



Neutral Citation Number: [2022] EWHC 1040 (Comm)

Case No: CL-2021-000101

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2022

Before :

MR JUSTICE ANDREW BAKER

Between :

GULFVIN INVESTMENT LTD

- and -

**(1) TAHRIR PETROCHEMICALS
CORPORATION S.A.E.
(2) BASIL EL-BAZ
(3) CHARLES GARFINKEL**

Claimant

Defendants

Ben Woolgar (instructed by **Seladore Legal Ltd**) for the **Claimant**
Ciaran Keller & David Baker (instructed by **Baker Botts (UK) LLP**) for the **Defendants**

Hearing date: 4 May 2022

**Judgment Approved by the court
for handing down
(subject to editorial corrections)**

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Mr Justice Andrew Baker :

Introduction

1. The first defendant ('TPC') is a company registered and carrying on business in Egypt. It is a subsidiary of Carbon Holdings Ltd ('CHL'), a company registered in the Cayman Islands but operating in Egypt. CHL was founded by the second defendant, Mr El-Baz, as a holding company for SPVs doing business in the petrochemical industry in Egypt.
2. Mr El-Baz is domiciled in Egypt. At the date of the SPA to which I refer below, he was Chairman and CEO of CHL, EHI Ltd ('EHI') and TPC, the sole owner and director of EHI, and a shareholder in CHL and TPC.
3. EHI, another Cayman Islands company, was established in 2015 by Mr El-Baz to hold shares in CHL on his behalf. At the date of the SPA, EHI's sole asset was a 36.7% shareholding in CHL, and TPC was the project company for the development of a large petrochemicals production facility in the Ain Sokhna Industrial Zone in Egypt.
4. The third defendant, Mr Garfinkel, is a US national domiciled there. At the date of the SPA, and until mid-2021, he was resident in Texas, but he now lives in Colorado. At the date of the SPA he was Chief Commercial Officer of CHL, EHI and TPC. He is a minority shareholder in CHL.
5. The claimant ('Gulfvin') is also a Cayman Islands company, carrying on business in Houston, Texas. It is part of the Vinmar group, a global marketing and distribution business which includes Vinmar International Ltd.
6. By a sale and purchase agreement dated 10 March 2016 ('the SPA') between Gulfvin, EHI and CHL, which was negotiated in Texas between Mr Garfinkel, for CHL and EHI, and representatives of Gulfvin, EHI agreed to sell and Gulfvin agreed to purchase 2,403,232 shares in CHL (a 1.428% shareholding) for US\$5 million, also expressed in Clause 2.1 of the SPA as a price of US\$2.0805 per share (which would be US\$4,999,924.18).
7. The SPA was expressly governed by English law and provided for the reference of disputes to arbitration under LCIA Rules in London. It also specified that the purchase price of US\$5 million was to be paid to an account at Barclays Bank in London held under the name of 'Tahrir Petrochemicals'. TPC is not the only entity with those words in its name, but as Gulfvin confirmed by obtaining a *Norwich Pharmacal* order against Barclays in this court, the account holder was indeed TPC.
8. The purchase price was paid, but EHI did not transfer any shares in CHL to Gulfvin. Instead, for reasons that I do not need to consider, Mr El-Baz transferred 389 shares in EHI to Gulfvin, representing a 3.89% shareholding. It was said in evidence from Gulfvin's solicitors that Gulfvin never accepted that transfer and in any event that it was ready, willing and able to return that shareholding in EHI to Mr El-Baz in exchange for a refund of the purchase price. What exactly was meant by the first part of that (the claim that Gulfvin never accepted the transfer of the shares in EHI) was not explained further and so was not capable of being explored at the hearing.

