

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 47 OF 2009 (IKJ)

BETWEEN

RIAD TAWFIQ AL SADIK

Plaintiff

-and-

- (1) INVESTCORP BANK B.S.C.**
- (2) INVESTCORP INVESTMENT ADVISERS LIMITED**
- (3) SHALLOT IAM LIMITED**
- (4) BLOSSOM IAM LIMITED**
- (5) INVESTCORP NOMINEE HOLDER LIMITED**
- (6) INVESTCORP TRADING LIMITED**

Defendants

IN CHAMBERS

Appearances:

Lord Falconer of Thoroton of counsel and Ms Shelley White and Ms Sarah Gavin of Walkers, on behalf of the 1st Defendant (“Investcorp”)

Mr Tom Lowe QC of counsel and Ms Jessica Williams, Mr Lachlan Greig and Ms Anya Park, of Harney, Westwood & Riegels, on behalf of the Plaintiff

Before: The Hon. Justice Kawaley

Heard: 18 October 2018

**Draft Judgment
Circulated:** 2 November 2018

**Judgment
Delivered:** 13 November 2018



HEADNOTE

Application for anti-suit injunction in support of Cayman Islands final judgment-finality in litigation-whether proceedings brought by Plaintiff in Dubai in breach of exclusive jurisdiction clause-abuse of process-issue estoppel-whether claims asserted in Dubai could or should have been asserted in Cayman Islands proceedings

JUDGMENT

Introductory

1. Pursuant to a Share Purchase Agreement between the Plaintiff and Investcorp dated March 1, 2008 (the “SPA”), the Plaintiff invested approximately US\$136 million with Investcorp. The Plaintiff redeemed his shares in December 2008, after the collapse of Lehman Brothers in September 2008, for approximately US\$80 million. This return reflected a loss of around 42 per cent. On December 14, 2009, the Plaintiff commenced proceedings in this Court against, *inter alia*, Investcorp, with a view to recovering this loss.
2. By a Judgment and Order dated May 18, 2012 (the “Judgment”), this Court (Jones J.) dismissed the Plaintiff’s claims herein. On May 30, 2012, the Plaintiff appealed against this judgment to the Cayman Islands Court of Appeal. The Court of Appeal dismissed the appeal September 21, 2016. The Plaintiff’s further appeal to the Judicial Committee of the Privy Council was heard on April 30 and May 1, 2018. On May 28, 2018, the Plaintiff commenced proceedings in the Dubai Court of First Instance seeking to set aside the SPA (the “Dubai Proceedings”). On June 18, 2018 (in *Al Sadik-v-Investcorp Bank and others* [2018] UKPC 15), the Privy Council delivered its advice that the Plaintiff’s appeal should be dismissed. By Order dated June 27, 2018, the Plaintiff’s final appeal was dismissed.
3. By an interlocutory Summons issued on August 31, 2018, Investcorp seeks declarations that:



- (a) the subject matter of the Dubai Proceedings are disputes within the exclusive jurisdiction clause of the SPA;
 - (b) the Judgment is a final and binding Order of this Court;
 - (c) the commencement and continuation of the Dubai Proceedings constitute a breach by the Plaintiff of clause L.1 of the SPA and are vexatious and oppressive in any event; and Orders that
 - (d) until further order, the Plaintiff shall not take any further steps in the Dubai Proceedings;
 - (e) until further order, the Plaintiff shall not commence or pursue any proceedings in connection with any dispute arising out of or relating to the SPA in any court other than the courts of the Cayman Islands;
 - (f) the Plaintiff shall within 14 days of the date of this order, terminate the Dubai Proceedings.
4. On October 14, 2018, four days before Investcorp's Summons seeking anti-suit relief in respect of the Dubai Proceedings was due to be heard, the Plaintiff filed an Amended Claim in the Dubai Proceedings which undertook not to re-litigate the issues determined by the Judgment but seeking compensation for the same investment loss based on alleged breaches of Dubai regulatory law.
5. In brief, Investcorp seeks to restrain the Plaintiff from continuing the Dubai Proceedings on the grounds that they are being pursued either in breach of the exclusive jurisdiction clause in the SPA (the "EJC") or are oppressive and vexatious because the claims being pursued belonged to the present action and could with reasonable diligence have been pursued herein.



The Judgment

6. The salient elements of the dispute which culminated in the Judgment can most conveniently be found in the Privy Council's decision dismissing the Plaintiff's appeal. The present application justifies attention to what type of litigant the Plaintiff is, the nature of his investment, the nature of his claims and, finally, the disposition of those claims.

The Plaintiff's profile as a litigant

7. That the Plaintiff is, and at all material times was, a well-resourced sophisticated commercial litigant does not appear to me to be in dispute. Lord Briggs (delivering the advice of the Judicial Committee described him and his financial position before he invested with Investcorp in this way:

“3. The appellant Mr Riad Tawfiq Al Sadik is a very wealthy, very experienced businessman, resident in Dubai. By 2007 his company Al Habtoor Engineering Enterprises LLC had become the largest construction and engineering company in the United Arab Emirates, with over 40,000 employees. In the course of a merger between Habtoor and an Australian company in 2007, Mr Al Sadik sold 45% of his shares in Habtoor for AED1.2 billion.”

The nature of the Plaintiff's investment

8. The actual investment made by the Plaintiff was considered not in isolation but in light of the proposal which preceded it. This was described in the following way:

“4. By the end of 2007 Mr Al Sadik was considering investing a substantial proportion of that sum in a hedge fund strategy promoted by the first respondent Investcorp Bank BSC (“Investcorp”) which was (and remains) an international investment firm, with offices in Bahrain, London and New York. On 28 January 2008 representatives of Investcorp presented Mr Al Sadik with a written proposal for investment (“the Investment Proposal”). This outlined a strategy for the investment of AED1 billion in three Investcorp funds. 50% was to be invested in the Leverage Diversified Strategies Fund Ltd SPC (“LDSF”) at 3x leverage. The remainder was to be invested in two blocks of 25% each in Single Managers Fund Ltd SPC (“SMFCo”) at 1x leverage and in Leveraged Event



Driven Fund (“LEDF”) at 1x leverage. The Portfolio Objectives identified in the Investment Proposal included a target return of 45%+ over a three-year investment horizon. The Investment Proposal made it clear that the amount of leverage within the portfolio might change from time to time, but the aggregate initial leverage would be 2x: ie borrowing an additional AED2 billion in excess of the initial investment of AED1 billion. Each of LDSF, SMFCo and LEDF were, for leverage purposes, broadly equivalent to feeder funds as described above, so that the leverage method implicitly described in the Investment Proposal was the second of those outlined in para 2 above. Those three funds were available for investment by numerous Investcorp customers.

5. In the event, Mr Al Sadik decided only to invest AED500m (US\$136m odd) with Investcorp pursuant to a written Share Purchase Agreement (“the SPA”) dated 1 March 2008 and made between him and (1) Investcorp (2) Investcorp Nominee Holder Ltd and (3) Shallot IAM Ltd (“Shallot”).

6. The meaning of the SPA is a core issue in this appeal...”

9. The main provisions of the SPA, for the purposes of the Privy Council appeal, are then set out at paragraph 6:

“Clause A

PURPOSE

I/We have requested Investcorp Bank B.S.C. (‘Investcorp’) to establish a separately managed account (the ‘Investment Account’), which will invest in certain hedge funds or segregated accounts with any hedge fund managers selected by the Investment Manager (as defined below), including, but not limited to, any Investcorp hedge fund (whether an Investcorp Fund of Hedge Funds, an Investcorp Single Manager Fund or any other Investcorp hedge fund product (any of the foregoing, an ‘Investcorp Hedge Fund’) or a hedge fund or a segregated account with any other hedge fund manager; provided, however that any such other hedge fund manager is at the time of investment a manager with which an Investcorp Hedge Fund is invested. The Investment Account will be established as a special purpose vehicle, Shallot IAM Limited which will be incorporated under the laws of the Cayman Islands (the ‘Company’). All assets of the Company are hereafter referred to as the ‘Assets Under Management’ and each hedge fund or segregated account in which Assets Under Management are invested is hereafter referred to as an ‘Underlying Investment’. To the extent



that Assets Under Management are invested in any Investcorp Fund of Hedge Funds, such investment will be made in non-fee bearing shares.

Clause D

ACTIONS TO BE TAKEN PRIOR TO ACCEPTANCE OF SUBSCRIPTION

In contemplation of my/our investment, and as a condition precedent to the final acceptance thereof, I/we understand and agree that the following actions shall be taken:

1. The Company will enter into (a) an Investment Management Agreement (the 'Management Agreement'), pursuant to which the Company will appoint Investcorp Investment Advisers Limited ('IIAL' or the 'Investment Manager') as its sole and exclusive manager in respect of its acquisition, holding and disposition of its corporate assets. I/We understand that I/we may receive a copy of the Management Agreement upon written request to Investcorp.

2. The initial shareholder of the Company has elected the directors of the Company, who will continue to serve as directors of the Company until their successors are duly elected. I/We understand that the incumbent directors will have the power to fill any vacancies on the Company's board of directors. I/We further understand that the Company's board of directors will authorize or otherwise cause the Company to take any actions that the board believes are necessary or desirable in order to effectuate the purposes of this investment or otherwise manage the affairs of the Company.

