[2016 Gib LR 336]

BWIN.PARTY DIGITAL ENTERTAINMENT LIMITED v. EMERALD BAY LIMITED, STINSON RIDGE LIMITED, R. PARASOL DeLEON and J.R. DeLEON

SUPREME COURT (Jack, J.): December 2nd, 2016

Injunctions—anti-suit injunction—circumstances in which made—grant of anti-suit injunction discretionary—granted in respect of US proceedings if parties previously agreed US courts not to have jurisdiction, and Gibraltar appropriate jurisdiction for determination of dispute

The claimant applied for an anti-suit injunction.

The claimant, an online gambling business, had been formed by the merger of two companies in 2011. The merger had been preceded by an agreement ("the 2010 agreement") between the two companies, the third and fourth defendants and others. The third and fourth defendants held shares in one of the businesses (the shares were held through Gibraltar companies: the first and second defendants). The 2010 agreement envisaged that the claimant might wish to take advantage of emerging business opportunities. It provided that if certain conditions were met the claimant could consider that there was a qualifying business opportunity. It could then serve a notice on the defendants that would trigger various duties on their part to assist the claimant to take advantage of the opportunity.

In 2013, online gambling was permitted in New Jersey. The claimant considered that this created a qualifying business opportunity and served a notice on the defendants. Negotiations between the claimant, the New Jersey regulator (the Division of Gaming Enforcement, "the DGE") and the defendants resulted in a divestiture agreement under which the defendants' shares in the claimant were to be sold ("the 2014 agreement"). The share price declined, however, and the defendants wished to obtain an

extension of the two-year divestiture period. They alleged that the claimant initially agreed to support their claim for an extension but subsequently refused to assist them. They claimed to have sold the shares at a heavy loss. A few months later, a takeover offer was made for the claimant at a much higher price per share.

In May 2016, the defendants issued proceedings against the claimant in the Superior Court of New Jersey. The complaint was said to be brought for fraud, negligent misrepresentation, tortious interference with prospective business advantage, breach of contract, breach of an implied covenant of good faith and fair dealing, and promissory estoppel.

In July 2016, the Chief Justice granted the claimant a temporary anti-suit injunction in respect of those proceedings.

The 2010 agreement stated, in cl. 10.1, that it would be governed by and construed in accordance with English law but that the interpretation of the requirements of any regulatory process and the laws of any regulatory body would be governed by and construed in accordance with the laws of the jurisdiction of such process or body. "Regulatory process" was defined as "all or any of obtaining, renewing or amending a licence, being confirmed as suitable or completing some other form of regulatory process with respect to Gaming." Clause 10.2 provided for the courts of England to have non-exclusive jurisdiction to settle any dispute arising in connection with the creation, validity, *etc*. of the agreement, and that the US courts would have no jurisdiction to settle disputes unless the relevant parties were resident there at the relevant time. Clause 10.3 provided that "notwithstanding Clause 10.2, any disputes regarding a Regulatory Process shall be governed by the laws of the jurisdiction of that Regulatory Process and the courts of England shall have non-exclusive jurisdiction to settle any such disputes."

Clause 27 of the 2014 agreement provided that in the event of any conflict or inconsistency between the 2014 agreement and any other agreement between the parties, the 2014 agreement would prevail. Clause 28 provided, *inter alia*, that the agreement should be enforced and interpreted before the DGE pursuant to the provisions of the Casino Control Act.

The claimant sought the continuation of the anti-suit injunction. It submitted *inter alia* that cl. 10.2 of the 2010 agreement, which excluded the jurisdiction of the US courts, continued to apply to the disputes raised by the defendants in the New Jersey complaint.

The defendants submitted *inter alia* that (a) the whole of the 2010 agreement had been superseded by the 2014 agreement; alternatively (b) the New Jersey complaint raised issues about regulatory process so that, under cl. 10.3, the New Jersey courts had jurisdiction.

Held, granting the anti-suit injunction:

(1) Jurisdiction clauses were not subject to the rules on ascertaining the true law of a contract provided by Council Regulation (EC) No. 593/2008 (Rome I). The ordinary rules of English and Gibraltar conflicts of laws

therefore applied. Under these rules, the proper law of a contract in general would govern the jurisdiction clause. Article 4(1) of the Council Regulation (EU) No. 1215/2012 (recast) (Brussels I) provided that "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." That was, however, subject to the exception in art. 25(1) that if the parties, regardless of their domicile, had agreed that the courts of a Member State were to have jurisdiction to settle any disputes in connection with a particular legal relationship, those courts would have jurisdiction unless the agreement were void. Although New Jersey was not a Member State, it was appropriate to apply these provisions when considering the choice of the jurisdiction in the 2010 and 2014 agreements. The standard to be applied in determining whether the court had jurisdiction was that of a "good arguable case," which required the defendants to show that they had a much better argument than the claimant that the usual rule in art. 4(1) of Brussels I Regulation (recast) was ousted by art. 25 (paras. 38–45).

(2) The Supreme Court of Gibraltar had jurisdiction under art. 4 of the Brussels I Regulation (recast). Clause 10.3 of the 2010 agreement merely permitted matters of regulatory process to be litigated before US courts. The causes of action relied on in the New Jersey complaint were not disputes regarding regulatory process, which was a defined term, but ordinary private law claims. Entering the 2014 agreement was a precondition to "obtaining, renewing or amending a licence" or "completing some other form of regulatory process with respect to Gaming" and did not fall within regulatory process as defined. The background to the claim was the New Jersey regulatory environment but that did not make the claim a dispute regarding a regulatory process. Moreover, cl. 10.3 was an exception to cl. 10.2 and had therefore to be construed narrowly. Nor did cl. 28 of the 2014 agreement, which provided for the agreement to be enforced and interpreted before the DGE pursuant to the provisions of the New Jersey law, give the New Jersey courts jurisdiction in this matter. The DGE and the New Jersey Casino Control Commission could determine regulatory issues but they had no jurisdiction to determine private law disputes. The DGE could not therefore determine the defendants' New Jersey complaint. Under art. 3 of the Rome I Regulation, the parties had freedom to choose the law applicable but the choice had to be expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. A choice of New Jersey law was not expressly or clearly demonstrated. The express provision for DGE jurisdiction was a limited, not a general, submission to the New Jersey jurisdiction. The 2010 agreement expressly provided for regulatory matters to be subject to the law of the regulatory jurisdiction and other matters to be subject to English law. In addition, cl. 27 of the 2014 agreement recognized that the 2010 agreement would continue to govern the parties' relationships, except insofar as the 2014 agreement was inconsistent with it. In the absence of a choice of law, art. 4(2) of the Regulation provided that the agreement would be governed by the law of the country where the party

required to effect the characteristic performance of the contract had his habitual residence. The characteristic performance of the 2014 agreement was the divestiture of shares by the trustees, who were habitually resident in Gibraltar. Gibraltar law therefore applied (save insofar as there was express jurisdiction given to the DGE) (paras. 46–54; paras. 59–62; para. 68; para. 71).

