THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2018/0011

BETWEEN:

STANFORD INTERNATIONAL BANK LIMITED (IN LIQUIDATION)
(ACTING BY AND THROUGH ITS JOINT LIQUIDATORS, MARCUS A. WIDE AND HUGH DICKSON

Appellant/Respondent

and

[1] PROSKAUER ROSE LLP

First Respondent/Counter-Appellant

[2] THOMAS V. SJOBLOM

Second Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Justin Fenwick, QC with him, Ms. Nicolette M. Doherty and Mr. Malcolm Arthurs for the Claimant/Appellant
Mr. Laurence Rabinowitz, QC with him, Prof. Edwin Peel, Dr. Niranjan Venkatesan and Dr. David Dorsett for the First Defendant/Respondent

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2020: February 10, 11;
October 29.

Civil appeal – Interlocutory appeal - Service out of jurisdiction – Whether learned judge erred in granting application to set aside the order to serve out of the jurisdiction – Rules 7.3(3)(a) and 7.3(4) of the Civil Procedure Rules 2000 – Whether learned judge erred in concluding that appellant satisfied contract and tort gateways to standard of a good arguable case – Whether appellant had a good cause of action and consequently a serious issue to be tried on merits - Whether learned judge erred in concluding that Antigua was not the appropriate forum for trial of the claims

The joint liquidators of Stanford International Bank ("SIB" or "the Bank"), an offshore bank incorporated in Antigua and Barbuda (or "Antigua"), filed a claim form and statement of claim in the High Court of Antigua against Proskauer Rose LLP ("Proskauer"), a New York based law firm, and Mr. Thomas Sjoblom ("Mr. Sjoblom"), a partner at Proskauer, alleging breach of contract, tort and breach of fiduciary duties pursuant to the retainer contract between SIB and Proskauer ("the Proskauer Retainer"). The Proskauer Retainer was a continuation of the Chadbourne Retainer whereby Mr. Sjoblom, while a partner at Chadbourne and Parker LLP, another New York firm, was retained to represent the Stanford Financial Group ("SFG"), the Stanford Group Company and SIB in investigations and enforcement proceedings against them being carried out by the United States Securities and Exchange Commission (the "SEC") and the related examinations by various regulatory bodies.

SIB sought leave of the court to serve the claim form and statement of claim out of Antigua on Proskauer on the basis of the jurisdictional gateways provided in rules 7.3(3)(a) ("the contract gateway") and 7.3(4) ("the tort gateway") of the **Civil Procedure Rules 2000** (the "CPR") respectively. They contended that there was a breach of the Proskauer Retainer committed both within and outside Antigua and that tortious negligent acts and/or omissions were committed by Proskauer and Mr. Sjoblom both within and outside Antigua, and that those acts and/or omissions caused SIB to sustain damages both within and outside Antigua. The learned judge granted leave to serve both the claim form and statement of claim outside of Antigua. Proskauer, having been served with the claim form and statement of claim, filed an application to set aside the service out order on a number of bases, primarily of which was that Antigua was not the appropriate forum. The learned judge granted Proskauer's application on the basis that though SIB had satisfied the tort and contract gateways and there was a serious issue to be tried, Antigua was not the appropriate forum for the trial of the claim.

SIB, being dissatisfied with the decision of the learned judge appealed to this Court. Their main complaint was that the learned judge erred in concluding that some state in the United States of America ("USA") as opposed to Antigua, was the appropriate forum to resolve the dispute and therefore the judge had improperly set aside the leave that had been granted to serve out of Antigua. Proskauer agreed with the learned judge's conclusion that Antigua was not the appropriate forum, but challenged, by way of counter-appeal, the judge's finding that the jurisdictional gateways in the CPR were satisfied and that there was a serious issue to be tried. Proskauer asserted that there were alternative bases on which the learned judge should have granted its application to set aside the order to serve out of Antigua. Proskauer's fundamental complaint was that the judge should have, in any event, set aside the service out order on the basis that SIB had failed to meet the jurisdictional gateways.

The issues that arise for this Court's determination are: (i) whether the learned judge erred in concluding that SIB had a good cause of action and consequently, a serious issue to be tried on the merits; (ii) whether the learned judge erred in concluding that SIB had satisfied the tort and contract gateways to the standard of a good arguable case; and (iii) whether the learned judge erred in holding that Antigua was not the appropriate forum to try the issues that arose between the parties.

Held: allowing the counter-appeal, dismissing the appeal and making the orders set out in paragraph 89 of the judgment, that;

1. It is settled law that in order to obtain leave to serve outside of the jurisdiction, three prerequisites must be satisfied. The applicant must establish that there is a serious issue to be tried on the merits of the claim, there is a good arguable case against each of the foreign defendants which falls within the relevant jurisdictional gateway in the CPR, and that the local court is clearly or distinctly the appropriate forum in which to resolve the issues between the parties. In so far as it relates to the standard of proof for the application of the relevant jurisdictional gateway, the applicant is required to establish that there is a good arguable case for its application, with a plausible evidential basis showing that it has the better argument.

   Nilon Limited and Another v Royal Westminster Investments SA and Others [2015] UKPC 2 applied; **Four Seasons Holdings Incorporated v Brownlie** [2017] UKSC 80 applied; **Goldman Sachs International v Novo Banco SA** [2018] UKSC 34 applied.

2. In respect of the contract and tort gateways on which SIB relied to ground their application for leave to serve out of Antigua, it is clear that the pleaded claim form and statement of claim together with the evidence adduced by SIB failed to substantiate its claim that there was a breach of contract of the Proskauer Retainer committed in Antigua. At the very least, SIB was required to establish that some part of the contract should be performed in Antigua and there was a breach of that part. Similarly, the extent of the evidence adduced by SIB failed to demonstrate that there was any tort committed in Antigua or that damage was sustained within the jurisdiction flowing from the commission of that tort. The fiduciary claims, being contingent on the claims in contract or tort, also fail. In this regard, having considered the evidence adduced by both Proskauer and SIB, it is evident that SIB failed to prove that it has the better of the arguments in relation to the jurisdictional gateways. Accordingly, there was no basis on which the learned judge could have reasonably concluded that SIB had a good arguable case in relation to the jurisdictional gateways and consequently, the fiduciary claims.

   Rules 7.3(3)(a) and 7.3(4) of the **Civil Procedure Rules 2000** applied; **Four Seasons Holdings Incorporated v Brownlie** [2017] UKSC 80 applied; **Goldman Sachs International v Novo Banco SA** [2018] UKSC 34 applied; **Seaconsar Far East Ltd v Markazi Jomhouri Islami Iran** [1994] 1 AC 438 applied; **Altimo Holdings and Investments Limited and Others v Kyrgyz Mobil Tel Ltd and Others** [2011] UKPC 7 applied.

3. Having failed to show that there is a good arguable case for the application of the relevant jurisdictional gateways, it therefore follows that SIB would have no reasonable prospect of success in establishing that there was a breach of contract committed in Antigua or that any substantial acts causing damage were committed by Mr. Sjoblom in Antigua or that significant damage resulting therefrom was sustained in Antigua. Accordingly, the learned judge erred in concluding that there was a serious issue to be tried on the merits.

   Four Seasons Holdings Incorporated v Brownlie [2017] UKSC 80 applied.

4. Consequently, the set aside order should have been granted on the alternative basis that SIB had failed to satisfy the jurisdictional gateways to the standard of a good arguable case and to establish that there was a serious issue to be tried on the merits. This effectively disposes of the appeal and cross appeal.

JUDGMENT

Introduction

[1] **BLENMAN JA:** This is an appeal by the joint liquidators of Stanford International Bank ("SIB" or "the Bank") and a cross appeal by Proskauer Rose LLP ("Proskauer") against the order dated 28th October 2017 and the reasons for the order as reflected in a written judgment of the learned judge dated 4th April 2018. The learned judge, in his order, set aside the leave to serve the claim form and statement of claim outside of Antigua, in Washington, DC in the United States of America ("the USA") on Proskauer. The underlying claims were brought by SIB against Proskauer and Mr. Thomas Sjoblom ("Mr. Sjoblom"), based on the Proskauer Retainer (as defined below), wherein SIB alleged breach of contract, tort and breach of fiduciary duties. In this appeal, SIB contends that the learned judge, having correctly found that the jurisdictional gateways of rules 7.3(4) and 7.3(3)(a) of the **Civil Procedure Rules 2000** ("the CPR") had been satisfied, erred in concluding that some state in the USA, as opposed to Antigua and Barbuda (or "Antigua"), was the *forum coveniens* in which to resolve the dispute and therefore improperly set aside the leave that had been granted to serve out of the jurisdiction.

