Neutral Citation Number: 2014 EWHC 540 (Ch)

Case No: HC13E03490

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2014

Before :

THE CHANCELLOR OF THE HIGH COURT

- -

Between :

(1) STEPHEN JOHN AKERS
(2) MARK BYERS
(3) HUGH DICKSON
(AS JOINT OFFICIAL LIQUIDATORS
OF SAAD INVESTMENTS COMPANY LIMITED)
(4) SAAD INVESTMENTS COMPANY LIMITED (IN LIQUIDATION)

Claimants / Respondents

and

(1) SAMBA FINANCIAL GROUP

Defendant / Applicant

- -

David Brownbill QC, Felicity Toube QC
(instructed by **Morrison & Foerster (UK) LLP**) for the **Claimants**
Mark Hapgood QC, John Odgers QC and Alan Roxburgh
(instructed by **Latham & Watkins (London) LLP**) for the **Defendant**

Hearing dates: 29th and 30th January 2014

- -

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.

.....
THE CHANCELLOR OF THE HIGH COURT

The Chancellor (Sir Terence Etherton) :

1. This is an application by the defendant, Samba Financial Group ("Samba"), for a stay of these insolvency proceedings pursuant to CPR Part 11 on the ground that the courts of the Kingdom of Saudi Arabia are clearly and distinctly more appropriate for the determination of the claim than the courts of England and Wales.

2. Samba was served with these proceedings in England at its London branch as of right.

The claim

3. The proceedings are brought by the first, second and third claimants as the joint liquidators ("the Joint Liquidators") of the fourth claimant, Saad Investments Company Limited ("SICL").

4. The proceedings are for a declaration under section 127 of the Insolvency Act 1986 ("section 127") that the transfer on 16 September 2009 ("the September Transfer") by Mr Maan Al-Sanea ("Mr Al-Sanea") to Samba of shares in five Saudi Arabian companies ("the Disputed Shares") was a void disposition of the property of SICL. There is also a claim for payment of the value of the Disputed Shares and various other heads of relief which it is not necessary to describe. The Disputed Shares are alleged to have been held by Mr Al-Sanea on trusts for SICL governed by Cayman Islands law. They are alleged to have been worth some US$318 million at the date of the September Transfer.

5. SICL is incorporated under the Companies Law (as amended) of the Cayman Islands. It was wound up by order of the Grand Court of the Cayman Islands on 18 September 2009 pursuant to a winding up petition presented on 30 July 2009. The Joint Liquidators, having previously been appointed provisional liquidators by the Grand Court, were appointed official liquidators by the same order. Recognition orders of the English court made on 20 August 2009 and 25 September 2009 pursuant to the Cross Border Insolvency Regulations 2006 ("the CBIR") recognised the insolvency proceedings in the Cayman Islands as foreign main proceedings in accordance with the UNCITRAL Model Law on Cross-Border Insolvency set out in schedule 1 to the CBIR. Those orders recognised the Joint Liquidators as foreign representatives in those foreign main proceedings.

The Model Law and section 127

6. The UNCITRAL Model Law on Cross-Border Insolvency was given the force of law in Great Britain by the CBIR in the form set out in schedule 1 to those Regulations ("the Model Law"). The purpose of the Model Law is to enable a foreign office holder to use British insolvency law to obtain the same relief against persons located in Great Britain as if the insolvency were one that was commenced and continued in this jurisdiction.

7. CBIR reg. 3(1) provides that British insolvency law shall apply with such modifications as the context requires for the purpose of giving effect to the provisions of the CBIR.

8. Article 20(1)(c) of the Model Law provides that

> "Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this article … the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended".

9. Article 20(2) of the Model Law provides that:

> "The … suspension referred to in paragraph 1 of this article shall be
>
> (a) the same in scope and effect as if the debtor … , in the case of a debtor other than an individual, had been made the subject of a winding-up order under the Insolvency Act 1986; and
>
> (b) subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case."

10. The effect of those provisions is to enable the foreign representative to take advantage of section 127(1), which provides as follows:

> "In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void."

11. Accordingly, any disposition of SICL's property made after, at the latest, the date of recognition of the foreign proceedings on 20 August 2009 was void under section 127. The September Transfer was made after that date. The critical issue between the parties in relation to section 127, for the purpose of the present application, is whether or not, applying the relevant law, SICL had any property interest in the Disputed Shares at the date of the September Transfer.

12. The Joint Liquidators have decided to bring proceedings in this jurisdiction, taking advantage of the CBIR and the Model Law, rather than the Cayman Islands because, among other things, Samba has no presence there. The Joint Liquidators believed that Samba would refuse to submit to the jurisdiction of the Cayman Islands and that any judgment obtained there would be difficult to enforce.