Clause F.4

CALCULATION OF NET ASSET VALUE; REPORTS

4. A monthly statement of the Underlying Investments will be issued as soon as practicable after estimated net asset values have been received from all of the Underlying Investments or their administrators.

Clause H

REDEMPTION OF COMPANY SHARES

I/We may some [sic] or all of my/our Company Shares on the following terms:



1. I/We may redeem up to UAE Dirham 166,000,000 of the Company Shares at the end of any calendar quarter on not less than 60 days written notice.

2. I/We may redeem up to the remaining balance of the Company Shares, after the first anniversary of the initial investment, at the end of any calendar quarter on not less than 60 days written notice.

...

Clause I

BORROWING RELATIONSHIPS

In connection with my/our Investment, I/we understand and agree that the Company may be involved in certain borrowing relationships in accordance with the following terms:

1. The Company may borrow from third-party lenders, and in some cases from Investcorp, to meet possible temporary cash shortfalls and for other corporate purposes 'Liquidity Borrowings'. The aggregate amount of Liquidity Borrowings shall not exceed 25% of the equity of the Company.

2. The Company will seek to ensure that any interest rate and/or fees payable in connection with borrowings from Investcorp will be substantially in accordance with market practice."

10. Distilled to its essence, under the SPA the Plaintiff agreed to invest in a Cayman Islands special purpose vehicle which would make underlying investments in hedge funds which would be placed by an Investcorp affiliate acting as Investment Manager. How the investment was actually implemented was described by the Privy Council as follows:

"7. As is apparent from Clause A of the SPA, Shallot was to be (and was) incorporated in the Cayman Islands, as a special purpose vehicle for handling Mr Al Sadik's investment, controlled by directors appointed by Investcorp. Mr Al Sadik had already paid AED500m to Investcorp in late February 2008. In early March it was converted to US\$136m and credited to an account of Shallot. Contrary to Clause D1 of the SPA, Shallot did not appoint Investcorp Investment Advisors Ltd as Investment Manager (or anyone else) either then or for another year. Nonetheless Mr Al Sadik's investment was effectively managed by Investcorp, the requisite authority for that purpose from Shallot being provided by its directors, who were Investcorp appointees.



8. As it was entitled to do under the SPA, Investcorp had in the meantime decided not to proceed to invest Mr Al Sadik's money strictly in accordance with the Investment Proposal. Rather, it decided to split his investment between DSF (which was the hedge fund for which LDSF, described in the Investment Proposal, was the feeder fund) as to 50% and as to the balance between (initially) five single manager funds, for which SMFCo was, or was equivalent to, the relevant feeder fund. That decision did not involve abandonment by Investcorp of an intention to leverage Mr Al Sadik's investment. On the contrary, its strategy involved 2x leverage of the 50% investment in DSF and 3x leverage of the investment of the balance in single manager funds. Since (for reasons which do not matter) the plan to leverage within feeder funds had been abandoned, Investcorp decided to achieve its planned leverage through a newly incorporated SPV, the fourth respondent Blossom IAM Ltd ("Blossom"), which was established as a wholly owned subsidiary of Shallot. After retaining US\$1.129m, for use in part to establish currency hedges as between AED and US\$, Shallot paid the balance of Mr Al Sadik's money to Blossom, which was in due course added as a party to a recently negotiated Master Note Purchase Agreement called White Ibis III whereby Investcorp could leverage customers' investments by borrowing from Royal Bank of Scotland ("RBS"). This enabled Blossom to leverage Mr Al Sadik's investments in the hedge funds described above by borrowing from RBS on the terms of the White Ibis III facility, on a non-recourse basis, secured on the assets constituted by the investment of Mr Al Sadik's money, together with the borrowed money, into the hedge funds."

11. The fact that mention is made of the pre-SPA proposal is noteworthy because it illustrates the fact that attention was given in the present action not simply to the SPA which was concluded, but also representations made by Investcorp before the agreement was consummated.

The issues raised by the Plaintiff in the Privy Council appeal and the Plaintiff's claims in the present proceedings

12. The main issues in the Privy Council appeal were summarised being two:



“9. The two main issues in this appeal are whether (a) Shallot’s transfer of the balance of Mr Al Sadik’s money to Blossom and (b) Blossom’s leveraging of those funds under the White Ibis III facility at the direction of Investcorp and Shallot represented breaches of the SPA by Investcorp and Shallot.”

13. The wider claims made by the Plaintiff at the beginning of this action were summarised by Lord Briggs in the following way:

“15. Mr Al Sadik issued claims against Investcorp, Shallot, Blossom and other Investcorp entities in the Grand Court of the Cayman Islands on 14 December 2009. By the time of trial his wide-ranging claims, set out in a re-re-Amended Statement of Claim, were described by the Judge (at para 1.14 of his judgment) under the following headings:

- a) Collateral contract.*
- b) Fraudulent misrepresentation inducing the SPA.*
- c) Unauthorised leveraging coupled with deceitful non-disclosure of it.*
- d) Breach of trust.*

16. Taking those heads of claim briefly, and in turn, the collateral contract claim consisted of an allegation that Investcorp had given a contractual guarantee of a 45% return on Mr Al Sadik’s investment over three years (collateral to the SPA) and then repudiated it. This was rejected by the judge and by the Court of Appeal. It has not been pursued before the Board.

17. The second claim (dishonest misrepresentation procuring the SPA) was abandoned on day 26 of the ten-week trial. The alleged fraud had been based upon the supposed motive that Investcorp sought Mr Al Sadik’s money to remedy a cash-flow shortage in its hedge funds business, and it was abandoned when it became apparent that there had been no such shortage.

18. The third claim was rejected both by the judge and by the Court of Appeal, but has been pursued before the Board. It will be necessary to describe it in more detail later but, in outline, the case was that the SPA did not authorise the transfer of Mr Al Sadik’s money by Shallot otherwise than by investment in a qualifying



hedge fund, and did not authorise borrowing other than for liquidity purposes, under Clause I of the SPA, so that both the payment to Blossom and its leveraging by means of the White Ibis III facility were unauthorised....

20. Finally, the fourth head of claim in breach of trust was based upon the allegation, rejected by the judge and by the Court of Appeal, that the defendants had pursued the leveraging of Mr Al Sadik's portfolio for their own purposes rather than in Mr Al Sadik's best interests, and therefore in breach of fiduciary duty. This had originally been pleaded upon the basis of the alleged (but eventually abandoned) motivation of Investcorp to remedy a cash flow shortage, but was pursued unsuccessfully after the abandonment of that allegation on narrower grounds which the judge decided had not been pleaded but which, in any event, he rejected on the merits. The Court of Appeal concluded that the judge was entitled, on the evidence, to reach that conclusion, and the breach of trust claim has not been pursued before the Board."

14. From this summary of the Plaintiff's claims it is apparent that he initially sought to rescind the SPA on the grounds of fraudulent misrepresentation and also, more broadly, asserted claims which alleged that Investcorp had acted in bad faith and/or dishonestly. The 'deceitful non-disclosure' claim sought to rescind the SPA (see paragraph 54 of the Privy Council judgment). It is also apparent that the Plaintiff was willing to assert claims which he was later forced to abandon, effectively adopting a scatter-gun approach. Lord Falconer in oral argument in the present case characterised the proceedings as "kitchen sink" litigation.
15. In summary, it is clear that the present action was commenced by the Plaintiff in respect of a single investment he made with Investcorp in 2008 with a view to recouping his substantial losses. Wide-ranging claims were asserted, some of which sought to rescind or set aside the SPA on the grounds of misrepresentations which allegedly induced the Plaintiff to enter into the agreement. The financial loss was described by the Privy Council in the following way:

"14... Upon redemption, he received back only AED292,398,778.45 of his original AED1/2 billion investment, incurring a loss slightly in excess of AED207m, ie 41.5% of his original investment."



The disposition of the Plaintiff's claims

16. The Plaintiff's claims in respect of his investment loss of approximately AED207 million were dismissed by this Court (Jones J.) in a final judgment dated May 18, 2012. His appeal against that decision to the Court of Appeal was dismissed on September 21, 2016. His appeal against the decisions of this Court and the Cayman Islands Court of Appeal was dismissed by the Judicial Committee of the Privy Council by Order dated June 27, 2018.

The Dubai Proceedings

17. The Dubai Proceedings can conveniently be analysed by reference to the original claim and the amended claim ("Original Claim" and "Amended Claim") and, within each claim, by reference to the relief sought and the claims asserted.

The Original Claim

18. The Original Claim brought by the Plaintiff against Investcorp filed on or about May 28, 2018 exhibited a copy of the SPA and contained the following summary of the Claim under the heading "case subject":

"Petition for nullification and/or avoidance of the Investment Contract and charging the Defendant with an amount of AED 207,601,221.55 in addition to 9% interest, from the due date until the full satisfaction, as well as the charges and expenses and alternatively to appoint a three-member expert committee."

19. The claim was on its face a claim for the same loss and an attempt to set aside the same contract which was the subject of the present proceedings. Most of the averments appear to advance complaints which were advanced and rejected in the present proceedings. However, a new illegality claim was asserted:

"3. After several meetings held in Dubai between the Plaintiff and the representatives of the Defendant Bank, the Plaintiff was deluded into thinking that the Defendant is licensed and duly permitted as a foreign entity to carry



out such investment activities in the U.A.E., including marketing, selling investment products. However, the Plaintiff discovered and knew that, recently (in 2018), the Defendant was not actually licensed or authorized by the Central bank of the U.A.E. to or Securities & Commodities Authority to carry out such business in the U.A.E...

