COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2018/CLE/gen/01404

IN THE MATTER OF THE WINTER TRUST, THE SUMMER TRUST AND THE SPRING TRUST

AND IN THE MATTER OF AN INTENDED ARBITRATION

BETWEEN

MATTEO VOLPI

Plaintiff in an Intended Arbitration

AND

(1) DELANSON SERVICES LIMITED

(2) GABRIELE VOLPI

Defendants in an Intended Arbitration

Before Hon. Mr. Justice Ian R. Winder

Appearances: Fenner Moran QC with Adrian Hunt for the plaintiff
Brian Simms QC with Marco Turnquest for the first defendant
Stephen Smith QC with Terry North for the second defendant

Hearing dates: 7 and 8 March 2019

RULING

WINDER J

This is the second round in a contentious trust dispute involving these parties. The defendants seek to set aside an injunction made in support of arbitral proceedings and or the service of the action on the plaintiff.

Background

[1.] I adopt the basic factual matrix to this dispute as set out in my 27 November 2018 decision in action 2018/CLE/gen/474.

[2.] The 2nd Defendant Gabriele Volpi (Gabriele) is an Italian born businessman who established a substantial business enterprise in Nigeria and eventually became a citizen of Nigeria. Gabriele's business involved the provision of services to the Oil and Gas Industry since the 1980's. The Plaintiff, Matteo Volpi (Matteo) is one of Gabriele's two children. At some point Gabriele had sought to integrate both of his children into his businesses. Matteo says that he worked in the business for the past two decades.

[3.] In October 2006 Gabriele settled the Winter and Summer Trust and appointed the 1st Defendant (Delanson), then a Panamanian Company, as Trustee for both trusts. In March 2012 Gabriele settled the Spring Trust and again appointed Delanson, which at that time had re-domiciled to The Bahamas. The objects of discretionary powers in the three trusts included Gabriele his children and descendants. The three trusts are settled in remarkable similar terms and for convenience, in this ruling, are collectively referred to as "the Trusts".

[4.] Matteo says that he was aware of the establishment of trusts for the benefit of the family in the late 2000's and was unaware of what was held in the Trusts but assumed it held all of Gabriele's assets, since it was established for tax purposes. Matteo says that he became aware of the Trusts in 2013 and says that all of Gabriele's assets had been transferred into them. Matteo estimates that the

Trusts held several billion dollars' worth of assets, including Orlean Invest Holding Group (the group through which the Nigerian businesses were structured), other significant business holdings, real estate and yachts. Notwithstanding the Trusts, Gabriele nonetheless continued to control the companies. All the relevant business decisions were made by Gabrielle who was treated as the majority shareholder in the businesses.

[5.] Delanson had been first incorporated as a Panamanian company on 27 October 2006 under the name Delanson Service Inc. The name was then changed to Delanson Services PTC Limited and was re-domiciled to The Bahamas on 29 September 2010. Delanson, it is said for tax advantages, re-domiciled, a second time, to Auckland, New Zealand in August 2016 where its offices are located. The corporate name was again changed on 16 January 2017 to its present name, Delanson Services Limited.

[6.] Gabriele says that, in March 2016, Matteo fell out with him and left the businesses following differences of opinion as to the future direction of the businesses. Matteo says that the falling out took place in mid-2017 around the same time as the breakdown of his parent's marriage. Notwithstanding Matteo's leaving the companies, Gabriele continued to financially support him. Matteo continued to receive a US$35,000 a month salary; he received lump sum payments totaling US$700,000 (in July and August 2016); and received US$50,000 per month from July 2016 onwards.

[7.] On or about 6 October 2016 Delanson made a distribution of all (or the majority) of the assets of the Trust to Gabriele. Delanson subsequently executed a Termination of the Trusts on 17 January 2017.

