Neutral Citation Number: [2019] EWHC 1661 (Comm)

CL-2017-000782

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 4 July 2019

BEFORE:
DANIEL TOLEDANO Q.C.
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

Between:

(1) ED&F MAN CAPITAL MARKETS LIMITED

Claimant

- and -

(1) COME HARVEST HOLDINGS LIMITED
(2) MEGA WEALTH INTERNATIONAL TRADING LIMITED
(3) STEVEN KAI SHING KAO
(4) GENESIS RESOURCES INC
(5) GENESIS PROPERTIES HOLDING LLC
(6) GENESIS KINGHWA LLC
(7) TRANSCENDENT GLOBAL FINANCE INC
(8) TRANSCENDENT (SG) PTE LTD
(9) SAMPO INTERNATIONAL LTD
(10) STRAITS (SINGAPORE) PTE LTD

Defendants

Huw Davies Q.C. and John Robb (instructed by **Clyde & Co LLP**) for the **Claimant**

David Lewis Q.C. and **Andrew Dinsmore** (instructed by **Reed Smith LLP**) for the **Tenth Defendant**

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Hearing date: Thursday 20 June 2019

JUDGMENT

Daniel Toledano Q.C.:

Introduction

1. This is the application of the Tenth Defendant ("Straits") made under CPR Part 11 challenging the jurisdiction of the Court and seeking to set aside the Order that I made ex parte on 23 November 2018 granting permission to the Claimant ("MCM"), a company registered in England, to serve the proceedings on Straits in Singapore.

2. At the heart of Straits' case on this application is a complaint about MCM having procured the Order dated 23 November 2018 using material which it had obtained in pre-action disclosure proceedings in Singapore. By doing so, the Claimant breached an implied undertaking to the Singapore Court about the use of that material. Indeed, by Order dated 31 May 2019, Aedit Abdullah J in the High Court of Singapore granted an injunction restraining MCM from using in this action in England any part of the material obtained in Singapore covered by the implied undertaking. As a result, MCM has produced redacted versions of the evidence that it relied on when seeking permission to serve out of the jurisdiction, as well as a redacted version of the Amended Particulars of Claim, which had previously also included reference to the material obtained in Singapore.

3. Straits claims that two consequences flow from this. First, Straits claims that the Order of 23 November 2018 cannot stand and must be set aside in its entirety. Secondly, Straits claims that MCM, by issuing and then pursuing pre-action disclosure proceedings in Singapore, exercised a choice in favour of any substantive proceedings against Straits in Singapore such that it cannot now change course and pursue Straits in England as England would not be the proper place for the claim. Before considering these two issues and the other matters that arise, I will set out the factual and procedural background to this application.

Background to MCM claims

4. In 2016, MCM entered into a Commodities Sale and Purchase Agreement with each of the First Defendant ("Come Harvest") and the Second Defendant ("Mega Wealth") (dated 29 April 2016 in the case of Come Harvest and 13 June 2016 in the case of Mega Wealth) (the "Master Agreements"). The Master Agreements were governed by

English law and provided for disputes to be resolved by the Courts of England and Wales. Come Harvest and Mega Wealth are companies incorporated in Hong Kong.

5. The Master Agreements contemplated that the parties would thereafter enter into contracts for the sale and purchase of metal whereby Come Harvest or Mega Wealth would sell the metal to MCM but with the option to repurchase it at a later date. The mechanics involved MCM making payment to Come Harvest or Mega Wealth upon receipt of warehouse receipts relating to the metal. The recipient of an original endorsed warehouse receipt can obtain possession of the nickel by presenting the warehouse receipt to the warehouse operator. The warehouse operator was Access World Logistics (Singapore) Pte Ltd ("Access World").

6. Pursuant to the Master Agreements, MCM entered into a number of purchase contracts with each of Come Harvest and Mega Wealth relating to the sale and purchase of nickel. The nickel the subject of these contracts was stored in various warehouses in Malaysia, South Korea and Singapore.

7. In each case:

   (1) MCM made payment to Come Harvest or Mega Wealth from its bank accounts held in England. According to the pleaded claim, USD117,326,050.86 was paid to Come Harvest and USD167,210,088.37 was paid to Mega Wealth.

