In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2018: No. 149

BETWEEN:-

ATHENE HOLDING LTD

Plaintiff

-v-

(1) IMRAN SIDDIQUI
(2) STEPHEN CERNICH
(3) CALDERA HOLDINGS LTD

Defendants

RULING

(In Chambers)

Whether to set aside, stay or strike out writ on grounds of forum non conveniens – whether to stay action on case management grounds

Date of hearing: 8th June 2018
Date of ruling: 28th June 2018

Mr Kevin Taylor, Taylors, for the Plaintiff
Mr Alexander Potts QC, Kennedys Chudleigh Ltd, for the Third Defendant
The First and Second Defendants did not appear and were not represented

Introduction

1. The Plaintiff, Athene Holding Ltd ("Athene"), has filed a Specially Indorsed Writ of Summons ("the Writ") dated 3rd May 2018 in which it seeks injunctive relief and damages against the Defendants. The Third Defendant, Caldera Holdings Ltd ("Caldera") was served with the Writ on 8th May 2018.

2. Athene sought and obtained on an *ex parte* basis leave to serve the First Defendant, Imran Siddiqui ("Mr Siddiqui"), and the Second Defendant, Stephen Cernich ("Mr Cernich"), out of the jurisdiction. As at 8th June 2018, ie the date of the hearing which gave rise to this ruling, they had not yet been served.

3. When granting leave, the Court was satisfied that: (i) in relation to Mr Siddiqui and Mr Cernich there was a good cause of action, ie a serious issue to be tried on the merits; (ii) there was a good arguable case that pursuant to RSC Order 11, rule 1(1)(c) the claim was brought against a person duly served within the jurisdiction, ie Caldera; that Mr Siddiqui and Mr Cernich were necessary or proper parties thereto; and that as between Athene and Caldera there was a real issue which Athene could reasonably ask the Court to try; and (iii) that in all the circumstances Bermuda was clearly and distinctly the appropriate forum for the trial of Athene's claim against Mr Siddiqui and Mr Cernich. These requirements for leave to serve out of the jurisdiction were stated by Lord Collins in Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804 PC at para 71.

4. Those findings were provisional in that they were made on an *ex parte* without notice application on which the Court did not have the opportunity to hear argument from Mr Siddiqui and Mr Cernich. It is open to them to apply to set aside leave on the ground that one or more of these conditions was not satisfied, and they have indicated that, once they have been served with the Writ, that is their intention.

5. By a summons dated 17th May 2018, Caldera sought leave to enter a conditional appearance, which was granted by an order dated 22nd May 2018. Caldera also sought an order pursuant to RSC Order 12, rule 8 and/or

the Court's inherent jurisdiction setting aside, staying or striking out the Writ on grounds of *forum non conveniens*, or alternatively an order staying the Writ on case management grounds. This is a ruling on Caldera's application for that relief. Caldera asserts that the convenient forum for the trial of the dispute is the State Court in New York ("the New York Court").

6. The balance of Caldera's summons, which seeks to strike out the Writ pursuant to RSC Order 18, rule 19 and/or the Court's inherent jurisdiction, has been adjourned pending the outcome of the *forum non conveniens*/case management application.

Athene

7. Athene is incorporated in Bermuda as an exempt company. Since December 2016, it has been registered on the New York Stock Exchange. Mr Cernich states in his affidavit that prior to that it was a private company owned in its majority by an affiliate of a company known as Apollo Global Management LLC ("Apollo").

8. Athene's annual filing with the US Securities and Exchange Commission ("SEC") for the year ended 31st December 2017, on what is known as a Form 10-K, was relied upon by counsel for both parties as a reliable source of information about the company.

   (1) Athene, together with its consolidated subsidiaries, is: "*a leading retirement services company that issues, reinsures and acquires retirement savings products designed for the increasing number of individuals and institutions seeking to fund retirement needs.*" It is based in Bermuda, with its US subsidiaries' headquarters located in Iowa. [Form 10-K, page 9.]

   (2) Athene, together with its consolidated subsidiaries, has a "*strategic relationship*" with Apollo, whose indirect subsidiary, Athene Asset Management LP ("AAM"), serves as Athene's investment manager. The Apollo Group (comprising Apollo and its affiliates) controls 45% of the total voting power of Athene and five of Athene's 12 directors

are employees or consultants of Apollo, including its Chairman, Chief Executive Officer ("CEO") and Chief Investment Officer, who is a dual employee of both Athene and AAM. [Form 10-K, page 10.]

