[2017 Gib LR 95]

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

COURT OF APPEAL (Kay, P., Moore-Bick and Goldring, JJ.A.): May 5th, 2017

Conflict of Laws—jurisdiction—construction of jurisdiction clauses—under Regulation (EU) No. 1215/2012 (recast), art. 4(1), party prima facie to be sued in Member State in which domiciled—exception in art. 25(1) if parties agree alternative jurisdiction—good arguable case to show usual rule in art. 4(1) ousted by art. 25

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 respondent applied to the Supreme Court for an anti-suit injunction.

The respondent, 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 appellants and others. The third and fourth appellants held shares in one of the businesses (the shares were held through Gibraltar companies: the first and second appellants). The 2010 agreement envisaged that the respondent might wish to take advantage of emerging business opportunities. It provided that if certain conditions were met the

respondent could consider that there was a qualifying business opportunity. It could then serve a notice on the appellants that would trigger various duties on their part to assist the respondent to take advantage of the opportunity.

In 2013, online gambling was permitted in New Jersey. The respondent considered that this created a qualifying business opportunity and served a notice on the appellants. Negotiations between the respondent, the New Jersey regulator (the Division of Gaming Enforcement, "the DGE") and the appellants resulted in a divestiture agreement under which the appellants' shares in the respondent were to be sold ("the 2014 agreement"). The share price declined, however, and the appellants wished to obtain an extension of the two-year divestiture period. They alleged that the respondent 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 respondent at a much higher price per share.

In May 2016, the appellants issued proceedings against the respondent 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 respondent 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 respondent applied to the Supreme Court, seeking the continuation of the anti-suit injunction. It submitted 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 appellants in the New Jersey complaint. The appellants submitted 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.

The Supreme Court (Jack, J.) found in favour of the respondent and granted the anti-suit injunction. It held that it had jurisdiction under art. 4 of Council Regulation (EU) No. 1215/2012 (recast) which provided that persons domiciled in a Member State should be sued in the courts of that state. 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 but ordinary private law claims. 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 the present matter. The DGE court determined regulatory issues but not private law disputes (that decision is reported at 2016 Gib LR 336).

The appellants appealed against the Supreme Court's decision that the dispute should be determined in Gibraltar, submitting that (a) the 2010 agreement had been superseded by the 2014 agreement in relation to the matters with which the latter was concerned; (b) the claims made in the New Jersey action had all arisen from, or were directly related to, the performance of the 2014 agreement and were not, therefore, subject to cl. 10 of the 2010 agreement, which had to that extent been superseded; (c) the parties had agreed to submit to the jurisdiction of the courts of New Jersey to determine any disputes arising under the 2014 agreement; alternatively (d) the claims made in the New Jersey action were "disputes regarding a regulatory process" within the meaning of cl. 10.3 of the 2010 agreement and therefore to be determined by the courts of New Jersey.

The respondent submitted, *inter alia*, that the 2010 agreement, including cl. 10, continued to govern the parties' relationship except to the extent, if at all, to which they had agreed otherwise; that it had not agreed to submit disputes between itself and the appellants to the courts of New Jersey; and that none of the claims made in the New Jersey proceedings related to the proceedings going on there. The proceedings in New Jersey involved a breach of cl. 10.2 of the 2010 agreement.

Held, dismissing the appeal:

(1) As the respondent was domiciled in Gibraltar, the starting point for consideration of jurisdiction was art. 4(1) of Council Regulation (EU) No. 1215/2012 (recast) (Brussels I), which provided that a person domiciled in a Member State was to be sued in the courts of that Member State. The respondent was therefore entitled to be sued in the courts of Gibraltar unless the appellants could persuade the court that it had agreed that the courts of another country should have jurisdiction to determine the

dispute. The appellants had therefore to persuade the court that they had a good arguable case, *i.e.* much the better argument, that the respondent had entered into a clear and distinct agreement that the courts of New Jersey should have jurisdiction to decide the present dispute (paras. 21–22).

(2) The 2014 agreement contained neither an express nor an implied agreement to submit to the jurisdiction of the courts of New Jersey, save in respect of proceedings involving the DGE in its capacity as regulator. All the causes of action contained in the New Jersey complaint were subject to the jurisdiction agreement in cl. 10 of the 2010 agreement. The judge had correctly taken the 2010 agreement as his starting point. The 2010 agreement could properly be described as a framework agreement, in the sense that it established principles for satisfying future regulatory requirements relating to Ms. Parasol and Mr. DeLeon at a time when the need for action on their part was uncertain. At that stage the parties had been in agreement that the English courts should have jurisdiction to determine any disputes, and that the US and Canadian courts should not. The 2014 agreement was not a framework agreement. Its purpose was to implement the agreement by Ms. Parasol and Mr. DeLeon to divest themselves of their shares in order to enable the respondent to obtain regulatory approval. The 2014 agreement therefore operated within the framework established by the 2010 agreement. It contained no express modification of the 2010 agreement in relation to jurisdiction. Clause 27 of the 2014 agreement did not provide that the 2014 agreement superseded the 2010 agreement in relation to disputes of the kind raised in the New Jersey proceedings. Clause 27 of the 2014 agreement was to ensure that the 2014 agreement was the controlling document in relation to the arrangements by which Ms. Parasol and Mr. DeLeon were to divest themselves of their interests in the respondent, but had nothing to do with the operation of the 2010 agreement as the framework within which the 2014 agreement sat. Clause 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 Act, did not give the New Jersey courts jurisdiction in the present matter. It was not implied that the private parties to the 2014 agreement were agreeing to submit to the jurisdiction of the New Jersey courts for all purposes. The 2014 agreement recognized the existence of two quite different legal regimes, one dealing with private law claims by and between parties other than the DGE and one dealing with the regulatory process which was essentially of a public law nature and was the only aspect of the parties' relationship in which the DGE was interested. In the present case, there was every reason for the parties to have envisaged that disputes with the DGE arising out of the exercise of its regulatory powers should be determined in New Jersey but that private disputes between the respondent and other parties to the agreement not involving the DGE should be determined in accordance with the 2010 agreement. Furthermore, the claims being pursued by the appellants in

