[2013–14 Gib LR 209]

PICARD and BERNARD L. MADOFF INVESTMENT SECURITIES LLC (in liquidation) v. VIZCAYA PARTNERS and FOUR OTHERS

SUPREME COURT (Dudley, C.J.): June 19th, 2013

Conflict of Laws—jurisdiction—submission to jurisdiction of foreign court—submission by agreement—establishing submission by agreement has reasonable chance of success if contract in question subject to foreign law, therefore (i) power to enforce contract; (ii) contract constituted agreement to submit to jurisdiction of foreign courts although did not state so expressly; and (iii) agreement obtained by fraud voidable, not void—whether submissions on foreign law correct and applicable for substantive hearing, not summary judgment

Conflict of Laws—jurisdiction—submission to jurisdiction of foreign court—submission by presence—establishing defendant's submission by presence in foreign jurisdiction at time proceedings instituted has reasonable chance of success when consideration of foreign law required to determine whether (i) contract in question made foreign investor defendant's agent; (ii) investor undertaking investments on defendant's behalf established presence; or (iii) defendant was SPV for business via foreign investor—no actual business being carried out by foreign investor (actually fraud) not fatal to presence if transfer of moneys was contractual obligation—not settled law that presence obtained by fraud negatives jurisdiction—matters for consideration at substantive hearing, not at application for summary judgment

The first claimant sought the enforcement in Gibraltar of New York Bankruptcy Court judgments against the defendants.

The first defendant ("Vizcaya") received a sum of $150m. from the US company Bernard L. Madoff Investments Securities LLC ("BLMIS") less than three months before BLMIS went into voluntary liquidation when it emerged that it was operating as a large Ponzi scheme. BLMIS went into liquidation in New York, and the first claimant ("the trustee") was appointed as trustee to administer BLMIS's affairs. The moneys were received by the first defendant into its account with the second defendant bank ("Safra Gibraltar"), from where sums were transferred to the third, fourth and fifth defendants ("Zeus," "Asphalia" and "Siam" respectively).

The trustee sought recovery of the sums transferred from BLMIS to Vizcaya on the basis that, under New York law, it was "customer property"

to be applied to the debts owed by BLMIS. In August 2010, the trustee obtained default judgments against the various defendants in the New York Bankruptcy Court. Zeus agreed to pay the sums transferred to it into court in New York, and Siam settled with the trustee, leaving the New York default judgments live only against Vizcaya and Asphalia.

The trial to determine whether the default judgments were enforceable in Gibraltar was adjourned to await the outcome of a relevant decision of the UK Supreme Court, following which it was accepted that the trustee could only rely on the traditional common law principles to enforce the US default judgments. The trustee no longer sought to argue that the judgment against Asphalia was enforceable, but submitted that the US judgment was enforceable against Vizcaya as it had submitted to the jurisdiction of the New York Bankruptcy Court by agreement, under the terms of the customer agreement between Safra Gibraltar and BLMIS, or by being present in New York at the time the proceedings were initiated.

Vizcaya applied for summary judgment against the trustee on the grounds, *inter alia*, that (i) the trustee's case had been inadequately pleaded as it was based on an exception to the common law rules, and had not been amended to reflect the finding of the UK Supreme Court that the exception did not exist (and no permission to amend the pleadings should be granted as it was too late); (ii) Vizcaya was not subject to the jurisdiction of the New York Bankruptcy Court by virtue of having been present in New York, as it had no physical presence there, nor presence through BLMIS, as BLMIS was not its agent or representative, but merely transferred moneys to BLMIS for the purpose of investing and, in any event, no actual investments took place as the scheme was in reality a fraud; and (iii) Vizcaya had not submitted to the jurisdiction of the New York Bankruptcy Court by virtue of the customer agreement, as neither Vizcaya nor the trustee were a party to the agreement between Safra Gibraltar and BLMIS, the agreement contained no express submission to the jurisdiction of the New York Bankruptcy Court (and in fact on its terms indicated the contrary) and in any event the agreement was obtained by fraud and was, as a matter of Gibraltar law, void.

The trustee submitted in reply that, *inter alia*, (i) the arguments on submission by agreement had a real chance of success, as the customer agreement was governed by New York law, under which the trustee had the power to enforce the customer agreement, the terms of the agreement did not require an express statement of submission to the jurisdiction of the New York Bankruptcy Court, and the agreement was not void by virtue of the fraud; and (ii) the arguments on submission by presence had a real chance of success, as consideration of whether Vizcaya was present in New York at the time the proceedings against it were instituted required detailed submissions and consideration of the factual matrix, including the interpretation of the customer agreement as a matter of New York law, which required a substantive hearing; whether fraud negatived presence was not settled law and, although Vizcaya had ceased its dealing with

BLMIS when the proceedings were commenced, there were valid account management documents, which, under New York law, was sufficient.