[8.] Matteo commenced action 2018/CLE/gen/474 on 25 April 2018 complaining that Delanson had, in breach of trust, improperly distributed the entirety of the assets of the Winter Trust, the Summer Trust and the Spring Trust to Gabriele. He

asserted that Gabriele was liable to account for the assets received from the distribution. Specifically Matteo sought:

(1) Declarations that the purported distributions ("the Distributions") on 6 October 2016 of all (or the majority) of the assets of the Trusts by Delanson to Gabriele was a breach of trust or a fraud on the power and was in any event void;
(2) An order setting aside the Distributions and subsequent Termination of the Trusts dated 17 January 2017 and executed by Delanson;
(3) An order that, insofar as Gabriele is not able to fully reconstitute the Trusts, that he pay damages or equitable compensation to the trusts for knowingly receiving trust property and/or dishonestly assisting in a breach of trust;
(4) An order requiring Delanson to account for the whereabouts of the assets of the Trusts; and
(5) Replacement of Delanson as trustee of the Trusts by a suitably qualified, independent professional trustee.

[9.] In my 27 November 2018 decision, upon the application of Delanson and Gabrielle, I stayed the 2018/CLE/gen/474 action on the basis that the claims fell to be determined by arbitration. The alternative finding was that the claims would in any event be caught by the exclusive jurisdiction clause and nonetheless be stayed in favor of proceedings in New Zealand. Following the delivery of the 27 November 2018 decision a conservatory stay was granted to Matteo until 4 December 2018 to permit him and his advisors to consider the written decision and to determine whether he would pursue an appeal or seek a further stay.

[10.] Following upon the court's decision to stay the proceedings in favor of Arbitration, Matteo, on 30 November 2018, submitted the dispute to arbitration proceedings by way of service on Delanson and Gabrielle. On the same day, 30 November 2018, Matteo commenced a fresh action by Originating Summons seeking interim injunctive relief.

[11.] On 4 December 2018, at the return hearing, Matteo formally indicated that he would not be seeking to appeal the decision but instead would be seeking leave to serve the Originating Summons, in the new action, out of the jurisdiction and interim injunctive relief. Counsel for the defendants, who were present in Court

for the 2018/CLE/gen/474 hearing both indicated that they had not been instructed in the new action and did not want to remain for the proceedings lest it be considered that their clients were submitting to the jurisdiction or otherwise participating in the new proceedings. Counsel were permitted to withdraw from the Chambers.

[12.] On 4 December 2018 I granted leave to serve the Originating Summons out of the jurisdiction on the defendants and interim injunctive relief in similar terms as the prior injunction which had been set aside.

[13.] On 4 February 2019 the Arbitral Tribunal became fully constituted with the appointment of Dr. Georg von Segesser as the Chairman of the Tribunal. Lord Neuberger of Abbotsbury and Professor Malatesta had earlier been appointed by the parties. On 13 February 2019 a telephone hearing took place to deal with preliminary matters including the seat of the arbitration. On 21 February 2019 the Arbitral Tribunal determined that the seat of the arbitration was The Bahamas.

[14.] The defendants have made separate but similar applications for the setting aside of the order dated 4 December 2018 granting leave to serve out of the jurisdiction and the interim injunction.

[15.] Notwithstanding the multipronged attack launched by the defendants, I am satisfied that the application is to be resolved entirely on the question of jurisdiction. The principal jurisdictional issue is whether these proceedings could be served out of the jurisdiction. The seat of the arbitration is The Bahamas but the parties to the arbitration are outside of The Bahamas, the assets being enjoined are not in The Bahamas and the hearing will also not take place in The Bahamas as none of the Arbitrators are here. It is accepted by all parties that without service out of the jurisdiction, there can be no interim relief in support of the arbitration. Having considered the matter I am not satisfied that the current state of the law permits me to make an order to lend assistance by way of an

interim injunction to the arbitration process where I do not have personal jurisdiction over the persons to be enjoined by my order.

[16.] It is accepted that a two stage analysis must be undertaken. Firstly, the relief being sought by the action must be available extra-territorially and secondly the rules on service out of the jurisdiction must accommodate the application for relief. Matteo relies on Section 55(2)(e) of the Arbitration Act ("AA") to satisfy the first stage and upon O. 11 r. 8(1) with respect to the satisfying the second stage of the analysis.

[17.] Section 55 of the AA provides:

> *55. Court powers exercisable in support of arbitral proceedings.*
> *(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.*
> *(2) Those matters are-*
> *a) the taking of the evidence of witnesses;*
> *b) the preservation of evidence;*
> *c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings -*
> *i.) for the inspection, photographing. preservation, custody or detention of the property, or*
> *ii.) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property, and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;*
> *b) the sale of any goods the subject of the proceedings;*
> *c) the granting of an interim injunction or the appointment of a receiver.*
> *(3) ...*

[18.] It cannot be disputed that the AA was intended to have some extraterritorial effect. Delanson argues however, that Section 55, in particular, was not intended to have such extraterritorial effect. Matteo disagrees and relies upon Section 4 of the AA, which reads, in part:

> 4. Application.

(1) The provisions of this Act apply where the seat of the arbitration is in The Bahamas.
(2) ...
(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside The Bahamas or no seat has been designated or determined -
(a) section 54; and
(b) section 55;
but the court may refuse to exercise any such power if. in the opinion of the court, the fact that the seat of the arbitration is outside The Bahamas, or that when designated or determined the seat is likely to be outside The Bahamas, makes it inappropriate to do so.
(4) ...

It does appear the Section 55 could have extra-territorial effect. However, whilst the power to grant an interim injunction exists under Section 55, the section is limited by the language indicating that the Court has the same power in relation to arbitral proceedings that it has relative to legal proceedings. I accept that this equivalent section in English law, under the English legislative regime, would have the power of enabling the Court to grant the claim and relief sought by Matteo in these circumstances. English law however, unlike our current legislative regime, has made provisions to support such a claim.

[19.] The defendants' argue, and I agree, that this court is not empowered to grant free standing interim injunctive relief in support of legal proceedings taking place outside of The Bahamas. In ***Meespierson (Bahamas) Limited and others v Grupo Torras SA and another - 2 ITELR 29*** the Court of Appeal held that there was no jurisdiction in the Supreme Court under the Supreme Court Act to grant a free standing Mareva injunction in aid of English proceedings. According to ***Gonsalves-Sabola P.***, page 34:

> Certainly s 25 of the English 1982 Act made a significant inroad in the *The Siskina* principle by allowing a free-standing Mareva in aid of foreign (Contracting State) proceedings brought or to be brought. Nowhere in Bahamian statute law is there a comparable enactment to s 25 of the English 1982 Act and therefore the conclusion seems irresistible that the Bahamian Parliament has not yet considered that public policy calls for law

reform in the shape of the English legislation. The following question arises: could it be said that where the Bahamian Parliament, unlike its English counterpart, has omitted to reform the law by thus widening the power of the courts to grant Mareva relief, the courts may themselves, as a matter of inherent jurisdiction, effect the desired reform? To pose the question is to answer it. As a matter of first principles, a court may not arrogate to itself legislative functions. For this court to apply a rule of law that is inconsistent with *The Siskina* without the authority of legislation to that end, simply because it is considered desirable to achieve the result produced by s 25 of the English 1982 Act, is an impermissible aberration from the judicial function.

In reliance on Section 55 therefore, the Court could not do for arbitral proceedings taking place outside of The Bahamas that which it is incapable of doing for legal proceedings taking place outside of The Bahamas.

[20.] Matteo's application for leave to serve the Originating Summons out of the jurisdiction was stated to have been made on the footing of O. 11 r. 8(1) of the Rules of the Supreme Court. Order 11 rule 8 provides:

> 8. (1) Subject to paragraph 2 and Order 66, rule 4, service out of the jurisdiction of an originating summons is permissible with the leave of the Court.
>
> (2) Where the proceedings begun by an originating summons might have been begun by writ, service out of the jurisdiction of the originating summons is permissible as aforesaid if, but only if, service of the writ, or notice of the writ, out of the jurisdiction would be permissible had the proceedings been begun by writ.
>
> (3) Where any proceedings are authorised by these Rules or (apart from these Rules) by or under any Act to be begun by originating motion or petition, service out of the jurisdiction of the notice of motion or of the petition is permissible with the leave of the Court.
>
> (4) Subject to Order 66, rule 4, service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with the leave of the Court.

(5) Rule 4(1), (2) and (3) shall, so far as applicable, apply in relation to an application for the grant of leave under this rule as they apply in relation to an application for the grant of leave under rule 1 or 2.

(6) An Order granting under this rule leave to serve out of the jurisdiction an originating summons to which an appearance is required to be entered must limit a time within which the defendant to be served with the summons must enter an appearance.

(7) Rules 5, 6 and 7 shall apply in relation to any document for the service of which out of the jurisdiction leave has been granted under this rule as they apply in relation to a writ.

[21.] In considering the scope of Order 11 rule 8, the Court of Appeal, in the case of **AWH Fund Limited (In Compulsory Liquidation) v. ZCM Asset Holding Company (Bermuda) Limited - [2014] 2 BHS J. No. 53** at paragraph 34 held as follows:

> In particular, O. 11 r. 8(1) permits service out of the jurisdiction of an originating summons except an originating summons in arbitration proceedings; and is subject to the further limitation in paragraph (2) that service out of an originating summons in proceedings which may have been begun by writ is permitted only if such service would be permissible if the proceedings had been begun by writ. (emphasis added)

The Court of Appeal decision in ***AWH Fund Limited*** was very recently upheld by the Privy Council. The efficacy of the above statement at paragraph 34 was not discussed in the opinion of Lady Arden, who gave the decision of the Board.

[22.] Despite the clear and unequivocal statement by the Court of Appeal, Matteo invites the court to consider the statement as merely obiter and to distinguish it on the basis that the facts were related to insolvency proceedings and to service out of the jurisdiction of interlocutory processes. It is true the Court of Appeal was not being asked to consider O. 11 r. 8(1) in relation to arbitration proceedings however the Court took the opportunity to consider the entire scope of O. 11 r. 8, and if not binding upon me, the decision is highly persuasive.

[23.] In any event, I accept that the dicta of the Court of Appeal is a correct statement of law. O. 11 r. 8(1) specifically states that it is subject to the O. 66 r. 4 of the Rules of the Supreme Court. O. 66 provides:

> ORDER 66 - ARBITRATION PROCEEDINGS
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> 1. (1) Every application to the Court —
>
> a) to remit an award under section 10 of the Arbitration Act; or
> b) to remove an arbitrator or umpire under section 11(1) of that Act; or
> c) to set aside an award under section 11(2) thereof, must be made by originating motion to a single judge in court.
>
> (2) A special case stated for the decision of the Supreme Court by an arbitrator or umpire under section 19 of the Arbitration Act shall be heard and determined by a single judge.
>
> (3) An application for a declaration that an award made by an arbitrator or umpire is not binding on a party to the award on the ground that it was made without jurisdiction may be made by originating motion to a single judge in court, but the foregoing provision shall not be taken as affecting the judge's power to refuse to make such a declaration in proceedings begun by motion.
>
> 2. (1) Subject to the foregoing provisions of this Order, the jurisdiction of the Supreme Court or a judge thereof under the Arbitration Act may be exercised by a judge in chambers.
>
> (2) An application for an order under section 19 of the said Act directing an arbitrator or umpire to state a case must be made by originating summons and the summons must be served on the arbitrator or umpire and the other party to the reference.
>
> (3) No appearance need be entered to an originating summons by which an application under the said Act is made.
>
> 3. (1) An application to the Court —
>
> a) to remit an award under section 11 of the Arbitration Act; or
>
> b) to set aside an award under section 12(2) of that Act or otherwise, may be made at any time within 6 weeks after the award has been made and published to the parties.
>
> (2) In the case of every such application, the notice of motion must state in general terms the grounds of the application; and, where the motion is founded on evidence by affidavit, a copy of every affidavit intended to be used must be served with that notice.

4. (1) Service out of the jurisdiction —

a) of an originating summons for the appointment of an arbitrator or umpire or for leave to enforce an award; or
b) of notice of an originating motion to remove an arbitrator or umpire or to remit or set aside an award; or
c) of any order made on such a summons or motion as aforesaid,

is permissible with the leave of the Court provided that the arbitration to which the summons, motion or order relates is to be, or has been, held within the jurisdiction.

(2) An application for the grant of leave under this rule must be supported by an affidavit stating the grounds on which the application is made and showing in what place or country the person to be served is, or probably may be found; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service (sic) out of the jurisdiction under this rule.

(3) Order 11, rules 5, 6 and 7, shall apply in relation to any such summons, notice or order as is referred to in paragraph (1) as they apply in relation to notice of a writ.

5. ... (emphasis added)

O. 66 r.4. refers to service of originating processes out of the jurisdiction with respect to arbitration proceedings and provides that service of an originating summons, seeking to (1) appoint an arbitrator or umpire or (2) for leave to enforce an award is permissible with leave of the Court. There is no reference to any other type of assistance which may be provided to arbitration proceedings for which service out of the jurisdiction is permissible.

[24.] Matteo says that the two categories of arbitration related claims identified to be pursued by way of Originating Summons was not meant to be exhaustive or exclusive. Counsel for Matteo, Mr Moran QC, says that O. 66 r. 4 does not say that these are the only types of application that can be granted permission for service out. Respectfully, I cannot accept such an argument. O. 11 r 1(1), like O. 66 r. 4 is framed in a similar way to identify the list or categories of claims which service of a Writ of Summons out of the jurisdiction is permissible with leave of the Court. Surely it cannot be contended that the list of claims under O. 11 rule 1(1) is not exhaustive as it relates to the types of Writ claims for which

service out is permitted. Unless some other power or gateway exists under the rules to permit service out, the Court cannot supplement the rules to do so.

[25.] Service out of the jurisdiction requires express authorisation by or under statute. This was the dicta in ***Masri v Consolidated Contractors International (UK) Ltd (No 4) [2010] 1 AC 90***. In ***Masri***, the claimant had obtained an order under the English rules against a director of the defendant, who was resident in Greece, to attend before the court in England to give evidence as to the assets of the company outside the jurisdiction to assist the claimant in enforcing its judgment against those assets. The House of Lords held that there was no such jurisdiction to make this order. There is likewise no expressed authority to permit the service out of the jurisdiction for an originating summons seeking an interim injunction in arbitral proceedings. This fact is clear as O. 66 r.4, which predated the enactment of the AA, was designed on the earlier Arbitration Act which did not provide for all of the relief now provided for in Section 55 of the AA.

[26.] Further, the relevant 1976 Supreme Court Practice Notes 73/1 makes it clear that O. 66 (whose English equivalent was O. 73) provided a complete code with respect to arbitration proceedings. Note 73/1 states:

> General Note on the Order - This Order reproduces, with a few minor amendments in Rules 1, 2, 3 and 6 of the RSC 1962, Order 88, which was new; it conveniently embodies all the rules regulating the procedure in the High Court relating to any arbitration proceedings. ..."

Further, at Note 73/7/1 (which corresponds to O. 66 r. 4.) :

> This Rule is taken from RSC 1962, O. 88 r. 6. which had been taken from the former O. 11 r. 8A(c), so far as related to arbitration proceedings. It is really an extension of O. 11 and an additional case in which service out of the jurisdiction is permissible with the leave of the Court. The basis of the jurisdiction under this Rule is that the "arbitration is to be or has been held within the jurisdiction." The practice under this rule is the same in all respects as under O. 11.

[27.] The English rules were amended by ***SI 1542/79, Rules of the Supreme Court Amendment (No. 4) 1979*** to widen the scope to permit service out of the jurisdiction in accordance with the then 1979 Arbitration Act. That rule permitted service out of the jurisdiction where the arbitration was governed by English law, has been held or is being held in England. No similar amendments or adjustments to our rules have been made to accommodate applications of the nature sought by Matteo.

[28.] Assuming Matteo was right, and that O. 66 r. 4 provided additional claims which may be brought in Arbitration proceedings, the question to be asked is what is the purpose of O. 66 r. 4? Order 66 r. 4 would serve no purpose if O. 11 r. 8(1) remained available for the purposes of obtaining leave to serve out of the jurisdiction.

[29.] Matteo, in his summons for relief, relied on section 55 of the AA and the inherent jurisdiction of the Court. There is however, no inherent jurisdiction of the Court to issue proceedings against persons outside the jurisdiction or to grant an injunction against them outside of the Rules of the Supreme Court.

[30.] Section 105 of the AA provides:

> 105. Rules. The Rules Committee constituted under section 75 of the Supreme Court Act (Ch. 53) may make rules in respect of all or any of the jurisdiction conferred by this Act on the court.

[31.] Matteo complains that "*to construe O. 11 r. 8 RSC otherwise, would mean that Parliament has conferred a jurisdiction and power on the Supreme Court under section 55 of the Act which cannot be exercised and a party to an arbitral proceeding's right to interim relief may be held hostage by the Rules Committee.*" It is clear that if the intent was to give Section 55 of the AA extra territorial effect O. 66 would have to be amended ***to make rules in respect of all or any of the jurisdiction conferred by the AA on the court***. Parliament is taken to have been aware of the rules (O. 66) that would apply on the enactment of Section 55 of the

AA. Having included Section 105 in the AA, it is the Rules Committee and it alone empowered to set the scope, timing for implementation and the extent to which Section 55 is to operate. It is not open to me to fill any lacuna in the rules. The discussion of the Court of Appeal in ***Meespierson (Bahamas) Limited and others v Grupo Torras SA and another - 2 ITELR 29*** is instructive. ***Gonsalves-Sabola P.***, speaking to the absence of a power under the Supreme Court to permit free standing interim relief, stated at page 38:

> [I] do not perceive a public policy in the Bahamas, standing as an sovereign state, which drives the Bahamian judge to be creative to the extent of making a serendipitous discovery of a common law principle equivalent to the provisions of s 25 of the Civil Jurisdiction and Judgments Act 1982 which the English Parliament saw fit to enact to empower free-standing interim relief to be given in aid of proceedings brought or to be brought in a Contracting State to the Brussels or Lugano Convention.
> With appropriate self-reproach I acknowledge communion with the late Lord Denning's 'timorous souls' of The Siskina fame who would not take 'fresh courage' and exercise what was seen as the judges' inherent jurisdiction to lay down the practice and procedure of the courts instead of waiting for the Rules Committee to act, if not Parliament itself. That was really an invitation to pre-empt either Parliament or at least the Rules Committee, by substituting a new ground rule dispensing with the requirement of substantive domestic proceedings as a basis for seeking a Mareva injunction and justifying the judicial activism involved as being required by justice or the comity of nations. This is how Lord Diplock gently but definitively put down the proposal Lord Denning made in the Court of Appeal ([1977] 3 All ER 803 at 815) in The Siskina [1979] AC 210 at 260:
>
> > 'My Lords, there may be merits in Lord Denning MR's alternative proposals for extending the jurisdiction of the High Court over foreign defendants but they cannot, in my view, be supported by considerations of comity or by the Common Market treaties. <u>They would require at least subordinate legislation by the Rules Committee under s 99 of the Supreme Court of Judicature (Consolidation) Act 1925, if not primary legislation by Parliament itself. It is not for the Court of Appeal or for your Lordships to exercise these legislative functions, however tempting this may be'</u>. (Emphasis supplied).

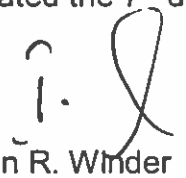
Ultimately therefore, this is a matter for the Rule Committee, if not parliament, but not for the Supreme Court judge.

[32.] In conclusion, I accept the submission of Delanson and Gabrielle that there is no basis, no gateway to permit the service out of the jurisdiction in the circumstances

of this case. I therefore have no jurisdiction to permit an Originating Summons seeking interim injunctive relief in aid of arbitration proceedings, to be issued out of the jurisdiction.

[33.] In all the circumstances, unless the plaintiff have any views to the contrary, I see no reason why costs should not follow the event.

Dated the 7th day of August 2019



Ian R. Winder

Justice