the alleged fraudulent representations in relation to the circumstances surrounding the claimed PRC investor. According to the appellant, the alleged wrong was done: (1) by the 5 identified individuals Dr. Cho, Mr. Lin, Mr. Zhang and Mr. Cao and Mr. Wu; (2) by means of the alleged Investment Representation and Representation of Intention; (3) to the respondents between November 2011 and February 2014; (4) in Hong Kong; (5) in circumstances where (so it is alleged) the 5 individuals knew that there was no such wealthy individual and that their dishonest intention was to seek to deprive the Chengs of the shares in the Company in favour of the appellant.

[31] The appellant suggested that the wrong had its intended effect when the respondents executed the Documents on 26th March 2014 and 11th April 2014 in Hong Kong, including critically the 2 SPAs and the 3 Instruments of Transfer. The appellant pointed out that at paragraph 7 of the judgment, the judge observed that

the reliefs claimed in the statement of claim were based on two categories of representations 'which were both either false or fraudulent' allegedly made to the respondents by the 5 persons. I would observe here that the judge did not in paragraph 7, as the appellant suggests, observe that the reliefs claimed were 'based' on the two false or fraudulent representations. That word was interposed by the appellant.

[32] The appellant points out that the judge did acknowledge that '[t]he tort of fraudulent misrepresentation is alleged to have been committed in Hong Kong'[22] and that in this regard the following words of Lord Mance in **VTB Capital plc v Nutritek International Corp** were 'apposite'.

> "51. The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. … The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. … The significance attaching to the place of commission may be dwarfed by other countervailing factors."

The appellant argues that in the absence of any countervailing factors, that should have been a stronger pointer towards the Hong Kong jurisdiction.

[33] The complaint is that the judge nonetheless concluded at paragraph 64 that 'the acts or wrong complained of' all took place in the BVI. Paragraph 64 reads as follows:

> "Against this must be balanced the connecting factors with BVI. The dispute concerns shares in a BVI company, the alleged wrongdoer is also a BVI company, and the acts or wrong complained of, that is the submission of the Documents to the registered agent of the Company in BVI and the changes made to the Registers of Members and Directors based on these documents, all took place in BVI."

[34] This, the appellant suggests, obviously was wrong. It is suggested that the reason for the judge's wrong turn was based on the respondents' erroneous submission in its skeleton (cited by the judge at paragraph 62(ii)) that the wrong done was the removal of the respondents from the Company's Register of Members and the

[22] At. para. 65.

substitution of the appellant. In fact at paragraph 62(ii) the judge did agree with the respondents' submission that the wrong was done in the BVI, as he expressly stated 'This is a factor in favour of BVI'. This, the appellant submitted, was in stark conflict to the statement of claim which makes it clear that the effective wrong was an alleged dishonest scheme to appropriate the respondents' shares.

[35] Further, according to the appellant, there was no evidence before the judge to establish that the act of updating the Register of Members had taken place in the BVI (and even if there had been, the use of the instruments of transfer was merely an administrative step, consequent upon the success of the alleged fraudulent scheme to appropriate the shares, "actioned" by making the appropriate changes to the Register of Members (in accordance with section 54 of the **BVI Business Companies Act, 2004**) ("the BCA")). However, but for the alleged Hong Kong fraud it was a step that could never have taken place.

[36] In these circumstances, argued the appellant, the judge should have found that the 'wrong' complained of was a tort committed in Hong Kong with the result that (per **VTB Capital plc v Nutritek International Corp**) the Hong Kong court was prima facie the appropriate forum being the court where, in the words of Robert Goff LJ in **Cordoba Shipping Co. Ltd. v National State Bank, Elizabeth, New Jersey (The "Albaforth")**,[23] it was 'manifestly just and reasonable that the defendant should answer for his wrongdoing'.[24] The reply of Mr. Collings, QC on this ground was to insist that the wrong was done in the BVI, in that the respondents were deprived of their shares in a BVI company by its Register of Members wrongly being changed in the BVI (or such changes taking effect in the BVI).

[23] [1984] 2 Lloyd's Rep 91.
[24] At p. 96.