Held, dismissing the application for summary judgment:

(1) The trustee had properly pleaded that the New York Bankruptcy Court had, as a matter of Gibraltar law, competent jurisdiction over Vizcaya. Both the traditional common law rules and the exception originally believed to exist had been properly encompassed in the pleadings, and it was not necessary for the trustee to have pleaded the specific basis on which recognition and enforcement of the New York judgments were sought (para. 7).

(2) If it had been necessary to amend the pleadings, permission to do so would have been granted as the application to amend did not come too late. Any need to amend the pleadings arose out of the decision of the UK Supreme Court that the apparent exception did not exist, the original adjournment pending that decision was granted on the application of Vizcaya and Asphalia, the further moratorium to study the implication of the decision was agreed by the parties and the trustee had proceeded appropriately since then; and the application to amend could therefore not be described as coming too late. This was especially true since Vizcaya failed to identify any prejudice it would have suffered as a result of granting the amendment, and was aware of the amended case advanced by the trustee (para. 8)

(3) The court would not give summary judgment on the question of whether Vizcaya submitted by agreement to the jurisdiction of the New York Bankruptcy Court, as (a) there had been inadequate time to address the matter of the custody agreement; and (b) evidence from the expert witness on New York law called by the trustee indicated that he had a reasonable chance of success in arguing that the customer agreement was subject to New York law, and that as a matter of New York law (i) the trustee had the power to enforce the contract; (ii) the customer agreement constituted an agreement to submit to the jurisdiction of the New York courts although it did not state so expressly; and (iii) the agreement being obtained by fraud did not make it void, but rather voidable. Whether these submissions as to New York law were correct and whether they were applicable in the present case were matters for a substantive hearing, and not suitable for proceedings to obtain summary judgment (paras. 11–16).

(4) Similarly, the court would not give summary judgment on the question of whether Vizcaya was present in New York when the proceedings against it were instituted, and thereby subject to the jurisdiction of the New York Bankruptcy Court. The trustee had a reasonable chance of succeeding with his submission that Vizcaya was an SPV created for the sole purpose of investing with BLMIS as its agent and that Vizcaya was therefore deemed to be present in New York. Determining whether the customer agreement made BLMIS Vizcaya's agent or whether BLMIS's

purportedly undertaking investments on Vizcaya's behalf established such presence, or whether Vizcaya was such an SPV as the trustee alleged, required detailed consideration of the facts and of New York law, and would therefore require a substantive hearing. Further, the fact that no actual business was carried out by BLMIS was not necessarily fatal to establishing presence if Vizcaya's transfer of money to BLMIS was a contractual obligation; it was not settled law that obtaining the purported presence by fraud would negative jurisdiction, nor was it certain that as a matter of New York law, Vizcaya's having ceased trading with BLMIS by the time the proceedings were instituted meant that any presence was terminated by that time (paras. 17–25).

Cases cited:

(1) *Adams* v. *Cape Indus. Plc*, [1990] Ch. 433; [1990] 2 W.L.R. 657; [1991] 1 All E.R. 929, considered.

(2) *Cambridge Gas Transp. Corp.* v. *Navigator Holdings PLC (Creditors' Cttee.)*, 2005–06 MLR 297; [2007] 1 A.C. 508; [2006] 3 W.L.R. 689; [2006] 3 All E.R. 829; [2007] 2 BCLC 141; [2006] BCC 962; [2006] UKPC 26, not followed.

(3) *IG Index Ltd*. v. *Ehrentreu*, [2013] EWCA Civ 95, considered.

(4) *Ingram* v. *Inland Rev. Commrs*., [2000] 1 A.C. 293; [1999] 2 W.L.R. 90; [1999] 1 All E.R. 297, referred to.

(5) *Rubin* v. *Eurofinance S.A.*, [2013] 1 A.C. 236; [2012] 3 W.L.R. 1019; [2013] 1 All E.R. 521; [2012] 2 BCLC 682; [2013] BCC 1; [2012] UKSC 46, applied.

K. Azopardi, *Q.C*., *Ms. S. Fatima*, *O. Smith* and *Ms. K. Power* for the claimant;

M. Driscoll, *Q.C*., *R. Vasquez, Q.C*. and *J. Gomez* for the first and fourth defendants;

L.E.C. Baglietto for the second defendant.

