**IN THE SUPREME COURT OF THE TURKS AND CAICOS ISLANDS** Action No. CL-78/2022

**BETWEEN:**

**(1) SEBASTIAN HOLDINGS INC.**
**(acting by Shane Crooks and Malcolm Cohen as joint receivers)**
**(2) SHANE CROOKS**
**(3) MALCOLM COHEN**

**Plaintiffs**

**– and –**

**(1) SAREK HOLDINGS LTD.**
**(2) ALEXANDER VIK**
**(3) PER JOHANSSON**
**(4) REITEN & CO CAPITAL PARTNERS VI GP LIMITED (in liquidation)**
**(5) REITEN & CO CAPITAL PARTNERS VII GP LIMITED**
**(6) SHARIFAH MORRIS**
**(in her capacity as liquidator of Reiten & Co Capital Partners VI GP Limited)**
**(7) SEBASTIAN HOLDINGS INC.**
**(acting by its director)**

**Defendants**

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RULING

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**Before:** Registrar Narendra Lalbeharry

**Appearances:** Tim Penny K.C for the Plaintiffs

**Hearing Date:** 25th May 2023

**Venue:** By Microsoft Teams

**Date Delivered:** 11th July 2023

INTRODUCTION

1. This ruling concerns an application made by the Plaintiffs for service of an Amended Writ and Statement of Claim on the Defendants out of jurisdiction. The application is supported by the Affidavits of Shane Michael Crooks ('the Crooks Affidavit') and Dominique Alexandria Gardiner ('the Gardiner Affidavit').

BACKGROUND

2. By way of background, in 2009 Deutschebank AG ('DBAG') commenced proceedings against Sebastian Holdings Inc. ('SHI') in the High Court of Justice of England and Wales claiming approximately US$250 million in respect of sums owed to DBAG by SHI. On 8th November 2013, SHI was ordered by the English High Court to pay to DBAG US$243,023,089 plus interest ('the Judgment Debt'). The outstanding amount of the Judgment Debt including interest, increased to US$350,065,255.00 as at 15th August 2022.

3. In these proceedings, the Plaintiffs claim all amounts due to SHI in respect of its interests in and claims relating to Reiten & Co Capital Partners VI ('Reiten VI') and Reiten & Co Capital Partners VII LP ('Reiten VII') (together, 'the Reiten LPs'), which are private equity funds registered as limited partnerships in England and Wales governed by the Limited Partnerships Act 1907 of England and Wales, but administered in Guernsey by Fourth and Fifth Defendants ('the Guernsey GPs').

4. By agreement with Reiten VI, SHI made total capital and loan contributions in the sum of €12.5 million and was admitted as a limited partner of Reiten VI on 15th December 2005. Subsequently by agreement with Reiten VII, SHI made a total capital and loan contribution of €25 million and was admitted as a limited partner on or around 20th April 2007.

5. The Plaintiff's case is that in or around 2nd January 2009 in breach of fiduciary duty and breach of trust, SHI's interest in Reiten VI was transferred to Sarek Holdings Limited ('Sarek') and on the same date SHI's interest in Reiten VII was transferred to Otto Inc ('Otto') which was then transferred from Otto to SHI on or about 24th March 2009 and finally from SHI to Sarek on or about 12 April 2011. The Receivers now seek recovery of all of SHI's Reiten interests.

6. At paragraph 118 of the Crooks Affidavit, it is stated SHI transferred its interest in Reiten VI to Sarek was registered on 31st December 2008 stating, *"On 2nd January 2009, Sebastian Holding Inc transferred its entire interest in the Partnership to Sarek*

*Holdings Ltd, which received a capital contribution of Euro 125,000.00 and consequently on that date Sarek Holdings Ltd became a limited partner"*. The transfer was then advertised in the London Gazette on 9 January 2009 which stated that the transfer had taken place on the 2nd of January 2009.

7. At paragraphs 119 to 121 of the Crooks Affidavit, it is stated that SHI's interest in Reiten VII to Otto was registered at Companies House on 2nd January 2009 which was subsequently advertised in the London Gazette on 9 January 2009. The re-transfer of the interest in Reiten VII from Otto to SHI was registered on 25th March 2009 and then advertised in the London Gazette on 30th March 2009. The transfer of Reiten VII from SHI to Sarek was registered with the Companies House on 20th May 2011 stating that the transfer was made on 12 April 2011.

