THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0002

BETWEEN:

WWRT Limited

Appellant

and

[1] Carosan Trading Limited
[2] Boris Kaufman

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Nathan Pillow, QC with him Ms. Sophia Hurst and Dr. Alecia Johns for the Appellant
Mr. Brian Lacy for the First Respondent
Mr. Richard Morgan, QC with him Mr. Richard Brown and Ms. Rowena Page for the Second Respondent

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2022: May 9 and 10;
July 20.

Interlocutory appeal - Appellate interference with exercise of trial judge's discretion - Order setting aside permission to serve defendant outside jurisdiction - Whether learned judge erred in setting aside service-out order - Test for service outside the jurisdiction - Serious issue to be tried - Whether learned judge erred in holding no serious issue to be tried - Construction of foreign documents and laws - Locus Standi - Whether on a proper construction of the Star Assignment and article 514 of the Civil Code of Ukraine ("CCU") the appellant had standing to bring the claims against the respondents - Role of expert evidence in construing foreign documents and laws - Absence of expert evidence as to rules of construction of foreign documents - Whether in absence of rules of construction of the Star

Assignment the learned judge erred in construing it according to its plain, ordinary meaning - Rejection of expert evidence as to foreign law - Whether learned judge erred in the construction of article 514 of the CCU by disregarding the evidence of the appellant's expert witness as fanciful - Forum conveniens - Order granting stay of proceedings in the BVI on ground of forum non conveniens - Whether learned judge erred in the exercise of discretion by holding that Ukraine was the more natural and appropriate forum for trying the claims - Application to adduce fresh evidence - Principles in Ladd v Marshall - Time of availability of evidence - Whether evidence of the ongoing Ukrainian conflict should be adduced when such evidence became available after the hearing on forum in the lower court

The appellant ("WWRT"), a company incorporated in England and Wales, claimed to be the indirect assignee of various tortious claims of the Ukrainian Bank, JSC Platinum Bank (the "Bank") against the first respondent ("Carosan"), a company incorporated in the Territory of the Virgin Islands (the "BVI") and second respondent ("Mr. Kaufman"), a Ukrainian businessman. In the lower court, WWRT alleged that the Bank had been the victim of a complex fraud for which Carosan and Mr. Kaufman were responsible. Under the scheme, the Bank disbursed monies under loan agreements (the "Loans") to various Ukrainian borrowers. These Ukrainian borrowers then transferred the monies received to various offshore companies, including Carosan, which in turn, recycled the monies between the borrowers and the offshore companies. WWRT's claim was that the Loans were not legitimate commercial loans and that the majority of the money borrowed had never been repaid. Furthermore, WWRT alleged that the fraud was carried out under the direction of and/or for the benefit of Mr. Kaufman and that Carosan played a central role in receiving and 'spiriting away' the proceeds of the fraud.

The Bank was declared insolvent in 2017 and was placed under the supervision of the Deposit Guarantee Fund (the "DGF"). In 2019, the DGF sold the Bank's rights in respect of the Loans to Star Investment One LLC ("Star Investment") under an agreement (the "Star Assignment"). In 2020, Star Investment then assigned its rights under the Loans to WWRT by a Loan and Property Rights Sale Agreement (the "WWRT Assignment").

It is by virtue of these assignments that WWRT has claimed to be the indirect assignee of the Bank's claims against the respondents and that such claims included the Bank's rights to causes of action in tort against the respondents by operation of Article 514 of the Civil Code of Ukraine (the "CCU"). WWRT therefore commenced proceedings in the BVI courts against Carosan as of right, and against Mr. Kaufman pursuant to rule 7.3(2)(a) of the Civil Procedure Rules 2000 (the "CPR"), asserting that he was a necessary or proper party to the claim. WWRT claimed compensation under BVI law against Carosan and also claimed damages against both respondents pursuant to article 1166 of the CCU.

In June 2021, the trial judge granted WWRT permission to serve Mr. Kaufman outside the jurisdiction at an address in Ukraine (the "service-out order"). In September 2021, Mr. Kaufman applied, inter alia, to set aside the leave granted to serve him outside the jurisdiction. He based his application on the grounds that (i) WWRT had not taken a valid assignment of the Bank's claims and therefore had no standing to bring the claims and (ii) the BVI court was neither the appropriate nor convenient forum for determining the claim against him. In October 2021, Carosan applied to stay the proceedings against it in the BVI

on the ground of *forum non conveniens*. As it pertained to Mr. Kaufman's application, the judge set aside the service-out order and declared that the BVI had no jurisdiction to try the claim against him. He determined that there was no serious issue to be tried on the merits since all the Bank's tortious claims had not been assigned under the Star Assignment. As a result, these claims had not been subsequently assigned under the WWRT Assignment and WWRT had no standing to pursue the claims against the respondents. On Carosan's application, the judge declared that the BVI court would not exercise its jurisdiction to try the claim on the ground of *forum non conveniens* and that Ukraine was the more natural and appropriate forum for trying the claim. The learned judge accordingly ordered that WWRT's claim against Carosan be stayed.

Being dissatisfied with the judge's ruling, WWRT appealed. WWRT only advanced two grounds of appeal and consequently, only two issues arose for determination, namely (i) whether the learned judge erred in setting aside the service-out order by finding no serious issue to be tried on the merits; and (ii) whether the learned judge erred in displacing the BVI with Ukraine as the *forum conveniens* for trying the claims against the respondents. At the hearing of the appeal, WWRT also sought to introduce fresh evidence in relation to the ongoing armed conflict in Ukraine which began in February 2022. Counsel for WWRT argued that the evidence to be adduced demonstrated that the conflict rendered Ukraine an unavailable forum and that the Court should have this in mind when reviewing the judge's decision as to forum. Counsel for the respondents countered that the Court could only admit evidence that existed at the time of the trial in the lower court, that being December 2021 and not evidence that came to light after. The Court refused to admit the new evidence.

Held: dismissing the appeal and awarding costs on the appeal and on the application to the respondents, to be assessed by a judge of the Commercial Division if not agreed within 21 days, that:

1. An appellate court should be cautious in interfering with the decision of the trial judge. An appellate court should only interfere with a trial judge's decision if the court is satisfied that the judge erred in principle and as a result his or her decision exceeded the generous ambit of reasonable disagreement or was blatantly wrong.

   Dufour and Others v Helenair Corporation Ltd and Others (1995) 52 WIR 188 applied.

2. On an application for permission to serve out of the jurisdiction, the claimant or counter-claimant has to satisfy three elements, namely (i) that there is a serious issue to be tried on the merits; (ii) there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given; and (iii) that the local jurisdiction must be clearly or distinctly the appropriate forum for the trial of the dispute and that it is appropriate to permit service out. A failure to establish even one of these elements would be grounds for the court to deny an application for leave to serve outside the jurisdiction or for the court to set aside the leave as granted.

Altimo Holdings and Investment Limited and Others v Kyrgyz Mobil Tel Limited and Others [2011] UKPC 7 applied; **Mitsuji Konoshita et al v JTrust Asia Pte Ltd** BVIHCMAP2018/0047, BVIHCMAP2018/0020 (delivered 18th December 2018, unreported) applied.

3. In determining whether there is a serious issue to be tried for the purposes of a service-out order, a judge is not required to conduct a mini trial. Rather, the judge must assess the claim and evidence before him and determine whether it met the threshold of a serious issue. The trial judge in determining whether the case at bar met this threshold was cognisant of the relevant case law and engaged in a sound evaluative process, assessing the claim and the evidence before him. The learned judge began his analysis at the correct starting point, that is, whether the Bank's rights to tortious claims had been transferred under the Star Assignment, employed the correct approach in considering an English translation of the Star Assignment and was entitled to reject the evidence of an expert witness opinion as it pertained to article 514 of the CCU. The learned judge having come to these conclusions, did not err in determining that, as a matter of construction of the Star Assignment and by operation of article 514 of the CCU, there was no real prospect of showing that the Star Assignment had been effective to transfer to WWRT the right to sue in respect of tortious claims under article 1166 of the CCU. The tortious claims made against the respondents were bound to fail and accordingly WWRT had failed at the first stage of the process for service-out. Therefore, the learned judge did not err in setting aside the service-out order.

   Dicey, A. V., Morris, J. H. C., & Collins, L. (2018). **Dicey, Morris, and Collins on the Conflict of Laws** 15th edition. London: Sweet & Maxwell applied; **Bumper Development Corporation v Commissioner of Police of the Metropolis and others** [1991] 1 W.L.R. 1362 applied; **WWRT Limited v Tyshchenko and another** [2021] EWHC 939 (Ch) applied.

4. A stay of an action on the ground of *forum non conveniens* will only be granted where the court is satisfied that there is some available forum, which is the clearly or distinctly more appropriate forum for the trial of the claim. Such a forum must be a court where the case may be tried more suitably for the interests of all the parties and the ends of justice. To determine the most appropriate forum for trying a case, the court must conduct a three-stage inquiry. The first is whether there is another available forum, second, whether that forum is more appropriate than the local court, and third if so, whether there is a risk of injustice if the claim were to be prosecuted there.

   Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 applied; **Livingston Properties Equities Inc and others v JSC MCC Eurochem and another** BVIHCMAP2016/0042-0046 (delivered 18th September 2018, unreported) applied.