[37] In relation to this ground, the appellant sought by notice of application dated 13th April 2016 to adduce fresh evidence in the form of a third witness statement of Mr. Wu dated 13th April 2016, that in fact it was he who had updated the Register of Members on behalf of the appellant between the dates of 29th January 2015 and 4th February 2015 in Hong Kong. The fresh evidence application would have to satisfy the requirements set out in **Ladd v Marshall**[25] and the application was premised on the following grounds: (a) that the evidence could not have been obtained with reasonable diligence for use at the hearing below (since no point had been taken by the respondents, prior to the hearing, as to the place where the Register had been updated); (2) the evidence would (were the Court of Appeal to agree with the judge that the place where the Register was updated was important) probably have an important influence on the result of the case; and (3) the evidence was credible. The appellant concluded that the short factual point was that the judge's assumption (without evidence) that the Register was updated in the BVI was wrong: it was updated by Mr. Wu in Hong Kong.

[38] Before the court considers the fresh evidence application, it should first seek to determine the fundamental or underlying basis of the claim. That determination would itself point to the "wrong" that would engage a court's attention in a trial of this action. That in turn would assist the Court in deciding (for the purposes of the fresh evidence application) whether the place where the Register was updated is in fact important, and would have had an important influence on the result of the case.

[39] At paragraph 62(ii) of the judgment, the judge accepted Mr. Collings, QC's submission that the wrong was done in the BVI and so the cause of action arose in the BVI. The judge described the wrong as 'namely the removal of the [respondents] from the Company's Register of Members and the substitution of the [appellant]'. In the next sentence the judge commented that 'This is a factor in favour of BVI'. The judge immediately continued:

[25] [1954] 1 WLR 1489.

> "The wrong being complained of is using the Documents, which are said to have been executed by the [respondents] in Hong Kong having been induced to do so by two fraudulent misrepresentations, without the consent of the [respondents], and contrary to the agreement of the parties when the Documents were executed and handed over. The registration of the [appellant] on the Register of Members in respect of the disputed shares, was done in BVI, in furtherance of the wrong allegedly committed to the [respondents], that is, using the Documents in this manner contrary to the agreement that they were to be of no legal effect. Again this factor seems to me to favour either BVI as the more appropriate forum, or to be at least a neutral factor".

[40] Before the judge, Mr. Collings, QC for the respondents explained that the respondents' case rested on two pillars. First, the primary case was that the suite of documents was not intended to create legal relations (without more), and was of no legal effect; nor was there any consideration. Reliance on, and any action taken pursuant to, the documents was therefore a nullity; and ownership of the shares in the Company remained (at least beneficially) with the Chengs, unaffected. Second, the claim was put on the further or alternative basis of fraudulent misrepresentation. In light of what has happened, the Chengs now believed that there was no wealthy Chinese individual, and that it was always intended to act upon the documents without further reference to them: in other words to deprive them of their ownership of the Company for nothing which is what occurred (at least so far as legal title to the shares is concerned).[26] Mr. Collings, QC maintained that division before this Court.

[41] Mr. Collings, QC is in fact correct that he pleaded the respondents' case in the way described. But assuming that his case can be bifurcated as he suggests, that would help him only if the order of priority of his claims as pleaded would be determinative of the issue. In my opinion it would not. For our purposes we will have to assume that any trial will be a trial of both his primary claim and his secondary claim together. The determination of both claims will be inextricably interlinked. Consequently, in this case, it makes no difference that the nullity claim is pleaded as the primary claim and the fraudulent representation claim as the

[26] See clause 3 of respondents' skeleton arguments in the court below.