8. At paragraph 123 of the Crooks Affidavit, it is stated that the Deed of Transfer for both Reiten VI and VII transfers had a "(handwritten) effective date of 16th September 2008". The Deed of transfer for Reiten VII from SHI to Sarek had a "typed effective date of 1 January 2009. The Deed of Transfer for the re-transfer from Otto to SHI was "dated 24th February 2009 but has a (handwritten) effective date of 16th September 2008.

9. At paragraph 124 of the Crooks Affidavit, it is stated the Deeds of Transfer for Reiten VI and VII from SHI to Sarek and Otto respectively all have fax time stamps of 18th November 2008, 25th February 2009 for the re-transfer to SHI and 25th April 2011 for transfer from SHI to Sarek.

10. On the 20th of January 2009 DBAG issued a formal demand. On 21st Jan 2009 DBAG commenced legal proceedings and obtained Judgment in favour of DBAG. The Plaintiffs contend both in their pleadings and in the Crooks Affidavit that the transfer took place at a time after SHI was aware of the liability to DBAG, the transfers were made without consideration and not made to a bona fide purchaser. It is inferred this was done to put the assets beyond the reach of DBAG and dishonestly so.

11. On 18th January 2017, DBAG applied to the High Court of Justice of England and Wales for the appointment of the 2nd and 3rd Plaintiffs herein, as receivers of SHI ('the Receivers'). On 17th February 2017 a Receivership Order was made with the Receivers being appointed to collect all amounts due to SHI.

12. On 4th April 2017 the Receivers initiated legal action in the Turks and Caicos Islands ('TCI') by Writ of Summons (CL 44/2017) against Sarek, Mr. Vik, Mr. Johansson, Otto and the Reiten GPs as defendants. On 3rd May 2017 the Plaintiffs applied and obtained permission to serve the defendants out of jurisdiction by order of the then Chief Justice Ramsay-Hale dated 3rd May 2017. Subsequently, the 2nd and 3rd Defendants herein applied to set aside the Writ. By Order dated 18th January 2018 the Court refused to set aside the Writ. Both 2nd and 3rd defendants appealed to the Court of Appeal, who invited arguments on the issue of whether the proceedings were ultra vires on the issue of recognition of the Receivers. On 31st August 2018 the Court of Appeal allowed the appeal on the ground that the Receivers were not recognised in TCI, and the writ of summons was set aside.

13. To recommence proceedings in the TCI, the Receivers issued an originating summons dated 12th October 2018 (CL-119/2018), seeking recognition of the Receivership Order and the powers thereunder. Subsequently, the 2nd and 3rd Defendants herein applied to challenge the recognition proceedings. On 4th September 2020 judgment was handed down by Chief Justice Agyemang recognising in TCI the Receivership Order and granting recognition to the Receivers, provided that outstanding costs [of the previous action] to the 2nd and 3rd Defendants were paid. On the 25th of March 2021, a costs Order was agreed and by Order dated 20th May 2021 the Receivers herein received recognition.

14. In the instant case, by Writ of Summons filed on 15th August 2022 (CL 78/22), the Plaintiffs initiated action against the Defendants. Both Sarek and SHI were served with the Writ within the TCI, by delivery at the offices Misick and Stanbrook, who filed acknowledgements of Service dated 14th September 2022. They were further

served the Amended Writ of Summons and Amended Statement of Claim filed 1st May 2023.

THE CLAIMS

15. The Plaintiffs claim against Sarek that:-

    i. Sarek is not a bonafide purchaser for value and therefore holds the interests in Reiten LPs in trust for SHI;

    ii. Sarek is not a bonafide purchaser without notice of breach of trust and is therefore deemed to hold interests in the Reiten LPs on constructive trust.

    iii. SHI has personal and proprietary remedies against Sarek as a knowing recipient of assets disposed by Mr. Vik in breach of fiduciary duty.

    iv. Sarek is liable to account as a constructive trustee for dishonestly assisting Mr. Vik's breach of fiduciary duty.

    v. The Reiten transfers were not effective to transfer the equitable interest in the Reiten LPs;

    vi. Sarek is the alter ego, nominee or agent of Mr. Vik and accordingly Sarek is jointly and severally liable with Mr. Vik in respect of breaches of his fiduciary duty and breaches of trust.

    vii. Sarek has been unjustly enriched by the Reiten Transfers on the grounds of lack of consideration, lack of consent or want of authority.

    viii. The Reiten Transfers were effected in order to defraud creditors;

    ix. Sarek has conspired with Mr. Vik and Mr. Johansson to cause and has in fact caused damage to SHI by unlawful means.