5. An appellate court will be reluctant to interfere with a trial judge's decision on the most appropriate forum for the trial of the case. It will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him. In this case, the learned judge applied the correct test to determine the most appropriate forum for trying the case in the interests of all the parties and the ends of justice. He considered the evidence before him and embarked on an evaluation exercise that gave sufficient weight to the multitude of factors placed before him by the parties. The learned judge was entitled to displace the BVI in favour of Ukraine as the *forum conveniens* for trying the claims brought by WWRT, as the respondents were able to provide evidence that demonstrated that Ukraine was clearly the more appropriate forum, and that there were several connecting factors pointing to Ukraine being the natural forum to determine the claims. The learned judge's evaluation of the connecting factors was also reasonable and sought to ensure that the forum identified was distinctly more suitable in the interests of all the parties and the ends of justice. The learned judge's decision did not exceed the generous ambit within which reasonable disagreement is possible and therefore his decision should not be disturbed.

   Aldi Stores Ltd v WSP Group plc [2007] EWCA Civ 1260 applied; **Bitech Downstream Ltd v Rinex Capital Inc and another** BVIHCV2002/0233 and BVIHCV2003/0008 (delivered 12th June 2003, unreported) applied; **WWRT Limited v Tyshchenko and another** [2021] EWHC 939 (Ch) considered; **Showa Holdings Co. Ltd v Nicholas James Gronow and John David Ayres** BVIHCMAP2020/0031 (delivered 31st May 2021, unreported) applied.

6. To satisfy the first limb of the **Ladd v Marshall** test, the applicant must show that the evidence to be adduced is evidence that existed at the time of the trial but could not have been obtained with reasonable diligence for the use at the trial. WWRT sought to adduce fresh evidence in relation to the ongoing armed conflict in Ukraine which commenced after the hearing and determination of the application to set aside the service-out order and stay application. The Court was not satisfied having regard to the applicable principles that the fresh evidence should be allowed on the hearing of the appeal.

   Ladd v Marshall [1954] 1 W.L.R. 1489 applied; **Staray Capital Limited and another v Cha, Yang (also known as Stanley)** [2017] UKPC 43 distinguished; **ISC Technologies Ltd. & Another v James Howard Guerin & Others** [1992] 2 Lloyd's Rep 430 applied; **Erste Group Bank AG (London) v JSC (VMZ Red October)** [2015] EWCA Civ 379 applied.

JUDGMENT

[1] **PEREIRA CJ:** At the heart of this interlocutory appeal lies two issues. The first raises the question of the standing of the appellant, WWRT Limited ("WWRT"), to bring the claims in tort against the first respondent, Carosan Trading Limited ("Carosan"), and the second respondent, Mr. Boris Kaufman ("Mr. Kaufman"), as pleaded by WWRT in these proceedings. WWRT brings the claims as the indirect assignee of loan agreements made by a Ukrainian bank to various Ukrainian persons. If the answer to this question is yes, then the second question which arises for consideration is whether the Territory of the Virgin Islands ("BVI") or Ukraine, is the appropriate forum for the determination of the claims. WWRT has appealed against the decision of Jack J [Ag.] given on 10th December 2021, whereby the learned judge set aside an order granting WWRT permission to serve Mr. Kaufman outside of the jurisdiction. He also declared that the BVI court would not exercise its jurisdiction to try the claim against Carosan on the ground of *forum non conveniens*.

Background

[2] WWRT is a company incorporated in England and Wales. It claims to be the indirect assignee of various tortious claims of the Ukrainian Bank, JSC Platinum Bank (the "Bank"). Carosan is a company incorporated in the BVI. Its control and ownership is disputed, however, it has been alleged by WWRT that Carosan is one of many offshore companies connected to Mr. Kaufman, a wealthy Ukrainian businessman.

[3] WWRT, in its statement of claim filed in the court below, alleged that the Bank had been the victim of a complex fraud committed between 2008 and 2015, for which Carosan and Mr. Kaufman were responsible. Under the fraudulent scheme, the Bank disbursed monies under certain loan agreements (the "Loans") to various Ukrainian borrowers. These Ukrainian borrowers then transferred the monies received under the Loans to various offshore companies, including Carosan, which in turn, recycled the monies between the borrowers and the offshore companies. WWRT's claim was that the Loans were not legitimate commercial loans and that

the majority of the money borrowed had never been repaid. Furthermore, WWRT alleged that the fraud was carried out under the direction of and/or for the benefit of Mr. Kaufman and that Carosan played a central role in receiving and 'spiriting away' the proceeds of the fraud.

[4] The Bank was declared insolvent on 10th January 2017 and was placed under temporary administration on 24th February 2017 under the supervision of the Deposit Guarantee Fund (the "DGF"), an entity which represents the interests of Ukrainian bank depositors. On 5th March 2019, the DGF sold the Bank's rights in respect of the Loans to Star Investment One LLC ("Star Investment"), formerly known as APS Ukraine LLC under an agreement (the "Star Assignment"). Star Investment then assigned its rights under the Loans to WWRT by a Loan and Property Rights Sale Agreement dated 29th July 2020 (the "WWRT Assignment").

[5] It is by virtue of these assignments that WWRT claims to be the indirect assignee of the Bank's claims against the respondents. WWRT also asserted that by operation of article 514 of the Civil Code of Ukraine (the "CCU") these claims included the Bank's rights to causes of action in tort or delictual claims against the respondents. WWRT therefore commenced proceedings in the BVI courts against Carosan as of right, and against Mr. Kaufman, the alleged mastermind of the entire operation, pursuant to rule 7.3(2)(a) of the **Civil Procedure Rules 2000** (the "CPR"), asserting that he was a necessary or proper party to the claim.

[6] WWRT claimed compensation under BVI law against Carosan for dishonest assistance in breach of trust and knowing receipt. It was alleged that Carosan assisted the Ukrainian borrowers in their breach of trust by receiving payments of the Loans when it knew it had no right or expectation of those sums which were not given for a genuine commercial purpose. WWRT also claimed damages under Ukrainian law pursuant to article 1166 of the CCU against both respondents for harm caused by their alleged unlawful actions.

[7] On 17th June 2021, the trial judge granted WWRT's ex-parte application for a worldwide freezing order (the "WFO") against both respondents and also granted WWRT permission to serve Mr. Kaufman out of the jurisdiction at an address in Ukraine (the "service-out order"). On 24th September 2021, Mr. Kaufman applied to discharge the WFO and to set aside the leave granted to serve him outside the jurisdiction. His application was made on two primary bases:

(i) that, WWRT had not taken a valid assignment of the Bank's claims and therefore had no standing to bring the claims; and

(ii) that the BVI court was neither the appropriate nor convenient forum for determining the claim against him.

On 15th October 2021, Carosan also made an application to stay the proceedings against it in the BVI court on the ground of *forum non conveniens*.

Judgment of the lower court

[8] After hearing counsel for the parties and the evidence of two expert witnesses in relation to the applications, the learned judge gave an oral ruling on 10th December 2021 which was reduced to writing in a judgment dated 30th December 2021. In relation to Mr. Kaufman's application to set aside the service-out order, the judge found that there was no serious issue to be tried on the merits. The judge ruled that all of the Bank's tortious and delictual claims had not been assigned by DGF to Star Investment under the Star Assignment and consequently, these claims had not been assigned to WWRT under the WWRT Assignment. The judge held that what had been transferred to WWRT were the contractual claims which the Bank had against the debtors.

[9] Having found no serious issue to be tried, the learned judge declared that the BVI court had no jurisdiction to try the claim against Mr. Kaufman and set aside the service-out order. He also struck out the claim form and statement of claim insofar as they sought relief against Mr. Kaufman. As it pertained to Carosan's application,

the judge declared that the BVI court would not exercise its jurisdiction to try the claim against Carosan on the ground *forum non conveniens* and that Ukraine was the more natural and appropriate forum for the trial of the claim. Accordingly, he ordered that WWRT's claim against Carosan be stayed.

The Appeal

[10] Being dissatisfied with the learned judge's ruling, WWRT sought and obtained leave to appeal. In the notice of appeal, WWRT challenged the judge's findings on two grounds of appeal. In the first ground of appeal, WWRT argued that the learned judge erred in the exercise of his discretion in finding that there was no serious issue to be tried and in setting aside the service-out order. WWRT also contended that he erred in holding that the right to sue the respondents, in respect of tortious claims pursuant to article 1166 of the CCU, had not been transferred to WWRT.

[11] In their second ground of appeal, WWRT submitted that the learned judge erred in finding that BVI was not the appropriate forum as regards both respondents and that he erred in the exercise of his discretion by considering irrelevant factors and disregarding relevant ones.

The issues on appeal

[12] Two main issues therefore arise for determination on this appeal. They are:

(i) Whether the learned judge erred in setting aside the service-out order by finding no serious issue to be tried on the merits; and

(ii) Whether the learned judge erred in displacing the BVI in favour of Ukraine as the *forum conveniens* for trying the claims brought by WWRT against the respondents.