13. The UNCITRAL Model Law has not been enacted in Saudi Arabia.

<u>The principles for the grant of a stay</u>

14. The relevant principles are well known and not in dispute. They are set out in the speech of Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. The court has a discretion to stay proceedings if there is another more appropriate forum, even where, as in the present case, the court's jurisdiction has been invoked by the claimant as of right. It will only do so in such a case, however, if the following conditions are satisfied.

15. The defendant must satisfy the court that there is another forum which is clearly or distinctly more appropriate than the English court. In determining that issue, the court will consider with which forum the issues in the proceedings have the most real or substantial connection, including the governing law of the relevant transactions, the places where the parties respectively reside or operate, and the convenience of witnesses and the location of evidence. If the court considers that there is no other forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.

16. If, however, the court is satisfied that there is another forum which is clearly more appropriate, then the court will ordinarily order a stay unless the claimant can satisfy the court that justice requires that the proceedings continue in England because, for example, it is established objectively and by cogent evidence that justice will not be done in that other forum. Ultimately, the question for the court is whether it is more suitable that the case should be tried in England having regard to the interests of all the parties and ends of justice.

The background

The parties

17. SICL is, as I have said, a Cayman Islands company. At all relevant times it had its registered office there. It is a member of the Saad Group of companies, which was formed in 1980 by Mr Al-Sanea, who has been at all relevant times a citizen of Saudi Arabia and domiciled and ordinarily resident there. The Saad Group has its headquarters in Al Khobar in Saudi Arabia. Mr Al-Sanea was the ultimate beneficial owner of SICL, acted as one of its directors and was chairman of its board of directors. SICL has had a number of directors over time. Some of them were based in Saudi Arabia, but three professional directors were not. SICL is essentially Mr Al-Sanea's family investment vehicle, the active management of which was conducted by an associated company in Geneva.

18. Samba is a public company which was incorporated in Saudi Arabia in 1980. It is listed on Tadawul, the Saudi Arabian stock exchange. It carries on business as an international bank. In addition to its operations in Saudi Arabia, it has operations in the United Kingdom, the United Arab Emirates, Qatar and Pakistan. According to its website "Samba has maintained a strong presence in the United Kingdom for over 20 years with a branch in London". Mr Al-Sanea acted as a director of Samba from 2004 until 2006.

19. SICL had a relationship with Samba's London branch. Samba, as lender, and SICL, as borrower, entered into a US$60 million facility agreement originally dated 6 December 2004 (and subsequently amended) governed by English law ("the SICL/Samba Facility Agreement"). SICL's liability under the SICL/Samba Facility Agreement was guaranteed by Mr Al-Sanea under a guarantee governed by English law. Under the jurisdiction clause in the SICL/Samba Facility Agreement, Samba required SICL to sue it only in the English courts.

20. SICL and Samba had other financial relationships, including Samba's US$50 million participation in the facility agreement which I mention below and certain credit

balances in accounts which, since at least 2000, were held by SICL with Samba in London.

21. On about 24 August 2007 SICL entered into a facility agreement as the borrower with a syndicate of bank lenders for a revolving loan facility in an aggregate amount equal to US$2.815 billion ("the Facility Agreement"). Samba was one of the syndicate. The Facility Agreement was governed by English law and contained a jurisdiction clause, under which the lenders (including Samba) required SICL to sue them only in the English courts. At the date of presentation of the petition to wind up SICL there was outstanding under the Facility Agreement a debt of US$2.815 billion and interest in excess of US$31 million.

22. SICL's insolvency is very considerable. The effect of the September Transfer of the Disputed Shares, if they constituted property of SICL, was to give Samba priority over other creditors of SICL to the extent of their value. The Joint Liquidators allege that the Disputed Shares had a value of some US$318 million at the date of the September Transfer.

The Disputed Shares and the September Transfer

23. At the date of the September Transfer Mr Al-Sanea was the registered owner of the Disputed Shares. They comprised shares in Samba and in four other Saudi Arabian banks, namely National Commercial Bank ("NCB"), Arab National Bank ("ANB"), Banque Al Saudi Al Fransi ("BSF") and Saudi British Bank ("SBB"). All those companies, other than NCB, were public companies listed on Tadawul. Mr Al-Sanea was registered as the owner of the shares in the public companies at the Saudi Arabian Securities Depository Centre ("the SDC"), which is operated by Tadawul. He was listed as the owner of the NCB shares in the share register of NCB.

24. The Joint Liquidators claim that, at the date of the September Transfer, the Disputed Shares were held by Mr Al-Sanea on trusts governed by the law of the Cayman Islands for SICL as a result of seven transactions which took place between 1998 and 2008 ("the seven transactions") and various bonus issues, stock dividends and stock splits associated with the shares which were the subject of those transactions. Samba, on the other hand, claims that the seven transactions were governed by the law of Saudi Arabia or the law of Bahrain, and that no separate beneficial interest and consequently no such trusts are recognised under their laws.