New Jersey were not disputes regarding regulatory process for the purposes of cl. 10.3 of the 2010 agreement, but ordinary private law claims (paras. 25–30; paras. 34–43).

(3) As the respondent had much the better argument, that the appellants remained bound by their agreement not to pursue their claims in the courts of the United States or Canada and by doing so were acting in breach of contract, the judge had a discretion to grant an anti-suit injunction to restrain them. He had considered various factors relating to *forum conveniens* but concluded that there was nothing substantial to weigh against the respondent's contractual entitlement not to be sued in New Jersey and granted the relief it sought. Although a court would normally grant such an anti-suit injunction to enforce a jurisdiction agreement, it might decline to do so if there were sufficiently strong reasons for not holding the parties to their bargain. While there was some force in the suggestion that from a practical point of view issues between the parties might more easily be determined in New Jersey, the advantages should not be overstated. A case of this kind could be tried in Gibraltar without undue difficulty. There was insufficient evidence that New Jersey would be an overwhelmingly more appropriate forum so as to justify overriding the parties' agreement that proceedings between them should not be pursued in the United States. The court agreed with the judge's view but, even if it had not, the decision had involved an exercise of discretion and could only have been set aside if the judge had misdirected himself or if his decision had been plainly wrong. His decision was correct and there were no grounds for setting it aside (paras. 44–46).

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; [2007] 1 All E.R. (Comm) 461; [2007] 1 Lloyd's Rep. 683; [2007] 1 C.L.C. 308, applied.

(2) *Fiona Trust & Holding Corp*. v. *Privalov*, [2007] 4 All E.R. 951; [2007] 2 All E.R. (Comm) 1053; [2007] Bus. L.R. 1719; [2008] 1 Lloyd's Rep. 254; [2007] 2 C.L.C. 553; [2008] 4 LRC 404, referred to.

Legislation construed:

Council Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art. 4(1):

"Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

K. Azopardi, *Q.C.*, *O. Smith* and *J. Wahnon* for the appellants;
D. Lewis, *Q.C.* and *J. Montado* for the respondent.

1 **MOORE-BICK, J.A.:** This is an appeal against the order made by Jack, J. on December 2nd, 2016 granting an injunction to restrain the appellants from pursuing certain proceedings against the respondent in the courts of New Jersey. By the same order he dismissed the appellants' application for a stay of the proceedings in Gibraltar pending the outcome of the proceedings in New Jersey (that decision is reported at 2016 Gib LR 336).

Background

2 The respondent, Bwin.Party Digital Entertainment Ltd. ("Bwin"), represents the result of a merger between two companies involved in online gaming, PartyGaming plc, a company incorporated in Gibraltar, and Bwin Interactive Entertainment A.G. ("BIE"), a company incorporated in Austria. Immediately before the merger, Ms. Ruth Parasol and Mr. James DeLeon each beneficially owned a substantial body of shares in PartyGaming: Ms. Parasol through a wholly owned company, Emerald Bay Ltd. ("Emerald") and Mr. DeLeon through another wholly owned company, Stinson Ridge Ltd. ("Stinson"). The original intention was for PartyGaming to absorb BIE and become a *societas europaea* and it was envisaged that following the merger Ms. Parasol and Mr. DeLeon would each retain, through their respective companies, the beneficial interest in a substantial body of shares in the new entity. In the event, however, the merger took a different form from that originally intended. Instead of creating a *societas europaea*, PartyGaming simply absorbed BIE under the Companies (Cross-Border Mergers) Regulations 2010. It was subsequently renamed and converted into an ordinary limited liability company, the present respondent. As the judge observed, therefore, Bwin is the same corporate entity as PartyGaming and as a result Ms. Parasol and Mr. DeLeon each continued to be the beneficial owner through Emerald and Stinson respectively of a substantial body of its share capital.

3 It was envisaged by those behind the merger that the new company would wish to pursue fresh business opportunities wherever they might arise, particularly in the United States of America, where it was thought that some states might decide to liberalize their gaming laws. However, they recognized that it would be necessary to satisfy local regulatory requirements in order to do so. Accordingly, in contemplation of the merger, PartyGaming, BIE and certain of their shareholders entered an agreement dated July 29th, 2010 ("the 2010 agreement"), conditional on the completion of the merger, under which they made provision for certain steps to be taken in order to enable the merged entity to obtain any regulatory approval it might require in order to operate in a new jurisdiction. The 2010 agreement was subsequently amended and restated on December 22nd, 2010, and it was common ground before us that the amended and restated agreement is the relevant contract for present

purposes. All references to the 2010 agreement must therefore be understood as referring to the later version.

