[2024 Gib LR 571]

NANOX IMAGING PLC v. SCHICK

SUPREME COURT (Happold, J.): November 18th, 2024

2024/GSC/043

Conflict of Laws—contracts—exclusive jurisdiction clause—no stay of Gibraltar proceedings where dispute concerns agreement containing exclusive jurisdiction clause in favour of Gibraltar courts—art. 25(1) of Brussels Recast applies—Brussels Recast not displaced by s.33 of Civil Jurisdiction and Judgments Act 1993

Injunctions—anti-suit injunction—circumstances in which made—anti-suit injunction granted where dispute concerns agreement containing exclusive jurisdiction clause in favour of Gibraltar courts—defendant who wished to sue claimant in Israel failed to show strong reasons why anti-suit injunction should not be granted

The claimant applied for an anti-suit injunction and the defendant applied for a stay.

The claimant ("Nanox Gibraltar") was a Gibraltar registered company which until September 2019 had carried on business in the field of medical imaging technology. In September 2015, the claimant had entered into a consultancy agreement with the defendant, a US national, for the defendant to provide consultancy services to the claimant for a monthly fee. The agreement also provided that in the event of a "liquidity event" within 24 months of termination, the defendant would receive a bonus, the terms of payment of which were set out in Appendix B. The agreement was terminable by either party on 30 days' written notice. No written notice of termination was given. The claimant said the defendant ceased to provide any services under the agreement by March 2017 at the latest, whereas the defendant said he continued to do so until at least 2019.

The consultancy agreement contained two jurisdiction clauses. Clause 6.5 provided:

> "Both parties agree that any action, demand, claim or counterclaim relating to this Agreement, or to its breach, shall be commenced in the state of Gibraltar in a court of competent jurisdiction. This Agreement and the validity, interpretation and performance of this Agreement shall be governed by, and construed in accordance with, the laws of Gibraltar without giving effect to conflict of law principles."

Clause 8 of Appendix B provided:

> "This Agreement shall be governed by and interpreted in accordance with the laws of Gibraltar without giving effect to the rules respecting conflict of law, and the competent courts of Gibraltar shall have sole and exclusive jurisdiction over any dispute between the parties."

In 2021, the defendant brought proceedings in the US against the claimant, Nano-X Imaging Inc. ("Nanox Israel"), a Mr. Poliakine and 11 others. Nanox Israel was a company registered in Israel to which, by an asset purchase agreement in September 2019, Nanox Gibraltar had sold its assets. Mr. Poliakine (now deceased) was an Israeli national and a beneficial owner of Nanox Gibraltar and Nanox Israel. The US proceedings were dismissed for lack of personal jurisdiction.

On December 21st, 2023, the defendant brought proceedings against the claimant, Nanox Israel and Mr. Poliakine in Israel, claiming *inter alia* breach of contract, including of the consultancy agreement. The defendants in the Israeli proceedings challenged the Israeli courts' jurisdiction based on the exclusive jurisdiction clause in the consultancy agreement.

On December 22nd, 2023, the claimant brought the present proceedings seeking declarations that the consultancy agreement had been terminated and that the claimant had no liability to the defendant. The claimant also sought a declaration that the defendant was obliged to commence any action or claim relating to the consultancy agreement in accordance with cl. 6.5 and cl. 8 of the agreement. The claimant applied for an anti-suit injunction.

The defendant applied for a stay. He accepted that cl. 6.5 of the consultancy agreement gave the court jurisdiction but submitted that it was not exclusive. The wording of cl. 6.5 was permissive, not mandatory. The court should decline to exercise its jurisdiction on *forum non conveniens* grounds and allow the claim in Israel to proceed.

Article 25(1) of Council Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels Recast") provided:

> "1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

The defendant submitted that the court nevertheless had discretion under s.33 of the Civil Jurisdiction and Judgments Act 1993 to grant a stay on *forum non conveniens* grounds. Section 33 provided:

> "Nothing in this Act shall prevent any court in Gibraltar from staying, striking out or dismissing any proceedings before it on the ground of forum non-conveniens or otherwise, where to do so is not inconsistent with the 1968 Convention or, as the case may be, the Lugano Convention or the 2005 Hague Convention."

The defendant submitted that granting a stay would not be inconsistent with the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters or the Hague Convention on Choice of Court Agreements (all of which were incorporated into Gibraltar law by the 1993 Act) and it was irrelevant whether it would be inconsistent with it because it was not listed with those treaties.

Held, judgment as follows:

(1) The court would not order a stay. Clause 6.5 of the consultancy agreement was an exclusive jurisdiction clause which granted the courts of Gibraltar exclusive jurisdiction over disputes between the claimant and the defendant relating to the consultancy agreement. The test for distinguishing a non-exclusive jurisdiction clause from an exclusive jurisdiction clause was whether on its proper construction the clause obliged the parties to resort to the relevant jurisdiction. The court rejected submissions that cl. 6.5 was permissive, not mandatory, because it did not expressly refer to "irrevocable" submission to the Gibraltar courts, to those courts having "sole" or "exclusive" jurisdiction, or expressly prohibit proceedings being brought elsewhere. The consultancy agreement was an agreement in writing and art. 25(1) of Brussels Recast applied. Section 33 of the Civil Jurisdiction and Judgments Act did not displace Brussels Recast and give the court discretion to grant a stay on *forum non conveniens* grounds. The Act incorporated the Brussels, Lugano and 2005 Hague Conventions into Gibraltar law but, as an EU Regulation, Brussels Recast had direct effect as a matter of EU law. As cl. 6.5 of the consultancy agreement was an exclusive jurisdiction clause, and s.33 of the Civil Jurisdiction and Judgments Act did not apply so as to grant the court a power to order a stay which the court would not otherwise have had under art. 25(1) of Brussels Recast, that disposed of the defendant's application for a stay on *forum non conveniens* grounds. It also disposed of the defendant's application for a stay on case management grounds (paras. 15–23).