[2] By way of counter-appeal, Proskauer challenges various findings of fact and law in the judgment, though agreeing with the learned judge that Antigua is not the proper forum

for the resolution of the dispute. Indeed, the counter-appeal primarily challenges the judge's finding that: (i) both the tort and contract gateways ("the gateways") in rules 7.3(4) and 7.3(3)(a) of the CPR ("the CPR requirements") respectively were satisfied; and (ii) the claim against Proskauer for breach of fiduciary duty, met the CPR requirements. Proskauer therefore asserts that, there were alternative bases on which the learned judge could have granted its application to set aside the leave to serve the claim form and statement of claim outside of Antigua. Proskauer urges this Court to allow its counter-appeal and dismiss SIB's appeal.

Background

[3] The factual background has been helpfully set out in paragraphs 4 to 16 of SIB's skeleton arguments and I gratefully adopt them with some enlargements, in order to provide the relevant context. It is necessary to recite them in some detail given the nature of the appeal and counter-appeal.

[4] SIB was an offshore bank which was incorporated in Antigua. Mr. Robert Allen Stanford ("Mr. Stanford"), the sole shareholder and controller of SIB, together with his associates, used SIB to create a fraudulent Ponzi scheme ("the Ponzi scheme") funded by the monies invested in the Certificates of Deposits ("CDs") which were issued by the Bank up until February 2009.

[5] Suspicions were afoot that Mr. Stanford was conducting the business unlawfully and investigations were commenced by the United States Securities and Exchange Commission (the "SEC") in relation to his dealings and that of Stanford Financial Group ("SFG"), SIB and its affiliates. The operators of the Stanford scheme, by oral agreement, retained Mr. Sjoblom, who was an American-trained attorney and was then a partner at Chadbourne and Parke LLP ("Chadbourne"), a New York based law firm, to represent SIB, SFG and the Stanford Group Company in the SEC investigations and enforcement proceedings against them. This was due to Mr. Sjoblom's extensive expertise and experience in SEC enforcement matters, since prior to entering private practice, he

spent almost 12 years at the SEC's Washington, DC offices. On 23rd August 2005, the oral retainer was put in writing ("the Chadbourne Retainer").

[6] The 'Scope of Services' heading in the Chadbourne Retainer reads:[1]

> "You have asked us to represent SFG and its affiliated entities through all stages of the ongoing investigation by the United States Securities and Exchange Commission ("SEC") and any related litigation matters that may arise therefrom. For purposes of this engagement, at a minimum, we would contemplate the following services:
>
> - Interviewing financial advisors and compliance personnel at SGC;
> - Interviewing appropriate officers and personnel of SIB;
> - Interviewing appropriate officers responsible for managing the assets of SIB;
> - Meeting with the appropriate bank regulatory authorities who oversee and examine SIB;
> - Discussing with senior management of SFG, SGC and SIB the various issues being raised by the SEC staff;
> - Starting a dialogue and meeting with the SEC staff to bring about a resolution of the SEC investigation; and
> - Handling any follow on litigation if the SEC staff decides to commence litigation
>
> **While this letter is intended to deal with the SEC proceedings, the terms and conditions set forth herein will also apply to any additional legal services that we may agree to provide that are outside the initial scope of our representation**." (emphasis mine)

The Proskauer Retainer

[7] Mr. Sjoblom then moved to Proskauer, another large New York firm, a year later and took the matter with him and operated out of the firm's Washington DC's offices. This resulted in the Proskauer Retainer dated 6th September 2006. The beginning of the retainer letter to Mr. Mauricio Alvarado, Esq, the General Counsel for the SFG, dated 6th September 2006 reads:[2]

> "Thank you very much for permitting me to continue representing the Stanford Financial Group and its affiliate companies in the investigation by the United States Securities and Exchange Commission and related examinations by various regulatory bodies. I am writing pursuant to Part 1215 of the Joint Rules of the Appellate Division of the State of New York to confirm the terms of our engagement regarding such representation.

[1] Bundle F, Tab 3, pp. 2-3.
[2] Bundle F, Tab 15, p. 1.

> Unless otherwise agreed; the terms of this letter shall apply to this representation and any additional matters that we handle on your behalf. I will be the partner primarily responsible for these matters."

[8] On 19th February 2009, in the USA, the SEC shut down all operations by SFG, SIB and its affiliates owned by Mr. Stanford and operating in the USA. On 27th February 2009, the SEC filed a complaint against, SIB, Stanford Group Company, Stanford Capital Management LLC, Mr. Stanford, James Davis and Laura Pendergest-Holt alleging that for at least 10 years, Mr. Stanford operated a Ponzi scheme using the companies he owned, including SIB. The Ponzi scheme collapsed in February 2009 and SIB was placed in liquidation in Antigua soon thereafter in April 2009.

[9] On 12th March 2009, an order was granted by the District Court of Texas, Dallas Division ("the District Court") appointing a receiver in a case brought by the Group Company against SIB ("the US Receivership Order"). Under the US Receivership Order, Godbey J purported to assume exclusive jurisdiction over and take possession of SIB's assets, and authorised the US Receiver, Mr. Ralph Janvey ("Mr. Janvey" or "the US Receiver"), to take control over said assets and to institute or intervene in proceedings related to them.

[10] In the High Court of Antigua, Harris J refused to recognise the US Receivership Order in Antigua in the case of **Fundora v Stanford International**[3] and on 12th May 2011, Michel J, as he then was, appointed SIB's current joint liquidators. The joint liquidators and Mr. Janvey then concluded a settlement agreement on 8th March 2013 ("the Settlement Agreement") by which they agreed to share the proceeds of certain recoveries made by them in different jurisdictions.

[11] The joint liquidators, within the relevant limitation period for the filing of claims in Texas, by application dated 13th January 2012, sought leave to pursue claims against Proskauer in the District Court. This application was dismissed by order dated 1st February 2012, primarily on the basis that similar claims were being pursued by the US

[3] ANUHCV2009/0149 (delivered 24th April 2009, unreported).

Receiver. Further, the joint liquidators' application to recognise the Antiguan proceedings as a foreign main proceeding was refused and the learned judge, in that application, limited their relief which they sought in Texas to 'the examination of witnesses [and] the taking of evidence or the delivery of information concerning [SIB's] assets, affairs, rights, obligations or liabilities'.

[12] In the USA, Mr. Janvey, in his capacity as the US Receiver, had the following claims:

(i) An original complaint filed on 31st January 2013 in the Northern District of Texas, Dallas Division.

(ii) A case against Proskauer in the US District Court for Columbia ("the DC claim") which was dismissed by an order dated 24th July 2014 with prejudice for lack of subject matter jurisdiction; and

(iii) By order dated 28th April 2017, he withdrew certain claims brought in Texas, inclusive of the negligence claim and there was a Rule 41 stipulation entered dismissing the said claims with prejudice.

Accordingly, the remaining counts that were being pursued in Texas were in relation to aiding, abetting or participation in breaches of fiduciary duties and aiding, abetting or participation in a fraudulent scheme. These claims are not the same as the ones for which SIB sought leave of the Antigua High Court to serve out of the jurisdiction.

The Claim Below

[13] In the High Court of Antigua, on 10th September 2013, the joint liquidators filed a claim form and statement of claim against Mr. Sjoblom and Proskauer based on the Proskauer Retainer. In the statement of claim, SIB contended that Mr. Sjoblom, and by extension Proskauer, acted negligently and in breach of contract and fiduciary duty by failing to take steps to prevent the Ponzi scheme, which included blowing the whistle. SIB also complained that despite receiving critical information that Mr. Stanford was operating a Ponzi scheme, Mr. Sjoblom and Proskauer failed to make proper enquiries and/or report this information to SIB's innocent officers or regulatory bodies

such as the SEC and the Antiguan Financial Services Regulatory Commission ("FSRC") and/or failed to withdraw their representation of SIB. In addition, SIB asserted that Proskauer and Mr. Sjoblom deliberately concealed their negligent acts and/or acted in breach of their duties and that their deliberate concealment and/or breach could not have been discovered with reasonable diligence before 15th April 2009.

[14] SIB brought their claims under the CPR jurisdictional gateway requirements of rules 7.3(3)(a) and 7.3(4), and sought the following reliefs: (i) damages for breach of retainer made between SIB and Proskauer and Mr. Sjoblom on or about 6th September 2006, and/or negligence arising out of work carried out by Proskauer and Mr. Sjoblom on behalf of SIB between 6th September 2006 and 11th February 2009 in their capacity as legal representatives for SIB, in connection with the SEC's investigation of SIB; (ii) damages for breach of fiduciary duties arising from Proskauer's and Mr. Sjoblom's representation of SIB as set out above; (iii) interest pursuant to Section 27 of the **Eastern Caribbean Supreme Court (Antigua and Barbuda) Act**;[4] (iv) such further and other relief as this Court deems fit; and costs.