4 The 2010 agreement expressly contemplated that persons directly or indirectly interested in the ownership of the new entity, as well as its directors and members of its senior management team, might have to be personally approved by any relevant regulator if Bwin were to be permitted to enter the local online gambling market. In particular, it contemplated that the regulator might require Ms. Parasol and Mr. DeLeon as holders (albeit indirectly) of a substantial body of shares in the new entity to obtain the regulator's approval and perhaps to reduce the size of their shareholdings before it would give its approval to the company's entering the local market. In order to provide for that eventuality, the parties agreed a mechanism by which the directors could require Ms. Parasol and Mr. DeLeon to take such action as might be necessary to persuade the regulator to grant its approval, if necessary by disposing of some or all of their shares. In due course the proposed merger took place and the 2010 agreement became unconditional.

The 2010 agreement

5 The provisions relating to the identification by the company of potentially valuable new sources of business and the subsequent triggering of obligations on the part of Ms. Parasol and Mr. DeLeon to assist Bwin in complying with the regulator's requirements are contained in cl. 4 of the 2010 agreement. They are quite complex, but for present purposes their essential elements can be summarized as follows:

(i) Ms. Parasol and Mr. DeLeon's obligations to assist Bwin to obtain regulatory approval for a new business opportunity arose only if a majority of the independent directors and both chief executive officers (if there were two) considered that the new business was likely to increase Bwin's annual revenue or profits by at least 10%, or was likely to result in an increase in its market capitalization of at least 5%. Such an opportunity was called a "Qualifying Business Opportunity" ("QBO").

(ii) If obtaining regulatory approval to pursue the new business opportunity required steps to be taken by Ms. Parasol and Mr. DeLeon to obtain the regulator's approval of them personally, Bwin was required to give them formal notice of those requirements in the form of a "Qualifying Business Opportunity Notice" ("QBO notice").

(iii) On receipt of a QBO notice, Ms. Parasol and Mr. DeLeon became obliged to submit to individual licensing and suitability reviews or to enter into such transactions as would enable the regulatory process to be successfully completed, including, if necessary, disposing of part or all of their shareholdings.

The triggering of obligations under the 2010 agreement and the execution of the 2014 agreement

6 As a result of an amendment to state legislation passed in February 2013, internet gambling was legalized in New Jersey with effect from November 26th, 2013. In order to take advantage of that business opportunity, on June 10th, 2013 Bwin formed a New Jersey subsidiary, Bwin.Party Entertainment NJ LLC, to carry on the business of internet gambling in New Jersey, and on June 12th, 2013 it served a QBO notice on Ms. Parasol and Mr. DeLeon pursuant to cl. 4.2 of the 2010 agreement.

7 Gambling in New Jersey is governed by the Casino Control Act. The regulator responsible for the administration of the statutory provisions is the Division of Gaming Enforcement ("DGE"), part of the New Jersey Department of Law and Public Safety. The need to obtain regulatory approval for Bwin's entry into the online gambling market and the service of the QBO notice led to negotiations between Bwin, Ms. Parasol, Mr. DeLeon and the DGE, which culminated in a divestiture agreement dated October 30th, 2013, to which Bwin, Ms. Parasol, Mr. DeLeon and the DGE, among others, were parties. By that agreement Ms. Parasol and Mr. DeLeon agreed to arrangements under which they would divest themselves of the entirety of their interests in the shares of Bwin within a period of three years following the date on which internet gambling became legal in New Jersey (the "authorized state go-live date"). Those arrangements involved the transfer into trusts of the shares held by Emerald and Stinson and their subsequent disposal in accordance with the terms of the agreement. Ms. Parasol and Mr. DeLeon were given control over the disposals for a period of two years; thereafter control over the disposal of any remaining shares passed to Bwin. The divestiture agreement was amended and restated on January 27th, 2014 following a change of trustees. Again, it was common ground before us that the later version of the agreement ("the 2014 agreement") contains the terms which govern the relationship between the parties.

8 Bwin was authorized to accept online gambling business from the authorized state go-live date, November 26th, 2013. The period during which Ms. Parasol and Mr. DeLeon could exercise control over the disposal of their shares (unless extended under the terms of the agreement) therefore expired on November 25th, 2015. The judge found that on November 26th, 2013 (*i.e*. some three weeks after the divestiture agreement had been executed) Bwin's share price had been 128.6 pence, but that it had subsequently declined to an all-time low of 75.72 pence per share on April 17th, 2015. As a result, Ms. Parasol and Mr. DeLeon sought an extension of the period during which they could control the disposal of their shares and asked Bwin to help them persuade the DGE to grant one. Nothing came of that, however, and a dispute has since arisen between Bwin and Ms. Parasol and Mr. DeLeon, who say that Bwin failed to

comply with its obligations under the 2014 agreement to provide them with co-operation and assistance in their dealings with the DGE.

9 In the event, the shares beneficially owned by Ms. Parasol and Mr. DeLeon were all finally disposed of during 2015 at prices well below that at which they had stood when Bwin had started trading in New Jersey. However, in September 2015 another company, GVC Holdings plc, made a takeover bid for Bwin. The shares rose in value and by the time the purchase was completed in February 2016 the consideration was worth 143.041 pence per share.

