In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL LIST

No 103 of 2012

BETWEEN:-

(1) JOLIET 2010 LIMITED
(2) TEODORO 29 CORP

Plaintiffs

-v-

(1) GOJI LIMITED
(2) ERAN BEN-SHMUEL
(3) ALEXANDER BILCHINSKY

Defendants

JUDGMENT

Date of hearing: 14th and 15th November 2012
Date of judgment: 5th December 2012

Mr Narinder Hargun and Mr Ben Adamson, Conyers, Dill & Pearman, for the Plaintiffs
Mr Nathaniel Turner, Attride-Stirling & Woloniecki, for the First Defendant
Mr Timothy Marshall and Ms Katie Tornari, Marshall Diel & Myers Limited, for the Second and Third Defendants

Parties

1. The Plaintiffs, Joliet 2010 Limited ("Joliet") and Teodoro 29 Corp ("Teodoro"), are, respectively, the largest and third largest shareholders in the First Defendant, Goji Limited ("Goji").

2. Joliet was incorporated in Liberia. It is owned by a trust, the beneficiaries of which are the family of a man named Professor Shlomo Ben Haim ("Professor Ben Haim").

3. Teodoro was incorporated in the British Virgin Islands. Its beneficial owner is a man named David Yisrael ("Mr Yisrael").

4. Goji was incorporated in Jersey and has been continued in Bermuda. Professor Ben Haim is one of its directors. It has a wholly owned subsidiary, Goji (Israel) Limited ("Goji Israel").

5. The Second and Third Defendants, Eran Ben-Shmuel ("Mr Ben-Shmuel") and Alexander Bilchinsky ("Mr Bilchinsky"), are former employees of Goji Israel. They have brought proceedings in Israel in Civil Case 1782/10/11 ("the Israeli proceedings") against various defendants including Professor Ben Haim, Goji, Goji Israel, and Joliet.

6. Mr Yisrael is not a defendant in the Israeli proceedings. Mr Ben-Shmuel and Mr Bilchinsky have clarified in the course of this hearing that in those proceedings they do not intend to make any claim against him or Teodoro or their assets.

The Israeli proceedings

7. In the Israeli proceedings, Mr Ben-Shmuel and Mr Bilchinsky (together, "the Israeli Plaintiffs") claim to have made an innovative series of inventions for heating through radio waves. It was common ground before me that they played at the very least a major role in these inventions. The inventions are valuable intellectual property ("the intellectual property").

8. The rights to that intellectual property are now held by Goji. The Israeli Plaintiffs claim that the rights were originally held by them, but that the defendants in the Israeli proceedings ("the Israeli Defendants"), under the auspices of Professor Ben Haim, unlawfully misappropriated the rights through a combination of fraud and improper pressure.

9. The following provisions of the statement of claim in the Israeli proceedings are relevant. References in this paragraph to Plaintiffs and Defendants are to Plaintiffs and Defendants in the Israeli proceedings.

   (1) Paragraph 152 alleges that the Defendants' acts and omissions constitute minority oppression of the Plaintiffs contrary to section 191 of the Israeli Company Law.

   (2) Paragraph 153 alleges that the above-named Defendants, among others, breached their fiduciary duty with respect to "*the Company*". This is an umbrella term that is defined at paragraph 16 of the statement of claim to denote collectively Goji, Goji Israel, and RF Dynamics Commercial Limited, another Bermuda company.

   (3) Paragraph 159 seeks a declaration that the Plaintiffs are entitled to all the shares and rights in Goji.

   (4) Paragraph 163 seeks in the alternative a declaration that the Plaintiffs are entitled to a share of, among others, Goji, at a rate that the Court will determine.

   (5) Paragraph 164 seeks an order that the Plaintiffs be entitled to be represented on the board of directors of, among others, Goji, proportionate to their shares in the Company, and an order for the correction of the documents of incorporation of, among others, Goji, insofar as necessary.

   (6) Paragraph 165 seeks relief that includes an order for the dismissal of Professor Ben Haim from Goji's board of directors.

(7) Paragraph 167 seeks an order for the termination or "*voidness*" of transactions with interested parties performed by or on behalf of Professor Ben Haim with the Company which benefit him at the expense of the other shareholders, or alternatively compensation of the Plaintiffs and/or the Company.

The Bermuda proceedings

10. On 26th March 2012, on an ex parte application before Kawaley J (as he then was), the Plaintiffs obtained (i) leave to serve a specially endorsed writ out of the jurisdiction on the Second and Third Defendants and (ii) an interim anti-suit injunction against them.

11. In the specially endorsed writ the Plaintiffs seek declaratory relief that:

(1) Goji's affairs have not been conducted in a manner oppressive to shareholders and/or that relief would not be granted pursuant to section 111 of the Companies Act 1981 or at all.

(2) Goji's board may continue to run its affairs pursuant to the bye-laws and the respective directors will not be acting in breach of duty, and will in any event be excused from liability pursuant to section 281 of the Companies Act 1981, in doing so despite the existence of the Israeli proceedings.

(3) Contracts entered into by the current board of directors are valid and/or authorised and/or shall not be considered ultra vires unless and until the courts of Bermuda direct otherwise.

(4) Goji's shareholders' register accurately reflects the current shareholders and Goji can conduct itself on this basis.

12. Further, and in any event, the Plaintiffs seek a final injunction preventing the Second and Third Defendants from litigating what are described as "*the Shareholder Claims*" in Israel and/or seeking relief for minority oppression in the Israeli proceedings.

13. The interim ant-suit injunction provides that:-

"*Until after final judgment in this action or further order of this court the Defendants or any of them must not whether by their servants, agents or any other person howsoever proceed or continue to proceed with or assist or participate in the conduct of any Shareholder Action in [the Israeli proceedings]. A Shareholder Action for the purposes of this paragraph means the pursuit of one or more of the following remedies:*

1.1 Declarations as to the ownership of Goji's share capital;

1.2 Alteration of and/or appointment to Goji's board of directors;

1.3 Amendments to Goji's bye-laws and/or memorandum of association;

1.4 Annulments of contracts entered by Goji with third parties save such contracts as are governed by Israeli law and/or expressly subject to the jurisdiction of the Israeli Courts;

1.5 Claims for compensation to Goji for breach of fiduciary duties."

14. The meaning of "*a Shareholder Action*" in the interim injunction and "*Shareholder Claims*" in the writ of summons is in all material respects the same. In this judgment, for the sake of consistency I shall refer to a Shareholder "*Action*" or "*Actions*" rather than a Shareholder "*Claim*" or "*Claims*".