[15] SIB sought leave of the High Court of Antigua to serve the claim form and statement of claim outside of Antigua on Proskauer. This application for leave was made on the basis that there was a breach of the Proskauer Retainer committed both within and outside Antigua and that those tortious negligent acts and/or omissions were committed by Proskauer and Mr. Sjoblom both within and outside Antigua and those said acts and/or omissions caused SIB to sustain damages both within and outside Antigua. SIB relied on rules 7.3(3)(a) and 7.3(4) of the CPR to ground their application. The learned judge, on 27th March 2014, granted SIB leave to serve the claim form and statement of claim out of Antigua. Proskauer, having been served with the claim form and statement of claim, filed an application to set aside the service out order on a number of bases, primarily of which was that Antigua was not the appropriate forum for the trial of the matter.

[4] Cap. 143 of the Laws of Antigua and Barbuda.

[16] Proskauer's application to set aside the service out of the claim form and statement of claim was heard and granted with costs by an order dated 28th October 2017. On the set aside application, SIB, relying on the jurisdictional gateways, asserted that there were real issues of law and fact between it and Proskauer and Mr. Sjoblom, which were reasonable for the High Court to try and on which it has a realistic prospect of success. SIB maintained that Antigua is the *forum conveniens* for the trial of the claims since it was now time-barred from bringing its claims in the only other possible forum. In any event, they submitted that the claims instituted in the USA were different from the proceedings in Antigua. Proskauer countered that SIB could not have satisfied the applicable test for leave to serve out of the jurisdiction since upon closer examination of their pleadings, they failed on each limb. Proskauer contended that SIB's claim did not fall within the jurisdictional gateways and that it had no good cause of action. Proskauer also asserted that Antigua was not the proper forum for the trial of the claims. Proskauer therefore implored the judge to set aside the permission that was granted.

Judgment Below

[17] The learned judge, in his written judgment, stated that a preliminary question which arose in the determination of the appropriate forum was ascertaining the applicable law. In a detailed judgment, he found that the proper and applicable law in relation to the claims for breach of contract and tort and by extension, the breach of fiduciary duties, was not Antiguan law but the law of an unnamed state in the USA, whether federal or other state law, excluding New York.

[18] In relation to whether there was a serious issue to be tried, the judge held that this was satisfied. The learned judge also held that SIB had a good arguable case that: (i) an actionable breach of the Proskauer Retainer occurred in Antigua; and (ii) substantive losses incurred were suffered by SIB in Antigua. However, in relation to the question of *forum conveniens*, which the learned judge considered to be the determinative issue, he rejected SIB's contention that Antigua is the appropriate forum. He concluded instead that the appropriate forum is a state in the US, excluding New York. Essentially, the judge concluded that the tort and contract gateways in rules 7.3(4) and 7.3(3)(a) of

the CPR were satisfied but granted the set aside application on the basis that the *forum conveniens* was not Antigua.

[19] Given the gravamen of both SIB's and Proskauer's complaints respectively, it is imperative that some aspects of the judgment be recited in detail. The learned judge expressed himself thusly:

> "[76] In relation to the second requirement, and again without going into an exhaustive analysis, I am also satisfied that SIB has a good arguable case that its proposed claims against Proskauer come within the procedural gateways.
>
> [77] Concerning the claim in contract, I am of the view that SIB has a good arguable case that an actionable breach of the Contract of Retainer occurred within the jurisdiction of this Court, through material omissions by Proskauer.
>
> [78] In relation to the claim in tort, I am also satisfied that SIB has a good arguable case that substantive losses incurred in tort were suffered by SIB within the jurisdiction. This is implicit from the evidence of how SIB's finances were organized. The evidence includes that management of SIB's cash assets was subcontracted to another Stanford group company for a fee. The logical inference is that SIB was intended to benefit financially from that arrangement. Further, there is evidence that there were operations of SIB in Antigua. Mr. Sjoblom had no reason to come to Antigua when he was making his initial fact-finding inquiries if it was merely to inspect a brass plate. It is at least arguable that any tortious losses suffered by SIB were suffered in Antigua. Proskauer brings no proof rendering that case unarguable.
>
> [79] I am also satisfied that the claim for breach of fiduciary duty rides through the gateways on the back of either the claim in contract or tort, since such a claim for breach of fiduciary duty derives from the underlying contractual or tortious obligations.
>
> [80] The determinative issue in my view is whether this Court is clearly or distinctly the appropriate forum in which to try the issues that arise between the parties. The burden of satisfying the Court of this is on the claimant.
> ….
>
> [103] On its face, it might appear obvious that Antigua must be the appropriate forum because the claims cannot be pursued in the United States. In my respectful opinion however, that is not so. The crucial aspects appear to me to be that:
>
> (1) As SIB's causes of action are at least at first sight governed by United States law, rather than Antiguan law, one of the courts of

the United States appears to be a more appropriate forum for a trial of an action than this Court;

(2) The United States was an available forum when SIB through its Liquidators sought permission of a United States court to bring its claims there. SIB through its Liquidators had brought that application within the limitation period. SIB's cause of action arising out of the Proskauer Contract of Retainer was already being pursued against Proskauer in the United States, framed as heads of claim recognised under United States law, demonstrating that SIB's claims could be brought there. They subsequently continued to be pursued there. SIB through its Liquidators have not been denied the possibility of pursuing claims in the United States because they were time-barred, or because such claims could not in principle be brought there, but because the United States court was of the view that to do so would be to duplicate the Receiver's efforts.

(3) The United States still is an available forum in the sense that SIB's cause of action is being pursued there and - this is a key factor - substantial justice on this cause of action can be expected to be rendered in the United States, even though the heads of claim are in part expressed differently. There is also the factor that, as I understand the evidence to be, SIB's Joint Liquidators have an agreement with the United States Receiver to share recoveries. Although SIB relies upon this to support its contention that it should be allowed to bring claims in Antigua and Barbuda, with any recovery from such a claim standing to be shared with the United States receivership estate, the converse also appears to hold true, namely that SIB's Joint Liquidators can expect to receive a share of recoveries made by the United States Receiver should he succeed in vindicating SIB's cause of action. SIB can expect to receive substantial justice on its cause of action through the United States proceedings.

(4) It is in the United States that Proskauer is based, where it worked and where the substance of the transaction upon which it was engaged was situated Proskauer's primary client was also based in the United States. Aside from the issue of where most of the potential witnesses are available and where most of the documents probably are located, which are logistical issues of relative neutrality in what is a high value international claim, the United States appears to be a more appropriate forum than Antigua. This is because the United States probably has different legal, regulatory and commercial norms and expectations applying to a client - United States attorney-at-law relationship than Antigua, and

a United States court would in principle be better qualified than this Court to adjudicate on these aspects."

[20] Critically and in addition, the learned judge made a number of findings of facts and law that do not need to be spelt out in detail, while refraining from making a number of other findings of fact and law. In light of those findings and/or alleged omissions, the judge granted the application to set aside leave to serve out of Antigua.

The Appeal and Cross Appeal

[21] As alluded to earlier, SIB, being dissatisfied with the decision of the learned judge, has appealed to this Court. Proskauer resists the appeal and argues that the decision ought to be upheld. Indeed, Proskauer, though in agreement with the learned judge's finding on the appropriate forum, filed a counter-appeal in which they assert alternative grounds for setting aside the service out order. Proskauer contended that New York law or alternatively Texas law is the applicable law. More importantly, Proskauer complained that SIB's claims raised no serious issue on their merits, as they were brought after the applicable limitation periods and are barred by *res judicata* and that the claims did not meet the jurisdictional gateways for service out of the jurisdiction as required by the CPR.

Condensed Issues on Appeal and Cross Appeal

[22] Both SIB and Proskauer have filed several grounds of appeal and cross-appeal each of which has sub-grounds. From the grounds of appeal and cross-appeal, three main issues arise for this Court to resolve:

(i) Whether the learned judge erred in concluding that SIB had a good cause of action and consequently, a serious issue to be tried on the merits ("Serious issue to be tried").

(ii) Whether the learned judge erred in concluding that SIB had satisfied the tort and contract gateways to the standard of a good arguable case ("The gateways issue"); and

(iii) Whether the learned judge erred in holding that Antigua was not the appropriate forum to try the issues that arose between the parties ("The appropriate forum issue").

Submissions on behalf of SIB
Serious Issue to be tried

[23] Learned Queen's Counsel Mr. Justin Fenwick, strenuously resisted the contention that SIB's claims did not raise serious issues to be tried. He argued that SIB's claims were brought within the relevant limitation periods for both tort and contract. He further contended that Mr. Sjoblom and by extension, Proskauer, continued to breach their duties until February 2009 resulting in loss to SIB until 15th April 2009, when it was placed in liquidation. Alternatively, he submitted that SIB can rely on the deliberate concealment provision in order to fortify its contention in relation to the limitation period not having expired when SIB's claims were filed against Proskauer in the High Court of Antigua. He insisted that the claims had a good prospect of success and emphasised that the judge did not err in so concluding.

