Neutral Citation Number: [2021] EWCA Civ 264

Case No: A4/2020/0021

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
QUEEN'S BENCH DEVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2021

Before:

LORD JUSTICE UNDERHILL
(The Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE COULSON
and
LORD JUSTICE PHILLIPS

- -

Between:

PRASHANT HASMUKH MANEK	**Claimants/ Appellants**
SANJAY CHANDI	
EAGM VENTURES (INDIA) PRIVATE LIMITED	
- and -	
IIFL WEALTH (UK) LIMITED	**1st Defendant**
RAMU RAMASAMY **PALANIYAPAN RAMASAMY**	**Defendants/ Respondents**
AMIT SHAH	**4th Defendant**

- -

Stephen Midwinter QC (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Appellants/Claimants**
James Collins QC and Siddharth Dhar (instructed by **Burness Paull LLP**) for the **Respondents/Defendants**

Hearing date: 4th February 2021

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Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am, Monday 1st March 2021."

LORD JUSTICE COULSON :

1 INTRODUCTION

1. This is another appeal concerned with issues of jurisdiction. The appellants allege that they were the victims of a fraud, pursuant to which the respondents (the majority shareholders) persuaded their representatives to sell to them their minority shares in an Indian company called Hermes i-Tickets Private Limited ("Hermes"), on the basis that a good offer had been made by a company called EMIF to buy Hermes for around $40 million. It is the appellants' case that, unbeknownst to them, the respondents had arranged for Hermes to be immediately sold on by EMIF to a German company, Wirecard AG, for around €250 million. Although the appellants have not yet ascertained who owned or controlled EMIF, they say that the respondents benefitted from the sale. In this way, the appellants claim to have been cheated out of the true value of their shares in Hermes.

2. The appellants have brought their claims against the respondents in the Commercial Court in London, alleging deceit. The first and fourth defendants have accepted the court's jurisdiction and provided defences in which they deny the claims. The second and third defendants, who are the respondents to this appeal, are brothers. They are referred to in the papers as Ramu and Palani. They are domiciled in India.

3. On 2 February 2018, Andrew Baker J granted permission to serve the claim form and particulars of claim on Ramu and Palani outside the jurisdiction. Thereafter, on 14 March 2018, they were the subject of a worldwide freezing order made by Robin Knowles J. Ramu and Palani subsequently applied to set aside those orders, on the basis that the Commercial Court did not have the jurisdiction to hear the claims against them.

4. When the application came before His Honour Judge Pelling QC, sitting as a judge of the High Court ("the judge"), there were a number of specific issues between the parties. The appellants sought to rely on two separate gateways to found the proceedings against the respondents in England: the 'necessary or proper party' gateway, under CPR 6BPD, paragraph 3.1(3) (which involved a consideration of whether or not there was a real issue between the appellants and the first (anchor) defendant, IIFL Wealth (UK) Ltd ("IIFL")); and/or the tort gateway, under CPR 6BPD paragraph 3.1(9)(a). There were also other issues said to be relevant to jurisdiction concerned, first, with the applicability of an arbitration clause in the relevant Sale and Purchase Agreement ("SPA"); secondly, as to whether England was the most appropriate forum for the trial of the action in any event ("the *forum conveniens* issue"); and thirdly, as to alleged non-disclosure by the appellants.

5. In a judgment dated 11 December 2019 ([2019] EWHC 3361 (Comm)), the judge rejected the appellants' claim under the "necessary or proper party" gateway. He concluded that the appellants had not shown that they had a realistic claim against IIFL, the anchor defendant for these purposes in the terms explained by Lord Briggs in *Vedanta Resources PLC v Lungowe* [2018] UKSC 20, at paragraphs 20 and 21. That was on the particular basis that the appellants had not demonstrated that the fourth defendant, Amit Shah ("AS"), was acting on behalf of IIFL when he made various representations to the appellants' representatives. There is no appeal against that part of the judge's order.

6. The judge also rejected the appellants' claim under the tort gateway, on the basis that they had not shown that sufficiently "substantial or efficacious" acts had been committed within the jurisdiction of the English courts. It is that part of the judge's judgment which is the principal subject of this appeal.