15. By a summons dated 15th June 2012, the Second and Third Defendants seek orders that:

(1) The specially endorsed writ be set aside against all three Defendants on the basis that the Courts of Israel have jurisdiction to adjudicate upon any disputes between the parties and not the Bermuda Courts, or alternatively, in the event that the Court concludes that it has jurisdiction, that Israel is the convenient forum in any event.

(2) Alternatively, and without prejudice to (1), that these proceedings be stayed pending the determination of the Israeli proceedings.

(3) That the interim anti-suit injunction be set aside.

16. The relief sought is stated to be without prejudice to the Second and Third Defendants' position that they have not submitted and do not intend to submit to the jurisdiction of this Court.

Evidence

17. I have had the benefit of hearing oral evidence from two Israeli lawyers with intimate knowledge of the Israeli proceedings: Yariv Kesner ("Mr Kesner"), who acts for the Israeli Plaintiffs in those proceedings, and Dr Avigdor Klagsbald ("Dr Klagsbald"), who acts for Professor Ben Haim and three other defendants in the Israeli proceedings, but does not act in those proceedings for either Goji or Joliet.

18. Both men have been called as witnesses of fact rather than independent experts. I have found their evidence helpful in better understanding the issues in the Israeli proceedings.

19. I have also heard oral evidence from Bernard Junod ("Mr Junod"). He is a director of Jaywick Services Limited, a company in the British Virgin Islands which is a corporate director of Joliet. I have heard, too, from Mr Yisrael, who gave oral evidence via Skype. Both these witnesses were called by the Plaintiffs.

20. All these witnesses filed affidavits. Ben Adamson, one of the counsel for the Plaintiffs in Bermuda, also filed two short, pro forma affidavits. The exhibits to the various affidavits included English language translations of a number of court documents from the Israeli proceedings, and copies of various documents generated by the parties to the Israeli proceedings that are relevant to the dispute between them.

Issues

21. The following issues arise:

(1) For purposes of these proceedings, does the Court have jurisdiction over the Second and Third Defendants?

(2) For the purposes of the Shareholder Actions, does the Israeli Court have competent jurisdiction over the Plaintiffs and Goji?

(3) If the Israeli Court does have competent jurisdiction, is it the forum conveniens for the determination of the Shareholder Actions?

(4) Should these proceedings be stayed pending the determination of the Israeli proceedings?

(5) Should the interim anti-suit injunction be discharged?

22. These issues are to some extent interrelated. They are framed by the oft quoted formulation of Lord Goff in the House of Lords in Spiliada Maritime Corp. v Cansulex Ltd [1987] 1 AC 460 at page 476 C:

"*The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be more suitably tried for the interests of all the parties and the ends of justice.*"

For purposes of these proceedings, does the Court have jurisdiction over the Second and Third Defendants?

Submission to jurisdiction

23. Mr Turner, who appears for the First Defendant, submits that the Second and Third Defendants have already submitted to the jurisdiction of the Court. First, because they have contested committal proceedings brought by the Plaintiffs, and secondly, because the relief that they claim is said to be inconsistent with contesting jurisdiction.

Committal proceedings

24. On 27th September 2012 the Plaintiffs issued a notice of motion seeking an order for committal against the Second and Third Defendants as they were allegedly in breach of the anti-suit injunction.

25. On 19th September 2012 the Court issued a notice advising the parties that the hearing of the Second and Third Defendants' application would take place on 14th and 15th November 2012.

26. At a directions hearing on 11th October 2012 Kawaley CJ ordered that the committal application should be heard in the week of 5th November 2012. However the order was expressed to be without prejudice to the Second and Third Defendants' application and their position that they have not submitted, and did not intend to submit, to the Court's jurisdiction.

27. Pursuant to the order for directions, the Second and Third Defendants filed affidavit evidence on the committal application.

28. The committal hearing took place before me on 6th November 2012. Having canvassed the question of jurisdiction with the parties, and having read the order for directions made on 11th October 2012, I agreed to hear the matter prior to the hearing of the Second and Third Defendants' application on the express basis that the committal hearing was without prejudice to their jurisdictional challenge. That would fall to be determined in their application, and I reserved judgment until after the Court had made that determination.

29. On these particular facts it would be an act of judicial bad faith to find that by reason of contesting the committal application the Second and Third Defendants have submitted to the jurisdiction of the Court. I find that they have not.

Relief claimed

30. Mr Turner submits that the Second and Third Defendants have done more than challenge the Court's jurisdiction by applying to set aside the writ. They have also applied to set aside the anti-suit injunction (which he submits was unnecessary because if the writ was set aside the injunction would necessarily fall) and for a stay. He submits that these further steps involve contesting the case on the merits, and that by taking them the Second and Third Defendants have submitted to the Court's jurisdiction.

31. Mr Turner refers me to the judgment of Colman J in the High Court of England and Wales in Spargos v Atlantic Capital Corporation. The case was only reported in (1995) The Times, 11th December, but the relevant passage was quoted in full by Patten J in SMAY Investments Limited v Sachdev [2003] EWHC 474[1] at paragraph 41. I extract the following principles:

    (1) A person makes a voluntary submission to the jurisdiction if he takes a step in the proceedings which amounts to a recognition of the court's jurisdiction in respect of the claim which is the subject matter of those proceedings.

    (2) A useful test is whether a disinterested bystander with knowledge of the case would regard the acts of that person, or his solicitors, as inconsistent with the making and maintaining of his challenge.

    (3) In order to count as a submission to the jurisdiction, the relevant step must be an unequivocal submission. It is not enough that the step is consistent with submission: it must be inconsistent with any other explanation.