[24] Mr. Fenwick, QC maintained that Proskauer's submissions on *res judicata* fails for a number of reasons, all of which he adverted this Court's attention to. He asserted that when all those factors are considered in the round, Proskauer's entire argument on the serious issue to be tried cannot succeed. He sought to buttress his position by referring the Court to the underlying claims and the evidence to substantiate those claims.

The Tort and Contract Gateways

[25] Mr. Fenwick was adamant that SIB had satisfied the tort and contract gateways. He argued that Proskauer's reliance on Lord Sumption's observations in **Four Seasons Holdings Incorporated v Brownlie**[5] was misplaced since His Lordship was in the minority. He advocated that the correct interpretation of the Supreme Court decision in **Brownlie** in relation to the good arguable case test, is that the claimants seeking

[5] [2017] UKSC 80.

to serve out, need only to show that they have the better of the argument in relation to the gateways. He further argued that applying the ratio in **Brownlie**, the tort gateway was satisfied by either the direct or consequential damage suffered in Antigua. In this regard, he underscored that there was substantial evidence before the learned judge to arrive at the conclusion, namely, that tortious losses suffered by SIB were suffered in Antigua. He was adamant that the judge did not apply the wrong standard or burden of proof in determining this issue. He suggested that the criticisms of the learned judge in this regard were unjustified and he once again referred the Court to the pleaded case and the evidence in support to substantiate his position.

[26] Mr. Fenwick reiterated that the learned judge was correct to find that both the tort and contract gateways in rules 7.3(4) and 7.3(3)(a) of the CPR respectively were satisfied. He maintained that applying the majority decision in **Brownlie**, the tort gateway was satisfied either by direct or consequential damage suffered in Antigua. He stated that there was ample evidence before the learned judge from which he could have concluded, and did correctly conclude that significant damage had been incurred by SIB in Antigua. In relation to the fiduciary claim, he posited that the judge's approach to that was quite sensible in saying that it came within either the tort or contract gateway and therefore should not be impugned.

Appropriate Forum

[27] Mr. Fenwick submitted that the learned judge erred in finding that Texas, or another unspecified state in the US was an available forum for the purposes of the *forum conveniens* analysis. He stated that this was on two bases, namely: (i) his erroneous conclusion that the joint liquidators were to be equated with the US Receiver; and (ii) his judgment of whether or not such a US state was unavailable by virtue of limitation at the wrong time, that is, January 2012 rather than 27th March 2014 when

leave to serve outside the jurisdiction was granted. He submitted that between those dates, any claims brought by SIB against Proskauer in the US would have been time-barred.

[28] Mr. Fenwick disagreed with the judge that Texas was an available forum in which SIB could have prosecuted its claim against Proskauer. He referred this Court to the case of **Hindocha & Ors v Gheewala & Ors (Jersey)**[6] for the proposition that a forum is only available for the purpose of forum analysis if it is available to the claimant. The main thrust of his argument was that if Texas or any other US state is not an available forum for the joint liquidators to prosecute its claim, it cannot be the natural forum for their claims or where substantial justice could be done on those claims. He maintained that at the date of the hearing of the service out application, Texas was not an available forum in which SIB could have prosecuted its claim.

[29] In relation to the limitation bar, Mr. Fenwick emphasised that applications to set aside the service out order should be determined by reference to the circumstances as they existed when leave was granted. Accordingly, he argued that it was significant that the relevant US time bar elapsed between January 2012 and 27th March 2014, the latter being the date on which the joint liquidators were given leave to serve out. He relied on the case of **Mohammed v Bank of Kuwait and Middle East KSC**[7] to support this argument. He contended that whether at some point in the past, a claim could have been brought in a foreign jurisdiction is irrelevant to whether or not it is an available forum.

[30] Mr. Fenwick reminded this Court that in the present case, the joint liquidators did not reasonably fail to commence proceedings in the USA. To the contrary, they tried to do so in the Texan court but were prevented from doing so by the judge. He therefore reiterated, that the learned judge erred in failing to conclude that the proper forum for the joint liquidators' claim was Antigua, since it was the only forum in which

[6] [2003] UKPC 77.
[7] [1996] 1 WLR 1483.

they could now proceed. He relied on the pronouncement of Lord Goff in **Spiliada Maritime Corporation v Cansulex Ltd**[8] in support of this proposition. He maintained that setting aside the service out order was to stifle a single jurisdiction application. To buttress his arguments, Mr. Fenwick referred to numerous matters in which he said the learned judge made errors in determining the *forum conveniens*. These do not need to be spelt out for reasons which will become apparent.

[31] Mr. Fenwick contended that the correct conclusion would have been that Antiguan law, rather than the law of an unspecified US state other than New York, was applicable to the claims brought by SIB against Proskauer. He pointed out that though the learned judge found that there were serious issues to be tried in relation to the applicable law, he went on to determine a number of factual issues against SIB and in so doing drew adverse conclusions in determining the *forum conveniens*. He stated that if there were insufficient evidence to resolve those issues, then the learned judge should have held that they raised serious issues to be tried but had a neutral or insignificant effect on the question of forum.

[32] Mr. Fenwick argued that, in dealing with the evidence before him, the learned judge fell into error when considering the applicable law in respect of the tortuous and contractual claims by: (i) giving too little weight to the obligations owed by Proskauer to SIB; and (ii) holding that the Proskauer retainer and/or Mr. Sjoblom's representation of SIB did not extend to representation before the FSRC. In this regard, he posited that the judge erred in finding: (i) that Mr. Sjoblom's visit to the FSRC was just a fact-finding mission so that he could be better positioned to represent the Financial Group and its affiliates in relation to the SEC investigations; and (ii) that there was no evidence that Mr. Sjoblom believed that he had any responsibility to act for SIB in any investigations by the FSRC. He also reiterated that there was no evidential basis for the finding that Proskauer's primary client contact was with the Stanford Financial Group since the evidence before the court was to the contrary.

[8] [1987] AC 460.

[33] His main challenge was to the correctness of the learned judge's conclusion that Antigua was not the *forum conveniens* but rather it was some state in the USA. He complained that the learned judge clearly erred in staying SIB's claims on that basis. Accordingly, he urged this Court to allow the appeal and dismiss the cross-appeal.

Submissions on behalf of Proskauer
Serious Issue to be Tried

[34] Learned Queen's Counsel Mr. Laurence Rabinowitz submitted that the limitation period for filing a claim expired on 7th September 2012, 6 years after the cause of action accrued.[9] He posited that contrary to SIB's submissions that Proskauer was guilty of continuing breach which extended beyond 6th September 2006 and which would enlarge the time for filing the claim, this was not a case of continuing breach on the basis of SIB's case as pleaded. He also argued that SIB's alternative contention on the basis of deliberate concealment under section 32 of the **Limitation Act 1997**[10] also failed since in order for SIB to rely on that extension, it must be shown that a fact relevant to its right of action was deliberately concealed from it by Proskauer and it could neither discover nor could it have been discovered with reasonable diligence. He contended that SIB's pleaded case raises no substantial question of law or fact with a real prospect of fulfilling the requirements of same.

[35] Mr. Rabinowitz also contended that the learned judge erred by failing to address the question of *res judicata*. He argued that had the judge done so, this would have provided an alternative ground in support of his order, in the event that he was wrong on the question of proper forum. He further submitted that if this question were addressed, the learned judge would have concluded that SIB has no real prospect of succeeding on the claim as they would be defeated by the doctrine of *res judicata*.

[9] Proskauer contended that the cause of action accrued on the date the Proskauer Retainer was entered in to, i.e. 6th September 2006. The claim form was filed on 10th September 2013: See paragraph 13 above.
[10] Act No. 8 of 1997 Laws of Antigua and Barbuda.

[36] In sum, Proskauer's position in relation to this issue is that, had these other issues been considered or considered in full, they would have provided an alternative basis for the judge to set aside the leave to serve out.

The Tort and Contract Gateways

[37] On its counter appeal, Mr. Rabinowitz contended that the learned judge erred in concluding that SIB discharged the burden of showing a 'good arguable case', that the claims made against Proskauer met the requirements of rule 7.3(4) of the CPR ("the tort gateway") or that of rule 7.3(3)(a) ("the contract gateway"). He reminded this Court that CPR 7.3(4) requires proof to the standard of a 'good arguable case' that a claim in tort is made and the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction. CPR 7.3(3)(a) requires proof to the standard of a 'good arguable case' that 'a claim is made in respect of a breach of contract committed within the jurisdiction'.

[38] Mr. Rabinowitz challenged the learned judge's conclusion that the contract gateway was indeed satisfied. He submitted that the entirety of the judge's reasoning was summed up in a brief statement wherein he stated that, 'SIB has a good arguable case that an actionable breach of the Contract of Retainer occurred within the jurisdiction of this Court, through material omissions by Proskauer'.