   (2) MCM made payment upon receipt by MCM at its offices in London of purported warehouse receipts (the "Receipts") issued by Access World. All but one of these Receipts purported to have been originally issued by Access World to the order of Straits and then endorsed either to Come Harvest or Mega Wealth and then, in turn, blank endorsed and delivered to MCM. The remaining Receipt was issued by Access World to the order of the Fourth Defendant.

8. MCM sold the nickel on to a sub-buyer called ANZ Commodity Trading Pty Ltd ("ANZCT").

9. In January 2017 MCM claims to have received information that led it to investigate the transactions. Representatives of MCM met with representatives of Access World in Singapore to seek confirmation that the nickel was in existence. Shortly thereafter ANZCT sought to present one of the Receipts to Access World for authentication. Access World concluded that this Receipt was not genuine. It would seem that Access

World thereafter concluded that all but one of the Receipts were not genuine and cancelled them. Straits admits that the Receipts are not genuine although the other Defendants put MCM to proof on this issue. Straits has claimed that, at all material times, it or its bankers have retained possession of the authentic original warehouse receipts.

10. In light of the above, MCM concluded that it had been the victim of a substantial fraud using the forged Receipts.

Procedural history in Singapore and in England

11. On 25 May 2017 MCM commenced pre-action disclosure proceedings called OS 533 against Straits in Singapore seeking 11 categories of documents and seeking to administer 10 interrogatories on Straits. I consider the nature of these pre-action disclosure proceedings in more detail later in this Judgment. MCM accepts that its provisional intention at this time was also to commence substantive proceedings against Straits in Singapore if such proceedings were justified by the evidence. In response to the OS 533 application, Straits filed Affidavit evidence of Ms He in support of its position that MCM was not entitled to the information and documents requested. This is the material that MCM used when first seeking relief against Straits in the English Court.

12. On 21 December 2017 MCM issued the English proceedings against Come Harvest and Mega Wealth only. The claim form asserted causes of action in deceit and unjust enrichment.

13. MCM did not reveal the existence of the English proceedings against Come Harvest and Mega Wealth to Straits or to the Singapore Court until 7 March 2018 even though Straits had sought in Singapore discovery from MCM of the proceedings that MCM was taking worldwide. On 14 June 2018 MCM told the Singapore Court that the English proceedings were "*strictly irrelevant*" so far as Straits was concerned.

14. Come Harvest and Mega Wealth served their Defence in the English action on 28 June 2018.

15. On 13 August 2018 Assistant Registrar Zeslene Mao dismissed OS 533. MCM appealed against this decision on 24 August 2018 although MCM accepted as part of its applications issued in England in September 2018 that it would discontinue the

appeal if required by the English Court. In the event, MCM discontinued its appeal on 11 February 2019.

16. MCM says that by September 2018 a number of reasons had combined to lead to the decision to apply to join Straits to the existing action in England against Come Harvest and Mega Wealth, rather than to bring a substantive claim against Straits in Singapore. In particular, MCM had by summer 2018 received the Defence from Come Harvest and Mega Wealth and other documentation that it had not been in possession of at the outset. MCM says that the Defence was important because it appeared to implicate Straits in the alleged fraud perpetrated against MCM.

17. Accordingly, on 7 September 2018 MCM filed an application to amend its Particulars of Claim in the English proceedings, to join the Third to Tenth Defendants and to serve the proceedings out of the jurisdiction on them. Come Harvest and Mega Wealth consented to the amendment application. The application came before me ex parte on 23 November 2018 and I gave permission to join and to serve out of the jurisdiction. However, on 24 January 2019 Straits issued the present jurisdiction challenge.