1 **DUDLEY, C.J.:** This is an application by Vizcaya Partners Ltd. and Asphalia Fund Ltd. for the dismissal of the claim pursuant to the Civil Procedure Rules, Part 24; for the release of certain moneys paid into court in this claim and claim No. 2009 M 13; and an enquiry as to damages arising from the payment into court and costs. Given the time constraints which arose in relation to the hearing of the application, not least as a consequence of the three-hour time estimate in the application notice, the matter went part-heard, and proceeded on the basis that, in the first instance, I would deal with the summary judgment application seeking dismissal of the claim for enforcement of a US default judgment against Vizcaya. The claimant ("the trustee") no longer seeks to argue that the US default judgment against Asphalia is enforceable.

Background

2 This action arises as a consequence of the fraudulent Ponzi scheme operated by Bernard Madoff, and the liquidation of his business, Bernard L. Madoff Investments Securities LLC ("BLMIS"). The trustee, appointed by the US Bankruptcy Court to deal with the administration of BLMIS, sought the recovery of $150m. transferred by BLMIS to Vizcaya on October 31st, 2008, which was within three months of the liquidation of BLMIS. It is asserted by the trustee that the moneys are recoverable under US law on the basis that it was a fraudulent transfer and/or preference, and comprise "customer property" to be administered by him. The moneys were received by Vizcaya in the account it held at Bank J. Safra (Gibraltar) Ltd., from where it transferred sums on to Zeus Partners Ltd., Asphalia and Siam Capital Management Ltd. When this action was instituted (there are five other extant actions, but for present purposes it is unnecessary to consider the interplay between them) the trustee did not seek a substantive determination of entitlement to the moneys transferred, but rather it sought ancillary relief supportive of US adversary proceedings issued by the trustee on April 9th, 2009 against the various parties. In February 2011, the court gave the trustee permission to amend the claim form to add claims seeking the enforcement of US default judgments which the trustee had obtained against the various parties on August 3rd, 2010. An application to enforce the US default judgment against Zeus was not pursued as Zeus agreed to transfer the funds held by it and paid into court in Gibraltar (a sum in excess of $61m.) to the custody of the US Bankruptcy Court. Thereafter, in September 2012, the trustee settled its claim with Siam, thereby leaving the claims for enforcement of the US default judgments live only as against Vizcaya and Asphalia. The sums paid into court currently remaining are some $10m. from the account held by Vizcaya with Safra Gibraltar, and some $1.8m. from the account held by Asphalia with Safra Gibraltar.

3 The trial of the enforcement claims was originally set down for June 6th–10th, 2011, but on May 23rd, 2011, Vizcaya and Asphalia sought an adjournment of the trial on three distinct grounds. I granted the adjournment on basis that *Rubin* v. *Eurofinance S.A.* (5), in which the English Court of Appeal had applied the principles enunciated by the Privy Council in *Cambridge Gas Transp. Corp.* v. *Navigator Holdings PLC (Creditors' Cttee.)* (2) was subject to an appeal before the UK Supreme Court, and that it was common ground that *Rubin* would be highly material, albeit not necessarily determinative, of the action.

4 In *Rubin* v. *Eurofinance S.A.* (in which the trustee intervened by a written submission by virtue of the relevance of the outcome to these and similar proceedings in the Cayman Islands), a majority of the UK Supreme Court held that *Cambridge Gas* was wrongly decided. The

trustee is now therefore unable to rely upon the *Cambridge Gas* bankruptcy exception to the effect that bankruptcy judgments are neither judgments *in rem* nor judgments *in personam*, and that rules of private international law concerning their recognition and enforcement do not apply. The primary contentious issue which now arises is whether the trustee can enforce the US default judgment against Vizcaya by the application of the traditional common law principles as set out in Rule 43 in 1 *Dicey, Morris & Collins on The Conflict of Laws*, 15th ed., at para. 14R–054 (2012), which received judicial approval from Lord Collins in *Rubin*, and which provides:

> ". . . [A] court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition as against the person against whom it was given in the following cases:
>
> ***First Case***—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.
>
> ***Second Case***—If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.
>
> ***Third Case***—If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.
>
> ***Fourth Case***—If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country."

In the present application the first and fourth cases are engaged.

5 It is against this backdrop that the application for summary judgment is made. The applicable principles when dealing with a Part 24 application premised on a point of law are to be found in *IG Index Ltd*. v. *Ehrentreu* (3) where Lewison, L.J. said ([2013] EWCA Civ 95, at para. 13):

> ". . . [I]t is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in

> law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd*. v. *TTE Training Ltd*., [2007] EWCA Civ 725."

Although the application notice is drawn in wide terms, there are three distinct limbs to the submissions which require consideration, and which, in shorthand, are: (1) adequacy of pleaded case; (2) presence in New York; and (3) agreement to submit.