25. By the September Transfer Mr Al-Sanea transferred to Samba his holdings in more than 60 Saudi Arabian securities in partial discharge of his liabilities to Samba. The Joint Liquidators claim that they included the Disputed Shares.

The seven transactions

26. The seven transactions, briefly summarised, were as follows.

27. The first transaction took place originally on 30 November 1998 when Mr Al-Sanea and SICL entered into a written agreement for the sale by Mr Al-Sanea to SICL of the beneficial ownership of 400,000 shares in Samba ("the 1998 Agreement"). It provided, under the heading "Nominee Arrangements", for the legal title to the shares to continue to be registered in Mr Al-Sanea's name. It provided that "[the 1998]

Agreement and the relationships of the parties in connection with the subject matter of [the 1998] Agreement shall be governed by and determined in accordance with the laws of Bahrain". That agreement was superseded by a sale agreement dated 17 December 2002 between Mr Al-Sanea and SICL ("the 2002 Agreement").

28. The 2002 Agreement recited that in 1998 SICL had acquired from Mr Al-Sanea the beneficial ownership of 400,000 Samba shares, and that, as a result of a bonus issue by Samba, SICL had acquired the beneficial ownership of an additional 100,000 Samba shares. It recited that Mr Al-Sanea retained legal ownership of all those shares in order to comply with legal requirements in Saudi Arabia. It also recited that Mr Al-Sanea had offered to sell SICL the beneficial ownership of an additional 100,000 Samba shares (called "the New Samba shares").

29. Section 1.1 of the 2002 Agreement provided that Mr Al-Sanea agreed to sell to SICL the beneficial ownership of the New Samba Shares. Section 1.2 provided that nominal ownership of the New Samba Shares shall remain vested in Mr Al-Sanea until otherwise provided under the agreement. There were other provisions as to the price to be paid by SICL, including a provision that the purchase price was to be paid by the delivery of a Note in the form attached to the 2002 Agreement. Section 1.5.2 provided that, upon receipt of that Note by Mr Al-Sanea, the beneficial ownership of the New Samba Shares shall be transferred to SICL from Mr Al-Sanea. Section 2 provided that, upon payment of the purchase price, the substantive provisions of the 1998 Agreement shall cease to have effect and the provisions of the 2002 Agreement shall apply to all the Samba shares which were the subject of the two agreements. Section 3 of the 2002 Agreement provided that Mr Al-Sanea shall cause the legal title to all those Samba shares to remain registered in his name. Section 4 provided that, after the purchase, all of the risk and benefits of ownership of the Samba shares shall accrue to SICL, and Mr Al-Sanea shall have no interest whatever in them except in his capacity as the registered owner. Section 6 provided that all cash dividends, cash distributions and other cash payments and all stock dividends or other distributions of common stock received by Mr Al-Sanea on or with respect to all the Samba shares from completion of the sale shall be held by him as trustee for SICL. Section 20 provided that:

> "This Agreement and the relationships of the parties in connection with the subject matter of this Agreement shall be governed by and determined in accordance with the laws of Bahrain."

30. The second transaction was effected by a written agreement made on 17 December 2003 between Ahmad Hamad Algosaibi & Brothers Company ("ALGME"), SICL and Mr Al-Sanea ("the 2003 Agreement"). Mr Al-Sanea was called the "Nominee". The 2003 Agreement concerned the sale by ALGME to SICL of 200,000 shares in ANB, 185,000 shares in BSF and 175,000 shares in SBB ("the ALGME Shares"). It recited that ALGME had offered to sell to SICL and SICL wished to buy the ALGME Shares. It also contained the following recital:

> "SICL cannot hold legal title to such shares and the Nominee is willing to hold legal ownership of such shares as nominee for SICL in order to comply with legal requirements in Saudi Arabia".

31. In Section 1 of the 2003 Agreement ALGME agreed to sell and SICL agreed to purchase all the right, title and interest in and to the ALGME Shares at the price specified in schedule 2. It also provided that, upon payment of the purchase price, ALGME shall deliver to SICL a bill of sale in the form set out in schedule 3 and ALGME shall transfer to the Nominee all right, title and interest in and to the ALGME Shares free and clear of any lien, security interest, mortgage, pledge, charge or other encumbrance of any nature whatsoever.