18. So far as Singapore is concerned, on 1 March 2019 Straits issued a summons for an anti-suit injunction seeking to restrain the English proceedings as against it and also sought an injunction to restrain the use outside of Singapore of the materials obtained from the OS 533 action. On 31 May 2019 the Singapore High Court refused the anti-suit injunction but granted the injunction restraining use of the OS 533 materials. In dismissing the anti-suit injunction application, the Judge said:

> "*5. As for the Anti-suit injunction, I was not persuaded that Singapore was the clearly more appropriate forum. There were factors, relied on by* [Straits]*, which pointed to Singapore; but just as much there were factors pointing instead to England. It suffices to note that given this close balance, the Defendant did not make out the first requirement for the issuing of an ASI.*
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> *6. Additionally, I would note that none of the factors relied on by the Defendant were to my mind sufficient in any event to establish vexation and oppression of the degree that would justify the issuing of an anti-suit injunction. The mischief or conduct raised could be better and specifically targeted by the injunction against use of documents.*"

19. Shortly before the hearing of the present jurisdiction challenge, Straits applied in England to adjourn the hearing and made a further application in Singapore for an anti-suit injunction. Both applications were dismissed.

The nature of the OS 533 action

20. Each of Straits and MCM relied on expert evidence in relation to the nature of these proceedings. I gave permission to each side to rely on this evidence although I do not consider that I need to determine any of the (relatively narrow) disputes between the experts. Indeed, I consider that the really important considerations relating to the OS 533 application can be ascertained from the relevant court rules in Singapore and from authority.

21. In particular, in the case of **Dorsey James Michael v World Sport Group Pte Ltd** [2014] SGCA 4 the Singapore Court of Appeal determined that pre-action interrogatories (and the court made it clear that the principles underlying pre-action disclosure are the same) can only be ordered in relation to intended proceedings in a Singapore court and that the court's powers did not extend to interrogatories in aid of proceedings beyond Singapore.

22. Further, under Singapore Rules of Court O. 24 r. 6 an originating summons seeking pre-action disclosure has to be supported by an affidavit which must state "*whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court*", which means in Court in Singapore.

23. It follows from the above that, when instituting and pursuing the OS 533 application, MCM must have been intending to bring substantive proceedings against Straits, if any were justified, in Singapore. Indeed, as I have already indicated, MCM accepts that this was so albeit that it contends that this was its provisional assessment only and one that was overtaken by subsequent events as I have described. I accept that not only was this MCM's intention prior to August 2018, it was the impression that it gave to the Court in Singapore by issuing and pursuing OS 533 and by indicating to the Singapore Court that the English proceedings were irrelevant so far as Straits was concerned.

24. The real issue, it seems to me, is whether having had this intention in Singapore and having conveyed this impression to the Singapore Court, MCM was nonetheless entitled to change its mind so as to pursue Straits in England or whether MCM's

conduct precluded such a change of mind or had the effect of rendering Singapore and not England the proper place in which to pursue Straits. I consider this further below.

23 November 2018 Order

25. Straits contends that this Order cannot stand. It was procured using material which had been obtained in Singapore in the OS 533 application, which was covered by an implied undertaking to the court in Singapore and which is now the subject of the injunction against use.

26. MCM did not dispute (strictly for the purposes of this application) that the material should not have been used and has now redacted it. The evidence now relied on by MCM and the draft Amended Particulars of Claim do not rely on the material obtained in Singapore, subject to any outstanding disputes about the extent of redaction (which both sides accept is for the Singapore court to consider, if this becomes necessary). MCM claims that the decision to use the Singapore material resulted from an inadvertent mistake. According to MCM's evidence, it had originally considered itself at liberty to refer to the He Affidavit on the basis that it had been voluntarily disclosed by Straits. This understanding is said to have derived from Singaporean legal advice over which MCM has not waived privilege.

27. Straits claims that the 23 November 2018 Order can no longer operate in accordance with its terms because it gives permission to serve the unredacted documents out of the jurisdiction rather than the redacted versions of the same. Moreover, Straits refers to the Claim Form itself which states that it attaches the Particulars of Claim, which are the unredacted Particulars of Claim.

28. Straits refers to CPR 6.38(1) which provides that where the permission of the court is required to serve the claim form out of the jurisdiction, the claimant must obtain permission to serve any other document in the proceedings out of the jurisdiction. By (2), if the court gives permission for a claim form to be served out of the jurisdiction and the claim form states that particulars of claim are to follow, then the permission of the court is not required to serve the particulars of claim.

29. However, it seems to me that these rules do not present a difficulty in the present case because rule (1) applied (as the claim form stated that particulars of claim were attached) and the Order of 23 November 2018 gave effect to that rule by giving

permission to serve the Particulars of Claim out of the jurisdiction. It is true that this was a reference to the unredacted version of this document, but the Order also gave permission to serve out of the jurisdiction "*any other documents in these proceedings*" which would include any redacted versions of the relevant documents.