9. As I noted above, EHI's only asset was a 36.7% shareholding in CHL. Therefore, a 3.89% shareholding in EHI had the capacity to have a value equivalent to that of a 1.428% shareholding in CHL (36.7% of 3.89% is 1.428%). Whether there was in fact any such equivalence in value is contentious between the parties and not something on which I need to express a view, nor am I in any position to do so.
10. By this Claim, Gulfvin made claims:
 - i) against TPC, seeking restitution on the ground of unjust enrichment;
 - ii) against Mr El-Baz and Mr Garfinkel, seeking damages for deceit.
11. The deceit claim alleges representations, said to have been false and to have been made knowing them to be false or reckless as to their falsity:
 - i) by Mr El-Baz, that he intended to procure the approvals required for the transfer, and the transfer, of the shares in CHL promised to Gulfvin by the SPA;
 - ii) by Mr El-Baz and by Mr Garfinkel, that they had reasonable grounds to believe that the necessary approvals could be obtained with 20 business days of the payment of the purchase price;
 - iii) by Mr Garfinkel, that he believed that Mr El-Baz intended to procure the necessary approvals, and the transfer, and/or that he was not aware of any facts or matters indicating otherwise.
12. At a hearing on 4 May 2022, I granted the defendants' application under CPR Part 11, made by application notice dated 9 September 2021, and therefore set aside the permission to serve proceedings out of the jurisdiction granted without notice by Order of Cockerill J dated 1 July 2021, and the service of proceedings effected thereunder.
13. It was common ground that it was Gulfvin's burden to persuade the court that England and Wales is clearly and distinctly the most appropriate forum for the trial of the action. I granted the defendants' application on the basis that, in the light of the helpful skeleton arguments that outlined the rival positions, and having heard from Mr Woolgar for Gulfvin, I was not so persuaded. I said that I would provide fuller reasons in writing – and this judgment sets out those reasons – but that, in short:
 - i) at best for Gulfvin, this is an English unjust enrichment claim against TPC naturally enough brought here (if considered in isolation) and to which might conveniently and justly be added the Texan fraud claim against Mr El-Baz and Mr Garfinkel arising in connection with the same overall transaction, only equally as much as it is a Texan fraud claim against Mr El-Baz and Mr Garfinkel that ought to be pursued in Texas (all things being equal) but to which might conveniently and justly be added the unjust enrichment claim against TPC so that the claims could be dealt with together, which is not good enough for Gulfvin under Part 11;
 - ii) indeed, in my view, in truth it is more the latter than the former;

- iii) therefore, absent any suggestion that Gulfvin could not pursue both claims and all three defendants in Texas (and in fact, the unchallenged expert evidence for the application is that they could), it could not be said that this jurisdiction is clearly and distinctly more appropriate than Texas for the trial of Gulfvin's claims.
14. I explored with Mr Woolgar in concept the possibility of a conclusion that the unjust enrichment claim and the deceit claim should be considered separately, in relation to the question of appropriate forum. However, his firm and understandable submission for Gulfvin was that it would not be satisfactory for the claims to be tried separately. It was therefore appropriate to ask the question, in conventional terms as Mr Woolgar formulated it, whether England and Wales was shown, clearly and distinctly, to be the most appropriate forum for the trial of this action (*viz.* an action pursuing both claims against all three defendants). It will be appreciated that my conclusion that that was not shown does not mean that, if Gulfvin had sued TPC here on the restitution claim and had sued, or was proposing to sue, Messrs El-Baz and Garfinkel in Texas or Egypt on the deceit claim, a Part 11 application by TPC against the action here would necessarily have succeeded. I have not considered that at any length, given the position adopted by Gulfvin.