secondary claim. From a trial perspective, the matter must be looked at as a whole. The substantive dispute that will engage a court in a trial of this action will center on whether the Documents executed by the respondents in Hong Kong are null, void and of no effect, and if they are of any legal effect, whether the respondents are entitled to rescission on the ground of fraudulent misrepresentation. Very little if anything at all will turn on the respondents' identified "wrong" constituted by the acts of removal of the respondents from the Company's Register of Members and the entry of the name of the appellant therein (the "register entry wrong"). The "register entry wrong" would have, at best, constituted a resultant or ancillary wrong. It would not have encapsulated, from a trial perspective, the primary wrong relative to the substantive dispute for determination by the court. As between the two identified wrongs, the primary wrong (being reflective of the alleged impugned acts that would constitute live issues for determination by the court) would be constituted by the alleged fraudulent representations.[27] It would make no difference if this on paper related to the secondary claim, because the order of the claims was irrelevant, and also in a trial both claims would be inextricably intertwined. It is an alleged wrong of fundamental importance that the trial court would have to deal with, and which was directly related to the underlying dispute. It is the real or underlying dispute which will engage a court at trial that must be considered. In this regard the approach taken in **Nilon Limited v Westminster Investments S.A.**[28] is instructive. There the Mahtani parties brought proceedings in the BVI against Mr. Varma for breach of contract to procure the issue of shares in Nilon to themselves, and against Nilon for rectification of the share register, and sought permission of the BVI Commercial Court for permission to serve Mr. Varma out of the jurisdiction. In His Lordship's analysis of that claim, Lord Collins at paragraph 62 of the judgment stated:

[27] It would appear that the emphasis being placed on the "wrong" was, in the context of at least the respondents' primary claim, somewhat misplaced, bearing in mind the real and substantial underlying dispute which the judge identified, as the acts, documents and personalities relating thereto would be firmly rooted in Hong Kong. Nonetheless, the judge went on to accept the "wrong" in the form identified and the appellant's answer was to counter with the "wrong" as it identified. As a result we have a competition between the two "wrongs".

[28] [2015] UKPC 2.

> "[T]he Court of Appeal's reasoning showed that the issues relating to the underlying claim had nothing to do with the BVI, and there was nothing about the issues in the claims for rectification of the register and breach of contract, taken together, which pointed towards the BVI as the appropriate forum."

[42] At paragraph 66 Lord Collins concluded:

> "The reality of the matter is that, apart from the fact that the claim is that Mr. Varma made a promise to allot shares in a BVI company, and that if they are successful the Mahtani parties may obtain an order that Mr. Varma procure the allotment or transfer to them of shares in Nilon, the issues have nothing to do with the BVI at all".

[43] In **Pacific Electric Wire & Cable Company Limited v Texan Management Limited et al**,[29] the High Court adopted a similar approach where at paragraph 45 of the judgment, in analysing the claim before her, the judge focused on the factual events underlying the dispute and stated:

> "It can hardly be disputed that the subject matter of these claims concerns real property in Hong Kong. It seems factually correct that the events and transactions giving rise to the claim took place in Hong Kong. This is borne out in the several affidavits of the parties. Although the claimant attempts to dissociate the issue which is at the heart of the Hong Kong proceedings from the issue in the BVI proceedings, it is a monumental task for the claimant not to accept at the end of the day that the principal issue for determination in the BVI proceedings as well as the Hong Kong proceedings is the ultimate beneficial ownership of the PacMos shares. I do accept that there may be other issues but scrutinizing the statement of claim, the amended statement of claim and the re-amended statement of claim, the other issues are only ancillary to the principal issue."

[44] In order to establish their case it will be necessary for the respondents to prove the terms of the alleged agreement, and the fraudulent representations all of which allegedly occurred in Hong Kong. The judge appears to have acknowledged this when he stated in paragraph 62(i) that:

> "[T]he substantial dispute for determination by a court at trial concerns whether the Documents executed by the [respondents] are null and void and of no effect and, hence, not capable of being used to effect a transfer of the disputed shares in the Company from the [respondents] to the [appellant]."

[29] BVIHCV2005/0140 (delivered 12th May 2006, unreported).

[45] Nonetheless, it appears that for the purpose of the forum non conveniens determination, the learned judge considered the primary wrong to be the using of the Documents in the BVI resulting in the entry of the appellant's name on the Register of Members. This amounted to a mischaracterisation of, or a failure to properly identify, the essential and underlying wrong that would engage a court in the trial of this action, resulting in an error of law. That primary wrong was, on the pleadings, related to the fraudulent representations and done in Hong Kong and not BVI. Alternatively, even if the making of the relevant entries in the Register of Members in the BVI was correctly identified as a "wrong", that was resultant or mechanical only. The judge would have erred in applying any weight to this resultant or mechanical "wrong" as a true connecting factor.