[39] First, Mr. Rabinowitz stated that the learned judge erred in finding that the requirements under the contract gateway were met 'through material omissions by Proskauer'. He stated that the learned judge's conclusion is inconsistent with his finding in relation to the tort gateway, in so far as the judge made no reference to the 'material omissions' in his discussion on the tort gateway, which would have provided an alternative basis for meeting that gateway. Also relying on **Brownlie**, Mr. Rabinowitz posited that the learned judge utilised a lower evidential standard of a 'serious issue to be tried', instead of the requisite standard of a 'good arguable case'. He maintained that a good arguable case, in accordance with **Brownlie**, amounts to a 'plausible evidential basis' on the basis of the material available. However, he said that notwithstanding this guidance, the judge erroneously

concluded that the evidence supported a finding that the contract gateway was satisfied.

[40] Additionally, Mr. Rabinowitz maintained that in concluding that there were 'material omissions', the learned judge was required to identify what obligations, if any, Proskauer was contractually required to perform in Antigua, and erred by failing to address and identify those obligations. He stated that the judge's conclusion failed to address the requirement that jurisdiction may only be taken pursuant to a gateway in relation to those claims which fall within the gateway in question. He therefore contended that there are no material omissions which are pleaded in SIB's statement of claim and that there is no evidence of those material omissions. Consequently, he was adamant that the learned judge fell into error when he found that SIB's claims satisfied the requirements of the contract gateway.

[41] Mr. Rabinowitz reminded this Court that rule 7.3(4) of the CPR requires proof to the standard of a "good arguable case" that a claim in tort is made and the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction. He reiterated that it is indisputable that these requirements must be met if SIB has a good arguable case that significant damage was suffered in Antigua or that the claim in tort was based on 'substantial and efficacious acts'[11] committed in Antigua.

[42] Mr. Rabinowitz challenged the learned judge's finding that the requirements under CPR 7.3(4) were met because 'substantive losses' were suffered by SIB in Antigua. He stated that the judge failed to identify any 'plausible evidential basis' from the material available to support the conclusion that SIB had met the requirements of showing significant damage in Antigua. He pointed out that the learned judge found that the suffering of 'substantive losses' in Antigua was implicit from the evidence of how SIB's finances were organised. He reiterated that it is not clear what, if any,

[11] Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc. [1990] 1 QB 391.

was the evidence of substantive loss suffered in Antigua as a consequence of any acts or omissions of Mr. Sjoblom and by extension, Proskauer.

Appropriate Forum

[43] Mr. Rabinowitz suggested that when determining the proper forum issue, the judge referred to the fact that the USA was an available forum because of the claims being pursued there. He maintained that this was a clear reference to the Texas proceedings and that the judge did consider whether there was a risk of injustice in SIB pursuing its claim there. He submitted that in any event, it is irrelevant for the purposes of the *forum conveniens* analysis to consider whether the law of some state other than Texas and New York governed SIB's claims. This, he said, is due to the fact that irrespective of which state law applies, the determination that any US state law governs, as the judge found, does not make Antigua the proper forum to try the claims. Mr. Rabinowitz accepted that the Texas court was the alternative forum for the resolution of SIB's claim and maintained that the judge did not err in concluding that Antigua was not the appropriate forum.

[44] Mr. Rabinowitz submitted that SIB acknowledged that another forum was available when 'it would be open to [the claimant] to institute proceedings against the defendant before that court'. He said that the learned judge found that this test was satisfied because SIB's claims against Proskauer were being heard before the Texas court. He maintained that the Texas court was available for prosecution of SIB's claims against Proskauer but not to the joint liquidators because any claim brought by them would duplicate the US Receiver's efforts.

[45] He posited that SIB's suggestion that the judge equated the joint liquidators with the US Receiver is also flawed. He said that the judge's findings were consistent with the test for an available forum and the need to ensure that there is no injustice. He maintained that the judge did not err in that regard.

[46] With regard to SIB's contention on statutory limitation, Mr. Rabinowitz submitted that this is misleading, as there has been no definitive ruling that the claims in the Texas court were time-barred. He maintained that the present case is distinguishable from **Spiliada** which SIB relied on to support its argument in relation to the effect of the time bar. He argued that until the Rule 41 Stipulation and Order of Dismissal in April 2017, Proskauer continued to face all SIB's claims. Alternatively, Mr. Rabinowitz contended that even if the claims were time-barred or that it is sufficient that they might have been, the question is whether it would be unjust to confine SIB's claims to the court which was identified as the natural forum. He submitted that the judge did not err in concluding that the claims should have been confined to be litigated in the forum, which, in the judge's view, was the available forum.

[47] Mr. Rabinowitz submitted that though the learned judge rightly concluded that Antiguan law was not applicable, he should have gone further to find that the claims are governed by New York law or alternatively, Texas law. During oral arguments, Mr. Rabinowitz seemed to have conceded that Texas was the natural forum and that Texan law was therefore applicable.

[48] He further argued that, in any event, the judge had arrived at the correct decision in setting aside the service out order since the gateways had not been satisfied and the judge should have so held. By way of his concluding arguments, Mr. Rabinowitz emphasised that the judge was correct in concluding that Antigua was not the appropriate forum and therefore urged this Court to dismiss SIB's appeal and allow Proskauer's cross-appeal.

Discussion
General Observation

[49] It is essential to recognise that this appeal engages the interrogation of well-established principles of Private International Law that undergird the determination of whether leave should be granted to an applicant to serve a claim form and a statement of claim outside of the jurisdiction. It brings into focus the question of

whether the learned judge erred as a matter of law or fact, in setting aside the leave that was granted to SIB to serve the claim form and statement of claim out of Antigua on Proskauer, on the basis that Antigua was not the appropriate forum. It also examines the related matters of whether or not the judge correctly concluded that SIB had satisfied the tort and contract gateways as provided by the procedural rules. As a related matter, it is common ground that SIB's fiduciary claim is parasitic to the tort and/or contract gateways and therefore only arises for consideration if the gateway is satisfied. In addition, the appeal addresses the matter of whether the judge was correct in holding that SIB had a serious issue to be tried and a good arguable case that its proposed claims against Proskauer fell within the procedural gateways.

[50] It is helpful to underscore that as a general rule, there are two well recognised personam bases upon which a local court is clothed with jurisdiction to hear a claim, namely the presence of the defendant or if the defendant, though not present within the jurisdiction, submits to the jurisdiction of the local court. Outside of these two categories, the local court has competence to serve a defendant ex juris or outside of the jurisdiction on the basis of the assumed jurisdiction of the local court, in this case, the High Court of Antigua. These well-established principles were recognised by the learned Professor Winston Anderson in his treatise **Caribbean Private International Law**[12] where he stated that there are three bases upon which jurisdiction is normally founded: (i) the defendant's presence within the jurisdiction; (ii) voluntary submission; or (iii) where the court allows service of process upon the defendant outside the jurisdiction pursuant to rules governing civil procedure.[13]

[51] The jurisdiction to serve claims outside of the country is circumscribed by certain prerequisites that must be satisfied. These are largely stipulated by the CPR. The stipulations are reflected in the judicial pronouncements of Lord Diplock in **Amin Rasheed Shipping Corporation v Kuwait Insurance Co**.[14] His Lordship

[12] Caribbean Private International Law, 2nd edn, Sweet and Maxwell 2014.
[13] Ibid, at para 8-001.
[14] [1984] AC 50 at p. 59.

enunciated that in order to serve outside of the jurisdiction, the claimant must satisfy both the jurisdiction and discretion conditions. He stated as follows:

> "First, it had to bring the case within *R.S.C., Ord. 11, r. 1 (1)*, in order to obtain leave to serve a writ on the insurers out of the jurisdiction. Although the assured had originally asserted that the contract of insurance had been made on its behalf by an agent trading in England, this failed on the facts; and in this House the only provision of rule 1 (1) that was relied upon by the assured was that contained in subparagraph (*f*) (iii) of which the relevant wording is:
>
> > 'if the action begun by the writ is brought against a defendant not domiciled or ordinarily resident in Scotland to enforce…a contract...being ...a contract which…(iii) is by its terms, or by implication, governed by English law; …'
>
> I will call this first obstacle the jurisdiction point.
>
> The second obstacle is that the assured must satisfy the requirements of rule 4 (2) which provides:
>
> > 'No such leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order.'
>
> I will call this second obstacle the discretion point.' "

The above principles have stood the test of time and are applicable today, even though the procedural rules have been modernised and are now provided for in Part 7 of the CPR. Professor Anderson stated that the new CPR is to similar effect in that a claim form may be served out of the jurisdiction only if: (a) the case falls within one of the categories covered in rule 7.3; and (b) the court gives permission. I am in entire agreement with this.[15]

[52] In so far as SIB has appealed on the basis that the learned judge erred in concluding that Antigua was not the *forum coveniens* and Proskauer has cross appealed against the judge's findings that SIB has satisfied both the tort and contract

[15] Supra, n.12 at para 8-012.

gateways, it makes practical and chronological sense to treat with Proskauer's cross appeal first.