(2) The court would grant an anti-suit injunction. Where there was an exclusive jurisdiction clause and a claim falling within the scope of the agreement was brought in another forum, the court would ordinarily exercise its discretion to ensure compliance with the exclusive jurisdiction clause unless the party bringing the claim could show strong reasons for suing in that other forum. The onus was therefore on the defendant to show "strong reasons" why the claimant's request for an anti-suit injunction should not be granted. However, the reasons advanced by the defendant for suing in Israel were not so strong as to permit him to avoid his contractual obligation to sue the claimant in Gibraltar. Nanox Gibraltar was a Gibraltar-registered company, with its registered office located, corporate records stored and a corporate director resident in Gibraltar. The defendant was a US national and resident. Nanox Israel was an Israeli-registered company and Mr. Poliakine was an Israeli national and resident. Israel appeared to be the

place where most of the witnesses and evidence were located. The Israeli proceedings included all parties whom, and all causes of action on which, the defendant wished to sue. Although the contractual claim against Nanox Gibraltar appeared to be governed by Gibraltar law (as provided by cl. 6.5 of the consultancy agreement), the non-contractual or "conspiracy" claims against the defendants were pleaded under Israeli law, which also governed the asset purchase agreement. Israel was also said to be the location of the wrong. These would be very relevant factors if the court were determining an application for a stay on *forum non conveniens* grounds. However, there were countervailing factors. The risk of parallel proceedings and inconsistent decisions arose from the defendant's decision to bring his claim in Israel despite the existence of the exclusive jurisdiction clause in his contract with the claimant and despite the claimant having previously relied on that clause successfully to resist proceedings in the US. The proceedings in Israel were at an early stage and the Israeli court had not yet ruled on whether it had jurisdiction. Nanox Israel and the estate of Mr. Poliakine also challenged the Israeli courts' jurisdiction. This court was well placed to deal with the contractual issues in dispute, which were potentially determinative of all of the defendant's claims, and it had not been argued that the defendant would be prejudiced by having to litigate them in Gibraltar (paras. 24–41).

Cases cited:

(1) *British Aerospace plc* v. *Dee Howard Co.*, [1993] 1 Lloyd's Rep. 368, considered.

(2) *Donohue* v. *Armco Inc*., [2001] UKHL 64; [2002] 1 All E.R. 749; [2002] 1 All E.R. (Comm) 97; [2002] 1 Lloyd's Rep. 425, considered.

(3) *Eleftheria (Cargo Owners)* v. *Eleftheria (Owners) ("The Eleftheria")*, [1970] P. 94; [1969] 2 All E.R. 641, considered.

(4) *Fiona Trust & Holding Corp*. v. *Privalov*, [2007] UKHL 40; [2007] 4 All E.R. 951; [2007] Bus. L.R. 1719, referred to.

(5) *Owusu (Judgments Convention/Enforcement of Judgments)*, *Re*, [2005] Q.B. 801; [2005] 2 W.L.R. 942; [2005] 2 All E.R. (Comm) 577; [2005] 1 CLC 246; [2005] Il Pr 25; [2005] 1 Lloyd's Rep. 452, referred to.

(6) *R.* v. *Transport Secy.*, *ex p. Factortame Ltd.*, C-213/89; [1990] 3 CMLR 1; [1990] Lloyd's Rep. 351; [1990] ECR I-2433, referred to.

(7) *Salcombe Hotel Development Co.*, *Re* (1989), 5 BCC 807, referred to.

(8) *Sinochem Intl. Oil (London) Ltd*. v. *Mobil Sales & Supply Corp. (No. 2)*, [2000] 1 Lloyd's Rep. 670; [2000] CLC 1132, considered.

(9) *Standard Bank plc* v. *Agrinvest Intl. Inc.*, [2007] EWHC 2595 (Comm); [2008] 1 Lloyd's Rep. 532, considered.

(10) *Star Reefers Pool Inc*. v. *JFC Group Co. Ltd*., [2012] EWCA Civ 14; [2012] 2 All E.R. (Comm) 225; [2012] 1 CLC 294; [2012] 1 Lloyd's Rep. 376, referred to.

Legislation construed:
Civil Jurisdiction and Judgments Act 1993, s.4: The relevant terms of this section are set out at para. 21.
s.33: The relevant terms of this section are set out at para. 19.
s.38: The relevant terms of this section are set out at para. 21.

Council Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels Recast"), art. 25(1): The relevant terms of this paragraph are set out at para. 17.

R. Pennington-Benton, *D. Martinez* and *N. Leah* (instructed by Hassans) for the claimant;
R. den Besten, *K.C.*, *J. Montado* and *D. Victor* (instructed by Isolas) for the defendant.