[46] Mr. Hardwick, QC further submits that had the judge correctly identified the wrong as having occurred in Hong Kong (the tort of fraudulent misrepresentation), then the result would have been that (in accordance with the speech of Lord Mance in **VTB Capital plc v Nutritek International Corp**) the Hong Kong court was prima facie the appropriate forum where (in the words of Robert Goff LJ in **Cordoba Shipping Co. Ltd. v National State Bank, Elizabeth, New Jersey (The "Albaforth")**) it was manifestly reasonable that the defendant should answer for his wrongdoing.

[47] At paragraphs 10 and 11 of **VTB Capital plc v Nutritek International Corp**, Lord Mance stated:

> "10. The conclusion that the alleged tort of deceit is governed by English law is very relevant to the question of the appropriate forum, and I am prepared to assume that the alleged tort of conspiracy is also governed by English law. However, assuming English law to govern both alleged torts, no one suggests that this is decisive of the appropriate forum.
>
> …
>
> "11. The appeal was originally presented to the Supreme Court as raising a significant issue regarding the nature and extent of the relevance of the governing law and the way in which this should

> be expressed. The suggestion was that a conclusion that the tort was committed in England gave rise to a 'strong presumption' in favour of an English forum."

[48] Having reviewed the relevant statement by Robert Goff LJ in **The "Albaforth"** at page 96 and also the comments of Lord Steyn in **Berezovsky v Michaels and Another**,[30] Lord Mance concluded at paragraph 18:

> "The Albaforth line of authority is no doubt a useful rule of thumb or a prima facie starting point, which may in many cases also prove to give a final answer on the question whether jurisdiction should be appropriately exercised. But the variety of circumstances is infinite, and the Albaforth principle cannot obviate the need to have regard to all of them in any particular case. The ultimate over-arching principle is that stated in The Spiliada, and, if a court is not satisfied at the end of the day that England is clearly the appropriate forum, then permission to serve out must be refused or set aside."

[49] In this case, by mischaracterising the primary wrong and the place of its alleged commission, the judge would have erred in principle for the reasons explained above. I agree that had the judge correctly identified the wrong (the tort of misrepresentation) as having been committed in Hong Kong, then based on **VTB Capital plc v Nutritek International Corp***,* Hong Kong, would have been prima facie, the appropriate forum. However this would not have been decisive of the matter, as in any event a proper determination on this point would not, per Lord Mance, obviate the need to have regard to all of the other factors. The appellant therefore succeeds on this ground.

[50] Having identified the primary wrong alleged in the respondents' case, we now address the appellant's fresh evidence application. The Court is of the opinion that the entry on the Register of Members was merely collateral and administrative and not much if anything would turn on that point in relation to the underlying substantive dispute. Consequently, that evidence, if given would not in our opinion probably have an important influence on the result of the case. This would be sufficient to deny the application. But the application would have failed for another

[30] [2000] 1 WLR 1004 at 1014A-F.

reason. The appellant submits that, in relation to the first limb of **Ladd v Marshall**, the evidence in the form of the third witness statement of Mr. Wu that it was in fact he who updated the Register of Members on behalf of the appellant between the dates of 29th January 2015 and 4th February 2015 in Hong Kong, could not have been obtained with reasonable diligence for use at the hearing below, since no point had been taken by the respondents prior to the hearing as to the place where the Register had been updated.

[51] The respondents' answer to this point is simply that the evidence was plainly always available to the appellant; it just omitted to deploy it. The respondents submitted that the issue in this case has always been the ownership of the shares in the Company and that paragraph 25 of the statement of claim referred to the wrongful change of the Register of Members, and that it appears that the appellants simply overlooked the evidence of the physical location of the Register as a potential factor. To this the appellant countered by submitting that the answer to the respondents' emphasis on "the availability" of the evidence was that unless and until the matter was in issue, it was not evidence that a party acting with reasonable care would incur time and cost in obtaining. Reliance was placed on **Phipson**[31] at 13-07 where the authors state:

> "This part of the test is more flexible than might be thought. The test is not whether or not the evidence was in fact available, but whether a party acting with reasonable care could have anticipated the need to call the relevant evidence."