(3) An anti-suit injunction would be granted. The grant of an anti-suit injunction was discretionary but the court's starting point was that the parties had agreed that the US courts should not have jurisdiction over the disputes raised in the New Jersey complaint. Gibraltar was a perfectly appropriate jurisdiction for the determination of the disputes. The claimant's business was run from here, all the parties resided here, the alleged misrepresentations had been made here or in London, and most of the lay witnesses were in Gibraltar or Europe. Although New Jersey courts would be more familiar with New Jersey gaming law, that might not be a particular advantage as the defendants had requested trial with a civil jury. The main indicator in favour of New Jersey was that experts on New Jersey regulatory procedures would be to hand, rather than having to travel to Gibraltar. Neither Gibraltar nor New Jersey was a *forum non conveniens*. When exercising its discretion to grant the anti-suit injunction, the court considered that there was nothing substantial to weigh against the claimant's contractual entitlement not to be sued in New Jersey (paras. 72–76).

Cases cited:

(1) *Bols Distilleries B.V. (t/a Bols Royal Distilleries)* v. *Superior Yacht Servs. Ltd*., [2006] UKPC 45; 2005–06 Gib LR 143; [2007] 1 W.L.R. 12, applied.

(2) *Campione* v. *Adamar of New Jersey* (1998), 155 N.J. 245, referred to.

(3) *Chartbrook Ltd.* v. *Persimmon Homes Ltd.*, [2009] UKHL 38; [2009] 1 A.C. 1101; [2009] 3 W.L.R. 267; [2009] 4 All E.R. 677, referred to.

(4) *Coreck Maritime GmbH* v. *Handelsveem BV* (Case C–387/98), [2000] E.C.R. I-9337; [2001] C.L.C. 550, applied.

(5) *Joint Stock Co. Aeroflot—Russian Airlines* v. *Berezovsky*, [2013] EWCA Civ 784; [2013] 2 Lloyd's Rep. 242; [2013] 2 C.L.C. 206, considered.

(6) *Owusu* v. *Jackson (t/a Villa Holidays Bal-Inn Villas)* (Case C–281/02), [2005] Q.B. 801; [2005] 2 W.L.R. 942; [2005] 1 C.L.C. 246, referred to.

(7) *Premium Nafta Products Ltd.* v. *Fili Shipping Co. Ltd.*, [2007] UKHL 40; [2007] 4 All E.R. 951; [2007] 2 All E.R. (Comm) 1053; [2007] Bus. L.R. 1719, applied.

(8) *Skype Technologies SA* v. *Joltid Ltd.*, [2009] EWHC 2783 (Ch); [2011] I.L.Pr. 8, applied.

(9) *UBS AG* v. *HSH Nordbank AG*, [2009] EWCA Civ 585; [2010] 1 All E.R. (Comm) 727; [2009] 2 Lloyd's Rep. 272, applied.

(10) *Vizcaya Partners Ltd.* v. *Picard*, [2016] UKPC 5; 2016 Gib LR 18; [2016] 3 All E.R. 181; [2016] Bus. L.R. 413, considered.

Legislation construed:

Council Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I), art. 4(2): The relevant terms of this paragraph are set out at para. 62.

Council Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art. 4(1): The relevant terms of this paragraph are set out at para. 41.

art. 25(1): The relevant terms of this paragraph are set out at para. 41.

D. Lewis, *Q.C.* and *S. de Lara* for the claimant;
K. Azopardi, *Q.C.*, *O. Smith* and *J. Wahnon* for the defendants.

1 **JACK, J.:** This is an application by the claimant ("Bwin Gibraltar") for the continuation of an anti-suit injunction granted *ex parte* on notice by Dudley, C.J. on July 27th, 2016 preventing the defendants ("the Parasol/DeLeon parties") pursing litigation now pending in the Superior Court of New Jersey in the United States of America. The Parasol/DeLeon parties cross-apply to challenge the jurisdiction of this court. They seek the dismissal or a stay of the current action in favour of the New Jersey action.

Background facts

2 The background to the two sets of litigation is the 2011 merger of two internet gambling businesses, Bwin Interactive Entertainment AG ("Bwin Austria"), an Austrian company, and PartyGaming plc ("PartyGaming"), a Gibraltarian public limited company. Although originally it was envisaged that the merger would take place by PartyGaming being converted into a new *societas europaea* and absorbing Bwin Austria, in fact PartyGaming merely renamed itself as Bwin.Party Digital Entertainment plc and absorbed Bwin Austria under the Companies (Cross-Border Merger) Regulations 2010. Subsequently Bwin.Party Digital Entertainment plc converted itself into an ordinary limited company, the current claimant. Thus Bwin Gibraltar is the same corporate entity as PartyGaming.

3 The third defendant ("Ms. Parasol") was an internet pioneer. In 1997 she founded Starluck Casino, an online gaming site, which was a precursor of PartyGaming. The fourth defendant ("Mr. DeLeon") joined PartyGaming in 2001 and became a minority founding shareholder in 2002. Ms. Parasol and Mr. DeLeon married in 2003. They divorced in 2014.

4 From 2004 onwards, Ms. Parasol and Mr. DeLeon held approximately equal shares in PartyGaming. Ms. Parasol held her shares through the first defendant ("Emerald") and Mr. DeLeon through the second defendant ("Stinson"), both Gibraltar companies. In 2005, PartyGaming was floated on the London Stock Exchange. Ms. Parasol and Mr. DeLeon sold some of their shares, retaining 58,498,667 and 58,498,666 shares respectively, about 14.18% of the stock each. From December 2006, Ms. Parasol and Mr. DeLeon withdrew from any executive or consultant function with PartyGaming; their only role thenceforth was as shareholders.

5 Ms. Parasol now resides in Gibraltar and Israel, whilst Mr. DeLeon resides in Gibraltar and England.

6 The merger of Bwin Austria and PartyGaming was preceded by an agreement dated July 29th, 2010. However, this agreement was amended and restated on December 22nd, 2010 and it is this latter agreement ("the 2010 agreement") on which the parties rely in the current applications. In addition to PartyGaming, Bwin Austria and the Parasol/DeLeon parties, there were another six parties to the 2010 agreement but these are irrelevant for current purposes.

7 The 2010 agreement envisaged that Bwin Gibraltar might wish to take advantage of emerging business opportunities. In particular, it was possible that various states in the United States of America might lift some of the restrictions which prevented Bwin Gibraltar providing internet gambling facilities in the United States. Detailed provisions were made for what Bwin Gibraltar could and should do if it wished to take advantage of such opportunities. In particular, if certain conditions were met, Bwin Gibraltar could consider that there was a "Qualifying Business Opportunity." It could then serve a "QBO notice" on the Parasol/DeLeon parties, which triggered various duties on the part of the Parasol/DeLeon parties to assist Bwin Gibraltar in taking advantage of the business opportunity.