(3) As of 1st January 2018, Athene, together with its consolidated subsidiaries, had approximately 1,125 employees located in Bermuda and the US. It had subsidiaries licensed to carry on insurance business in all 50 states of the US and the District of Columbia. They were subject to regulation and supervision by those states. The subsidiaries were organised and domiciled in one of Delaware, Iowa or New York. [Form 10-K, page 23.]

(4) As of 31st December 2017, Athene, together with its consolidated subsidiaries, employed 24 non-Bermudians in its Bermuda office (other than spouses of Bermudians, holders of permanent residents' certificates, and holders of working residents' certificates). [Form 10-K, page 55.]

(5) Athene was currently intended to operate in a manner which would not cause it to be treated as being engaged in a trade or business within the US or subject to US federal income taxation on its net income. [Form 10-K, page 62.]

(6) Athene is a holding company with limited operations of its own. Its primary subsidiaries are insurance and reinsurance companies that own substantially all of its assets and conduct substantially all of its operations. [Form 10-K, page 68.]

(7) Documents relating to Athene's 2016 share incentive plan gave Athene's address as c/o an Iowa subsidiary. [Eg Form 10-K, exhibit 10.26.2.]

9. James Belardi ("Mr Belardi") swore affidavit evidence on behalf of Athene. He stated that he has served as the Chairman, CEO and Chief Investment Officer of Athene since 2009. In his role as CEO he is responsible for Athene's overall strategic direction and management.

10. He stated that Athene has a real and significant presence "*on the ground*" in Bermuda. It leases an office in Bermuda at which services are performed for it. The vast majority of its board meetings and official executive meetings are held in Bermuda. All its annual general meetings of shareholders take place in Bermuda.

Mr Siddiqui

11. Mr Siddiqui has sworn affidavit evidence in which he stated that he is a US citizen, currently resident in New York. He was formerly a partner and employee of Apollo, which he joined in 2008. He was appointed as an Apollo-nominated director of Athene in July 2009 and resigned in March 2017, although he was not an employee of Athene. Almost all his work for Athene was performed in his capacity as director of Athene and a partner and employee of Apollo, and almost all of it was carried out in the State of New York, where Apollo is domiciled. Athene maintained offices in New York and Iowa. At all material times, Mr Siddiqui worked out of Apollo's New York office.

12. However Mr Belardi noted that, from 2012 until Mr Siddiqui resigned as a director of Athene, Mr Siddiqui travelled to Bermuda 20 times for Athene board meetings. Mr Belardi stated that Athene does not lease or own a New York office or any office in the US. Some of Athene's US subsidiaries had US offices, but not Athene.

13. Mr Siddiqui noted that all the officers of Athene, as identified on its website, lived in the US, including New York. He stated that in his own experience, the day-to-day operations of Athene, including the vast majority of the business decisions and business activities, took place by way of its officers carrying out their functions in the US.

Mr Cernich

14. Mr Cernich is a US citizen currently resident in Kentucky. Mr Siddiqui's affidavit evidence explained that Mr Cernich was employed by Athene and

its affiliates from 2009 to June 2016 in various positions, including Chief Actuary and Executive Vice President.

15. Mr Cernich stated in his affidavit that he believed that, during his tenure with Athene, the majority of strategic and other "*decision-making efforts*" took place at meetings in New York, Iowa and Los Angeles, not Bermuda. The meetings often involved representatives of Apollo. He further stated that Athene's principals maintained assigned office space in the US for which Athene reimbursed its subsidiaries. Mr Belardi noted that, from 2012 until Mr Cernich left Athene, Mr Cernich travelled to Bermuda 14 times for Athene board meetings. However Mr Cernich drew a distinction between board meetings, and management meetings, which took place in the US.

16. On his departure from Athene, Mr Cernich entered into a Separation Agreement and General Release dated 21st June 2016 with Athene and AAM ("the Release").

    (1) Para 3 of the Release acknowledged that Mr Cernich had been granted and/or purchased a number of shares in Athene under various share agreements.

    (2) Para 7 of the Release acknowledged that the Protective Covenants contained in the share agreements were necessary to protect, *inter alia*, Athene's confidential and proprietary information.

    (3) Para 18 of the Release stated: "*This Agreement shall be construed and interpreted in accordance with the internal laws of the State of New York, without regard to its choice of law rules*".