16. Whereas the Investment Agreement, under which the Defendant received an amount of AED 500 Million from the Plaintiff, is an agreement concluded without the Defendant's obtaining a license from the Central Bank to carry out such business and to receive such amounts for such purposes in the U.A.E., which makes this Contract unlawful one, in respect of its description and origin, with varied elements, object and form, from those prescribed by law. This makes the Contract void pursuant to the provisions of Article 210 of the Civil Transactions Law, which requires reinstating the Contracting Parties, as per the provisions of Articles 274 and 275 of the Civil Transaction Law."

20. While the primary substantive relief sought was based in part on this new claim, it also asserted what appear to be very similar to the breach of contract and deceitful non-disclosure claims previously asserted in this action:

"2. To rule that the Investment Contract concluded between the Plaintiff and the Defendant is null and/or void, due to having the Defendant failed to obtain the license required for conducting transactions in the U.A.E., as well as the Defendant's breach of the clauses and conditions of the agreed-upon investment and its deliberate deceiving of the of the Plaintiff, concealing material facts from the Plaintiff, manipulating the Plaintiff's funds and as a result, to [sic] obligated the Defendant to pay to the Plaintiff an amount of AED207,601,221.55...in addition to 9% interest on the said sum, from the due date until the full satisfaction."

The Amended Claim

21. The present Summons was filed on August 31, 2018 and listed for hearing on October 18, 2018. The Amended Claim, which was filed on or about October 14, 2018, added the Plaintiff's wife as Second Plaintiff because the funds invested were said to have come from their joint account. It contains the following new averments:



“5. While the terms and conditions of the SPA are not at issue in this case, there are some provisions of the SPA which are relevant to understanding the background facts which give rise to this case...”

9. The First Plaintiff commenced legal proceedings against the Defendant in December 2009 in the Cayman Islands Court, for various causes of action which sought to enforce his rights and/or claims in connection with the SPA... Those claims were finally determined in favour of the Defendant upon final appeal to the Privy Council. The First Plaintiff did not claim that such claims shall be considered before this Court. The Plaintiffs, as well do not seek that such claims should be re-litigated in this Court. Those claims were brought in connection with the SPA and accordingly, were brought by the First Plaintiff in the Cayman Islands courts, in accordance with the terms of the SPA...”

22. The Amended Claim is significant for the fact that it acknowledges that the Plaintiff has no right to re-litigate the claims which were finally dismissed by the Privy Council. It also only explicitly advances the following lynchpin regulatory claim although the relief sought is an annulment of the SPA:

“11. The first violation is that the Defendant has conducted investment banking activities in the State, including the activity of marketing and promoting investments without a license and without the relevant regulatory approvals from the UAE Central bank and the Securities & Commodities Authority and that such conduct constituted a breach of Regulation 164/8/94 of the UAE Central Bank...”

13. As a result of the Defendant’s violation and breach of the UAE regulatory laws, therefore, any agreement between the Defendant and the Plaintiffs in relation to the payment of monies to the Defendant’s account on 27 February 2008 (before the execution of the Agreement) was illicit and unlawful and has no legal effect pursuant to Article 210 of the UAE Civil Transactions Code.”



23. Paragraph 18 does allege, consequentially, a breach of Article 246 of the Civil Transactions Code, which Investcorp characterised (by reference the Code) as a contractual claim. However, the relief sought is formulated in the following way:

“a. To adjudge the annulment of all arrangements between the Defendant and the Plaintiffs, which have no legal basis and which took place as a result of the deceitful conduct of the Defendant in relation with having no regulatory licenses or approvals, and to restore the Plaintiffs to their original status.

b. Consequently, to obligate the Defendant to pay the amount of AED 207,601,221.55 due to the Plaintiff and 12% as interest as of the due date and until full payment.

c. To obligate the Defendant to materially and immaterially remedy and compensate the Plaintiffs for the damage they incurred all along the period their claimed monies were deposited in the Defendant’s safe with the amount that the Court shall deem fit and appropriate to repair such damage, including moral damages.”

24. In summary, on its face the Amended Claim appears to be substantially grounded on a legal claim which was not advanced in the present action but it also appears to seek substantially the same compensatory relief in respect of the same umbrella transaction and the same investment loss.

The Evidence

25. Investcorp’s present Summons is primarily supported by the Eight Affidavit of Philip Rocher, a partner of Gibson Dunn & Crutcher UK LLP. This Affidavit explains the background to the application and exhibits key documents including the SPA and an “*informal translation*” of the original claim in the Dubai Proceedings. It then summarises the two bases for seeking to restrain the Plaintiff from further pursuing the Dubai Proceedings. The prejudice caused to Investcorp is then set out, essentially costs and the risks of inconsistent findings. It also asserted that the Plaintiff’s “*conduct in commencing these proceedings is unconscionable and risks undermining the integrity of this court’s processes.*”



26. The Plaintiff's response is primarily set out in the First Affidavit of Jeremy Miocevic, a partner of Curtis, Mallet-Prevost, Colt & Mosle LLP, based in Dubai. The deponent explains that the Amended Claim will be filed in Court on October 14, 2018, and that it will only assert regulatory claims. He also explains that the Dubai Proceedings were commenced because the Plaintiff discovered that Investcorp may not have been licensed in the UAE at the relevant time in May 2018. This is explained in the following way:

“14. At the time Mr Al Sadik transferred funds in UAE dirhams to Investcorp for the benefit of the joint client account he held with Mrs Al Sadik at Investcorp, they understood that Investcorp held the appropriate trade license and approval of the UAE Central bank to provide these services. The basis for this understanding is set out in the Amended Claim, including as I understood it, that Investcorp provided details of its UAE dirham bank account.

15. It is widely known in the UAE that in practice, no bank will permit any entity to open a UAE dirham account without holding a valid trade license. I understand that an entity without a trade license may only open foreign currency accounts.

16. In or around May 2018 Mr Al Sadik learned, through discussions with another investment bank, that Investcorp may not have held the required specific trade license at the time that it was marketing and promoting investments to Mr Al Sadik, or at the time that it solicited and received payments with respect to potential future investments. Mr Al Sadik subsequently inquired about the issue and obtained annual reports from the Central Bank of the UAE...

17. The annual reports for 2007 and 2008 indicate that Investcorp did not hold any license in the UAE at these times.

18. The 2013 annual report indicates that Investcorp first received its license to operate a 'representative office' in 2013, which indicates in my view that it had not previously held such a license...”



27. Mr Miocevic proceeds to assert that the Dubai Court is the most appropriate forum for interpreting and applying the UAE Civil Code, further deposing that the Amended Claim does not raise matters “*in connection with any dispute or disagreement under, or arising out of, or relating to the SPA*” (paragraph 33). He states that Mr and Mrs Al Sadik “*do not accept*” the complaints that Investcorp will suffer prejudice through the Dubai Proceedings or that there is a risk of inconsistent findings which would undermine the integrity of this Court’s process. It is averred that the Dubai Proceedings are based on different legal provisions and recently discovered factual matters. Mr Rocher in reply in his Ninth Affidavit notes that it is not suggested in the Plaintiff’s evidence that the enquiries made in 2018 about Investcorp’s regulatory status could not have been carried out in 2008.
28. The primary facts, the Court record in these proceedings and the Dubai Proceedings, were, with one exception, not in controversy. Nor were the terms of the EJC. Rather, how the relevant documents should be interpreted in light of the governing legal principles was hotly disputed. The only sworn evidence on either side came from the parties’ respective overseas attorneys. The one controversy which entailed primary fact finding was also not directly addressed and was left to inference. That was the question of whether or not there was a reasonable explanation for the Plaintiff only investigating Investcorp’s regulatory status in UAE in May 2018. It was at first blush surprising that such a contentious issue was dealt with on the basis of a lawyer relaying his instructions as if dealing with uncontroversial matters.

Legal findings: governing principles for the grant of anti-suit injunctions to enforce an exclusive jurisdiction clause.

Statutory jurisdiction

29. It was common ground that this Court’s jurisdiction to grant injunctive relief is ultimately derived from section 11 of the Grand Court Law and section 37(1) of the English Senior Courts Act 1981:

“11. (1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject



to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by-

(a) Her Majesty's High Court of Justice; and

(b) the Divisional Courts of that Court,

as constituted by the Supreme Court of Judicature (Consolidation) Act, 1925, and any Act of the Parliament of the United Kingdom amending or replacing that Act.

(2) Without prejudice to subsection (1), the Court shall have and shall be deemed always to have had power to make binding declarations of right in any matter whether any consequential relief is or could be claimed or not.”

Common law principles governing the exercise of the discretion in relation to anti-suit injunctions

30. It was also common ground that where an applicant has a legal right not to be sued abroad, this Court will ordinarily grant an anti-suit injunction, “*unless the party suing in the non-contractual forum can show strong reasons for suing in that forum*”: *Skeleton argument on behalf of Riad Tawfiq Al Sadik for hearing on 18 October 2018*, paragraph 15(a). Investcorp’s Skeleton Argument cited, *inter alia*, the following passage from the speech of Lord Bingham in *Donoghue –v-Armco* [2001]UKHL 64:

“24. *If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the*



absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case...