8 New Jersey had since 1976 permitted gambling in casinos in Atlantic City. The relevant legislation is and was the Casino Control Act ("CCA"). The regulator is the Division of Gaming Enforcement ("DGE"), which is part of the New Jersey Department of Law and Public Safety. On February 26th, 2013, the New Jersey legislature approved and the governor of the state signed a law which amended the CCA so as to permit internet gambling in New Jersey with effect from November 26th, 2013.

9 Bwin Gibraltar considered that these changes in New Jersey law gave rise to a qualifying business opportunity under the 2010 agreement. On June 12th, 2013, it served a QBO notice on the Parasol/DeLeon parties pursuant to the 2010 agreement. Shortly before, on June 10th, 2013, it formed a New Jersey corporation called Bwin.Party Entertainment NJ LLC ("Bwin NJ") which was to be the corporate vehicle for the proposed online gaming business in New Jersey. Bwin NJ was managed from

Atlantic Suites, Gibraltar but with an address for service in West Trenton, New Jersey.

10 The service of the QBO notice resulted in three-way negotiations between Bwin Gibraltar, the DGE and the Parasol/DeLeon parties. This resulted in a divestiture agreement dated October 30th, 2013 in order that the remaining shares in Bwin Gibraltar held by the Parasol/DeLeon parties might be sold. As a result of the need to change the trustee, the divestiture agreement was amended and restated on January 27th, 2014 and it is this agreement ("the 2014 agreement") on which the parties rely in the current cross-applications.

11 The parties to the 2014 agreement were (1) Bwin Gibraltar, (2) the DGE, (3) Samuel Vidal Moses Cohen ("Mr. Cohen") as trustee of the Emerald Trust, (4) Christopher Vujnovich ("Mr. Vujnovich") as trustee of the Stinson Trust, (5) Frederick Devesa ("Judge Devesa") as protector of the Emerald Trust and the Stinson Trust, and (6)–(9) the Parasol/DeLeon parties. Mr. Cohen and Mr. Vujnovich were both Gibraltarian residents. They were to hold the shares of Emerald and Stinson respectively in order to dispose of them in accordance with the 2014 agreement. Judge Devesa was a retired New Jersey judge, although living in Pennsylvania, who was nominated by the DGE to ensure that the terms of the two trusts were honoured. The initial period for divestiture of the shares ("the grantor disposal period") was two years from the "authorised state go-live date," in practice November 26th, 2013.

12 On November 26th, 2013, the share price of Bwin Gibraltar was 128.6 pence. The price declined throughout 2014. By December 2014, it had dropped to 110 pence. Thereafter it dropped further, hitting an all-time low of 75.72 pence on April 17th, 2015. The drop in the share price, the Parasol/DeLeon parties allege, made the disposal of shares difficult because, in an illiquid market, sales of shares tended to destabilize the market. As a result, the Parasol/DeLeon parties wished to obtain an extension of the divestiture period. This required the agreement of the DGE. The Parasol/DeLeon parties say that Bwin Gibraltar originally, in April 2015, agreed to support their claim for an extension of the divestiture period from the DGE but they complain that Bwin Gibraltar reneged on the agreement and refused to assist them in obtaining an extension. In consequence, they say, they sold the remaining shares at a heavy loss, with the last disposal on June 16th, 2015 to a firm called Numis Securities for 93 pence per share.

13 Subsequently, in September 2015, another online gaming company, GVC, made a take-over offer for Bwin Gibraltar. When it was first announced, the value of the offer was 129.64 pence per share but on completion on February 1st, 2016, the offer was worth 143.041 pence per share.

14 On May 13th, 2016, the Parasol/DeLeon parties issued proceedings against Bwin Gibraltar in the Superior Court of New Jersey. I shall return to the relief sought and the causes of action relied upon. The complaint in that action (the equivalent of our particulars of claim) demanded a jury trial.

15 On July 4th, 2016, Bwin Gibraltar issued the current proceedings seeking an anti-suit injunction in respect of the existing New Jersey proceedings and a general injunction against any proceedings being brought against Bwin "in any court or tribunal, except before the Supreme Court of Gibraltar." It is now conceded that this second head of relief was on any basis too wide in that the Brussels I Regulation (recast) (Council Regulation (EU) No. 1215/2012), the revised Lugano Convention 2007 and (as regards Denmark) the Brussels Convention 1968 prevent anti-suit injunctions in respect of proceedings before courts in the European Economic Area.

16 On July 27th, 2016, Dudley, C.J. heard an application by Bwin Gibraltar for a temporary anti-suit injunction. The application was heard *ex parte* on notice. The Parasol/DeLeon parties undertook until the return date not to prosecute, continue or take any steps in the New Jersey proceedings, or to commence any proceedings against Bwin Gibraltar in any court or tribunal other than the Supreme Court of Gibraltar.

17 In the meantime, Bwin Gibraltar filed a motion in the New Jersey court seeking dismissal of the New Jersey proceedings. By a consent order dated August 24th, 2016, the New Jersey court ordered that the time for the Parasol/DeLeon parties to file a response to Bwin Gibraltar's motion to dismiss be extended until after the determination of the current applications by this court.

The 2010 agreement

18 The 2010 agreement is a 70-page document. Clause 1 contains definitions. "Qualifying Business Opportunity" is defined as meaning:

> "A Business Opportunity that a majority of Independent Directors and both Chief Executive Officers of the Company (or the Chief Executive Officer if there is only one) acting on a good faith basis and on reasonable grounds:
>
> (a) approve as in the best interest of the Company;
>
> (b) conclude is a Material Business Opportunity; and
>
> (c) conclude that the Business Opportunity is capable of being, and would likely be, closed (in the case of a Business Opportunity that is a transaction with a third party) or commenced (in the case of a Business Opportunity that is not

a transaction with a third party) within 120 days of completion of the relevant Regulatory Process."

"Material Business Opportunity" is defined as:

"A Business Opportunity which . . . (b) if pursued, the Merged Group's market capitalisation would, in the judgement of a majority of Independent Directors and both Chief Executive Officers of the Company (or the Chief Executive Officer if there is only one) acting on a good faith basis and on reasonable grounds, likely to be at least 5 per cent higher if such Business Opportunity were to be closed (in the case of a Business Opportunity that is a transaction with a third party) or commenced (in the case of a Business Opportunity that is not a transaction with a third party) than if it had not been so closed or commenced (as the case may be), in the 12 months following the later of the closing or commencement (as the case may be) of such Business Opportunity (assuming the commencement of the 12 month period takes place reasonably promptly following the successful completion of the Regulatory Process)."