Caldera

17. Caldera was incorporated in Bermuda as an exempt company in or about July 2017. Mr Siddiqui and Mr Cernich are its sole directors and shareholders and Mr Cernich is its CEO. Athene and Caldera are rivals for the hand of another company which was referred to in these proceedings as Company A. They both want to acquire or combine with it, and only one (or neither) of them can succeed. This rivalry has given rise to various court

and arbitral proceedings in Bermuda and the US between, in each case, one or more of Athene, Apollo, and their affiliates on the one hand and one or more of Mr Siddiqui, Mr Cernich and Caldera on the other.

18. Mr Siddiqui gave affidavit evidence that the vast majority of potential witnesses and relevant documents relating to the dispute between Athene and the Defendants in relation to Company A are located in New York, as are the legal and financial advisors for both Caldera and Company A. He stated that it was from New York that he: "*communicated in connection with the transaction at issue by Athene's claim*".

The Bermuda action

19. Athene claims that Mr Siddiqui and Mr Cernich unlawfully seek to use confidential information belonging to Athene and relating to Company A, obtained while they were an office holder and employee of Athene respectively, for the benefit of Caldera and themselves, and to the detriment of Athene. The confidential information is said to include Athene's extensive assessments and analyses of Company A's business, and Athene's plans and strategies for acquiring Company A and deriving value from the acquisition.

20. Athene alleges that Mr Siddiqui and Mr Cernich are misusing this confidential information in an attempt to acquire Company A, and that they have incorporated Caldera as a vehicle to make that acquisition. Their unlawful activity is said to predate their departure from Athene. The causes of action alleged against Mr Siddiqui and Mr Cernich are breach of fiduciary duty, breach of duty of confidence, and breach of contract, which are all said to be governed by Bermuda law. In addition, Mr Cernich is alleged to be in breach of the Protective Covenants contained in the share agreements and incorporated by reference into the Release. Athene accepts that the claim for breach of the Release is governed by New York law.

21. Kevin Taylor, who appeared for Athene, submitted that the claim for breach of fiduciary duty should be construed broadly to include a claim for breach of the statutory duty of care imposed on the officers of a company by section

97 of the Companies Act 1981 ("the 1981 Act"), which is headed "*Duty of care of officers*". He submitted that both Mr Siddiqui and Mr Cernich were formerly officers of Athene and had therefore been subject to section 97. Alex Potts QC, who appeared for Caldera, reserved his position as to whether Mr Cernich had been an officer and noted that breach of section 97 had not been expressly pleaded.

22. Section 97(1)(a) provides that every officer of a company in exercising his powers and discharging his duties shall act honestly and in good faith with a view to the best interests of the company. Section 97(2) provides that every officer of a company shall comply with the 1981 Act, the regulations and the bye-laws of the company.

23. Mr Taylor referred to an exclusive jurisdiction clause in Athene's bye-laws which occurred variously at bye-law 83 and bye-law 84 of different editions of the bye-laws:

> "*In the event that any dispute arises concerning the [1981] Act or out of it or in connection with these Bye-laws, including any question regarding … whether there has been any breach of the [1981] Act or these Bye-laws by an Officer or Director (whether or not such claim is brought in the name of … the Company), any such dispute shall be subject to the exclusive jurisdiction of the Supreme Court of Bermuda.*"

24. He submitted that by reason of section 97(2) of the 1981 Act, Mr Siddiqui and Mr Cernich, as respectively a director and officer of Athene, were bound by the exclusive jurisdiction clause.

25. I am not persuaded that section 97(2) has this effect. Read in context, it means that in exercising his powers and discharging his duties, a director or officer shall comply with the regulations and bye-laws of the company. It does not mean that a director or officer is contractually bound by the bye-laws as if he were a member. Mr Siddiqui and Mr Cernich are not bound by the exclusive jurisdiction clause in the bye-laws, as it did not govern the exercise of their statutory duties arising under section 97 but rather the choice of forum for the resolution of a dispute relating to an alleged breach of those duties.

26. As to Caldera, it is alleged that the company is an alter ego of Mr Siddiqui and Mr Cernich, and that:

> "*By using the Confidential Information in its efforts to acquire or combine with Company A, including by assisting and abetting [Mr Siddiqui and Mr Cernich] in their misuse of Confidential Information, [Caldera] is a party to the breach of the Relevant Fiduciary Duties, the Duty of Confidence, and the Relevant Contractual Duties by [Mr Siddiqui and Mr Cernich]*."