The appellate court's role

[13] As a starting point, we wish to reiterate the role of the appellate court when it has been invited to review the exercise of a trial judge's discretion. Guidance on the role of the appellate court in this regard has been set out in the leading case of

Dufour and Others v Helenair Corporation Ltd and Others[1] where Sir Vincent Floissac CJ stated that an appellate court would only interfere with the trial judge's decision if the court is satisfied that:

> "(1)... in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and
>
> (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[14] It is in accordance with the principles set out in **Dufour v Helenair** that this Court shall determine this appeal. Further, it is of note that this appeal involves two distinct yet connected respondents and so this judgment will be structured accordingly. I will first deal with the trial judge's decision to set aside the service-out order, which was the application brought by Mr. Kaufman. Then, I will consider the judge's decision on *forum* to the extent relevant to both respondents.

Issue 1: Whether the trial judge erred in setting aside the service-out order
The test for service outside the jurisdiction

[15] As stated earlier, Mr. Kaufman is a wealthy Ukrainian businessman whom WWRT alleged was the mastermind behind the defrauding of the Bank and that Carosan, under his direction, played a central role in the entire scheme. WWRT therefore initiated proceedings against Mr. Kaufman in the BVI owing to his allegedly strong connection with Carosan, a BVI company and anchor respondent. WWRT contended that he was a necessary and proper party to the claim and initially applied to serve him outside the jurisdiction pursuant to rule 7.3(2)(a) of the CPR. The relevant rule provides:

> "**Service of claim form out of jurisdiction in specified proceedings**
> 7.3
> 2. A claim form may be served out of the jurisdiction if a claim is made –

[1] (1995) 52 WIR 188.

a. Against someone on whom the claim form has been or will be served, and –

i. there is between the claimant and that person a real issue which it is reasonable for the court to try; and

ii. the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is necessary or proper party to claim;"

[16] The test for granting service outside the jurisdiction was set out by the Privy Council in the case of **Altimo Holdings and Investment Limited and Others v Kyrgyz Mobil Tel Limited and Others**.[2] At paragraph 71 of the decision, Lord Collins stated that:

> "On an application for permission to serve a foreign defendant…out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements…First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success…Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other…Third, the claimant must satisfy the court that in all the circumstances the Isle of Man 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."

[17] In **Altimo**, the Board therefore established three elements or a three-staged approach which must all be proven by a claimant who wished to serve a defendant outside the jurisdiction, namely (i) that there is a serious issue to be tried on the merits, (ii) there is a good arguable case and finally (iii) that the local jurisdiction must be clearly or distinctly the appropriate forum for the trial of the dispute and that it is appropriate to permit service out. A failure to establish even one of these elements would be grounds for the court to deny an application for leave to serve outside the jurisdiction or for the court to set aside the leave as granted.

[2] [2011] UKPC 7.

[18] In **Mitsuji Konoshita et al v JTrust Asia Pte Ltd**,[3] this Court held that in determining whether there was a serious issue to be tried for the purposes of a service-out order, the judge was not required to conduct a mini trial. Rather, the judge must assess the claim and evidence before him and determine whether it met the threshold of a serious issue. Further, in a prima facie case of fraud, the judge was entitled to take a robust approach.

[19] There is no dispute that the trial judge correctly directed himself to the correct legal principles to be applied when considering whether to set aside the permission granted for service of the claim form outside the jurisdiction. He was cognisant of the relevant case law and began his analysis at the correct starting point, that is, determining whether or not there was a serious issue to be tried. The real question is whether the learned judge erred in his analysis and application of the legal principles in light of the evidence before him.

WWRT's arguments

[20] Extensive written and oral submissions were given on behalf of WWRT by learned Queen's counsel, Mr. Nathan Pillow. Mr. Pillow, QC submitted that the judge erred in setting aside the service-out order and in finding no serious issue to be tried. Learned Queen's counsel posited that the judge erred in determining that, as a matter of construction of the Star Assignment and by operation of article 514 of the CCU, there was no real prospect of showing that the Star Assignment had been effective to transfer to WWRT the right to sue in respect of tortious claims under article 1166 of the CCU.

[21] As to the construction of the Star Assignment, learned Queen's counsel accepted that the judge directed himself to the correct legal principles regarding the interpretation of foreign documents as stated in **Dicey, Morris & Collins on the**

[3] BVIHCMAP2018/0047, BVIHCMAP2018/0020 (delivered 18th December 2018, unreported).

Conflict of Laws.[4] However, counsel contended that the judge's interpretation was erroneous since he did not have before him all that was necessary to properly construe the Star Assignment. Counsel argued that the judge erred by construing the English translation of the document rather than the Ukrainian version and further erred by considering the translation as provided by Mr. Kaufman and by disregarding the translation as provided by WWRT. Mr. Pillow, QC argued that the judge ought to have concluded that he was not in a position to determine which of the translations was the most accurate or alternatively, the judge ought to have had regard to both translations.

[22] It was also argued that since neither expert had given evidence as to how commercial documents ought to be construed as a matter of Ukrainian law, the judge was therefore not in a position to determine the meaning of the Star Assignment and could not rule on whether or not the Bank's rights to tortious claims were assigned. The judge consequently erred when he concluded that he could carry out an ordinary exercise of interpreting the Star Assignment according to its natural meaning, essentially assuming a BVI law perspective to the issue of construction when the document was governed by Ukrainian law.

[23] Counsel further submitted that the judge erroneously conducted what amounted to a mini trial of the issue, without the benefit of cross-examining the expert witnesses. The judge also considered inadmissible evidence given by both experts as to the meaning of the Star Assignment. Learned Queen's counsel argued that neither expert could have given evidence as to the meaning of the document but only evidence as to the principles by which the document would be construed under Ukrainian law.

[24] As to the interpretation of article 514 of the CCU, learned Queen's counsel accepted that the learned judge properly directed himself to the correct test for

[4] Dicey, A. V., Morris, J. H. C., & Collins, L. (2018). Dicey, Morris, and Collins on the conflict of laws 15th edition. London: Sweet & Maxwell.

evaluating expert evidence on foreign statutes and laws as stated in **Dicey**. However, it was contended that the learned judge erred by rejecting Prof. Vasylyna's (WWRT's expert) evidence as fanciful, when her evidence was unchallenged by Mr. Kaufman's expert, Mr. Stelmashchuk. The judge then went on to incorrectly interpret the statutory provision according to English and BVI principles and erred in holding that article 514 did not operate to assign the Bank's rights to tortious claims against the respondents to WWRT.

Mr. Kaufman's arguments

[25] Learned Queen's counsel Mr. Morgan for Mr. Kaufman countered, stating that the learned judge did not err in holding that WWRT had no right or title to the Bank's tortious claims against the respondents. Counsel noted that both experts had agreed that as a matter of Ukrainian law, contractual assignments could limit the scope of the rights being assigned. Counsel further submitted that neither expert had put forward any evidence that the process by which construction of the Star Assignment was undertaken was any different to that which all BVI judges undertook. Counsel therefore argued that the learned judge was entitled to look at the plain ordinary meaning of the Star Assignment and to construe it accordingly.

[26] Mr. Morgan, QC further contended that whilst counsel for WWRT took issue with the learned judge relying on the English translation supplied by them, WWRT made no attempt to procure a certified translation of its own. Furthermore, they failed to identify how Mr. Kaufman's certified translation of the document was in any material way inaccurate. Mr. Morgan, QC also argued that whilst their expert made no explicit reference to article 514 of the CCU, Mr. Stelmashchuk referred to a report of the Ukrainian Supreme Court addressing the relevant article in the context of what had been stated by Prof. Vasylyna.

Discussion

[27] The question of whether or not the Bank's rights to tortious claims had been transferred under the Star Assignment is really the threshold question, since it

raises the issue of WWRT's standing to bring the claim against the respondents. As the learned judge stated in his judgment, it was a "knock-out point" since, if determined in favour of the respondents, there would be no need to go on to the issue of forum as WWRT would have no standing to continue the claims.

[28] Contrary to Mr. Pillow, QC's assertions, we find no error in the learned judge's approach to consider an English translation of the Star Assignment. To suggest that a judge sitting in an English-speaking jurisdiction consider a Ukrainian document in its native language without the use of a translated copy, would be illogical and of no assistance to the court. The judge also did not err when he considered the certified translation as supplied by Mr. Kaufman. WWRT had ample time in the lower court to procure its own certified translation and chose not to do so. Furthermore, there has been no argument on WWRT's part that the translation as considered by the learned judge was in any way materially flawed or failed to accurately portray what had been stated in the Ukrainian version of the document. We now move on to the legal principles as considered by the learned judge.

The law on the construction of foreign laws and documents

[29] There is no dispute amongst the parties that the learned judge correctly identified the appropriate legal principles as regards questions on the interpretation of foreign documents and laws. The learned judge quoted the relevant passages from **Dicey** in this regard. Notably, the learned authors of **Dicey** state the general rule at paragraph 9R-001 as follows:

> "RULE 25—(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.
>
> (2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case."

This general rule was affirmed by Purchas LJ in **Bumper Development Corporation v Commissioner of Police of the Metropolis and others**.[5] The role

[5] [1991] 1 W.L.R. 1362.

of experts, however, differs when it comes to foreign laws and foreign documents.

As the learned authors of **Dicey** stated at paragraph 9-019:

> "The function of the expert witness in relation to the interpretation of foreign statutes must be contrasted with his function in relation to the construction of foreign documents. In the former case, the expert tells the court what the statute means, explaining his opinion, if necessary, by reference to foreign rules of construction. In the latter case, the expert merely proves the foreign rules of construction, and the court itself, in the light of these rules, determines the meanings of the documents."