7. Although it is conventional, in jurisdiction disputes of this sort, to deal with any gateway and *forum conveniens* issues together, the judge did not do so here. That was partly because the *forum conveniens* issue was tied up with a potentially complicated debate about the scope and applicability of an arbitration clause which, in turn, involved questions of Indian law. In the light of his negative conclusions on both the gateway issues, the judge decided that it would be of academic interest to decide the other issues. That decision, although entirely pragmatic, has given rise to difficulties on this appeal, for reasons I explain below.

8. At the appeal hearing on 4 February 2021, the court heard the parties on the tort gateway issue. At the end of the parties' submissions, the court indicated that the appeal on the tort gateway would be allowed and that, for the reasons outlined briefly in Section 7 below, this court would hear at a later date the arguments on the remaining issues. Sections 2-6 of this judgment are solely concerned with an analysis of the judge's decision in respect of the tort gateway.

2 THE RELEVANT ALLEGED FACTS

9. What follows is a summary of the critical allegations of fact made by the appellants in this case. During the course of these events, the appellants at all times acted through their two representatives (two relatives of the first and second appellants), referred to in the papers as Hasu and Jayesh. Both are resident in England.

10. Hermes is an Indian company. The appellants were the minority shareholders. The majority shareholder was another Indian company, Great Indian Retail Private Limited ("GIR"), a company owned and controlled by Ramu and Palani.

11. Between July and September 2015, it is said that Ramu, Palani and AS represented to Hasu and Jayesh on a number of different occasions, and in a number of different ways, that a good offer had been made by EMIF of Hermes for approximately $40 million; that Hermes was performing poorly (which was why the offer by EMIF was a good one); that EMIF would be the ultimate purchaser of Hermes; and that if the appellants did not sell their minority shares to the respondents then Hermes would be stripped of its assets and their shares would be rendered worthless.

12. One particular feature of the proposed transaction was that Ramu and Palani insisted that the appellants must sell their shares to their own company GIR, who would then sell all the shares in Hermes to EMIF. They did not want the appellants to sell their shares directly to EMIF. The evidence demonstrates that that was one of the principal features of the proposal which caused Hasu and Jayesh suspicion and concern.

13. Before going on to identify the relevant events for the purposes of the tort gateway, I must emphasise an important part of the story which was not known to the judge, but which emerged in the evidence put forward by Wirecard, in support of their – ultimately successful – application to strike out the appellants' separate claim against them for conspiracy ([2020] EWHC 1904 (Comm)). As set out at paragraphs 13-19 of the

judgment of Sir Ross Cranston, Wirecard's evidence was that their Chief Operating Officer (Mr Marsalek) had met Ramu and Palani on 10 December 2014 in Vienna, at the start of the negotiations, and that by June 2015 they had told him that EMIF would acquire all of the Hermes shares. One clear inference is that this was in order to allow Wirecard to buy Hermes from EMIF: that was why the acquisition of Hermes had "become viable" by that date (paragraph 13 of the judgment). AS met with Wirecard too, apparently as a representative of EMIF. Wirecard's evidence was that Mr Marsalek was discussing the commercial terms with Ramu and Palani in the summer of 2015. Those negotiations were ongoing on 7 August 2015 when a purchase price for Hermes of around €250-300 million was agreed between Wirecard's chief financial officer (Mr Helms) and Mr Marsalek. By the end of August, Wirecard were chasing as to why the acquisition of the shares in Hermes had not taken place (paragraphs 18 and 19 of the judgment). It goes without saying that none of this was ever mentioned to the appellants, or to Hasu and Jayesh.

14. The first meeting at which Ramu and Palani outlined their proposals to the appellants was in Chennai on 4 July 2015. The second appellant attended: neither Hasu nor Jayesh were present. After further emails, it became apparent that, for the plan to work, Ramu needed to persuade Hasu and Jayesh of the merits of the proposed sale of the appellants' shares in Hermes to GIR.