The pleaded case

6 Mr. Driscoll advances the submission that the "real prospect of success" summary judgment test is to be measured against the case as pleaded, and that in the Part 8 details of claim, there has been a failure to plead that the New York Bankruptcy Court had, as a matter of Gibraltar law, competent jurisdiction over Vizcaya (or Asphalia). He surmises that the reason for that failure is that until the UK Supreme Court reversed the English Court of Appeal decision in *Rubin* (5) and held *Cambridge Gas* (2) to have been wrongly decided, there had been no need to advance the case; that therefore to rely now upon the common law rules is a departure from the pleaded case; that there is no application to amend, and that therefore the claim should be dismissed; and that even if such an application were to be made, it would require proper formulation and, in any event, it should be refused because it comes too late.

7 There is, in my judgment, little merit in the argument. Item 6 in the endorsement in the amended Part 8 claim form advances the following claim—". . . that the judgment or order of the New York Court dated August 3rd and 6th, 2010 against [Vizcaya] . . . for payment . . . be registered and/or enforced in Gibraltar, as if it were a judgment or order of the Supreme Court of Gibraltar." Thereafter, in attached details of claim, particulars of the US judgments and of letters of request from the US Bankruptcy Court are provided, with the basis for the relief sought set out at para. 31: "Further, the claimant seeks to register and/or enforce the US judgment against the first, fourth and fifth defendants, pursuant to such powers vested in the court at common law and/or in its inherent jurisdiction . . ." Before the UK Supreme Court decision in *Rubin*, the US judgments may have been capable of enforcement under the *Cambridge Gas* exception to the common law rules. Now what falls to be determined

is whether it is capable of enforcement under the traditional rules. The traditional rules and the erstwhile exception were common law rules and are properly encompassed in the pleaded case. I am fortified in that view in that 12(2) Atkin, *Encyclopaedia of Court Forms in Civil Proceedings*, 2nd ed., issue form 43, at pp. 149–50 (2009), does not suggest that it is necessary to plead the basis upon which recognition and enforcement of a foreign judgment is sought.

8 If I am wrong, and it was necessary to amend the pleadings, then I would grant permission to do so. The trial of the action was adjourned on May 24th, 2011 on the application of Vizcaya and Asphalia. The UK Supreme Court handed down its judgment in *Rubin* on October 24th, 2012 and the parties agreed to a 28-day moratorium to study its implications and consider their respective positions, with a further 14 days being agreed on December 4th, 2012. Before the expiry of the 14 days, on December 14th, 2012, the trustee's solicitors, in a lengthy letter to Vizcaya's solicitors stated, *inter alia*:

> ". . . [W]e confirm that our client will contend that the US judgment against Vizcaya is enforceable on the basis that there has been a submission to NY jurisdiction by Vizcaya. That issue . . . either needs to go to trial or be dealt with as a preliminary point within this action. In advance of that, we would intend to ask the court to give directions to facilitate that hearing."

Evidently, Vizcaya disagreed with the position adopted by the trustee and on December 21st, 2012 issued the present application notice with the overly optimistic time estimate of three hours. For its part, the trustee filed an application notice on January 13th, 2013 requesting a case-management conference which was given May 6th, 2013 as the return date, and which, in the event, was used for the adjourned hearing of this application. If there were a need to amend the pleadings, it arises as a consequence of the UK Supreme Court's determination in *Rubin* that *Cambridge Gas* was wrongly decided, and against that backdrop, and the manner in which the trustee has now sought to progress its claim, it cannot be said that the application for an amendment (which the trustee seeks, if necessary) can properly be described as coming too late. Particularly in circumstances where Vizcaya points to no specific prejudice it would suffer by the amendment and is aware of the case now being advanced by the trustee.

Submission by agreement

9 The arguments touching upon the issue of submission by agreement are, in large measure, predicated upon the contractual relationship existing between Safra Gibraltar, Vizcaya and BLMIS. As I understand the submissions, the trustee primarily relies upon a "customer agreement"

dated March 23rd, 2005 between BLMIS and Safra Gibraltar "as custodian for Vizcaya Partners Ltd." Of particular relevance, in the context of the submissions advanced, are the following terms:

> "7. *Broker as agent*
>
> The customer understands that the broker [BLMIS] is acting as the customer's agent, unless the broker notifies the customer, in writing, before the settlement date for the transaction, that the broker is acting as dealer for its own account or as agent for some other person."
>
> "10. *Choice of laws*
>
> This agreement shall be deemed to have been made in the state of New York and shall be construed, and the rights and liabilities of the parties determined, in accordance with the laws of the state of New York."
>
> "12. *Arbitration disclosures*
>
> . . . The parties are waiving their right to seek remedies in court, including the right to jury trial."
>
> "13. *Arbitration*
>
> The customer agrees, and by carrying an account for the customer the broker agrees that all controversies which may arise between us concerning any transaction or the construction, performance, or breach of this or any other agreement between us pertaining to securities and other property, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration under this agreement shall be conducted pursuant to the Federal Arbitration Act and the laws of the state designated in para. 10 . . ."

