Fed Rep of Brazil v Durant and Others

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	06 September 2010
Neutral Citation:	[2010] JRC 162
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Text

[2010] JRC 162

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq.**, Bailiff, **and** Jurats Le Breton **and** Morgan

Between
The Federal Republic of Brazil
The Municipality of Sao Paulo
Plaintiffs
and
Durant International Corporation
Kildare Finance Limited
Defendants

and

Deutsche Bank International Limited
Deutsche International Custodial Services Limited
Deutsche International Corporate Services Limited
Deutsche International Trustee Services (CI) Limited
Parties Cited

Advocate S. M. Baker **for the Plaintiffs.**

Advocate D. S. Steenson **for the Defendants.**

The Parties Cited were not present and not represented.

Authorities

Re Esteem [2002] JLR 53.

Macdoel Investments Limited v Federal Republic of Brazil [2007] JLR 201.

Service of Process (Jersey) Rules 1994.

ISC Technologies Limited v Guerin [1992] Lloyds LR 430.

Spiliada Maritime Corporation v Cansulex Limited [1987] 1 AC 460.

Gheewalla v Compendium Trust Limited [2003] JLR 627.

Dicey, Morris and Collins 14 th Edition.

Bailiff

THE

1 This is an application by the defendants to set aside an order for leave to serve out of the jurisdiction and/or for an order that the proceedings be stayed on the ground of *forum non conveniens*.

Factual Background

2 Between 1993 and 1996 Paulo Maluf was Mayor of Sao Paulo. It is alleged that, during his time as mayor and thereafter, Mr Maluf, together with members of his family and others conspired to defraud the Municipality of Sao Paulo (“the Municipality”) by diverting public funds for their own benefit. The allegations relate to three separate matters. The first related to alleged kick backs during the construction of the Ayrton Senna tunnel, the second is in

relation to secret profits made from trading in certain municipal bonds and the third concerns overpayments and kick backs in relation to the construction of the Avenue Agua Espraiada ("the Avenue project"). The proceedings with which we are concerned relate only to the Avenue project.

3 The nature of the alleged fraud in relation to the Avenue project can be summarised very briefly as follows. The fraud was orchestrated by Mr Maluf. In order to participate in the project, sub-contractors were required to submit inflated invoices to Mendes Junior, the main contractor. Mendes Junior submitted these inflated invoices for payment by the Municipality. Through the connivance of corrupt officials, payment was duly made by the Municipality to Mendes Junior which in turn paid the sub-contractors. However, Mendes Junior almost immediately received back from the sub-contractors approximately 90% of the value of the invoice, thereby creating a slush fund.

4 This slush fund, made up of mis-appropriated monies from the Municipality, was administered by Mendes Junior. Some 20% of the total costs of the Avenue project were distributed as bribes and/or secret commissions to Mr Maluf or his son Flavio or other members of his family. Large sums of cash were delivered to Mr Maluf.

5 The claim in the present proceedings in Jersey relates to a small part of the Avenue project fraud. It is said that between 9th January and 6th February, 1998, Mr Maluf or other members of his family caused some of the proceeds of the fraud to be paid in US dollars to an account in New York opened at the request of Flavio Maluf in the name of 'Chanani' at Saffra National Bank of New York. From there the funds were transferred to a bank account of Durant International Corporation ("Durant") held with Deutsche, Morgan Grenfell (CI) Limited in Jersey from which they were in turn moved to the account of Kildare Finance Limited ("Kildare"), a wholly owned subsidiary of Durant. The funds were then used by Kildare to purchase shares in 6 Jersey unit trusts. The only business carried out by the unit trusts was to acquire shares in Eucatex SA a Maluf family publicly quoted company in Brazil.

6 Durant and Kildare are said to be ultimately owned and controlled by the Maluf family with the consequence that the knowledge of members of the Maluf family is to be attributed to those two companies. The claim in the Jersey proceedings is therefore brought on two grounds. First, it is said that the two companies are liable in knowing receipt on the basis that their state of knowledge of the source of the monies was such that it would be unconscionable for them to retain the monies transferred to them. Secondly, a claim is brought in restitution on the grounds of unjust enrichment as developed in *Re Esteem* [2002] JLR 53 at paras 148–157. The amount said to be transferred to the Durant account via the Chanani account is approximately US$ 11 million and the total claim, allowing for compound interest, is US$22 million.