15. The first meeting with Hasu and Jayesh took place in London on 8 August 2015. On Wirecard's evidence in the other action, this was the day after their negotiations with Ramu and Palani had reached such an advanced stage that Wirecard's internal documents could show their willingness to buy Hermes for up to €300 million. Ramu flew in to London Heathrow early in the morning of 8 August. The meeting took around five hours, at the Hilton Hotel at Heathrow's Terminal 5. It is not disputed that at that meeting, Ramu showed Hasu and Jayesh a draft SPA between GIR, Hermes and EMIF, which had been identified as the purchaser of Hermes. Ramu refused to leave Hasu and Jayesh a copy of the SPA for them to scrutinise.

16. During the meeting, Ramu also said that Hermes' sales figures were "not that great" and that in consequence EMIF's offer of $40 million was particularly attractive. Ramu attempted to convince Hasu and Jayesh that they should sell their shares to GIR and that they should do it urgently, because otherwise EMIF might walk away.

17. Hasu and Jayesh were not convinced. In particular, they could see no reason why the appellants should not sell their shares directly to EMIF. In order to further convince them, Ramu stayed on to 9 August and he had a further meeting that morning with Hasu. Ramu also called Jayesh and the first and second appellants on the phone, again endeavouring to persuade them to sell their shares to GIR. He then boarded a plane back to India. At no time did he make any mention of the fact that EMIF were not the ultimate purchasers of Hermes. Neither did he mention his discussions with Wirecard and the fact that figures were apparently being discussed as to the value of Hermes which was far beyond anything which had been indicated to Hasu or Jayesh. Although the respondents have correctly pointed out that the €250-€300 million figure was in an internal Wirecard document rather than a record of any discussion with them, it is most unlikely that figures in this range were not part of their negotiations. The prospective buyer does not usually identify a proposed purchase price in its internal documents that is much higher than the prospective seller has indicated that it will accept.

18. The appellants then became involved with IIFL and AS, a director. IIFL was a sister company to EMIF. AS appears to have been put up to vouch for the bona fides of EMIF: that aspect of Jayesh's evidence in this case might be thought to have been corroborated by Wirecard's evidence in the other action, where the judgment at paragraph 15 describes AS (the founder and managing partner of EIFML Group, another linked company) as being part of the Hermes "side" in the discussions with Wirecard, along with Ramu and Palani. There were a number of telephone calls between AS and Hasu and Jayesh.

19. On 22 August, when Jayesh rang from London to speak to AS (who was apparently in Singapore), his evidence was that AS confirmed that the EMIF offer was a good deal and that the appellants should sell their shares to GIR. An explanation was given as to the technicality which apparently meant that the appellants could not sell to EMIF directly. In the same call, AS suggested that, if the appellants did not agree to the proposal, he would buy the remaining Hermes shares from GIR, transfer all of the assets from Hermes to the new company, and thereby render the appellants' shares in Hermes worthless.

20. On 24 August, there was a second meeting in London attended by the first appellant, Hasu and Jayesh, together with Sarju Vakil ("Sarju"), who was said to be another director of IIFL. Sarju brought with him an updated copy of the draft SPA between EMIF, Hermes, GIR, Ramu and Palani. After some debate, he left a copy of this updated SPA with Hasu and Jayesh.

21. On 25 August, Jayesh rang from London to speak to Ramu in India. He still had concerns about the lack of transparency. In a subsequent telephone conversation between the two on 26 August, Ramu denied that any aspects of the transaction were being hidden from the appellants. However, Hasu and Jayesh still had ongoing concerns, which were set out in detail by Jayesh in an email to Ramu of 30 August. Ramu responded by email on 31 August and Palani, also by email, on 1 September.

22. It appears that on around 2 September 2015, on the advice of Hasu and Jayesh, the appellants finally agreed to sell their shares in Hermes to GIR. In his statement of 5 July 2019, Jayesh summarised the position at paragraph 78:

> "78. Following Amit's email and Ramu's subsequent call and email, all on 26 August 2015, we had a long discussion amongst us. **Based on an overall consideration of the threat by Amit, review of the documents provided by Sarju, representations made by Ramu and Amit and the further explanations and assurances provided by Ramu and Palani on 31 August and 1 September 2015, my view was that the Claimants had little choice but to proceed with the sale of their shares to GIR,** which Sanjay and Prashant decided to do. I summarized the basis on which the Claimants would sell to GIR in an email to Palani dated 2 September 2015. I genuinely believed at the time that Ramu and Amit would proceed with the transaction without the Claimants' shares if they did not agree to sell to GIR and Amit would transfer out the assets from Hermes as he had threatened. We subsequently discovered that the travel business of Hermes was transferred out of Hermes in October/November 2015 into a new vehicle called Goomo following the transaction." (Emphasis supplied)

23. It appears that SPAs were executed on 9 September in Abu Dhabi. However, it then transpired that Ramu thought that new versions of the SPAs needed to be executed. Thus on 20 September 2015 he flew to London for a few hours so that new versions could be signed.