"Regulatory Process" is defined as meaning "all or any of obtaining, renewing or amending a licence, being confirmed as suitable or completing some other form of regulatory process with respect to Gaming."

19 Clause 4 sets out a detailed procedure to be followed, which is summarized by Mr. Hoskin for Bwin Gibraltar as follows:

"Stage 1: The Company's directors identify a Business Opportunity.

Stage 2: The Company commences a consultation process with the shareholders, who are given the opportunity to consult with the Company's financial and legal advisors, *etc.* to consider the merit and viability of the Business Opportunity.

Stage 3: The Company then considers whether the Business Opportunity constitutes a Qualifying Business Opportunity and, if so, provide[s] the shareholders with updated information on the proposed opportunity.

Stage 4: The shareholders accept the business proposal.

Stage 5: In the event that the relevant authorities require the shareholders to take any action (*e.g.* the disposal of shares) with regard to their Shares, then the Company serve a QBO Notice so that they comply with the authorities' direction."

20 Clause 10 is a law and jurisdiction provision. It reads:

"10.1 This Agreement will be governed by and construed in accordance with the laws of England, provided that the interpretation

of the requirements of any Regulatory Process and the laws of any Regulatory Body shall be governed by and construed in accordance with the laws of the jurisdiction of such Regulatory Process or such Regulatory Body.

10.2 The parties agree that the courts of England are to have non-exclusive jurisdiction to settle any dispute (including claims for set-off and counterclaims) which may arise in connection with the creation, validity, effect, interpretation or performance of, or the legal relationships established by, this Agreement or otherwise arising in connection with this Agreement. The parties further agree that the courts of the United States and Canada and each of their respective territories and possessions will have no jurisdiction to settle any such dispute unless the relevant parties are resident in such jurisdiction at the relevant time.

10.3 Notwithstanding Clause 10.2, any disputes regarding a Regulatory Process shall be governed by the laws of the jurisdiction of that Regulatory Process and the courts of England shall have non-exclusive jurisdiction to settle any such disputes."

The QBO notice

21 As noted above, on June 12th, 2013, Bwin Gibraltar served its QBO notice on the Parasol/DeLeon parties. The substance of the notice says:

"Pursuant to the terms of the 2010 Agreement, we hereby inform you that:

"1. A majority of the Independent Directors and the Chief Executive Officer of [Bwin Gibraltar] acting on a good faith basis and on reasonable grounds has concluded that the New Jersey Business Opportunity is a Qualifying Business Opportunity . . . and that [Bwin Gibraltar] could not lawfully engage in the new Jersey Qualifying Business Opportunity without completing the relevant New Jersey Regulatory Process and without the Substantial Shareholders [*i.e.* the Parasol/DeLeon parties] taking the actions contemplated by clause 4.3(a) of the 2010 Agreement or disposing of Shares such that they own, in aggregate, less than a maximum percentage of the issued Shares of [Bwin Gibraltar].

2. [This deals with an agreement made with Boyd Gaming Corp.]

3. A majority of the Independent Directors and the Chief Executive Officer of [Bwin Gibraltar] acting on a good faith basis and on reasonable grounds has concluded that they are confident the relevant New Jersey Regulatory Process will be successfully completed if and when the Substantial Shareholders successfully comply with clauses 4.3 and 4.6 of the 2010 Agreement."

The 2014 agreement

22 The 2014 agreement recites Bwin Gibraltar's application for a New Jersey online gaming licence, which was then "in the process of being considered and investigated by the DGE." It recited that Emerald and Stinson held all respectively of Ms. Parasol's and Mr. DeLeon's shares in Bwin Gibraltar. Recital (E) said:

> "In order to facilitate the consideration of the Licence Application, [Ms. Parasol] and [Mr. DeLeon] have agreed to enter into an irrevocable divestiture trust arrangement whereby the entirety of the [Bwin Gibraltar] Shares held by them (directly or indirectly) at the Effective Date will be placed in divestiture trusts (the Trusts) in the form of the documents attached hereto at Annexes 1-A and 1-B, so as to bring about the orderly divestiture of the [Bwin Gibraltar] Shares in a matter acceptable to [Ms. Parasol, Mr. DeLeon, Bwin Gibraltar] and the DGE."

23 Clause 4 made detailed provision for the disposal of the shares by the trustees. Clause 10 imposed an obligation to provide the DGE with information and then provided that—

> "any breach of the terms of this Agreement or failure to cooperate by any party may result in a monetary fine . . . and/or a finding by the DGE of non-cooperation for the party or parties deemed by the DGE to be violating or failing to cooperate with the terms of this Agreement, pursuant to [various provisions of the CCA]. In the event of any breach of the terms of this Agreement by the Trustees, Protector or [Ms. Parasol or Mr. DeLeon], [Bwin Gibraltar] shall have the right to seek specific performance from the DGE or seek any of the remedies listed in clause 20 of the Agreement against the Trustees, Protector and/or [Ms. Parasol and Mr. DeLeon] so as to ensure compliance by the Trustees, Protector or [Ms. Parasol and Mr. DeLeon] of all the terms of this Agreement."

Clause 20 provided:

> "Without prejudice to any other rights or remedies that the parties may have, each party acknowledges and agrees that damages would not be an adequate remedy for any breach of the terms of this Agreement. Accordingly, the parties shall be entitled, without proof of special damages, to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of the terms of this Agreement."

24 Clause 19 sets out various warranties which Bwin Gibraltar gave, including:

"19.1 [Bwin Gibraltar] represents and warrants to [Ms. Parasol and/or Mr. DeLeon] as at the date of this Agreement that [Bwin Gibraltar] reasonably believes that it (through its relevant [Bwin Gibraltar] Group Companies and the Licence Applicants) will be able to commence its proposed internet gaming business activities in New Jersey on the Authorised State Go-Live Date at a level reasonably likely to reach the threshold required to for the New Jersey Business Opportunity to constitute a Qualifying Business Opportunity (as defined in the 2010 Agreement).

19.2 [Bwin Gibraltar] represents and warrants to [Ms. Parasol and/or Mr. DeLeon] as at the date of this Agreement that a majority of the Independent Directors and the Chief Executive Officer continue to consider, acting on a good faith basis and on reasonable grounds, that the new Jersey Business Opportunity constitutes a Qualifying Business Opportunity for the purposes of the 2010 Agreement.

. . .

19.4 [Bwin Gibraltar] shall provide [Ms. Parasol and/or Mr. DeLeon] with all reasonable support and co-operation in relation to any issues which arise during the course of the implementation of this Agreement and/or the Trust Deeds, including without limitation where [Ms. Parasol and/or Mr. DeLeon] wish to file a petition with the DGE pursuant to any of clauses 4.2.3(d), 8.1, 8.2 or otherwise."