30. The Court was referred to a number of relevant authorities which indicate that the Court has a discretion in a case such as the present to decide what order will best serve the overriding objective: **The 'Kurnia Dewi'** [1997] 1 Lloyds Rep 552, Clarke J at pp. 562-564; the decision of the Supreme Court in **NML Capital Limited v Republic of Argentina** [2011] UKSC 31, [2011] 21 AC 495, Lord Clarke at [74]-[75] and [80].

31. In my judgment, the matters relied on by Straits in relation to the Order are not, on their own, reasons to set it aside or to conclude that it cannot stand. Whilst the Order was procured using material that should not have been used, MCM claims that permission to serve out as at 23 November 2018 can be justified without regard to any of that material. If it is right about that, then Straits would effectively be asking the Court to set aside the Order and service pursuant to it, only for the Court then to re-grant permission. I see no purpose in setting aside the Order only to re-grant permission based on the redacted material now before the court. This would not accord with the overriding objective to deal with cases justly and expeditiously. My conclusion is reinforced by the evidence before the Court, which I accept, that the use of the Singapore material was the result of an inadvertent error and by the fact that the Singapore High Court did not itself consider that MCM had acted vexatiously or oppressively against Straits such as might have justified the grant of an anti-suit injunction. I also consider that it would be right to take into account that MCM is not seeking to add new causes of action or to pursue an entirely new case. MCM is asserting the same causes of action but is no longer able to support them by reference to the Singapore material.

32. MCM accepted that it would nonetheless be required to amend its Particulars of Claim (and, if necessary, its claim form) in due course in order to ensure that all passages containing material from Singapore were removed, and to seek any necessary permission from the court to do so. MCM claimed that this was not something that arose on the present application since amendments would affect all defendants in the action and not just Straits.

33. In light of the matters I have set out above, I conclude that Straits' attack on the 23 November 2018 Order does not add anything to its jurisdiction challenge. In my judgment, if that challenge succeeds, then the Order must be set aside. However, if that challenge fails on its merits, then the Order ought to stand.

34. I therefore turn to consider Straits' jurisdiction challenge.

Grant of permission to serve out of the jurisdiction

35. It is common ground that in order for the English court to grant permission to serve out of the jurisdiction, MCM must satisfy the Court as to the following three matters which were restated by Lord Collins in the Privy Council in **AK Investments v Kyrgyz Mobil** [2011] UKPC 7:

    (1) There must be a serious issue to be tried on the merits in relation to each alleged cause of action;

    (2) There must be a good arguable case that each cause of action falls within one or more jurisdictional gateway under CPR Practice Direction 6B ("PD 6B"); and

    (3) In all the circumstances, the Court ought to exercise its discretion to permit service out of the jurisdiction. The Court will only do so if it is satisfied that England is the proper place in which to bring the claim.

36. Straits accepts that the first requirement has been met, in other words that MCM has demonstrated a serious issue to be tried on the merits in relation to each cause of action alleged against it (albeit that Straits reserves the right to apply for summary judgment in the future if the Court is against it on jurisdiction and if Straits considers that course to be appropriate, about which I express no view).

37. Straits also accepts that the second requirement is satisfied in respect of one of the gateways relied on by MCM, namely, the necessary or proper party gateway contained in PD 6B paragraph (3). That paragraph provides as follows:

    "(3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –

    (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

38. By accepting that MCM has demonstrated a good arguable case in relation to this gateway, Straits is thereby accepting to that standard (a) that MCM's claim against Come Harvest and Mega Wealth involves real issues which it is reasonable for the Court to try and (b) that Straits is a necessary or proper party to that claim.

39. MCM relied in addition on two other gateways. First, so far as the claim in unlawful means conspiracy is concerned, MCM relies on gateway (9) which concerns claims in tort. Secondly, so far as the knowing receipt claim and the equitable proprietary claim which are based on constructive trust allegations, MCM relies on gateway (15) which concerns constructive trust claims. In light of Straits' acceptance of the applicability of the necessary or proper party gateway, the parties did not focus very much attention in their skeleton arguments and at the hearing on the other gateways. For reasons which will become apparent from the remainder of this Judgment, I do not consider that I need to reach a view on the applicability of the other gateways.