27. Mr Potts was scathing in his criticism of the statement of claim. He submitted that Athene had failed to plead full and proper particulars of the allegedly confidential information. The requirement to do so was stated in forceful terms by Laddie J in Ocular Sciences Ltd v Aspect Vision Care [1997] RPC 289 at 359 – 360. He further submitted that, as pleaded, the claim against Caldera was legally incoherent.

28. There is force in both submissions, although the defects identified by Mr Potts could be cured by judicious amendments to the statement of claim. The confidential information is pleaded with sufficient particularity for me to understand in broad terms the nature of Athene's case, which is sufficient for the present hearing. The factual allegation at the root of the statement of claim – that Caldera is the vehicle through which Mr Siddiqui and Mr Cernich are misusing confidential information to acquire Company A – is consistent with Caldera being their agent or nominee. Alternatively, it is consistent with them using Caldera as a device to evade their personal obligations in respect of the confidential information – a circumstance which would justify the court in piercing the corporate veil and treating the acts of the company as the acts of its principals. As Lord Sumption JSC stated in his leading judgment in Prest v Prest [2013] 2 AC 415 at para 35:

> "*I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship*

between the company and its controller which will make it unnecessary to pierce the corporate veil."

29. I have also considered whether, applying OBG Ltd v Allen [2008] 1 AC 1 HL, Athene's claim against Caldera lends itself to formulation in terms of the torts of inducing a breach of contract or conspiring to injure by unlawful means. I cannot see that it does, although that provisional view is formed without the benefit of legal argument.

30. The relief claimed by Caldera included a claim, presumably by way of damages, for continuing legal costs, fees and expenses incurred in pursuit of these proceedings, the quantum of which is to be particularised prior to trial. This was in addition to a claim for the costs of the present proceedings. Mr Potts submitted that it was reasonable to infer that these costs related to activities carried out by attorneys acting for Athene, and possibly Apollo on Athene's behalf, in the US.

31. Eg on 3rd May 2017, Athene's US attorneys wrote to Mr Cernich to warn him in relation to Company A not to breach the Protective Covenants mentioned in the Release. In the latter part of 2017 there was an exchange of correspondence between Apollo and its US attorneys and Mr Siddiqui's US attorneys in which Apollo warned Mr Siddiqui in relation to Company A not to breach the similar post-employment restrictive covenants contained in the Limited Partnership Agreement with Apollo ("the Partnership Agreement") into which he had entered on 24th November 2014.

32. Mr Potts made the point that there was no suggestion in the correspondence by the attorneys for either Athene or Apollo that, in relation to Company A, Mr Siddiqui or Mr Cernich were subject to any obligations arising under Bermuda law.

First JAMS[1] arbitration

33. Apollo and several affiliates were the claimants and Mr Siddiqui and Company A were the respondents. Athene and Mr Cernich were not party to

[1] Judicial Arbitration and Mediation Services.

the arbitral proceedings. By a Statement of Claim dated 9th January 2018, and amended on 29th January 2018, the claimants sought both a preliminary and a permanent injunction against Mr Siddiqui to prevent him from using confidential information belonging to Apollo relating to Company A. This was expressed to include information which Apollo had used in relation to Athene.

34. The causes of action alleged against Mr Siddiqui were breach of his post-employment restrictive covenants and breach of fiduciary duty. The cause of action against Company A was tortious interference with contract. There were no causes of action based on Bermudian law.

35. The arbitration was commenced pursuant to the arbitration clause in the Partnership Agreement. This provided that any dispute arising out of or relating to the Partnership Agreement would be settled exclusively by arbitration by a single arbitrator in New York County, New York, applying Delaware law.

36. Mr Siddiqui filed a document dated 23rd January 2018 headed Counterclaims, Third Party Claim, and Response to Statement of Claim in which he denied Apollo's allegations and alleged that Apollo was acting in (to use my words) bad faith. Para 7 of the pleading, for example, provides a flavour of his case, alleging:

> "*Apollo's wholesale refusal to deal fairly (if at all) with Mr Siddiqui is revelatory of Apollo's true intent: to deploy its virtually unlimited resources to manufacture a claim that is a cover for a money-grab, while stifling legitimate marketplace competition with a non-covered company in which Apollo invests and from which it derives excessive management fees [ie Athene]*."

37. The arbitration was resolved by a Settlement Agreement and Mutual Release ("the Settlement Agreement") between the claimants and Mr Siddiqui dated 21st February 2018. The release executed by Apollo was expressed to apply to "*Mr Siddiqui, and his affiliates, employers, and any company formed by Mr Siddiqui*". The Settlement Agreement stated that it was to be governed by the laws of the State of New York without regard to the conflict of law provisions thereof and that any disputes in relation to the Release should be

resolved exclusively by arbitration conducted before a single arbitrator in New York County, New York.