[53] I now turn, therefore, to specifically address the first two issues which are interconnected and will be considered together.

Issue 1 - Serious issue to be tried;
Issue 2 – The gateways issue.

[54] It is settled that in order to obtain leave to serve outside of the jurisdiction three main prerequisites must be satisfied, namely:

(a) There is a serious issue to be tried on the merits of the claim;

(b) There is a good arguable case against each of the foreign defendants which falls within the specific category of the CPR; and

(c) The applicant must establish that the local court is clearly or distinctly the appropriate forum in which to resolve the issues between the parties.

[55] Importantly, the onus is on the applicant to persuade the court that it should exercise its discretion in its favour. The first of the two issues require the judge to scrutinise the pleadings, the application to serve out and the supporting evidence. The learned judge was alive to these prerequisites and examined them in his judgment.

[56] The modern formulation of this principle was enunciated by Lord Collins in **Nilon Limited and Another v Royal Westminster Investments SA and Others**[16] at paragraph 13 where His Lordship stated:

> "The applicable principles relating to service out of the jurisdiction were set out, with references to the prior authorities, in AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2012] 1 WLR 1804, at para 71, per Lord Collins. On an application for service out of the jurisdiction, three requirements have to be satisfied. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried

[16] [2015] UKPC 2.

> on the merits, i.e. a substantial question of fact or law, or both. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other. Third, the claimant must satisfy the court that in all the circumstances the forum which is being seised (here the BVI) is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

In order to determine whether there is any merit in Proskauer's complaint that the learned judge erred in concluding that there are serious issues to be tried and that SIB has a good arguable case that its claims came within the gateways, it is necessary to scrutinize the pleadings, the application to serve out of the jurisdiction and the affidavit evidence in support of the application. Similarly, Proskauer's argument that there are no serious issues to be tried and therefore the judge erred in so holding will be addressed.

[57] A close reading of the judgment indicates the detail with which the judge approached this aspect of the matter, which turned out to be weightier than perhaps it would ordinarily be. This was compounded by the fact that the matters of finality of judgment, limitation periods, *res judicata*, illegality, want of causation, breach of the duty of full and frank disclosure were all canvassed. Nearly all of the possible legal objections that can be taken in relation to the substantive claim appear to have been canvassed in the application to set aside the service out order. In addition, in my view, the learned judge was led into error in addressing several matters of substance which were unsuitable for resolution at the leave or set aside stage. This in no way detracts from the fact that the learned judge was required to carefully apply the relevant principles.

The Procedural Rules

[58] It is of sufficient importance to the resolution of the issues that have been distilled, that the relevant procedural rules be set out in full. Rule 7.2 of the CPR provides for

the general rule as to service of the claim form out of the jurisdiction and provides that, '[A] claim form may be served out of the jurisdiction only if – (a) rule 7.3 allows; and (b) the court gives permission.'.

[59] Rule 7.3 enables the service of the claim form outside of the jurisdiction in specified proceedings. It states:

> "7.3 (1) The court may permit a form to be served out of the jurisdiction if the proceedings are listed in this Rule.
> *Features which may arise in any type of claim*
> (2) A claim form may be served out of the jurisdiction if a claim is made –
> (a) Against someone on whom the claim form has been or will be served, and -
> (i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
> (ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is necessary or proper party to claim;
>
> …
>
> *Claims about contracts*
> (3) A claim form be served out of the jurisdiction if –
> (a) a claim is made in respect of a breach of contract committed within the jurisdiction;
> (b) a claim is made in respect of a contract where the contract –
> (i) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract; or
> (ii) is by its terms or by implication governed by the law of any Member State Territory;
> (iii) was made by or through an agent trading or residing within the jurisdiction; or
> (iv) was made within the jurisdiction; or
> ...
>
> *Claims in tort*
> (4) A claim form may be served out of the jurisdiction if a claim in tort is made and the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction."

[60] By way of emphasis, cognisance must be paid to the fact that on an application to set aside the leave to serve out order, the court is required to scrutinise SIB's pleaded case, the application to serve out, the application in support together with

the affidavit evidence and the opposing application of Proskauer and its affidavit evidence in support. At the set aside stage, the court seeks to determine whether the three requirements for service out of the jurisdiction had in fact been satisfied and whether the order to serve out was properly granted.

[61] It is noteworthy that the Proskauer retainer lies at the heart of the proceedings. It is also worthy of emphasis that in its pleaded case, SIB contended that Proskauer held themselves out as being attorneys with experience in regulatory and fraud matters and were retained by SIB to undertake work in this area. SIB also stated that Proskauer, whilst performing the implied obligations and duties owed to SIB under the contract of retainer, carried out investigations which revealed that Mr. Stanford was operating as a Ponzi scheme. They asserted that Proskauer, having received the information, failed to make proper enquiries and/or report that information to SIB's innocent officers, the SEC and the FSRC in Antigua and/or failed to withdraw from representing SIB. It emerges from the pleadings that SIB's case is that Proskauer breached the implied terms of the contract of retainer, was guilty of professional negligence and breached their duty of care, skill and diligence to SIB causing loss and damage to SIB. They also allege that Proskauer had breached its fiduciary duties.[17] SIB argued that had it not been for Proskauer's tortious, contractual and fiduciary breaches it would have been possible for SIB or the relevant regulatory bodies to stop the fraud. However, on the application for the leave to serve out of the jurisdiction, SIB did not appear to rely on the alleged implied or express terms of the retainer in order to undergird its application.

[62] As stated earlier, rule 7.3(4) of the CPR permits for the service out of the claim either if the tortious act was committed within Antigua or the damage was sustained in Antigua. It is also critical to note that this requires proof that the jurisdictional basis of tort as provided by the CPR was satisfied to the standard of a good arguable case as enunciated by Lord Sumption in **Brownlie**.

[17] The fiduciary claims would be treated together with the tort and contract claims for convenience.

[63] On the first and second limbs, namely, whether there is a serious issue to be tried and a good arguable case that the claim falls within one of the jurisdictional gateways, I find the authoritative pronouncements of Lord Goff in **Seaconsar Far East Ltd v Markazi Jomhouri Islami Iran**[18] instructive and I can do no more than to helpfully apply them. In that case, it was held that in order to be granted leave to serve outside of the jurisdiction, the claimant must show that there is a serious issue to be tried, in that there was a substantial question of law and fact or both arising on the facts and the standard of proof was that of a good arguable case. Lord Goff enunciated as follows:

> "Once it is recognised that, so far as the merits of the plaintiff's claim are concerned, no more is required than that the evidence should disclose that there is a serious issue to be tried, it is difficult to see how this matter, although it falls within the ambit of the court's discretion, has not in practice to be established in any event. This is because it is very difficult to conceive how a judge could, in the proper exercise of his discretion, give leave where there was no serious issue to be tried. Accordingly, a judge faced with a question of leave to serve proceedings out of the jurisdiction under Order 11 will in practice have to consider both (1) whether jurisdiction has been sufficiently established, on the criterion of the good arguable case laid down in *Korner's case*, under one of the paragraphs of rule 1(1), and (2) whether there is a serious issue to be tried, so as to enable him to exercise his discretion to grant leave, before he goes on to consider the exercise of that discretion, with particular reference to the issue of forum conveniens."[19]

[64] In the Privy Council decision of **Altimo Holdings and Investments Limited and Others v Kyrgyz Mobil Tel Ltd and Others**,[20] the Board stated that the threshold requirements of the test for whether or not there is a serious issue to be tried is, 'the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful prospect of success'.[21]

[65] In relation to the set aside application, this Court has to determine whether the judge properly exercised his discretion to set aside the permission to serve out. By way of emphasis, it should be stated that the question of whether to grant leave to serve

[18] [1994] 1 AC 438.
[19] Ibid at p. 456.
[20] [2011] UKPC 7.
[21] Ibid at para 71.

out of the jurisdiction engages the assessment of the decision of the local court. Over the years, courts have consistently approached the review of the decisions of the lower court with great care. Bearing in mind that it is no part of this Court's function to determine the issues that were raised in the substantive claims, careful regard was given to the arguments that were advanced in relation to the judge's determination that there were serious issues to be tried. Many of the arguments that were advanced before this Court are better suited to be resolved during the hearing of the substantive claim. In fact, it would be well-nigh impossible for any court to resolve some of those issues raised before the court below in the absence of cross-examination which is aimed at testing their veracity.