[30] In **Dicey**, the learned authors also give appropriate cautions to a court in rejecting the evidence of the expert and in conducting its own research into foreign law:

> "9-015 An English court will not conduct its own researches in foreign law; in the common law system, 'the trial is not an inquisition into the content of relevant foreign law any more than it is an inquisition into other factual issues that the parties tender for decision by the court'. But if an expert witness refers to foreign statutes, decisions or books, the court is entitled to look at them as part of his evidence. But the court is not entitled to go beyond this: thus if a witness cites a passage from a foreign law-book he does not put the whole book in evidence since he does not necessarily regard the whole book as accurate. Similarly, if the witness cites a section from a foreign code or a passage from a foreign decision the court will not look at other sections of the code or at other parts of the decision without the aid of the witness, since they may have been abrogated by subsequent legislation.
>
> 9-016 If the evidence of the expert witness is to the effect of the sources quoted by him is uncontradicted, 'it has been repeatedly said that the court should be reluctant to reject it,' and it has been held that where each party's expert witness agrees on the meaning and effect of the foreign law, the court is not entitled to reject such evidence, at least on the basis of its own research into foreign law. But while the court will normally accept such evidence it will not do so if it is 'obviously false,' 'obscure,' 'extravagant,' lacking in obvious 'objectivity and impartiality,' or 'patently absurd,' or if 'he never applied his mind to the real point of law', or if 'the matters stated by [the expert] did not support his conclusion according to any stated or implied process of reasoning'; or if the relevant foreign court would not employ the reasoning of the expert even if it agreed with the conclusion. In such cases the court may reject the evidence and examine the foreign sources to form its own conclusion as to their effect. Or, in other words, a court is not inhibited from 'using its own intelligence as on any other question of evidence'. Similarly, the court may reject an expert's opinion as to the meaning of a foreign statute if it is inconsistent with the text or the English translation and is not justified by reference to any special rule of

> construction of the foreign law. It should, however, be noted in this connection that quite simple words may well be terms of art in a foreign statute.
>
> 9-017 If the evidence of several expert witnesses conflicts as to the effect of foreign sources, the court is entitled, and indeed bound, to look at those sources in order itself to decide between the conflicting testimony.
> …
> 9-018 Since the effect of foreign sources is primarily a matter for the expert witness, it is desirable when proving a foreign statute, also to obtain evidence as to its interpretation."

[31] In **Bumper Development Corp**, Purchas LJ cited with approval the words of Lord Langdale MR in **Earl Nelson v Lord Bridport**:[6]

> "Though a knowledge of foreign law is not to be imputed to the Judge, you may impute to him such a knowledge of the general art of reasoning, as will enable him, with the assistance of the bar, to discover where fallacies are probably concealed, and in what cases he ought to require testimony more or less strict."

The Star Assignment

[32] As a starting point to this discussion, it is to be noted that whilst it is disputed that the Star Assignment included the Bank's rights to causes of action in tort against the respondents, it is not disputed that the WWRT Assignment was sufficient to assign to WWRT any claims which had been validly assigned under the Star Assignment. The Star Assignment would therefore be a key document to be construed for the purpose of deciding the question whether there was a serious issue to be tried on the merits.

[33] The relevant provisions of the Star Assignment, as considered by the learned judge, are now set out. Clause 1.1 says:

> "The Parties hereby agree that, by its legal nature, this Agreement is a transaction for the transfer by the Bank through selling the rights of claim specified in this Agreement to the New Creditor (assignment of claims)."

[6] (1845) 8 Beav 527 at 537.

Clause 2.1 states:

> "Under this Agreement, in accordance with the terms and conditions specified in this Agreement, the Bank shall assign by selling to the New Creditor, and the New Creditor shall acquire, in the amount and under the terms specified in this Agreement, the Bank's claims against borrowers, mortgagors and guarantors specified in Appendix No. 1 to this Agreement hereinafter referred to as "the Debtors", including claims against the successors of the Debtors, heirs of the Debtors, insurers or other persons to whom the duties of the Debtors have been transferred or who are obliged to perform the obligations of the Debtors, under credit agreements, guarantee agreements and pledge agreements, taking into account all changes, additions and appendices to them, according to the list-register in Appendix No. 1 to this Agreement, hereinafter referred to as "the Principal Agreements", hereinafter referred to as "the Claims". The New Creditor shall pay the Bank for the Claims in the amount and in the manner specified in this Agreement. The Parties have agreed that the assignment by the Bank to the New Creditor of the claims under mortgage agreements (pledges), which were concluded to ensure the fulfillment of the Debtors' obligations under the Principal Agreements and were certified by a notary, shall take place under a separate agreement concluded between the Parties no later than 5 (five) calendar days from the date of conclusion of this Agreement and is subject to be certified by a notary."

Clause 2.2 states:

> "Under this Agreement, the New Creditor on the day of concluding this Agreement, but in any case not earlier than the time of receipt by the Bank of monetary funds in full, in accordance with para. 4.1. of this Agreement, shall acquire all the rights of the creditor under the Principal Agreements, including, but not limited to: the right to demand proper performance by Debtors of obligations under the Principal Agreements, payment by Debtors of monetary funds, interest, penalties, forfeits in the amounts specified in Appendix No. 1 to this Agreement, transfer of collateral to fulfill obligations, indemnity under the insurance contract, etc. The amount of Claims transferred to the New Creditor is specified in Appendix No. 1 to this Agreement. The creditor's rights under the Principal Agreements shall be transferred to the New Creditor in full and on the terms existing at the time of assignment of the Claims, except for the right to contractual debit of funds from the Debtors' account (accounts) provided to the Bank in accordance with the Principal Agreements."

[34] The learned judge would have had before him 5 expert reports for consideration (3 from Prof. Vasylyna and 2 from Mr. Stelmashchuk). As to the construction of the Star Assignment, the learned judge found that neither expert had pointed him to any special rules of construing the document. On that basis, he went on to consider

the natural and ordinary meaning of the Star Assignment. Having set out clauses 1.1, 2.1 and 2.2 of the Star Assignment as seen above, the learned judge found that the central focus was on the part of clause 2.1 which stated, 'claims against the successors of the Debtors, heirs of the Debtors, insurers or other persons to whom the duties of the Debtors have been transferred or who are obliged to perform the obligations of the Debtors'. Construing the natural and ordinary meaning of the words 'other persons', the learned judge found that this reference must be to 'those persons to whom the duties of the debtors have been transferred or who are obliged to perform the obligation of debtors'. He then stated that there was no basis for saying that claims against third parties of a non-contractual nature were transferred. According to the learned judge, what had actually been transferred under the Star Assignment were the contractual claims which the Bank had against the debtors as expanded to include other people.

[35] Nowhere in his reasoning does the learned judge mention having relied on the experts' evidence as to the meaning of the agreement. Furthermore, as **Dicey** pointed out, the expert's role as regards foreign documents would be to prove the foreign rules of construction to the court, and in the absence of satisfactory evidence on foreign law, the court will apply English law, or in this case, BVI law. There were no rules of foreign construction put before the judge by either expert and I am of the view that the learned judge made no error in relying on BVI law principles of construction and accordingly adopting the approach of construing the plain ordinary meaning of the words in the Star Assignment.

Article 514 of the CCU

[36] As a starting point to this aspect of the discussion, the relevant article is as follows:

> "The rights of the original creditor in an obligation shall be transferred to the new creditor to the extent and on the conditions that existed at the time of the transfer of these rights, unless otherwise established by contract or law."

[37] As to the construction of article 514, it would have been the duty of Prof. Vasylyna and Mr. Stelmashchuk to tell the court what the provision meant and to explain their

opinions. The learned judge agreed with Prof. Vasylyna when, in her original report, she referred to the replacement of the creditor in the obligation as meaning that all the property rights attaching to the Loans, including the right to claim against third parties, were assigned to the new creditor. He found that this seemed to follow from the plain wording of article 514. However, he rejected her conclusion at paragraph 83 in her original report where she opined that WWRT had the right to enforce its right to repayment by filing a claim against third parties against whom tortious or delictual remedies lay at the suit of the Bank. He instead accepted the views posited by Mr. Stelmashchuk and rejected Prof. Vasylyna's opinion on the assignment of the article 1166 claim under article 514 as fanciful.

[38] The learned judge was mindful of the caution to the court in rejecting the evidence of an expert as noted in **Dicey** and as stated in **WWRT Limited v Tyshchenko and another**,[7] a case cited by the judge. In his judgment, the judge gives a thorough explanation as to why he was rejecting the evidence of Prof. Vasylyna in favour of the evidence of Mr. Stelmashchuk. He explains at paragraph 50 that he found Prof. Vasylyna's jump from her conclusions in paragraph 74 of her original report to her conclusions in paragraph 83 as wholly unclear and unexplained. He stated that it seemed to be an illogical and unjustified jump.

[39] Whilst the court ought to be hesitant to reject an expert witness, as the authorities state, the court may do so if 'the matters stated by [the expert] did not support his conclusion according to any stated or implied process of reasoning'.[8] As Bacon J also noted in **WWRT v Tyshchenko**:

> "25. …The fact that Mrs. Tyshchenko is a lawyer qualified in Ukraine does not undermine that conclusion: without corroboration by independent expert evidence, her submissions as to the interpretation and application of Ukrainian law can carry no greater weight than the submissions of counsel for the parties.
>
> 26. That does not preclude the court, in an appropriate case, from rejecting expert evidence that is clearly and obviously wrong, or patently absurd, on the basis of the materials before it such as the English

[7] [2021] EWHC 939 (Ch).
[8] Supra n. 4 at paragraph 9-016.