24. Thereafter, it appears that Hermes was sold to EMIF. On about 27 October 2015, 100% of the shares in Hermes were sold on to Wirecard in accordance with the agreement apparently reached (without the appellants' knowledge) in August 2015 (paragraph 13 above). The appellants subsequently discovered what had happened and a letter of claim dated 4 April 2017 was sent on their behalf. Proceedings were commenced in the Commercial Court on 26 January 2018.

3 THE JUDGMENT

25. The judge dealt with the tort gateway between [22]-[36] of his judgment. He summarised the law and, at [24], he identified the four events on which he said the appellants relied in support of their case that their losses "resulted from substantial and efficacious acts committed within the jurisdiction". Those events were the meeting in London on 8/9 August 2015 (which he called Event 1); the meeting in London on 24 August 2015 (Event 2); the meeting on 20 September 2015 (Event 3); and the subsequent sale of the Hermes shares to Wirecard in October 2015 (Event 4).

26. The judge addressed the meeting on 8/9 August at [25]-[28]. He said that the only allegation material to the deceit claim was the representation that the sales figures for Hermes in 2014-15 "were not that great and as a result the buyer's offer was particularly attractive". He said that all the other misrepresentations relied on in the pleaded claim were derived "either from prior or subsequent statements, all of which were alleged to have been made at meetings in, or in emails or telephone calls emanating from India or Singapore".

27. He rejected the appellants' case that the making of this representation was a substantial and efficacious act. That was in part because, as he put it, "nothing material resulted from the discussions" [26]. He said that the issue between the parties at the meeting "was not the sale of the appellants' shares but to whom they were to be sold".

28. The other reason for the judge's conclusion was set out at [28]. He said that he had to assess not only "the intrinsic potency of the particular event relied on but also assessing its significance in the context of all other facts and matters relied on by [the appellants]…" He went on to say that "what was said at the meeting was at best of minor importance and can be properly characterised as insignificant. That is all the more the case when what is alleged to have happened at the meeting is viewed in the context of all the other allegations made by the appellants, each of which are more important, and in the case of the impact of what AS is alleged to have said, much more important, than what was said at the first London meeting." The reference to what AS is alleged to have said was a reference to the telephone call on 22 August 2015 and the threat to asset-strip: see paragraph 19 above.

29. The judge dealt much more shortly with the second meeting on 24 August. He said that this event did not assist the appellants because it was not alleged that any representations, much less any relevant representations, were made during the course of the meeting. He noted that neither Ramu nor Palani were present. Although he noted

that the appellants' solicitor, Mr Gadhia, had said that the meeting was "a key component of the overall fraudulent scheme", the judge said that assertion, at least in respect of the deceit claim, was not explained.

30. At [31]-[34], the judge dealt with the meeting to re-sign the SPAs on 20 September 2015. He rejected the suggestion that this was a substantial or efficacious event because the SPAs had already been signed; he noted that it was not alleged that anything material had happened on 20 September; and he recorded that it was not alleged that Ramu or Palani had done anything relevant within the jurisdiction on that date. He rejected any case based on Event 4, the ultimate purchase of Hermes by Wirecard, as being irrelevant to the deceit alleged.

31. For all those reasons, he rejected the appellants' case that substantial or efficacious acts had been committed within the jurisdiction. He therefore concluded that the appellants had not made out a claim under the tort gateway, and that, in consequence, the court did not have the jurisdiction to hear the appellants' claims against Ramu and Palani.

4 THE LAW

32. The tort gateway is set out at paragraph 3.1(9) of 6BPD as follows:

> "(9) A claim is made in tort where - …
>
> (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction."