Second JAMS arbitration

38. Apollo and several affiliates are the claimants and Mr Siddiqui is the respondent. By a Statement of Claim dated 3rd May 2018 (ie the same date as the Writ in the present case) the claimants allege that Mr Siddiqui has breached the Settlement Agreement by continuing to use and disclose Apollo's confidential information, which is defined thus:

> "*The term 'Confidential Information' refers to all confidential and proprietary information that is not generally known to the public in Apollo's possession, including information that Apollo has directly developed. Thus, the confidential and proprietary information that Apollo has obtained from its client, Athene, while providing investment advisory services to Athene falls within this definition of Confidential Information.*"

39. Mr Siddiqui has filed a Response to Statement of Claim and a First Counterclaim dated 9th May 2018 and an Amended Response to Statement of Claim dated 12th May 2018. He denies breaching the Settlement Agreement and alleges that the arbitration is part of a campaign by Apollo and Athene to harm Caldera. Further, he alleges that under the Settlement Agreement Apollo released all claims against him challenging his alleged use of confidential information to acquire Company A. He alleges that Apollo has pursued this "*sham arbitration*" solely to harm his and Caldera's investors and marketplace relationships, and seeks declaratory relief that in so doing it is Apollo, and not he, who has breached the Settlement Agreement. Mr Siddiqui also counterclaims for breach of contract, tortious interference with prospective business relations/prospective economic advantage, and defamation.

New York action

40. The plaintiffs are Caldera and two of its affiliates and the defendants are Apollo and various of its affiliates, Athene and one of its affiliates, and Leon Black, the Chairman and CEO of Apollo. By a Summons with Notice,

which is analogous to a generally endorsed writ, filed on 3rd May 2018, the plaintiffs state that the case arises out of the defendants' conspiracy to manipulate the market for acquisitions of insurance companies. The defendants' misconduct allegedly includes, but is not limited to, unfair business practices, unfair competition, tortious interference with commercial relationships, commercial disparagement "*and other blatantly anti-competitive activities*". The relief sought by the plaintiffs includes damages of not less than $300 million plus punitive and/or exemplary damages.

41. On 23rd May 2018, the defendants other than Athene filed a Notice of Appearance and Demand for Complaint. Athene filed a Demand for Complaint on 24th May 2018, "*expressly reserv[ing] all of its rights and defences, including, without limitation, that service of the summons with notice was ineffective, and that there is no personal jurisdiction over Athene*".

42. I had the benefit of expert affidavit evidence from the Hon Howard A Levine, formerly an Associate Judge on the New York State Court of Appeals, who stated that under New York law, Athene's filing of the Demand does not preclude Athene from seeking to dismiss any complaint that may be filed in the action, including on grounds that the New York Court lacks personal jurisdiction over it and on *forum non conveniens* grounds. He also stated that the Demands meant that the complaint was not due before 12th June 2018.

43. I have also had the benefit of expert affidavit evidence from the Hon Victoria A Graffeo, formerly Senior Associate Judge on the New York State Court of Appeals. I found the evidence of these distinguished former judges helpful in providing me with contextual material about New York law and resolving some specific points of detail.

Forum non conveniens

44. There was broad agreement between the parties as to the principles applicable to the present *forum non conveniens* application. As stated by

Lord Goff in Spiliada Maritime Corp v Cansulex Ltd [1987] 1AC 460 HL at 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.*"

45. The onus lies on the party seeking a stay to satisfy the court that there is some other, more appropriate forum. However, each party will typically seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour. It is for the party asserting such a matter to establish its existence. See Spiliada *per* Lord Goff at 476 D – E.

46. In the present case, the issue of competent jurisdiction was fiercely contested. Da Costa JA summarised the applicable principles in National Iranian Oil Company v Ashland Overseas Trading Limited [1988] Bda LR 13 CA at pages 29 – 30:

"*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."

47. "*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. "*The defendant*" means the defendant in the foreign proceedings, even though that defendant may be the plaintiff in the Bermuda action. The question is whether, if Athene is forced to litigate its claim in another forum and wins, it will get an internationally recognised judgment. See the ruling of Ground CJ in Universal Reinsurance Co Ltd v Holden & Co Inc [2006] Bda LR 26 SC at paras 18 – 19.