The proceedings in New Jersey

10 On May 13th, 2016, Ms. Parasol, Mr. DeLeon, Emerald and Stinson brought an action against Bwin in New Jersey. The complaint contains nine causes of action, which for present purposes can conveniently be grouped under the following heads:

(i) claims based on an allegation that Bwin had no reasonable basis for giving a QBO notice (and thereby triggering the operation of the 2010 agreement) because it had no reasonable grounds for thinking that entering into the online gambling market in New Jersey would improve its financial position to the extent required (the first, second and third causes of action);

(ii) claims based on alleged breaches of warranties given in the 2014 agreement to the effect that at the date of that agreement Bwin honestly and reasonably believed that entering the online gambling market would improve its financial position to the extent required (the fourth, fifth and sixth causes of action); and

(iii) claims based on alleged breaches of its obligation to provide reasonable support and co-operation in connection with the claimants' request for an extension of the two-year period allowed for the disposal of the shares under their control (the seventh, eighth and ninth causes of action).

11 On July 4th, 2016, Bwin issued proceedings here in Gibraltar seeking an anti-suit injunction restraining the appellants from pursuing their action in New Jersey and a declaration that it was not liable to them for any breach of contract or duty as alleged. On July 27th, 2016, the matter came before Dudley, C.J. *ex parte* on notice on an application by Bwin for interim relief by way of anti-suit injunction, which the Chief Justice granted. Subsequently, on August 22nd, 2016, the appellants applied for an order staying the proceedings in Gibraltar until judgment had been given on their claims in New Jersey. The applications were heard together *inter partes* by Jack, J. who granted an anti-suit injunction in favour of

Bwin and dismissed the cross-application for a stay of the proceedings in Gibraltar.

12 In the meantime Bwin had filed a motion in New Jersey seeking to have the proceedings there dismissed on jurisdictional grounds. By a consent order dated August 24th, 2016, the court in New Jersey ordered that time for the claimants to file a response to that motion should be extended until after the determination of the present applications. Despite some procedural hiccoughs, that remains the position.

The appeal

13 The present appeal is concerned only with the question whether the dispute between the parties should be determined in New Jersey or Gibraltar. It turns principally on the interaction between cl. 10 of the 2010 agreement and cll. 27 and 28 of the 2014 agreement.

14 Clause 10 of the 2010 agreement provides as follows:

> "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."

15 Clauses 27 and 28 of the 2014 agreement provide as follows:

> "27 ENTIRE AGREEMENT
>
> 27.1 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. GOVERNING LAW AND JURISDICTION

28.1 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 submit 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."

The parties' submissions

16 There are in all 12 separate grounds of appeal, but the essence of the appellants' case can be summarized as follows:

(i) the 2010 agreement was superseded by the 2014 agreement in relation to the matters with which the latter is concerned;

(ii) the claims made in the New Jersey action all arise from, or are directly related to, the performance of the 2014 agreement and are therefore not subject to cl. 10 of the 2010 agreement, which has to that extent been superseded;

(iii) the parties have agreed to submit to the jurisdiction of the courts of New Jersey to determine any disputes arising under the 2014 agreement; and

(iv) alternatively, the claims made in the New Jersey action are "disputes regarding a regulatory process" within the meaning of cl. 10.3 of the 2010 agreement and are therefore to be determined by the courts of New Jersey.

17 Mr. Azopardi, Q.C. based his excellent submissions firmly on the language of cll. 27 and 28 of the 2014 agreement. He relied in particular on the following parts of cl. 27:

"In the event of any conflict or inconsistency between this Agreement and *any other agreement* between the parties, this Agreement will prevail . . . *This Agreement supersedes all previous agreements*, arrangements and understandings between the parties in relation to the subject matter of this Agreement." [Emphasis supplied.]

18 That language, he submitted, was clear and was to be given the meaning it naturally bears. He argued that the 2014 agreement had for all practical purposes superseded the 2010 agreement, at least in relation to disputes of the kind that have now arisen between the parties. That included the provisions of cl. 10 of the 2010 agreement, including the provisions of cl. 10.2 in which the parties had previously agreed that the courts of the United States should have no jurisdiction to deal with disputes between them. It had therefore ceased to have any application as far as they were concerned. The parties' agreement in cl. 28 of the 2014 agreement to submit to the jurisdiction of the DGE for the purpose of the enforcement of their respective duties and obligations and to nominate agents for service demonstrated a willingness to litigate in New Jersey. The position was reinforced by the terms of cl. 20 of the 2014 agreement, under which the DGE had the right to seek an injunction or other equitable relief in response to a threatened breach of the agreement, a course which the parties must have envisaged taking place in New Jersey. There was, therefore, a clear choice by implication of New Jersey jurisdiction.

19 In the alternative, Mr. Azopardi submitted that if, contrary to the appellants' primary case, cl. 10 had not been superseded and did apply to the present disputes, they were all disputes regarding a regulatory process within the meaning of cl. 10.3 and therefore fell to be determined by the courts of New Jersey as the courts of the state whose regulatory process was involved.

20 Mr. Lewis, Q.C. took issue with the suggestion that the 2014 agreement had superseded that 2010 agreement, save in relation to the mechanics of divestiture. He submitted that the 2010 agreement, including cl. 10, continued to govern the parties' relationship except to the extent, if at all, to which they had agreed otherwise. Bwin had not agreed to submit disputes between itself and Ms. Parasol and Mr. DeLeon to the courts of New Jersey and none of the claims made in the New Jersey proceedings related to the regulatory process going on there. Accordingly, the proceedings in New Jersey involved a breach of cl. 10.2 of the 2010 agreement.

The effect of the 2014 agreement

(i) ***The test***

21 Bwin is domiciled in Gibraltar and therefore the starting point for any discussion about jurisdiction is art. 4(1) of Council Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). Under art. 4(1), a person domiciled in a Member State is to be sued in the courts of that Member State. Bwin is therefore entitled to be sued in the courts of Gibraltar, unless the appellants can persuade the court that it has agreed that the courts of another country should have jurisdiction to determine the

dispute. As the Privy Council put it 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. . . . [A]s the case law of the Court of Justice emphasizes, in order to establish that the usual rule . . . is ousted . . . 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 . . ."

22 Accordingly, it is for the appellants in this case to persuade the court, the application being interlocutory in nature, that they have much the better of the argument that Bwin has entered into a clear and distinct agreement that the courts of New Jersey should have jurisdiction to decide the present disputes, and that in turn depends on the correct interpretation of the 2014 agreement.

(ii) ***Proper law***

23 It is perhaps worth emphasizing at this stage that the court is concerned with jurisdiction rather than proper law. Mr. Azopardi addressed us at some length on the proper law of the 2014 agreement, but, having heard expert evidence on the point, the judge found that the principles of construction to be applied under the law of New Jersey were the same as those to be applied under the law of England or the law of Gibraltar and there is no appeal from that part of his decision. In those circumstances the identification of the proper law of the agreement has no bearing on the question of construction and therefore on the contention that the parties had by implication agreed to submit the relevant disputes to the determination of the New Jersey courts.

24 However, Mr. Azopardi also submitted that, since the agreement was governed by the law of New Jersey, a term was to be implied by law that the parties agreed to submit to the jurisdiction of the courts of New Jersey in relation to the determination of all disputes arising under or in connection with it. In support of that submission, he relied on certain evidence given by Mr. Lloyd Levenson, an attorney practising in Atlanta, which had been filed in support of the appellants' case. In my view, however, Mr. Levenson's evidence falls far short of what is required to make good that submission. In the first place, although he clearly has extensive experience of the gaming law in New Jersey, Mr. Levenson does not appear to have been put forward as an expert witness on New Jersey

law in general. Moreover, as Mr. Lewis pointed out, Mr. Levenson is not independent of the parties, being a member of the law firm currently acting for the claimants in the New Jersey proceedings. Quite apart from that, however, the evidence he gives is directed to the meaning of the 2014 agreement, rather than to the existence of any term implied as a matter of New Jersey law. In my view, Mr. Levenson's evidence is of no assistance to the appellants in determining whether under the general law of New Jersey an agreement in the terms of the 2014 agreement is subject as a matter of law to an implied term of the kind suggested. It follows that in my view it is unnecessary for present purposes to determine the proper law of the 2014 agreement.

(iii) ***The context of the 2010 agreement***

25 I return, therefore, to the question whether the 2014 agreement contains an agreement to submit to the jurisdiction of the courts of New Jersey. In his skeleton argument, Mr. Azopardi drew our attention to many cases in which the courts have consistently affirmed the importance of giving the words of a contract their ordinary and natural meaning. As a starting point that can hardly be disputed, but it has long been accepted that when construing a document of any kind it is vital to have regard to the context in which it was created and in which particular words are used. Words often take their meaning from the context in which they are found, whether that be the document itself or the wider context of the transaction of which the particular contract forms part. In their first ground of appeal, the appellants criticize the judge for taking the 2010 agreement as his starting point but in my view he was right to do so because the 2010 agreement provides an important part of the background to the 2014 agreement and the context in which it is to be construed. How the two documents were intended to relate to each other and whether the parties intended to depart from what had previously been agreed between them depends on the correct interpretation of the 2014 agreement read in its context.

26 The 2010 agreement can properly be described as a framework agreement, in the sense that it established principles for satisfying future regulatory requirements relating to Ms. Parasol and Mr. DeLeon at a time when the need for action on their part was uncertain. For that reason alone, one would expect it to contain the basic principles governing the future relationship between them and Bwin in relation to such matters. It will be necessary at a later stage to consider in greater detail the provisions of cl. 10 of that agreement but it is clear from cl. 10.2 that, at that stage, the parties were in agreement that the English courts should, and the courts of the United States and Canada should not, have jurisdiction to determine any disputes arising in connection with it. At that point,

therefore, it is possible to identify a clear agreement between the parties in relation to jurisdiction.

(iv) ***Clause 27 of the 2014 agreement***

27 One then turns to the 2014 agreement to see whether the parties modified the agreement they had made a few years earlier. Unlike the 2010 agreement, the 2014 agreement is not a framework agreement; on the contrary, its purpose was to implement the agreement by Ms. Parasol and Mr. DeLeon to divest themselves of their shares in Bwin in order to enable the company to obtain regulatory approval. It can therefore be seen as operating within the framework established by the 2010 agreement. The 2014 agreement itself contains no express modification of the 2010 agreement in relation to jurisdiction, either in relation to the positive choice of England or the equally positive exclusion of the United States and Canada. That is perhaps not surprising, given its relatively limited purpose, but it means that there is no express indication that the parties had formed a clear intention to depart from what had previously been agreed in relation to jurisdiction so far as concerns disputes arising in connection with the 2010 agreement. If any such agreement exists, therefore, it must be implied and must be derived from the language of cll. 27 and 28 of the 2014 agreement.