32. Section 2 provided as follows:

> "Nominee to Hold Legal Title to the Nominee shares
>
> The Nominee shall cause [sic] legal title to the Shares, as well as any other shares or securities that it may come to hold pursuant to the provisions of Sections 5.2 and 5.3 from time to time (such Shares and other shares and securities being hereinafter referred to as the "Nominee Shares") as trustee for SICL, to the order of SICL, for the sole benefit of SICL and free and clear of any lien, security interest, mortgage, pledge, charge or other encumbrance of any nature whatsoever except as may be created from time to time by SICL or at its instruction for the period beginning immediately after the Closing until the earlier of (i) completion of the sale by SICL of its ownership of all of the Nominee Shares pursuant to the provisions of Section 4 or 11 of this Agreement or (ii) the termination of the Nominee's services as nominee of SICL under this Agreement (such period being hereinafter referred to as the "Nominee Period").

33. Section 3 provided, under the heading "Beneficial Ownership of the Nominee Shares", that during the Nominee Period all of the risk and benefits of ownership of the Nominee Shares shall accrue to SICL and the Nominee shall have no interest whatsoever in the Nominee Shares except in his capacity as their registered owner as nominee for SICL pursuant to the terms of the 2003 Agreement.

34. Section 21 provided as follows under the heading "Governing Law":

> "This Agreement and the relationships of the parties in connection with the subject matter of this Agreement shall be governed by and determined in accordance with the laws of Saudi Arabia."

35. The third transaction was effected by a written agreement made on 2 July 2005 between Mr Al-Sanea and SICL ("the 2005 Agreement") for the sale by Mr Al-Sanea to SICL of 170,000 shares in NCB. Section 12 provided for the governing law to be that of Saudi Arabia and was in the same terms as section 21 of the 2003 Agreement.

36. The fourth transaction was effected by two documents, a bill of sale ("the 2006 bill of sale") and a written declaration of trust ("the 2006 declaration of trust"), both dated 5 June 2006 and to which Mr Al-Sanea and SICL were parties. The 2006 bill of sale stated that Mr Al-Sanea thereby sold to SICL 1,275,000 shares in NCB "subject to

that certain 2005 Share Sale Agreement". In the absence of any evidence to the contrary, it would appear that is a reference to the 2005 Agreement. In the 2006 declaration of trust Mr Al-Sanea was described as "the Seller" or "the Trustee" and SICL as "the Buyer". Section 3 of the declaration of trust provided as follows:

> "The Trustee:
>
> (a) declares that the assets described in the Schedule to this Declaration though standing in the name of the Trustee in fact belong to the Buyer.
>
> (b) undertakes to hold those assets in trust for and to the order of the Buyer and at the Buyer's expense to transfer them or otherwise deal with them and any rights attached to them as directed by Buyer and to complete all documentation necessary for that purpose."

37. The fifth transaction was also effected by a bill of sale ("the 2007 bill of sale") and a declaration of trust ("the 2007 declaration of trust") to which Mr Al-Sanea and SICL were parties and which were dated 24 January 2007. They concerned 8,523,000 Samba shares. They were in substantially the same terms as the 2006 bill of sale and the 2006 declaration of trust except that there was no reference to the 2005 Agreement or any earlier agreement.

38. The sixth transaction was also effected by a bill of sale and a declaration of trust, to which Mr Al-Sanea and SICL were parties and which were dated 12 October 2008. They concerned 1,800,000 shares in SBB and 987,000 shares in BSF. They were in substantially the same terms as the 2007 bill of sale and the 2007 declaration of trust.

39. The seventh and final transaction was again effected by a bill of sale and declaration of trust, to which Mr Al-Sanea and SICL were parties and which were dated 16 October 2008. They concerned 9,750,000 Samba shares. They were also in substantially the same terms as the 2007 bill of sale and the 2007 declaration of trust.

40. It appears that the witnesses to the bills of sale and declarations of trust which effected the fifth, sixth and seventh transactions were all Saudi nationals since the documents specify their "Saudi ID or Iqama No."

<u>The evidence</u>

41. Witness statements were made, on behalf of Samba, by Syed Sajjad Razvi, Samba's chief executive officer and general manager.

42. Witness statements were made, on behalf of the claimants, by Stephen John Akers, who is the first claimant and one of the Joint Liquidators.

43. Both sides adduced expert evidence on the law of Saudi Arabia in the form of written reports. There were two expert reports by Andreas Haberbeck, for Samba, and an expert report by Professor Chibli Mallat, for the claimants.

44. The following matters of Saudi Arabian law are common ground. The ownership of, and security interests in, Saudi Arabian public companies traded on Tadawul must be

registered with the SDC. In the case of Saudi Arabian private companies, ownership of shares is registered in the company's register.

45. The law of Saudi Arabia does not recognise trusts in the common law sense, that is to say an arrangement under which there is a division between legal and beneficial ownership. It does, however, recognise the "amaana", which is an arrangement where one person entrusts property to another, the "amin", who must act in accordance with the instructions of the former. The amin cannot assert ownership of the property. Nor can the amin's family claim it as part of the amin's estate on the amin's death. Mr Haberbeck and Professor Mallat appear to consider an amaana analogous to a bailment in English law, carrying a duty of care but not causing the vesting of a separate property interest.