48. It is common ground that the New York Court has personal jurisdiction over the defendants in the Bermuda action. Mr Siddiqui is resident in New York; Mr Cernich has agreed to submit to the jurisdiction of the New York Court; and Caldera has commenced proceedings in the New York Court. It was not suggested that the New York Court did not have competent jurisdiction to try the subject matter of the action.

49. I heard much argument as to whether the New York Court had personal jurisdiction over Athene. It is not necessary to resolve that question to decide whether the New York Court has competent jurisdiction as (analysing the question from a Bermudian perspective) Athene would by definition be the plaintiff with regard to any claim or counterclaim which it brought in that jurisdiction. The question of personal jurisdiction would be relevant (although probably not decisive) if Athene were to assert that if forced to litigate in New York it would lose a legitimate personal or juridical advantage which it could obtain in Bermuda. See Spiliada *per* Lord Goff at 475H – 476 B. The burden of making good such an assertion would lie on Athene. It is not one which Athene attempted to discharge.

50. In deference to counsel's submissions, I shall briefly consider whether the New York Court did have personal jurisdiction over Athene. Mr Potts relied primarily upon Athene's alleged presence in New York as founding such jurisdiction. He referred me to the judgment of Slade LJ in Adams v Cape Industries [1990] Ch 433 EWCA at 530 C – F:

"*(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."

51. Adams v Cape Industries was concerned with trading corporations. 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.*"

52. The fact that Athene has subsidiaries carrying on business in New York is not sufficient to establish presence. There is a conflict of evidence, which I am not in a position to resolve, as to whether Athene also maintains office space in New York or carries on business there. If it does, then it probably has a presence there. Athene states in its form 10-K that it was currently intended to operate in a manner which would not cause it to be treated as being engaged in a trade or business within the US. On the present state of the evidence I am unable to say whether or not Athene has a presence in New York.

53. Mr Potts further submitted, albeit faintly, that the Demand for Complaint constituted a submission by Athene to the jurisdiction of the New York Court. Whether there has been a submission depends on Bermuda law, which follows English law on this question. As stated by Lord Collins in Rubin v Eurofinance SA [2013] 1 AC 236 UKSC at para 159:

"*The general rule in the ordinary case in England is that the party alleged to have submitted to the jurisdiction of the English court must have 'taken some step which is only necessary or only useful if' an objection to jurisdiction 'has been actually waived, or if the objection had never been entertained at all':* Williams & Glyn's Bank plc *v* Astro Dinamico Cia Naviera SA *[1984] 1 WLR 438, 444 (HL) approving* Rein *v* Stein *(1892) 66 LT 469, 471 (Cave J).*"

54. Mr Potts submitted that, from a Bermuda law perspective, filing the Demand for Complaint did not make sense if Athene did not accept the jurisdiction of the New York Court.

55. However, the Court in Bermuda will take into account the domestic law where the step has been taken. See the judgment of Lord Collins in Rubin at paras 161 – 163. Rubin was followed in Bermuda in Kader Holdings Co Ltd v Desarrollo Inmobilario Negocios Industriales de Alta Technologia de Hermosilio, SA de CV [2014] Bda LR 18 CA *per* Bell AJA, giving the judgment of the Court, at para 40.

56. In the present case, the Court had the benefit of expert evidence from Judge Levine that filing a Demand for Complaint does not preclude Athene from alleging that the New York Court does not have personal jurisdiction over it. Applying Bermuda law principles, I am satisfied that the filing of a Demand for Complaint did not constitute submission by Athene to the jurisdiction of the New York Court. In the context of New York law, the filing was not only necessary or useful if an objection to jurisdiction had been waived or had never been entertained.

57. Mr Potts further submitted that Athene has previously litigated in New York. In Luftig v Athene Holdings Ltd, Case No 09-CV-9414, a former employee sued Athene for breach of contract, *quantum meruit*, and violation of the New York Labor Law, in the US District Court for the Southern District of New York. Athene filed an Answer & Affirmative Defenses in which it admitted that its principal place of business was in California. However I am not persuaded – and Mr Potts did not suggest – that the fact that Athene submitted to the jurisdiction of the New York Court in one action counts as a submission for further actions. Neither am I persuaded that an admission for the purposes of one action, in which forum was not an issue, has much

relevance for the purpose of future actions. In any case, a presence in California does not equate to a presence in New York.