The submission advanced on the trustee's behalf is that the BLMIS/Safra [Vizcaya] customer agreement is subject to New York law and jurisdiction, and that the effect and construction of the agreement and general factual matrix underpinning the BLMIS/Vizcaya relationship is such that it constitutes submission by agreement. Reliance is also placed upon the use of the word "determined" in cl. 10, and it is said that premised upon that, the submission can be advanced that the clause goes beyond a choice of law clause but is also capable of being interpreted as a New York jurisdiction clause. Reliance is also sought to be placed upon the limited jurisdiction clause by which there is exclusive submission to arbitration by a US tribunal. In this regard, it is, I think, accepted that contractual submission to arbitration by a US tribunal does not necessarily amount to submission to the New York court generally, but that rather, as put in *Dicey, Morris & Collins* (*op. cit.*, at para. 14–076), ". . . the question is one of construction of the contract." However, the primary submission advanced for the trustee is that, the jurisdiction agreement and the

arbitration agreement being governed by the law applicable to the contract of which it forms part, it will in due course be necessary to adduce evidence of New York law on the relevant questions of construction.

10 Mr. Driscoll advances four alternative reasons in support of the proposition that Vizcaya has not submitted to the jurisdiction of the New York Bankruptcy Court, and should have summary judgment on that issue.

Reason 1

11 The customer agreement is between BLMIS and Safra Gibraltar; Vizcaya is not a party, as Safra Gibraltar is a trustee for Vizcaya, and a trustee is not an agent for a beneficiary. The general proposition of law advanced by Mr. Driscoll is in my view right (see *Ingram* v. *Inland Rev. Commrs*. (4)). However, in the present case, what falls to be determined is whether the custody agreement of April 18th, 2005, as amended by the further agreement of February 9th, 2007 (both subject to Gibraltar law with the Gibraltar courts having non-exclusive jurisdiction), which govern the "client"/"custodian" relationship between Vizcaya and Safra Gibraltar, makes the latter a trustee of the former. I accept that the nature of the relationship is a matter of interpretation and construction of the agreements, ascertainable from their four corners. The difficulty is that I was only referred to the custody agreement by Mr. Driscoll in his reply, and then only after I queried the basis upon which it was being asserted that Safra Gibraltar was a trustee. In my view, there has been inadequate opportunity to address this point in argument, and I decline the opportunity to consider the agreements and make a determination as to their effect in the absence of substantive submissions.

Reason 2

12 The short point advanced by Mr. Driscoll is that the trustee is not a party to the customer agreement. It is accurate to say that on the first day of the hearing of the application there was no evidence before the court to the effect that, as a matter of New York law, the trustee was entitled to enforce the contract. However, the application having gone part-heard at the adjourned hearing, for the reasons I gave at the time, I allowed the trustee to rely upon the witness statements of Professor Klee and Mr. Zeballos on the application of US law on a number of issues arising in the action. At para. 21 of his witness statement, Professor Klee has this to say:

> "A trustee appointed to administer a SIPA liquidation is 'vested with the same powers and title with respect to the debtor and the property of the debtor . . . as a trustee in a [bankruptcy case].' . . . Thus, upon commencement of a SIPA case, the SIPA trustee (like the trustee in a case under the Bankruptcy Code) steps 'into the shoes' of the debtor, accedes to all of the rights and interests of the debtor in property

> (including rights and interests under contracts), and obtains the exclusive power to exercise, control and/or dispose of those rights and interests on behalf of the estate. Commencement of the SIPA case does not terminate these rights and interests, but instead transfers them to the control of the trustee."

Evidently, this court, when necessary, will determine matters of foreign law as questions of fact. Professor Klee's expert evidence may or may not be accepted in due course, but on this issue, the trustee evidently has some prospect of succeeding.

Reason 3

13 Mr. Driscoll submits that the customer agreement is not, as a matter of words, an agreement to submit to the jurisdiction of the New York Bankruptcy Court, and that as a matter of Gibraltar law there must be an express agreement to submit to the jurisdiction of a foreign court. In support of that proposition, reliance is placed upon a passage in *Dicey, Morris & Collins* (*op. cit*., at para. 14–079):

> "It may be laid down as a general rule that an agreement to submit to the jurisdiction of a foreign court must be express: it cannot be implied. If the parties agree, expressly or by implication, that their contract shall be governed by a particular foreign law, it by no means follows that they agree to submit to the jurisdiction of the courts which apply it."

