IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
FROM THE GRAND COURT, FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal 8 of 2021
(FSD 88 OF 2019 (RPJ)

BETWEEN:

(1) RITCHIE CAPITAL MANAGEMENT L.L.C.
(2) RITCHIE CAPITAL MANAGEMENT SEZC, LTD.
(3) RITCHIE RML TRADING, LTD.
(4) RITCHIE SPECIAL CREDIT INVESTMENTS, LTD.
(5) RHONE HOLDINGS I. LTD
(6) RITCHIE STRUCTURED MULTI-MANAGER, LTD.
(7) YORKVILLE INVESTMENTS I, L.L.C.

Appellants

AND

(1) LANCELOT INVESTORS FUND, LTD. (IN OFFICIAL LIQUIDATION)
(2) GENERAL ELECTRIC COMPANY

Respondent

Before:	**The Rt. Hon Sir John Goldring, President** **The Hon C Dennis Morrison, Justice of Appeal** **The Rt. Hon Sir Alan Moses, Justice of Appeal**
Appearances:	**Mr. Tom Lowe QC instructed by Peter Sherwood & Ashleigh Dixon of Carey Olsen for the Appellants** **Mr Adrian Beltrami QC (via video-link) instructed by Nicholas Fox & Luke Burgess-Shannon of Mourant Ozannes (Cayman) LLP for the Second Respondent.**
Heard:	**8 September 2021**
Judgment delivered:	**18 July 2022**

JUDGMENT

The Rt. Hon Sir Alan Moses JA:

1. This is an application for leave to appeal against an Order of The Hon. Justice Parker dated 21 December 2020. Parker J had set aside his Order dated 28 June 2019 giving leave to the

Applicants to serve a Writ and Statement of Claim on the Second Defendant, the Respondent to this application, out of the jurisdiction. Parker J having refused leave, the President ordered an oral application and we heard counsel for the applicant Mr. Lowe QC's oral submissions and short submissions by Mr Beltrami QC for the Respondents, amplifying their full written submissions.

2. The background to the application to serve out of the jurisdiction is explained in Parker J's judgment. For the purposes of this judgment it is unnecessary to do more than summarise.

3. Following the collapse, in 2008, of what was said to be one of the largest ever Ponzi schemes, operated by Thomas Petters in USA, a Bankruptcy Trustee was appointed to deal with the bankruptcy estates of Petters' companies and their affiliates. They had been placed into bankruptcy in Minnesota in October 2008, and thereafter the Trustee started proceedings to recover some of the US$3.65 billion which had been lost.

4. The Applicants (Ritchie) are a group of funds and investment managers which invested indirectly through funds which invested into Petters' companies from 2002 and directly from 2008. It asserts losses in excess of US$ 200 million. Lancelot Investors Fund LTD (LPI), a Cayman Islands entity, was one of a number of feeder funds operated by Gregory Bell, from Illinois. The Lancelot Funds all filed for bankruptcy in October 2008 in USA and in December 2008, LPI was placed into official liquidation in the Cayman Islands. It was one of the feeder funds into which Ritchie had invested.

5. The General Electric Capital Corporation (GECC) made loans to two of Petters' companies, on the strength of the bogus representation that the investments were to fund the acquisition of merchandise from distressed retailers. It was a subsidiary of General Electric Company (GE) but merged with it in 2015. It ceased to make loans, so it said, in 2001, and was repaid in full. But it continued, it is alleged, to vaunt Petters' respectability in a letter of endorsement first issued in January 2000 and never withdrawn.

6. This letter founded the claim which Ritchie commenced against GECC on 23rd September 2014 in New York. Judge Engelmayer dismissed that claim on grounds the substantive nature of which are disputed in these proceedings. But his dismissal was upheld by the US Court of Appeals for the Second Circuit on 11 May 2016.

7. By these Cayman proceedings, commenced on 20 May 2019, Ritchie seeks to recover against both Lancelot and GE for deceit and unlawful means conspiracy. It alleges that Bell on behalf of Lancelot made false representations as to security arrangements to protect investments within

the Lancelot funds and that Lancelot was party to the conspiracy with Petters and his companies.

8. Against GE, Ritchie relies on GECC's endorsement letter, which it was handed by Bell in 2002, in alleging deceit and conspiracy.

9. On 27 June 2019 Ritchie made an *ex parte* application for leave to serve the proceedings on GE out of the jurisdiction. Parker J granted that order the next day pursuant to Order 11 r.1(c) of the Grand Court Rules. But GE sought by summons to set the Order aside.

10. GE succeeded on all the four grounds which it had advanced:
    1) that the claims against both Lancelot and GE are out of time and statute barred, since Ritchie had sufficient evidence to bring proceedings for fraud in 2009-2010 and in any event well before 2014, when the primary limitation period expired;
    2) the proceedings in New York give rise to an issue estoppel;
    3) that the Cayman Islands was not the *forum conveniens;* and
    4) and Ritchie had failed to make full and frank disclosure in its *ex parte* application to the same judge, Parker J.