31. Mr Lowe QC referred to a recent consideration of these principles by this Court in *Re Argyle Funds SPC Inc.*, FSD 163 of 2017 (RPJ), judgment delivered on January 26, 2018 (unreported), and the *dicta* of Parker J. at paragraphs 47 and 48. These passages highlighted the heavy *prima facie* burden an applicant must discharge when seeking anti-suit injunctive relief at the interlocutory stage, and only secondarily acknowledged that the respondent “needs to establish that there are good or strong reasons for not enforcing the clauses.” In fact the relevant general principle more clearly appears in paragraph 45 of Parker J’s judgment where he opined as follows:

“45. From these authorities it is clear that the jurisdiction is discretionary and will not be exercised as a matter of course, but if the court finds that there is a binding arbitration or jurisdiction clause identifying a forum, then the court will ordinarily grant the injunction to enforce the contractual right that a party has bound itself to, unless there are good or strong reasons why that should not be done.”

32. The Cayman Islands Court of Appeal in *Argyle Funds SPC (In Official Liquidation)-v-BDO Cayman Ltd*, CICA (Civil) 8 of 2018, judgment dated October 8, 2018 (Field JA at paragraph 23), approved the statement of principles set out by Parker J. at first instance at paragraphs 39-45 of his judgment.

Approach to determining whether claims are within or without the scope of an exclusive jurisdiction clause

33. In the present case it was essentially common ground that the SPA contained the EJC, although the Plaintiff’s counsel sought to cast doubt on the clarity of its terms. What was in controversy was the narrower question of whether or not the claims asserted in the Dubai Proceedings were within or without the scope of the clause. The principles governing the interpretation of exclusive jurisdiction clauses are critical to this inquiry. In my judgment it is clear that this Court is required to construe the EJC broadly and assume that the parties to commercial contracts ordinarily prefer having all disputes



relating to a contract resolved in one forum rather than opting for a multiplicity of proceedings to resolve disputes arising out of a single contract. Investcorp's counsel referred the Court to ample authority justifying this conclusion.

34. In *Fiona Trust & Holding Corporation and others-v-Privalov* [2007] 4 All ER 951, Lord Hoffman opined as follows:

“13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at [17]: ‘[i]f any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.’”

14. This appears to be the approach adopted in Germany: see Schlosser ‘The Decision of 27 February 1970 of the Federal Supreme Court of the Federal Republic of Germany (Bundesgerichtshof)’ Arbitration Int 1990, 6(1) p 79:

‘There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals.’

15. If one adopts this approach, the language of clause 41 of Shelltime 4 contains nothing to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else...”

35. In *Hamilton-Smith-v-CMS Cameron McKenna LLP* [2016] EWHC 1115 (Ch), the issue of whether non-contractual claims were within a contractual exclusive jurisdiction clause was also considered. Nugee J. held:



“25...the House of Lords has deprecated the drawing of fine distinctions based on linguistic nuances in the various phrases used in clauses such as this. The principle is that the construction of such a clause should start from the assumption that the parties as rational businessmen are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal: *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40 at [13]. That was in fact said in relation to an arbitration clause, but there can be no doubt that the same principle applies with equal force to jurisdiction clauses, which are intended to do the same thing: see the discussion of this point by Lewison J in *Skype Technologies SA v Joltid Ltd* [2009] EWHC 2783 (Ch) at [14]-[17], which with respect is obviously right. On this principle, even if the language were much less favourable to CMS, the Court would start with the assumption that an exclusive jurisdiction clause in a professional retainer was likely to have been intended to cover claims in tort as well as claims in contract.”

36. This approach to construing exclusive jurisdiction clauses or arbitration clauses is of older vintage. In *The Playa Larga* [1983] 2 Lloyds LR 171 at 182, the Court of Appeal (Akner LJ) approved the following statement by Mustill J. (as he then was):

“It seems to me that the claimant must show either that the resolution of a contractual issue is necessary for a decision on the tortious claim... or, that the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other...”

37. Investcorp further submitted that in characterising the claims asserted in the Dubai Proceedings, the relevant conflict rules required this Court to apply Cayman Islands law. This proposition was not apparently challenged; the Plaintiff abandoned initial plans to adduce expert evidence on Dubai law. However, as will be seen below, this submission ignores the terms of the governing law clause, which appear to exclude the operation of Caymanian conflict rules. In its Skeleton Argument, Investcorp relied upon two passages from the English Court of Appeal decision in *Macmillan Inc.-v-Bishopsgate Investment Trust Plc (No. 3)* [1996] 1 WLR 387 to substantiate the further submission that the characterisation process should favour substance over form. Firstly, Auld LJ (at 407 B-C) opined as follows:



“Subject to what I shall say in a moment, characterisation or classification is governed by the lex fori. But characterisation or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system: see Cheshire & North's Private International Law, 12th ed., pp. 45-46, and Dicey & Morris, vol. 1, pp. 38-43, 45-48.”

38. Secondly, Aldous LJ (at 418A-B), stated:

“...Any claim, whether it be a claim that can be characterised as restitutionary or otherwise, may involve a number of issues which may have to be decided according to different systems of law. Thus it is necessary for the court to look at each issue and decide the appropriate law to apply to the resolution of that dispute...”

39. With respect, that passage does not support the proposition it was deployed in aid of. However, the passage is helpful in another, more general, sense. It illustrates the important practical point that courts in one jurisdiction often have to grapple with the problem of applying an appropriate foreign governing law to some claims or issues which form part of a claim. Litigants suing in Forum A routinely assert not simply claims governed by the law of Forum A, but claims or issues governed by the laws of Fora B and/or C and D as well. *Macmillan* does, however, support the broader principle that Cayman Islands law governs the characterisation of foreign claims, an issue which was itself not in dispute in that case. As Aldous LJ stated (at 417G):

“As appears from the second chapter of Dicey... the problem of characterising which judicial concept or category is appropriate, is not easy, but it is a task which is essential for the court to complete before it can go on to decide which system of law is to be used to decide the question in issue. In this case, the court's task is made easier as the parties are agreed that the characterisation of the issue is to be determined according to English law.”



40. It is not obvious to me from this case that the same conflict of law rule applies to the characterisation of foreign claims for all purposes. No authority was explicitly cited in support of the bare submission that Cayman Islands law governs the characterisation of the claims asserted in the Dubai Proceedings. However the simplest justification for this proposition is the terms of the governing law clause itself, which provides that the SPA is governed by Cayman Islands domestic law.
41. Be that as it may the issue before the Cayman Court is whether or not a foreign law claim falls within or without an exclusive jurisdiction clause found in a contract governed by Cayman Islands law. That issue in my judgment does not primarily turn upon how the foreign law claims are characterised. One is here concerned with construing the scope of a jurisdiction clause in accordance with the governing law of the relevant contract. This is an issue which will, absent unusual factors pointing in another direction, fall to be determined by Cayman Islands law.

Findings: is Investcorp entitled to an anti-suit injunction on contractual grounds?

The EJC: points arising

42. The SPA, as explained in Section A (“PURPOSE”), is an agreement governing the Plaintiff’s subscription for shares in a Cayman Islands company to be incorporated as an investment vehicle to be managed by Investcorp pursuant to establishing the Plaintiff’s “Investment Account”. Section L of the SPA provides as follows:

“The parties agree that this Agreement shall be governed by and construed in accordance with the laws of the Cayman Islands, excluding conflicts of law. In connection with any dispute or disagreement under, arising out of, relating to this Agreement, the parties consent and submit to the non-exclusive jurisdiction of the courts located within the Cayman Islands and agree that any such action or proceeding brought by a party to enforce any right, assert any claims or obtain any relief whatsoever in connection with this Agreement, shall be commenced by such party exclusively in the Cayman Islands.”

43. The most striking point which arises is the inconsistency between the words “submit to the non-exclusive jurisdiction of the courts located within the Cayman Islands” and the



agreement that any action or proceeding “*shall be commenced by such party exclusively in the Cayman Islands*”. Is the EJC an exclusive jurisdiction clause at all? The other noteworthy point is the breadth of the language used in terms of the range of matters which shall be litigated in the Cayman Islands.

44. A peripheral point, which was not regarded by counsel as significant in this regard, is that the governing law segment of the jurisdiction clause, the first sentence of paragraph 1 of Section L, applies “*laws of the Cayman Islands, excluding conflicts of law*”. Excluding the conflict of law rules of the Cayman Islands and applying the domestic law of the governing legal system alone appears, in terms of optics if nothing else, more consistent with an exclusive jurisdiction being selected by the parties rather than a non-exclusive one. However, it might equally be said to support the view that foreign law claims were intended to be excluded.
45. In these circumstances I ignore this aspect of the governing law clause and treat it as a neutral consideration for the purposes of determining the exclusivity and scope of the EJC.

Is the EJC an exclusive jurisdiction clause?

46. Investcorp advanced its case on the question of whether the EJC required exclusive submission of claims to which the clause applied to the exclusive jurisdiction of the Cayman Islands in the following way:
 - (a) the key question was whether a mandatory obligation to refer disputes to this Court was created: *Sohio Supply -v- Gatoil (USA) Inc* [1989] 1 Lloyd’s Rep 588 at 591. It clearly had been;
 - (b) further and in any event, since the Plaintiff had elected to sue in this jurisdiction, it was no longer open to him to contend for a competing forum: *Breams Trustees Ltd.-v-Upstream Downstream Simulation Services Ltd.* [2004] EWHC 211 (Ch) at paragraph 27.



