



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 257 OF 2023 (DDJ)

BETWEEN:

NEW ORDER FOUNDATION

Plaintiff

AND

ANDREJ RADONJIC

First Defendant

AND

GECKOBYTE LABS INC.

Second Defendant

Before:

The Hon. Justice David Doyle

Appearances:

Christopher Levers and Dunzelle Daker of Ogier

Heard:

1 February 2024

Ex Tempore Judgment delivered:

1 February 2024

**Draft transcript of Ex Tempore
Judgment circulated:**

1 February 2024

**Transcript of Ex Tempore
Judgment approved:**

5 February 2024

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HEADNOTE

*Determination of an application seeking permission to serve the Defendants out of the jurisdiction in
Canada*

EX TEMPORE JUDGMENT**Introduction**

1. I record that I have considered the hearing bundle, the Plaintiff's skeleton argument dated 26 January 2024, the Plaintiff's 8 page supplementary skeleton argument dated 29 January 2024, which belatedly covers gateway (d) contract and arguments on the most appropriate forum issue and the impact of exclusive jurisdiction clauses, and on the last two pages covers full and frank disclosure.
2. I have also benefitted from Christopher Levers' helpful, eloquent and quick thinking oral submissions this morning.

The ex parte summons

3. The Plaintiff and its attorneys have had a busy start to the New Year. By an *ex parte* summons dated 3 January 2024 the Plaintiff seeks leave to serve the Defendants out of the jurisdiction in Canada. The First Defendant is stated to reside in Canada and the Second Defendant has its registered office in Canada. The First Defendant is a director of the Second Defendant.

The Writ of Summons

4. By Writ of Summons dated 1 September 2023 the Plaintiff seeks various declarations against the First Defendant, that the First Defendant is in breach of what is defined as a Consultancy Agreement

and what is defined as an Incubation Agreement and various orders including specific performance, damages and an indemnity.

5. As against the Second Defendant the Plaintiff at paragraph 9 seeks:

“Orders requiring the Second Defendant [I think the word “to” is missing] take all necessary steps to rectify its register of members to reflect the legal entitlement of the Plaintiff to the Equity and record the registration of the Equity in the name of the Plaintiff.”

6. As against the First and Second Defendants, the Plaintiff seeks a declaration and an injunction and an inquiry as to damages caused by the First and Second Defendants conspiring with each other as to the breach of confidence and/or other misuse of the Intellectual Property and/or the Confidential information (both as defined in the Writ of Summons) being a course of conduct stated to consist of unlawful means with the intention of injuring the Plaintiff. An account of profits is also sought against the Defendants.
7. I have considered all that Mr Levers has written and submitted in respect of the various claims.

The Evidence

8. Mr Levers has referred me to the agreements and the evidence before the court. In particular he refers me to a letter dated 29 August 2023 from Conyers, who act for the First Defendant. I have read that letter and Ogier’s reply dated 22 September 2023.
9. I also record that I have considered the evidence, in particular the First Affidavit of Inderson Dhaliwal, sworn on 26 January 2024.
10. I note at clause 8(c) General Terms of the Consulting Agreement dated 29 March 2022 (between the Plaintiff and the First Defendant) – Cayman governing law and Cayman exclusive jurisdiction clause although somewhat unusually the word “federal” appears before the words “laws of the Cayman Islands”, so maybe it was drafted by non-Cayman lawyers.

11. Clause 1.5 of the Incubation Agreement dated 27 October 2022 (between the Plaintiff and the First Defendant) also contains a Cayman law governing clause, a submission to the exclusive jurisdiction of the courts of the Cayman Islands and a waiver of objection.
12. The Second Defendant is not a party to these agreements.