32. Mr Marshall, who appears for the Second and Third Defendants, replies that the relief that they claim is either consistent with a jurisdictional challenge or claimed in the alternative that the Court rejects such a challenge. His clients, he submits, could hardly be said to submit unequivocally to the

[1] Part of the judgment, although not paragraph 49, was reported as a Practice Note at [2003] 1 WLR 1973.

jurisdiction of the Court when, as their application makes clear, their primary contention is that they are not subject to its jurisdiction.

33. I agree with Mr Marshall. The Second and Third Defendants have not taken any steps amounting to an unequivocal submission to the jurisdiction of this Court.

Order 11

34. Mr Hargun, who appears for the Plaintiffs, submits that the Court has jurisdiction over the Second and Third Defendants because the writ falls within Order 11(1) of the Rules of the Supreme Court 1985 ("RSC"). It was on this basis that leave to serve out of the jurisdiction was sought and obtained.

35. Order 11 provides in material part that, subject to certain exceptions that do not apply here, service of a writ out of the jurisdiction is permissible with the leave of the court if in the action begun by writ:

    (1) The claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto, at rule 1(1)(c);

    (2) The claim is brought, inter alia, to enforce a contract, being a contract which was made within the jurisdiction or is by its terms, or by implication, governed by the law of Bermuda, at rule 1(1)(d)(i) and (iii); or

    (3) The whole subject matter of the claim relates to property located within the jurisdiction, at rule 1(1)(g).

36. The test applicable was summarised by Lord Goff when giving the judgment of the House of Lords in Seaconsar Ltd v Bank Markazi [1994] 1 AC 438 at 456H – 457A:

"*Accordingly, a judge faced with a question of leave to serve proceedings out of the jurisdiction under Order 11 will in practice have to consider both (1) whether jurisdiction has been sufficiently established, on the criterion of the good arguable case … under one of the paragraphs of rule 1(1), and (2) whether there is a serious issue to be tried, so as to enable him to exercise his discretion to grant leave, before he goes on to consider the exercise of that discretion, with particular reference to the issue of forum conveniens.*"

37. The test was stated in slightly fuller terms by Lord Collins when giving the judgment of the Privy Council in AK Investment CJSC v Kyrgyz Mobil Tel Limited [2011] UKPC 7 at paragraph 71. In particular, he stated that the serious issue to be tried must be in relation to the foreign defendant and that the claimant must satisfy the court that the forum for which he contends is clearly and appropriately the appropriate forum for the trial of the dispute.

38. Mr Hargun submits that there is a good arguable case that all the above provisions of Order 11 rule 1 apply.

Order 11 rule 1(1)(c)

39. Much of the argument in relation to rule 1(1)(c) concerned the question of whether the Second and Third Defendants were necessary or proper parties to the proceedings. These terms are disjunctive: the test is necessary *or* proper not necessary *and* proper.

40. This called for consideration of another question, which arose in AK Investments at paragraph 74, namely: "*when is an action 'properly brought' against the defendant served within the jurisdiction*", which was referred to as D1 or "*the anchor defendant*"?

41. Mr Marshall submits that the claim was not properly brought in relation to Goji as the company was sued solely in order to join the Second and Third Defendants. In those circumstances, he submits, the Second and Third Defendants are not necessary or proper parties.

42. This submission might at first sight appear unpromising, as at paragraph 76 Lord Collins noted:

"*the mere fact that D1 is sued only for the purpose of bringing in D2 is not fatal to the application for permission to serve D2 out of the jurisdiction*".

43. However, Lord Collins went on to state at paragraph 79 that:

"*... the fact that D1 is sued only for the purpose of bringing in the foreign defendants is a factor in the exercise of the discretion and not an element in the question whether the action is 'properly brought' against D1, provided that there is a viable claim against D1*."

44. Mr Marshall submits that the test requires that the plaintiff is engaged in adversarial litigation "*against*" D1 whereas here there is no dispute between the Plaintiffs and Goji: as between them the proceedings are not adversarial but friendly. This is evidenced by the fact that Goji has adopted all the Plaintiffs' submissions on this application. The company has not been properly joined, Mr Marshall submits, because the Plaintiffs have no viable claim "*against*" it.

45. Alternatively, Mr Marshall submits that what he impliedly characterises as the collusive nature of the litigation between the Plaintiffs and Goji should weigh heavily with the Court when considering the exercise of its discretion.

46. When evaluating Mr Marshall's submissions it is helpful to switch focus and consider the criterion for whether a person out of the jurisdiction is a proper party to the proceedings within the jurisdiction.

47. In Massey v Heynes (1888) 21 QBD 330 in the Court of Appeal of England and Wales Lord Esher MR formulated a test which was approved by the Privy Council at paragraph 87 of AK Investments:

"*The question, whether a person out of the jurisdiction is a 'proper party' to an action against a person who has been served within the jurisdiction, must depend on this, – supposing both parties had been within the jurisdiction would they both have been proper parties to the action? If they would, and*

only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction."

48. Mr Hargun, who relies on this passage, focuses on the Plaintiffs' claim for a negative declaration with respect to minority oppression. He accepts that this involves a dispute between shareholders, but argues that Goji is both a necessary and proper party to the proceedings. This is because unless the company is a party to the proceedings it will not be bound by any order made. Companies are for this reason invariably joined in claims for minority oppression.

49. I agree with Mr Hargun. There is also this point. Quite apart from the question of minority oppression, the Plaintiffs, as shareholders in Goji, are entitled to know whether the company can continue to conduct its affairs in the normal way without regard to any order that the Israeli Court may make. Thus the proceedings against Goji have been properly brought.

50. The Second and Third Defendants are proper parties to these proceedings for two reasons. First, according to their pleaded case in the Israeli proceedings they seek relief with respect to the composition of Goji's board of directors, contracts entered into by Goji, and Goji's register of shareholders, which appears inconsistent with the relief sought by the Plaintiffs in the instant proceedings. It is therefore just and convenient that they should have the opportunity to make their case before this Court.