Gateways (CPR PD6B)

15. So far as jurisdictional gateways are concerned, it was common ground at the hearing that:
- i) the enrichment founding the unjust enrichment claim was obtained within the jurisdiction (CPR PD6B, para 3.1(16)); and
 - ii) there was enough of a factual connection between the unjust enrichment claim and the deceit claim to make Mr El-Baz and Mr Garfinkel, as defendants to the latter, properly additional parties to an action pursuing the former (CPR PD6B, para 3.1(3)(b)).
16. It was also common ground that if there was no serious issue to be tried whether TPC is liable on the unjust enrichment claim, then:
- i) permission to serve out should not have been granted for that claim; and
 - ii) CPR PD6B, para 3.1(3)(a) would not have been satisfied for the deceit claim (*viz.* that there is a real issue on the unjust enrichment claim as 'anchor' claim that it is reasonable for the court to try).
17. The defendants contended that there was no serious issue to be tried as to TPC's alleged liability in unjust enrichment, so that on the above basis permission to serve out should not have been granted irrespective of considerations of *forum conveniens*. I did not reach or express any concluded view as to that.

Forum Conveniens

18. Whilst ultimately not determinative, Gulfvin's very experienced litigation solicitor, in his witness statement in support of the without notice application for permission to

serve out, felt unable to put the matter higher than this, namely that “*Gulfvin does not believe that a more appropriate and convenient alternative forum than England exists in which to try this dispute*”. That would be sufficient, if the court concurred with Gulfvin’s view, to see off a *forum non conveniens* application. It is not good enough for permission to serve out where the claimant must demonstrate that England and Wales is either the only sensibly available forum or is clearly and distinctly more appropriate than any other such forum.

19. In his skeleton argument before me, having noted “*that certain factors can be pointed to which might favour [either Texas or Egypt as the natural forum]*”, Mr Woolgar submitted that this “*reflects [the fact] that this case is similar to Manek, in that no single forum is likely to emerge as the sole plausible candidate for resolution of the dispute*”. The reference to *Manek* was to *Manek v IIFL Wealth (UK) Ltd* [2021] EWCA Civ 625 at [65].
20. In *Manek*, having at [64] quoted Lord Briggs’ observation in *Vedanta Resources v Lungowe* [2019] 2 WLR 1051 at [68], to the effect that the court is looking for “*a single jurisdiction in which the claims against all the Defendants may most suitably be tried*”, Coulson LJ said at [65] that that observation had a “*particular resonance*” in *Manek*, explaining that:

“This was, on the Appellants’ case, an international fraud. It arose out of critical misrepresentations made in England about the onward sale of the shares in an Indian company ... to a company domiciled in Mauritius, without revealing the fact that the ultimate purchaser, a German company ..., was going to pay much more for the same shares. There was never going to be one jurisdiction which would emerge as the only candidate for the hearing of this claim. The issue is whether, in all the circumstances, and taking a realistic approach to the numerous jurisdictions that might potentially be involved, the Appellants have demonstrated that England and Wales is clearly the place where the claims against all the Defendants may most suitably be tried.”
21. At [79], Coulson LJ referred again to the need for “*realism when considering the proper place for a claim of this sort to be heard It cannot be enough for the defendant(s) to such a claim to point to other jurisdictions round the world where the case might be heard and then say that, because the situation is complicated and involves so many different countries, the claimant has not discharged the necessary burden of proof. That could give rise to a never-ending carousel of unsuccessful applications across the world.*” I venture respectfully to express a word of caution about that *dictum* lest it be allowed to water down the requirement upon a claimant to justify bringing defendants before what, for them, is a foreign court, to defend the claimant’s claims, rather than suing the defendants ‘at home’. The spectre of a never-ending carousel of unsuccessful applications for permission to commence proceedings appears to me to rest upon assumptions, which seem rather shaky, that a doctrine akin to our doctrine of *forum conveniens* would apply across the globe and that defendants could not suitably be sued in a jurisdiction that would mean at least one of them was being sued at home.
22. Coulson LJ concluded, at [80], that “*the first stage of the Spiliada test [viz that this jurisdiction be shown to be clearly or distinctly the proper place for the claims to be determined] presupposes that, despite the competing claims of different jurisdictions,*

a consideration of all the relevant evidence will indicate one jurisdiction as the proper place for the claim to be heard. ... I consider that the Appellants have successfully discharged the burden of showing clearly that England and Wales is the proper place for this claim to be heard.” Given that final assessment on the facts, and the statement of the legal issue at [65], as quoted in paragraph 20 above, I consider that *Manek* is not authority for the proposition that the *Spiliada* test is satisfied if this jurisdiction is only one of several equally suitable available fora. If my conclusion had been that that was the position in this case, and if Mr Woolgar’s argument had been that on that basis the *Spiliada* test was satisfied, I would have wanted to conduct with the assistance of counsel a much fuller review of the *form non conveniens* authorities than either side had attempted for this hearing.