47. The Plaintiff's counsel, astutely, did not challenge these cogent submissions, choosing to do battle on the scope of the clause terrain. In the Plaintiff's Skeleton Argument, it was submitted:

“25. It is for Investcorp to demonstrate that this clause applies. It is plainly self-contradictory. The clause suggests on the one hand that the parties submit to the ‘non-exclusive’ jurisdiction of the Cayman Court in relation to any dispute or disagreement under or arising out of, or relating to the SPA, but on the other hand, that the parties agree that proceedings to enforce a right, claim, or relief in connection with the SPA shall be commenced exclusively before the Cayman Court.

26. Notwithstanding this ambiguity, it is submitted that the allegations in the Amended Claim relate to matters that are distinct from the SPA...such that the clause is not engaged in any event.”

48. In my judgment despite the ambiguity, the only sensible commercial construction to place on the EJC is that it obliged the parties to obligatorily refer any disputes to which the clause applies to this Court. Firstly, I have regard to the presumption that rational businessmen would prefer to have all disputes determined in one forum. Secondly, the jurisdiction clause has two elements to it; one the ‘submission’ element and two the ‘forum for dispute reference purposes’. In my judgment the ‘submission’ element is otiose for present purposes. It is clear from the language used that all disputes to which the clause applies must be referred to the exclusive jurisdiction of this Court. I accept Investcorp's submissions in this regard. Although, as already noted, these submissions were not directly challenged, the exclusivity point was not expressly conceded either¹. I have accordingly considered this point more fully than may strictly have been required.
49. The soundness of Investcorp's primary submission on the exclusive nature of the EJC is confirmed by a decision not referred to in argument. In *Standard Bank Plc & Anor-v-Agrichem* [2007] EWHC 2595 (Comm), Teare J. held as follows:

¹ The Plaintiff's counsel indicated that Mr Al Sadik had instructed counsel “*not to dispute the issue of jurisdiction*”, a concession the precise scope of which I regard as unclear (Skeleton argument, paragraph 23).



“19. The manner in which jurisdiction clauses have been construed has a long history; see *Austrian Lloyd Steamship Company v Gresham Life Assurance Society Limited* [1903] 1 KB 249, *Sohio Supply Co. v Gatoil (USA) Inc.* [1989] 1 Lloyd’s Rep. 588, *S&W Berisford PLC v New Hampshire Insurance Co.* [1990] 1 Lloyd’s Rep. 454, *Continental Ban NA v Aekos Compania Naviera SA* [1994] 1 Lloyd’s Rep.505, *British Aerospace PLC v Dee Howard Co.* [1993] 1 Lloyd’s Rep. 368 and *Sinochem International Oil (London) Co.Ltd. v Mobil Sales and Supply Corporation* [2000] 1 Lloyd’s Rep. 670.

20. In the last mentioned case *Rix J.* summarised the essential question at para.32 as follows:

‘The test which has been developed for distinguishing an exclusive from a non-exclusive jurisdiction clause is whether on its proper construction the clause obliges the parties to resort to the relevant jurisdiction, irrespective of whether the word “exclusive” is used: Dicey and Morris 13th. ed 2000 at para.12-078. Or to put the issue in another way: is the obligation contained in the clause the intransitive one to submit to a jurisdiction if it is chosen by the other contracting party, or is it the transitive one to submit all disputes to the chosen jurisdiction?’

21. The natural meaning of the first limb of clause 19.2 is that it imposes an intransitive obligation to submit to the jurisdiction of the English Courts. However, the second limb of clause 19.2 lends itself to a transitive construction, namely, a mutual obligation to submit all disputes relating to the MSA to the English Courts. Moreover, in the context of parties who had chosen that the MSA would be governed by English law and had submitted to the jurisdiction of the English Courts it is difficult to think of a reason why they would have agreed to the English Court having non-exclusive jurisdiction (cf *Sohio v Gatoil* [1989] 1 Lloyd’s Rep.588 per Staughton LJ at p.591 col.2 – p.592 col.2).

22. It might be suggested that the use in the second limb of the word ‘may’ rather than ‘shall’ is indicative of the language of option rather than of obligation. However, this seems an unlikely intention having regard to the context and the use of the word ‘irrevocably’ which is suggestive of obligation rather than of option. I consider that the proper construction of the second limb of clause 19.2 is that once one party has decided that a dispute was to be referred to the English Court the other party is bound (because he irrevocably



agreed) to submit that dispute to the English Court. The suggestion that, despite the context and the use of the word 'irrevocably', a party was intended to be free to submit disputes relating to the MSA to a court other than the English Court in circumstances where the other party insisted upon the English Court is unlikely to have been the parties' intention; cf the discussion in Lobb Partnership v Aintree Racecourse [2000] CLC 431 at pp.434-435 per Colman J. In the present case the Bank decided to have the dispute decided in England by commencing proceedings in England."

50. The fall-back proposition that once an available non-exclusive jurisdiction has been selected it becomes in practical terms the exclusive jurisdiction in any event was clearly supported by the authorities on which *Investcorp* relied. In *Breams Trustees Ltd.-v-Upstream Downstream Simulation Services Ltd.* [2004] EWHC 211 (Ch) (at paragraph 27), Patten LJ stated: "*When (as in this case) the Claimant invokes its right to begin proceedings in the chosen jurisdiction, the Defendant is bound to accept that.*" Lord Falconer argued that this principle had even greater force in the present case where the Plaintiff had elected to sue in the contractually agreed forum. Reliance was also placed on Adrian Briggs, '*Civil Jurisdiction and Judgments*', Sixth Edition, at paragraph 4.51, where the learned author opines as follows²:

"...It may have been right to see the agreement on jurisdiction as initially being non-exclusive, but one which became exclusive, and binding in that sense, once it had been invoked by the claimant summoning the defendant before the English court; hardly a novel idea, for options to purchase operate in exactly the same way. If that were its true construction, the granting of an injunction to enforce it is right in principle."

Are the claims asserted in the Dubai Proceedings within the scope of the EJC?

51. Having found that the scope of jurisdiction clauses should be liberally construed, and that broadly expressed clauses embrace contractual and tort claims, the question of whether or not the claims asserted in the Amended Claim are within the scope of the EJC admits only an affirmative answer. The language of the clause clearly embraces contractual and non-contractual claims and could not be broader. The parties:

² Discussing *Sabah Shipyard (Pakistan) Ltd.-v-Islamic Republic of Pakistan* [2002] EWCA Civ 1643.



“...agree that any such action or proceeding brought by a party to enforce any right, assert any claims or obtain any relief whatsoever in connection with this Agreement, shall be commenced by such party exclusively in the Cayman Islands.” [Emphasis added]

52. The *Skeleton Argument on behalf of Investcorp Bank* summarised the submission pithily in the following way:

“50. The Amended Dubai Claim falls squarely within the material scope of the Jurisdiction Clause. The Illegality Claim and Tort Claims are undoubtedly claims ‘in connection with’ the SPA. The former is a claim that the SPA is void for illegality; the latter claims are in tort for damages in relation to Investcorp’s alleged wrongdoing regarding its ability to carry out the activities that were the subject matter of the SPA.”

53. The Plaintiff’s Skeleton Argument summarised his case in an equally clear and concise manner in the following submission:

“27. In summary, it is alleged that Investcorp (a) breached licensing regulations promulgated by the UAE Central Bank and (b) committed an ‘intentional tort’ through its misleading or deceitful conduct by silence that it was duly regulated to provide investment services in the UAE in that Mr and Mrs Al Sadik entered into this arrangement because they understood Investcorp was duly authorised to operate investment and banking services in the UAE. Mr and Mrs Al Sadik seek an ‘annulment’ of the arrangement entered into, prior to entry into the SPA, and return of monies paid on this basis, and damages.”

54. In other words, it was contended that the Amended Claim has successfully severed the Dubai Proceedings altogether from the SPA by limiting its attack to the pre-contractual arrangements entered into by the parties in the UAE and by asserting only claims governed by UAE law. I accept entirely that the Dubai Proceedings in their present form do not on their face seek any direct relief in respect of the SPA. The alleged breach of Regulation 164/8/94 by marketing and promoting investments without the requisite regulatory approvals, standing by itself, has little obvious connection with a share purchase agreement in relation to a Caymanian company governed by Caymanian law. The difficulty with the Plaintiff’s case is that the panoply of regulatory and tort claims



asserted culminate with a prayer for the following relief, described in the Plaintiff's Skeleton Argument (at paragraph 28) thus:

“(e) The relief sought in the Amended Claim is an ‘annulment’ of arrangements between Investcorp and Mr and Mrs Al Sadik, and to restore them to their original status by returning monies paid and associated damages.”

55. Mr Lowe QC was forced to rely on a wholly artificial and technical analysis which floated above the solid ground of commercial reality in order to support the submission that the Amended Claim in the Dubai Proceedings does not “*seek relief arising out of or relating to the SPA, nor does it ...seek relief connected to the SPA*”. The most obviously significant head of relief sought the return of the balance of the monies placed with Investcorp for investment under the legal umbrella of the SPA. Albeit at the second time of asking, the Amended Claim formulated complaints about Investcorp's right to negotiate an arrangement which was consummated through the execution of the SPA. It is impossible to see how it can be rationally concluded that a claim which seeks to recover monies the investment of which was governed by the SPA is not “connected to” the SPA.

56. Lord Falconer also relied upon the Original Claim to illustrate, in effect, the commercial reality underpinning the Dubai Proceedings. That claim explicitly sought relief in relation to the SPA. As far as the Amended Claim is concerned, the most significant feature which was identified as pointing to an obvious connection with the SPA was that the Amended Claim sought to recover the same loss as was unsuccessfully sought in the present proceedings. For example, paragraph 8 concluded as follows:

“Therefore, the balance amount between the AED 500,000,000 paid to the Defendant, on trust pending final agreement of the investment, and the monies returned to the Plaintiffs following their demand to liquidate the investments and return their monies, is a shortfall of AED 207,601,221.55.”

57. The practical effect of these claims coupled with the relief sought, Lord Falconer rightly submitted, was to invite the Dubai Court to declare that, by reason of a contravention of Emirati law, Investcorp lacked the legal capacity to validly enter into the SPA. Accordingly, all monies received were repayable. For my part, it is impossible to see how the Plaintiff can be entitled to recover the investment loss he suffered under the



SPA without the benefit of a legal finding which links the breaches of Emirati law pleaded in the Dubai Proceedings with the SPA. Investcorp cannot logically be compelled to repay monies lost under the SPA, which under Cayman Islands law the Plaintiff is not entitled to recover, without the validity of the implementation under the SPA being (directly or indirectly) impugned.

58. The loss complained of on any sensible view of the facts arose out of and is connected to the SPA, even if it is also related in a very remote sense to the alleged breaches of Emirati law. Investcorp must be entitled to defend the Dubai Proceedings, in part at least, on the basis that the Plaintiff suffered no loss as a result of any regulatory infractions because after preliminary discussions, the investment was actually placed under the terms of the SPA. Assuming Emirati law to be the same as Cayman Islands law, a sufficient causative link must be established, whether in contract or in tort, between the conduct complained of and the loss claimed.
59. Lord Falconer also sought to demonstrate the close factual connection between the claims asserted in Amended Claim and those asserted in the present proceedings by reference to the fact that a complaint was made herein about pre-contractual deceitful non-disclosure (Court of Appeal judgment, September 21, 2016, paragraph 16(3)). This illustrates the fact that the commercial relationship between the parties which was consummated in the SPA was explored in the present proceedings in its broadest canvass, with the Plaintiff himself asserting a claim about pre-contractual unlawful conduct. The Judgment of Jones J. describes this pre-contractual period as follows³:

- **October 18, 2007:** the Plaintiff was a sent an Investment Presentation;
- **November 27, 2007:** the Plaintiff met with an Investcorp team member in Dubai to discuss the Investment Presentation;
- **December 25, 2007:** a follow up meeting took place;
- **January 22, 2008:** a further meeting with the Plaintiff took place, this time attended by a hedge fund specialist;
- **January 28, 2008:** a further meeting took place to discuss the Investment Proposal;

³ Paragraphs 3.3-3.17.



- **February 24, 2008:** the first meeting to discuss the SPA took place at the Plaintiff's office in Dubai;
- **February 26-29, 2008;** further meetings to negotiate the terms of the SPA took place in Dubai, the first at the Plaintiff's new hotel;
- **March 1, 2009:** the SPA was signed.

60. Jones J. also makes reference to abandoned fraudulent misrepresentation claims⁴:

“Secondly, he claimed that Investcorp had fraudulently misrepresented to him certain aspects of his investment...these claims, coupled with a conspiracy claim...were abandoned after the conclusion of the evidence on the 26th day of the trial...”

61. Paragraph 6 of the Re-Re-Amended Statement of Claim (“RRASC”) refers to the “*Risk Representation*”. According to paragraph 11 of the RRASC:

“11. The evidence for the Risk Representation lies in the information given to Mr Al Sadik by Investcorp Bank about the investment, and in particular in the ‘Investment Proposal’, ‘Investment Presentation’ and the draft SPA...”

62. The “*Investment Representation*” was another aspect of the misrepresentation claim asserted by the Plaintiff in these proceedings which overlapped with the general pre-contractual factual matrix of which complaint is made in the Dubai Proceedings. It was alleged:

“16B. Investcorp Bank represented to Mr. Al Sadik at the time of the Investment Presentation, the Investment Proposal and all times until and after the signature of the SPA that the entire value of the Investment amount would be invested in Investcorp Hedge Funds or in other Authorised Investments...Investcorp Bank’s knowledge that the Investment Representation was not true was a deception. The deception made the Investment Representation into a pre-contractual

⁴ At paragraph 1.14.



misrepresentation on which Investcorp Bank intended Mr. Al Sadik to rely and on which he did rely. Mr. Al Sadik was induced by the misrepresentation to enter into the SPA and it was material.”

63. The abandoned fraudulent misrepresentation claim illustrates the factual connection between the present proceedings more vividly than the deceitful non-disclosure claim, because the latter claim was based on the temporal allegation that the Defendants “*began to carry out their intention on the same day as the signature of the SPA*” (RRASC, paragraph 21). Because the misrepresentation claims focussed on pre-contractual representations made during various meetings in Dubai, it is instructive to compare the averments set out in the above-quoted portions of the RRASC with the averments made in the Amended Claim:

“2. In or around the middle of October 2007, the Defendant, through its representatives... attended meetings with the First Plaintiff in his offices in the Emirate of Dubai, for the purposes of marketing hedge fund investments... The Defendant provided the First Plaintiff with investment presentations and attended meetings to explain these investment presentations to the First Plaintiff to convince him to invest ...

7. On the basis of the proposals made to the Plaintiffs by the Defendant and the conduct of the Defendant in requesting and attending meetings in the offices of the of the Plaintiffs in Dubai and the general conduct of the Defendant, including operating a bank account denominated in AED...the Plaintiffs understood, and had been led into this illusion by the Defendant, that the Defendant was an entity duly authorized to operate investment banking activities, including the marketing and selling of investment products and providing investment advice, in the United Arab Emirates...”

64. What was said by who in the context of pre-contractual negotiations was in issue at the trial before Jones J. In my judgment the factual terrain of the Dubai Proceedings and the factual matrix of the claims initially asserted by the Plaintiff in the present proceedings “*are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other*” (*The Playa Larga* [1983] 2 Lloyds LR 171 at 182). I find that an agreement to refer disputes about one form of



tortious pre-contractual conduct to the exclusive jurisdiction of this Court can only sensibly construed as covering all such claims arising out of the same factual matrix, without regard to the proper law of such claims.

65. It cannot be enough to escape the strictures of an exclusive jurisdiction clause for a litigant to identify any conceivable non-contractual foreign law claim, and then seek to set aside the contract under that foreign governing law having lost in the contractually agreed forum. This is not what rational businessmen would agree. If the pre-contractual meetings in the present case had taken place not just in Dubai, but in Doha as well, could the EJC sensibly be construed so as to permit the Plaintiff to launch similar regulatory-based proceedings in Qatar as well as Dubai?
66. Giving the EJC a liberal interpretation that an entirely orthodox view of the canons of contractual construction requires, I find that the regulatory and tortious claims asserted against Investcorp by the Plaintiff and his wife in the Amended Complaint filed in the Dubai Proceedings fall within the scope of the SPA's EJC. This is most simply because the main relief sought is substantially the same as that sought in relation to the SPA in the present proceedings. In addition, the claims asserted are closely connected with the same evidential and legal terrain which was covered in the present proceedings (albeit in relation to pre-contractual claims which were abandoned by the Plaintiff near the end of the trial).

Has the Plaintiff shown strong reasons why the EJC should not be enforced?

67. The Plaintiff's counsel rightly submitted that "*where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct*": *Donohue-v-Armco* [2002] 1 All ER 749 (at paragraph 24 f-g). In that case, the House of Lords declined to restrain the prosecution of a New York action against the applicant and other defendants who were not subject to the same English exclusive jurisdiction clause. The strong reasons were, at an early stage in both sets of proceedings, the undesirability of having the same issue decided in separate proceedings in London and New York.
68. It was also rightly submitted that in *The Eleftheria* [1970] P 94 at 100A-C, Brandon J. (in a passage approved by Lord Bingham in *Donohue-v-Armco*) identified the following



relevant discretionary factors, again at the pre-trial stage in context of deciding whether or not to enforce the right to a future trial in the contractually agreed forum:

“(a) In what country the evidence on issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies, and if so whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the Defendants genuinely desire a trial in the foreign country, or are only seeking procedural advantages. (e) Whether the Plaintiffs would be prejudiced by having to sue in a foreign court because they would (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.”

69. Although the issues were framed in the context of a suit in England in breach of a contract to sue abroad, I accept that these factors are recognised as potentially relevant ones where the converse is the case. However, they are factors which assume that the relevant analysis is taking place before the dispute covered by the exclusive jurisdiction clause has been adjudicated. Mr Lowe QC did refer in oral argument and in written submission to another judicial statement in aid of his client’s ambitious cause. In *Deutsche Bank AG-v-Highland Crusader Offshore Partners LP* [2010] 1 WLR 1023 at 1036 E-G, Toulson LJ stated:

“50... An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract. In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal polices may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.” [Emphasis added]



70. Reliance was placed on the second underlined portion of this passage, but the prefatory words of the first underlined text were ignored. The case before the English Court of Appeal involved a non-exclusive jurisdiction clause. Toulson LJ was explaining why in that context, it was necessary to have regard to considerations of comity and be more deferential to the foreign court. As Toulson LJ observed later in the same judgment:

“56. In Maxwell at 761-2...Hoffmann J observed that the theory that an anti-suit injunction is not an intended interference with the affairs of a foreign court, because it merely operates in personam upon a person subject to the jurisdiction of the English court, is a more realistic description in some cases than in others. It is a fair description where the injunction is intended to enforce a contractual submission to the exclusive jurisdiction of the English court. But where the court is not enforcing a contractual right under English law, the normal assumption is that an English court has no superiority over a foreign court in deciding what justice between the parties requires and, in particular, that both comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue...”

71. The Plaintiff relies on the fact that Emirati law applies and is different to Cayman Islands law, the factual connection of the claims and the Plaintiff and his wife with the UAE, and the fact that Investcorp is established in the region. Those factors may have carried some weight if the jurisdiction clause in the SPA was non-exclusive and the Plaintiff’s attempt to recoup his investment loss had not already been finally tried. In the context of seeking discretionary relief from an exclusive jurisdiction clause where the relevant dispute has already been unsuccessfully tried in the agreed adjudicative forum at the suit of the Plaintiff himself, I regard these as very weak grounds indeed.
72. Lord Falconer rightly submitted that the Plaintiff has failed to establish good strong reasons for this Court declining to enforce the EJC by granting the anti-suit injunction sought.

Summary on Investcorp’s contractual claim for an anti-suit injunction

73. Investcorp has established that the Plaintiff’s commencement and pursuit of the Dubai Proceedings are in breach of the EJC in the SPA. The Plaintiff has failed to discharge



the burden on him to show strong reasons why the anti-suit injunction sought should not be granted.

Legal findings: principles governing the grant of anti-suit injunctive relief on abuse of process grounds

74. It was common ground that this Court possesses the jurisdiction to grant an anti-suit injunction to restrain the pursuit of proceedings designed to litigate issues which should have been pursued in previous proceedings on abuse of process grounds. The applicant must demonstrate that the pursuit of the foreign proceedings is oppressive and vexatious and/or unconscionable. Whether an abuse of process exists or not is not a question of discretion. Whether, when an abuse of process has been established, injunctive relief should be granted turns on discretionary considerations. When it is sought to restrain proceedings which are pending in a foreign court, regard must be had to considerations of comity - the need for due respect to be given to the processes of the foreign court. The guiding public policy objective is the goal of achieving finality in litigation. Figuratively speaking, a litigant who has lost in one proceeding should not be permitted to re-litigate what is in substance the same dispute in subsequent proceedings, merrily singing “this is the case that never ends, it goes on and on my friend” (to the tune of the children’s song, ‘This is the Song that Never Ends’). For present purposes, the governing legal principle is issue estoppel, a branch of the wider *res judicata* principle, principles which were described more elegantly by Lord Sumption in *Virgin Atlantic Airways Ltd-v-Zodiac Seats UK Ltd*. [2014] AC 160 at 180, 184 as follows:

“17. Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle ...

22. ... Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.”

75. This jurisdiction is generally cited by reference to the case generally regarding as establishing the principle, *Henderson –v-Henderson* (1843) 3 Hare 100. Foster J. in



Nedgroup Trust (Jersey) Limited-v-Renova Industries Limited & Ors, FSD 11 of 2013 (AJEF), Judgment dated July 22, 2014 (unreported), described the jurisdiction as follows at paragraph 9.4:

“Accordingly, it would appear that decisions in earlier cases should now be read in light of this guidance from the House of Lords. The applicable principle behind Henderson v Henderson (supra) is ‘abuse of process’, namely the power of the court to prevent misuse of its procedure in such a way which would be unfair to a party to litigation or would bring the administration of justice into disrepute. ‘The bringing of a claim or the raising of a defence in later proceedings may amount to abuse of process if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedingsThe court should take a broad, merits-based approach which takes account of all the facts of the case and focusing on whether a party is misusing or abusing the process of the court’ see Clerk & Lindsell on Torts (20th Edn.) at 31-25.”

76. It was also common ground that the principle seeks in part to give effect to a public interest in finality in litigation: *Johnson-v-Gore-Wood & Co.* [2002] 2 AC 1 at 31 (Lord Bingham) and at 58-59 (Lord Millett). The critical question in controversy in the present case is whether or not the Plaintiff’s Dubai claims should have been raised in these proceedings. Another helpful recent statement of principle from this Court, relied upon by Investcorp, may be found in *Governor-v- Information Commissioner* [2015 (1) CILR 258] where Owen J. (Acting) cited at paragraph 33 the rule in *Henderson v. Henderson*:

“A claimant is barred from litigating a claim that has already been adjudicated upon or which could and should have been brought before the Court in earlier proceedings arising out of the same facts. Parties are expected to bring their whole case to the court and will in general not be permitted to re-open the same litigation in respect of a matter which they might have brought forward but did not, whether from negligence, inadvertence or even accident.”

77. The principle has been recognised by the Cayman Islands courts for many years. In *Miller-v-Gianne* [2007 CILR 18], Smellie CJ stated (at paragraph 51) that abuse of process in this context occurred “*where in subsequent proceedings matters are raised*



which could and therefore should have been litigated in earlier proceedings". Even earlier, in *Micro Industries Inc-v- Condoco Grand Cayman Resort Ltd* [2003 CILR 373], the Cayman Islands Court of Appeal (Taylor JA, at paragraph 17) stated that:

"...it will be an abuse of process for a party to raise in a later proceeding issues which were clearly part of the subject-matter of the earlier proceedings between the same parties, and could clearly have been raised in that earlier action."

78. Investcorp's counsel invited me to adopt the approach of Waller J. (as he then was) in *Zeeland Navigation Co.-v-Banque Worms* [1995] Lexis 1907:

"The question I pose myself at this stage is whether, if the plaintiffs commenced an action in England raising the above points, would the English court take the view that it was an abuse of process?..."

79. I accept that question is a helpful starting point in the analysis. But it does not follow that answering that question affirmatively will result in an anti-suit injunction being granted. It was not granted in *Zeeland*, as Mr Lowe QC pointed out. Waller J. (at page 11) stated:

"Injunctive relief with extraterritorial effect, as here proposed, must be an exceptional remedy... It is, after all, inconsistent with normal relations between friendly nations..."

80. It is important to note, however, that Waller J. declined to grant injunctive relief in deference to the Indonesian court's right to protect the integrity of its own judgments and the Cypriot court's demonstrated ability to grant similar anti-suit injunctive relief.

81. The Plaintiff's counsel also relied upon the following observations of Lawrence Collins LJ (as he then was) in *Masri-v-Consolidated Contractors Int (UK) Ltd (No.3)* [2009] 2 WLR 669 at 679:



“26...the English court has power over persons properly subject to its in personam jurisdiction to make ancillary orders in protection of its jurisdiction and its processes, including the integrity of its judgments. That power is of course a discretionary one, to be exercised in accordance with the requirements of international comity.”

82. In that case an anti-suit injunction was granted at first instance and upheld on appeal. The decision most significantly for present purposes supports the view that considerations of comity are far less important when the local court is being asked to uphold the integrity of its own judgments. Collins LJ concluded his judgment in *Masri* by opining as follows:

“100. The discretion was properly exercised in this case, consistently with the dictates of comity. It is consistent with principle for an English court to restrain re-litigation abroad of a claim which has already been subject of an English judgment. There is long-established authority that protection of the jurisdiction of the English court, its process and its judgments by injunction is a legitimate ground for the grant of an anti-suit injunction.”

Findings: is Investcorp entitled to an anti-suit injunction on abuse of process grounds?

Preliminary

83. In all the circumstances of the present case, it is difficult for me to envisage circumstances in which it would not properly be open to me to find that Investcorp was entitled to injunctive relief on contractual grounds yet still possible for me to find that injunctive relief should be granted on abuse of process grounds. There is a strong analytical overlap between the question of whether the claims asserted by the Plaintiff in Dubai fall within the scope of the EJC and the controversy over whether those same claims could and should have been asserted in the present proceedings. Nevertheless, in theoretical terms at least, there is a distinction between the question of whether a claim is within the scope of a jurisdiction clause and the question of whether or not a claim or issue forms part of a particular piece of litigation.
84. Accordingly, if it was not properly open to me on legal grounds to find that the Dubai Proceedings should be restrained on contractual grounds I would in any event find that



they ought to be restrained on abuse of process grounds. The relevant claims could and should have been asserted in these proceedings. “Could” and “should” are two distinct considerations. Mr Lowe QC justifiably relied on Lord Bingham’s observation in *Johnson-v-Gore-Wood & Co* [2002] 2 AC 1 at 31:

“...It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it later proceedings necessarily abusive...”

Could the claims asserted in Dubai have been asserted in these proceedings?

85. I do not understand the Plaintiff to dispute the proposition that it was legally possible for what Lord Falconer characterised as illegality arguments to be raised in these proceedings. As I have indicated in my findings above, the Amended Claim broadly asserts that Investcorp falsely represented that it was licensed in the UAE and authorised to market, negotiate and conclude the investment agreement which was consummated in the form of the SPA. By necessary implication, it also in my judgment asserts that Investcorp lacked the capacity to enter into the SPA so that all monies received by Investcorp from the Plaintiff are recoverable as the contract was unlawful.
86. This claim and the related tort claims could have been asserted, supported by expert evidence on Emirati law, and dealt with by Jones J. at trial.

Should the claims asserted in Dubai have been asserted in these proceedings?

87. The Plaintiff’s evidence in support of his case that it was not possible with reasonable diligence to have asserted the Dubai claims in the present proceedings amounts to this. He was misled by the conduct of Investcorp as to their regulatory status, in particular by the fact that it held a local currency account in the UAE, and only discovered the true regulatory position by chance in May 2018. This evidence lacked conviction, because it was not directly supported by the Plaintiff’s own evidence. Mr Lowe QC’s defence of the paucity of the evidence on due diligence was in part that it is impossible to prove a negative. Further, it was submitted that there was no basis for finding that the Plaintiff had acted unreasonably or that his lawyers had been negligent.



88. In legal terms, the Plaintiff's counsel also sought to fortify the weak evidential foundation for this limb of his client's case by legal arguments. Firstly he argued that there was no general requirement all claims relating the same facts had to be tried in the same court. Secondly he argued that there were differences of law and fact between the claims asserted in the two sets of proceedings.
89. Lord Falconer clearly demonstrated that the Plaintiff could with comparative ease have established that Investcorp was not regulated in the UAE and did not hold itself out as being regulated there at the beginning of the present proceedings. The true regulatory status of Investcorp was disclosed in its financial statements to which reference was made in the RRASC (at paragraph 26.A.1). The evidence adduced on behalf of the Plaintiff in response to the present application demonstrates how easy it was for the Plaintiff to obtain confirmation of the regulatory position in the UAE. However, the critical question is a more nuanced one. Should the Plaintiff have investigated the regulatory position when bringing his SPA-focussed claim?
90. The Plaintiff's express case on this issue is that he assumed at the time that Investcorp was licensed to do business in Dubai, and was led by its representatives' conduct to assume that it was. The indisputable factual position is that the various meetings which took place in the prelude to the execution of the SPA were the subject of scrutiny by the Plaintiff and his legal advisers, in particular, as regards the fraudulent misrepresentation claims but in relation to other claims as well. I rely for these purposes on my findings above (when dealing with the contractual limb of the injunction application) about the close connection between the claims in the two proceedings dealing with the pre-contractual 2007-2008 period. This was "kitchen sink" litigation (as Lord Falconer put it) in which the Plaintiff, a well-resourced litigant, sought to set aside the SPA on the grounds of allegedly dishonest conduct by Investcorp in the process of negotiating that agreement.
91. In my judgment the question of whether the monies received by Investcorp in relation to the SPA were liable to be repaid in full because Investcorp acted unlawfully before concluding the SPA very much belonged to the SPA litigation. The critical question is not so much whether the Plaintiff's legal advisers were negligent in failing to investigate the regulatory position. The relevant question is should the Plaintiff himself, who (according to Mr Miocevic) assumed at the time that Investcorp was regulated, have instructed his legal advisers to investigate the regulatory status of an entity which he was accusing of deceptive conduct during meetings in Dubai? In my judgment the



answer to this question must be informed by legal principle as opposed to a value-neutral objective assessment of the position.

92. The governing legal principle is that the public policy goal of finality, which underpins the issue estoppel principle, imposes a duty on a litigant to bring forward of all his related claims at one time. The accepted approach to the question of whether or not a ‘subsequent’ claim should have been brought in earlier proceedings is set out in an oft-cited passage in Lord Bingham’s speech in *Johnson-v-Gore-Wood & Co.* (*supra*) at page 31:

“...Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears



that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.” [Emphasis added]

93. In my judgment the most cogent indicator that the Amended Claim seeks to litigate in Dubai an issue which should have been pursued in these proceedings is that the principal relief sought is precisely or substantially the same in commercial and all but formal legal terms. The parties entered into one contract, the SPA, and the Plaintiff suffered one investment loss which he seeks to recover in the Dubai Proceedings having failed to recover in the present proceedings. It does amount to harassment of Investcorp for the Plaintiff to have commenced the Dubai Proceedings, in terms which blatantly sought to re-litigate the issues dealt with at three Cayman Island Court levels, even before judgment was delivered on his final appeal. The Amended Claim is a valiant but unhappily transparent attempt to disguise the true purpose of the Dubai Proceedings through legal sophistry.
94. Would the claims asserted in the Dubai Proceedings be regarded as an abuse of the process of this Court if brought here? They very clearly would be. In my judgment it must follow that Investcorp has established that their pursuit in the UAE is also an abuse of process which this Court possesses the jurisdictional competence to restrain.

Should the Court exercise its discretion to grant injunctive relief?

95. Mr Lowe QC referred the Court to an abundance of authority which demonstrated the need for caution and restraint when considering restraining proceedings overseas. They included the observations of Lord Scarman in *British Airways-v-Laker Airways* [1985] 1 A.C. 58 at 95G, Toulson LJ in *Deutsche Bank AG-v-Highland Crusader Offshore Partners LP* [2010] 1 WLR 1023 at 1036 E-G (set out above) and the observations of Lord Hobhouse in *Turner-v-Grovit* [2002] 1 WLR 107 at 119-120. Those judicial statements were either general propositions or made in circumstances in which the importance of comity was not diluted by countervailing policy concerns. However, in my judgment the present case is a ‘comity lite’ one, because this Court is being asked



to uphold the finality of one of its own judgments. In *Masri-v-Consolidated Contractors Int (UK) Ltd (No.3)* [2009] 2 WLR 669 at 693, Collins LJ held:

“80. *The judgment debtors say that it is contrary to principle for an injunction to be granted solely on the ground that it is sought to restrain the relitigation elsewhere of a matter which has already been decided in England. This is because it is a matter for the courts of the relevant country to decide, if need be by reference to their own choice of law rules and any applicable international treaty, what the effect of the English judgment on liability should be (The Western Regent [2005] 2 All (Comm) 515, paras 50,66) and it is not sufficient that the foreign litigation ignores, or seeks to obtain a result contrary to, the judgment of the English court: ED & F Man (Sugar) Ltd v Haryanto (No 2) [1991] 1 Lloyd’s Rep 429, at 437-438.*

81. *This argument is an appeal to considerations of international comity. In modern times the courts have often emphasised the importance of comity in the exercise of the discretion to grant anti-suit injunctions. Although the injunction is directed to the parties it involves an indirect interference with the foreign court, and caution is required before the injunction is granted: see, among many others, Cohen v Rothfield [1919] 1 KB 410, 413, per Scrutton LJ; Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] A.C. 871, 892, per Lord Goff of Chieveley. The litigation in Phillip Alexander Securities and Futures Ltd v. Bamberger [1996] CLC 1757 and in British Airways Board v Laker Airways Ltd [1985] A.C. 58 showed how foreign courts may object to the imposition of an anti-suit injunction by the English court. Comity may be decisive where the English court is asked to grant an anti-suit injunction when the case has no relevant connection with England, since to grant an injunction in such a case may be a breach of international law: Airbus Industrie v Patel [1999] 1 A.C. 119.*

82. *I do not accept the judgment debtors’ argument that there is a principle (whether it is expressed as a condition for the exercise of the jurisdiction, or as an aspect of comity, or as an element in the exercise of the discretion) that the English court will not restrain relitigation abroad of a claim which has already been the subject of an English judgment adverse to the person seeking to relitigate abroad. It has been established since at least 1837 that the fact that the respondent is seeking to relitigate in a foreign jurisdiction matters which are already res judicata between himself and the applicant by reason of an English judgment can be a sufficient ground for the grant of an anti-suit injunction...*

95. *But the present case is not a case where the foreign court has given a judgment with which an English injunction will be inconsistent. It is simply a case in which the judgment debtors are seeking to relitigate abroad the merits of a case which, after a long trial, they have lost in England. In my judgment it is a classic case of vexation and oppression, and of conduct which is designed to interfere with the process of the English court in litigation to which the judgment debtors submitted.* [Emphasis added]



96. The Plaintiff's counsel invited me, if I found that the case for an injunction was *prima facie* made out, to merely grant declaratory relief to avoid any interference with the foreign Court's processes. I decline this invitation. The Dubai Proceedings are at an early stage and to my mind it would be unjust in all the circumstances to require Investcorp to seek a formal stay from the Dubai Court having made out a case for injunctive relief before this Court. The need for such restraint is in my view not justified at the request of a Cayman Islands judgment debtor who elected to sue in this jurisdiction, lost, and is seeking to sue the judgment creditor abroad in respect of substantially the same dispute. Were the jurisdictional position reversed, this Court would expect the Dubai Court to assume responsibility for upholding the integrity of one of its own judgments.
97. Lord Falconer in reply submitted that the present case was a classic case of issue estoppel where injunctive relief ought properly to be granted. I agree.

Summary

98. The application for an anti-suit injunction is granted in favour of Investcorp on a contractual basis by way of enforcement of the EJC in the SPA together with a declaration that the subject matter of the Dubai Proceedings is disputes within that clause. I would in any event have granted similar injunctive relief on the alternative grounds that it is an abuse of the processes of this Court for the Plaintiff to seek to re-litigate abroad an issue which could and should have been advanced in the present proceedings which he initiated in this forum but lost.
99. I shall hear counsel if required as the terms of the Order to be drawn up to give effect to the present Judgment and as to costs.


HON MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