46. There are restrictions under the law of Saudi Arabia on the engagement of non-Saudis in economic activities in Saudi Arabia. There are "cover up" laws which make it a criminal offence in certain circumstances to conceal arrangements which are in breach of those restrictions.

47. The courts of Saudi Arabia do not apply foreign law.

48. It was also common ground that there is no material difference between the law of Bahrain and the law of Saudi Arabia on those matters.

49. The experts did not agree on all points. Mr Haberbeck expresses the view, for example, that not only was it impossible under Saudi law for SICL to have acquired the beneficial interest in the Disputed Shares but that the purported arrangements in the seven transactions were illegal and ineffective under the "cover up" law.

50. Professor Mallat, on the other hand, considers that, in the light of Mr Al-Sanea's prominent role in SICL, it is implausible that Mr Al-Sanea breached regulations directed at non-Saudi nationals investing in Saudi Arabia by hiding behind Saudi nationals. He also says that the documents comprising the seven transactions are more easily understood as reflecting common law trust principles which have no application in Saudi Arabian law.

51. Professor Mallat considers that the courts of Saudi Arabia will not assist the Joint Liquidators by granting the same relief as they would if there was a Saudi Arabian insolvency. He also says that the Saudi Arabian court system is increasingly confusing and cases are subject to considerable delay. Mr Haberbeck takes issue on those matters. The experts also do not agree on the issue of the conclusiveness of registration of Samba as the owner of the Disputed Shares or on whether each of the seven transactions is properly to be interpreted as an amaana.

52. Other areas of Saudi Arabian law which are in dispute concern the priority under Saudi Arabian law of pledge declarations of the Samba Shares by Mr Al-Sanea in favour of Samba, which were registered at Tadawul, and the significance of Samba's rights of seizure of its own shares under its articles of association. There may also be a dispute about whether or not Samba was a bona fide purchaser of the Disputed shares and the consequences under Saudi Arabian law if it was or if it was not.

Discussion

53. I am satisfied that this is a case where I should grant a stay. I can state my reasoning quite briefly.

54. The claim of the Joint Liquidators and SICL is pursuant to section 127. That section is only relevant and capable of application if, at the date of the September Transfer, SICL had a proprietary interest in the Disputed Shares. The interest alleged is a beneficial interest under a trust governed by the law of the Cayman Islands. There is no claim that Samba is a constructive trustee of the Disputed Shares and, by virtue of its presence in this jurisdiction, it can and should be held personally liable to account for its dealings with the Disputed Shares even though they are foreign property and the relevant dealings took place abroad: cf. *Webb v Webb* [1991] 1 WLR 1410, [1994] QB 696.

55. The first critical issue on this application, therefore, is to determine which law governs whether or not, at the date of the September Transfer, SICL had a proprietary interest in the Disputed Shares. The Joint Liquidators submit that it is the law of the Cayman Islands or at least it is arguably that law because that is the law with which the seven transactions have the closest connection. Samba submits that it is the law of Saudi Arabia both under common law conflict of laws principles and under the Recognition of Trusts Act 1987 ("the 1987 Act") which gives effect in English law to the Hague Trusts Convention ("the Convention"). Samba is, in my judgment, plainly correct on that issue.

56. Under common law principles the ownership of shares is determined by the law of the place where the shares are situated, which is where the company is incorporated: *Macmillan Inc v Bishopsgate Investment Trust plc (No. 3)* [1996] 1 WLR 387. No authority has been cited to me indicating that any different common law principle applies to determine the beneficial ownership of shares as distinct from the legal title. In the present case, the Disputed Shares were all shares in companies incorporated in Saudi Arabia. Furthermore, the shareholders were registered there either with the SDC maintained by Tadawul or, in the case of the NCB, in its register of shareholders.

57. The common law rule is applicable under the 1987 Act and the Convention to determine issues of title. Article 15 of the Convention provides as follows, so far as relevant:

> "The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters …
>
> (d) the transfer of title to property and security interests in property; …
>
> If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means."

58. Section 1(3) of the 1987 Act provides that the provisions of the law mentioned in Article 15 shall, to the extent there specified, apply to the exclusion of the other provisions of the Convention.