1 **HAPPOLD, J.:** This is my judgment on two applications. By an application dated April 5th, 2024, the claimant asks for an anti-suit injunction, either interim or final. By an application dated July 12th, 2024, the defendant requests that the proceedings be stayed on *forum non conveniens* or, alternatively, case management grounds. By an order of Restano, J. of September 25th, 2024, it was decided that the two applications would be heard together, and the parties agreed that it would be sensible to hear them in reverse chronological order, as were a stay to be granted the application for an injunction would fall away and, in addition, various factors relevant to whether a stay should be granted might also be relevant as to whether to grant the injunction. The defendant originally also argued that service had not properly been effected on him, but this is no longer an issue before the court.

The background

2 The claimant ("Nanox Gibraltar") is a Gibraltar registered company which until September 2019 carried on business in the field of medical imaging technology. The defendant is an electrical engineer and describes himself as an experienced entrepreneur in the medical device field. He is a US national resident in California. On September 22nd, 2015, the claimant and the defendant entered into a consultancy agreement. The defendant was to provide consultancy services to the claimant in connection with the claimant's medical imaging technology business, in consideration of which he would be paid a monthly fee of US$15,000. The agreement also provided that in the event of a "liquidity event" the defendant would receive a substantial "one-time bonus," the terms of payment of which were set out in Annex B "attached to this Agreement . . . and made a part hereof" (cl. 3.4 of the consultancy agreement). The agreement was terminable by either party on 30 days' written notice (cl. 2.1).

3 It is accepted no written notice of termination was given. The claimant says that the defendant ceased to provide any services under the agreement by March 2017 at the latest, whereas the defendant says he continued to do so until at least 2019, albeit that the contract was varied by agreement in 2016, with the defendant agreeing to defer payment of his fees until the claimant had the resources to pay him. The date of termination is important not only as regard what fees, if any, the claimant might owe the defendant but also because Mr. Schick was entitled to a bonus if a liquidity event occurred before or up to 24 months after the "termination date" as defined in Annex B of the consultancy agreement (although there is disagreement as to whether this should be calculated from the date of termination of the agreement or otherwise).

4 The consultancy agreement contains two jurisdiction clauses. The first, cl. 6.5 provides that:

> "Both parties agree that any action, demand, claim or counterclaim relating to this Agreement, or to its breach, shall be commenced in the state of Gibraltar in a court of competent jurisdiction. This Agreement and the validity, interpretation and performance of this Agreement shall be governed by, and construed in accordance with, the laws of Gibraltar without giving effect to conflict of law principles."

The second, in cl. 8 of Appendix B, is in different terms. It provides that:

> "This Agreement shall be governed by and interpreted in accordance with the laws of Gibraltar without giving effect to the rules respecting conflict of law, and the competent courts of Gibraltar shall have sole and exclusive jurisdiction over any dispute between the parties."

The parties concur that cl. 8 does not create a "carve out" for disputes concerning Annex B, which is not an agreement separate from the consulting agreement (see para. 2 above). But they disagree as to its relevance for the interpretation of cl. 6.5, which they agree is applicable.

5 On October 28th, 2021, Mr. Schick brought proceedings before the US District Court for the Central District of California against the claimant, Nano-X Imaging Inc. ("Nanox Israel"), Mr. Ran Poliakine and eleven other defendants. Nanox Israel is a company registered in Israel to whom, by an asset purchase agreement dated September 3rd, 2019, Nanox Gibraltar sold its assets, including its intellectual property rights. Subsequently, in July 2020, Nanox Israel was the subject of an initial public offering on the NASDAQ stock exchange. Mr. Poliakine, who died earlier this year, was an Israeli national and a beneficial owner of both Nanox Gibraltar and Nanox Israel.

6 Mr. Schick brought claims for breach of contract, misrepresentation, fraud, breach of fiduciary duty and conversion against the defendants in the California proceedings. He argued that he was entitled to outstanding fees

for consultancy services under the consultancy agreement as well as a "one-time bonus." The asset purchase agreement, Mr. Schick asserted, saw Nanox Gibraltar's assets sold to Nanox Israel at an undervalue and was a scheme designed to deprive him of his bonus, his entitlement to which crystallized either on the date of the asset purchase agreement or of Nanox Israel's IPO.

7 The defendants applied to have the action dismissed for lack of personal jurisdiction. Nanox Gibraltar argued that it was "not subject to personal jurisdiction of the State of California. Specifically, there exists an enforceable exclusive forum selection clause in the contract at issue . . ." (motion to dismiss complaint, February 15th, 2022, exhibit BC1, p.90); that it lacked minimal contracts with the State of California; and that the complaint should be dismissed on *forum non conveniens* grounds and for failure to state a claim upon which relief could be granted. Nanox Israel, Mr. Poliakine and another defendant, Nano-X Imaging Inc. (a Delaware corporation), also served and filed motions to dismiss. On July 19th, 2022, US District Judge Dale S. Fischer granted the motions to dismiss Mr. Schick's complaint for lack of personal jurisdiction and dismissed the action.

8 Following the conclusion of the Californian proceedings, by a resolution of the company dated December 30th, 2022 Nanox Gibraltar was put into voluntary liquidation and a liquidator appointed. Having divested itself of its intellectual property by the asset purchase agreement, Nanox Gibraltar's only remaining asset of real value is a 3% shareholding in Nanox Israel received in exchange, which was valued at US$6,713,905 as of September 30th, 2024 (second witness statement of Mr. Benjamin Cuby, dated October 8th, 2024, para. 15, and Oppenheimer & Co. Inc., client statement, exhibit BC2, p.1).