33. If jurisdiction is disputed under this gateway, the test to be applied by the court is that set out in *Metall und Rohstoff v Donaldson* [1990] 1 QB 391 at 437 E-G. This was a judgment of the Court, which included Bingham LJ (as he then was). The relevant passage reads:

> "Condition (c) prompts the inquiry: what if damage has resulted from acts committed partly within and partly without the jurisdiction? This will often be the case where a series of acts, regarded by English law as tortious, are committed in an international context. It would not, we think, make sense to require all the acts to have been committed within the jurisdiction, because again there might be no single jurisdiction where that would be so. But it would certainly contravene the spirit, and also we think the letter, of the rule if jurisdiction were assumed on the strength of some relatively minor or insignificant act having been committed here, perhaps fortuitously. **In our view condition (c) requires the court to look at the tort alleged in a common sense way and ask whether damage has resulted from substantial and efficacious acts committed within the jurisdiction (whether or not other substantial and efficacious acts have been committed elsewhere): if the answer is yes, leave may (but of course need not) be given.** But the defendants are, we think, right to insist that the acts to be considered must be those of the putative defendant, because the question at issue is whether the links between him and the English forum are such as to justify his being brought here to answer the plaintiffs' claim." (Emphasis supplied)

34. This test has been approved/applied in a number of subsequent cases including *ABCI v Banque Franco-Tunisienne* [2003] EWCA Civ 205 and *Newsat Holdings Limited v Zani* [2006] EWHC 342 (Comm).

35. The court's approach to disputed evidence in jurisdictional challenges has been the subject of considerable recent judicial pronouncement: see *Brownlie v Four Seasons Holdings International* [2017] UKSC 80; *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34; and *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV and others* [2019] EWCA Civ 10. In short, in respect of any disputed allegation of fact, a claimant endeavouring to persuade the court to accept jurisdiction – in this case the appellants – has to show at this interim stage a plausible evidential basis that he or she has the better argument: see paragraph 73 of *Kaefer*.

36. Happily, it is unnecessary in the present case to go further into the potential complexities of that test in practice. That is because, not only do the respondents in the present case accept that there is a serious issue to be tried, they also do not dispute, at least for the purposes of the jurisdiction challenge, the assertions made by the appellants as to what was said and done at the relevant meetings. As Mr Collins accepted, the factual debate was limited to questions of reliance and causation. So the only issue for the purposes of the tort gateway was whether the appellants could show on the evidence that they had the better of the argument in demonstrating that substantial and efficacious acts were committed within the jurisdiction.

5 THE MEETING IN LONDON ON 8/9 AUGUST 2015

5.1 Context

37. In my view, it is important to set the context for the meeting in London on 8/9 August 2015. This was the first face-to-face meeting between either of the respondents (in this case, Ramu) and the appellants' representatives, Hasu and Jayesh. It was therefore significant for that reason alone. Furthermore, the date might not have been coincidental. On the basis of the Wirecard evidence in the other action, it could be said that their negotiations with Ramu and Palani had reached some form of fruition the day before, when a figure of up to €300 million was internally agreed by Wirecard for their purchase of Hermes. If their plan was going to work, there was now pressure on Ramu and Palani to obtain the appellants' shares in Hermes as soon as they could.

5.2 Errors of Fact

38. I am keenly aware that a fact-finding exercise is primarily a matter for the first instance judge. Although this is not a case which involved oral evidence, so that this court is in the same position as the judge below when considering the written evidence, I bear in mind paragraphs 94-99 of Green LJ's judgment in *Kaefer* and his sensible strictures against over-intervention by this court on matters of fact. On the other hand, the factual debate in this case is not extensive, and what matters rather more is the causative significance to be ascribed to what was said and done. That is primarily a matter of impression. But endeavouring to maintain a proper balance between these competing constraints, I have nevertheless concluded that the judge made three findings at [25]-[28] which were incorrect.