23. Before finally dealing with the question of *forum conveniens* on the facts, I should record that the concept of a ‘proper’ party under CPR PD6B, para 3.1(3)(b), is a wide one. It follows that getting a claim through that gateway does not, without more, show it to have more than a weak connection to this jurisdiction. Mr Woolgar accepted that in consequence particularly close scrutiny is called for of the assertion by a claimant able to rely only on that gateway that this jurisdiction is the proper forum for the claim in question.
24. I turn then to the facts and circumstances of this litigation, as relied on in argument.
25. Firstly, the unjust enrichment claim connects the litigation to this jurisdiction, but also to Texas (and, more peripherally, to Egypt). The enrichment was here, by TPC’s receipt of US\$5 million into its Barclays account in London. It was the result of a payment from Texas by a company based there, by way of indirect investment (through an intended shareholding in CHL) in TPC’s Ain Sokhna project.
26. In this court, the restitution claim would be governed by English law and there was no evidence that it would be treated as governed by a different system of law if tried in Texas (or Egypt). It gives rise to an interesting point of principle under English law, namely whether the doctrine illustrated by *MacDonald Dickens & Macklin (a firm) v Costello et al* [2011] EWCA Civ 930, [2012] QB 244, applies to an unjust enrichment claim based upon the total failure of the basis on which the enrichment was conferred. All things being equal, it would be most appropriate for that point to be decided here. That said, it is a short point of principle suited to determination upon expert evidence of English law as a foreign law if not litigated here.
27. If the rule in *Costello* applies, the question will arise whether an obligation upon TPC to make restitution would be inconsistent with the terms of the SPA agreed between Gulfvin and EHI/CHL pursuant to which the payment was made. That depends on the meaning to be given to Clause 6(c)(ii) of the SPA, which provides that the termination of the SPA, one ground for which under Clause 6(b) is that the promised shares in CHL have not been transferred, is not to entitle Gulfvin to claim repayment of the price “*other than in respect of Clause 6(b)*”. That appears to be a reference to the provision in Clause 6(b) that Gulfvin “*may pursue whatever legal or equitable rights it may have pursuant to Clause 14.2 (Arbitration)*”.
28. It is not obvious why that does not mean, as Mr Keller submitted for the defendants, that by the SPA Gulfvin agreed that the only forum in which it would pursue any claim for repayment was arbitration, necessarily therefore that the only parties against

whom it would pursue any such claim would be EHI/CHL. But whatever the contrary arguments might be, Gulfvin can say that the point, a question of the proper construction of the SPA, is governed by English law and so all things being equal ought preferentially to be tried before an English court.