40. It is readily apparent from the matters that I have referred to already that the real dispute between the parties concerned the third of the three requirements that a claimant must demonstrate in order to obtain permission to serve out. Straits contended that the Court should not exercise its discretion to permit service out of the jurisdiction because MCM had not demonstrated that England was the proper place in which to bring the claim. MCM contended that the Court should exercise its discretion in its favour by permitting service out and that England was clearly and distinctly the proper forum for its claims.

Proper place in which to bring the claim

41. The starting point in relation to the third requirement is CPR 6.37(3) which provides that "*The court will not give permission unless satisfied that England and Wales in the proper place in which to bring the claim.*" This gives expression to the well-known forum conveniens test, famously described by Lord Goff of Chieveley in **Spiliada Maritime Corpn v Cansulex Ltd (*The Spiliada*)** [1987] AC 460, 475-484. As Lord Collins JSC said more recently in **Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd** [2011] UKPC 7, [2012] 1 WLR 1804, para [88], the task of the Court is "*to identify the forum in which the case can suitably be tried for the interests of all the parties and for the ends of justice*".

Multiplicity

42. In the most recent Supreme Court decision in this area, **Lungowe v Vedanta Resources plc** [2019] UKSC 20, Lord Briggs JSC (with whom the other Justices agreed) stated (at para [68]) that there was "*no doubt*" that Lord Goff would have regarded the test to be applicable to the case as a whole, and therefore as including the anchor defendant among the parties. The Court was addressing "*a single piece of multi-defendant litigation and seeking to decide where it should, as a whole, be tried"* and the Court was looking "*for a single jurisdiction in which the claims against all the defendants may most suitably be tried*". As Lord Briggs pointed out [69]-[70], one factor, albeit a very important one, was the desire to avoid multiplicity of proceedings and the risk of inconsistent judgments. In cases where the claimants will in any event continue against the anchor defendant in England, this has frequently been found to be decisive in favour of England as the proper place, even in cases where all the other connecting factors appeared to favour a foreign jurisdiction.

43. The issue that arose in **Vedanta** was whether this approach was the correct one in circumstances where the claimants, having a choice, had brought upon themselves the risk of irreconcilable judgments. In that case, the Zambian claimants had sued a UK plc and its Zambian subsidiary in relation to damage caused by discharges from a Zambian copper mine which was owned and operated by the Zambian subsidiary. The UK plc offered to submit to the jurisdiction of the Zambian courts to enable the whole case to be tried there. The claimants therefore had a choice as to whether to sue both entities in Zambia or whether to insist on their right to sue the UK plc in England. The claimants chose to continue against the UK plc in England and sought to argue that it followed that the proper place for the case against the Zambian subsidiary must also be England.

44. The Supreme Court held (see [84]-[87]) that the risk of irreconcilable judgments was not a "*trump card*" in circumstances where the risk of that arose purely from the claimants' choice to proceed against one of them in England rather than, as was available to them, against both of them in Zambia. This meant that the claimants had failed to demonstrate that England was the proper place for the trial of their claims against the defendants, although ultimately the Supreme Court upheld the grant of

permission to serve out of the jurisdiction on the basis that there was a real risk that substantial justice would not be obtainable in Zambia.

45. Straits seeks to rely on the concept of choice as explained in the **Vedanta** case. Straits claims that MCM exercised a choice at the outset to commence the OS 533 action against Straits in Singapore and thereby intended that any substantive proceedings would be brought there too. Straits says that MCM should be held to this choice which it says exerted and continues to exert a "*gravitational pull*" towards Singapore. Straits also says that MCM could have attempted to engineer a single composite forum for all claims against all parties in Singapore by requesting that Come Harvest and Mega Wealth did not insist on their rights under the English court exclusive jurisdiction clauses in the Master Agreements or by commencing proceedings against those parties in Singapore in breach of the exclusive jurisdiction clauses and then contending that strong reasons existed as to why no anti-suit injunction should be imposed against the continuation of those proceedings, relying on the decision of the House of Lords in **Donohue v Armco** [2002] 1 Ll. Rep. 425. Straits contended that MCM should not be able to rely as a "*trump card*" on the multiplicity point and the risk of irreconcilable judgments so as to create a single forum for all claims against all parties in England, in circumstances where that outcome was the result of choices which MCM had made along the way.