[52] Considering the manner in which the respondents framed their statement of claim and specifically paragraph 25 of the statement of claim, (and notwithstanding that the Court is in agreement with the appellant's description of the underlying substantive claim), I am of the opinion that a party acting with reasonable care would have anticipated the need to call the evidence concerning the updating of the Register. For that reason, the appellant would have failed to satisfy the first limb of the **Ladd v Marshall** test.

[31] Phipson on Evidence (18th edn., Sweet & Maxwell).

Ground 3: "Wrong" not done by a person in the BVI

[53] Ground 3 flows from ground 2 and is inextricably tied up with the arguments concerning the proper identification of the fundamental or underlying wrong set out in the statement of claim. Having concluded above that the substantive or underlying wrong related to the making of the Representations, which were allegedly done in Hong Kong, one is led to the inescapable conclusion that the judge was wrong to focus on the "wrong" relating to the Register of Members when he stated at paragraph 62(iii) of the judgment that '[t]he wrong was done by a person in BVI, namely the [appellant]' and that '[i]ndeed the alleged wrongdoer is a BVI company' and to conclude that '[t]his is an important and strong factor'. This is an error that flowed from the misidentification of the "wrong" as the administrative act of the removal of the respondents from the Register of Members. The respondents' answer on this ground is that the wrong was done by a person in the BVI, the defendant is a BVI company, which is now wrongly on the Register of Members in place of the respondents. The respondents argued that if people interested in a BVI company might not come to Wickams Cay to conduct meetings of the company, or to make representations on behalf of the company, that does not make it any less the actions of the BVI company. The submissions of the respondents again appear to place emphasis on the ancillary acts relating to the making of the entries on the Register of Members which, while related to, are not the true substantive matter in dispute. I agree with Mr. Hardwick, QC that the judge erred in this regard and that this had the result of elevating the final administrative act of registration above the alleged Hong Kong conceived fraud, by 5 Hong Kong individuals which lies at the heart of this claim. The appellant therefore succeeds on this ground also.

Ground 4: Shares in a BVI company not an important factor

[54] In relation to ground 4, the appellant submitted that the judge was wrong to identify the fact that the shares were in a BVI company as (apparently) an important connecting factor in favour of the BVI as the appropriate forum for the trial. In fairness to the learned judge, at paragraph 64 of his judgment he identified the fact

that the dispute concerned shares in a BVI company merely as one of a number of BVI connecting factors without indicating the weight he thought should be attributed to it. The context in which he addressed the shares is as follows. At paragraph 63 of the judgment, the judge stated: 'The dispute has a connection with Hong Kong for a number of reasons' and went on to enumerate. At paragraph 64 the judge continued:

> "Against this must be balanced the connecting factors with BVI. The dispute concerns shares in a BVI company, the alleged wrongdoer is also a BVI company, and the acts or wrong complained of, that is the submission of the Documents to the registered agent of the Company in BVI and the changes made to the Registers of Members and Directors based on these documents, all took place in BVI".

[55] Mr. Hardwick, QC concedes that the dispute ultimately concerns shares in a BVI company but submits that there are no live issues in the claim in relation to the nature of the shares and that the question is simply whether the transfer of shares was procured by fraud. Further, in the absence of any issue relating to the shares, the fact that the shares were in a BVI company is not a factor that, in the search for an appropriate forum, should command any weight at all. It is a point which goes, simply, to the fact that the ultimate remedy (of rectification) must be in the BVI, which the judge (inconsistently, says Mr. Hardwick, QC) acknowledged was not much of a factor at all. The respondents in answer submit that the fact that the shares were in a BVI company was an important factor in that the subject matter of these proceedings is an asset located in the BVI. This submission by the respondents is evidently circular. The judge's treatment of the relevance of the shares being in BVI company, at paragraph 64 also appears to be somewhat inconsistent with his treatment of the same point at paragraph 62. The fact that the shares were in a BVI company was Mr. Collings, QC's first connecting factor but the judge there, while acknowledging that to be a fact, appeared to discount its importance as a connecting factor by observing that the substantial dispute for determination by the court at trial, was whether the Documents executed by the respondents were null, void, and of no effect. Having expressed that position, it was a bit surprising to see the judge later cite the shares in the BVI as a connecting factor. I agree with Mr. Hardwick, QC. The shares being in a BVI