[66] Having carefully examined the rival positions, let me say straightaway that, on SIB's pleaded case, there are bare assertions of the causes of action of tortious conduct in Antigua and/or alternatively tortious conduct outside of Antigua which resulted in damage being suffered to SIB within Antigua, and they are largely unsubstantiated by the evidence. It is attractive for the Court to be invited to resolve the issues that are raised but this would be a misguided approach. The remit of this Court in this matter is to ascertain whether the issues are serious issues to be tried on the merits and that there is a good arguable case that the claim falls within the relevant jurisdictional gateways. It therefore behoves this Court, as indicated earlier, to ascertain whether the learned judge erred in so holding. With the relevant principles in mind, I have given deliberate consideration to the competing arguments that were reproduced above. As alluded to earlier, it is convenient to deal with the question of whether or not the procedural gateways were satisfied before addressing whether there is a serious issue to be tried.

[67] As it relates to the gateways, the learned Professor Anderson has helpfully outlined three traditional bases (which are not exhaustive) on which the Court can permit service out of the jurisdiction. These are: (i) where the contractual dispute was in respect of a contract made within the jurisdiction; (ii) where the contract was made by or through an agent which trades or resides in the jurisdiction on behalf of a

principal which trades or resides outside of the jurisdiction; and (iii) where, by its terms or by implication, the local law governs the contract. On leave to serve out in tort actions, Professor Anderson indicated that the courts have adopted a more flexible approach, that is, 'when the tort is complete, look back over the series of events constituting it and ask the question: where in substance did this cause of action arise?'.[22] This test was approved and applied in the case of **Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc.** In this case, the acts of inducement took place in New York. This resulted in breaches of contract and economic loss to the claimant in England. It was held that the tort of inducing a breach of contract was committed in England. This case is illustrative of the fact that the place where the defendant acted is not necessarily the decisive factor in the 'substance' test. Moreover, CPR 7.3(4) has modernised the approach to this test whereby a claimant would satisfy the tort gateway if he or she could prove that damage or loss flowing from the commission of the tort was sustained within the jurisdiction of Antigua.

[68] In relation to the standard of proof being a good arguable case, in the recent Court of Appeal decision in **Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV and others**,[23] the Court provided clarification and reconciled the authorities on the three (3) limbed test of "good arguable case" that a claimant asserting jurisdiction must establish. The court's starting point was with the recent decisions of the UK Supreme Court in **Brownlie** and **Goldman Sachs International v Novo Banco SA**.[24] The reformulation of the test by Lord Sumption in **Brownlie** was obiter but it was unanimously endorsed by the Supreme Court in **Goldman Sachs**.

[69] Lord Sumption at paragraph 9 of **Goldman Sachs** underscored the test to be applied in determining an issue of jurisdiction. His Lordship observed that:

> "This is, accordingly, a case in which the fact on which jurisdiction depends is also likely to be decisive of the action itself if it proceeds. For the purpose

[22] Caribbean Private International Law, 2nd edn, Sweet and Maxwell 2014 at para 8-020.
[23] [2019] EWCA Civ 10.
[24] [2018] UKSC 34.

> of determining an issue about jurisdiction, the traditional test has been whether the claimant had "the better of the argument" on the facts going to jurisdiction. In Brownlie v Four Seasons Holdings Inc…this court reformulated the effect of that test as follows: '… **(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.**' " (emphasis mine)

[70] However, no guidance was given on how the test works given the practical difficulties and the Court of Appeal in **Kaefer** provided some clarification. On the first limb, Green LJ stated that the reference to a 'plausible evidential basis' is a reference to an evidential basis showing that the claimant has the better argument; the burden of proof remained upon the claimant; the standard of proof under this limb was not a balance of probabilities and is not appropriate for use at the interim stage; and the test is context specific and flexible. Critically, at paragraph 77, he urged as follows:

> "Next, the adjunct "*much*" in the *Canada Trust* formulation must be laid to rest. This was the view expressed by a variety of judges prior to *Brownlie* (see for instance per Aikens LJ in *JSC Aeroflot* at paragraph [14]) and the word was, rightly in my view, deemed superfluous in *Brownlie* by Lord Sumption. There is no discernible logic for saying that jurisdiction arises if the claimant, having established that it has the better case (relatively), then has to proceed upwards and onwards and show that it has "*much*" the better case. A plausible case is not one where the claimant has to show it has "*much*" the better argument."

[71] The second limb is an instruction to the court to use judicial common sense and pragmatism to 'overcome evidential difficulties' and arrive at a conclusion if it "reliably" can. This limb 'recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence'. The third limb is intended to address situations where the court is unable to make a reliable assessment and form a decided conclusion based on the evidence before it. This limb, to an extent,

has moved away from a relative test and introduced a test which combined good arguable case and plausibility of evidence. In other words, the claimant is still obliged to establish that there is a good arguable case for the application of the gateway with a plausible (albeit contested) evidential basis for it.

[72] Looking in some detail at SIB's ex parte application for leave to serve out of Antigua, SIB stated at paragraphs 4, 5, 6 and 7 as follows:

> "4. The Applicant's claim against the Defendants, in accordance with CPR 7.3(3)(b)(ii) is made in respect of the Contract of Retainer which by implication is governed by the laws of Antigua and Barbuda.
>
> 5. The Applicant's claim against the Defendants is made, pursuant to CPR 7.3(4), in respect of the tortious negligent acts and/or omissions of the Defendants committed both within and outside the jurisdiction of Antigua and Barbuda, which acts and/or omissions caused the Applicant to sustain damages both within and outside Antigua and Barbuda.
>
> 6. In particular, the Applicant avers that the Defendants, in the course of their obligations and duties to the Applicant, acted negligently and/or omitted to act where necessary, in breach of their fiduciary duties owed to the Applicant when the Second Defendant, in his capacity as Partner of the First Defendant, conducted due diligence meetings with key members of the Applicant's staff within and outside Antigua and was given critical information demonstrating that the Applicant was being operated as a Ponzi scheme by RAS, but failed to report that information to (a) the Applicant's innocent officers; (b) the SEC; (c) the Financial Services Regulatory Commission in Antigua (the FSRC) and/or (d) failed to withdraw from representing the Applicant.
>
> 7. In addition, the Applicant believes that the Defendants went as far as willfully concealing their negligent acts and/or omissions, in breach of their fiduciary duties, by facilitating the furtherance of the fraud orchestrated by RAS but for which facilitation the Applicant would not have sustained the damages that it did."

[73] Proskauer, having been served, filed an application to set aside service of the claim form on the grounds that: (i) service out of the jurisdiction was not permitted by rule 7.7(2)(a) of the CPR; (ii) SIB does not have a good cause of action pursuant to rule 7.7(2)(b) of the CPR; and (iii) the case is not a proper one for the court's jurisdiction

pursuant to rule 7.7(2)(c) of the CPR.[25] In essence, Proskauer contended that SIB did not satisfy the requirements of the jurisdictional gateways on which it relied and in any event, Antigua was not the appropriate forum for the trial of the matter.

[74] However, on the affidavit evidence filed by SIB in support of its application for permission to serve out, it is not readily apparent that any breaches of the Proskauer Retainer agreement resulted in losses to SIB which were sustained in Antigua or that there were torts committed within Antigua. The cumulative effect of the above points to the conclusion that SFG, SIB and their affiliates retained Proskauer primarily to provide advice and legal representation in relation to the SEC investigation.

[75] Given the fact that the claims are said to have arisen from the Proskauer Retainer, it is critical to have examined the contract of retainer and the claims as pleaded by SIB. Having done so, it is evident that there is very little pleaded by SIB which can substantiate that there was any tort committed in Antigua or that damage was sustained within the jurisdiction flowing from the commission of the tort. Paragraph 37 of the affidavit of Mr. Marcus Wide, which supports SIB's ex parte application for permission to serve Proskauer and Mr. Sjoblom out of the jurisdiction, simply states without more that SIB's claim is made in respect of the tortious negligent acts and/or omissions of the respondents committed both within and outside of Antigua, and which acts and/or omissions caused SIB to sustain damage both within and outside of Antigua. In my view, the extent of Mr. Wide's evidence of any tort committed or damage sustained within the jurisdiction is limited to his refence at paragraph 35 of his affidavit to '[t]he facts evidencing the Defendants' [respondents'] breach of the Contract of Retainer and/or negligence, and … breach of Fiduciary duties… set out in detail in SIB's Claim Form and Statement of Claim…' . I am not of the considered view that this provides a proper evidential basis on which the learned judge could have reasonably concluded that SIB has a good arguable case that substantive

[25] See paragraph 16 of the affidavit of Steven E. Obus filed in support of the application to set aside service.

losses were sustained in Antigua. The evidence that SIB adduced in support of its claims was very thin in this regard.