There is undoubtedly merit in the submission advanced that although cl. 10 of the customer agreement expressly provides that New York law applies, it does not on terms expressly establish submission by the parties to the courts of New York. The argument is developed further, and reliance is placed upon cl. 12 by which the parties waive their rights to seek "remedies in court," and it is submitted that, of itself, that clause demonstrates that no reliance can be placed upon the customer agreement as an agreement to submit to the jurisdiction of the New York Bankruptcy Court. Reliance is also placed upon the arbitration clause which, it is said, plainly shows that there is no agreement to submit to the jurisdiction of any court.

14 However, in my judgment, the possible flaw in Mr. Driscoll's submission is his contention that determination of whether there is an agreement to submit to the New York Bankruptcy Court is a matter of Gibraltar law and not New York law. I have previously alluded to Mr. Azopardi's primary submission that the jurisdiction agreement is governed by New York law, and that there is some merit in that is evident from the passage in *Dicey, Morris & Collins* (*op. cit*., at para. 12–103):

> ". . . [A]s a matter of common law, normally a jurisdiction agreement (like arbitration agreements . . .) is governed by the law applicable to

> the contract of which it forms a part. Accordingly, and as a matter of the common law principle of the conflict of laws, the law which governs the contract will also generally govern the jurisdiction agreement."

Whether or not this case falls within the general rule may require further argument, but for the purpose of this application it is apparent that the trustee can reasonably argue that New York law governs the jurisdiction agreement and, premised upon that, rely upon the expert evidence of Mr. Zeballos who, at para. 20 of his witness statement, opines—

> "As a matter of New York law (*i.e*., since it is the applicable law of the account management documents), Vizcaya agreed to the jurisdiction (and venue) of the New York courts. This is apparent from, *inter alia*, the fact it executed and agreed to the account management documents that explicitly establish a contractual agency relationship governed by New York substantive law . . ."

And later, at para. 22:

> "It is well settled under New York law that by agreeing to a contract governed by New York law, involving the transaction of business in New York by an agent, a party submits to the 'specific jurisdiction' of New York courts for adjudication matters arising from that contract."

Whether that factual matrix is in due course made out, or Mr. Zeballos' expert opinion evidence is accepted as fact is not capable of determination at this juncture but, in my view, the trustee has a prospect of succeeding on this issue.

Reason 4

15 The final submission advanced by Mr. Driscoll in opposition to the trustee's contention that the customer agreement is subject to the jurisdiction of the New York courts is premised on the submission that the agreement, having been obtained by fraud (it is not in dispute that BLMIS ran a giant Ponzi scheme and in fact there were no dealings in securities at all), the agreement is void and has no legal effect whatsoever. I am not sure whether the assertion that, as a matter of Gibraltar law, an agreement obtained by fraud is void, as opposed to voidable, is necessarily as clear-cut as is suggested. Or, indeed, that the interplay between fraud and the application of *ex turpi causa* in the present circumstances is capable of easy resolution. But in the event at this juncture they do not fall to be considered as the applicable law would appear to be New York law. According to the expert evidence of Mr. Zeballos, New York law holds that contracts induced by fraud are voidable and fraud does not "terminate or void the contract or the contractual relationship."

16 Mr. Driscoll questions the reliability of the evidence of Mr. Zeballos, in that in New York the trustee, through Baker Hostetler LLP, of which Mr. Zeballos is a partner, advances a contrary argument and it is said that a truly impartial independent witness would and should refer to the contrary arguments and attempt to distinguish them. In support of this contention, reliance is placed upon a memorandum of law dated September 28th, 2012, relied upon by the trustee in certain BLMIS litigation in the US, in which, *inter alia*, the following passage is to be found: "Defendants are not entitled to a safe harbour because any agreements and/or payments are against public policy and illegal and therefore void and unenforceable." The summary judgment process is not one which is designed towards assessing the reliability of witnesses, even if it is expert evidence of foreign law. But in any event, the criticism which is levied by Mr. Driscoll is in my view unduly harsh. It is apparent from the memorandum of law that the claim against the defendants, in that action, is that they were aware of or participated in Madoff's fraudulent scheme. That is not the case advanced against Vizcaya, and it is, I think, easy to understand how different legal principles can apply to these distinct sets of facts.