company is at best a "paper" connection but certainly not a connection of any value. In this regard, the observations made in **Nilon Limited v Westminster Investments S.A.** by Lord Collins at paragraph 66 are, on the present facts, applicable:

> "The reality of the matter is that, apart from the fact that the claim is that Mr. Varma made a promise to allot shares in a BVI company, and that if they are successful the Mahtani parties may obtain an order that Mr. Varma procure the allotment or transfer to them of shares in Nilon, the issues have nothing to do with the BVI at all."

[56] I therefore conclude that the fact that the shares were in a BVI company should not have been considered to be a connecting factor and the judge's conclusion in this regard was wrong. The appellant also succeeds on this ground.

Ground 5: The "core" importance of witnesses in Hong Kong and
Ground 6: BVI proceedings necessary where "domestic" BVI issues engaged.

[57] Because of the manner in which the judge dealt with these two issues, grounds 5 and 6 will be dealt with together. In relation to ground 5, the appellant submits that the judge made an important error in relation to the relative importance of the witnesses. In this regard, the judge acknowledged (at paragraph 63) that: '[t]he [respondents] and the principals of the [appellant] all reside in Hong Kong or the PRC, and any other witnesses on either side will come from either Hong Kong or the PRC' and that 'this is a dispute between Hong Kong resident individuals and a BVI company, owned and controlled by persons resident in Hong Kong, concerning shares in a BVI company'.

[58] The judge also identified the problem of foreign languages (Mandarin and Cantonese) and the need for interpreters noting (at paragraph 67):

> "[67] … The evidence before me establishes that many of these witnesses speak either Mandarin or Cantonese as their native language, although some do also speak English. While the BVI Commercial Court can accommodate a trial involving such witnesses, with interpreters being sourced by the parties themselves, it is obvious that the Hong Kong court would have more facilities available to it than the BVI court, to properly

> accommodate such trials. Likewise, interpreters fluent in such languages, would be more readily available in Hong Kong than BVI. However, I have been made to understand by counsel that court proceedings in Hong Kong are usually conducted in English. Also, the Commercial Court in BVI has accommodated trials involving parties from such jurisdictions who speak Mandarin or Cantonese."

[59] At paragraph 68 of the judgment the judge continued, 'As regards the inconvenience and cost related to having these witnesses come to BVI for a trial, this is certainly a consideration, but one which must not be overstated'. The appellant's complaint here is that the judge fell into error in categorising this factor as merely "a consideration" when it should, on authority, have been a *core factor*. This, submitted the appellant, ran counter to degree of relevance accorded this factor by Lord Mance in **VTB Capital plc v Nutritek International Corp** where at paragraph 62 Lord Mance stated that the residence/convenience of witnesses was a factor 'at the core of the question of appropriate forum' and also to the speech of Lord Collins in **Nilon Limited v Westminster Investments S.A.** where at paragraph 14, His Lordship emphasised that 'the question of the location of witnesses will be an important factor, and has been described as a core factor'.

[60] Ground 6 relates to the judge's conclusion at paragraph 68 that the potential importance of the location of witnesses as a connecting factor was to be balanced against the consideration that 'persons who incorporate companies in BVI must contemplate that they may be required, in the event of disputes over or involving such companies, to have to travel to BVI to attend court proceedings'. The actual words used by the judge were:

> "[68] As regards the inconvenience and cost related to having these witnesses come to BVI for a trial, this is certainly a consideration, but one which must not be overstated. This is so especially because persons who incorporate companies in BVI must contemplate that they may be required, in the event of disputes over or involving such companies, to have to travel to BVI to attend court proceedings."