46. I am unable to accept Straits' submissions on these points. It seems to me that there is a world of difference between the choice that the Supreme Court was considering in the **Vedanta** case and the choices that Straits is complaining about in the present case. In **Vedanta**, and leaving aside the substantial justice issue, the claimants had a straightforward choice between Zambia and England for all claims against all parties. The dispute was overwhelmingly Zambian in focus and nature. Yet the claimants chose to pursue their claims in England. In the present case, MCM has never had a straightforward choice of this kind that would have enabled it to sue all parties in Singapore (or some other jurisdiction apart from England). MCM has at all material times been bound by the exclusive jurisdiction clauses in the Master Agreements to sue Come Harvest and Mega Wealth in England. There is no evidence to suggest that, had either of these parties been approached, they would have been willing to give up their rights under those exclusive jurisdiction clauses. Nor do I accept that the concept of choice as referred to by the Supreme Court can be stretched so as to require a party to

act in breach of contractual promises as to jurisdiction and then to fall on the mercy of the Court so as to avoid the grant of an anti-suit injunction. MCM is entitled to say that it had no choice but to sue Come Harvest and Mega Wealth in England. Having done so, there is real force in the submission made by MCM that England is the proper place for all claims against all parties because it is the only jurisdiction where a single composite forum can be achieved.

47. I accept that for the period between May 2017 and summer 2018 MCM appears to have considered that it was best served by bringing substantive proceedings against Come Harvest and Mega Wealth in England but with the intention of bringing any substantive proceedings against Straits in Singapore. However, MCM did not in the event bring substantive proceedings against Straits in Singapore. It applied to join Straits to the proceedings in England. In effect, MCM changed its mind. It says that this was at least in part due to the nature of the Defence served by Come Harvest and Mega Wealth in England which appeared to point the finger at Straits. Whatever the reasons for the change of mind, I can see no proper basis on which to say that, when it comes to forum, MCM must be stuck with its originally contemplated choice of Singapore for claims against Straits. The issue for the Court on this application is whether MCM has demonstrated that, as at 23 November 2018, England was the proper forum for the claims. By that date, MCM had already changed its mind and had indicated that it wished to bring all claims against all parties in England. It is true that MCM did not actually withdraw its appeal against the dismissal of the OS 533 action until 11 February 2019 but it expressed a willingness to do so in its original evidence in support of the application for permission to serve out of the jurisdiction.

48. Straits sought to rely on the principle that a party ought not to approbate and reprobate or to blow hot and cold. However, I do not consider that this principle applies in the present circumstances or that, even if it did, it would operate so as to prevent MCM exercising a choice in favour of English substantive proceedings simply because it had previously anticipated Singapore proceedings.

49. Straits also sought to rely on the fact that in Singapore MCM had asserted that the English proceedings were irrelevant because they were distinct from the Singapore OS 533 action. However, at the time that MCM asserted this, the proceedings in England were only against Come Harvest and Mega Wealth and did not include a cause of action

in conspiracy. The position only changed thereafter once MCM sought to join additional parties to the English proceedings and to add new causes of action including in conspiracy. Straits accepted that it could not go so far as to suggest that anything said by MCM in Singapore was false.

50. I also reject Straits' submission that MCM's conduct in Singapore continues to exert a "*gravitational pull*" towards Singapore. I do not see how there was any such pull as at November 2018 in circumstances where MCM had changed its mind and was then, as now, wishing to advance all claims against all parties in England.

51. In my judgment, the present case, unlike **Vedanta**, is one where the need to avoid multiplicity of proceedings and the risk of irreconcilable judgments should bear considerable weight in the evaluation of proper forum.