9 By letter dated March 3rd, 2023, Gibraltar lawyers (Signature Litigation) writing on behalf of Mr. Schick wrote to the liquidator asserting a prospective claim against the company. By letter dated March 20th, 2023, Hassans, acting for the liquidator, invited Signature Litigation to set out their client's prospective claim no later than March 31st, 2023, failing which the liquidation would proceed. As a result of email correspondence, this period was extended on request, first until April 14th, and then until April 27th, 2023. In an email of April 14th, 2023 (DM1, p.102) agreeing the second extension, Mr. Martinez of Hassans stated:

> "[I]f your client's position is not received by 27 April 2023, I am instructed to file an application for directions from the Court where we will be seeking an order that your client sets out his position within 2 weeks of any order made by the Court, failing which, the liquidator be entitled to proceed with the liquidation."

10 On May 1st, 2023, Nanox Gibraltar, Nanox Israel and Mr. Poliakine received a letter before action from Israeli lawyers (Herzog Fox & Neeman) instructed by Mr. Schick. The liquidation of Nanox Gibraltar was subsequently terminated to allow the company's directors to address the issues set out in the letter and to manage any litigation.

11 On December 21st, 2023, the defendant brought proceedings against the claimant, Nanox Israel and Mr. Poliakine before the District Court of Jerusalem. Mr. Schick claims that the defendants are liable to him for breach of contract, including of the consultancy agreement; breach of the duty to act in good faith, including in the fulfilment of agreements; causing a breach of obligations owed to him; making false representations; fraud; deprivation and dispossession of his rights pursuant to the consultancy agreement; unreasonable and negligent conduct; unjust enrichment; and assisting, soliciting and supporting all the aforementioned causes of action (statement of claim, December 21st, 2023, para. 114, exhibit DS1 pp. 35–36). And he seeks damages in the amount of US$1,395,000 in unpaid consultancy fees (92 months' fees from January 2016 to September 2023), and a one-time bonus in the amount of US$29,466,518 (statement of claim, December 21st, 2023, para. 115, exhibit DS1 p.36).

12 The claimant challenged service in the Israeli proceedings on the basis that it had not been properly served by service of process on Mr. Tal Shank, an Israeli national resident in Israel, as a director of Nanox Gibraltar. On September 23rd, 2024, Judge Penina Neubirt, sitting in the Jerusalem District Court, denied the request, holding that there had been valid service. The estate of Mr. Poliakine and Nanox Israel had already filed defences on September 16th and 17th, 2024 challenging the Israeli courts' jurisdiction to decide the merits of the defendant's claim based on the existence of an exclusive jurisdiction clause in the consultancy agreement. I understand that the claimant can and is now doing likewise (see the second witness statement of Ms. Moran Mordechay, dated October 8th, 2024, para. 7, and letter of Herzog Fox and Neeman to Mr. Montado, October 3rd, 2024, paras. 8 and 9, exhibit DS2, pp. 218–219).

13 By a claim form issued on December 22nd, 2023 and amended on April 5th, 2024, the claimant brought these proceedings, requesting declarations that the consultancy agreement has been terminated and that the claimant has no liability to the defendant under the agreement or otherwise. The claimant also seeks a declaration that the defendant "is obliged to commence any action, demand, claim or counterclaim relating to the [consultancy] Agreement in accordance with Clause 6.5 and Clause 8 of Annex B of the same," as well as damages. Proceedings were served on Mr. Schick on May 16th, 2024, and he no longer takes issue with their service. I am now asked to decide the application by the claimant for an anti-suit injunction and the application by the defendant for a stay.

Whether I should grant the defendant a stay on *forum non conveniens* or case management grounds

Is cl. 6.5 of the consultancy agreement an exclusive jurisdiction clause?

14 The defendant accepts that cl. 6.5 gives this court jurisdiction but says that it is not exclusive, and that the court should decline to exercise its jurisdiction on *forum non conveniens* grounds and allow Mr. Schick's claim in Israel to proceed. Clause 6.5 is permissive, not mandatory, because it does not expressly refer to "irrevocable" submission to the Gibraltar courts, to those courts having "sole" or "exclusive" jurisdiction, or expressly prohibits proceedings being brought elsewhere; and because the term "shall" is not the language of obligation. In addition, the defendant says that cl. 8 of Appendix B is irrelevant to the interpretation of cl. 6.5.

15 I disagree. As stated by Rix, J. in *Sinochem Intl. Oil (London) Ltd.* v. *Mobil Sales & Supply Corp. (No. 2)* (8) ([2000] CLC 1132, at para. 32):

> "The test which has been developed for distinguishing an exclusive from a non-exclusive jurisdiction clause is whether on its proper construction the clause obliges the parties to resort to the relevant jurisdiction, irrespective of whether the word 'exclusive' is used . . . Or to put the issue in another way: is the obligation contained in the clause the intransitive one to submit to a jurisdiction if it is chosen by the other contracting party, or is it the transitive one to submit all disputes to the chosen jurisdiction."