25 Clause 21 placed an obligation on the trustees to make deeds of adherence to the 2010 agreement. The form of the deeds of adherence was exhibited in Annex 3. There are various other parts of the 2014 agreement (for example, cl. 6.1.6) which refer to the 2010 agreement and it is clear that the 2010 agreement remained in full force for at least some purposes.

26 Clauses 27 and 28 provide:

"27. In the event of any conflict or inconsistency between this Agreement and any other agreement between the parties, this Agreement will prevail provided that for the avoidance of doubt the rights and obligations of the parties under any other agreement between them will not be affected by any obligation under this Agreement ceasing to apply. This Agreement supersedes all previous agreements, arrangements and understandings between the parties in relation to the subject matter of this Agreement.

28. The parties agree that this Agreement takes priority over the Trust Deeds and this Agreement shall govern in the event of any conflict or inconsistency between this Agreement and the Trust Deeds. This Agreement shall be enforced and interpreted before the DGE pursuant to the provisions of the Casino Control Act and all parties subject

> to the jurisdiction of the DGE for the purpose of the enforcement of compliance with their respective duties and obligations under this Agreement and to that end the Trustees and Grantors shall agree to appoint an agent to receive service of process in New Jersey within 7 days of the Effective Date."

27 The wording of cl. 28 was the subject of hard bargaining. One draft (with the rubric "noting changes since 28 August 2013") shows that a Gibraltar choice of law clause had been inserted but removed. Likewise, a proposal for general submission to the courts of New Jersey had been inserted but removed. A later draft (with the rubric "noting changes since September 24, 2013") provided for Gibraltar law and jurisdiction, save that regulatory matters would be subject to the jurisdiction of the DGE and the New Jersey courts, but again this provision was removed.

28 In my judgment these negotiations are irrelevant to the question of construction of the final agreement: *Chartbrook Ltd.* v. *Persimmon Homes Ltd.* (3). Mr. Azopardi, Q.C. for the Parasol/DeLeon parties suggested that the existence of the negotiations was relevant "as a fact" but in my judgment it is only in special cases, such as a claim for rectification or an allegation of estoppel, that the drafting history is relevant to the true construction of an agreement in writing. This also appears to be the law of New Jersey: see the expert reports of Deborah T. Poritz, a retired Chief Justice of the New Jersey Supreme Court, at paras. 23–25, and Gary S. Stein, a retired Associate Justice of the same court, at para. 78. Even if I were wrong about this, the terms of cl. 27, second sentence, expressly exclude reference to any pre-existing understandings. That is, in my judgment, wide enough to prevent reliance on pre-contract negotiations.

The New Jersey civil complaint

29 Before dealing with the parties' contentions as to the construction and interaction of the 2010 and 2014 agreements, it is convenient to look at the claim brought in New Jersey by the Parasol/DeLeon parties. The complaint says that the action is brought "for fraud, negligent misrepresentation, tortious interference with prospective business advantage, breaches of contract, breach of the implied covenant of good faith and fair dealing, and promissory estoppel."

30 The claim is put in two alternative ways. The primary case is that, by intentional or negligent misrepresentations, the Parasol/DeLeon parties were induced to enter the 2014 agreement, thereby "alienating control over more than [US]$100 million worth of stock and requiring [the] Plaintiffs to sell all of that stock within a two-year disposal period." The secondary, alternative, case is based on Bwin Gibraltar's "bad faith refusal to support an extension of the [2014] Agreement's disposal period and

[its] bad faith actions intended to force Plaintiffs to dispose of their shares prematurely, and before a formal takeover offer was made for the Company."

31 The amount claimed under the primary case is about US$60m. and under the secondary case about US$40m.

32 The complaint relies on nine separate causes of action. The first is an allegation of fraudulent misrepresentation. It asserts that the opportunity to enter the New Jersey online gaming market was not a "Material Business Opportunity," that Bwin Gibraltar and its board knew that and that the reason for making the representation was to force the Parasol/DeLeon parties "to divest their shares, and thereby rid [Bwin Gibraltar] of [the] Plaintiffs' presence and influence." The second cause of action is that, in the alternative to fraud, Bwin Gibraltar made the representations negligently.

33 The third cause of action is tortious interference with a prospective business advantage. It alleges that, in 2015, Bwin Gibraltar "intentionally, and without justification or excuse, interfered with [the] Plaintiffs' ability to retain their shares until the time of the GVC Takeover, and ultimately forced [the] Plaintiffs to sell all their remaining shares at a devastating loss shortly before the GVC Takeover."

34 The fourth cause of action is breach of the warranty in cl. 19.1 of the 2014 agreement. The fifth cause of action is the same in respect of cl. 19.2 and the sixth breach of the obligation of support and cooperation in cl. 19.4. The seventh cause of action is breach of the covenant (which is implied as a matter of New Jersey law) of good faith and fair dealing. The eighth cause of action is for breach of the alleged agreement in April 2015 to support an application to the DGE for an extension of the divestiture period. The ninth and last cause of action repeats the eighth cause of action, but asserts that it gives rise to a promissory estoppel.

The parties' contentions on jurisdiction

35 Before turning to the detailed submissions of the parties, it is useful to summarize the parties' positions on how the jurisdiction provisions of the 2010 and 2014 agreements should be interpreted. Bwin Gibraltar's submission is that the jurisdiction provision of the 2010 agreement in cl. 10.2 (which excludes the jurisdiction of US courts) continues to apply to the disputes raised in the New Jersey complaint.

36 Mr. Azopardi, Q.C.'s primary submission on behalf of the Parasol/DeLeon parties is that the whole of cl. 10 of the 2010 agreement has been superseded by the 2014 agreement. Mr. Azopardi says that the second sentence of cl. 28 of the 2014 agreement (submission to the jurisdiction of the DGE and the nomination of agents in New Jersey to accept service)

necessarily amounts also to a general submission to the jurisdiction of the New Jersey courts.

37 His secondary submission arises if he is wrong on this construction of cl. 28, so that cl. 10 of the 2010 agreement continues in force. His submission then is that cl. 10.3 of the 2010 agreement is governing (disputes regarding a regulatory process). The New Jersey complaint, he submits, raises issues about regulatory process, so under cl. 10.3 there is New Jersey jurisdiction.

The construction of jurisdiction clauses

38 I turn first to the principles of construction of jurisdiction clauses. Jurisdiction clauses are not subject to the rules on ascertaining the true law of a contract provided by the Rome I Regulation (European Parliament and Council Regulation (EC) No. 593/2008): see art. 1(2)(e). Accordingly, the ordinary rules of English and Gibraltarian conflict of laws apply. Under these in general the proper law of the contract will govern the jurisdiction clause: Dicey, Morris & Collins, *The Conflict of Laws*, 15th ed., para. 12–103, at 603–604 (2012).