51. Secondly, the Second and Third Defendants are properly joined so as to help ensure that any orders made by the Court are effective. For as Ackner LJ (as he then was) accepted in Bekhor v Bilton [1981] 1 QB 923, CA at 942 G – H:

"… *where the power exists to grant the remedy, there must also be inherent in that power the power to make ancillary orders to make that remedy effective.*"

52. Mr Turner draws my attention to one instance of this principle: a line of cases in which the Court of Appeal of England and Wales has developed

what is known as the Chabra jurisdiction, after its decision in TSB Private Bank International SA v Chabra [1992] 1 WLR 231. This jurisdiction was applied in Bermuda in Mubarak v Mubarak [2002] Bda LR 63 at paragraph 40.

53. The principle is summarised by Potter LJ in Yukong Line v Rendsburg [2001] 2 Lloyd's LR 113 at paragraph 44:

"*... where there are grounds to believe that a co-defendant is in possession or control of assets to which the principal defendant is beneficially entitled, ... the jurisdiction exists to make a freezing order as ancillary and incidental to the claim against the principal defendant, although there is no direct cause of action against the co-defendant.*"

54. The Chabra jurisdiction has been developed in relation to freezing orders. But by parity of reasoning analogous principles apply to other types of injunction.

55. Thus, irrespective of whether the Plaintiffs have an independent cause of action against the Second and Third Defendants, the Court has jurisdiction to make an anti-suit injunction against them so as to ensure that any declaratory relief granted to the Plaintiffs is effective.

56. I am therefore satisfied that there is a good arguable case that service out of the jurisdiction is permissible under Order 11 rule 1(1)(c).

Order 11 rule 1(1)(d)

57. Mr Hargun submits that the Plaintiffs bring a claim to enforce a statutory contract, namely Goji's bye-laws. He relies on section 16 of the Companies Act 1981, which provides that the company and its members shall be bound by the bye-laws. This much is common ground.

58. He further submits that the contract was made in Bermuda because that is where the bye-laws were approved and accepted. They may have been, but

that point is contentious and I have seen insufficient evidence to make a finding one way or the other.

59. However Goji has been continued in Bermuda. The bye-laws contain no choice of jurisdiction clause, but they state in various places that particular provisions within them are subject to the Companies Acts, which are defined as, "*every Bermuda statute from time to time in force concerning companies insofar as the same applies to [Goji]*". Therefore, as Mr Marshall concedes, the bye-laws are expressly or by implication governed by the law of Bermuda.

60. I am therefore satisfied that there is a good arguable case that service out of the jurisdiction is permissible under Order 11 rule 1(1)(d)(iii).

Order 11 rule 1(1)(g)

61. Mr Hargun submits that the whole subject-matter of the Plaintiffs' claim relates to property located within the jurisdiction. There is no dispute that the claim relates to Goji's shares and that these are located within Bermuda.

62. In Treasurer of Ontario v Aberdein [1947] AC 24 Lord Uthwatt, giving the judgment of the Privy Council, held at page 30 that:

"*... the first matter to be ascertained in an inquiry as to the situs of registered shares is the place in which the shares can be effectively dealt with as between the shareholders and the company so that the transferee will become legally entitled to all the rights of a member. ... if such a place be found within a particular jurisdiction, the shares are situate within that jurisdiction, ...*"

63. The law is unclear as to whether the "*situs*" or location of the shares is the place of incorporation or the place where the register was kept. In MacMillan v Bishopsgate (No 3) [1996] 1 WLR 387 the Court of Appeal of England and Wales was divided on the issue. It is unnecessary to decide the point because for Goji both the place of continuation, which is analogous to

the place of incorporation, and the place where the register is kept is Bermuda.

64. However Mr Marshall submits that the whole subject matter of the Plaintiffs' claim does not relate to the shares but includes other matters that are not located within the jurisdiction, such as minority oppression.

65. The language of Order 11 rule 1(1)(g) is in all material respects the same as the language of rule 6.20(10) of the Civil Procedure Rules ("CPR") in England and Wales. The words "*relates to*" in CPR rule 6.20(10) replaced the words in the Rules of the Supreme Court of England and Wales ("EW/RSC"), Order 11 rule 1(g), "*situate within*".

66. As Lightman J explained in In re Banco Nacional de Cuba [2001] 1 WLR 2039 at paragraph 33, the wording of CPR rule 6.20(10):

"*... extends to any claim for relief, whether for damages or otherwise, so long as it is related to property located within the jurisdiction.*"

67. This form of words gives the English Court under the CPR, and the Bermuda Court under Order 11 rule 1(1)(g), a much broader jurisdiction than the English Court had under the EW/RSC. I agree with Mr Hargun, who relies on this passage, that the wording of the Order 11 rule 1(1)(g) in Bermuda is broad enough to encompass the relief claimed by the Plaintiffs.

68. I am therefore satisfied that there is a good arguable case that service out of the jurisdiction is permissible under Order 11 rule 1(1)(g).

69. I remind myself that, as Lightman J went on to say in the same paragraph:

"*... since the jurisdiction is discretionary the court can and will in each case consider whether the character and closeness of the relationship is such that the exorbitant jurisdiction against foreigners abroad should properly be exercised.*"

However this is no more than an exhortation to be mindful of the second and third limbs of the Seaconsar test: whether there is a serious issue to be tried and the issue of forum conveniens.

Serious issue to be tried

70. The Plaintiffs contend that in relation to the Second and Third Defendants there are serious issues to be tried on the merits, namely whether the Court should grant an anti-suit injunction and whether Goji's affairs have been conducted in a manner oppressive to shareholders.

71. In AK Investments the Privy Council held at paragraph 71 that "*a serious issue to be tried on the merits*" means a serious question of fact or law, or both, and noted that this is the same test as for summary judgment, namely whether there is a real, as opposed to a fanciful, prospect of success.

72. I shall defer consideration of this question until I come to consider the issue of an anti-suit injunction later in this judgment. I am not in a position to form any view as to whether Goji's affairs have been conducted in a manner oppressive to shareholders.

Forum conveniens

73. The Plaintiffs contend that Israel is not a competent jurisdiction to try their claims and that Bermuda is the only convenient forum. In AK Investments the Privy Council held at paragraph 71 that the claimant must satisfy the court that in all the circumstances (i) the domestic court, in this case Bermuda, is clearly or distinctly the appropriate forum for the trial of the dispute, and (ii) the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. I shall consider questions of competence and appropriate forum below, and shall reserve the exercise of my discretion until I have done so.