58. As I am satisfied that the New York Court has competent jurisdiction to try this dispute, I must go on to consider whether it is a forum in which the case may be more suitably tried for the interests of all the parties and the ends of justice. Another way to express this is to ask whether the New York Court is the natural forum for the dispute, ie that with which the dispute has the most real and substantial connection. See Spiliada *per* Lord Goff at 477H – 478A, citing Lord Keith of Kinkel in The Abidin Daver [1984] AC 398 at 415. Lord Goff continued at 478 A – B:

> "*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.*"

59. In VTB Capital plc v Nutritek International Corpn [2013] 2 AC 337 UKSC at paras 192 – 193, Lord Clarke JSC emphasised the importance of identifying what the issues of fact between the parties at trial are likely to be.

60. Mr Potts submitted that New York was the appropriate forum for a number of reasons. I have considered them all, and summarise here what seem to me to be the main ones:

    (1) The Bermuda action duplicates the claims brought in the JAMS arbitrations by Apollo (same alleged facts; same allegedly confidential information; same alleged conduct). It is a reasonable and obvious inference that Apollo, which owns and controls Athene, are working together, and that Apollo brought the arbitration proceedings, in part at least, on Athene's behalf.

    (2) The most plausible (or least implausible) aspect of the claims against Mr Siddiqui and Mr Cernich are to be found in respectively the Settlement Agreement and the Release, both of which are expressed to be governed by New York law.

(3) New York is the centre of gravity for Athene's claims. Athene has many substantial connections with New York. Eg its shares are publicly listed on the New York Stock Exchange, it is regulated by the SEC, and on the Defendants' case it has a presence in New York. The acts and transactions to which the litigation relates have mainly taken place in New York. Most of the witnesses, including any forensic expert witnesses, are likely to be resident in New York or elsewhere in the US, and that is where most of the documents are likely to be held. The New York Court could readily compel a reluctant witness, whereas the Bermuda Court would have to rely upon a cumbersome letters rogatory procedure to obtain their evidence.

(4) The New York action will proceed in any event. It is undesirable for the Bermuda Court to hear a duplicate action involving the same or substantially the same parties, issues, witnesses and documents, and giving rise to a real risk of conflicting judgments.

61. Mr Taylor's case on *forum non conveniens* was rooted in the fact that Athene and Caldera are both incorporated as exempt companies in Bermuda. He submitted that this in itself is sufficient to establish a strong connection between them and Bermuda.

62. Eg in the Arabian American case the plaintiff sought a negative declaration that it was not the reinsurer of or liable to the defendant in respect of certain specified reinsurance contracts. The defendant was a captive insurance company which was incorporated and registered in Bermuda but had no real operation or presence here other than the minimum required to comply with its statutory obligations. It operated from the offices of its parent company in Kuwait. The defendant argued that Kuwait was the appropriate forum for the resolution of the dispute. Ground J (as he then was) disagreed, stating at page 10 of his ruling:

"*The defendant was put in a difficult position by this. Clearly its day to day connection with Bermuda is slight – it does not in fact operate here, and it maintains no offices or operational personnel here. On the other hand it has chosen incorporation in Bermuda for its own purposes and is subject to the requirements of Bermuda's Companies and Insurance Acts, including a requirement to maintain certain accounting records and a*

quorum of directors within the jurisdiction. I think that in such a case, although the company's connection with Bermuda is minimal, it is real and not to be regarded as fragile or easily displaced: indeed Bermuda is the place where it has chosen to have its seat and is, therefore, by necessary implication the place to whose jurisdiction it has chosen to be subject. I think that cogent grounds would be needed to supplant that choice.

I am reinforced in this by the reasoning of the Court of Appeal in Banco Atlantico v BBME [1990] 2 Lloyd's Rep 504 at p.510 per Bingham LJ

> *'Although the Judge described BBME's connection with this forum as "not a fragile one", it is in truth very solid indeed. It must be rare that a corporation resists suit in its domiciliary forum. Rarely would this court refuse jurisdiction in such a case. In my judgment very clear and weighty grounds for doing so were not shown.'*

63. Mr Taylor further submitted that:

(1) The claims against Mr Siddiqui and Mr Cernich were connected to Bermuda in that they were founded on duties which these defendants allegedly owed to Athene by reason of their roles as respectively former director and former officer and/or senior employee of the company.