59. As I understood him, Mr David Brownbill QC, for the Joint Liquidators, submitted that Article 15(d) is irrelevant because the seven transactions resulted in the creation of the beneficial interest in the Disputed Shares and not the transfer to SICL of title to the beneficial interest in the Disputed Shares. He referred to the following passage in the speech of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 706E-F:

> "It is said that, since the Bank only intended to part with its beneficial ownership of the moneys in performance of a valid contract, neither the legal nor the equitable title passed to the local authority at the date of payment. The legal title vested in the local authority by operation of law when the moneys became mixed in the bank account but, it is said, the Bank "retained" its equitable title.
>
> I think this argument is fallacious. A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title. Therefore to talk about the bank "retaining" its equitable interest is meaningless. The only question is whether the circumstances under which the money was paid were such as, in equity, to impose a trust on the local authority. If so, an equitable interest arose for the first time under that trust."

60. That statement of Lord Browne-Wilkinson has nothing to do with the vesting of a beneficial interest as a consequence of the creation of an express trust. All that he was emphasising there was the inappropriateness of referring to the "retention" of an equitable interest by the owner of property following a transfer of the property in the factual circumstances mentioned in the passage. If the transferor of the property has an equitable interest it will have been created by, that is to say it is the result of, the imposition by law of a trust on the transferee in the circumstances mentioned in the quoted passage.

61. In the present case the Joint Liquidators rely on six of the seven transactions as evidencing express declarations of trust by Mr Al-Sanea for SICL. They rely on the second transaction as constituting a transfer of the shares to Mr Al-Sanea on an express trust for SICL. Under the conventional view of English or Cayman Islands law the effect was, in the words of Lord Browne-Wilkinson which I have quoted, to cause "a separation of the legal and equitable estates". As Lord Browne-Wilkinson said in *Westdeutsche* at 705F:

> "(iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be

> enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice."

62. I have referred to the "conventional" view of English and Cayman Islands law because there was no reference in the submissions of either side to a line of academic discourse that equitable rights under a trust are not proprietary interests: B. McFarlane, "The Structure of Property Law" (2008), and see Burrows, the Law of Restitution (3rd ed) pp. 191-193.

63. Adopting the conventional approach, the claimants' case was that the effect of the seven transactions was to vest beneficial entitlement to the Disputed Shares in SICL and to remove it from the legal owner. I can see no good reason why that process should not fall within the expression "transfer of title to property" within Article 15(d). That is a conclusion consistent with the views of Professor Jonathan Harris, "The Hague Trusts Convention, Scope, Application and Preliminary Issues" (2000) at page 374. Accordingly, there is nothing in the Convention to preclude the application of the common law rule that the law governing the title to shares is the *lex situs*, namely the law of Saudi Arabia in the case of the Disputed Shares.

64. Even if Mr Brownbill was correct in his argument that the seven transactions gave rise to the creation of a beneficial interest rather than the transfer of title to the beneficial interest within Article 15(d), the consequence would be the same. Article 8 of the Convention provides that the law specified in Article 6 or Article 7 will govern the validity of the trust, its construction, its effects and the administration of the trust. Articles 6 and 7 are as follows.

> "Article 6
>
> A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.
>
> Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply."
>
> "Article 7
>
> Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.
>
> In ascertaining the law with which a trust is most closely connected reference shall be made in particular to—
>
> (a) the place of administration of the trust designated by the settlor;

(b) the situs of the assets of the trust;

(c) the place of residence or business of the trustee;

(d) the objects of the trust and the places where they are to be fulfilled."

65. Mr Brownbill submitted that nothing turns on Article 6 on this application and that the law applicable under Article 7 is the law of the Cayman Islands or at least that is well arguable. I agree with him that Article 6 is not determinative on this application. I disagree that the governing law under Article 7 is, or arguably is, the law of the Cayman Islands. I consider that I am in a position to decide, and I do decide, that the governing law under Article 7 is the law of Saudi Arabia.

66. There are three reasons why the governing law of the trusts created by the seven transactions cannot be resolved on this application by reference to Article 6 of the Convention. Firstly, only the first, second, third and (by cross reference to the 2005 Agreement) fourth transactions contained express choices of Saudi Arabian law or Bahraini law. There are strong grounds for concluding that the fifth, sixth and seventh transactions contained an implied choice of Saudi Arabian or Bahraini law since the bills of sale and declarations of trust in those transactions were in substantially the same terms as the 2006 bill of sale and the 2006 declaration of trust except that they did not contain any reference to the 2005 Agreement or any earlier agreement. The parties to them and, it would appear, the witnesses who signed them, were all Saudi Arabian entities or citizens. Nevertheless, I am reluctant on this application to reach a final conclusion on whether they did contain an implied term making such a choice.

67. Secondly, assuming in favour of Samba, that all the transactions contained an express or implied choice of Saudi Arabian or Bahraini law, it is common ground that those laws do not recognise a category of trust, like the common law trust, in which there is a separation of the legal and equitable interests. In those circumstances, the second paragraph of Article 6 makes Article 7 applicable.