16. The Plaintiffs claim against Mr. Vik: -

    i. Breach of fiduciary duty and breach of trust.

    ii. Knowing receipt and constructive trust.

    iii. Resulting trust and unjust enrichment.

iv. An unlawful means conspiracy.

17. The Plaintiffs claim against Mr. Johansson -:

    i. Dishonest assistance of Mr. Vik's breaches of fiduciary duty.

    ii. Damages for unlawful means conspiracy.

18. As it relates to the claims against the Guernsey GPs and the Liquidator the Plaintiffs do not allege any wrongdoing against these defendants, they are included as defendants because the Plaintiffs allege, they hold or control the assets which are the subject of this claim. The Plaintiffs suggest that all such assets are being held by these defendants on trust. Relief is sought against these defendants for the transfer to SHI of all assets being the subject of this action.

19. SHI is sued to ensure that it is bound by any orders made and reliefs granted.

THE APPLICATION

20. By letter dated 9th November 2022 the Plaintiffs applied to the Court for leave to serve the Writ and Statement of Claim out of jurisdiction on the 2nd to 6th Defendants, supported by the Crooks and Gardiner Affidavits. Mr. Wilson KC in the said letter states that the usual practice in obtaining leave is that the application is made *ex parte* on an affidavit setting out facts, therefore there is no requirement and or necessity for a summons or other form of application notice. Counsel requested that the letter of 9th November 2022 be treated as the Plaintiff's application.

21. The Crooks Affidavit states that the application for a grant of leave is made pursuant to Order 11 Rule 1(1) RSC. He states that the proceedings herein are to recover all amounts due to SHI in respect of its interests in and claims relating to Reiten & Co Capital Partners VI LP and Reiten & Co Capital Partners VII LP.

22. Service out of the jurisdiction is governed by Order 11 of the Rules of the Supreme Court 2000:

(1) Order 11, rule 1(1) lists the classes of case in which leave to serve a writ out of the jurisdiction may be given.

(2) Order 11, rule 4(1) sets out the requirements for an affidavit in support of an application for leave to serve out of the jurisdiction.

(3) Order 11, rule 4(2) provides: "No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."

(4) Order 11, rule 9 provides that Order 11, rule 1 also applies to service out of the jurisdiction of documents other than a writ.

THE SUBMISSIONS

23. Mr. Penny KC referred, the Court to the Privy Council decision in AK Investment v Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2012] 1 WLR 1804 at [71]; the English Supreme Court decision in VTB Capital plc v Nutritek International Corp [2013] UKSC 5, [2013] 2 AC 337 at [164]; and the English House of Lords decision in Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438, at pp.453-457. Counsel argues that in order for leave to be granted the three requirements set out below need to be satisfied.

**Requirement 1:** The plaintiff must satisfy the court that in relation to each foreign defendant there is a serious issue to be tried on the merits.

**Requirement 2:** the plaintiff must satisfy the court that there is a good arguable case including a plausible evidential case against each foreign defendant that the claim falls within one or more of the classes of case in which permission to serve out may be given.

**Requirement 3:** the plaintiff must satisfy the court that in all the circumstances the TCI is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction on each defendant.

24. Counsel for the Plaintiffs made the following submissions in respect of each requirement.

**Requirement 1: Serious issues to be tried on the merits for each foreign defendant.**

25. Counsel submits here, the test is whether there is a real (as opposed to a fanciful) prospect of success, which is the same test as for summary judgment; that is the Court is satisfied if the plaintiff puts forward a case which has sufficient substance to defeat a notional summary judgment or strike out application: *AK Investment v Kyrgyz Mobil* at [71] and [82]; and the English Supreme Court decision in *Lungowe v Vedanta* [2020] A.C. 104, at [42].

26. Counsel refers to the Amended Statement of Claim and the Crooks Affidavit in support of the requirement above and submits that these documents comfortably show a serious issue to be tried on the merits. He further submits that the Amended Statement of Claim and evidence as submitted by Crooks would comfortably withstand a notional summary judgment application by any of the foreign defendants.

**Requirement 2: A good arguable case and the jurisdictional gateways**

27. Counsel argues that there is a good arguable case against each defendant and that the claim falls within one or more of the classes of case in which permission to serve out may be given. He submits that the following may be considered:

    (1) In the TCI, the classes of case in which permission to serve out may be given (referred to as the "jurisdictional gateways") are set out in Order 11, rule 1(1).