> translation of statutory provisions on which the expert relies: see in that regard §9-016 of Dicey, Morris and Collins, The Conflict of Laws (15th ed), which was cited at §46 of Kyrgyz Republic. But the power to do so must be exercised with great caution, and it should certainly not open the door to the rejection of expert evidence on the basis of submissions as to the interpretation of materials that are ambiguous, incomplete or otherwise unclear."

[40] The learned judge quoted various excerpts from Prof. Vasylyna's report and set out the passages in Mr. Stelmashchuk's report which he found to comprehensively answer her opinion. It cannot be said that he was so blatantly wrong in rejecting her opinion as it pertained to article 514. He was ever mindful of the cautions given by the authorities, considered the evidence of the experts before him and having done so, explained quite clearly in his reasoning his decision to dismiss Prof. Vasylyna's conclusions as fanciful in favour of Mr. Stelmashchuk. An appellate court ought to be reluctant to interfere with a trial judge's assessment of the witnesses and his findings in relation to those witnesses. On the facts, it cannot be said that the learned judge erred in rejecting Prof. Vasylyna's evidence on article 514 and in holding that the Bank's tortious claims were not assigned to WWRT by operation of Ukrainian law.

Conclusion on Issue 1

[41] Having arrived at the conclusions discussed above, the learned judge did not err in construing the Star Assignment as he did, and in rejecting Prof. Vasylyna's evidence on article 514 as fanciful. Consequently, it cannot be said that he was blatantly wrong in holding that, as a matter of construction of the Star Assignment and by operation of article 514, the Bank's rights to tortious claims against the respondents were not assigned to WWRT. In answer to the first issue, the learned judge was therefore not wrong to rule that on the merits, there was no serious issue to be tried. It was quite open to the judge, in applying the test applicable to summary judgment on construing the Star Assignment to find that the tortious claims made against the respondents were bound to fail. Having arrived at that conclusion, he would have been correct to conclude as he did that there was no serious issue to be tried, or in any event, that there was no serious issue to be tried as between

WWRT and Carosan to which Mr. Kaufman, a foreign party, was a necessary or proper party. The end result was that WWRT had failed at the first stage of the process for service-out. The learned judge accordingly did not err in setting aside the service-out order.

[42] This conclusion would be sufficient, not only to dispose of the first issue, but also the entire appeal for the simple reason that WWRT would have no right or standing to pursue the claims sounding in tort as against either respondent. Nonetheless, I now address the forum issue and more so as it relates to Carosan which was sued as of right and whose challenge was not as to WWRT's standing to bring the claims but whether the claim should be stayed in favour of Ukraine as the distinctly more appropriate forum. It is to be noted that Mr. Kaufman's application was separate and distinct from the application made by Carosan. The learned judge delivered a single judgment in respect of both applications and this, it seems, gave rise to a single notice of appeal in respect of the decisions made on the applications. I am of course mindful that since WWRT's case against Mr. Kaufman has not gotten past the first stage of the service-out test, the second and third stages in relation to the gateway under CPR and satisfying the *forum conveniens* test respectively, fall away in respect of the case against Mr. Kaufman.

Issue 2: Whether the learned judge erred in displacing the BVI in favour of Ukraine as the *forum conveniens* for trying the claims brought by WWRT against the respondents

WWRT's submissions

[43] The parties have raised several important points in their submissions on this question and, to some extent understandably, the arguments of Mr. Kaufman and Carosan overlap. As it relates to Mr. Kaufman's service out challenge, had WWRT satisfied the first and second stages of the test for service out WWRT would additionally have the burden of establishing that BVI was the more appropriate forum for the trial of the claims and that in all the circumstances the court should exercise its discretion and serve Mr. Kaufman out of the jurisdiction. As it relates to Carosan, which was served as of right in BVI, the burden was on Carosan to

demonstrate why a foreign forum, here Ukraine, is clearly or distinctly the more convenient forum than BVI for the trial of the claims against it so that the claims against it in BVI should be stayed. As it relates to forum then, the exercise to be carried out by the trial judge would have overlapped albeit that the incidence of the burden differed.

[44] Mr. Pillow, QC in his introductory submissions on this issue, stated that the learned judge erred in displacing the BVI in favour of Ukraine as the *forum conveniens* for trying the claims brought by WWRT against the respondents. Learned Queen's counsel argued that this error made by the learned judge, was as a result of the flawed evaluative exercise undertaken by the judge, who simultaneously took into account irrelevant factors and failed to take into account or give too little weight to a number of relevant factors that were introduced in the application before him. Mr. Pillow, QC submitted that the learned judge's flawed evaluation on this issue and the resulting conclusion exceeded the generous ambit within which reasonable disagreement was possible and as such the learned judge's decision was susceptible to challenge. Mr. Pillow, QC therefore invited this Court to 're-weigh' and 'reevaluate' the factors and circumstances considered by the learned judge and determine that the BVI, not Ukraine, is the *forum conveniens* for trying the claims against the respondents.

[45] In advancing his case, Mr. Pillow, QC made reference to paragraph 56 of the judgment, where the learned judge in considering the issue of *forum conveniens* stated 'in my judgment the evidence is all in one way'. Mr. Pillow, QC argued that this statement by the learned judge showed that the judge failed to take into account many other factors which pointed towards BVI being the appropriate forum to determine the claims brought by WWRT. Mr. Pillow, QC submitted that the learned judge failed to consider:

(a) the position of Carosan, a BVI company, which was sued as of right within the jurisdiction, and which had the burden of proof of showing that the claim against it should be stayed. There was inadequate consideration given by

the learned judge as to whether all or any of the claims against Carosan could or should proceed in the BVI or whether it necessarily followed from his consideration of Mr. Kaufman's position that the whole claim must be tried in Ukraine;

(b) the alleged fraud, limiting it to the initial procurement and payment of loan advances from the Bank. Had the learned judge properly considered the position of Carosan, it would have been determined that the claims against it would be most appropriately tried in the BVI, because of the significant role it played in the fraud and the fact that relevant disclosure given by it is likely to be held, or largely held, in the BVI and in the English language;

(c) the international aspect to the fraud relating to payments and funds outside Ukraine. The learned judge failed to take into account the identity and location of the alleged corporate recipients of funds from the fraud. Had the learned judge considered this factor, he would have concluded that the alleged fraud was not principally a Ukrainian fraud but an international fraud, which impacted the BVI;

(d) the non-availability of a freezing order relief or worldwide freezing order relief in Ukraine;

(e) the evidence that one or more of Mr. Kaufman's lawyers spoke Russian, thus enabling him to give instructions without needing an interpreter;

(f) the existence of BVI law claims against Carosan, and therefore wrongly concluding that those claims were governed by Ukrainian law. As a result of this flawed analysis, the learned judge wrongly concluded that Ukrainian law applied to the claims against Carosan, and failed to take into account that there was a BVI law claim; and

(d) the finding that there was a prima facie case of fraud, and that the fraud was one in which Carosan, a BVI company, had clearly played a significant role.

[46] Mr. Pillow, QC submitted that the learned judge instead took into consideration the following irrelevant factors:

(a) that the case 'bristled' with points of Ukrainian law, which could be much more satisfactorily and cheaply resolved by the Ukrainian Courts than by the BVI court, despite the fact that it is routine for foreign law to be determined in courts like the English court as elucidated in **WWRT v Tyshchenko**, or the BVI court;

(b) that there was 'difficulty' in relation to the loss position under article 1166 of the CCU and that it was unclear how liability could attach to Carosan for assisting in what is alleged to be subsequent money laundering;

(c) that issues of causation were much better dealt with in Ukraine;

(d) the 'Cambridgeshire' factor which could not be properly applied to this case as the DGF claim was not complex, there would be no need for special expertise and the matter would not be heard in the same court as the other DGF proceedings;

(e) the availability of disclosure of documents in Ukraine without properly considering WWRT's evidence that there is no real equivalent of a disclosure procedure in Ukraine;

(f) that both Carosan and Mr. Kaufman could be sued together in a Ukrainian court on the basis that Prof. Vasylyna had not responded to the reply report filed on behalf of Mr. Kaufman; and

(g) that the overwhelming number of companies said to be associated with the alleged fraud are Ukrainian companies.

Mr. Kaufman's submissions

[47] Mr. Morgan, QC agreeing to bear the principal burden of the oral submissions for both respondents, set out the criteria to be satisfied by a party when seeking permission to serve a defendant outside of the jurisdiction or a party seeking a stay on forum grounds. Mr. Morgan, QC stated that a party is required to demonstrate to the court that the subject *forum* 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 out of the jurisdiction or as the case may be for granting a stay in favour of another or foreign jurisdiction.

[48] The 'appropriate' forum or *forum conveniens*, Mr. Morgan, QC submitted, is the natural forum where the action has the most real and substantial connection, and the court is required to look for connecting factors. This, Mr. Morgan, QC stated, has been well settled in **Spiliada Maritime Corp v Cansulex Ltd.**[9] He further stated that these connecting factors can relate to convenience and expense and can include the location of witnesses and documents, the availability of a common language so as to minimise the expense and potential for disruption involved in translation of evidence but can also include other factors such as the law governing the relevant transactions and the places where the parties respectively reside or carry on business.