Various proceedings

7 There are a substantial number of civil and criminal proceedings taking place in a number of jurisdictions. However, for the purposes of this application, there are two relevant proceedings in Brazil.

8 In October 2004, the state prosecutor of the State of Sao Paulo, Mr Silvio Marques instituted civil proceedings before the 4th Treasury Court of Sao Paulo ("the civil proceedings"). The claim related to all three of the alleged frauds and the total sum claimed was approximately US$344 million. It involved 37 different defendants. Durant was originally a defendant. However, at a time when the Municipality was about to institute the present proceedings in Jersey, the state prosecutor agreed, at the request of the Municipality, to drop Durant from the civil proceedings. The state prosecutor made the necessary application on 17th March, 2009, and shortly afterwards the judge agreed that Durant was not a necessary party and granted the order requested. At that stage the civil proceedings had not been served on Durant. Kildare was never a defendant to the civil proceedings.

9 There have been previous proceedings in Jersey. The plaintiffs applied for Norwich Pharmacal relief in order to obtain information and documents concerning the defendants and other companies which were thought to be owned and controlled by the Maluf family and to have received proceeds of the various frauds. That application was granted by the Royal Court and its decision was upheld on appeal (see *Macdoel Investments Limited v Federal Republic of Brazil* [2007] JLR 201). The present proceedings were instituted following consideration of the information and documents received as a result.

10 The present proceedings were instituted by Order of Justice dated 30th March, 2009. I gave leave to serve out of the jurisdiction on the defendants. I also granted a Mareva injunction in the sum of US$22 million together with the usual supporting disclosure orders.

11 The defendants are both companies incorporated in the British Virgin Islands. On attempting to effect service on them, it was established that they had been struck off the company register on 1st May, 2008. for failing to pay their annual fees. Accordingly, on the application of the plaintiffs, an order for substituted service was made on 15th April, 2009, authorising service upon Walkers, the firm of advocates in Jersey.

12 On 2nd June, 2009, the defendants issued a summons seeking various relief which included a declaration that the proceedings had not been duly served upon them, that the order of substituted service should be discharged, that the order for leave to serve outside the jurisdiction should be set aside, that the proceedings should be stayed on the grounds of *forum non conveniens* and that the Mareva injunction should be discharged.

13 In August 2009, the state prosecutor began a further civil claim in the 4th Treasury Court in Sao Paulo. These proceedings are referred to as "the Eucatex proceedings" as the focus of the claim relates to the alleged fraudulent diversion of public funds that were ultimately used to purchase shares/debentures in Eucatex. Again, the underlying factual background

relates to the alleged frauds concerning the Avenue project and the Ayrton Senna tunnel construction project. However, as a result of the additional information obtained from documents in Jersey and London, the fuller extent of the alleged money laundering scheme resulting in the purchase of the Eucatex shares has become known to the state prosecutor and it is in those circumstances that he has instituted these additional proceedings. Durant and Kildare are defendants in the Eucatex proceedings although they have not yet been served.

14 Mr Marques emphasises in his affidavit that his office is independent from the Municipality of Sao Paulo. His role as state prosecutor is to investigate and prosecute civil cases on behalf of the State of Sao Paulo, including any acts of administrative misconduct in public office. The independence of his office has been established to maintain integrity and avoid any political interference at the State or Municipality level. He says that, whilst therefore he works with the Municipality when he can, he and the Municipality have separate constitutional rights and obligations.

15 In relation to the Eucatex proceedings, the Municipality has made it clear that it wishes to pursue the US$22 million claim in relation to the monies which came through the Chanani account in Jersey rather than in Brazil. Accordingly, following an application made by the state prosecutor, the judge in charge of the Eucatex proceedings has issued a request to this Court to assume jurisdiction in relation to the Chanani claim and has excluded this sum from the claim in the Eucatex proceedings.