[61] The appellant submits that the judge was wrong in his conclusion. The consideration that foreigners incorporating companies in the BVI must expect to travel to the BVI was expressed by Bannister J at first instance in **Royal Westminster Investments S.A. et al v Nilon Limited et al**[32] when he stated, 'if foreigners incorporate companies in the BVI they must expect to have to come to the BVI to litigate disputes going to the membership and administration of such companies' and was approved and relied upon by Bennett JA in the Court of Appeal in **Royal Westminster Investments S.A. et al v Nilon Limited et al**.[33] On appeal to the Privy Council, Lord Collins addressed this point as follows:

> "59. Second, the Court of Appeal thought it relevant that matters concerning the organisation and administration of a company are generally treated as matters ideally suited to be determined in the location in which the company has been formed …
>
> "60. But this is not a case involving any of the domestic issues referred to. The relevant principles have been developed in the context of such issues as those arising between members, or issues relating to the powers of organs of a company, the appointment of directors, the extent of members' liabilities for debts of the company, or the right of shareholders to bring derivative actions. The Court of Appeal relied on Bannister J's statement that if foreigners incorporate companies in the BVI they must expect to have to come to the BVI to litigate disputes going to the membership and administration of such companies, but the Court of Appeal ignored the context of those remarks, which was consideration of the forum conveniens if (contrary to his view) there was a viable cause of action against Nilon for breach of contract. The issues in this case are not about the organisation or administration, or the internal management, of a company. They are about the terms of an alleged contract to which it is not suggested Nilon was a party."

[62] Mr. Hardwick, QC submits that precisely the same applies here in that the issues relating to: (1) the alleged negotiations/representations which took place in Hong Kong, and (2) documents which were signed in Hong Kong, are not domestic issues touching upon the organisation or administration or internal management in

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[32] BVIHC(COM)2010/0039 (delivered 21st October 2010, unreported).
[33] BVIHCVAP2010/0034 & BVIHCVAP2011/0001 (consolidated) (delivered 16th January 2012, unreported).

respect of which persons should have had to contemplate travel to the BVI to attend court proceedings.

[63] The respondents' answer here is simply that these were factors which the judge plainly considered and took into account, that the judge weighed all the factors and his decision cannot be faulted. This simply asserts that the judge was right but stops far short of meeting the convincing submissions of Mr. Hardwick, QC. I agree with the appellant's submissions on both grounds. The location of the witnesses was not simply a factor but was a core factor and its importance was not to be diluted by a consideration that BVI incorporators should expect to have to travel to the BVI to attend court proceedings, as the context of that latter consideration was inapplicable to the nature of the underlying claim in these proceedings. The appellant therefore succeeds on both grounds.

Ground 7: The Weightiest factor-jurisdiction as of right

[64] In relation to ground 7, the judge found as the weightiest factor the fact that the respondents have founded jurisdiction in the BVI as of right. At paragraph 70 of the judgment the judge stated:

> "[70] Having taken into account the various factors, in my judgment the BVI is the most appropriate forum for the trial of this claim. The weightiest factor is that the Claimants have founded jurisdiction in BVI as of right. The BVI court ought not to lightly disturb jurisdiction so established. This is a claim against a BVI defendant company concerning the disputed ownership of shares in a BVI company. It concerns on [sic] alleged wrong committed in BVI, that is, the wrongful submission and registration of documents which are said to be null and void and wholly ineffective in law. The changes effected to the Register of Members and Register of Directors, based on these Documents, took place in BVI. It is by these steps that the Claimant [sic] complains they were deprived of their shares in the company".

[65] It is unclear precisely how the judge treated with this factor as "the weightiest factor" in his evaluation exercise. However it is clear that he considered it the strongest factor of the factors that favoured the BVI, attracting formidable weight.