29. Secondly, however, the deceit claim connects the litigation predominantly to Texas, to some extent to Egypt, and only peripherally or insubstantially to this jurisdiction. It is a claim alleging deceit practised in Texas against Gulfvin, which is based in Texas, inducing a contract concluded in Texas and a payment made from Texas (both in the sense that the bank account from which the payment was made was in Texas and in the sense that the relevant decision to pay and instruction to pay was made and given in Texas). To the extent that (as alleged) the deceit was authorised by or upon the instruction of Mr El-Baz, that connects the claim to Egypt, where he was. The contract allegedly induced (the SPA) was governed by English law, and the payment was to a bank account in London, but those are matters of happenstance as regards the deceit claim, not significant features of it.
30. Mr Woolgar also relied on the fact that various other contracts, in particular a CHL Shareholders Agreement dated 2 July 2015 and CHL's primary funding facility, a US\$50 million Facility Agreement with GC Credit dated 7 September 2016, were also governed by English law. It will be part of Gulfvin's case to say that those contracts put obstacles in the way of the transfer of shares in CHL promised by the SPA the existence of which may lend support to the claim that Mr El-Baz and/or Mr Garfinkel did not have an honest expectation that the transfer would occur. However, I was not shown any reason to suppose that the fact those agreements are governed by English law rather than any other system of law has any significance to that aspect of the case.
31. The bank statements obtained from Barclays under the *Norwich Pharmacal* order evidenced the disbursement by TPC over a few months of the US\$5 million received by it from Gulfvin. Mr Woolgar submitted that what TPC did with the funds might cast light on whether Mr El-Baz and Mr Garfinkel had a motive to dissemble over whether shares in CHL would ever be transferred as promised. He suggested this created more of a link than might otherwise appear to the eye between the deceit claim and this jurisdiction. There is some limited force in that, qualifying a little my characterisation of the place of receipt of the US\$5 million a matter of happenstance as regards the deceit claim. The bank statement evidence in question would equally be in Egypt, with TPC, and available to Gulfvin through disclosure; and the substantive matter for investigation, if there is one, would be why TPC needed to, or in any event why it did, make the payments thus evidenced, which will primarily concern TPC's activities in Egypt, in particular its Ain Sokhna project and the cashflow demands upon TPC resulting from it.
32. Although it is not necessary finally to determine the point, the deceit claim is very probably governed by the law of Texas under Article 4(1) of Rome II. The suggested argument that it might be governed by English law under Article 4(3) seems to me a difficult one for Gulfvin. There is a substantial issue whether the deceit claim is time barred under the law of Texas. It is common ground (a) that *prima facie* the claim is time barred if governed by the law of Texas (the limitation period being four years) and (b) that one of three doctrines of law in Texas can in principle have the effect of saving a claim from that time bar. On the expert evidence before me for the present application, however, the nature of those three doctrines of law is agreed only at a

high level of generality. The second report of Mr Stromberg, relied on by the defendants, makes a range of important and subtle points as to the nature, scope and requirements of the doctrines that I cannot say would be common ground and that would be far better determined, and in any event far better applied, even if they were common ground, by a judge with expertise and familiarity, i.e. a judge in Texas, than by an English judge

33. Thirdly, the parties' domiciles or centres of operation at the time of the events connect the litigation to Texas, Egypt and (faintly) the Cayman Islands, and not at all to England and Wales. Their present domiciles etc. likewise, save that Mr Garfinkel now provides a connection to Colorado, albeit that has only been true since after this Claim was commenced and indeed when Gulfvin joined Mr Garfinkel as co-defendant in late June 2021, it did so on the basis that he was still properly sued as Charles Garfinkel of an address in Texas.
34. Fourthly, subject to the final point, below, the practicalities of the litigation are connected principally to Texas and Egypt, and to some extent to other parts of the US, and barely at all to England and Wales. Gulfvin's witnesses are all in Texas or elsewhere in the US. Mr Garfinkel was in Texas at the material time, and is now in Colorado. Mr El-Baz, TPC and EHI/CHL are all in Egypt. Apart from any documents held by Barclays in London, the documents that might be relevant to the case would originate in those various locations.
35. Fifthly, there is something of a '*Cambridgeshire* factor' (harking back to the previous trial and its impact considered in *The Spiliada*) connecting the litigation to London, in that there has been an LCIA arbitration, seated in London, in which the solicitors of record for Gulfvin and the defendants in this Claim represented Gulfvin and EHI/CHL respectively. There are therefore English litigation teams already familiar with the underlying transactions and the dispute (the detail of which I was not asked to consider and the arbitration award in respect of which is awaited following a final hearing in December 2021) over whether EHI/CHL were in breach of the SPA and, if so, what remedies should be granted to Gulfvin.
36. I am not persuaded that the degree of overlap between the issues that will arise on the deceit claim and the issues that are being considered by the arbitrators makes this a strong factor in the present case. The disadvantage of requiring different lawyers to get up to speed on the case generally and the corresponding advantage of lawyers already familiar with the wider case litigating these claims in particular is real, but not in my view particularly substantial. As regards the deceit claim, I consider it is outweighed by the disadvantage of not having Texan lawyers litigating the limitation defence before a Texan court.
37. Sixthly, the fact that hardly any relevant documents will have originated here is reduced in significance as a factor favouring other jurisdictions by the fact that there will have been a disclosure exercise for the LCIA arbitration, managed by the English legal teams from London and resulting in document collections held by them here. I could not say on the evidence for this application that there will not still be substantial further documentation of importance, in Texas, Colorado and/or Egypt in particular, that would be part of any disclosure exercise here or discovery process in Texas. But one practical aspect of the *Cambridgeshire* factor in this case would be that many significant documents will have become collected by and already familiar to the