This application

16 As already stated at paragraph 12 above, the summons issued by the defendants raised a number of issues. However, when opening the case, Advocate Steenson confirmed that he was only proceeding with the claims that leave to serve out of the jurisdiction should be set aside, alternatively, even if such leave was not set aside, that the proceedings should be stayed on the grounds of *forum non conveniens*. As matters progressed at the hearing, it became clear that he was concentrating exclusively on the *forum non conveniens* argument and he accepted at the conclusion of the hearing that his application would stand or fall on that point alone.

17 For the sake of good order we should confirm however that we are quite satisfied that there is a good arguable case against each defendant in knowing receipt and restitution and that the relevant causes of action fall within the terms of Rule 7 of the Service of Process (Jersey) Rules 1994. Accordingly, subject only to the aspect mentioned in the next paragraph, leave to serve out the jurisdiction was properly given.

18 The third aspect which must be considered when granting leave to serve out of the jurisdiction or deciding whether to set aside such an order relates to whether Jersey is the *forum conveniens* i.e. the forum where the claim can most suitably be tried in the interests

of all parties and the ends of justice. In considering an application to set aside an order giving leave to serve out of jurisdiction, the question is whether the order was rightly made at the time it was made. Accordingly, any change in circumstances since then is not relevant. However, where the application is not to set aside the order for service out of the jurisdiction but is for a stay on the grounds of *forum non conveniens*, the appropriate time to consider the matter is at the date of the hearing and therefore events since the granting of leave to serve out of the jurisdiction may be taken into account. Authority for this proposition is to be found in the judgment of Hoffmann J in *ISC Technologies Limited v Guerin* [1992] Lloyds LR 430 at 434. The defendants having brought an application for a stay on the ground of *forum non conveniens* as well as an application to set aside the decision to grant leave to serve out of the jurisdiction in the first place, it is convenient simply to consider the matter as at the date of the hearing of the summons before this Court and both parties proceeded on that basis.

The test

19 The applicable test when considering an application of this nature is well established in Jersey and is summarised in the speech of Lord Goff in *Spiliada Maritime Corporation v Cansulex Limited* [1987] 1 AC 460. The court is concerned to establish which is the appropriate forum for the trial of the action i.e. that in which the case may be tried most suitably for the interests of all the parties and the ends of justice. Lord Goff also approved use of the expression “the natural forum” as being that with which the action had the most real and substantial connection. Thus, one is looking for connecting factors which will include matters such as convenience or expense (such as availability of witnesses), the law governing the relevant transaction and the places where the parties respectively reside or carry on business. In a case such as this, where the defendants have not been served as of right, the burden lies on the plaintiffs to show that Jersey is the appropriate forum.

Availability of an alternative forum

20 The doctrine of *forum non conveniens* only comes into play where there is an alternative available forum. Advocate Baker submitted that the Brazilian courts did not provide an available alternative forum in this particular case. Neither defendant was a party to the civil proceedings. Although they were both defendants in the Eucatex proceedings, they were both BVI companies and could not be forced to enter an appearance or submit to the jurisdiction of the Brazilian court in relation to those proceedings. If they did not, any judgment given against them by the Brazilian court in the Eucatex proceedings would not be enforceable in Jersey (where the assets were situated) without full re-investigation of the merits.

21 In response, Advocate Steenson submitted that, by way of an affidavit dated 8th March, 2010, sworn by Mr Paul Gully-Hart (a partner of Schellenberg Wittmer, a Swiss firm of lawyers in Geneva), who said that he was authorised by Durant and Kildare to do so on their behalf, the defendants formally undertook to submit to the jurisdiction of the Brazilian

court in the context of the Eucatex proceedings.

22 However, it transpired during the hearing that both defendants, although they were apparently briefly reconstituted after the Order of Justice was issued in March 2009, had subsequently been struck off again and remained struck off from the register of BVI companies as at the date of the hearing. It followed that, at the date that Mr Gully-Hart purported to give an undertaking on their behalf, the defendants were struck off.