39. First, I consider that the judge was wrong to conclude that the only actionable misrepresentation that was made at the meeting on 8/9 August was that the sales figures for Hermes "were not that great" and that in consequence "the buyer's offer was particularly attractive". That ignores the uncontested evidence that, at the meeting, Hasu and Jayesh were shown copies of the SPA between GIR, Hermes and EMIF. The obvious inference from the SPA and the discussions about it was that the ultimate purchaser of Hermes was EMIF, and that the appellants and the respondents were being treated in the same way in the proposed sale of Hermes, such that there was no downside or risk involved in the appellants selling their minority shares to GIR rather than directly to EMIF.

40. The importance of that misrepresentation, within the alleged fraud as a whole, cannot be overstated. This was not a complex or sophisticated arrangement. On the appellants' case, Ramu and Palani wanted control of all the Hermes shares so that *they* could arrange the sale to EMIF, presumably so that *they* could then arrange the onward sale, for a much larger sum, to Wirecard. That was why Ramu and Palani wanted control of all the shares in Hermes, and that was in turn why they wanted the appellants to sell to GIR, not EMIF. On the appellants' case, this was the mechanism by which Ramu and Palani were cheating them out of the true value of their shares in Hermes. On that basis, the meeting on 8/9 August, with its disclosure of an apparently bona fide SPA between GIR, Hermes and EMIF, was about much more than what was said about Hermes' performance and the offer of $40 million.

41. I note that the judge said that the only issue at the meeting was whether the appellants could sell directly to EMIF or had to go via GIR. Whilst the evidence makes clear that there were many other issues discussed at the meeting, the debate about the identity of the purchaser of the appellants' shares, was not, as the judge seemed to indicate, a point against the appellants and the triggering of the tort gateway. On the contrary, I consider that it went to the heart of the alleged fraud.

42. Secondly, and related to this first point, I consider that the judge was wrong not to find that, on a proper analysis, the bulk of the misrepresentations alleged against Ramu and Palani in the particulars of claim stemmed from what was said and done at the meeting on 8/9 August. Paragraph 100 of the pleading identifies the relevant express representations made by Ramu and Palani during this 8 week period as follows:

> "100. The following express and/or implied representations were made by and/or on behalf of Ramu and/or Palani:
>
> (1) An offer had been made to purchase the entire issued share capital of Hermes for approximately USD 42 million and/or USD 35 million.
>
> (2) The proposed purchaser of Hermes was EMIF, a Mauritius based fund.
>
> (3) The offer price represented a "*super premium*" on the valuation of Hermes, i.e. the offer exceeded what Ramu and Palani considered the value of Hermes to be.

(4) The margins of Hermes had fallen in FY 2014/2015, which was a matter of concern.

(5) The sales figures for Hermes in FY 2014/2015 were "*not that great*", i.e. were poor.

(6) The offer was "*very good"*, an *"excellent opportunity*" for the Claimants and was "*particularly attractive*".

(7) The reason why Ramu and Palani considered that the Claimants should transfer the Shares to GIR, rather than the purchaser direct, was to avoid having to seek the approval of the RBI and/or to avoid the Claimants' liability for certain transaction costs.

(8) No relevant aspects of the transaction to sell the shares in Hermes had been hidden from the Claimants.

(9) The shares sold to GIR would be on-sold at the same price at which they were purchased.

(10) GIR would sell Ramu and Palani's shares in Hermes at the same price as the Shares were to be sold.

(11) GIR would not retain the Shares in order to obtain a future gain or profit at the Claimant's expense.

(12) Neither Ramu nor Palani nor any of their family members would retain any interest in Hermes following the transaction."

43. The judge said at [25] that only the representation at paragraph 100(5) could be linked back to the London meeting. But on my analysis, the representations at 100(1), (2), (3) (the words "super premium" were not used, but Ramu clearly represented that EMIF's offer was in excess of the value of Hermes), (5), (6), (7) (Ramu was clear that the appellants' shares had to be transferred to GIR and not sold directly to EMIF, although the technical explanation came later), (8), (9), (10) and (11) were all made expressly or could be inferred from the background to, the discussions during, and the sharing of the SPA at the meeting on 8/9 August. The same could, I think, be said of the implied representations at paragraph 102 of the Particulars of Claim.