[49] Mr. Morgan, QC argued that when considering the test as laid out in **Spiliada**, and the case at bar, it is plain that all factors point to Ukraine as being the *forum conveniens* and not the BVI. He further argued that when considering that the law governing the disbursements of the Loans is Ukrainian, the place of the commission of the alleged tort is Ukraine, the language spoken is Ukrainian or Russian, the documents and likely witnesses are Ukrainian and, but for the purported

[9] [1987] AC 460.

assignments, the principal parties would all be Ukrainian, it is self-evident that Ukraine is the forum in which the present allegations may be most suitably tried in the interests of all the parties and the ends of justice. Mr. Morgan, QC further argued that the mere linkage of Carosan or the claim against it in the BVI provided no sufficient support for the identification of the BVI as the appropriate forum for the claim against Mr. Kaufman.

[50] Mr. Morgan, QC submitted that to displace the identification of Ukraine as the appropriate forum for the hearing of the case, WWRT had to demonstrate that the learned judge made a significant error of principle in conducting an evaluative or balancing exercise. However, Mr. Morgan, QC argued that WWRT had failed to demonstrate that the learned judge made such an error of principle in his evaluation and that the decision of the learned judge cannot be susceptible to challenge as it was not only within the ambit of rational decisions, it was also plainly correct.

[51] Mr. Morgan, QC also rejected WWRT's arguments that the judge forewent relevant factors (as detailed in paragraph 45 above) in favour of irrelevant factors (as detailed in paragraph 46 above). In answer to WWRT's assertions on this issue Mr. Morgan, QC submitted that:

(a) the learned judge was correct to hold that the case 'bristled' with points of Ukrainian law, as this claim would engage substantive Ukrainian law and require substantial documentary and oral evidence in relation to the alleged torts which occurred in Ukraine;

(b) that WWRT had the opportunity to explain its case at the hearing before the learned judge but failed to articulate any case beyond that set out in the statement of claim;

(c) as WWRT's assertions are unsupported by factual or expert evidence, it is perfectly rational to decide that a Ukrainian court would be better placed to determine the merits of such a claim under Ukrainian law involving documents and oral evidence given in the local language;

(d) as there have been documents filed at the court in Ukraine in relation to the Loans, there is plainly a 'Cambridgeshire' factor, as identified in **Spiliada** in that a court in Ukraine is being asked to consider how the Loans came to be made. The judge recognised this as a factor but did not suggest that it was decisive. As such the judge's reasoning in this regard cannot be faulted;

(e) despite being under a duty of full and frank disclosure on its application to serve out of the jurisdiction, WWRT failed to procure the full documentary record in relation to the allegations that appear on the face of the statement of claim. A Ukrainian court would be better placed than a BVI court to determine this matter which involves Ukrainian documentation and Ukrainian witnesses. Further, a BVI court has no coercive power at all to obtain the relevant documents in Ukraine, which WWRT itself does not have in its possession;

(f) **Altimo** supports the proposition that a claim brought against Carosan as of right does not operate as some sort of vortex into which any and all other respondents must automatically be drawn;

(g) the inaccuracy of WWRT's inadequate translation of documents has already caused issues in these proceedings;

(h) all witnesses of primary fact will have Ukrainian or Russian as their native language;

(i) the learned judge did not find that there was a prima facie case of fraud. The learned judge's finding of a connection between Carosan and Mr. Kaufman went no further than that there was a prima facie case that businesses in which Mr. Kaufman had an interest in, were alleged to be connected to Carosan.

Carosan's submissions

[52] Mr. Lacy acknowledging that Mr. Morgan, QC had substantially addressed the court on behalf of both respondents, submitted the supplementary points, that the judge was not required to record every single fact and matter and point of law that comes up in the course of the hearing and that in any event the connecting factors all point to Ukraine being the appropriate *forum* to determine the claims.

Discussion
The law on *Forum Conveniens*

[53] The critical issue that this Court must resolve is in which forum, Ukraine or the BVI, can the case be most suitably tried for the interests of all parties and for the ends of justice. It is settled that the starting point of such resolution must appreciate the principles governing the grant of a stay on the grounds of *forum non conveniens*. These principles have been well-established, having been enunciated in **Spiliada**, and restated in **IPOC International Growth Fund Limited v LV Finance Group Limited**[10] and **Livingston Properties Equities Inc and others v JSC MCC Eurochem and another**.[11]

[54] In **Spiliada**, Lord Goff of Chieveley set out in detail the three-stage inquiry a court must conduct to determine what is the most appropriate forum for trying the case in the interests of all the parties and the ends of justice. This three-stage inquiry of Lord Goff has been helpfully summarised by Gordon JA in **IPOC**, a judgment of this Court. At paragraph 27 of **IPOC**, Gordon JA stated:

> "In the lead judgment, Lord Goff of Chieveley summarised the law in the following way, and I take the liberty of paraphrasing the learned Law Lord: (i)The starting point, or basic principle, is that a stay on the grounds of forum non conveniens would only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In this context, appropriate means more suitable for the interests of all the parties and the ends of justice.

[10] Civil Appeals No. 20 of 2003 and No. 1 of 2004 (delivered 22nd November 2004, unreported).
[11] BVIHCMAP2016/0042-0046 (delivered 18th September 2018, unreported).

(ii)The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once a defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction. Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of the claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that 'where there can be pointers to a number of different jurisdictions' there is no reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that the alternative jurisdiction is clearly or distinctly more appropriate than this jurisdiction.

(iii)When considering whether to grant a stay or not, the court will look to what is the 'natural forum' as was decided by Lord Keith of Kinkel in The Abidin Daver, 'that with which the action has the most real and substantial connection'. In this connection the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions might be subject, in the case of actions in tort where it is alleged that the tort took place and the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of considerations a court should have in exercising its discretion.

(iv)If the court determines that there is some other available and prima facie more appropriate forum then ordinarily a stay will be granted unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in the Abidin Daver made it very clear that the burden of proof to establish such a circumstance was on the claimant and that cogent and objective evidence is a requirement."

[55] In **Eurochem**, another decision of this Court, Webster JA [Ag.] at paragraph 26, further summarised the three-stage inquiry stating that:

"[W]hen a defendant seeks a stay of an action on the ground of forum non conveniens the court should determine whether there is another available forum (stage 1), and whether that forum is more appropriate for the trial of the case (stage 2). If there is another forum that is more appropriate, a stay should be granted unless there is a risk that the claimant will not receive justice in the more appropriate forum (stage 3). The burden of proof in the first two stages is on the defendant seeking the stay, and on the claimant at the third stage."

[56] This Court has been invited by WWRT to conduct its own three-stage inquiry as detailed by the authorities above, to determine whether the learned judge identified the appropriate forum or *forum conveniens* to try the tortious claims against the respondents. However, an appellate court such as this, must not only be cognisant of the principles governing *forum conveniens* but also of its role as an appellate court and the need for caution when reviewing a trial judge's exercise of discretion. This Court highlighted the need for this caution at paragraph 21 of **Eurochem** where Webster JA [Ag.] stated:

> "The need for caution in reviewing what is in effect a balancing exercise by the trial judge is even more important in the search for which of two or more competing fora is the most appropriate for trying a claim between disputing parties."

[57] In **Aldi Stores Ltd v WSP Group plc**,[12] Thomas LJ said that:

> "The types of case where a judge has to balance factors are very varied and the judgments of the courts as to the tests to be applied are expressed in different terms. An appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him."

[58] In the *locus classicus* **Spiliada**, Lord Templeman said:

> "In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere."

[59] Bearing these observations in mind I now examine the evaluation of the evidence and analysis conducted by the learned judge.

[60] It is evident that for WWRT to succeed on this ground it must show this Court that the learned judge erred in the exercise of his discretion, in that no weight, or no

[12] [2007] EWCA Civ 1260.

sufficient weight, was given to relevant considerations. Put another way, WWRT must show that the learned judge erred in the exercise of his discretion and that as a result, his decision is outside the generous ambit of reasonable disagreement.

[61] Having reviewed the pleaded claims, the evidence before this Courtthe submissions of the parties, and the principles as detailed above, I do not consider that the learned judge erred in the exercise of his discretion in identifying Ukraine as the *forum conveniens* for the determination of the tortious claims against the respondents. WWRT contended in their submissions that the learned judge gave too little weight to relevant factors in favour of irrelevant factors in his determination of the forum issue. However, it is clear from the learned judge's treatment of the forum issue, that he employed the correct test, considered the evidence before him and embarked on an evaluation exercise that gave sufficient weight to the multitude of factors placed before him by the parties.

Available forum

[62] The learned judge firstly considered the three-stage inquiry to be conducted, citing **Spiliada** and its restatement in **IPOC**. The learned judge was aware that the satisfaction of **Spiliada** and **IPOC** required that Carosan had to firstly show that there was an alternative jurisdiction, and that the alternative jurisdiction was clearly or distinctly more appropriate than the BVI. The respondents were able to provide evidence that demonstrated that there was an alternative jurisdiction, Ukraine, and that it was clearly the more appropriate forum than the BVI.