    (2) A good arguable case connotes that "one side has a much better argument than the other" and that the claim falls within one or more of the gateways: Canada Trust Co v Stolzenberg (No.2) [1998] 1 WLR 547 at 555; AK Investment v Kyrgyz Mobil at [71].

(3) The test as explained in Canada Trust was further clarified by Lord Sumption in the English Supreme Court decision in Brownlie v Four Seasons Holdings Inc [2017] UKSC 80, [2018] 1 WLR 192 at [7] as follows: *"The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof which the House of Lords had rejected in Vitkovice. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much"*, *which suggests a superior standard of conviction that is both uncertain and unwarranted in this context*." This reformulation was endorsed by the English Supreme Court in Goldman Sachs International v Novo Banco SA [2018] UKSC 34, [2018] 1 WLR 3683 at [9].

28. In light of the above, the Plaintiffs rely on gateways (c), (d), (j) and (v) of Order 11 Rule 1(1).

29. Gateway (c); "*the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto"* Counsel refers to Dicey & Morris on the Conflict of Laws, 16th Edition paras 11-124 0 11-126 and argues as follows-:

> Point 1 – *the anchor defendant must be served* – Counsel submits that both Sarek and SHI are the anchor defendants and have been duly served within the jurisdiction in accordance with the terms of the Order of Mr. Justice Hylton KC for substituted service dated 29th August 2022 and acknowledgements of service have been filed dated 14th September 2022.

Point 2 – *There must be a real issue between the anchor defendant and the plaintiffs, the test here being the same for summary judgement.* On this point Counsel submits that the claims against Sarek are not brought only for the purpose of bringing the foreign defendants into TCI proceedings, substantive reliefs are sought against Sarek, which are real issues for the court to try.

Point 3 – *The foreign defendant who is out of jurisdiction must be a necessary or proper party to the proceedings and the claims against them involve one investigation*. On this point Counsel submits that all defendants are necessary and/or proper parties to the claim against Sarek, because as set out in the pleadings and the Crooks Affidavit, the claim is not bound to fail and the claims against all defendants are closely bound up with and involve one investigation.

*30.* Gateway (d); *"the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which -*

*i). was made within the jurisdiction, or*

*ii). was made by or through an agent trading or residing within*

*iii). the jurisdiction on behalf of a principal trading or residing*

*iv). out of the jurisdiction, or*

*v). is by its terms, or by implication, governed by the law of*

*vi). the Turks and Caicos Islands; or*

*vii). contains a term to the effect that the Supreme Court should*

*viii). have jurisdiction to hear and determine any action in respect*

ix). *of the contract."*

Counsel submits that at paragraphs 55-60 and 107 of the Amended Statement of Claim, a claim is made to rescind the Settlement Agreement whereby Rand and/or

Mr. Vik procured SHI to enter into the agreement in breach of their fiduciary duties to SHI and is therefore voidable at the election of SHI.

31. Gateway (j); "*the claim is brought for any relief or remedy in respect of any trust over which the Court has jurisdiction under section 5 of the Trust Ordinance"*. The Plaintiffs claim that Mr. Vik acted in breach of fiduciary duty and/or breach of trust, which is a matter of TCI law. The Plaintiffs claim that as a result of the benefit Sarek has received as a consequence of Mr. Vik's breaches of fiduciary duty and/or breaches of trust, the interests in the Reiten LPs and the benefits received in respect thereof are held by Sarek and/or Mr Vik on constructive trust and/or resulting trust and/or bare trust for SHI. The plaintiffs therefore seek an Order that Sarek and Mr. Vik transfer all interests held on trust for SHI to the Receivers forthwith and an order that the Guernsey GPs and the Liquidator pay all distributions, loan repayments, capital (re)payments and other payments and benefits due in respect of SHI's interest in the Reiten LPs to the Receivers.

32. Gateway (v); *the claim is brought against a person who is or was a director, officer or member of a company registered within the jurisdiction or who is a partner of a partnership whether general or limited which is governed by the laws of the Islands and the subject of the matter of the claim relates in any way to such company or partnership or the status, rights or duties of such director, officer, member or partner in relation thereto.* The Plaintiffs claim Mr. Vik was a director of SHI, which is a TCI company, until 28 July 2015 (and he continued to act as a *de facto* and/or shadow director thereafter). He was also a director of Sarek, which is a TCI company, until at least 2 April 2015[1]. Mr Johansson is believed to have been the sole director of SHI since around January 2020[2]. He is also believed to have been a director of Sarek at all material times[3]. The subject matter of the claims relates to SHI and in particular to Mr Vik's breaches of duty as a director of SHI. The subject matter of the claims also

[1] (see paragraph 127 of the Crooks Affidavit-1).
[2] (see paragraph 11 of the Crooks Affidavit-1).
[3] (see paragraph 127 of the Crooks Affdavit-1).

relates to Sarek in that the claims arise in relation to the transfer to Sarek of SHI's interests in the Reiten LPs. Therefore, all claims against Mr Vik and Mr Johansson fall within gateway (v).