The term "any" in the first part of the first sentence of cl. 6.5, followed, as it is, by the list "action, demand, claim or counterclaim relating to this Agreement, or to its breach," is used as a synonym for "all" (see *Sinochem* (8) ([2000] CLC 1132, at para. 33)), so as to cover all disputes arising in relation to the contract (on which, see also *Fiona Trust & Holding Corp.* v. *Privalov* (4) ([2007] UKHL 40, at para. 14, *per* Lord Hoffmann)). The term "shall" in both its dictionary and ordinary meaning does denote obligation, and this is confirmed by what is said both in *Sinochem* ([2000] CLC 1132, at para. 33): "the language 'are to have jurisdiction,' *pace* Mr. Hollander, who contrasts the word 'shall' in the opening line of the clause, is the language of obligation and not option," and in *Standard Bank plc* v. *Agrinvest Intl. Inc.* (9) ([2007] EWHC 2595 (Comm), at para. 22): "It might be suggested that the use in the second limb of the word 'may' rather than 'shall' is indicative of the language of option rather than of obligation." As for *Re Salcombe Hotel Development Co.* (7), prayed in aid by Ms. den Besten, that judgment concerned the interpretation of the word "shall" in a particular statutory context and, in my opinion, has no wider application.

16 That cl. 6.5 is both a jurisdiction and an applicable law clause (the applicable law being Gibraltar law) supports this interpretation: *Sinochem*

([2000] CLC 1132, at para. 33, quoting Waller, J. in *British Aerospace plc* v. *Dee Howard Co.* (1) ([1993] 1 Lloyd's Rep. at 375)):

> "[T]here is not much point in choosing a specific law to accompany a jurisdiction clause unless the intention is to make the courts where such law operates exclusive."

So does the wording of cl. 8 of Appendix B, which does contain indicia of exclusivity as argued by Ms. den Besten, and which I consider can be looked at to assist in interpreting cl. 6.5. If cl. 8 is not (as was agreed) to be read so as to detract from cl. 6.5, I do not see why it cannot be read to elucidate its meaning. Article 6.5 accordingly does grant the courts of Gibraltar exclusive jurisdiction over disputes between the claimant and the defendant relating to the consultancy agreement.

What is the effect of art. 25(1) of Brussels Recast?

17 Post-Brexit, Council Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels Recast") continues to form part of Gibraltar law as "direct EU law" as provided by s.6 of the European Union (Withdrawal) Act 2019. The consultancy agreement being an agreement in writing, Brussels Recast art. 25(1) applies. Article 25(1), in relevant part, provides that:

> "1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

For our purposes, Gibraltar is a Member State (see s.39 of the Civil Jurisdiction and Judgments Act 1993), and neither party has argued that the consultancy agreement is null and void under Gibraltar law. Given my conclusion on exclusivity, I do not need to determine (as I would have to have done had I determined cl. 6.5 to be a non-exclusive jurisdiction clause) what is meant by "unless the parties have agreed otherwise."

18 I do, however, need to decide whether s.33 of the Civil Jurisdiction and Judgments Act applies so as to give me discretion to grant a stay on *forum non conveniens* grounds regardless of what Brussels Recast might require. It was not argued by the defendant that I otherwise had the power to grant such a stay, and I think that is right. Conflicts between different Member States' courts concerning exclusive jurisdiction clauses are dealt with by Brussels Recast, art. 31 (and see also Recital, para. 12). Articles 33 and 34, which do permit stays in favour of proceedings in third countries'

courts, are not applicable when art. 25 confers jurisdiction on a Member State court. The reasoning in *Re Owusu (Judgments Convention/ Enforcement of Judgments)* (5) still applies.

Does s.33 of the Civil Jurisdiction and Judgments Act displace Brussels Recast and allow the grant of a stay?

19 Section 33 of the Civil Jurisdiction and Judgments Act ("the 1993 Act") provides that:

> "Nothing in this Act shall prevent any court in Gibraltar from staying, striking out or dismissing any proceedings before it on the ground of forum non-conveniens or otherwise, where to do so is not inconsistent with the 1968 Convention or, as the case may be, the Lugano Convention or the 2005 Hague Convention."

The defendant argues that granting a stay would not be inconsistent with the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, or the Hague Convention on Choice of Court Agreements (all of which are incorporated into Gibraltar law by the 1993 Act and appended to it, see s.4(1), (3) and (5), and Schedules 1, 6 and 6A), and it is irrelevant whether such a grant would be inconsistent with Brussels Recast because Brussels Recast is not listed together with those treaties.

20 Section 33, however, begins with the words "[n]othing in this Act shall prevent." The defendant's argument relies on Brussels Recast being "in" the 1993 Act in the same way as are the Brussels, Lugano and 2005 Hague Conventions (otherwise there would be no need expressly to require any stay, strike out or dismissal of proceedings to be consistent with those treaties). According to the defendant, this is the case because the 1993 Act, as amended by the Civil Jurisdiction and Judgments Act 1993 (Amendment) Regulations 2015 ("the 2015 Regulations"), incorporates or implements Brussels Recast in Gibraltar law. The 2015 Regulations amend the 1993 Act to implement Council Regulation (EC) No. 44/2001 (Brussels Recast), in particular through adding a Schedule 10, Part 1 of which is entitled "Application of the Regulation."