Connecting factors

[63] The respondents were able to demonstrate that there were several connecting factors pointing to Ukraine being the natural forum to determine the claims. These connecting factors were plentiful and were connecting factors which related to the non-exhaustive list of connecting factors as provided by the **Spiliada** case. These were factors related to the availability of the witnesses, the likely language to be used, the law governing the transaction, where the alleged action took place, where

the parties were resident and carried on business. The connecting factors provided by the respondents in the court below showed that there was a substantial connection to Ukraine.

[64] The respondents were able to provide cogent and objective evidence that the law governing the disbursements of the Loans was Ukrainian, that the language that was likely to be spoken by the witnesses would be Ukrainian or Russian, that the location of the alleged tort was Ukraine, that the law governing the disbursement of the Loans and the prosecution of the alleged tort was Ukrainian, and but for the purported assignments, the principal parties would all be Ukrainian. However, when the burden shifted to WWRT to prove by way of cogent and objective evidence that there was a risk that it would not receive justice in the more appropriate forum, that being Ukraine, WWRT did not successfully discharge that burden. WWRT presented several connecting factors, however, these factors all appeared to primarily hinge on Carosan's incorporation in the BVI. In **Bitech Downstream Ltd v Rinex Capital Inc and another**,[13] Rawlins J stated:

> "I do not think that the domicile of the company is necessarily the quintessential connecting factor or that it should be so as a matter of public policy. It is, like the law that governs the transaction or the issues for trial, a strong pointer or connecting factor. Like these, it is to be considered with other connecting factors."

[65] In addition to this, WWRT has argued that it is routine for the BVI court to hear matters on foreign law, therefore making the BVI an appropriate forum. While I accept WWRT's arguments that it is routine for foreign law to be determined in courts like the BVI court as elucidated in **WWRT v Tyshchenko**, and that the BVI court is a perfectly competent and capable forum to determine such claims, it must be borne in mind that such capability or the routine determination of foreign law are not the criteria for determining the appropriateness of a forum and does not provide a prescript without more for justifying the assumption of jurisdiction when determining the question of the appropriate forum for the trial of a claim. An appropriate forum is one where the action has the most real and substantial connection. It is the forum that most embodies the principles expressed by Lord Goff in **Spiliada** and applied by this Court time and again.

[13] BVIHCV2002/0233 and BVIHCV2003/0008 (delivered 12th June 2003, unreported).

[66] Further, a close reading of paragraphs 62 to 72 of the judgment reveals that the learned judge spent a considerable amount of time evaluating and balancing the connecting factors before him. Paragraphs 62 to 72 of the judgment state:

> "[62] Pausing there, it is also right to record that some of the loans predate the incorporation of Carosan.
>
> [63] Issues of causation are also much better dealt with in the Ukraine. As is well known in late 2013, there was a popular uprising in the Ukraine which gave rise to 19 Citing Sibir Energy Plc v Gregory Trading SA [2006] ECSCJ No 99. 24 a movement known as the Maidan revolution. On 20th February 2014, Russia invaded the Crimea and on 22nd February 2014, President Yanukovych fled the Ukraine. This resulted in a collapse in the value of the hryvnia and is said to have contributed to the collapse of the Platinum Bank. Many further issues of causation arise, in that DGF failed to issue proceedings in respect of many non-performing loans made by the Bank. That resulted in claims becoming time-barred. The courts of this territory are unlikely to have anything like the grasp of the overall actualité that a Ukrainian Court will have.
>
> [64] There is also the fact there are already related proceedings in the Ukraine — the claim brought by the DGF against the managers, to which I have already referred. The Cambridgeshire factor favours the Ukraine in these circumstances. This is also relevant to the question of documentation. It is often said that one of the advantages in suing in a common law jurisdiction is the availability of disclosure. This is not really of great weight in considering forum conveniens but in the current case, it has no weight. It is striking that the claimant does not have any of the documentation relating to the underlying loan agreements which were said to have been obtained by fraud. The claimant does not have the applications for the loans or the minutes of the Credit Committee.
>
> [65] Now it is said that the Ukrainian legal process for obtaining documents from third parties is defective. Well whether that is right or not, it is likely to be the only route to obtaining these documents which are likely to be key to a fair trial of the fraud claim. Moreover, it may well be easier to persuade the DGF voluntarily to assist in producing documents for the Ukrainian proceedings than for BVI proceedings.
>
> [66] A further factor in favour of the Ukraine is that the cost of translations will be avoided. Likewise, witnesses will be able to give evidence in their native tongue. Mr. Kaufman will be able to give instructions to his lawyers without needing an interpreter.
>
> [67] …
>
> [68] …

[69] …

[70] I accept that the claimant has shown an arguable connection between Mr. Kaufman and the companies listed in the annex to the Statement of Claim. Thus, I was taken in some detail to Mr. Kaufman's ownership of an English company, Odessa Airport Development Ltd, which was involved in the public procurement case I have mentioned. Mr. Ayres QC was able to show the involvement of Mr. Malamanchuk in that matter. Mr. Malamanchuk is said to be the ultimate beneficial owner and sole director of Carosan.

[71] Mr. Ayres rightly invites me to be suspicious about how a man who is ostensibly a lorry driver living in modest circumstances in the Ukraine comes to be the owner of a BVI company handling tens of millions of dollars. However, the BVI connection to Mr. Kaufman should not be exaggerated. The overwhelming number of companies said to be associated with the fraud in Annex A are Ukrainian companies.

[72] If the Article 1166 claims made by the Claimant were sustainable, I would hold, if it were relevant, that Mr. Kaufman was a necessary or proper party to the action. However, the overwhelming centre of the claims in this case is the Ukraine. The courts of the Ukraine are an available forum where justice can be done. The Ukraine is, for the reasons I have given, clearly the most appropriate forum. There is no risk that the claimant will not receive justice in that forum."

[67] While the learned judge may not have, in his judgment, detailed every connecting factor before him, this is not indicative that the learned judge did not consider those factors in arriving at his conclusion on the issue of *forum conveniens*. The Court in **Showa Holdings Co. Ltd v Nicholas James Gronow and John David Ayres**[14] stated that:

> "Cognisance must be paid to the fact that the weight placed on evidence is a matter that is exclusively for the trial judge. The judge has been immersed in all aspects of the case and as such he would be able to better assess the evidence and has advantages which the appellate court does not have. …it was left to the judge to decide how to express his conclusions."

[68] The learned judge was entitled to accept or reject the evidence of the parties and engage in his evaluative process. This exercise, as observed by Lord Goff in **Spiliada,** is quintessentially the province of the trial judge. It is clear that the learned judge's evaluation of the connecting factors was reasonable and sought to

[14] BVIHCMAP2020/0031 (delivered 31st May 2021, unreported).

ensure that the forum identified was distinctly more suitable in the interests of all the parties and the ends of justice. Accordingly, I conclude that the learned judge's decision did not exceed the generous ambit within which reasonable disagreement is possible. Therefore, there is no basis for disturbing the exercise of his discretion and this ground of appeal in my view fails.

[69] For the reasons set out above, I would dismiss WWRT's appeal in its entirety.

WWRT's application to adduce fresh evidence

[70] Before the prosecution of this appeal, WWRT sought to make an application to adduce fresh evidence in relation to the ongoing armed conflict in Ukraine which began on 24th February 2022 and to amend its notice of appeal to reflect the fresh evidence adduced. The Court, upon considering both the written and oral submissions of all parties, was of the unanimous view that the application to adduce fresh evidence should be dismissed. The Court also promised to provide written reasons for its decision. We do so now.

WWRT's submissions

[71] Mr. Pillow, QC, in his submissions before the Court, stated that the Russian invasion of Ukraine was a critical consideration in this appeal. Particularly as it related to this Court's treatment of the issue of *forum conveniens*. Mr. Pillow, QC argued that the application to adduce fresh evidence raised the issue of whether the Court, when considering the appeal about whether the judge was right on *forum conveniens*, should approach the matter blind to the fact that Ukraine is in a state of war with Russia. Mr. Pillow, QC answered this issue posed in the negative, suggesting that there was a supervening unavailability of a foreign forum, that being Ukraine, and that this should be adduced into evidence and be a ground relied on in WWRT's appeal as it related to the learned judge's decision on *forum*.

[72] To support this submission, Mr. Pillow, QC invited the Court to read the witness statement of Ms. Olga Gutovska dated 1st April 2022 which detailed the

unavailability of Ukraine as an appropriate forum, the implementation of martial law in Ukraine, the postponement indefinitely of civil proceedings, and the unavailability of lawyers and judges, who were said to have fled the jurisdiction or taken up arms to fight the war. Mr. Pillow, QC submitted that if the Court failed to adduce the evidence of the war's impact on Ukraine as being an appropriate forum, it would create a limbo in which WWRT's claim would be rendered 'untriable'.

[73] Mr. Pillow, QC, in both his written and oral submissions, identified the principles laid out in **Ladd v Marshall**[15] as the governing principles in relation to applications to adduce fresh evidence. He stated that the evidence sought to be adduced by WWRT met the requirements of **Ladd v Marshall** as (i) the evidence sought to be adduced by WWRT could not have been obtained at the trial with reasonable diligence; (ii) the evidence would or might, if believed, have a very important effect on the mind of the tribunal; and (iii) the evidence is of a sort which inherently is not improbable.