**Requirement 3: the appropriate forum**

33. Counsel in support of his argument that the TCI is clearly or distinctly the appropriate forum argues:

    (1) The principles governing the exercise of the discretion are set out by Lord Goff in the English House of Lords decision in Spiliada Maritime v Cansulex Ltd [1987] AC 460 at 475 - 484.

    (2) The task of the Court is *"to identify the forum in which the case can be suitably tried* for *the interests of all the parties and for the ends of justice":* see Spiliada at 480; AK Investment v Kyrgyz Mobil at [88]; VTB Capital v Nutritek at [12]; Lungowe v Vedanta at [66].

    (3) The burden is on the plaintiff to persuade the court that the TCI is clearly the appropriate forum: *see Spiliada at 480; AK Investment v Kyrgyz Mobil at [88]; VTB Capital v Nutritek at [12].*

    (4) This requires the court conducting a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated, including practical matters such as accessibility of courts for parties and witnesses and the availability of a common language so as to minimize the expense and potential for distortion involved in transaction: *Lungowe at [66].*

    (5) Where the claim is time-barred in a foreign jurisdiction and the plaintiff's claim would undoubtedly be defeated if it were brought there, practical justice should be done, so that if the plaintiff acted reasonably in commencing proceedings in the TCI, and did not act unreasonably in not commencing proceedings in a foreign country, it may not be just to deprive the plaintiff of

the benefit of the TCI proceedings: *Spiliada at 483 – 484; AK Investment v Kyrgyz Mobil at [88]*

34. Mr. Penny K.C submits that TCI is the appropriate forum as:

    a. The claim in the proceedings is essentially about the transfer of interests from one TCI company (SHI) to another TCI company (Sarek) (and in the case of Reiten VII via another TCI company, (Otto).

    b. The crux of the case is Mr Vik's breach of fiduciary duties owed by Mr Vik as a director of SHI, a TCI company.

    c. The governing law is TCI law. As stated above, the duties owed by Mr Vik as a director of a TCI company and the remedial consequences arising from the breach of these duties are governed by TCI law. The governing law is generally a positive factor in favour of a trial in that jurisdiction (VTB Capital v Nutritek at [46]), with the strength of this factor depending upon the likely importance of issues of law and the extent to which the legal principles differ from the country of the alternative forum in contention.

    d. At the material time there was no limitation period in the TCI that applied to bar the claims brought in these proceedings.

    e. Sarek and SHI (acting by its director) have already been served with the proceedings within the jurisdiction, and Misick & Stanbrook has served acknowledgments of service on their behalf.

    f. Although Mr Vik is believed to be a resident of Monaco, and Mr Johansson is resident in the USA, they have already instructed TCI attorneys, Misick & Stanbrook, to represent them (together with Sarek) in the current proceedings. TCI is likely to be at least as convenient a forum for Mr Vik and Mr Johansson as either Guernsey or England and Wales.

g. Ogier's letters (attorneys for the Guernsey GPs) of 22nd and 28th July 2021[4], confirmed that if the Court is minded to grant leave to serve the Writ out of the jurisdiction, the Guernsey GPs and the Liquidator would intend to serve an acknowledgement of service and then adopt a neutral role in relation to the proceedings.

h. The Receivership Order and the Receivers' powers under it have been recognised in the TCI as the result of the proceedings in CL 119/2018, on the basis that the Receivers intended to issue the present proceedings in the TCI[5].

i. Neither Sarek, Mr Vik and Mr Johansson who opposed the application for recognition in CL 119/2018 nor the Guernsey GPs who took a neutral role, opposed the application for recognition on the ground that the TCI would not be the proper forum for the Receivers to bring the intended claims.

j. There is no reason to believe that there will not be a fair trial of the dispute in the TCI courts. Nor is there any injustice to the defendants litigating in the TCI. Sarek and SHI (acting by its director) are incorporated in the TCI, whilst Mr Vik and Mr Johansson have carried on business in the TCI by reason of their involvement in SHI and Sarek (and Otto). As stated above, the Guernsey GPs and the Liquidator have indicated that they will take a neutral role in the proceedings.

k. There is no more appropriate alternative forum for the resolution of the claims.