[66] The appellant submits that, in accordance with the reasoning of Lord Goff of Chieveley in **Spiliada** at pages 476 to 478, the fact that the respondents had founded jurisdiction as of right in the BVI was merely *the reason* why the burden rested upon the appellant to establish that Hong Kong was a distinctly more appropriate forum than the BVI by reference to the "connecting factors". It was not however a factor of special weight or one which outweighed the plethora of other "connecting factors" to Hong Kong as identified.

[67] In **Spiliada** at page 476F-477E, Lord Goff of Chieveley stated:

> "The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established …
>
> "In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right …"

[68] In **IPOC International Growth Fund Limited v LV Finance Group Limited et al**[34] Gordon JA, paraphrasing from Lord Goff, stated at page 13:

> "Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of a claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that 'where there can be pointers to a number of different jurisdictions' there is no reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that that alternate jurisdiction is clearly or distinctly more appropriate than this jurisdiction."

[34] BVIHCVAP2003/0020 & BVIHCVAP2004/0001 (delivered 19th September 2005, unreported).

[69] The position of Mr. Collings, QC here was simply to repeat the analysis of the judge on this point and to conclude that there were indeed a number of weighty factors but he did not address on what legal basis, in light of the principles in **Spiliadia**, the judge was correct when he determined that this was the weightiest factor. I agree with Mr. Hardwick, QC's submission. The respondents having established jurisdiction as of right gave them no extra benefit, added no extra weight, but simply placed the burden on the appellant to demonstrate that there was another available forum which was clearly more distinctly appropriate than the BVI. The judge therefore erred in attributing the weight that he did to this factor. The appellant succeeds on this ground.

[70] In the final analysis, the learned judge was plainly wrong in arriving at the conclusion that the BVI was the most appropriate forum. The judge committed errors of principle and/or weight as explained in relation to grounds 2 through 7 above leading to an incorrect decision which justifies this Court in setting aside the judge's order dismissing the application for the stay on the ground of forum non conveniens. I therefore conclude that:

(a) The wrong which forms the fundamental and underlying basis of the claim is based on the fraudulent misrepresentations and these were made in Hong Kong. The tort of fraudulent misrepresentation is alleged to have occurred in Hong Kong and consequently Hong Kong would *prima facie* be the appropriate forum;

(b) The alleged wrong was allegedly committed by the 5 individuals in Hong Kong;

(c) The fact of the Disputed Shares being in a BVI company was not a true connecting factor or at best a connecting factor of little or minimal weight;

(d) The location of the witnesses was a core factor and the inconvenience and cost related to having witnesses come to the BVI for a trial was an important consideration, and was not to be diluted or balanced by any

consideration that persons who incorporate in the BVI must contemplate that they may be required to travel to the BVI. That latter consideration was applicable to matters concerning the membership and administration of such companies, which were not the issues involved in this case. The issues in this case concern the alleged negotiations and representations which took place in Hong Kong and documents which were signed in Hong Kong. These are not domestic issues in respect of which persons should have to contemplate travel to the BVI.

(e) The fact that the respondents had founded jurisdiction in the BVI as of right was not a factor of special weight or which outweighed the host of other factors in favour of Hong Kong.

[71] Consequently, the appeal is allowed and the Court makes the following orders.

1. The order of Farara J [Ag.] contained in paragraph 74 of the judgment that is, dismissing the application to stay or strike out the claim on grounds of forum non conveniens, is set aside.

2. A stay of the substantive claim is granted on grounds of forum non conveniens on the basis that Hong Kong is the most appropriate forum for the trial of this action.

3. The order of Farara J [Ag.] contained in paragraph 75 of the judgment, that is, that the respondents are to have their costs of the application to be assessed if not agreed, is set aside.

4. The appellant is to have its costs of the application in the High Court to be assessed if not agreed within 21 days.

5. The appellant is to have its costs in the appeal, but excluding the costs on the fresh evidence application, to be calculated at two-thirds of the costs in the court below.

6. The respondents are to have their costs in this Court in relation to the appellant's fresh evidence application, to be assessed if not agreed within 21 days.

Anthony E. Gonsalves, QC
Justice of Appeal [Ag.]

I concur.

Mario Michel
Justice of Appeal

I concur.

Paul Webster,
QCJustice of Appeal [Ag.]