For the purposes of the Shareholder Actions, does the Israeli Court have competent jurisdiction over the Plaintiffs and Goji?

Competent jurisdiction

74. Mr Hargun and Mr Turner both submit that for purposes of the Shareholder Actions the Israeli Court does not have competent jurisdiction over the Plaintiffs or Goji as it does not have competent jurisdiction over them or over the subject matter of the dispute.

75. In National Iranian Oil Company v Ashland Overseas Trading Limited, [1988] Bda LR 13 at pages 29 – 30, in the Court of Appeal, da Costa JA summarised the relevant principles:

"*Competent in this context means a jurisdiction which has personal jurisdiction over the defendant and subject matter jurisdiction (if that be relevant) over the subject matter of the action, and in which there are no procedural or technical bars to the prosecution of the action.*

It is obvious that the question of competency is crucial to the stay application. In Spiliada [1987] 460 at 474 Lord Goff referred to and approved the classic statement of Lord Kinnear in Sim v Robinow (1892) 19 R 665 as expressing the principle now applicable in both England and Scotland. The principle is in these terms:

> *'The plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and the ends of justice' (emphasis added).*

It appears therefore that the availability of a competent jurisdiction is a sine qua non for the application of the doctrine."

76. I note that for another forum to have competent jurisdiction it must have both personal jurisdiction and, where relevant, subject matter jurisdiction. The subject matter of the Shareholder Actions is relevant to the competence of the Israeli Courts as the Plaintiffs claim that it falls within the exclusive jurisdiction of the Bermuda Courts.

77. "*Competent*" means competent under international law and not merely according to local rules. See the judgment of Ground J (as he then was) in Arabian American Insurance Company (Bahrain) EC v Al Amarna Insurance and Reinsurance Company Limited [1994] Bda LR 27:

"*However, even if the defendant had discharged the burden of establishing that the Kuwaiti courts had jurisdiction according to their own rules, I do not think that it would have sufficed. Mr. Kentridge argues, and I accept that for these purposes jurisdiction has to be established in accordance with international law, which has regard only to domicile or residence, or, of course, a voluntary submission ... Put bluntly, for the application of the English conflict rules the English, and hence the Bermudian, courts will not recognise the sort of exorbitant jurisdiction which they themselves claim: see e.g. the observations of Lord Diplock to this effect in Amin Rasheed Shipping Corporation* v *Kuwait Insurance Company [1984] 1 AC 50 at 65G and 68B.*

The principles to which Mr. Kentridge refers were developed in the context of the enforcement of foreign judgments, and should say that I have not been shown anywhere where competency, in the sense of jurisdiction to render a foreign judgment actionable here, is expressly equated with 'competent' as is it used by Lord Goff in Spiliada . It is possible that he meant 'competent by its own rules' rather than competent in the limited sense relating to the enforcement of judgments. However, it is hard to see why an English or Bermudian court, particularly when vested with jurisdiction as of right arising from the residence of the defendant, should defer to a foreign court which was not capable of giving an internationally enforceable judgment. I therefore accept Mr. Kentridge's argument on this."

Jurisdiction in personam

Presence

78. As to in personam jurisdiction, neither the Plaintiffs nor Goji are domiciled or resident in Israel. However the Israeli Plaintiffs have purported to serve both Goji and Joliet in the Israeli proceedings. By a ruling given on 4th November 2012 the Israeli Court held that Joliet has not been validly served under Israeli law but that Goji has been validly served. The question therefore arises as to whether Goji has a presence in Israel sufficient to confer jurisdiction on the Israeli courts from an international law perspective.

79. Service on Goji was by way of Goji Israel. The Israeli Court held that Goji Israel was a representative of Goji, and that the level of intensiveness of the relationship between the companies was such that the Court could assume that Goji Israel had notified Goji of the proceedings against Goji. Service on Goji was therefore valid under regulation 482(a) of the Israeli Civil Procedure Rules.

80. The factors that the Israeli Plaintiffs relied on to establish the necessary level of intensiveness are set out in various documents that are before me. For example, in an Application for Recognition of Service According to Rule 482 of the Civil Procedure Rules which was filed on 3rd November 2011.

81. At paragraph 74 of the Application, these factors are said to include: identical or almost identical ownership of both companies; identical or almost identical bodies of management; identical economic interests; representing the interests of the foreign company by the Israeli company; the foreign corporation holding the Israeli company's shares; the foreign company's actual control of the Israeli company; negotiating and maintaining contacts with various bodies on behalf of the foreign company; the way the relation is perceived by company bodies and by company employees; and a similar or identical name and trademark.

82. Mr Marshall also relies on the fact that Goji entered into various contracts with the Israeli Plaintiffs which, it is not disputed, were concluded in Israel. These include an Instrument of Rescission dated 26th October 2009; Share Option Awards dated 3rd August; and a Memorialization and Release also dated 3rd August 2010 ("the Memorialization and Release"). In the Share Option Awards, Goji's address is given as "*c/o [Goji Israel]*" at a street address in Israel.

83. These factors fall to be considered within the context of the test under Bermuda law for whether a company incorporated in one jurisdiction is present in another jurisdiction. This is set out in the decision of the Court of Appeal of England and Wales in Adams v Cape Industries [1990] Ch 433. Slade LJ, giving the judgment of the Court, stated at page 530:

"(*1) The English courts will be likely to treat a trading corporation incorporated under the law of one country ('an overseas corporation') as present within the jurisdiction of the courts of another country only if either (i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a 'branch office' case), or (ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation's business in the other country at or from some fixed place of business.*

In either of these two cases presence can only be established if it can fairly be said that the overseas corporation's business (whether or not together with the representative's own business) has been transacted at or from the fixed place of business. In the first case, this condition is likely to present few problems. In the second, the question whether the representative has been carrying on the overseas corporation's business or has been doing no more than carry on his own business will necessitate an investigation of the functions which he has been performing and all aspects of the relationship between him and the overseas corporation."