44. I accept Mr Collins' submission that the appellants have previously indicated that far fewer of the paragraph 100 representations could be linked back to the London meeting on 8/9 August. But it is necessary for this court to consider the substance of the issues, and to avoid the over-elaborate salami-slicing which has sometimes been a feature of the appellants' case. In my view, it is quite clear from the evidence that, in one way or another, the significant representations which I have noted in paragraph 43 above can each be traced back to the meeting on 8/9 August.

45. Thirdly, at [27] and [28], the judge suggested that the appellants' own evidence was that the meeting on 8/9 August 2015 did not matter very much. I do not consider that to be a fair reading of the evidence. Indeed, I note that paragraph 78 of Jayesh's witness statement, set out at paragraph 33 above, summarises all the factors that went into the eventual decision to sell (I have put the relevant section in bold). That expressly refers

to "Ramu's representations". Those plainly included the representations made at the meeting on 8/9 August, which was the only face-to-face meeting that Jayesh ever had with Ramu prior to the sale of the shares. The judge made no mention of this paragraph in his judgment.

5.3 Errors of Principle

46. I also consider that the judge's approach in respect of the meeting on 8/9 August revealed a number of errors of principle.

47. The first concerned his view at [26] that "nothing material resulted from the meeting". That appears to be a reference to the fact that the appellants did not rely immediately on the representations made on 8/9 August and enter into the proposed sale of the shares to GIR. The judge seems to suggest that, because Hasu and Jayesh were not persuaded that they should immediately enter into the transaction, that made the representations on 8/9 August insubstantial or inefficacious.

48. That is wrong in principle. The alleged fraud was an ongoing process: Mr Collins correctly used the expression "evolution". It was a continuing fraud because of the concerns and suspicions of the appellants and their representatives. It is wrong in law to suggest that, in such circumstances, it was only the last misrepresentation or threat, whatever it was that finally broke Hasu and Jayesh's resistance, that could amount to the material event for the purposes of the claim in deceit. The absence of immediate reliance on one particular misrepresentation in an evolving fraud cannot be said to render that particular misrepresentation insubstantial or not causative of the eventual loss: it is sufficient if the misrepresentation substantially contributed to the ultimate deception: see *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48; [2017] AC 142, and *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596; [2019] 3 WLR 1113 at 26-43.

49. It might also be noted that the judge was inconsistent in his application of this approach anyway: nothing material resulted from the misrepresentations made during the call to AS on 22 August either (in the sense that Hasu and Jayesh still remained to be convinced thereafter), but that did not stop the judge from concluding that that call was substantial and efficacious.

50. On a related point, there is a suggestion in the judgment that, to the extent that at the meeting on 8/9 August Ramu simply repeated misrepresentations which had been made previously, this could be of no account in any consideration of the test in *Metall und Rohstoff*. Again I disagree. The fact that some of the misrepresentations may have been made before is nothing to the point. First, repetition is inevitable in a continuing process. Secondly, it ignores the fact that this was the first - and, as it happened, only – face-to-face meeting between Ramu, Hasu and Jayesh before the agreement to sell on 2 September 2015. What was said at the meeting, even if it had been said before, was therefore critical.

51. The second error of principle concerns the comparative exercise on which the judge embarked. At [28], he indicated that what was said at the meeting on 8/9 August was of minor importance and insignificant, when viewed in the context of other allegations said to arise from emails or calls emanating from India or Singapore. I have already indicated that that finding was flawed because it was based on the judge's finding that

only one misrepresentation had been made at the meeting. But in any event, I consider that this comparative approach was not in accordance with the principle outlined in *Metall und Rohstoff.*

52. Of course, as the judgment in that case makes plain, when considering whether damage resulted from substantial and efficacious acts committed within the jurisdiction, it is important that the court looks at the allegations and the evidence "in a common sense way". That means looking at the fraud as a whole. But it is wrong in principle to conclude, as the judge appears to have done, that because what he thought was a more important event (namely the call of 22 August, noted at paragraph 19 above), which was obviously substantial and efficacious, had occurred outside the jurisdiction, this therefore "emphasises the insignificance of what was said at the first London meeting".