11. It is important to underline that Ritchie needs to obtain leave to appeal against all the grounds on which the judge set aside his previous order. That is because any one of those grounds would have justified the judge setting aside his order and would be dispositive of any appeal.

12. At the outset it is worth noting that the hearing of GE's application to set aside the Order took six days. His judgment is closely reasoned and detailed. The length and nature of the hearing founds an underlying argument which Mr Lowe QC seeks to advance on appeal, namely that the judge failed to resist the temptation to embark on a mini-trial, in particular making findings on disputed issues of fact, which required determination on a full trial, after discovery and evidence. He reminded us that the question whether the claim against the defendants raised a triable issue in the context of an issue as to jurisdiction replicates the summary judgment test (see Lord Briggs in *Lungowe v Vedanta Resources* [2019] 2 WLR 1051 [para.9] and Lord Neuberger in *VTB Capital plc v Nutritek International Corporation* [2013] 2 AC [82]). If Mr Lowe QC could establish, in respect of each of his grounds, that it was reasonably arguable that the judge had made findings or reached conclusions in relation to matters which were properly for trial, then it is plain that leave should be granted.

13. However, it seems to me that there were two grounds for decision where it is not possible for Ritchie reasonably to contend that the judge disposed summarily of issues, which ought

properly to have been left for trial. Those grounds related to the appropriate forum and Ritchie's breaches of its obligations to make full and frank disclosure on its *ex parte* application.

Appropriate Forum

14. Under GCR Order 11 Rule 4(2), which replicates the English rule, Ritchie must establish on *Spiliada* principles, which have frequently been applied in these islands (see e.g. *Ahab v Saad* [2010] 2 CILR 289) that the Cayman Islands is the appropriate forum in which the case can suitably be tried in the interests of all the parties and to meet the ends of justice (*Spiliada Maritime v Cansulex* [1987] AC 460 at 476B).

15. The judge founded his conclusion that Ritchie had failed to persuade him that the Cayman Islands was the most appropriate forum and that he should exercise his discretion to permit service out, on a number of bases:

    a. The location of the parties, of their business and of the litigation hitherto in the United States. Even Ritchie itself had been originally incorporated in Delaware and operated its business in Illinois (Judgment [253]-[256]);
    b. the location of the alleged wrongdoing and of the loss and damage in Minnesota or Illinois [257]-[260]);
    c. the location of the witnesses and of the documentation [261]-[266];
    d. he inferred that the principal purpose in suing Lancelot was to found a claim under the necessary and proper gateway against GE and took that into account in exercising his discretion [267];
    e. there was no realistic risk of irreconcilable judgments [269].

16. Mr Lowe QC said that it was arguable that the judge's approach had failed to take into account that, in light of the recent authority of *Lungowe v Vedanta Resources plc* [2020] AC 1945, the presence of Lancelot in the Cayman Islands was a "*very weighty factor*" in favour of the conclusion that the Islands was the appropriate single forum. In that case Lord Briggs considered the problem of defendants domiciled in different jurisdictions and the circumstance that a stay against the 'anchor' defendant was not possible by virtue of EU law [67ff]. Mr Lowe QC contended that it was arguable that the judge had failed to consider the different emphasis in *Vedanta* to that apparent in the decision on which the judge did rely, *Altimo v Kyrgyz* [2011] UKPC 7.

17. In my view no difference in principle is to be detected in either of those two cases where the relevant factors differed, in the circumstance that in *Vedanta*, unlike *Altimo*, proceedings against an anchor defendant could not be stayed and accordingly the claimants had to make a choice [79]. In particular, there is nothing in *Vedanta* which arguably suggests that the Board's

adoption (in *Altimo* [73]) of the warning expressed by Lloyd LJ in *Golden Ocean Assurance v Martin (The Goldean Mariner)* [1990] 2 Lloyd's Rep 215, 222, that the gateway in GCR Order 11 should not be used as a matter of practice on the basis that the only alternative is to require suit in more than one jurisdiction. The judge was not arguably wrong to refer to this caution [250]. He was entitled to take the view that there was no risk of irreconcilable judgments. The judge was entitled to take the view that it is highly unlikely Ritchie would sue in the USA, where the judge was entitled to conclude that there was a strong argument the matter was *res judicata* [268].

18. Nor was he arguably wrong to take into account that the motive for suing Lancelot was to bring GE into the jurisdiction [251]. He followed Lord Collins in *Altimo* at [79] and it is unarguable that *Vedanta* has somehow changed the relevance of such a motive as a factor.

19. The judge's view that it was unlikely that Ritchie would sue Lancelot in the Cayman Islands [267] was challenged partly on the basis that he left out of account the *Cross-Border Insolvency Protocol Regarding Lancelot Investors Fund Limited which requires decisions of the Liquidator and the Courts of the Cayman Island*s in relation to the adjudication of proofs of debt and interest which is binding on the Trustee, in accordance with Cayman Islands' law. The judge plainly thought that had no bearing on the likelihood of irreconcilable judgments. Even if, as Mr Lowe QC contended ,it might explain why Ritchie had not proceeded against Lancelot before, it did not bear on the judge's view as to motive and on his consideration of the factors which fell to be taken into account in reaching a conclusion as to the appropriate forum. That is, no doubt, why he made no reference to the Protocol.