39 In the current case, the 2010 agreement has an express choice of English law as the general law of that contract: cl. 10.1. However, as an example of *dépeçage*, the subjecting of different parts of a contract to different laws (which is expressly permitted under art. 3(1), third sentence, of the Rome I Regulation), regulatory matters are subject to the law of the place of regulation.

40 The 2014 agreement contains no general express choice of law clause. Clause 28 provides only that the 2014 "Agreement shall be enforced and interpreted before the DGE pursuant to the provisions of the Casino Control Act." I shall return to my conclusions on the proper law of the 2014 agreement.

41 The Brussels I Regulation (recast) determines jurisdiction. The primary rule in the Regulation is that "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State": art. 4(1). This is subject to the exceptions in Sections 2 to 7 of Chapter II of the Regulation: art. 5(1). Of these, only art. 25(1) in Section 7 is relevant. It provides, so far as material:

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

agreement conferring jurisdiction shall be . . . (a) in writing or evidenced in writing . . ."

42 In the current case, New Jersey is of course not within a Member State. However, Mr. Lewis submits that it is legitimate to apply art. 25 "reflexively," or, perhaps more accurately, by analogy. In *Coreck Maritime GmbH* v. *Handelsveem BV* (4) ([2001] C.L.C. 550, at para. 19), the European Court of Justice held that cases of exclusive jurisdiction clauses in favour of non-Member States should be determined by the provisions of the Member State's own domestic conflict of laws. Professor Adrian Briggs, Q.C. argues (*Civil Jurisdiction & Judgments*, 6th ed., para. 2.307, at 358 (2015)) that (as a matter of the English rules of conflict of laws)—

"if a court is to give effect to an agreement for the jurisdiction of the courts of a non-Member State, it should be able to do so only if the agreement on jurisdiction complies with the formal requirements set out in Article 25(1) for agreements for the courts of Member States: a derogation from the general jurisdiction of the court of the domicile is just as much a derogation whether the court prorogated is in Dieppe or Djibouti. It is submitted that the derogation must comply with Article 25."

43 A similar argument made by Prof. Briggs in an article (*The Subtle Variety of Jurisdiction Agreements*, [2012] LMCLQ 364, at 376–381) was accepted by the English Court of Appeal in *Joint Stock Co. Aeroflot—Russian Airlines* v. *Berezovsky* (5) ([2013] EWCA Civ 784, at para. 64). (The case concerned art. 23 of the revised Lugano Convention 2007 but this is in identical terms to art. 25 of the Brussels I Regulation (recast).) In my judgment, Prof. Briggs' argument is convincing and it is right to apply art. 25 and the jurisprudence in respect of it when considering choice of jurisdiction in the 2010 and 2014 agreements.

44 The test to be applied is that determined by the Privy Council, on appeal from Gibraltar, in *Bols Distilleries B.V. (t/a Bols Royal Distilleries)* v. *Superior Yacht Servs. Ltd*. (1) (2005–06 Gib LR 143, at para. 28):

"The rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction. In practice, what amounts to a 'good arguable case' depends on what requires to be shown in any particular situation in order to establish jurisdiction. In the present case, as the case law of the [European] Court of Justice emphasizes, in order to establish that the usual rule in [what is now art. 4] is ousted by [what is now art. 25], the claimants must demonstrate 'clearly and precisely' that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties. So, applying the 'good arguable case'

> standard, the claimants must show that they have a much better argument than the defendants . . ."

45 The English Court of Appeal in the *Aeroflot* v. *Berezovsky* case suggested (*ibid.*, at para. 50) that "much" does not add very much to a test of having the "better argument," however, as a decision on appeal from Gibraltar, *Bols* is binding on me. The test of having "a much better argument" is in my judgment part of the Privy Council's *ratio decidendi*.

Clause 10.3

46 It is convenient to deal with cl. 10.3 first. Mr. Lewis, Q.C. submits that this provision "divorces applicable law from jurisdiction: it contemplates the English courts dealing with disputes regarding a Regulatory Process even though such disputes may be governed by the law of the jurisdiction of that Regulatory Process." By contrast, Mr. Azopardi, Q.C. submits that the effect of cl. 10.3 is merely to allow matters of Regulatory Process to be litigated before US or Canadian courts.

47 In my judgment, Mr. Azopardi is right about this. On Mr. Lewis's construction, cl. 10.3 would merely be a modest extension of what is already the subject of cl. 10.1. A much more natural construction of cl. 10.3 is that it is a jurisdiction clause which is an exception to the general jurisdiction clause, cl. 10.2. This follows from the opening words "notwithstanding clause 10.2." The effect of that phrase, in my judgment, is that the restriction in cl. 10.2 on suing in US and Canadian courts falls away in relation to regulatory process disputes. Given that it was very much in contemplation that Bwin Gibraltar would try and explore business opportunities in the United States, such a construction makes perfect sense.

48 This leads to the question as to whether the causes of action relied on in the New Jersey complaint constitute "disputes regarding a Regulatory Process." Mr. Azopardi submits that they are. He says that cl. 10.3—

> "is widely drawn. The sale of the shares (the divestiture) was mandated as part of the application to obtain a licence. It was an integral pre-condition to the grant. It was therefore entirely tied up with and part of the regulatory process. To that end the DGE required the parties to enter into the [2014] Agreement."

49 That is all true. However, "regulatory process" is a defined term. Entering the 2014 agreement was not *itself* "obtaining, renewing or amending a licence, [or] being confirmed as suitable." Nor in my judgment is it "completing some other form of regulatory process with respect to Gaming." As Mr. Azopardi says, it was a pre-condition and therefore, in my judgment, outwith the "regulatory process" as defined.

50 Moreover, cl. 10.3 is an exception to cl. 10.2 and therefore needs to be construed narrowly. The part of the 2010 agreement which was most likely to result in disputes was (as of course has occurred) the provisions of cl. 4 governing business opportunities. If Mr. Azopardi's wide construction were correct, it would be likely that most disputes under the 2010 agreement would fall within the exception rather than the general rule. Given the deliberate attempt to avoid the jurisdiction of the courts of the United States and Canada, it is unlikely that the parties intended this result.

51 The individual causes of action in the New Jersey complaint are ordinary private law claims of misrepresentation, tortious interference with a prospective business advantage, breach of warranty, breach of contract and promissory estoppel. Of course the background to these claims is the New Jersey regulatory environment. However, that does not make the claims disputes regarding a "regulatory process."