28 The main thrust of Mr. Azopardi's argument, based on the second sentence of cl. 27, was that the 2014 agreement had superseded the 2010 agreement so far as the present disputes are concerned. This brings me back to his submission that the words of cll. 27 and 28 of the 2014 agreement are clear and should be given their ordinary and natural meaning. In principle I accept that approach, but I think it likely that if the parties had intended to depart from what they had previously agreed in relation to an important matter such as jurisdiction they would have said so in terms. That alone suggests that, whatever words they used, that was not their intention. It is true, as Mr. Azopardi pointed out, that cl. 27 as a whole, and the final sentence in particular, is worded in unqualified terms, but a clause of this kind in what is essentially a subsidiary agreement would be an unusual vehicle by which to introduce an important modification to the primary agreement. Furthermore, there are many indications within the 2014 agreement itself that the parties intended the 2010 agreement to remain in force as the over-arching agreement governing their relationship. To give just one example, it expressly provided that any new trustees of the divestiture trusts should formally adhere to the 2010 agreement.

29 As Mr. Lewis observed, the first sentence of cl. 27 is concerned with conflicts or inconsistencies between the 2014 agreement and other agreements between the parties. Since the purpose of the 2014 agreement was to implement the divestiture provisions of the 2010 agreement, it is not

surprising that the parties should have wished to ensure that its provisions, which were the result of further negotiations between each other and the DGE, should prevail over any earlier agreement in the event of any conflict, but in the absence from the 2014 agreement of any clear provision dealing with jurisdiction, no conflict or inconsistency arises. The purpose of the first part of cl. 27, in my view, is to ensure that the 2014 agreement is the controlling document in relation to the arrangements under which Ms. Parasol and Mr. DeLeon were to divest themselves of their interests in Bwin, but that had nothing to do with the operation of the 2010 agreement as the framework within which the 2014 agreement sat.

30 The second sentence of cl. 27 also has to be read in its context, which includes the first sentence. If the second sentence were construed in the way suggested by Mr. Azopardi it would deprive the first of any content. The words "all previous agreements . . . in relation to the subject matter of this agreement," must be read in a way that gives effect to the overall commercial purpose of the document, and that requires a careful approach to deciding what is the subject matter of the 2014 agreement. In my view it is limited to establishing a procedure for implementing the principles established by the 2010 agreement. The purpose of this sentence, it seems to me, is to ensure that the 2014 agreement contains the definitive terms governing the divestiture arrangements. It prevents any of the parties from seeking to rely on any earlier understandings or informal arrangements to challenge or amplify the language of the agreement itself. I do not think that a clause in these terms can have been intended to sweep away all the provisions of the 2010 agreement, including those of a general nature, such as the agreement on jurisdiction. For these reasons, I am unable to accept Mr. Azopardi's submission that by virtue of cl. 27 the 2014 agreement superseded the 2010 agreement in relation to disputes of the kind raised in the New Jersey proceedings. Nor can I accept that steps taken under the 2010 agreement to trigger the operation of the divestiture provisions (in this case giving a QBO notice) can properly be regarded as falling within the scope of the 2014 agreement. Such a step was the precursor of the negotiations which ultimately led to the 2014 agreement. It was not the subject matter of the agreement itself.

(v) ***Clause 28 of the 2014 agreement***

31 In the absence of an express choice of New Jersey jurisdiction, Mr. Azopardi was forced to contend that a choice of jurisdiction need not be express but could be implied, and that in this case there was a combination of factors which supported the conclusion that the parties had by implication agreed to submit disputes under the 2014 agreement to the jurisdiction of the New Jersey courts. He relied on the fact that the DGE was a party to the agreement and that it contained many references to the

legislation and administrative arrangements of New Jersey relating to online gambling. He also relied heavily on the second sentence of cl. 28 which provides that the agreement is to be enforced and interpreted before the DGE pursuant to the provisions of the Casino Control Act and that all parties submit to the jurisdiction of the DGE for the purpose of the enforcement of compliance with their respective duties and obligations under the agreement.

32 Given the need to show clearly and precisely that any jurisdiction agreement was in fact the subject of consensus between the parties (see *Bols Distilleries B.V.* v. *Superior Yacht Servs. Ltd.* (1)), cases in which it is possible to be satisfied that there is an implied choice of jurisdiction are likely to be rare. In the present case, it may seem surprising at first sight that the DGE as an organ of government should have been party to an agreement dealing principally with private rights and obligations, but the explanation lies in the fact that, in order for Bwin to obtain regulatory approval in time for it to enter the market as soon as online gambling became lawful, it was necessary for the arrangements by which Ms. Parasol and Mr. DeLeon were to divest themselves of their shares over a period of two years to be contained in a legally binding agreement, the terms of which were not only acceptable to the DGE but could, if necessary, be enforced by it. The interest of the DGE explains the appointment of a protector to oversee the trusts into which Ms. Parasol and Mr. DeLeon were to transfer their shares for the purposes of their disposal in accordance with the trust deeds. It also explains the powers given to the DGE in relation to the treatment of new interests arising in relation to the shareholdings as the result of changes in the corporate structure of Bwin (see cl. 8). It explains as well the existence in cl. 10 of obligations on the part of Bwin, the trustees and others to provide information to the DGE and the power given to the DGE to punish by way of fine any breach of the agreement or failure to co-operate. I agree that the regulatory function of the DGE, not least its power to impose fines for failure to comply with the agreement, pointed clearly to the parties' acceptance that the exercise of those powers and any judicial proceedings that might arise as a result would inevitably take place in New Jersey. It does not follow, however, that the private parties to the 2014 agreement were agreeing to submit to the jurisdiction of the New Jersey courts for all purposes.