(2) On the present application, the task of the court was not to evaluate the merits of Athene's claims but to determine the forum in which those merits should be adjudicated. The claims for breach of fiduciary duty (including breach of statutory duty under the 1981 Act) and breach of confidence were governed by Bermuda law. Admittedly the claim against Mr Cernich for breach of the Release was governed by New York law, but Athene had no analogous claim against Mr Siddiqui for breach of the Settlement Agreement as it was not a party to that Agreement. The claim against Caldera was governed by Bermuda law (although in my judgment it could also be formulated under New York law, as *mutatis mutandis* it has been by Apollo in the Second JAMS arbitration).

(3) Although Apollo, and various affiliates of Apollo and Athene, are parties to the Second JAMS arbitration and the New York action, they

are separate and distinct legal entities to Athene. Moreover, Athene is not a party to the Settlement Agreement upon which the Second JAMS arbitration is founded and it is doubtful whether Athene would be able to enforce any award in Apollo's favour. However I have no doubt that Apollo would enforce the award. Neither Mr Cernich nor Caldera are parties to the Second JAMS arbitration, and neither Mr Siddiqui nor Mr Cernich are parties to the New York action.

(4) The fact that most of the witnesses are likely to be resident in New York or elsewhere in the US is not an obstacle to trying the action in Bermuda. There is easy access to Bermuda from New York and the US generally by plane. I interpolate that it would also be possible for the Court to hear evidence remotely by Skype or via a secure video link. There is no evidence that any potential witness would refuse to give evidence in Bermuda, and if they did the letters rogatory procedure would be a perfectly serviceable way to obtain their evidence. In large scale cross-border litigation, discovery often involves several jurisdictions and is often conducted electronically. The physical location of the discoverable documents therefore presents no impediment to the trial taking place in Bermuda. I should add that it is important not to elide New York and the US as a whole: at the state level, Iowa and California, where Athene's subsidiaries have a US presence, are separate jurisdictions to New York.

(5) The New York action is at a very early stage. Whether it will proceed to trial is a matter for speculation. Mr Taylor submitted that the action was a rhetorical gesture filed as a response to the Statement of Claim in the Second JAMS arbitration. I am not in a position to rule on that point. However, if the New York action does proceed to trial, it will not necessarily do so in relation to Athene, as the New York Court has yet to determine whether it has jurisdiction over the company. Having commenced the New York action apparently in relation to the same underlying facts as the Second JAMS arbitration, it lies ill with Caldera to complain about a multiplicity of proceedings.

64. I find Mr Taylor's submissions the more persuasive. Caldera has in my judgment failed to establish cogent grounds as to why the Court should set aside, stay or strike out Athene's claim against it on *forum non conveniens* grounds.

65. Caldera is a Bermudian company. It has not been sued as a mere device to bring proceedings against Mr Siddiqui and Mr Cernich but as an alleged wrongdoer in its own right. Those two Defendants are sued because of their relationship to Caldera, their former relationship to Athene, and their actions in relation to those two companies. Their joinder as parties does not materially strengthen Caldera's claim that New York is the appropriate forum for the trial of Athene's claims against the company. Neither does the Second JAMS arbitration, as Apollo and its affiliates are separate legal entities to Athene.

66. It is true that one aspect of Athene's claims against Mr Cernich is governed by New York law. But on Athene's case the remainder of its claims against all three defendants are not. In any case, the applicable law will be for the trial judge to determine based upon the facts which he (or she) finds. The location of witnesses and documents in New York and elsewhere in the US presents no real impediment to the trial of the action in Bermuda.

67. The undesirable consequence of two (or more) separate sets of proceedings is only relevant where the foreign forum is the appropriate one. See the leading judgment of da Costa JA in the Iranian Oil Company case at page 47, analysing The Abidin Daver. As I am not persuaded that New York is clearly and distinctly the appropriate forum, the possibility of multiple proceedings is of little relevance to Caldera's *forum non conveniens* application.

Stay on case management grounds

68. Neither the New York action nor the Second JAMS arbitration, which relates only to Mr Siddiqui among the Defendants and to which Athene is not a party, provides a good reason for me to stay the action on case management grounds. That would be to grant the Defendants' *forum non*

conveniens application by the back door. The action should proceed in Bermuda and it should do so without delay.

Summary

69. Caldera's application for an order setting aside, staying or striking out the Writ on grounds of *forum non conveniens*, or alternatively an order staying the Writ on case management grounds, is dismissed.

70. Due to issues of judicial availability, the question of costs is reserved to the conclusion of the hearing of Caldera's summons. I anticipate any order for costs will reflect the fact that, on the issues tried before me, Athene was the successful party.

Dated this 28th day of June, 2018

Hellman J