Submission by presence

17 It is not is dispute that the New York courts would, in principle, have jurisdiction if, at the time that the proceedings were instituted, Vizcaya had been present in New York. Mr. Driscoll initially identified the relevant date for determining presence as April 9th, 2009, that being the date on which the trustee filed a complaint in the New York Bankruptcy Court against Vizcaya and Safra Gibraltar, seeking the return of $150m. In *Adams* v. *Cape Indus. Plc*. (1), Slade, L.J., relying upon earlier authorities, suggested that the relevant date is that of service of process, rather than the date of issue of proceedings, and no doubt premised upon that, Mr. Driscoll subsequently asserted that the relevant date was April 23rd, 2009. Nothing material turns on which of the two is the relevant date.

18 In *Adams* v. *Cape*, undoubtedly the leading authority on presence in the context of the jurisdiction of foreign courts, the English Court of Appeal set out in some detail the applicable principles. Although somewhat extensive, it is worth setting out in full the following passage ([1990] Ch. at 530, *per* Slade, L.J.):

> "In relation to trading corporations, we derive the three following propositions from consideration of the many authorities cited to us relating to the 'presence' of an overseas corporation.
>
> (1) The English courts will be likely to treat a trading corporation incorporated under the law of one country ('an overseas corporation') as present within the jurisdiction of the courts of another country only if either (i) it has established and maintained at its own

expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a 'branch office' case), or (ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation's business in the other country at or from some fixed place of business.

(2) In either of these two cases presence can only be established if it can fairly be said that the overseas corporation's business (whether or not together with the representative's own business) has been transacted at or from the fixed place of business. In the first case, this condition is likely to present few problems. In the second, the question whether the representative has been carrying on the overseas corporation's business or has been doing no more than carry on his own business will necessitate an investigation of the functions which he has been performing and all aspects of the relationship between him and the overseas corporation.

(3) In particular, but without prejudice to the generality of the foregoing, the following questions are likely to be relevant on such investigation: (a) whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the overseas corporation; (b) whether the overseas corporation has directly reimbursed him for (i) the cost of his accommodation at the fixed place of business; (ii) the cost of his staff; (c) what other contributions, if any, the overseas corporation makes to the financing of the business carried on by the representative; (d) whether the representative is remunerated by reference to transactions, e.g. by commission, or by fixed regular payments or in some other way; (e) what degree of control the overseas corporation exercises over the running of the business conducted by the representative; (f) whether the representative reserves (i) part of his accommodation, (ii) part of his staff for conducting business related to the overseas corporation; (g) whether the representative displays the overseas corporation's name at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation; (h) what business, if any, the representative transacts as principal exclusively on his own behalf; (i) whether the representative makes contracts with customers or other third parties in the name of the overseas corporation, or otherwise in such manner as to bind it; (j) if so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations.

This list of questions is not exhaustive, and the answer to none of them is necessarily conclusive. If the judge, ante, p. 476B–C, was

intending to say that in any case, other than a branch office case, the presence of the overseas company can never be established unless the representative has authority to contract on behalf of and bind the principal, we would regard this proposition as too widely stated. We accept Mr. Morison's submission to this effect. Every case of this character is likely to involve 'a nice examination of all the facts, and inferences must be drawn from a number of facts adjusted together and contrasted:' *La Bourgogne* [1899] P. 1, 18, *per* Collins, L.J.

Nevertheless, we agree with the general principle stated thus by Pearson, J. in *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139, 146:

'A corporation resides in a country if it carries on business there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the agency is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval . . ."

On the authorities, the presence or absence of such authority is clearly regarded as being of great importance one way or the other. A fortiori the fact that a representative, whether with or without prior approval, never makes contracts in the name of the overseas corporation or otherwise in such manner as to bind it must be a powerful factor pointing against the presence of the overseas corporation."

19 Mr. Azopardi submits that the application of that test requires detailed submissions of law and consideration and determination of matters of fact as to how (if at all) Vizcaya transacted business in New York. Essentially, his "outline" substantive submissions on the presence issue are that whilst Vizcaya is registered in the British Virgin Islands, in no real sense does it carry out business from there; that it is a special purpose vehicle involved in the investment of moneys, and that it did this and nothing else for six years in New York, and solely through its agent BLMIS, under a contract subject to New York law and US/New York arbitration; that although Vizcaya held an account with Safra Gibraltar, the money would wend its way via Safra Suisse, and that prior to 2005 Safra France had been used instead of Safra Gibraltar; and against that factual matrix, that Vizcaya was "present" for the purposes of the *Adams* v. *Cape* test.

20 For Vizcaya, six alternative reasons are advanced as to why, as a matter of Gibraltar law, Vizcaya was not present in New York. I shall not deal with them in the same order as Mr. Driscoll, and to the extent that some merge, I deal with them together.