[76] I agree with the submissions of Mr. Rabinowitz, that the judge should have gone further to properly identify and assess the plausible evidential basis to support a finding that SIB met the requirement of showing that there was significant damage in Antigua. The factors that the judge outlined, namely, the arrangement of SIB's finances and that there was evidence of operation of SIB in Antigua were not sufficient to justify a finding that SIB has a good arguable case that substantive losses were suffered within the jurisdiction. It is also entirely inconsistent with his acknowledgement at paragraph 56 of the judgment that, '…Proskauer, perhaps understandably, does not appreciate the considerable scale of SIB's former activities in Antigua but I accept that **SIB's Joint Liquidators have not led any evidence on that aspect in this application**.' (emphasis mine). Proskauer, however, lead evidence of the limited scale of SIB's business activities in Antigua by way of the transcript of the testimony of Karyl Van Tassel who is a forensic auditor hired by the US Receiver to conduct a forensic audit of the Stanford entities. Ms. Van Tassel's findings included that 'SIB's two principal activities – selling CD's and otherwise directing the proceeds of sale – were controlled and conducted from the United States, with no meaningful management input from Antigua'. Of equal force, is Proskauer's argument that the learned judge seemed to have fallen into error by placing the evidential burden on Proskauer rather than on SIB to supply a plausible evidential basis that damage was suffered in Antigua, in keeping with the authorities.

[77] Further, there is very little by way of the evidence adduced which indicate that SIB suffered losses in Antigua as a consequence of any alleged breach of the contract of retainer. As alluded to earlier, the heart of SIB's contention is that Proskauer failed to perform its contractual duties. The Proskauer Retainer clearly contemplated that Mr. Sjoblom would 'continue representing the Stanford Financial Group and its affiliate companies in the investigation by the United States Securities and Exchange Commission and related examinations by various regulatory bodies'.

However, there appears no evidence, as indicated by Proskauer,[26] that 'various regulatory bodies' could be taken to include any regulatory body in Antigua, since neither Proskauer nor any of its partners were, at any time relevant to these proceedings, qualified or entitled to practise law in Antigua. Though SIB's pleadings assert that breaches were committed both within and outside the jurisdiction, there was no indication in the evidence of what breaches were committed in Antigua. At the very least, SIB was required to establish that some part of the contract was to be performed in Antigua and there was a breach of that part. Accordingly, in circumstances where the learned judge found that there were 'material omissions' committed by Proskauer, he was required to identify and address what obligation, if any, that Proskauer contractually obligated to perform in Antigua. The judge's failure to do so is significant to the resolution of this appeal.

[78] I reiterate that the court was required to scrutinise the claim form and the statement of claim together with the evidence in support of the service out application in order to determine whether SIB had established that its claims fell within the gateways. It was for SIB to satisfy the court that it had a good arguable case that its claims fall within the gateways relied upon. The court in ascertaining whether there is a good arguable claim should seek to determine which side has the better argument based on the material available. With this in mind, I disagree with the approach to analysis taken by the learned judge in arriving at his conclusion that the gateways were met.

[79] I am unable to discern, on any view of the evidence presented by SIB, how the 3 limbed test of "good arguable case" that a claimant asserting jurisdiction must establish was satisfied. In my view, the learned judge could not have adequately satisfied himself that SIB had met the requisite threshold requirements. This is quite evident from paragraphs 76 to 79 of his judgment wherein the learned judge failed to provide any reasons or any sufficient reasons for arriving at his conclusion that SIB satisfied the jurisdictional gateways. Accordingly, based on the factual context that emerges from SIB's pleadings, affidavits in support of its application and

[26] See Affidavit of Mr. Steven E. Obus in support of the application set aside service.

exhibits, I am of the considered opinion that it was not open to the judge to conclude that SIB had a good arguable case on any of the jurisdictional gateways in the CPR. It is also clear, in my view, that Proskauer, on its pleaded case, has the better of the arguments. It is evident that I am of the view that Mr. Rabinowitz's submissions on the issue of whether there was a good arguable case that the claim fell within the jurisdictional gateways are more persuasive and attractive and accordingly, they are accepted.

[80] It therefore follows that, having failed to show that there is a good arguable case in relation to the claims in contract, tort and by extension breach of fiduciary duties, SIB would have no reasonable prospect of success in establishing that there was a breach of contract committed within Antigua or that any substantial acts causing damage were committed by Mr. Sjoblom in Antigua or that significant damage resulting therefrom was sustained in Antigua. In making this finding, I rely on the pronouncement of the UK Supreme Court in **Brownlie**, wherein the court found that since Four Seasons Holdings (FSH) was not the owner of the Cairo hotel at the time of the accident, there was no realistic prospect of Lady Brownlie establishing that she had a contract with FSH or that it was liable for the driver's negligence. Consequently, her claims did not satisfy the requirement that there should be a reasonable prospect of success.

[81] Based on all that I have foreshadowed, I am unconvinced that there are serious issues to be tried in Antigua based on SIB's pleaded case and the evidence that it has adduced in support of its application to serve its claim out of the jurisdiction. In so far as SIB has failed to satisfy the jurisdictional gateway requirements, I am in total agreement with Mr. Rabinowitz where he advocated that the learned judge erred in concluding that SIB had established that there were serious issues to be tried on its claims and that the jurisdictional gateways had been satisfied. The learned Professor Anderson reminded us that if a claimant cannot surmount this obstacle then the case fails at this point and the court cannot allow service out.[27]

[27] Supra n. 12 at para 8-013.

[82] Cognisance must be paid to the fact that the main function of the appellate court on the review of the judge's decision is to seek to determine whether the judge erred in (a) jurisdictional issue and (b) in his exercise of discretion. With that duty firmly in mind and in view of all that I have foreshadowed, it is evident that I am of the view that the judge's determination of the jurisdictional matters should be impugned. This determination has the effect of disposing of the appeal in its entirety. This is consistent with the enunciations of Professor Anderson above.

[83] In my view, given the reasoning and conclusion on issues 1 and 2 on permission to serve out the jurisdiction and the arguability of SIB's claim, the *forum conveniens* issue has been rendered otiose or academic. Indeed, it cannot normally be right for a court to hold that there are no serious issues to be tried on the merits, and that none of the gateways have been satisfied, yet go on to consider the issue of *forum conveniens*. I am fortified in this view which is borne out by a strong stream of jurisprudence to similar effect. One such leading authority is the pronouncement of Lord Collins in **Nilon** where after determining that '...there [wa]s no claim against Nilon to which Mr. Varma can be a necessary and proper party', His Lordship stated that 'it follows that the question of joining Mr. Varma as a necessary and proper party to the claim against Nilon does not arise, and a fortiori the issue of *forum conveniens* also does not arise'.

[84] However, consonant with the position taken by the Board in **Nilon,** and out of deference to the submissions canvassed by learned counsel on the *forum conveniens* point, it is appropriate to make the following observations.

[85] Firstly, the burden is on SIB to show that Antigua is the appropriate forum. It must be reiterated that the underlying retainer was between SFG and its affiliated entities and Proskauer to provide services to SFG in relation to the SEC investigation. Further, Mr. Sjoblom is an American lawyer and is not admitted to practise in Antigua. There are also ongoing claims in Texas in which SIB is represented by the

US Receiver and some of the claims are somewhat similar to those brought in Antigua. Even though SIB's claim is skillfully drafted, in my view, it has failed to adduce any evidence indicating that either the tort, contract or fiduciary claims have anything to do with Antigua. In those circumstances, SIB could not have shown that Antigua is clearly or distinctly the appropriate forum.

[86] In light of the foregoing, and for the sake of completeness, it would have been impossible in any event for SIB to convince the Court that Antigua was the appropriate forum. I am therefore of the view that SIB's appeal against the learned judge's finding on *forum conveniens* would have also failed, if it had become necessary to determine this issue.

[87] The judge's disposition on the application to set aside the order to serve the claim form and statement of claim outside of the jurisdiction is therefore upheld, not on the basis of *forum conveniens*, but as I have indicated, on the basis that SIB has failed to satisfy the jurisdictional gateways. Proskauer therefore succeeds on its cross appeal and it follows that SIB is unsuccessful on its appeal against the learned judge's decision on *forum conveniens*.

Costs

[88] In so far as Proskauer has succeeded in resisting SIB's appeal and prosecuting its own appeal, Proskauer shall have its costs below and no more than two thirds of the costs in the court below on its appeal and cross appeal. These costs are to be assessed by a master or judge of the High Court unless otherwise agreed within 21 days of the date of this judgment.

Disposition

[89] For the reasons given:

(a) I would allow Proskauer's cross appeal and dismiss SIB's appeal against the decision of the learned judge in its entirety. Accordingly, the leave granted to SIB to serve its claim form and statement of claim outside of

Antigua was appropriately set aside and to that extent, the decision of the learned judge is upheld.

(b) Proskauer, having prevailed on its cross-appeal and in resisting SIB's appeal, shall have its costs in relation to both. These costs are to be assessed by a master or judge of the High Court unless otherwise agreed within 21 days and shall be no more than two thirds of the costs in the High Court.

[90] I gratefully acknowledge the assistance of all learned counsel.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Gerard St. C. Farara, QC
Justice of Appeal [Ag.]

By the Court

EASTERN CARIBBEAN SUPREME COURT
SEAL
COURT OF APPEAL

Chief Registrar