52 Accordingly, in my judgment the Parasol/DeLeon parties cannot rely on cl. 10.3 to allow them to sue in New Jersey.

Clause 28 of the 2014 agreement

53 I turn then to Mr. Azopardi's primary submission, that cl. 28 shows that all disputes under the 2014 agreement are subject to the jurisdiction of the New Jersey courts. He says that the provision that "this Agreement shall be enforced and interpreted before the DGE pursuant to the provisions of the [CCA]" necessarily gives the New Jersey courts jurisdiction.

54 It is common ground between the experts on New Jersey law that the DGE and the New Jersey Casino Control Commission can determine regulatory issues and that appeals against such determinations go to the Superior Court of New Jersey and the higher courts therefrom. It is also common ground that the DGE and the Commission have no jurisdiction to determine private law disputes: *Campione* v. *Adamar of New Jersey* (2). Thus the DGE could not determine the claims brought by the Parasol/DeLeon parties in the New Jersey complaint.

55 Mr. Azopardi argues that "sensible business people would not have intended that a dispute . . . would have been within the scope of two inconsistent jurisdiction agreements": *UBS AG* v. *HSH Nordbank AG* (9) ([2009] EWCA Civ 585, at para. 84, *per* Lord Collins of Mapesbury (giving the judgment of the English Court of Appeal)). To similar effect is Lord Hoffmann in *Premium Nafta Products Ltd.* v. *Fili Shipping Co. Ltd.* (7) ([2007] UKHL 40, at para. 7). Thus if the DGE had jurisdiction, so too, he submitted, did the courts of New Jersey for private law disputes. Further the provision for appointment of the agents in New Jersey to receive service shows that New Jersey was to have jurisdiction. On any

view, he submitted, if the DGE wanted to take court action (as opposed to internal regulatory measures) against any of the parties (as the DGE could, for example, under cl. 20), it could sue in New Jersey.

56 Against this, Mr. Lewis starts by noting that in the 2010 agreement the parties had expressly envisaged different jurisdictions for different parts of that agreement. The United States was excluded as a jurisdiction under cl. 10.2 of that agreement but (on the construction of cl. 10.3 which I have accepted) a state in the United States was a possible jurisdiction under cl. 10.3. This bifurcation could and did survive the making of the 2014 agreement, he submitted.

57 Further, Mr. Azopardi's submission, he submits, exaggerates the extent to which jurisdiction is given to the DGE. The submission to the DGE's jurisdiction is "*for the purpose* of the enforcement of compliance." Further it is only "*to that end*" that the trustees and Ms. Parasol and Mr. DeLeon appoint agents for service. Thus this sentence is not apposite to give the New Jersey courts jurisdiction over *all* disputes between *all* the parties. On the contrary, by making such a limited provision for jurisdiction, it impliedly did *not* give a general jurisdiction to New Jersey.

58 Mr. Azopardi sought to bolster his submissions on jurisdiction by submitting that the whole of the 2014 agreement was governed by New Jersey law. Again this raises similar issues as to the interaction between the 2010 agreement and the 2014 agreement. Clearly some parts of the 2014 agreement were to be governed by non-New Jersey law, including the draft deeds annexed to the 2014 agreement. Of these annexes, the trust deeds expressly apply the law of Gibraltar and the deeds of adherence English law.

59 In determining the applicable law of the 2014 agreement, my starting point is necessarily art. 3 of the Rome I Regulation, which gives the parties freedom to choose the law applicable. However, "the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case": art. 3(1), second sentence.

60 Is a choice of New Jersey law "expressly or clearly demonstrated"? In my judgment it is not. First, the *express* provision for DGE jurisdiction is on its face a limited submission to the New Jersey jurisdiction, not a general submission. Secondly, the 2010 agreement expressly split the applicable law, with regulatory matters subject to the law of the regulatory jurisdiction and the balance subject to English law. This is an important part of the "circumstances of the case." It is a powerful indicator against any clear demonstration of New Jersey being the applicable law. Thirdly, cl. 27 of the 2014 agreement recognizes that the 2010 agreement continues to govern the parties' relationships, except insofar as the 2014 agreement is inconsistent with them. This again in my judgment is an

indication against the 2014 agreement being generally governed by New Jersey law.

61 Mr. Azopardi relied on *Vizcaya Partners Ltd.* v. *Picard* (10), in the Privy Council on appeal from Gibraltar, for the proposition that a choice of law could be implied. *Vizcaya*, however, was a case on implied submission to the jurisdiction (in that case of New York). Jurisdiction clauses (whether express or implied) are outwith the Rome I Regulation: see art. 1(2)(e). Terms as to choice of law by contrast must satisfy art. 3(1) of Rome I, so *Vizcaya* is not in my judgment in point.

62 Accordingly it is necessary to turn to art. 4, which governs the applicable law in the absence of a choice of law under art. 3. None of the special rules in art. 4(1) applies, so under art. 4(2) "the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence." The "characteristic performance" of the 2014 agreement is in my judgment the divestiture of the shares by the trustees pursuant to cl. 4 of the 2014 agreement. The trustees were and are both habitually resident in Gibraltar, so in my judgment Gibraltar law applies (save insofar as there is express jurisdiction given to the DGE).

63 Even if I am wrong about that, and New Jersey law is the proper law of the whole of the 2014 agreement, it does not follow that, as a matter of New Jersey law, jurisdiction is given generally to the courts of New Jersey. The two experts who deal primarily with this question are Chief Justice Deborah T. Poritz for Bwin Gibraltar and Associate Justice Gary S. Stein for the Parasol/DeLeon parties (as I have noted, both now retired from judicial office). Although they each express themselves differently, there seems to be no dispute as to the principles of construction of written agreements. Indeed I have been unable to discern any relevant difference from English (and therefore Gibraltarian) principles of construction.

64 Both experts opine as to the true construction of the agreements, but that is not their role. Lord Collins of Mapesbury in *Vizcaya* (10) (2016 Gib LR 18, at para. 60) held:

> "Where the applicable law of the contract is foreign law, questions of interpretation are governed by the applicable law. In such a case, the role of the expert is not to give evidence as to what the contract means. The role is 'to prove the rules of construction of the foreign law, and it is then for the court to interpret the contract in accordance with those rules': *King* v. *Brandywine Reins. Co.* . . . ([2005] 2 All E.R. (Comm) 1, at para. 68; *Dicey* [*op. cit.*], at paras. 9–019 and 32–144 ('the expert proves the foreign rules of construction, and the court, in the light of these rules, determines the meaning of the contract')." [Footnotes omitted.]

65 Thus, it is for me to interpret the 2014 agreement in accordance with the rules of construction of the relevant law. Since for these purposes the laws of England, Gibraltar and New Jersey are all the same, I would necessarily reach the same conclusion regardless of the relevant law.

66 Even if I were wrong about this and had to assess the views of the experts, I note that on the question of the construction of cl. 28, my opinion agrees with that of Poritz, C.J. at paras. 36–38 of her witness statement and for the same reasons.

67 Stein, J. takes a different approach to the construction of the 2014 agreement. His quite different starting point is that the Superior Court of New Jersey, as the court first seised, has jurisdiction unless the contrary can be shown. The close connection with New Jersey, he says, makes New Jersey law applicable. He comments that New Jersey affords a perfectly fair jurisdiction for enforcement of the 2014 agreement. He considers that cl. 10.3 of the 2010 agreement applies because the dispute in the New Jersey complaint is about regulatory matters and, in any event, the 2014 agreement supersedes the 2010 agreement insofar as cl. 10.2 is relevant.

68 If I had to choose between the experts on their views of the true construction of cl. 28, I would much prefer the evidence of Poritz, C.J. Stein, J. really does not address cl. 28 at all. His conclusion, as can be seen, follows from other matters. As to these, many are not relevant to the task I have because my starting point has to be the Brussels I Regulation (recast) rather than the common law (whether of Gibraltar or of New Jersey). Under Brussels I (recast), the fact that the Superior Court of New Jersey (not being a court of a Member State) was the court first seised is irrelevant. Likewise the close connection to New Jersey is not determinative for me: I have to apply the Rome I Regulation to determine the governing law. I fully accept that New Jersey provides a fair system for the resolution of disputes, but again this is not relevant. The true construction of cll. 10.2 and 10.3 of the 2010 agreement is not for him at all, since on any view these clauses are governed by English law not New Jersey law.

Clause 10.2

69 Mr. Azopardi submits that none of the causes of action relied on in the New Jersey complaint is based on the 2010 agreement. In my judgment that is true but irrelevant. The terms of cl. 10.2 are very wide. All of the causes of action in the New Jersey complaint arise "in connection with" the 2010 agreement and in particular with its performance. As Mr. Lewis submitted, "fancy pleading" cannot be conclusive. As Lewison, J. (as he then was) said in *Skype Technologies SA* v. *Joltid Ltd.* (8) ([2009] EWHC 2783 (Ch), at para. 19):

> "Rational businessmen would not envisage that their choice of jurisdiction would depend on who issued proceedings first, or

whether an ingenious pleader could frame a cause of action without actually mentioning the . . . Agreement [containing the jurisdiction clause]."

70 Even if I were wrong that all of the causes of action arose in connection with the 2010 agreement, I would accede to Mr. Lewis's submission that it suffices that the "anchor claim" fell within the jurisdiction clause. Were it otherwise, there would be potentially two venues for litigation, which, as *UBS AG* v. *HSH Nordbank AG* (9) and *Premium Nafta Products Ltd.* v. *Fili Shipping Co. Ltd.* (7) show, is unlikely to have been the parties' intention. Further, having a small part of a dispute in another jurisdiction is likely to be vexatious and oppressive.

Conclusion on construction

71 Accordingly, I conclude:

(a) The 2014 agreement is, save where express provision is made to the contrary, governed by Gibraltarian law.

(b) The terms of cl. 10 of the 2010 agreement are not superseded by the 2014 agreement under cl. 27 of the latter agreement and continue to govern any dispute which may arise in connection with the creation, validity, effect, interpretation or performance of, or the legal relationships established by, the 2010 agreement or otherwise arising in connection with that agreement.

(c) The causes of action in the New Jersey complaint do not fall within cl. 10.3 of the 2010 agreement.

(d) The proceedings in New Jersey have been brought in breach of cl. 10.2 of the 2010 agreement.

(e) The Supreme Court of Gibraltar has jurisdiction under art. 4 of the Brussels I Regulation (recast).

Anti-suit injunction and *forum non conveniens*

72 The grant of an anti-suit injunction is discretionary but my starting point has to be that the parties have agreed that the courts of the United States should *not* have jurisdiction over the disputes raised in the New Jersey complaint. Mr. Azopardi submits that New Jersey is a much more suitable venue for the trial of issues relating to the New Jersey online gambling market and is therefore the *forum conveniens*. This court should only restrain the Parasol/DeLeon parties from suing in New Jersey, he submits, if those proceedings were vexatious or oppressive.

73 I am doubtful whether any part of the *forum non conveniens* doctrine survives in cases where this court has jurisdiction under the Brussels I Regulation (recast): *Owusu* v. *Jackson (t/a Villa Holidays Bal-Inn Villas)*

(6). Instead, the extent to which this court can and should stay the current proceedings is likely to be limited by arts. 33 and 34 of Brussels I (recast).

74 However, I do not need to determine that issue. Gibraltar is a perfectly appropriate venue for the determination of the dispute between the parties. The business of Bwin Gibraltar is run from here. All the parties reside here. The misrepresentations relied on were made in Gibraltar or London. Most of the lay witnesses are either in Gibraltar or in Europe.

75 It is true that the New Jersey courts will be more familiar with New Jersey gaming law. However, given that a trial there would be with a civil jury, that may not be such an advantage. In terms of disclosure of documents from the DGE, this is neutral in my judgment. If the proceedings continue in Gibraltar, the parties can apply in the federal courts of New Jersey under the United States Code, Title 28 § 1782 for disclosure of documents. (However, it is doubtful to what extent the DGE is obliged to produce documents. There is an American doctrine called executive privilege of which the DGE may be able to avail itself to refuse disclosure. This ground of privilege would appear to be available to the DGE whether the proceedings continued in New Jersey or in Gibraltar.) The main indicator in favour of New Jersey as a venue is that experts on New Jersey regulatory procedures would be to hand, rather than needing to fly into Gibraltar.

76 In my judgment, neither Gibraltar nor New Jersey is a *forum non conveniens*. In exercising my discretion as to whether to grant an anti-suit injunction, I consider that there is nothing substantial to weigh against Bwin Gibraltar's contractual entitlement not to be sued in New Jersey. Accordingly, I shall grant an anti-suit injunction.

The Parasol/DeLeon parties' application

77 It follows that the application by the Parasol/DeLeon parties for a stay of the current proceedings in favour of the New Jersey proceedings is refused.

78 However, since this matter may go further, I should indicate what I would have done if I were wrong on the application of cl. 10.2. If cl. 10.2 did not apply and there was a relevant jurisdiction clause in favour of New Jersey, then this would in my judgment be a quintessential case for the application of art. 33 of the Brussels I Regulation (recast) in favour of New Jersey. The Superior Court of New Jersey is very likely to give a judgment capable of enforcement and it would be in the interests of the proper administration of justice to hold Bwin Gibraltar to its agreement to litigate in New Jersey.

79 If cl. 10.2 did not apply and there were simply no jurisdiction clause at all in the 2014 agreement, the matter becomes more finely balanced.

However, since there is nothing to choose between Gibraltar and New Jersey as a venue, it does seem to me that priority should be given to the court first seised, in this case, New Jersey.

Order accordingly.