84. Adams v Cape Industries was concerned with trading corporations, as were all the authorities cited to the Court. However Slade LJ stated at page 742:

"*In the case of non-trading corporations, the same principles would presumably apply, with the substitution of references to the carrying on of the corporation's corporate activities for references to the carrying on of business.*"

85. The Israeli Plaintiffs do not contend in the Israeli proceedings that Goji has been carrying on its own business from a fixed place of business within Israel. Thus they plead at paragraph 14 of the statement of claim that:

"*Except for its ownership in the intellectual property, the company does not have any actual business and/or employees.*"

86. Mr Junod has given evidence in the Bermuda proceedings that Goji Israel is a sub-contractor of Goji and performs research and development relating to the intellectual property on its behalf. He states that the two companies are separate, each with its own board, and that no director sits on both boards. He concludes that Goji Israel does not, he believes, act as an agent for Goji.

87. In the circumstances, there is no evidence before me from which I can properly conclude that Goji has a presence in Israel through the agency of Goji Israel, whether as a trading or a non-trading corporation.

Voluntary submission

88. Mr Marshall invites me to conclude that Goji has submitted to the jurisdiction of the Israeli Court by reason of the terms of the agreements that it has with the Israeli Plaintiffs, and in particular the Share Option Awards. Goji entered a separate Share Option Award agreement with each of the Israeli Plaintiffs, but both agreements contain all the provisions on which Mr Marshall relies.

(1) Paragraph 1 grants the Israeli Plaintiffs options to purchase a specified number of shares in Goji.

(2) Paragraph 3.3 provides that the options shall be exercisable following the Israeli plaintiffs' "*termination*", which I take to mean the termination of their contracts of employment with Goji Israel.

(3) Paragraph 7 provides that the Share Option Awards shall be governed by the laws of the State of Israel and that the competent Israeli Courts shall have sole jurisdiction in any matters pertaining to the Awards.

89. The Memorialization and Release, which was concluded on the same date as the Share Option Awards, contains at paragraph 2 an acknowledgment that the intellectual property belongs to Goji, and that the Israeli Plaintiffs have already received any consideration for it to which they may be entitled, such consideration including "*pursuant exercise of options issued as of the date hereof*".

90. It is common ground that the Israeli Plaintiffs have not exercised the options to purchase shares in Goji, although they both hold shares in the company independently of those options.

91. By letters dated 14th February 2011, Goji's Israeli lawyers notified the Israeli Plaintiffs that Goji's board had resolved to cancel the Share Option Awards, and that consequently the Israeli Plaintiffs no longer had any right or interest with respect to any stock options of Goji.

92. In the statement of claim in the Israeli proceedings the Israeli Plaintiffs appear to allege at paragraphs 159 and 160 that the Share Option Awards are void. However Mr Marshall invites me to interpret the alternative claim at paragraph 163 as including a claim to the right to exercise the options under the Share Option Awards.

93. Dr Klagsbald gave evidence before me that under Israeli law a person faced with a breach of contract must elect to rescind or enforce the contract. Thus, he stated, having asserted that the Share Option Awards are void, it is not open to the Israeli Plaintiffs to seek to enforce them.

94. He also gave evidence that as a matter of Israeli law the exclusive jurisdiction clause cannot survive the termination of the Share Option Awards as these have been rescinded by both parties: Goji has rescinded them by letter and the Israeli Plaintiffs have rescinded them by their pleaded case. As Dr Klagsbald neatly put it, if neither party relies on an agreement, how can one of them rely on a jurisdiction clause within it?

95. Dr Klagsbald, while an impressive and knowledgeable witness, was not an independent expert. I shall therefore treat his evidence on this point as no more than an eloquent expression of submissions that the Defendants in the Israeli proceedings might choose to make.

96. I agree with Mr Marshall that Goji has submitted to the jurisdiction of the Israeli Courts for the purposes of determining the rights and obligations, if any, arising between it and the Israeli Plaintiffs under the Share Option Awards, insofar as these are a live issue in the Israeli proceedings.

97. However, so far as I can see, the litigation of these issues would not fall within the definition of a Shareholder Action for purposes of the Bermuda proceedings. The Share Option Awards merely conferred options to purchase shares: they did not confer ownership of those shares.

98. In any case, from the perspective of international law, an Israeli Court would not be competent to give a judgment in respect of the Share Option Awards that conferred legal title to the shares, even were it minded to do so, unless it also had subject matter jurisdiction over the shares and in personam jurisdiction over any shareholder who might be directly affected by such a judgment.

99. The most the Israeli Courts could do would be to give an order for specific performance of the Share Option Awards, not one purporting to transfer or deal with the shares. Such an order would be valid as between the parties to the agreements but not good against the whole world.

Subject matter jurisdiction

100. Goji has been continued in Bermuda and is governed by Bermuda company law. Mr Hargun submits that therefore the Israeli Courts have no jurisdiction to make orders with respect to its internal governance, eg as to the rectification of the share register, the removal of directors, or the content of the bye-laws.

101. These, he submits, are all things that must be done in accordance with the procedure laid down in the bye-laws, which are subject to the exclusive jurisdiction of the Bermuda Courts. (Different considerations might apply in the case of cross-border insolvency where a company incorporated in Bermuda had a presence in another jurisdiction, but that is not the case here.)

102. Mr Hargun further submits that the Israeli Courts have no jurisdiction to make orders regarding minority oppression with respect to Goji as this, too, is governed by Bermuda company law.

103. He refers me to the judgment of Patten J in the Chancery Division in SMAY Investments Limited v Sachdev at paragraph 49:

"*Quite apart from authority, I am strongly inclined to the view that issues relating to the ownership of shares in a foreign company, and to the right of a shareholder in such a company to obtain relief against a director in the name of the company, should be determined by the Courts of the place of incorporation.*"

104. As to the ownership of shares, the Israeli Plaintiffs state at paragraph 16 of an undated document filed in the Israeli proceedings and headed "The Petitioners' Summations in the Motion for Interlocutory Relief":

"*This is a claim for receipt of rights in assets, rights in rem, specifically … shares of a company registered in a tax haven.*"

105. Mr Hargun refers me to the decision of the Privy Council in Pattni v Ali [2007] 2 AC 85. Lord Mance, giving the judgment of the Board, approved

at paragraph 14 rule 40(1) in the fourteenth edition of Dicey, Morris & Collins, The Conflict of Laws (2006) that:

"*A court of a foreign country has jurisdiction to give a judgment in rem capable of enforcement or recognition in England if the subject matter of the proceedings wherein that judgment was given was … movable property which was at the time of the proceedings situate in that country.*"

106. In the present case, Goji's shares are situated in Bermuda.

107. In light of these facts and matters I agree with Mr Hargun. The Israeli Courts do not have competent jurisdiction over the subject matter of the Shareholder Actions.