21 I do not think that this is right. Although treaties are entered into by the Crown in exercise of the prerogative, their reception into domestic law requires legislation. The 1993 Act incorporated the Brussels, Lugano and 2005 Hague Conventions into Gibraltar law, providing that they "shall have the force of law in Gibraltar and judicial notice shall be taken of them" (s.4(1), (3) and (5)). But no such provision appears in the 1993 Act, as amended by the 2015 Regulations or otherwise, with regard to Brussels Recast. Nor is the text of the Regulation appended as a schedule to the Act, as are the texts of the Brussels, Lugano and 2005 Hague Conventions

(Schedules 1, 6 and 6A). And for obvious reason. As an EU Regulation, Brussels Recast had direct effect as a matter of EU law (see art. 288 of the Treaty on the Functioning of the European Union). The relevant incorporating legislation was the European Communities Act 1972, which made provision for the inclusion of Gibraltar into the European Communities (as then was) and, by virtue of its s.3, made Community law as a whole applicable in Gibraltar, subject to certain irrelevant exceptions. The amendments to the 1993 Act made by the 2015 Regulations are, as the title of Part 1 of Schedule 10 of the Act states, about amending Gibraltar law better to apply Brussels Recast, not about incorporating Brussels Recast into Gibraltar law. Section 38 of the 1993 Act makes this clear by stating that: "Schedule 10 (which applies certain provisions of this Act with modifications for the purposes of the Regulation) shall have effect." Of course, the European Communities Act 1972 has been repealed as a consequence of the United Kingdom's decision to leave the European Union, but Brussels Recast continues in force in Gibraltar as retained EU law (see s.6 of the European Union (Withdrawal) Act 2019).

22 At the hearing, Ms. den Besten reminded me of the principles of statutory interpretation, including the presumption that "[t]he legislature is taken to be a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner" (*Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed., at 11.3 (2020)). The reason why s.33 of the 1993 Act was not amended by the 2015 Regulations to include a reference to Brussels Recast in addition to the references to the Brussels, Lugano and 2005 Hague Conventions was not because the legislature wished to give the courts power to stay, strike out or dismiss proceedings even when doing so would be inconsistent with Brussels Recast. It was, it can be assumed, because the legislature was aware that there was no need to make such reference to avoid granting such a power because the 1993 Act, as amended by the 2015 Regulations, did not incorporate Brussels Recast into Gibraltar law because, as an EU Regulation, Brussels Recast had direct effect. The legislature also cannot be taken to have sought to do what the defendant suggests it did because such an attempt would have been ineffective given the precedence of directly applicable EU law over conflicting provisions of Member States' national law (see, *e.g.*, *R.* v. *Transport Secy*., *ex p. Factortame Ltd.* (6) ([1990] ECR at I-2473)), and the legislature must be taken to have known this.

23 As I have held that cl. 6.5 of the consultancy agreement is an exclusive jurisdiction clause, and that s.33 of the Civil Jurisdiction and Judgments Act does not apply so as to grant me a power to order a stay which I would not otherwise have under art. 25(1) of Brussels Recast, that disposes of the defendant's application for a stay on *forum non conveniens* grounds. I consider that it also disposes of the defendant's application for a stay on

case management grounds. In this context, I note that s.33 refers to stays "on the ground of *forum non-conveniens* or otherwise" and Brussels Recast does not permit me to order one (see my comments in para. 18 above).

Whether I should grant the claimant an anti-suit injunction

The legal test where there is an exclusive jurisdiction clause

24 I now turn to the claimant's application for an anti-suit injunction. In *Donohue* v. *Armco Inc.* (2), Lord Bingham of Cornhill stated ([2001] UKHL 64, at para. 24) that:

> "If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum."

The onus is thus on the defendant to show "strong reasons" why the claimant's request for an anti-suit injunction should not be granted.

25 What "strong reasons" might be, Lord Bingham said, "will depend on all the facts and circumstances of the particular case" (*ibid*.). Lord Bingham then referred to the list provided in the judgment of Brandon, J. in *The Eleftheria* (3) ([1969] 2 All E.R. at 645):

> "(a) In what country the evidence of the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely: (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would— (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

The Eleftheria concerned an application for a stay, but Lord Bingham saw it as helpful, albeit that the list was not intended to be comprehensive "but

mentioned a number of matters, including the law governing the contract, which may in some cases be material" (*ibid.*).

26 Lord Bingham went on to say ([2001] UKHL 64, at para. 27) that:

> "The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions."

The test, however, is not that in applications for *forum non conveniens* stays or for anti-suit injunctions where there is no exclusive jurisdiction clause. It is for the defendant to show "strong reasons" why the parties' agreement should not be enforced, rather than for the claimant to show that Gibraltar is the natural forum for the resolution of the dispute and that the defendant's conduct has been unconscionable (see *Star Reefers Pool Inc.* v. *JFC Group Co. Ltd.* (10) ([2012] EWCA Civ 14, at para. 25, *per* Rix, L.J.)).

The facts and circumstances of the case

27 The defendant relied on statements made by Mr. Cuby, a director of Nanox Gibraltar's corporate director, and Mr. Poliakine in the California proceedings. Then, Mr. Cuby stated then that "while Nanox Gibraltar does own assets in an entity traded on the NASDAQ, that entity is an Israel entity with its principal place of business in Israel" (declaration of Benjamin Cuby, February 14th, 2022, para. 8, exhibit DS2, at p.128). Mr. Poliakine stated that "most, if not all, of the relevant witnesses in this matter are located in Israel, Gibraltar, or Japan." Two of the four named witness were said to live and work in Israel, as did the "[a]ccounting personal responsible for processing Plaintiff's monthly invoices." Mr. Poliakine also stated that "[m]ost of the evidence and documents are located in Israel, Gibraltar, or Japan," and that Israel was "where the Nanox administrative, accounting, and legal teams are located" (declaration of Ran Poliakine, February 13th, 2022, paras. 9–10, exhibit DS2, at pp. 186–187).