20. In my view Mr Lowe QC has failed to demonstrate that it is arguable that the judge adopted an incorrect approach or failed to take into account a relevant factor. In reality his submissions are permeated with complaints as to the weight the judge gave to different factors which were, beyond argument, relevant to his conclusion. That is fatal to his application under this head and, therefore, to this appeal. It is important to underline that the window for an appeal against a decision as to the appropriate forum is narrow indeed. As Lord Briggs reminded:

> "*[13] Nor is it permissible to dress up what is in reality a factual dispute as if it were, or involved a misdirection in law by the first instance judge……Within every jurisdiction dispute or embedded question whether there is a triable issue, the first instance judge faces a typical quandary; how to balance the requirement of proportionality against the need to ensure that resources are not wasted on an unnecessary trial. The choice, at how deep a level to conduct that analysis and then in how much detail to express conclusions in a judgment are matters for the experienced first instance judge, with which an appellate court should be slow to interfere."*

21. Whilst Lord Briggs was expressly referring to the nature of the hearing, it casts light on an important aspect of this application. It was for the judge to weigh the different factors, provided they are relevant, and this court cannot and should not interfere with his evaluative assessment, reached as a matter of what is called discretion. I would refuse leave to appeal against this part of Parker J's judgment.

Full and Frank Disclosure

22. Parker J's decision as to Ritchie's failures rested on five significant breaches of duty [281]. I need only refer to the failure to draw to the attention of the judge at the *ex parte* hearing that in the New York hearing Ritchie had accepted that it could have discovered GECC's wrongdoing in late October 2009. [281](a)]. The judge was plainly entitled to take the view that that was a highly material omission in relation to the issues of limitation.

23. Mr Lowe QC submits that the judge arguably erred in law in failing to consider whether this and the other omissions were of sufficient importance and gravity to justify setting aside the application. Having found that there were omissions, he submits that it is arguable the judge ought then to have gone on to consider whether they were such as to justify so draconian a consequence.

24. There is no doubt that the mere fact of breaches of the obligation of full and frank disclosure will not necessarily lead to the consequence of setting aside an *ex parte* order (see *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 at 1358c). But I do not think it is arguable that the judge failed to consider the relevance and gravity of the omissions and their consequence. He plainly had regard to culpability because he found that the omissions were, by a narrow whisker, not deliberate [295] [296]. That demonstrates beyond argument that the judge was evaluating, in a balanced way, what the consequences of the failures should be and the extent to which he had been misled.

25. During the course of the hearing, I raised the question whether the duty of disclosure was less onerous in an *ex parte* application to freeze assets, than in an *ex parte* application, such as this, to serve out of the jurisdiction. An exchange of authorities after the close of submissions demonstrates that the obligation to make frank disclosure is no less serious in the one case than the other. It is true, as the Applicant's reliance on *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 teaches, that what is material in an application for a freezing order will differ from that which is relevant in an application to serve out of the jurisdiction [25]-[27]. But the need for full and frank disclosure is no less and the consequences may be no less severe.

26. In *Libyan Investment Authority v JP Morgan Markets Ltd* [2019] EWHC 1452, Bryan J underlined the importance of the obligation in relation to service out of the jurisdiction. In that case, like the instant application, there had been a failure to refer to matters relevant to a limitation defence. Bryan J pointed out that it was no answer to say that the matters which had not been disclosed were points to be taken by way of defence at [107]. At [120] he said:

> "*The importance of the duty of full and frank disclosure, on applications for permission to serve out, cannot be overstated. There is a difference in terms of what the disclosure must be directed at, and the matters being considered, but the underlying reason and rationale for the duty remains the same, as is the need to comply with the same. A failure to comply with that duty is by its very nature serious---an individual or entity has been brought into the jurisdiction without having had the opportunity to address the court as to why permission should not be granted, and as demonstrated by the present case, they are then exposed to very considerable costs upon an application to set jurisdiction aside.*"

27. Nor is it arguable that the judge was not entitled to reach the conclusions he did as to the fact and relevance of the omissions. He had heard the application by way of the *ex parte* hearing, and was in the best position to judge, in the light of what emerged at the subsequent *inter partes* hearing, the nature and effect of the failures. His reliance on those failures to set aside his own order fell well within the legitimate range of conclusion (see *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381 [70] and [72]).

28. For those reasons I would refuse leave. That I have not dealt with the other arguments advanced in relation to other grounds is not to be taken as an expression of any view as to their merit. I have not done so because no appeal is possible unless, as I have said, Ritchie could establish that each and every basis on which the judge set aside his order is arguably wrong. In my judgment, it cannot do so.

The Hon C Dennis Morrison, Justice of Appeal

29. I agree.

The Rt. Hon Sir John Goldring

30. I also agree.