52. This is especially so in circumstances where the claims that MCM is advancing by their nature require a single forum for their resolution. This is a case where a single overarching conspiracy is alleged against the First to Fourth Defendants as well as against Straits. Those claims need to be considered together alongside all of the claims now asserted against all Defendants. Documents and evidence available against one Defendant ought to be available against all Defendants. All of this points to the desirability of a single composite forum for this litigation. Although it was not known as at 23 November 2018 that the Third to Eighth Defendants would all submit to the jurisdiction of the English Court, that was certainly a possibility and that is now the position.

53. I am not persuaded that the Court can place much, if any, reliance on the existence of a set of proceedings relating to the same underlying transactions in Hong Kong. These proceedings were brought by ANZCT, not by MCM. There is no evidence that MCM had any say over where these proceedings were brought. MCM is not a party to ANZCT's claim in Hong Kong and nor is Straits although Come Harvest and Mega Wealth are defendants. I do not think that the existence of these proceedings detracts from the desirability of having one set of proceedings for all claims brought by MCM against all Defendants.

54. I therefore conclude that the multiplicity point is a factor of great significance in the present case and that it points strongly to England as the proper place for the resolution

of the claims against Straits. I will now consider other factors that the parties have relied on.

Factors other than multiplicity

Governing law: introduction

55. Both sides sought to rely on the governing law of the causes of action. This is because, as Lord Mance stated in **VTB Capital plc v Nutritek International Corpn** [2013] UKSC 5, [2013] 2 AC 337 at para [45] "*it is generally preferable, other things being equal, that a case should be tried in the country whose law applies*".

56. MCM said that the governing law of the claims was English law which it said reinforced its case that England is the proper forum. Straits, however, contended that the governing law was not English law but rather Singapore law (or, possibly, a combination of Singaporean, Malaysian and Korean laws).

57. Both sides accepted that this factor was unlikely to be a very significant one in the present case. This is because, on the face of it, the dispute is more likely to turn on factual issues rather than legal ones (which was the position in **VTB Capital** as well: see Lord Mance at para [49]). There is also no evidence before the Court as to any difference between English law and Singapore law (or any other law) as to any of the causes of action in issue.

58. Nonetheless, governing law is a factor that the Court takes into account when evaluating the proper forum. I will therefore set out my conclusions on this issue below.

Governing law: unlawful means conspiracy claim

59. I will deal with tort first. The governing law of MCM's claim in unlawful means conspiracy falls to be determined by the application of Article 4 of the Rome II Regulation (Regulation 864/2007/EC of 31 July 2007).

60. Article 4(1) of the Rome II Regulation provides: "*Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*"

61. Straits submitted, and I accept, that Article 4(1) looks to the country where the direct damage occurred. This is clear from Article 4(1) itself. It also follows from Recital 16 which refers to "*the country where the direct damage occurred (lex loci damni)*". It is confirmed by Dicey, Morris and Collins at paragraph 35-024.

62. The issue between the parties is as to how the concept of direct damage should be applied in the present case. Straits contends that the direct damage occurred where MCM was unable to obtain the metal it had purchased. That would be at the warehouses in Singapore, Malaysia and South Korea. By contrast, MCM contends that the direct damage occurred in England. This was the place from which MCM paid out funds to purchase the metal and it is also the place in which MCM received the Receipts that it alleges were forged.

63. Straits relied on **Domicrest Ltd v Swiss Bank Corpn** [1999] QB 548. That case concerned Article 5(3) of the Lugano Convention rather than Article 4(1) of the Rome II Regulation. Rix J held (at p. 568) that the damage occurred in Switzerland and Italy because it was from those countries that the goods were released prior to payment on the strength of the defendant's representations.

64. Straits also relied on the decision of Cockerill J in **FM Capital Partners Ltd v Marino** [2018] EWHC 1768 (Comm). Cockerill J considered the case of **Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening** [2009] EWHC 716 (Comm), [2010] 1 AER (Comm) 473. In that case, Christopher Clarke J concluded that Dolphin suffered damage for the purposes of Article 5(3) of the Brussels I Regulation in England where it should have been paid the settlement monies. Christopher Clarke J stated (in para [59]) that in cases where the claimant has failed to obtain some property or money a useful guide would be to ask what would have been the position if the tort complained of had not taken place. In **Dolphin Maritime**, the answer to that question was that payment would have been made to Dolphin in England. Christopher Clarke J drew a distinction (in para [60]) between cases in which the claimant complains that he has lost his money or goods and a case in which the claimant complains that he has not received a sum which he should have received. In the former case, the harm could be regarded as occurring in the place where the goods were lost or the place from or to which the moneys were paid, whereas in the latter case the harm lies in the non-receipt of the money at the place where it ought to have been received.