28 I was also referred to findings made by Judge Neubirt in the Jerusalem District Court in her decision on Nanox Gibraltar's challenge to service of the claim. The learned judge concluded that:

> "Nanox Gibraltar conducts administrative, legal and accounting activities, as evidenced by statements from Nanox Gibraltar and its representatives, and the location of its only assets (share in Nanox Israel). These facts, along with Shank's presence as a director of Nanox Gibraltar in Israel and his performance of duties as a director

> in Israel, demonstrate that Nanox Gibraltar has an interest in Israel and that Shank represents Nanox Gibraltar in Israel, including concerning the subject of this lawsuit." (District Court of Jerusalem, Civil Case 66266-12-23 *Schick* v. *Nanox Imaging plc et al*, decision of September 23rd, 2024, at para. 21)

I note that the evidence on which the learned judge's decision was based came from the statements of Nanox Gibraltar and Mr. Poliakine in the California proceedings, so it might be thought to add little additional weight. In addition, Judge Neubirt specifically noted that the test which she had to apply "does not set a high bar" (*ibid*., at para. 12), and the Jerusalem District Court has not yet determined the defendants in the Israeli proceedings' challenges to the court's substantive jurisdiction.

29 It does seem to me that Israel is not an unsuitable place for the dispute to be tried. Nanox Gibraltar is a Gibraltar-registered company, with its registered office located, corporate records stored, and a corporate director resident in Gibraltar (second witness statement of Mr. Benjamin Cuby, dated October 8th, 2024, at para. 12), and Mr. Schick is a US national and resident. But Nanox Israel is an Israeli-registered company and Mr. Poliakine was an Israeli national and resident. The declarations of Mr. Cuby and Mr. Poliakine in the California proceedings also indicate that Israel is the place where most of the witnesses and evidence are located. The Israeli proceedings include all parties whom, and all causes of action on which, Mr. Schick wishes to sue. And although the contractual claim against Nanox Gibraltar would appear to be governed by Gibraltar law (as provided by cl. 6.5 of the consultancy agreement), the non-contractual or "conspiracy claims" (as they were described by Mr. Pennington-Benton) against the defendants are pleaded under Israeli law, which also governs the asset purchase agreement. Israel is also said to be the location of the wrong, not least because it is where the asset transfer agreement was entered into. All of these would be very relevant factors were I determining an application for a stay on *forum non conveniens* grounds.

30 There do, however, seem to me to be countervailing factors. The "risk of parallel proceedings and inconsistent decisions" arises from Mr. Schick's decision to bring his claim in Israel, despite the existence of an exclusive jurisdiction clause in his contract with the claimant and despite the claimant having previously relied on that clause successfully to resist proceedings in another jurisdiction.

31 Although it was argued that whereas Mr. Schick has brought proceedings in Israel in a genuine attempt to have his dispute with the defendants there determined, these proceedings are purely reactive and tactical, as illustrated by the relief sought, designed to block (or "stymie") the Israeli proceedings, I do not think that this is quite right. Having failed in his attempt to bring proceedings in his home jurisdiction, Mr. Schick did

engage with the claimant's liquidator in Gibraltar, instructing Gibraltar lawyers and asserting a prospective claim in the liquidation, before changing tack and bringing proceedings in Israel (paras. 9 and 10 above). In my opinion, the claimant did not act unreasonably in failing to bring proceedings on the basis of the exclusive jurisdiction clause before it did or improperly in bringing them when it did.

32 I also take account of the fact that proceedings in Israel are at an early stage. If I were to grant an anti-suit injunction in these proceedings, Mr. Schick would be enjoined from proceeding against Nanox Gibraltar in Israel. I am informed that both parties intend to continue pursuing the proceedings they have initiated even were I to grant an anti-suit injunction, the claimant against the defendant here, the defendant against Nanox Israel and the estate of Mr. Poliakine in Israel. But Nanox Israel and the estate of Mr. Poliakine are also challenging the Israeli courts' substantive jurisdiction, which challenge has not yet been determined and would, if successful, end the litigation brought there.

33 Thus, although the interests of other parties are involved, it does appear that Nanox Israel and the executors of Mr. Poliakine's estate, given that they have filed submissions arguing against the Israeli courts exercising jurisdiction, do not consider it in their interests to be sued in Israel. Neither has undertaken to submit to the jurisdiction of this court, but nor was Mr. Schick required to sue them in Israel.

34 Ms. den Besten directed me to remarks in a witness statement made by Ms. Moran Mordechay, partner in Amit Pollak Matalon & Co., the Israeli law firm instructed by the claimant. If the Israeli proceedings against Nanox Israel and the estate of Mr. Poliakine were to proceed, Ms. Mordechay stated:

> "complex questions would rise as to whether it is possible to extricate and separate out those allegations made against Mr. Poliakine and Nano-X from those made against the Claimant and caught by the jurisdiction clauses." (Second witness statement of Moran Mordechay, October 8th, 2024, at para. 10)

Ms. Mordechay, however, continued by stating (*ibid.*):

> "Of course, these are the very issues which from the subject of the two extant jurisdiction challenges filed by Mr. Poliakine and Nano-X in Israel. Those have not been determined." (*ibid.*)

35 Ultimately, it seems to me, any liability of Nanox Israel and the estate of Mr. Poliakine to Mr. Schick is dependent upon him being able to show that at the time of the asset purchase agreement (September 3rd, 2019) at the least, he retained an entitlement under the consultancy agreement to monthly fees, which were only paid until the termination of the agreement; and to a bonus on the occurrence of a "liquidity event": that is, that the

asset purchase agreement was entered into either while the consultancy agreement was still in force or, at least, not more than 24 months after the "termination date" as defined in Annex B of the consultancy agreement. This is made clear in Herzog Fox & Neeman's letter to Mr. Montado of October 3rd, 2024, which states that:

> "The Israeli claim seeks monetary relief from all the Defendants, jointly and severally, for amounts due and unpaid under a consulting agreement entered into between Mr. Schick and Nanox Gibraltar on June 1, 2015." (Exhibit DS2, at p.217)

36 As briefly described above (see para. 2), the claimant and the defendant disagree as to when the agreement was terminated and as to how the provisions of Annex B are to be interpreted. If, as the claimant argues, Mr. Schick retained no entitlement to a bonus because a "termination date" occurred more than 24 months before any possible triggering event (said by Mr. Schick to be either the asset purchase agreement or Nanox Israel's IPO in July 2020), then the claims against Nanox Israel and the estate of Mr. Poliakine fall away, regardless of whether they engaged with Nanox Gibraltar in a scheme to forestall any claim by Mr. Schick under Annex B, because Mr. Schick suffered no loss. The same also applies in relation to Mr. Schick's entitlement to a monthly fee until termination of the consultancy agreement, even if (for reasons presently unclear to me) Nanox Israel and the estate of Mr. Poliakine are liable together with Nanox Gibraltar for fees unpaid under the contract.

37 These are issues which, in my opinion, fall within the exclusive jurisdiction conferred upon the Gibraltar courts by cl. 6.5. Indeed, they are precisely the questions which the claimant has asked this court to determine. And they are matters governed by Gibraltar law, as cl. 6.5 also provides, which this court, it might be thought, is better placed to decide than any other.

38 Although it can be accepted that there will be a risk of inconsistent decisions if the defendant continues proceedings against Nanox Israel and the estate of Mr. Poliakine in Israel, there will no longer be a risk of parallel proceedings as the defendant will be enjoined from continuing to sue the claimant there. The claimant will no longer be a party to both sets of proceedings, albeit both proceedings may deal with similar or substantially the same issues (as I said in para. 36 above, I cannot see how the non-contractual or "conspiracy claims" made against Nanox Israel and the estate of Mr. Poliakine can succeed unless Mr. Schick can show that at the relevant time he retained his entitlements under his contract with Nanox Gibraltar).

39 Of this remaining risk, two things can be said. First, it is just that: a risk. This is precisely the point made by Ms. Mordechay (see para. 34 above). The Israeli courts have yet to rule on whether they have substantive

jurisdiction over any of Mr. Schick's claims against any of the defendants in the Israeli proceedings. Second, the risk can only actualize if Mr. Schick continues to pursue his claim in Israel. Although neither Nanox Israel nor the executors of the estate of Mr. Poliakine have indicated that they will submit to the jurisdiction of this court, it remains open for Mr. Schick to seek to have them added as necessary or proper parties to a counterclaim in these proceedings. Alternatively, he could apply to stay the proceedings in Israel until this court has ruled.

My conclusions

40 To conclude: although Israel is potentially a suitable venue for the litigation, it is neither the defendant's first choice nor the choice of any of the other parties to the proceedings there. Nanox Israel and the estate of Mr. Poliakine, as well as the claimant, rely on what I have held to be an exclusive jurisdiction clause in the consultancy agreement to avoid the jurisdiction of the Israeli courts, as they previously did successfully to avoid the jurisdiction of the US courts, albeit that neither have undertaken to submit to the jurisdiction of this court. The Israeli court has not yet ruled on whether it has jurisdiction. This court, I have found, is well placed to deal with the contractual issues in dispute; those issues are potentially determinative of all of Mr. Schick's claims; and it has not been argued that Mr. Schick would be prejudiced in any manner mentioned in *The Eleftheria* (3) ([1969] 2 All E.R. at 645, see point (e) of Brandon, J.'s list) by having to litigate them in Gibraltar. Accordingly, I do not think that the reasons advanced by the defendant for suing in Israel are so strong as to permit him to avoid his contractual obligation to sue the claimant in Gibraltar.

Does delay by the claimant preclude me from ordering an injunction?

41 The defendant has also raised the issue of delay. The claim form was issued on December 22nd, 2023, immediately after initiation of the Israel proceedings. It was amended on April 5th, 2024, the same day as the application for an anti-suit injunction was made, and both were served on Mr. Schick on May 16th, 2024. This is a period of nearly five months but, first, it was a period during which the claimant also had to deal with the Israeli proceedings and, second, it is difficult to see that any prejudice has been caused to the defendant, given that the Israeli proceedings did not advance in that period. Given this, I do not consider that the delay between issuing these proceedings and applying for an anti-suit injunction is such as to prevent me granting one. I therefore grant an anti-suit injunction.

Should I grant an interim or a final injunction?

42 Finally, I address the issue of whether I should order an interim or a final injunction. Mr. Pennington-Benton argued that, as the parties have had full opportunity to put whatever evidence and to make whatever legal

arguments they wished before the court, I should grant a final injunction but, for obvious reasons, this was not something addressed by Ms. den Besten. Given this, I consider that I should give the defendant opportunity to address the matter before making my decision. This can be done at the hand-down, when I can also hear other submissions as to the form of my order, should the parties not agree beforehand.

Costs

43 It seems to me that costs should follow the event and be ordered on the standard basis. But I can hear submissions on costs at the hand-down.

Judgment accordingly.