If the Israeli Court does have jurisdiction, is it the forum conveniens for the determination of the Shareholder Actions?

108. If I am wrong with respect to competent jurisdiction, the factors on which I rely in answering that question will go to the question of whether Israel is the forum conveniens for the trial of the Shareholder Actions: ie whether it is a forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

109. When considering that question, I must have regard to the various factors enumerated by Lord Goff in Spiliada. Mr Marshall relies in particular on the requirement at page 478 A of the judgment that the Court must consider with which forum the action has the most real and substantial connection.

"*So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction … and the places where the parties respectively reside or carry on business.*"

110. Mr Marshall submits that the gravamen of the Israeli proceedings lies in Israel; that they relate to contracts and torts that were made or committed in

Israel; that the business enterprise that is the focus of the dispute is substantially located in Israel, and that most of the witnesses are also located in Israel. (An important exception is Professor Ben Haim, who lives in London.)

111. He further submits that whenever any of the parties to the Israeli proceedings concluded an agreement, it was typically expressed to be governed by Israeli law and subject to the sole jurisdiction of the Israeli Courts.

112. Although Goji's bye-laws are governed by Bermuda law, Mr Marshall submits that the contents of the bye-laws were negotiated and agreed in Israel. His clients contend that a draft of the bye-laws that gave Mr Ben-Shmuel the right to appoint up to two directors of Goji – a provision not included in the final version of the bye-laws – reflects what was actually agreed between the Mr Ben-Shmuel and Professor Ben Haim.

113. It is important to distinguish between the Israeli proceedings as a whole and the Shareholder Actions, which form but a part of them. When Mr Kesner was cross-examined it became clear that the Shareholder Actions formed a smaller part than appeared from the Israeli pleadings, which he described as having been drafted, as he said was custom and practice in Israel, "*in a very broad manner*".

114. Mr Kesner accepted that whereas the Israeli Plaintiffs sought declaratory relief in the Israeli proceedings with respect to the share register, register of directors, and bye-laws of Goji, rectification of these instruments could only be ordered by the Bermuda Court.

115. He further stated with respect to minority oppression that the Israeli Plaintiffs did not claim any remedy against Goji under Israeli company law.

116. In his closing submissions Mr Marshall submitted a written Declaration on behalf of his clients that clarifies matters further. This states inter alia that in the event that the Bermuda Court holds that it has jurisdiction over them

they will inform the Israeli Court in the context of the Israeli proceedings that:

(1) They are not seeking an order from the Israeli Court for rectification of the share register and bye-laws of Goji or of the register of directors. This is without prejudice to their claim for declaratory relief with respect to the shares, although they agree not to enforce such a declaration in Israel or elsewhere against any shareholder except Joliet.

(2) They will not pursue the minority oppression cause of action (as set out under Israeli company law) with respect to any of Goji's shareholders and will not seek relief under Israeli company law for that cause of action.

117. I therefore conclude that even on the Second and Third Defendants' case, the gravamen of the Shareholder Actions lies in Bermuda. If the Israeli Plaintiffs obtain the declaratory relief that they seek, they will have to enforce it through the Bermuda Courts.

118. In all the circumstances, I am satisfied that Bermuda is the forum in which the Shareholder Actions may be tried most suitably for the interests of all the parties and the ends of justice.

Should these proceedings be stayed pending the determination of the Israeli proceedings?

119. I have found that the Israeli Courts are not competent to try the Shareholder Actions, and that even if they were, Bermuda is the appropriate forum for the resolution of those Actions. It follows that there is no basis for staying the Bermuda proceedings on grounds of forum non conveniens. See, for example, the judgment of Bell J in the Supreme Court in Gleeson v Imagine Reinsurance Holdings Ltd [2005] Bda LR 68 at paragraph 11.

120. Mr Marshall invites me to stay these proceedings on an alternative basis, namely as a case management decision. As any order made in Israel in the Shareholder Actions would be unlikely to be recognised or enforced in Bermuda, this does not strike me as an attractive way to proceed.

121. I therefore decline to order a stay of these proceedings pending the outcome of the Israeli proceedings.

Should the interim anti-suit injunction be discharged?

Are the Israeli proceedings unconscionable?

122. In Glencore International AG v Exeter Shipping Ltd [2002] EWCA Civ 524, Rix LJ, giving the judgment of the Court of Appeal of England and Wales, summarised the conditions for the grant of an anti-suit injunction. These go both to the existence of the jurisdiction and the exercise of the Court's discretion.

(1) The respondent to the injunction must be subject to the Court's jurisdiction. In the present case this involves a degree of circularity, as in order for the Second and Third Defendants to be subject to the Court's jurisdiction there must be a serious issue to be tried on the merits, namely whether the Court should grant an anti-suit injunction. For the reasons given below, I am satisfied that there is such an issue.

(2) The threatened conduct must be "*unconscionable*". This term is not susceptible to exhaustive definition, but has been said to include conduct which is "*oppressive or vexatious or which interferes with the due process of the court*". It is analogous to abuse of process.

(3) An injunction must be necessary to protect the applicant's legitimate interest in the domestic (in this case, Bermudian) proceedings. Ie Bermuda must be the forum conveniens; the applicant must be a party

to the proceedings there; and the unconscionable conduct of the respondent must be directed to those proceedings.

123. I am satisfied that the pursuit of the Shareholder Actions by the Israeli Plaintiffs in the Israeli proceedings would be unconscionable in the sense of oppressive and vexatious. This is because the Israeli Courts are not competent to deal with those proceedings and Bermuda is the appropriate forum for their resolution.