33 Mr. Azopardi also laid some emphasis on the terms of cl. 20 of the 2014 agreement, which contains an acknowledgment that damages would not be an adequate remedy for any breach of the agreement, and gives any party (including, so it is said, the DGE) the right to obtain equitable remedies, including an injunction to restrain a threatened breach of the agreement or an order for specific performance to compel compliance. This clause, he submitted, shows that the DGE could seek equitable

remedies against other parties to the agreement, which it could do only in the courts of New Jersey. If that were so, the parties must have intended that any other disputes arising under the agreement would also be determined in New Jersey, since they can hardly be supposed to have contemplated that some disputes would be determined in New Jersey and others elsewhere: see *Fiona Trust & Holding Corp*. v. *Privalov* (2).

34 In my view the true position, as Mr. Lewis, Q.C. submitted, is that the 2014 agreement recognizes the existence of two quite different legal regimes, one dealing with private law claims by and between parties other than the DGE and one dealing with the regulatory process, which is essentially of a public nature and is the only aspect of the parties' relationship in which the DGE was interested. (This distinction between disputes relating to public and private rights is explicitly reflected in the drafts of amended and restated deeds of settlement contained in the annexes to the 2014 agreement.) No doubt everyone understood and intended that any regulatory proceedings would be conducted in the courts of New Jersey but it does not follow that they envisaged that purely private law disputes, much less disputes arising under the 2010 agreement, should be determined by the same courts. The approach to arbitration and jurisdiction clauses approved in the *Fiona Trust* case is based on a presumption that parties to an agreement would naturally expect all disputes between them to be determined in the same forum, but it is open to them to agree otherwise and there may be cases, of which in my view this is one, in which the difference in the nature of the disputes supports the conclusion that the parties did intend them to be decided by different tribunals. In the present case, there is every reason why the parties should have envisaged that disputes with the DGE arising out of the exercise of its regulatory powers should be determined in New Jersey but that private disputes between Bwin and other parties to the agreement not involving the DGE should be determined in accordance with the 2010 agreement.

35 Mr. Azopardi drew our attention to the fact that Bwin appears to have been willing, in the context of other potential ventures in the United States, to submit to the jurisdiction of local courts. That, he submitted, showed that Bwin was driven entirely by commercial considerations and was not averse to agreeing to litigate in the United States if need be, and tended to support the conclusion that Bwin had agreed to submit to the courts of New Jersey in connection with disputes arising in relation to the 2014 agreement. In my view, however, such evidence is neither relevant nor helpful; indeed, I do not think it is admissible in relation to the issue of construction. It may be that in a different context Bwin was willing for commercial reasons to accept terms that were less favourable than it might have wished and it may even be that it was unconcerned about the prospect of becoming embroiled in proceedings before the local courts (though that seems unlikely). However, whatever reasons it may have had

in other cases for being willing to contemplate such a possibility, they cannot shed any light on the meaning of the 2014 agreement, which has to be interpreted simply in accordance with its terms.

36 In summary, therefore, I am of the view that the 2014 agreement contains neither an express nor an implied agreement to submit to the jurisdiction of the courts of New Jersey, save in respect of proceedings involving the DGE in its capacity as regulator, and that all the causes of action contained in the New Jersey complaint are subject to the jurisdiction agreement in cl. 10 of the 2010 agreement.

Clause 10.3 of the 2010 agreement

37 I have set out above the full text of cl. 10. Clause 10.1 contains an express choice of English law but also provides that the interpretation of the requirements of any regulatory process and of the laws of any regulatory body shall be governed by the laws of the jurisdiction concerned. In the present case, therefore, it is necessary to look to the law of New Jersey for the proper interpretation of the Casino Control Act and the requirements of the regulatory process, but in my view that is not surprising. It has no bearing on the question of jurisdiction, for which the clause provides elsewhere.

38 Clause 10.2 contains an express submission to the jurisdiction of the English courts to determine any disputes 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." These are very wide words which are capable of encompassing not only claims for breach of contract but also claims in tort insofar as they arise in connection with the agreement, its performance or the legal relationships created by it. In my view, they can and should be construed as extending to claims made under the 2014 agreement, the purpose of which was to implement the relationship created by the 2010 agreement. Equally importantly for present purposes, cl. 10.2 contains an express agreement that the courts of the United States shall *not* have jurisdiction to determine any disputes falling within the ambit of the clause.

39 Clause 10.3 poses greater difficulty of interpretation, partly because of the opening words "notwithstanding Clause 10.2 . . ." and partly because of the use of the expression "any disputes regarding a Regulatory Process shall be *governed* by the laws of the [relevant jurisdiction]" in conjunction with the express provision that the courts of England shall nonetheless have jurisdiction to determine such disputes. Mr. Azopardi submitted that the claims being made in New Jersey were all part of a regulatory process as defined in the agreement and that the effect of cl.