68. Thirdly, Samba contends that, on their proper interpretation, each of the seven transactions gives rise to an amaana (which, it is common ground, is recognised under both Saudi Arabian and Bahraini law) and that is a trust within Article 2 of the Convention (so that the express and implied choices of Saudi Arabian and Bahraini law in the seven transactions are conclusive under Article 6). It is not possible, however, to resolve either of those matters on this application in the absence of cross-examination of the experts.

69. It is necessary to turn, therefore, to Article 7 of the Convention and the particular matters specified in (a) to (d). As to (a), in the case of the seven transactions there was no express designation of any place as the place of administration of the trusts. In practice, administrative, investment management and advisory services for SICL, the beneficiary of the trusts, was habitually carried out in Geneva. The benefits and obligations of ownership of the Disputed Shares were enjoyed and suffered by the legal owner, Mr Al-Sanea, in Saudi Arabia where he was resident, the companies were incorporated and had their head offices and he was registered as the owner of the shares.

70. As to (b), the *situs* of the Disputed Shares was Saudi Arabia, which is where the companies were incorporated and where the shareholders were registered.

71. As to (c), the trustee was Mr Al-Sanea, who was resident in Saudi Arabia. He was a citizen of Saudi Arabia and also domiciled there.

72. As to (d), the beneficiary of the trusts was SICL, which was incorporated in the Cayman Islands. The wider purpose of the trusts, as is evident from the recitals to the 2002 Agreement and the 2003 Agreement, was to circumvent the restrictions under the Saudi Arabian foreign investment regulations on foreigners investing in Saudi Arabian companies. Those recitals, when read in association with the express provisions in the second, third and (by cross-reference to the 2005 Agreement) fourth transactions specifying the law of Saudi Arabia as the law governing both the relevant agreement "and the relationships of the parties in connection with the agreement", give the appearance of a belief of the parties to the transactions that the arrangements were consistent with the law of Saudi Arabia.

73. Those matters taken together overwhelmingly indicate that the closest connection of the seven transactions for the purposes of Article 7 was with the law of Saudi Arabia and not the law of the Cayman Islands. Mr Brownbill submitted that the court is not in a position on this application to form a final view to that effect. He submitted that it is highly unlikely to be a correct conclusion under Article 7 since the law of Saudi Arabia would invalidate the trusts. The arrangements in the seven transactions would not, of course, be wholly invalidated if each of them can properly be interpreted as giving rise to an amaana, but he submitted, and I accept, that it is impossible on this application to reach a conclusion on that point in the absence of cross-examination of the parties' experts. His contention was that the substance of the whole dispute between the parties is as to which law applies to the seven transactions and the trusts constituted by them, and in the absence of full evidence, including oral evidence of the expert witnesses, the court's task on this application is to decide in which jurisdiction that dispute should be resolved.

74. I do not agree that it is impossible on this application properly to reach a final conclusion on the proper law governing the seven transactions. The only matter which is both in dispute and relevant to determination of the proper law of the seven transactions and cannot be resolved without oral evidence is whether or not each of the seven transactions constituted an amaana under Saudi Arabian law. Even making the assumption, against Samba, that none of them constituted an amaana, the relevant objective factors which I have mentioned in connection with Article 7 overwhelmingly support the conclusion that the governing law of the seven transactions is Saudi Arabian law.

75. I entirely accept that, in the ordinary course, a court will be cautious in reaching a conclusion that the governing law of a trust is one which does not provide for the trust which is envisaged. It is clear, however, that such a conclusion is possible: see Professor A.E von Overbeck's Explanatory Report on the Hague Trusts Convention at para. 61. It is consistent with the reasoning of the Court of Appeal in *Martin v Secretary of State for Work and Pensions* [2009] EWCA Civ 1289. In that case the Court of Appeal held that French law, which does not recognise an implied trust (resulting or constructive), governed the nature and extent of the claimant's rights in a French property which had been purchased by the claimant's friend, but was put in his

name. The property had been bought for use as a holiday home and for letting and had been put in the claimant's name so that, on his friend's death, it would pass to the claimant and their son rather than her children by an earlier marriage. She had not intended to make a gift of the property to the claimant and the understanding was that, during her lifetime, she would be entitled to decide whether it should be sold and she would be entitled to the proceeds of sale. The Court of Appeal held that France was the country with which the parties' arrangements had the closest connection because the reason for, and the sole purpose of, the arrangement putting the property into the claimant's name was to produce a certain effect under French succession law.