21 It is said that the moneys sent to New York were sent by Safra Gibraltar, as trustee for Vizcaya, which invested in New York and that a trustee is not an agent for its beneficiary. From this, it follows that by virtue of the customer agreement, BLMIS may be Safra Gibraltar's agent but not Vizcaya's agent. For the reasons I gave at para. 11 above, at this stage this submission fails.

22 The essence of four of the reasons advanced can be summarized as follows: (a) presence means an actual physical presence, not a notional one; (b) Vizcaya had no office in New York and no employees or directors present there; (c) Vizcaya had no control over BLMIS's offices and business, and made no direct financial contribution towards it; and (d) Vizcaya merely transferred moneys to BLMIS in New York for investment by BLMIS in securities dealings; (e) investing does not amount to carrying on business in New York, but that in any event no business was in fact carried out, because BLMIS was not investing the moneys but rather it was all a giant Ponzi fraud. Allied to that is the submission that presence obtained by deception or fraud is not presence for the purpose of establishing jurisdiction. In this regard, Mr. Driscoll relies upon the judgment of Slade, L.J. in *Adams* v. *Cape* (1) ([1990] Ch. at 518): ". . . [W]e accept the submission . . . that the temporary presence of a defendant on a foreign country will suffice provided at least that it is voluntary (i.e. not induced by compulsion, fraud or duress)."

23 All these are undoubtedly relevant factors premised upon which persuasive submissions can legitimately be advanced. Whether, however, the customer agreement makes BLMIS Vizcaya's agent or whether BLMIS, by purportedly undertaking investments on Vizcaya's behalf, establishes presence in New York requires detailed consideration of the facts and, to the extent that the customer agreement falls to be interpreted, evidence of New York law. If, as a matter of New York law, BLMIS was Vizcaya's agent, then the passage in *Dicey, Morris & Collins* (*op. cit*., at para. 14–064) is apposite:

> "The question whether at common law a foreign court has jurisdiction over an individual who is neither resident or present within the foreign jurisdiction but who carries on business regularly there through an agent has been raised but not decided . . ."

24 Alternatively, if it is established that Vizcaya was an SPV created for the sole purpose of investing in New York with BLMIS, the trustee can, in my view, properly advance the submission that it was carrying on business in New York. That, in fact, business was not transacted by BLMIS may be a material factor, but one which need not of itself necessarily negative presence, in that if Vizcaya, by placing the moneys with BLMIS, was discharging its contractual obligations, that might suffice to establish presence. That such presence may have been obtained by fraud because

BLMIS was engaged in a giant Ponzi scheme is the somewhat distinct point which is also advanced. In that regard it is noteworthy that the learned editors of *Dicey, Morris & Collins* do not interpret the passage in *Adams* v. *Cape* (1) relied upon by Mr. Driscoll as establishing a point of principle, but rather state (*ibid*.):

> "The Court of Appeal referred to the 'voluntary' presence of the defendant as being one not induced by compulsion, fraud or duress, but it is clear from the context that it was not finally decided that the presence of these factors would negative jurisdiction."

25 The final basis upon which it is said that presence is not made out is that as at April 23rd, 2009, Mr. Madoff had already been arrested, and BLMIS gone into liquidation, and that if Vizcaya had ever traded through BLMIS it had ceased to do so in December 2008. There is undoubtedly apparent merit in this submission; the applicable law of the account management documents is, however, New York law—and at this stage the trustee relies upon expert evidence of New York law by Mr. Zeballos that these were valid when the trustee commenced the adversary proceedings. Undoubtedly, detailed expert evidence will be required on this issue but at this stage on the material before me it would be inappropriate to give summary judgment.

26 Towards the conclusion of the hearing, Vizcaya sought to rely upon a letter dated December 11th, 2008 from Safra Gibraltar, *qua* custodian to BLMIS, in which it sought to "immediately redeem all positions." Following the conclusion of the hearing a witness statement was filed by Mr. Vasquez, explaining how the existence of the letter came to his attention at the lunchtime adjournment of the hearing. I do not ignore its potential relevance, but, given the nature and value of this litigation, it would be unfair on the trustee if I were to place any reliance upon it without giving him the opportunity to properly consider his position. In any event, it strikes me that this letter may well require interpretation in line with the account management documents, and therefore likely that issues of expert evidence of New York law will also arise.

27 For these reasons, Vizcaya's application for summary judgment fails. To the extent that the parties are unable to agree, I shall hear them on the detail of the directions which should issue to progress the matter to a substantive hearing. I shall also hear further submissions in respect of the orders to be made in relation to Asphalia and costs.

Orders accordingly.