[74] In relation to the first limb of the **Ladd v Marshall** test, Mr. Pillow, QC acknowledged that where an application is made for a stay on the grounds of *forum non conveniens*, the relevant time for determining the matter is not the date of the application, but the date of the hearing. Mr. Pillow, QC argued that while the evidence of the Russian invasion in Ukraine was not in existence at the hearing of the application in the court below in December 2021, the test in **Ladd v Marshall** could extend to or was not limited to evidence which was in existence at the time of the hearing but also included evidence that came into existence subsequent to the hearing below. To support this argument, Mr. Pillow, QC relied on the case of **Staray Capital Limited and another v Cha, Yang (also known as Stanley)**.[16] As to the second limb, Mr. Pillow, QC argued that the evidence would or (at the very least) might have had an important effect on the learned judge's decision on the *forum conveniens* issue. Mr. Pillow, QC stated that the witness statement of

[15] [1954] 1 W.L.R. 1489.
[16] [2017] UKPC 43.

Ms. Olga Gutovska provided important evidence that Ukraine is not or was no longer an available forum, directly impacting the three-stage forum inquiry as laid out in **Spiliada**. Further, as it related to the third limb, Mr. Pillow, QC submitted that that was at the very least inherently not improbable, as Ms. Gutovska gave first-hand evidence of her experience of the impact of the war in Ukraine, as well as exhibiting public sources of information for the matters to which she deposed. Mr. Pillow, QC further submitted that the Court should be flexible in its application of the **Ladd v Marshall** principles and be mindful of the need to do justice to the parties in the case, in accordance with the overriding objective.

Mr. Kaufman's submissions

[75] Mr. Morgan in his argument rejected Mr. Pillow, QC's submissions that an appellate court under the **Ladd v Marshall** principles could only admit evidence that existed at the time of the trial in the lower court. Mr. Morgan, QC argued that Mr. Pillow, QC's submissions sought to expand the principles which would cause both the parties and the Court to 'shoot at a moving target', with updated evidence being provided in the run up to the application, the outcome of which would be dependent on when it happened to be heard and what the latest available evidence happened to be. Such an approach would be costly both in terms of the Court's time and expense and would encourage parties to seek to have the 'last word' in evidential terms. Ultimately, he argued it would lead to unwieldy litigation, uncertainty, and injustice, running directly contrary to the overriding objective.

Carosan's submissions

[76] Mr. Lacy in his submissions shared the sentiments expressed by Mr. Morgan, QC adding that WWRT's assertions should also be disregarded for the purposes of the interests of justice test as WWRT had no intention of issuing a claim in Ukraine, regardless of whether Ukraine was an available forum or not. Mr. Lacy also accepted that the time for considering the issue on *forum conveniens* was

December 2021. He cited the House of Lords decision **Lubbe v Cape Plc**[17] as support for this submission.

Discussion
Ladd v Marshall principles

[77] This Court has acknowledged in **Guy Joseph v The Constituency Boundaries Commission et al**[18] that the CPR does not contain a specific rule governing the admission of fresh evidence on appeal. As it relates to civil matters, this Court is guided by the authoritative statement of Lord Denning in **Ladd v Marshall**.

[78] In **Ladd v Marshall**, Denning LJ set out a three-limb test stating that:

> "To justify the reception of fresh evidence ...three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it need not be incontrovertible."

[79] While this Court has accepted and adopted **Ladd v Marshall** as authoritative in deciding whether to admit fresh evidence on appeal, this Court has, in **Adam Bilzerian v Gerald Lou Weiner et al,**[19] acknowledged that the **Ladd v Marshall** principles are 'not special rules to be strictly applied by the court. It is no longer necessary for an applicant to show some special ground for the grant of permission to rely on fresh evidence upon the hearing of an appeal'. These principles must be broadly applied but relaxed in appropriate cases to give effect to the overriding objective of the court to do justice. Notwithstanding this, an applicant must produce strong grounds to merit the appellate court exercising its discretion in the applicant's favour.

[17] [2000] UKHL 41.
[18] SLUHCVAP2015/0013 (delivered 1st October 2015, unreported).
[19] SKBHCVA2019/0033 (delivered 21st July 2020, unreported).

First limb of the Ladd v Marshall principles

[80] To have succeeded on this first limb of the **Ladd v Marshall** principles, WWRT needed to have shown this Court that the evidence it sought to adduce, could not have been obtained with reasonable diligence for use at the trial.

[81] As it relates to applications to adduce fresh evidence there is no shortage of cases in the Eastern Caribbean, and in the United Kingdom which show that to satisfy this limb of the test the evidence to be adduce must be evidence that existed at the time of the trial but could not have been obtained with reasonable diligence for the use at the trial. Such evidence does include evidence that the applicant was unaware existed at the time trial or evidence that existed at the time but proved difficult to obtain. This limb does not however contemplate that evidence that did not exist at the time of the trial or a change in circumstance post-trial could be evidence adduced before the Court of Appeal. This would surely explain why there was no relevant authority provided by WWRT to substantiate this point.

[82] WWRT, in making this submission, sought to rely on this Court's decision in **Staray Capital Limited and another**. However, we are of the view that this case neither serves nor supports WWRT's submissions. In **Staray Capital Limited and another** the applicant sought to adduce two opinions from the Shanghai Municipal Bureau of Justice which were produced in response to complaints filed by the second appellant against the respondent. The opinions were dated 24th March 2013 and 1st July 2013 and the trial was held between 28th and 31st January 2013.

[83] Thom JA, delivering the Court's judgment, accepted that these two opinions produced after the trial had satisfied limbs (i) and (iii) of the **Ladd v Marshall** principles. While it may be tempting based on the dates in which these opinions were produced to argue that the Court in **Staray Capital Limited and another** accepted that evidence that did not exist before the trial would be accepted, this is not so. Upon a closer reading of the judgment of the Court, it becomes apparent that while the production of the opinions by the Shanghai Municipal Bureau of

Justice took place sometime after the trial, the information or evidence used to generate/populate those opinions existed well before the trial that took place in January 2013. At paragraph 25 of the judgment Thom JA stated that:

> "The Shanghai Bureau opined that in relation to his application for (i) a licence to practice in the PRC, (ii) annual registration licence and (iii) change of practice institution, Mr. Cha had provided all of the documents required under PRC law. He made no other disclosure. More specifically he did not disclose that he held US citizenship. In relation to whether Mr. Cha had violated any of the laws of the PRC when he obtained his Lawyer's Qualification Certificate on 7th December 2001 and at which time he had acquired US citizenship in September 2001, the Board opined that if Mr. Cha had ceased to be a Chinese national on 7th December 2001 he had violated the requirements of Article 4 of the Measures for Evaluation and Granting of Lawyer's Certificate (Promulgated on 1st January 1997, and repealed on 26th February 2009)."

[84] This is therefore distinguishable from the case at bar where WWRT sought to admit evidence/a circumstance, the war between Ukraine and Russia, that had not been in existence at the time the learned judge heard the jurisdictional challenges. **Staray Capital Limited and another** does not depart from the general understanding of the principle that the evidence to be adduced must be in existence at the time of the trial.

[85] Furthermore, to my mind it would be incongruous to say that an order setting aside service out made by the court below may be considered to be wrong on appeal because by the time of hearing the appeal circumstances had changed as it relates to the forum limb of the service out test. The same may be said in relation to an appeal against the stay granted on the ground of *forum non conveniens.* It may be that an application to the court on a different basis may be possible. That said, I hasten to add that I express no view thereon. I agree with Mr. Morgan, QC that to allow such a course would be like 'shooting at a moving target' with outcomes dependent on circumstances as they may develop at different points in time. In **ISC Technologies Ltd. & Another v James Howard Guerin & Others**,[20] Hoffman J expressed the view that the determination of the question whether leave to serve

[20] [1992] 2 Lloyd's Rep 430.

out was rightly given must be at the time when it was given and should not be discharged simply because circumstances have changed. As it relates to a stay on forum grounds, he opined that the appropriate time for considering the matter is the date of the hearing. These statements were approved by the English Court of Appeal in **Erste Group Bank AG (London) v JSC (VMZ Red October)**[21] at paragraphs 44 and 45.[22] This approach to my mind is sound in principle and I adopt it.

[86] While I am mindful of the disruptions to parts of the court system in Ukraine acknowledged to a greater or lesser extent by both sides as a result of war, this change in circumstance from when the learned judge presided over the application to set aside the service-out order and the stay application, should not be used to exploit and expand these guiding principles, which at their core, help ensure certainty, fairness and justice to all parties to proceedings.

[87] There was no doubt that WWRT had accordingly failed to satisfy the test for the admission of this evidence, and we dismissed the application. The respondents are accordingly entitled to their costs on the application.

Conclusion and Orders

[88] For the reasons above, I would make the following orders:

(i) The appeal is dismissed.

(ii) Costs on the appeal and the application to adduce fresh evidence are awarded to the respondents to be assessed by a judge of the Commercial Division if not agreed within 21 days.

[21] [2015] 1CLC; [2015] EWCA Civ 379.
[22] See also Satfinance Investment Ltd v Inigo Philbrick & Ors [2020] EWHC 3527 (Ch) paras 41-43.

[89] I am grateful to counsel for the parties for their helpful written and oral submissions.

I concur.
Mario Michel
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar