



Neutral Citation Number: [2020] EWHC 2195 (Comm)

Case No: CL-2019-000655

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 12/08/2020

**Before :**

**MR. JUSTICE TEARE**

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**Between :**

<b>TRAXYS EUROPE SA</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>(1) SODEXMINES NIGERIA LIMITED</b>	<b><u>Defendants</u></b>
<b>-and-</b>	
<b>(2) BASEM EL ALI</b>	

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**Stephen Phillips QC and Adam Turner** (instructed by **Hill Dickinson LLP**) for the **Claimant**  
**Nigel Jacobs QC** (instructed by **James Tidmarsh**) for the **Second Defendant**

Hearing dates: 14 July 2020  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Teare

**“Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:30 AM on 12 August 2020.”**

**Mr. Justice Teare :**

1. This is an application by the Second Defendant, Mr. Basem El Ali, (“Mr. Ali”) for an order that the court should not exercise its jurisdiction over Mr. Ali and that the proceedings against him should be stayed on the grounds that Nigeria is the *forum conveniens* for hearing the claim brought against him by the Claimant.
2. The claim in this action arises out of the alleged dishonest substitution by the First Defendant (Sodexmines Nigeria Limited) in Nigeria in 2018 of a virtually worthless product in place of a valuable tin product which the First Defendant had agreed to sell to the Claimant, Traxys Europe SA. Mr. Ali, the Second Defendant, is the beneficial owner and *alter ego* of the First Defendant.
3. The elaborate circumstances in which the products were swapped have been pleaded and are based upon evidence obtained from a police enquiry in Nigeria. In essence it is said that Mr. Ali arranged for “an abandoned hotel” to be rented and for the almost worthless product to be stockpiled in the hotel. The valuable tin product which was to be sold to the Claimant was then delivered to the hotel where it was placed in bags without seals and returned to the First Defendant’s premises. The almost worthless product was then despatched to the bonded warehouse accompanied by the documents relating to the valuable tin product and delivered to the Claimant in place of the tin product.
4. The claims brought by the Claimant against the two Defendants have been described by counsel for the Claimant in these terms:
  - a. *Contract/restitution.* Against Sodexmines only, Traxys advances a claim for failure to deliver the contracted-for cassiterite cargoes. Traxys seeks damages and/or restitution corresponding to the value of the cassiterite cargoes / the value of the payments made in respect of those cargoes.
  - b. *Tort.* Traxys claims against both Defendants in deceit and unlawful means conspiracy, and also claims against BEA for procuring/inducing Sodexmines’ breach of contract. The fundamental factual allegation is that BEA ordered the substitution of the ilmenite, but fraudulently continued to present the usual documents to Traxys so as to maintain the flow of payments. The actions and knowledge of BEA are the basis of the claim against both Defendants. Traxys again seeks damages, including not only the value of the cassiterite cargoes, but also various consequential losses. These consequential losses are expressly excluded by the Contract of Sale, but they are recoverable in tort.
5. The contract between the Claimant and the First Defendant provides for English law and jurisdiction. Permission to serve Mr. Ali out of the jurisdiction was granted on the basis that Mr. Ali was a necessary and proper party to the claim against the First Defendant and that England is the proper place in which to bring the claim. The grant

of permission was not challenged by Mr. Ali. However, he has sought a stay of the proceedings on the grounds that Nigeria is the *forum conveniens* for the determination of the claim against him.

6. The application for a stay is made in circumstances where the Defendants now accept that the tin product was dishonestly swapped for a worthless product. However, Mr. Ali maintains that he had no involvement in that dishonest conduct and so has no liability in tort to the Claimant.
7. Since Mr. Ali seeks a stay counsel for the Claimant submitted that the burden lies on him of establishing that the Nigerian court is the appropriate forum for the trial of the action, that is, the forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice. However, counsel for Mr. Ali submitted that since this is a case where the Claimant was not entitled to serve Mr. Ali as of right but required the leave of the court to serve Mr. Ali out of the jurisdiction, the burden lies on the Claimant to show that England is clearly and distinctly the appropriate forum.
8. The question of the burden of proof was addressed by the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] 1 AC 460. Lord Templeman said at p. 464:

“Where the plaintiff is entitled to commence his action in this country, the court, applying the doctrine of forum non conveniens will only stay the action if the defendant satisfies the court that some other forum is more appropriate. Where the plaintiff can only commence his action with leave, the court, applying the doctrine of forum conveniens will only grant leave if the plaintiff satisfies the court that England is the most appropriate forum to try the action. But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere. ”
9. Lord Goff also drew a distinction between cases where a stay was sought (at pp. 475-478) and cases where the court exercises its discretionary power to allow service out of the jurisdiction (at pp.475-482). Lord Goff said (at p.480 G) that it was “inevitable that the question in both groups of cases must be, at bottom, that expressed by Lord Kinnear in *Sim v. Robinow*, 19 R. 665, 668, viz. to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice.” But there was a distinction. In the former case the burden was on the defendant “to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum (see p. 477 at E). In the latter case “the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases that burden rests on the defendant (see p.480 at G).”
10. It is unclear to me why Mr. Ali framed his application as one to stay the exercise of the court’s jurisdiction rather than an application to set aside the order for service out of the jurisdiction on the grounds that England is not the proper place in which to bring the claim. If he had made the latter application there would have been no doubt as to the party upon which lay the burden of proof.

11. In deciding upon whom rests the burden of proof it is, I think, necessary to have regard to the reason why there is a distinction between the two classes of case. In the first group of cases where, as Lord Templeman put it, the claimant is entitled to commence proceedings in this country, the burden lies on the defendant of showing that there is another forum in which the case may be tried more suitably for the interests of the parties and for the ends of justice. In the second group of cases where, as explained by Lord Goff, the claimant must persuade the court to exercise a discretion in its favour the burden lies on the claimant of showing that England is the forum where the case may be tried more suitably for the interests of the parties and for the ends of justice. The present case falls into the second group of cases. It is true that as a matter of form Mr. Ali did not challenge the decision of the court to permit service out of the jurisdiction on him but it does not follow that this is a case where the Claimant was entitled to commence proceedings against Mr. Ali in this country. I consider that I should have regard to the substance of the matter, namely, that this is a case where the Claimant was not entitled to commence proceedings against Mr. Ali “as of right” (the expression used by Lord Goff at p.481 E) but needed to persuade the court, not only that there was a jurisdictional gateway permitting service out, but also that England was the forum conveniens for the claim against Mr. Ali. Thus, notwithstanding that as a matter of form and language Mr. Ali is seeking a stay, I consider that once battle lines were drawn as to whether England was the forum conveniens the burden lay on the Claimant to establish that England was the forum conveniens. That conclusion appears to me to be consistent with the reasoning underlying the distinction drawn by Lord Templeman and Lord Goff. It is rational to require the defendant to discharge the burden of proof where proceedings against him have been commenced as of right. It is also rational to require the claimant to discharge of proof when he needs to persuade the court that it is a proper case for service out of the jurisdiction. For these reasons I have concluded that the Claimant must show that England is “clearly” the forum in which the case against Mr. Ali may be tried more suitably for the interests of all the parties and the ends of justice.
12. In the present case the cause of action relied upon as against Mr. Ali is in tort. The significance of the place where the tort is committed has been discussed by the Supreme Court in *VTB Capital v Nutritek International* [2013] 2 AC 337 at paragraphs 14-15 and, in particular, 51 per Lord Mance:

“51 The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors.”
13. In the present case two of the causes of action in tort (deceit and unlawful means conspiracy) are also alleged against another defendant. That circumstance gives rise to the risk that if the claim against Mr. Ali is stayed in favour of Nigeria there may be inconsistent judgments in England and Nigeria. The significance of this factor has been considered by the Supreme Court in *Lungowe v Vedanta* [2019] 2 WLR 1051. Lord Briggs said at paragraph 70:

70. In cases where the court has found that, in practice, the claimants will in any event continue against the anchor defendant in England, the avoidance of irreconcilable judgments has frequently been found to be decisive in favour of England as the proper place, even in cases where all the other connecting factors appeared to favour a foreign jurisdiction: see e.g. *OJSC VTB Bank v Parline Ltd* [2013] EWHC (Comm) at [16], per Leggatt J.”

14. However, Lord Briggs went on to make clear, at paragraphs 76-84, that the irreconcilable judgments factor does not operate as a “trump card”. It is always necessary for the court to weigh it and all other relevant factors before coming to a decision. Lord Briggs emphasised that it was relevant to consider whether the claimant had a choice whether to sue multiple defendants in different jurisdictions (and so give rise to the risk of inconsistent judgments) or to sue all in one jurisdiction (and so avoid that risk).
15. A further factor to consider in this regard, when there is an anchor defendant and there is therefore a jurisdictional gateway to sue other defendants who are necessary and proper parties, is whether the claim against the anchor defendant will in fact go ahead. If it will not then in reality there is no risk of inconsistent judgments in the event that the claim against the other defendants is heard in an otherwise appropriate jurisdiction; see *Erste Group Bank v JSC “JMV Red October” and others* [2015] EWCA Civ 379 at paragraphs 136 and 138.
16. In the present case counsel for Mr. Ali has relied upon eight factors in support of his submission that Nigeria was the appropriate forum:
  - i) All the relevant events occurred in Nigeria.
  - ii) All the relevant witnesses in relation to the primary and secondary questions of fact (apart from Mr. Ali himself) are Nigerian or based in Nigeria. Nigerian witnesses cannot be compelled to give evidence in this jurisdiction but can be summoned in the Nigerian proceedings.
  - iii) In the light of the seriousness of the allegations, BEA should be entitled to cross-examine the witnesses who have accused him of fraud. However it seems unlikely that he will have this opportunity in this jurisdiction.
  - iv) It is clear from the proceedings in Nigeria (criminal and human rights) that both BEA and Traxys have already instructed lawyers in Nigeria and that those lawyers will have built up significant knowledge and expertise.
  - v) The proper law of the tort will be Nigerian law under Article 4(1) of Rome II. It is common ground that the country in which the damage occurred is likely to be Nigeria. That is where the payments by Traxys were made and where any misappropriation or non-delivery took place. Accordingly the exception in Article 4(3) will not apply.
  - vi) The criminal proceedings (instigated by Traxys themselves) against Mr. Ali are still extant. It follows from the above that there will be a duplication of costs (and possible inconsistent decisions) in the event that the civil proceedings

proceed in this jurisdiction whilst the same issues are examined in the context of the Nigerian criminal proceedings.

- vii) The tort and criminal proceedings can run in parallel.
  - viii) It is common ground that Traxys can seek compensation for its losses in the criminal proceedings.
17. Counsel for the Claimant relied upon seven factors in support of his submission that “it is clear beyond peradventure” that England is the appropriate forum.
- (i) Sodexmines, which is BEA’s *alter ego*, agreed to an exclusive English jurisdiction clause in respect of the sales which are the subject-matter of the dispute;
  - (ii) Sodexmines agreed for English law to govern its relationship with Traxys in respect of those sales;
  - (iii) The claim against Sodexmines is proceeding in this jurisdiction, and will continue to do so, even if the court stays the claim against Mr. Ali;
  - (iv) The evidence, and the relevant documents, will be in English;
  - (v) While Traxys and Mr. Ali are not based in England, Mr. Ali is a British citizen, and the English court is likely to be a convenient venue for both parties; by contrast, Mr. Ali has fled Nigeria, is avoiding entry there and will not, therefore, give evidence were the trial to take place in Nigeria;
  - (vi) BEA has repeatedly told the Nigerian courts, in sworn evidence, that the civil dispute arising from the loss of cassiterite ought to be litigated in England and Wales; and his Nigerian lawyers continue to do so;
  - (vii) There is cogent evidence (at its absolute lowest) that Mr. Ali has lied about the evidence of a Nigerian witness, and has encouraged that witness to change evidence he has given implicating him; in light of this cynical attitude towards the proper administration of justice, the court can and should infer that the present application is motivated by Mr. Ali’s desire to avoid the intense scrutiny that an English court will bring to bear upon the case, scrutiny which he seemingly hopes to avoid in Nigeria.
18. It was emphasised by Lord Briggs in *Lungowe v Vedanta* at paragraph 66 that the assessment of the competing factors should be “summary”. This reflects the need for jurisdictional challenges to be conducted at “proportionate” expense; see paragraphs 6-14.
19. I shall therefore examine the competing factors as shortly as I can, starting with the factors relied upon by Mr. Ali.

20. The dishonest substitution of the tin product occurred in Nigeria. It may be that not all of the relevant events occurred in Nigeria; for example, the Claimant relied on the documents in Luxembourg where they are based. But the alleged plan was executed in Nigeria. The alleged causes of action being in tort, the starting point is that Nigeria is the appropriate forum.
21. The witnesses relied upon by the Claimant are or are likely to be in Nigeria. Although not all of the witnesses interviewed by the Nigerian police will have to be called in circumstances where there is now no dispute that the valuable tin product was swapped before delivery to the Claimant the Claimant will certainly wish to call those witnesses who have spoken of Mr. Ali's involvement in that activity. Counsel for Mr. Ali prepared a schedule of the witnesses from which he identified at least four in this category: Mr. Alsaka, an accountant employed by the First Defendant, Mr. Daibu, another accountant employed by the First Defendant, Mr. Agunwa, the owner of an agency which delivered the goods into the bonded warehouse and Mr. Gbadamosi, the estate agent who found the abandoned hotel. These witnesses being in Nigeria, this is a strong connecting factor with Nigeria.
22. Counsel for Mr. Ali said that justice required that these witnesses be cross-examined and that could only be achieved if the case against Mr. Ali is heard in Nigeria. He suggested that this was because they were compellable witnesses in Nigeria but not in England. He suggested that the witnesses may be unwilling to give evidence in English proceedings. I suppose that is possible but, given that they have made statements to the police, it appears to me unlikely. I would expect that if this court heard the claim against Mr. Ali the witnesses would give evidence by video link from Nigeria. Nevertheless their presence in Nigeria is a strong connecting factor with Nigeria.
23. However, Mr. Ali himself is not in Nigeria and I am told will not return to Nigeria. He resides in Beirut. His evidence is obviously crucial on the issue as to whether he was, as is suggested, personally involved in the dishonest substitution of the valuable tin product. The ends of justice plainly require that he gives evidence. He has sought and obtained by a "human rights" action in Nigeria an order which, I am told, restrains the police from arresting him. That order is subject to an appeal. I was also told that he had refused to travel to Paris to be interviewed by the Nigerian police there. There was no evidence as to his willingness to travel to London to give evidence if the trial against him took place here but, given the involvement of Interpol and his fear of arrest, it seems to me improbable that he would travel to London to give evidence in this court. But it is almost certain that he would wish to give evidence whether the trial took place in London or in Nigeria and it is therefore most probable that he would do so by video link. Thus, so far as he is concerned his participation as a witness is, as counsel put it, "neutral" as between England and Nigeria. In either forum it is likely to be video-link.
24. Counsel for the Claimant relied upon evidence that in April this year the courts in Nigeria were shut because of the Covid 19 pandemic and that data connections were overloaded. He submitted that the facilities for evidence by video link were likely to be better in England than in Nigeria. Experience has shown that facilities in the Rolls Building for evidence by video link are good. However, there is no evidence as to what the video link facilities are in Nigeria. If they were affected by the increased demand for data connection services in the early stages of the pandemic it is likely that steps will be taken to improve them. I do not consider that the state of the evidence on this

topic enables me to say that the ends of justice will be better served if Mr. Ali gives his evidence by video link to the Rolls Building than to the court in Nigeria.

25. In Nigeria lawyers for both parties have been involved in Mr. Ali's "human rights" challenge to the Nigerian criminal investigation and so, it is suggested, will be knowledgeable of the issues in this case. That is true, although none of the lawyers in Nigeria will have addressed the question of Mr. Ali's alleged liability in tort. However, lawyers for both parties have been involved in this stay application and are knowledgeable of the issues in this case, including Mr. Ali's alleged liability in tort. Looked at broadly this appears to be another "neutral" factor.
26. There is a cogent case that Nigeria is the proper law of the alleged tort, though this is not the inevitable conclusion because it is argued on behalf of the Claimant that there is a manifestly closer connection with England by reason of the choice of law and jurisdiction clause and Mr. Ali being the alter ego of the First Defendant. However, as yet no material differences between Nigerian and English law have been identified and so this is another "neutral" factor.
27. The Nigerian criminal proceedings, I am told, are continuing. It is suggested that there will therefore be a duplication of costs and a risk of inconsistent decisions between those proceedings and the proceedings in this court. In the event that the criminal proceedings continue there is that risk. But the standard of proof is probably different and so, if there were inconsistent decisions, that would not be the calamity that inconsistent decisions ordinarily entail. So far as costs are concerned the criminal proceedings will generate extra costs whether the civil claim is heard in Nigeria or in England. I therefore do not consider that the criminal proceedings are material in the manner suggested.
28. There is evidence that the criminal proceedings and the case in tort against Mr. Ali can run in parallel in Nigeria. My understanding is that that means that any civil proceedings against Mr. Ali will not be delayed pending completion of the criminal proceedings. This is therefore a neutral factor. There is also evidence that the Claimant can recover damages in the criminal proceedings. The precise advantages of this were not explored. This was said to be no more than a "makeweight" factor.
29. Those then are the factors relied upon by Mr. Ali. In summary, the fact that the alleged tort occurred in Nigeria and the fact that the material witnesses, apart from Mr. Ali, are in Nigeria provide a cogent basis for the submission made on behalf of Mr. Ali that Nigeria is the forum in which the claim against him may be tried more suitably for the interests of all the parties and the ends of justice.
30. I can now turn to the factors relied upon by the Claimant.
31. The First Defendant agreed to English law and jurisdiction and the Second Defendant is the alter ego of the First Defendant. This does, I suppose, establish a connection of sorts between the Second Defendant and this jurisdiction but it cannot be taken too far. The First and Second Defendants are legally separate and distinct persons and the Second Defendant has not agreed to English law and jurisdiction for claims against him.
32. It is said that the claim against the First Defendant will take place in England. The Claimant insisted that, although there was no dispute as to liability in contract, the claim



in tort will go ahead in England because certain of the heads of claim are excluded in contract but are recoverable in tort. However, counsel on behalf of Mr. Ali described those heads of claim as minor and made it plain that Mr. Ali would not argue that those heads of claim were not recoverable in contract. In those circumstances it is unlikely that the claim in tort will go ahead in England against the First Defendant. This is significant because it means that in reality there is no real risk of conflicting decisions.

33. The evidence and the documents will be and are in English. But that is no reason for preferring England to Nigeria.
34. It is true that Mr. Ali is a British citizen but he has not lived in this country. As discussed above he is likely, whether the claim against him is heard here or in Nigeria, to give evidence by video link.
35. It is true that Mr. Ali has submitted before the courts of Nigeria (and continues to do so in response to the appeal in Nigeria from the “human rights” decision) that the civil claim arising out of the events in Nigeria is a matter for the English court based upon the jurisdiction clause. This circumstance suggests that Mr. Ali is content to say whatever suits his interests. In mitigation of this point it was said that the “human rights” action was commenced before civil proceedings were issued against Mr. Ali.
36. Finally, it is said that there is cogent evidence (at its absolute lowest) that Mr. Ali has lied about the evidence of a Nigerian witness, and has encouraged that witness to change evidence he has given implicating Mr. Ali; and that in light of this cynical attitude towards the proper administration of justice, the court can and should infer that the present application is motivated by Mr. Ali’s desire to avoid the intense scrutiny that an English court will bring to bear upon the case, scrutiny which he seemingly hopes to avoid in Nigeria. There is a dispute between the parties as to whether a certain witness is telling the truth and as to whether pressure has been put on him to say what he has said. However, that cannot be resolved on this hearing. Whether the claim against Mr. Ali takes place in England or in Nigeria the court hearing the claim will have to scrutinise the evidence with care.
37. Those are the factors relied upon by the Claimant in support of England being the appropriate forum. They are, upon my summary analysis, lacking in cogency. There is in truth no particular connection with England save that England is the agreed jurisdiction for claims against the First Defendant. However, it seems unlikely that proceedings against the First Defendant will in fact proceed here. There is also the unattractive feature of the case that Mr. Ali, having persuaded the Nigerian Court that civil claims are to take place in England is now seeking to persuade the English court that civil claims against him should be heard in Nigeria. But this factor, whilst perhaps relevant to the exercise of the court’s discretion, does little to show that England is the forum where the case may be more suitably tried in the interests of the parties and for the ends of justice.
38. In my judgment the Claimant has not established that England is the forum where the case may be more suitably tried in the interests of the parties and the ends of justice. Indeed, had I held that the burden lay on Mr. Ali to establish that Nigeria was the forum where the case may be more suitably tried in the interests of the parties and the ends of justice I would have held that he had done so. The claim against him lies in tort. The events which have given rise to those claims took place (in the main) in Nigeria. The witnesses upon whom the Claimant will rely to establish their claim against Mr. Ali are in Nigeria. In truth this is a Nigerian case, not an English case. The centre of gravity of the case is in Nigeria, not in

England. To use the phrase used in one of the cases to which I was referred “the fundamental focus of the litigation” is on Nigeria, not England.

39. I therefore grant the stay which has been sought.
40. Although Mr. Ali’s case was initially that in those circumstances the WFO granted against him should be set aside he now accepts that it should remain in place pending the establishment of Nigerian jurisdiction. Counsel for the Claimant suggested that it should remain in place until the Claimant is able to make an application for similar relief in Nigeria. Counsel for Mr. Ali resisted that. In my judgment it is right in principle that the WFO remains in force until the Claimant is able to make an application for similar relief in Nigeria. Once the court in Nigeria has resolved that application I would hope that the parties can agree to the WFO issued by this court being set aside.