Determination

13. At this *ex parte* stage of the proceedings and based on what I have read and heard to date, I am satisfied that:
 - (1) there is a good cause of action against the Defendants. There is in relation to each defendant a serious issue to be tried on the merits, although my prima facie view is that the rectification claim at paragraph 9 of the Writ of Summons must be determined in Canada and it is doubtful that the Cayman court has jurisdiction to make an order rectifying the register of members of a foreign company. I have considered Dicey, Morris & Collins *The Conflict of Law* Sixteenth Edition, particularly at paragraph 23-042, headed “Shares in Companies” and on rectification generally and jurisdictional issues *Nilon Limited and another v Royal Westminster Investments SA* [2015] UKPC 2, judgment of the Judicial Committee of the Privy Council from the Court of Appeal of the British Virgin Islands. I do not therefore give leave to serve out paragraph 9, the rectification claim, of the Writ of Summons. This however does not prevent the court from granting leave to serve out if other claims in the pleading survive, which they do in this case. In a case where several heads of claim are asserted against a defendant it is not necessary for every individual head of claim to pass through a gateway, but at least one of the heads of claim must do so (*AHAB v SAAD* 2010 (2) CILR Note 6; unreported judgment 29 September 2010, former Chief Justice Smellie at paragraph 9 (iii)). It may be that the relevant defendant in this case will endeavour to argue against such approach and rely on Dicey, Morris and Collins *The Conflict of Laws* Sixteenth Edition, paragraph 11-108 and Briggs *Private International Law in English Courts* Second Edition pages 203 and 225-6 and the authorities cited therein submitting that in an application for leave to serve out the relevant requirements must be satisfied for each claim advanced by the Plaintiff, but that is not a matter for today. Today,

I am content to follow the former Chief Justice's approach but I keep a mind that is open to persuasion, if and when the point is fully argued on an *inter partes* basis;

- (2) there is a good arguable case that the claims fall within one or more of the jurisdictional gateways namely (c) necessary or proper party gateway which includes a party duly served out of the jurisdiction as an anchor defendant. Gateway (c) is in respect of the Second Defendant and (d) the contract gateway is in respect of the First Defendant; and
 - (3) in all the circumstances the Cayman Islands is clearly the appropriate forum for the trial of the dispute and the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. It appears to the court that the case is a proper one for service out of the jurisdiction.
14. The jurisdiction clauses in the two agreements between the Plaintiff and the First Defendant are powerful factors pointing towards the Cayman Islands as the appropriate forum (see *Antec International Limited v Biosafety USA Inc* [2006] EWHC 47 (Comm) Gloster J, as she then was, at paragraph 7 and paragraph 12-108 of Dicey Morris & Collins *The Conflict of Laws* Sixteenth Edition). I do not lose sight of the fact that the Second Defendant is not a party to either agreement. I have also considered the *Deutsche Bank v Sebastian Holdings* [2009] EWHC 3069 (Comm), [2009] CLC 949 helpfully referred to in supplemental skeleton argument. I note Burton J's description of exclusive jurisdictional clauses at paragraph 15 and his reliance of Gloster J's judgment in *Antec International*. The supplemental skeleton argument also helpfully refers to the position where there is a waiver of objection relying on *Standard Chartered v Independent Power Tanzania* [2016] EWCA Civ 411, [2016] 1 CLC 750 and *Bank of New York Mellon v GV Films* [2009] EWHC 2338 (Comm) Field J.
15. My attention was also helpfully directed to 12-105 of Dicey, Morris & Collins *The Conflict of Laws* Sixteenth Edition where the learned authors state (footnotes omitted):

“... After the development of the *forum conveniens* principles in *Spiliada Maritime Corp v Cansulex Ltd*, there was a tendency to approach the application of jurisdiction clauses (particularly non-exclusive jurisdiction clauses) through the *Spiliada* lens, but the modern approach requires some modification to those principles to ensure that appropriate effect is

given to jurisdiction clauses. In particular, questions of the convenience or appropriateness have been said to be of negligible importance when a party seeks to enforce an exclusive jurisdiction clause.”

16. The position in respect of the Plaintiff and the First Defendant is relatively straight forward, especially in view of the exclusive jurisdiction clauses in their two agreements.
17. The position in respect of the Plaintiff and the Second Defendant is less straight forward. Mr Levers refers to paragraph 3.1(a)(ii) of the Incubation Agreement and highlights the fact that the Second Defendant was the legal entity formed for the purposes of the Project. I note also the nature of the claims against both Defendants and I am alive to the undesirable risk of inconsistent judgments if all claims are not dealt with in one jurisdiction.
18. Mr Levers in effect acknowledges the difficulties with the rectification claim and fairly and frankly took me to some of the Canadian connecting factors, including witnesses and documents and Canadian law covering some of the claims, but in my judgment Cayman is clearly the appropriate forum and if further summary proceedings have to follow for a formal rectification order in Canada then so be it.
19. For the record I should also add that I have considered all the full and frank disclosure points contained in the evidence and the written and oral submissions put before the court.

The Order

20. I am content therefore to make an order substantially in the terms of the draft submitted, such draft to incorporate the amendments I specified during my exchanges with counsel. If there is not to be an amended Writ deleting paragraph 9 (the rectification claim) then the order should make it plain that I do not grant leave to serve paragraph 9 out of the jurisdiction.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT

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