10.3 was that they were to be determined by the courts of New Jersey as the courts of the relevant jurisdiction.

40 The expression "Regulatory Process" is defined in the 2010 agreement as meaning "obtaining, renewing or amending a licence, being confirmed as suitable or completing some other form of regulatory process with respect to Gaming."

41 At one level, it may be true to say that the 2014 agreement was part of the regulatory process because the appellants' divestiture of their shares in Bwin was an essential condition of its obtaining regulatory approval, but I do not think that the expression "regulatory process" in cl. 10.3 can be read as widely as that. In my view, it is directed only to the process involved in, and generated by, an application for a licence or other regulatory approval made by Bwin to a relevant regulator. I think its purpose is to ensure that any disputes about the requirements of a particular regulatory process, which might affect the steps which the appellants can be required to take to enable Bwin to obtain a licence, are determined in accordance with the relevant local legislation. It does not, in my view, extend to arrangements made with third parties to enable Bwin to satisfy regulatory requirements. It so happens in this case that the regulator itself became a party to the agreement implementing the principles established by the 2010 agreement, but that is not something that the agreement contemplated as inevitable or even likely.

42 The most serious causes of action being pursued in New Jersey involve complaints that Bwin committed various wrongful acts which induced the claimants to enter into the 2014 agreement. As such, they arise out of events which occurred before the agreement was executed and it would be stretching language too far on any view to say that they formed part of the regulatory process. In any event, they are far removed from the regulatory process as such. Other claims, such as for breach of warranty and failure to co-operate, arise out of the 2014 agreement itself, but they too are not directly concerned with the regulatory requirements of the local jurisdiction. For these reasons I am unable to accept that any of the claims being pursued by the appellants in New Jersey fall within cl. 10.3.

43 It was part of Mr. Azopardi's case that the effect of the words providing for disputes regarding a regulatory process to be "governed by" the laws of the relevant jurisdiction was to import a submission to the jurisdiction of the local courts. Since I do not think that any of the claims made in the New Jersey proceedings give rise to a dispute regarding a regulatory process, this point does not arise but in any event I do not think that his submission can be right, because the clause itself deals explicitly with jurisdiction in a different way. In my view, the words "governed by" simply mean that disputes of that kind are to be determined in accordance

with the law of the relevant jurisdiction. Viewing cl. 10 as a whole, it is not easy to see what additional function cl. 10.3 is intended to perform, since the proper law (including in relation to regulatory process) has already been dealt with in cl. 10.1 and jurisdiction in cl. 10.2. However, for the reasons I have given, I do not think it was intended to confer jurisdiction on the courts of the place where the relevant regulatory process is being undertaken or that it was intended to modify the agreement in cl. 10.2 excluding the jurisdiction of the courts of the United States and Canada.

The anti-suit injunction

44 For the reasons I have given, I am satisfied that Bwin has a much better argument that the claims being made by the appellants in New Jersey fall within the scope of cl. 10 of the 2010 agreement, which continues to govern the parties' relationship. They therefore have much the better argument that the appellants remained bound by their agreement not to pursue their claims in the courts of the United States or Canada and by doing so are acting in breach of contract. That being so, the judge had a discretion to grant an anti-suit injunction to restrain them. He considered various factors relating to *forum conveniens* but concluded that there was nothing substantial to weigh against Bwin's contractual entitlement not to be sued in New Jersey and granted the relief it sought.

45 Although the court will normally grant an injunction to enforce a jurisdiction agreement, it may decline to do so if there are sufficiently strong reasons for not holding the parties to their bargain. Mr. Azopardi drew our attention to a number of factors which, he submitted, made New Jersey a much more appropriate forum for the resolution of the dispute in this case. At the root of the claims in New Jersey lies the allegation that Bwin misrepresented the benefits likely to be derived from entering into the online gambling market there. It is said that that will involve an analysis of the gambling market in New Jersey, something that would be more appropriately undertaken in New Jersey than Gibraltar. It is also said that it will be necessary to consider the negotiations that preceded the signature of the 2014 agreement and the dealings with the DGE before and after the agreement was signed. The claim that Bwin failed to provide the degree of co-operation due under the agreement will, it is said, call for investigation into the approach of the DGE and the extent to which such assistance as Bwin was in a position to give might have led to a different outcome.

46 There is, of course, some force in the submission that from a practical point of view these issues might more easily be determined in New Jersey, but the advantages should not be overstated. A case of this kind can be tried in Gibraltar without undue difficulty. In my view, the

factors relied on by Mr. Azopardi do not render New Jersey an overwhelmingly more appropriate forum so as to justify overriding the parties' agreement that proceedings between them should not be pursued in the United States. That was the judge's view and I agree with it but, even if I did not, it is important to bear in mind that the decision was one which involved an exercise of discretion and can be set aside only if the judge misdirected himself or his decision was plainly wrong. It was not suggested that the judge had misdirected himself in any material respect and in my view his decision, far from being plainly wrong, was correct. It follows that in my view there are no grounds for setting aside this part of the judge's order.

The cross-application

47 It follows from what I have said already that, in my view, Gibraltar is an appropriate jurisdiction for the determination of the issues between the parties and that the judge was right to refuse to stay the proceedings here.

Conclusion

48 For these reasons I would dismiss the appeal.

49 **GOLDRING, J.A.:** I agree.

50 **KAY, P.:** I also agree.

Appeal dismissed.