English legal teams. (I should make clear that in having regard to that factor, I have assumed in Gulfvin's favour that the confidentiality obligations arising in the LCIA arbitration do not create complication or difficulty even though Mr El-Baz and Mr Garfinkel were not party to the arbitration. That might be a generous assumption and if I had been minded to conclude that Gulfvin had the better of the *forum conveniens* argument overall I would have wanted to explore more carefully whether it is sound.)

38. This is not a case in which there is only one forum that might be regarded as a suitable venue for a trial of the restitution claim against TPC and the deceit claim against Mr El-Baz and Mr Garfinkel. This jurisdiction, Texas and Egypt may all fairly be regarded as suitable (assuming, in the case of Egypt, in the absence of evidence to the contrary bearing in mind Gulfvin's burden of proof, that Mr Garfinkel could be joined as a co-defendant if Mr El-Baz were sued there). Indeed, bearing in mind the proper weight to be given to the *prima facie* appropriateness of suing defendants where they are located (even if that does not have the degree of primacy at common law that it has under the Brussels/Lugano Regime), I do not think that Colorado, anchoring the litigation to Mr Garfinkel now that he is there, could be said to be a positively unsuitable venue, even if on a comparative analysis Texas and Egypt on any view, and I would say also England and Wales, had a claim to be considered more appropriate venues than Colorado.
39. If Gulfvin were pursuing only the restitution claim, it might well be proper to conclude that England and Wales is distinctly the most appropriate forum. Were it pursuing only the deceit claim, by contrast, I regard it as plain that Texas would be the most appropriate forum. That is a claim that representations were made in Texas by or on behalf of individuals, one resident in Texas and one resident in Egypt, to a company based in Texas, that were acted upon in Texas causing loss to be suffered in Texas and where the governing law is mostly likely the law of Texas under which a serious and possibly complex issue of limitation arises; and Texas is an available jurisdiction although Mr Garfinkel is now domiciled in Colorado rather than in Texas and Mr El-Baz was and is domiciled in Egypt.
40. In those circumstances, and weighing in the balance all of the features of the litigation that were relied on, in my judgment this jurisdiction was not shown clearly or distinctly to be more appropriate than Texas for the trial of the action that Gulfvin wishes to pursue. Standing back, considering the matter overall it seems to me that this phase of the wider dispute is primarily Gulfvin's attempt to establish personal liability for deceit on the part of Mr El-Baz and Mr Garfinkel. The restitution claim is the minor element of this phase of litigation taken as a whole. That to my mind tips the balance in favour of Texas as the most appropriate forum for the trial of the action Gulfvin wishes to pursue. Thus, even had it been the defendants' burden to show that England and Wales was *forum non conveniens* because justice would better be served by the claims being brought in Texas, I would have said that burden had been discharged and I would have granted their application under CPR Part 11. As it is, my prior conclusion that Gulfvin had not shown that this jurisdiction is the most appropriate venue was sufficient.