23 We were referred to sections 215–217 of the BVI Companies Act. Section 215(1)(b) provides that where a company has been struck off the register, the company and the directors, members and any liquidator or receiver thereof may not defend any legal proceedings, make a claim or claim any right for or in the name of the company or act in any way with respect to the affairs of the company. There is an exception in section 215(2) which provides that where a company has been struck off the register, the company, or a director, member, liquidator or receiver thereof may continue to defend proceedings that were commenced against the company prior to the date of the striking-off.

24 On the basis that the Eucatex proceedings were commenced after the defendants were struck off, it follows that there was no ability for either company to undertake to submit to the jurisdiction of the Brazilian court in relation to the Eucatex proceedings or indeed to take any step in relation to those proceedings. Thus the Brazilian court could not constitute an alternative available forum.

25 It is clear that the defendants realised by the conclusion of the hearing before this Court that this posed a real problem for them. Following reservation of its decision, the Court was informed by e-mail dated 29th June, 2010, from Advocate Steenson that the companies had been re-instated to the companies register in the BVI and, on their behalf, he undertook that they would submit to the jurisdiction of the Brazilian courts in connection with the Eucatex proceedings. He attached copies of the certificates of good standing in the BVI for both companies in support.

26 It is clear from the decision of the Privy Council in *Gheewalla v Compendium Trust Limited* [2003] JLR 627 that an undertaking to submit to the alternative jurisdiction may be taken as sufficient to show that the forum is an available alternative forum (see paragraph 24 of the judgment of Lord Walker of Gestingthorpe). Although, at the time of the application before us, there was no alternative forum, we turn nevertheless to consider the question of which is the natural forum for trial of the action in question.

Forum non conveniens

27 Advocate Steenson argued that what lay at the heart of the action against Durant and Kildare was whether there was in fact a fraud carried out in relation to the Avenue project. In the absence of such a fraud, there could be no cause of action against the defendants.

Whether there was such a fraud would be a matter to be determined under Brazilian law. More significantly, it occurred in Brazil and in order to prove it, it would be necessary for the plaintiffs to call all those witnesses from Brazil who would seek to substantiate the fraud and the defendants would need to call those witnesses from Brazil, including the Maluf family, who would contest the existence of a fraud. It was wrong to say that this particular claim could be hived off from the main allegation of fraud. There would be a risk of inconsistent verdicts if, for example, the Royal Court found that there had been a fraud whereas the Brazilian courts found there had not.

28 He pointed out that the plaintiffs themselves initially considered Brazil to be the natural forum because they originally joined Durant to the civil proceedings and also joined both defendants to the Eucatex proceedings. The removal of Durant from the civil proceedings was a tactical move designed to help their case before this Court, as was the decision to exclude the present claim against the defendant companies from the Eucatex proceedings. It amounted to forum shopping. The plaintiffs and, on the plaintiffs' case, the principals behind the defendant companies, were all Brazilian. The vast majority of witnesses would have to come from Brazil because they would be necessary in order to prove or dispute the fraud; similarly, most of the documents would be located in Brazil and would be in Portuguese. It was accepted there would be some Jersey witnesses who would speak as to the actions and state of mind of the defendant companies but their evidence was unlikely to be particularly controversial and they were few in number. Taking all these matters into account, the most appropriate forum was undoubtedly Brazil.

29 Advocate Baker emphasised that both sets of Brazilian proceedings had been instituted by the state prosecutor, who is independent of the Municipality. The Municipality had not supported the inclusion of the defendants in those proceedings so far as the Chanani claim was concerned. The defendants were not parties to the civil proceedings and accordingly any judgment in those proceedings would not be enforceable against them in Jersey. They were parties to the Eucatex proceedings. That claim involved a substantial number of other defendants and involved many other aspects of the frauds. It appeared likely to be lengthy and costly; it would be a slow process to bring the matter to trial. Furthermore, the Brazilian judge had requested that the Royal Court assume jurisdiction in relation to the claim against the defendants in so far as it arose out of the Chananifraud. In the interests of comity, the Royal Court should accede to a request to exercise the jurisdiction which it undoubtedly had in circumstances where the Federal Republic, the Municipality and the judge trying the Brazilian case had all requested it to do so.

30 He further submitted that any knowing receipt or unjust enrichment by Durant or Kildare occurred in Jersey and the claim against them will therefore be governed by Jersey law, as the place where the relevant receipt/enrichment took place — see Dicey, Morris and Collins (14th edition at 34 R – 001). Furthermore, the assets were situated in Jersey and any judgment would need to be enforced here. It would be far simpler and cheaper for the original judgment to be reached and enforced here rather than seeking to enforce a Brazilian judgment, with all the possibilities for delay and technical objections which could arise in such a case.

31 As to witnesses, he accepted that the underlying fraud would need to be proved but emphasised that this case concerned only a minute part of one of the frauds, namely the Chanani aspect of the Avenue project fraud. It would only be necessary to prove the fraud in relation to the payments to the Chanani account. The documents proved the fact of the payments to the Chanani account, the immediate onward transfers to the account of Durant in Jersey and the subsequent transfers to Kildare. He estimated that there would only be about five witnesses from Brazil on behalf of the plaintiffs e.g. Mr Santori, Mr de Oliveira, Mr de Barros and Mr Alves. Conversely, he thought that it would be necessary to call a substantial number of witnesses to show the involvement of the Maluf family with the defendant companies so as to establish the necessary state of knowledge of the defendant companies and these witnesses are based for the most part in Jersey or elsewhere in Europe. He gave as examples of the people who would need to be called from Citibank or Deutsche, Mr Jones, Mr Montero, Mr Peterson, Mr Gray, Mr Fitzjohn, Mr Wheller, Mr Turner, Mr de Souza, Mr Parsons, Mr Godber, Mrs Finch and Mr Boothman. In addition the plaintiffs would wish to call Mr Kalouti, who was an adviser to the defendants in Geneva and Mr Staff and Mr Aeschlimann from a firm of lawyers in Geneva.

Discussion

32 In our judgment, Jersey is the natural forum for the trial of the present proceedings. It is the forum where the claim can most suitably be tried in the interests of all parties and the ends of justice.

33 We would summarise our reasons for so concluding as follows:-

(i) We accept, as did Advocate Baker, that in order to succeed the plaintiffs will need to prove the existence of the underlying fraud in relation to the Avenue project. However we also accept that, because the claim is limited to the monies paid through the Chanani account, it will not be necessary to prove any of the other frauds or the wider aspects of the Avenue project fraud. We see no reason to doubt Advocate Baker's assertion that he would probably only need to call about five witnesses from Brazil in order to prove the fraud insofar as it relates to the payments to the Chanani account. To this figure must of course be added any witnesses from Brazil which the defence would call in order to refute the fraud, which Advocate Steenson thought would be at least seven.

(ii) Set against that, given that Mr Maluf has repeatedly denied any connection between his family and the defendant companies, the plaintiffs will need to call witnesses seeking to prove this connection as this will be a critical aspect in establishing the requisite knowledge on the part of the companies. It may be that the plaintiffs will not need to call quite as many witnesses in this respect as Advocate Baker suggested, but we see no reason to doubt his assertion that a substantial number will need to be called.

(iii) In all the circumstances, doing the best we can on the information presently available to us, we consider that the aspect of witnesses is fairly evenly balanced between Jersey and Brazil.

(iv) As to the parties, the plaintiffs are of course both in Brazil but they are keen that the action should be tried here. The defendants are both BVI companies but there is no realistic suggestion that the action should be tried in the BVI as there is no connection with that jurisdiction other than that it is the place of their incorporation. Conversely, both defendant companies carry on business in Jersey and are administered in this Island by members of the Deutsche Bank Group in this jurisdiction.

(v) As to the applicable law, the claims in knowing receipt and unjust enrichment would appear to be governed by the law of Jersey as the place where the relevant receipt or enrichment took place, although we accept that this is an area where the jurisprudence is not fully developed. Both heads of claim are fairly technical and, if Jersey law is applicable, it points in favour of the action being tried here. It would not be straightforward for a foreign judge to get to grips with such technical concepts. Conversely, whilst we accept that the question of whether there has been a fraud will be governed by the law of Brazil as being the place where it occurred, the issue will be fairly academic on the particular facts of this case. If the plaintiffs succeed in showing that, whilst Mayor, Mr Maluf arranged for the gross overpricing of a construction project paid for by the Municipality with diversion of the secret profits thereby made to members of his family or companies controlled by members of his family, issues of which system of law determines whether that is fraudulent would seem to be fairly academic, as one cannot envisage any system of law concluding that it was not. We therefore conclude that issues of the applicable law point in favour of Jersey as the appropriate forum.

(vi) The assets of the defendant companies are situated in Jersey. They consist of units in unit trusts governed by Jersey law and of which the trustee is a member of the Deutsche Group incorporated and carrying on business in Jersey. The trustee holds shares in Eucatex. Thus, any judgment will need to be enforced in Jersey. Even assuming for these purposes that the defendants submit to the jurisdiction of the Brazilian court pursuant to the undertaking in that respect which they have given, enforcement of a Jersey judgment would clearly be much simpler, cheaper and speedier than enforcement of a Brazilian judgment.

34 The above reasons are some of the more conventional factors which determine the outcome in forum applications and we are satisfied that, for these reasons alone, Jersey is the more appropriate forum even allowing for the burden resting upon the plaintiffs. However, in this particular case, there are additional factors which also point strongly in favour of Jersey:-

(i) The extremely complex and broad nature of the proceedings in Brazil means that, inevitably, it will be a long time before they can be brought to a conclusion. This is no

criticism of the Brazilian judicial system; it is simply a reflection of the enormous size and complexity of the proceedings in Brazil. Conversely, hiving off a discrete part of one of the frauds by reference to the monies passing through the Chanani account, should lead to a much earlier resolution of this particular part of the claim, because it will not have to await the outcome of the wider allegations in relation to the various frauds. The interests of justice are usually best served by bringing proceedings to a conclusion as soon as possible.

(ii) Jersey has a legitimate interest in ensuring that it is not used as a centre to launder proceeds of fraudulent activities. This was referred to (albeit in the context of Norwich Pharmacal disclosure) by the Court of Appeal in *Macdoel Investments Limited v Federal Republic of Brazil* [2007] JLR 201 at 214, para 39 per Jones JA:-

> ***"We are conscious that, as the Court of Appeal of Jersey remarked in*** *Durant International Corporation v Attorney General* [2006] JLR 112, ***at para 1, per Sumption, JA:-***
>
> ***'Over the last half-century, Jersey has become a major financial centre, providing trust and banking facilities for an extensive international clientele…It has for some time been the policy of the legislature and of the executive agencies exercising statutory powers that the commercial facilities available in Jersey should not be used to launder money or mask criminal activities here or anywhere else.'***
>
> ***Although these remarks were made in the context of an action that concerned the provision of assistance by the authorities in Jersey to foreign prosecutors, they have relevance in the sphere of civil litigation, where the courts are conscious that Jersey's reputation as a major financial centre might suffer if it were not willing to assist victims of wrongdoing to obtain redress."***

Where there is a claim that a Jersey company or a company administered or carrying on business in Jersey has been used to launder or conceal fraudulent proceeds in Jersey, there is certainly a case for saying that Jersey is indeed an appropriate forum for a claim of knowing receipt in relation to such proceeds to be determined and this is a factor to weigh in the balance with all the other factors when determining which is the appropriate forum in the particular case.

(iii) In this case there is an additional factor. The Brazilian court has specifically requested this Court to assume jurisdiction in relation to the Chanani fraud insofar as Durant and Kildare are concerned and will be excluding that part of the claim from the proceedings in Brazil. It seems to us that, where there is in any event a strong connection with Jersey making it a natural forum for resolution of the dispute in question, a request from the only alternative forum that the courts of Jersey assume jurisdiction is a powerful consideration. It would on the face of it seem somewhat inconsistent with the considerations mentioned by Jones JA in the passage referred to above if this Court were to refuse to assume jurisdiction in circumstances where not only the alleged victims of the fraud were requesting this Court to deal with the matter,

but the judge of the only alternative forum was making a similar request.

35 For all of these reasons we are satisfied that the plaintiffs have discharged the burden of showing that Jersey is the appropriate forum in which to try the proceedings against the defendants as set out in the Order of Justice and we refuse the application to stay the proceedings or to set aside the order for service out of the jurisdiction.