ANALYSIS

35. Ord. 11, r. 4(2) of the Civil Rules 2000 TCI provides that leave to serve a defendant out of the jurisdiction shall not be granted "*unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction*". This imposes a three-fold burden on a plaintiff seeking leave. Firstly, he must show that

[4] (see paragraphs 27 and 29 of the Crooks Affidavit)
[5] See further paragraph 202(c) of the judgment of Chief Justice Agyemang dated 4 September 2020.

the claim he wishes to pursue is a good arguable claim on the merits. While the court cannot at this stage determine whether the plaintiff, if given leave, will succeed, it must be satisfied that the plaintiff has a good chance of doing so. Secondly, the plaintiff must show a strong probability that the claim falls within the letter and the spirit of the sub-head or sub-heads of Ord. 11, r. 1(1) relied upon. This requirement is treated strictly: Vitkovice Horni A Hutni Tezirstvo v. Korner [1951] A.C. 869, 889, per [1990] 1 Q.B. 391 at 435 Lord Tucker. It is, furthermore, an established principle that a foreigner resident abroad will not lightly be subjected to what is, to him, a foreign jurisdiction. Thirdly, the plaintiff must persuade the court that the TCI is the proper forum in which the case can most suitably be tried in the interests of all the parties and for the ends of justice. This calls for the making of a judgment, the nature of which has been comprehensively reviewed in Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460.

36. *"If on the construction of any of the sub-heads of Order 11 there was any doubt, it ought to be resolved in favour of the foreigner:"* The Hagen [1908] P. 189, 201; Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210, 254-255, per Lord Diplock.

37. To assist the court in determining in any given case whether an application under Ord. 11, r. 1 falls within the ambit of this rule, Ord. 11, r. 4 lays down special rules as to the evidence which must support it. Rule 4(1) provides: *"[a]n application for the grant of leave under rule 1(1) must be supported by an affidavit stating - (a) the grounds on which the application is made, (b) that in the deponent's belief the plaintiff has a good cause of action…"* Note 11/4/3 in The Supreme Court Practice 1999 under Order 11 rightly stresses the importance of the affidavit by drawing attention to the following points:

> *"(a) The affidavit should be sufficiently full to show that the plaintiff has a good arguable case for the relief claimed. Drafts of the writ and statement of claim should be exhibited in all but the simplest cases. Copies of the documents pleaded should be exhibited.*

*(b) The affidavit must make clear which sub-rule of rule 1 is relied on ..."*

38. In Metall Und Rohstoff A.G v Donaldson Lufkin & Jenrette Inc. and Another [1987 M. No. 1772] [1990] 1 Q.B 391 Slade L.J stated:

> "In our judgement, if the draftsman of a pleading intended to be served out of jurisdiction under Order 11. r.1(1) ...can be reasonably understood as presenting a particular head of claim on one specific legal basis only, the plaintiff cannot thereafter, for the purpose of justifying his Application under Ordre. 11 r. 1 (1) be permitted to contend that that head of claim can also be justified on another legal basis (unless, perhaps, the alternative basis has been specifically referred to in his affidavit evidence, which it was not in the present case). With this possible exception, if he specifically states in his pleading the legal result of what he has pleaded, he is in our judgment limited to what he has pleaded for the purpose of an Order 11 procedure which is designed to ensure that both the court is fully and clearly apprised as to the nature of the legal claim with which it is invited to deal on the ex parte application, and the defendant likewise apprised as to the nature of the claim which he has to meet".

39. The Plaintiffs in their Application and the Crooks Affidavit in summary stated the following: -

(a) That the Plaintiffs have a good cause of action.

(b) Shane Crooks set out the parties and their location.

(c) That as at August 2022 the total amount owing to DBAG amounted to US$345,803,104.00;

(d) That there is a serious issue to be tried on the basis that the substantial interests in Reiten VI and VII held by SHI, admitted as a limited partner in each Reiten Interest with a total commitment of €12.5 million and €25 million respectively were dishonestly transferred to Sarek by the 2nd and 3rd Defendants herein. They allege dishonest breach and breach of fiduciary

duties and breach of trust against the 2nd Defendant and dishonest assistance against the 3rd Defendant.