124. The Bermuda Plaintiffs, over whom the Israeli Courts have no jurisdiction with respect to those Actions, should therefore not be put to the trouble of having to defend the Israeli proceedings or risk an undefended judgment in those proceedings that the Israeli Plaintiffs might seek to rely on or enforce elsewhere.

125. The same applies with respect to Goji. The Bermuda Courts will not hesitate to protect their exclusive jurisdiction over the internal governance of companies incorporated or continued in this jurisdiction.

126. Subject to the matters considered below, I am therefore satisfied that an anti-suit injunction should remain in place.

Is the interim anti-suit injunction redundant?

127. In light of the clarification offered by the Second and Third Defendants in the Declaration, I must consider whether there is any longer a need for an interim injunction.

128. The Israeli Plaintiffs made it plain through Mr Kesner that they do not intend to apply to amend the statement of claim in the Israeli proceedings as this would delay the trial of the action.

129. They have not yet informed the Israeli Court of the position taken in the Declaration, which was submitted very late in the day. That position may change. Assuming that it does not, they will continue to seek declaratory

relief with respect to all the shares in Goji and to enforce that declaration against Joliet.

130. In the circumstances I am satisfied that the interim anti-suit injunction should remain in place.

Non-disclosure

131. Mr Marshall submits that the Plaintiffs failed to comply with their duty to make full and frank disclosure to the Court when applying for ex parte relief. The anti-suit injunction should therefore, he submits, be discharged.

132. The relevant principles are helpfully summarised in Gee, Commercial Injunctions, Fifth Edition, at paragraph 9.001. They should be engraved on the heart of every applicant for ex parte relief.

"*Any applicant to the court for relief without notice must act in the utmost good faith and disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so on what terms. This is a general principle which applies to all applications for relief to be granted on an application made without notice. It applies not just to disclosure of facts but to absolutely anything which the judge should consider. It is part of the duty of an applicant for without notice relief to present the application fairly.*"

133. Mr Marshall submits that the Plaintiffs misrepresented the nature of the Israeli proceedings to the Court, exaggerating the importance of the Shareholder Actions and underplaying the extent to which the question of service on Goji and Joliet has been litigated in the Israeli proceedings.

134. Further, and Mr Marshall places particular emphasis on this point, the Plaintiffs did not draw to the Court's attention the exclusive jurisdiction clauses in the various contracts at issue in the Israeli proceedings. Neither did they put before the Court copies of the Share Option Awards.

135. I am satisfied that the Plaintiffs did not misrepresent the nature of the Israeli proceedings. The focus of their application was not the Israeli proceedings as a whole but the Shareholder Actions within them. Nevertheless, Mr Junod stated correctly in his affidavit that the Israeli courts were currently considering the Israeli Plaintiffs' arguments as to service on Goji and Joliet, and that the claims in the Israeli proceedings were extremely wide ranging. The statement of claim in the Israeli proceedings was exhibited to his affidavit and Mr Hargun referred the Court to it during the ex parte hearing.

136. The Court of its own motion raised the exclusive jurisdiction clause in the Memorialization and Release with Mr Hargun. Thus, to state the obvious, the Court made the ex parte orders in full knowledge of the clause.

137. As to the Share Option Awards, I can see their relevance in light of the way that the Second and Third Defendants have developed their case before me. But I would not have realised that they were relevant by reading the statement of claim in the Israeli proceedings, in which it is alleged that they are void. It is not apparent from the statement of claim that in the alternative the Israeli Plaintiffs are seeking to enforce the Share Option Awards. I therefore make no criticism of the Bermuda Plaintiffs or their lawyers for not exhibiting those agreements. Although at the ex parte hearing Mr Hargun did refer the Court to their terms as summarised at paragraph 134 of the Israeli statement of claim.

138. In the circumstances I do not accept that the Plaintiffs failed to comply with their duty of full and frank disclosure.

Application made ex parte

139. The application before Kawaley J was made ex parte. When I questioned Mr Hargun about this, the reasons that he gave were that service on the Second and Third Defendants would be have been time consuming; and that if the Second and Third Defendants had advance notice they might have

sought an injunction against the Plaintiffs prohibiting them from making the application.

140. I find these reasons unconvincing. The application could have been made ex parte on notice, without formal service. As the Israeli Court had yet to decide whether it had jurisdiction over Joliet, and had not even been asked to consider jurisdiction over Teodoro, the likelihood that it would have issued a pre-emptive anti-suit injunction against either of them was somewhat speculative. Even if it had, I have no doubt that that would not have deterred either Plaintiff from seeking relief from this Court. In short, notice would not have enabled the Second and Third Defendants to take action that would have defeated the purpose of the application before any order was made.

141. Be that as it may, the Second and Third Defendants have not been prejudiced by the ex parte nature of the application as they have had the opportunity to apply inter partes to set the interim anti-suit injunction aside.

142. I therefore conclude that the interim anti-suit injunction should not be discharged.

For purposes of these proceedings, does the Court have jurisdiction over the Second and Third Defendants?

143. I am now in a position to answer the question with which I began. (i) There is a good arguable case that jurisdiction has been established under RSC Order 11 rule 1. (ii) There is a serious issue to be tried on the merits between the Plaintiffs and the Second and Third Defendants, namely whether the Court should grant an anti-suit injunction. (iii) Bermuda is the forum conveniens for the Shareholder Actions. I am therefore satisfied that the Court was right to grant the Plaintiffs leave to serve the Second and Third Defendants out of the jurisdiction.

Conclusion

144. The issues raised on this application are resolved thus:

(1) For purposes of these proceedings, the Court does have jurisdiction over the Second and Third Defendants.

(2) For the purposes of the Shareholder Actions, the Israeli Court does not have competent jurisdiction over the Plaintiffs and Goji.

(3) In any event, Bermuda, and not the Israeli Court, is the forum conveniens for the determination of the Shareholder Actions.

(4) These proceedings should not be stayed pending the determination of the Israeli proceedings.

(5) The interim anti-suit injunction should not be discharged.

145. I will hear the parties as to costs.

Dated this 5th day of December 2012 _____

Hellman J