76. The governing law is always an important factor in forum challenges because it is generally preferable, all other things being equal, that a case should be tried in the country whose law applies: *VTB Capital plc v Nutritek International Corptn* [2013] UKSC 5, [2013] 2 AC 337, at [46] (Lord Mance). In the present case it is decisive. It is common ground that, if the law of Saudi Arabia governs the seven transactions, the claim in the present proceedings pursuant to section 127 will fail because SICL will not have had a property interest in the Disputed Shares at the date of the September Transfer. There will be nothing to be gained from the proceedings here. The only possible live issues between the parties, and between the Joint Liquidators and Mr Al-Sanea, will be matters of Saudi Arabian law arising from (1) the seven transactions concerning shares in companies incorporated in Saudi Arabia, of which Mr Al-Sanea, a Saudi national and resident, was registered as owner in Saudi Arabia, and (2) the September Transfer by which he transferred those shares to Samba, a Saudi company, in Saudi Arabia and the subsequent registration in Saudi Arabia of Samba as the owner of those shares.

77. If it is correct that the law of Saudi Arabia or the law of Bahrain governs the trusts created by the seven transactions, then the claimants accept that their claim under section 127 fails both because the law of those countries does not recognise the type of trust where there is a division between legal and beneficial ownership and also because the courts of those countries do not recognise, that is to say enforce, foreign laws.

78. For the sake of completeness, I would add that, if I had concluded that it is reasonably arguable that the governing law under Article 15(d) or, if that was inapplicable, Article 7 is the law of the Cayman Islands rather than Saudi Arabia, I would have refused a stay. In the briefest possible outline, I would have done so for the following reasons.

79. I would have rejected the argument of Mr Mark Hapgood QC, for Samba, under Article 18 of the Convention that it would be against the public policy of this jurisdiction to entertain proceedings which recognise and enforce an arrangement for the vesting in a non-Saudi entity of a property interest which would be illegal under the law of Saudi Arabia. Quite apart from the fact that there is disagreement between the experts on whether the seven transactions were illegal, the relief sought in the present proceedings is monetary relief and does not require anything to be done in Saudi Arabia: comp. *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2011] EWHC 56 (Comm) at [145].

80. I accept that, even if it is arguable that the governing law is the law of the Cayman Islands, there would be a number of matters of Saudi Arabian law in issue or

potentially in issue which I mentioned earlier in this judgment, including whether or not any of the seven transactions is properly to be interpreted as an amaana, whether SICL was a foreign investor for the purposes of Saudi Arabian foreign investment regulations and whether any of the transactions were illegal under Saudi Arabian law, whether pledges of shares by Mr Al-Sanea in favour of Samba have priority over any rights of SICL under the law of Saudi Arabia, whether Samba's rights of seizure of its shares under its articles of association are relevant, and whether Samba has any protection under Saudi Arabian law as a bona fide transferee of the Disputed Shares. As Mr Brownbill pointed out, most of those matters would only arise if section 127 was engaged and the court was considering whether or not to grant a validation order under that section.

81. Mr Hapgood also mentioned a number of practical matters that he said would make a trial in England more difficult than in Saudi Arabia, such as the presence there of (a) Mr Al-Sanea, a potentially important witness who is currently subject to a travel ban, (b) potentially relevant documents taken there by Mr Al-Sanea, and (c) the records of share registers which would assist identification of the Disputed Shares.

82. Notwithstanding those matters, as well as matters connecting the seven transactions and the September Transfer to Saudi Arabia which I have already mentioned in the context of Article 7 of the Convention and other matters connecting Samba and the Saad Group to Saudi Arabia, I would not have been satisfied that the *Spiliada* conditions for a stay had been met. Firstly, all the relevant documents alleged by the Joint Liquidators to give rise to the trusts of the Disputed Shares are in English and use language that is familiar to those versed in English jurisprudence which, so far as relevant, is the same as the law of the Cayman Islands: comp. *Seashell Shipping Corporation v Mutualidad de Seguros del Instituto Nacional de Industria* [1989] 1 Lloyd's Rep. 47 at 51. Secondly, even though the hypothesis (which I am now making) is that it is reasonably arguable under our domestic conflict of laws principles that the governing law is the law of the Cayman Islands any proceedings by the Joint Liquidators in Saudi Arabia would inevitably fail because the Saudi courts do not recognise foreign law: comp. *Banco Atlantico SA v British Bank of the Middle East* [1990] 2 Lloyd's Rep 504 and *Golden Ocean* at [142]-[143]. Thirdly, by contrast, the English courts recognise foreign laws, where those are the applicable laws under our domestic conflict of laws principles, including the laws of Saudi Arabia. Evidence of Saudi Arabian law and of factual matters in Saudi Arabia would be admissible here. In other words, I would not be satisfied that Saudi Arabia is clearly or distinctly more appropriate than the English court, and, even if that is wrong, I would be satisfied that it is more suitable that the case be tried in England having regard to the interests of all the parties and the ends of justice.

Conclusion

83. For the reasons I have given, I conclude that these proceedings should be stayed on the ground that the courts of Saudi Arabia are clearly and distinctly a more appropriate forum.