65. It seems to me that on the facts of the present case, the **Dolphin Maritime** principle is difficult to apply because the present case involves both the loss of money from the bank accounts in England and the non-receipt of the purchased metal which was located in the various warehouses in Singapore and elsewhere.

66. MCM relies by analogy on the analysis in Dickinson on The Rome II Regulation at paragraph [4.67]. That paragraph is concerned with fraudulent misrepresentation rather than conspiracy but MCM contended that the same principle should apply. That paragraph indicates that direct damage may be sustained when the victim performs, or fails to perform, some act which is irreversible such as incurring expenditure or losing control of assets.

67. In my judgment, the key to ascertaining where the direct damage occurred in the present case is to keep in mind that, under the Master Agreements, MCM was only required to make payment upon receipt of the Receipts. MCM suffered direct damage when it made payment upon receipt of what are alleged to have been forged Receipts. Both the payment out, and the obtaining of the Receipts, occurred in England. If the Receipts were forged, the warehouse operators will not have been required to hand over metal from the warehouses upon presentation of the Receipts. However, it seems to me that this is a consequence of the damage that on MCM's case it had already suffered rather than the direct damage itself.

68. I therefore conclude that MCM's direct damage for the purposes of Article 4(1) of the Rome II Regulation occurred in England and that English law therefore governs the claim for unlawful means conspiracy.

69. This factor therefore provides some additional support for the conclusion that England is the proper forum albeit that, for reasons I have already given, I do not think that governing law is a factor of great significance when it comes to assessing proper forum in this case.

Governing law: knowing receipt and equitable proprietary claims

70. There is a debate in the authorities as to whether a claim for knowing receipt falls under Article 4 of the Rome II Regulation or under Article 10. In so far as it falls under Article 4, then it will be governed by English law for the same reasons as those I have already addressed in relation to the conspiracy claim.

71. If, however, the knowing receipt claims falls under Article 10 it will fall to be determined under that Article along with the equitable proprietary claim.

72. Article 10 is headed Unjust Enrichment. Article 10(1) provides: "*If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.*"

73. It seems to me that the unjust enrichment alleged in the present case does concern a closely connected relationship existing between the parties that arises out of the alleged conspiracy. It follows that in my judgment Article 10(1) will give the same answer in the present case as Article 4(1), namely, that English law governs. I reject the submission made by Straits that the governing law cannot be determined in this case under Article 10(1) such that Article 10(3) must operate. If I am wrong about Article 10(1) such that Article 10(3) does apply, the result would be Singapore law since Singapore was the place where the unjust enrichment took place. However, even Straits accepted that this would not be a weighty factor because the knowing receipt claim is for a far smaller sum than the conspiracy claim.

Other factors

74. I take into account that MCM is based in England and that Straits is based in Singapore. Other Defendants are based in Hong Kong and yet others in California. In view of the different locations involved, this factor does not carry much weight, especially where most parties have now submitted to the jurisdiction of the English Court. As I have already said, I accept that it was not known as at 23 November 2018 that the Third to Eighth Defendants would submit to the jurisdiction but there was no basis as at that date to think that they would not do so and that has been borne out by subsequent events.

75. Straits relied on a number of other factors such as the location of the warehouse operators, the location of its own bank and the location of its forensic expert. However, in my judgment these are not factors to which I would place significant weight when considered along with all other relevant matters.

Conclusion

76. Taking into account all of the factors I have addressed above and giving due prominence and weight to the desire to avoid multiplicity of actions and the risk of inconsistent judgments, I have reached the conclusion that MCM has demonstrated that England is clearly the proper place in which to bring its claim against Straits. I would have reached the same conclusion even if I had concluded that some or even all of the claims against Straits were governed by Singapore law (or Malaysian or Korean law).

77. In light of the above, I dismiss Straits' jurisdiction challenge as well as its self-standing challenge to the Order of 23 November 2018.