(e) Documentary evidence was supplied "*showing that the 3rd Defendant knew or ought to know that SHI was insolvent or bordering on insolvency from 22nd or 23rd October 2008, alternatively by 18th November 2008, in the further alternative by 31 December, and in any event by 12 April 2011".*

(f) The Reiten interests were transferred after the knowledge of SHI's insolvency, and such transfer was done without any valid consideration with the assistance of the 4th Defendant.

(g) That SHI's share of the net assets of Reiten VI and Reiten VII that was transferred to Sarek was valued at €10,554,259.00 at the date of the Reiten Transfers.

(h) That the TCI is the proper forum in which to bring these proceedings because local attorneys represent the 1st and 7 Defendants and have entered acknowledgement of service for both parties.

(i) That the Writ includes a claim to rescind the Settlement Agreement and/or have it declared void on the ground that it was entered into in breach of fiduciary duty and/or to defraud creditors in order to assist the 2nd Defendant to frustrate enforcement of the Judgment Debt.

40. The Plaintiffs in their Writ and Statement of Claim in summary plead the following:

(a) Breach of Fiduciary Duty and Breaches of Trust by the 2nd Defendant

(b) Particulars of Breach of Fiduciary Duty and Trust

(c) Particulars of Fraud/Dishonesty

(d) The fact that there was a margin call on the 22nd of October 2008 which the 2nd Defendant failed to pay.

(e) That the Reiten transfers were effected after 22nd of October 2008

(f) That Sarek, the 1st Defendant, is closely connected to the 2nd Defendant and at all material times it was owned and/or controlled by the 2nd Defendant.

(g) That the Reiten transfers were made by SHI for no consideration, alternatively no proper consideration and had no bona fide commercial purpose.

(h) That Mr. Johansson knew about and had notice of the matters giving rise to the 2nd Defendant and also assisted the 2nd Defendants breaches of fiduciary duty.

(i) Particulars of loss were pleaded.

(j) That the Settlement Agreement should be rescinded, and that all property transferred from SHI is being held on trust.

41. In consideration of the Crooks and Gardiner Affidavits and the Amended Writ and Statement of Claim herein the Court is of the view that the Plaintiffs have submitted sufficient substance both factually and evidentially which shows that serious issues exist to be tried on the merits of this case against each foreign defendant.

42. The Plaintiffs both in their Writ and Amended Statement of Claim and the Crooks and Gardiner Affidavits have made out that a good arguable case exists both factually and evidentially and have shown that their claim falls within one or more of the jurisdictional gateways under Order 11 r 1 (1).

43. I have considered the Plaintiffs' submissions on Gateways (c), (d), (j) and (v) as follows.

44. **Gateway (c);** "*the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto".* The notes at 11/1/22 RSC 1999 1 state firstly that the original defendant need not have been served within the jurisdiction. In this case, however, the original or anchor defendant has been served as evidenced by an acknowledgement of service filed on their behalf. Secondly, it provides that R.4(1) (d) requires an application to be

supported by an affidavit to the effect that there is a real issue between the Plaintiff and the original or anchor defendant. In this case the Crooks Affidavit does show that there is a real issue to the tried between the Plaintiffs and the 1st Defendant as evidenced by the reliefs being claimed by the Plaintiffs. As it relates to whether the foreign Defendants are **necessary or proper parties** thereto, a person may be a proper party when the liability of several persons whether cumulative or alternative depends upon one investigation: Massey v Heynes [1881] 21 QBD 330 CA. In this case the actions of the 1st, 2nd and 3rd Defendants are all interrelated and form part of one transaction which is now the crux of this Claim; that the Reiten transfers were effected by the 2nd and 3rd Defendants on behalf of the 1st Defendant.

45. **Gateway (d)**; *[i]n order to bring a claim within this scope the Plaintiff must show that there is a contract between himself and the defendant and that is a good arguable case that the claim affects such contract*. The Settlement Agreement referred to in both the Crooks Affidavit and the Amended Statement of Claim and made between the 2nd Defendant and the 1st Plaintiff where the 2nd Defendant as director and officer in the 1st Defendant resigned and conveyed his shareholding interests to Rand. This agreement by clause 11 is governed by Turks and Caicos Islands law. By their Claim the Plaintiffs seek recission of the said Settlement Agreement on the basis that it is intended to defraud creditors. On the allegations, averments and affidavit evidence, the Plaintiffs have satisfied the requirements of this gateway, that there is a good and arguable case.

46. **Gateway (j) –** *Trusts* – Several claims of existence of trusts have been made against the 1st, 2nd and 3rd Defendants as follows: -

    (a) It is claimed that any and all rights and powers in respect of the Reiten LPs are being held on constructive trust by Sarek for SHI.

    (b) It is claimed that the 1st Defendant received the benefit of the Reiten interests and the sums receivable as trustee under section 66 and/or section 70 of the Trusts Ordinance 2016.

(c) A declaration is sought that the Reiten transfers were not effective and did not transfer the equitable interests in Reiten to Sarek, therefore Sarek holds the Reiten Interests on bare trusts for SHI.

(d) A declaration is sought that the transfer of the Reiten shares to Sarek was a gratuitous transfer, Sarek has been enriched at SHI's expense, there has been a total failure of consideration, failure of lack of consent, and want of authority in that the 2nd Defendant did not have the authority to transfer SHI's assets. Accordingly, the Reiten Interests are held on resulting trusts for SHI.

(e) It is also claimed that alternatively the 2nd Defendants hold the Reiten interests on a resulting trust for SHI.

47. The House of Lords in Tinsley v Milligan [1994] 1 AC 340, reiterated that equity would not intervene to find an equitable interest on resulting trusts in favour of a person who had transferred property in furtherance of an illegal purpose. The court is empowered to reverse any action which puts assets beyond the reach of creditors with the intention of avoiding or weakening their claims. In such a case, there is no need that the transaction be dishonest, it is sufficient that there was demonstrable intention to put assets out of the reach of creditors. Midland Bank v Wyatt [1995] 1 FLR 697.

48. Rights to restitution are rights that a defendant gives up to the claimant because of an enrichment made at his expense. It therefore followed that for a restitutionary claim to lie, it must be shown that (i) the defendant has been enriched at the claimant's expense and (ii) the circumstances are such that the enrichment must be given up to the claimant, in other words the enrichment was 'unjust'. If these two elements are successfully proven the courts are likely to impose a resulting trust in favor of the claimant. Therefore, the law of restitution is concerned with reversing unjust enrichments, thereby causing property to be returned to its rightful owner. Lipkin Gorman v Karpnale Ltd. [1991] 2 AC 548.

49. Constructive trusts arise by operation of the law. In general terms a proprietary constructive trust will be imposed on a person who knows that his or her actions in respect of specific property are unconscionable. All constructive trusts can be understood as arising based on this central principle. It is important that the trustee has knowledge of the unconscionability of his or her actions or omissions in relation to that property before a constructive trust will be imposed. This gateway has been satisfied.

50. Based on the above exposition this court is of the view that issues of trust law and unjust enrichment do arise in this case.

51. **Gateway (v)** - this sub-rule only exists in the TCI RSC 2000. To bring a claim under this scope it must be established that the claim is brought against a person who is or was a director, officer or member of a company registered within the jurisdiction. On the facts the 2nd Defendant was a director of both the 1st Plaintiff and 1st Defendant. It is also claimed that at a particular time the 3rd Defendant was a Director of 1st Defendant. This gateway has been satisfied.

52. The burden of proving that TCI is the appropriate forum rests on the Plaintiffs. To discharge this burden, it must be proven that the case can be suitably tried, for all the interests of the parties and for the ends of justice in the TCI: Spiliada *supra.* The core of this matter involves two (2) TCI registered companies (registered at the material time) namely Sarek Holding Inc. and SHI and the alleged breaches are governed by TCI law both in relation to alleged transfers and the Settlement Agreement. It is noted acknowledgements of service have already been entered on behalf of the two (2) companies involved in these proceedings. In the context of the discretion given to this court and in consideration of the pleading and Crooks and Gardiner affidavits, this court is of the view that the TCI is the appropriate forum for determination of this matter.

*53.* Finally, in reference to Order 11 r.4, the Plaintiff's affidavits in support of their application for service out of jurisdiction are sufficiently full, and did show that the

Plaintiff has a good and arguable case for the reliefs claimed. Additionally, this court is of the view that the Amended Writ and Statement of Claim does present sufficient reasonable facts to apprise both the court and the defendants, of the nature of the claim which exists and is not at variance with the application made herein: Metall Und Rohstoff *supra.*

DISPOSITION

54. On the facts and in consideration of the pleading and affidavits in support of this application all requirements as set out above have been satisfied by the Plaintiffs. In the circumstances leave is granted to the Plaintiffs to serve all the relevant Defendants in this matter, out of jurisdiction.

55. Cost to be cost in the cause.


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Narendra Lalbeharry

Registrar Supreme Court Turks and Caicos Islands