53. The judgment of the court in *Metall und Rohstoff* makes it clear that the court has to ask whether damage has resulted from substantial and efficacious acts committed within the jurisdiction, and not to concern itself with "whether other substantial and efficacious acts have been committed elsewhere". That is what the judgment says in express terms. It is not possible to gloss it. In an evolving international fraud like this, with relevant events in London, Vienna, Singapore and India, it is not permissible to embark on a geographical comparison exercise, identifying where each event happened, and then announcing the single winner of the jurisdictional contest by reference to the competing quantities and/or qualities (in terms of causative significance) of the relevant events. The fact that, on the judge's analysis, the telephone call of 22 August was more substantial and efficacious is irrelevant in principle to the question of whether what was said and done at the meeting in London on 8/9 August 2015 was substantial and efficacious.

5.4 Summary

54. In my view, for these reasons of fact and principle, the judge was much too dismissive of the misrepresentations made at the meeting on 8/9 August 2015. They were, on any view, substantial; they embraced all the major elements of the alleged fraud. And they were efficacious: they were ultimately the reason why the appellants sold their shares to GIR. Their legal potency was not extinguished because they were subsequently repeated and/or embellished, or because other substantial and efficacious acts happened elsewhere, or because it took time for the appellants to decide to sell. In this way, on a proper application of the test in *Metall und Rohstoff,* I conclude that the misrepresentations made at the meeting were substantial and efficacious acts committed within the jurisdiction.

55. Moreover, the judge was unaware of what Wirecard now say were their negotiations with Ramu and Palani which, the day before (7 August), had led to the identification of a proposed purchase price for Hermes far in excess of the figures mentioned to Hasu and Jayesh, and which depended on EMIF owning all the Hermes shares prior to the sale. That evidence, if correct, would make everything that Ramu said or did at the meeting in London on 8/9 August unambiguously fraudulent. That too points inexorably to the same conclusion.

56. On the basis of the 8/9 August meeting alone, therefore, I would allow the appeal in respect of the tort gateway. I go on to address, in rather less detail, the later events.

6 THE LATER EVENTS

57. As I have indicated, the judge set considerable store by the telephone call on 22 August in which AS threatened to buy the majority shares from GIR, asset-strip Hermes, and thereby leave the appellants with worthless shares. The judge was right to consider that that was an important part of the evolution of the fraud but, for the reasons I have already given, wrong to set this up as a decisive comparator with the events on 8/9 August.

58. Furthermore, although the judge only referred to paragraph 53 of Jayesh's witness statement in this context, the telephone call was dealt with by Jayesh extensively between paragraphs 50-54. Importantly, Jayesh makes clear that he made the call from London, whilst it appears that AS happened to be in Singapore. Although I accept that *Newsat* is authority for the proposition that jurisdiction emanates from the place where the misrepresentations were made, it is to be noted that, unlike here, *Newsat* was a case where there was just one relevant call.

59. Here, Jayesh placed the call from London to obtain information from AS as part of an evolving story, and where the key building blocks of the fraud had been put in place in London on 8/9 August. On his case, what AS said was an important part of that continuing fraud. Nobody suggests that, simply because AS was in Singapore at that time, that country would have the relevant jurisdiction to deal with this claim. I consider that, whilst not critical to my assessment, it is not irrelevant that, on Jayesh's case, the particular misrepresentations of 22 August were made to him in a call he made from London.

60. That call also provides the context for the second meeting in London on 24 August 2015. The meeting was arranged by AS so as to present to Hasu and Jayesh the updated version of the SPA between GIR, Hermes, EMIF, Ramu and Palani. Unlike the others, AS's partner Sarju was in London, so he provided the updated SPA. This time Hasu and Jayesh were allowed to keep a copy. On the face of it, therefore, these events were an important part of the pressure being placed on the appellants to sell their shares so as to avoid the risk of asset-stripping, and therefore an important part of the evolving fraud. On that basis, it can be linked back to the call on 22 August and further back to the misrepresentations that I have identified in paragraph 43 above.

61. The judge again suggested at [29] that, on the appellants' evidence, the meeting on 24 August was not an important element of the story. In my judgment, this ignores paragraph 68 of Jayesh's statement which said:

> "I believe that the meeting on 24 August 2015 and the documents produced by Sarju were central to the fraud that was carried out on the Claimants. While I continued to have doubts about the transaction, the documents produced by Sarju conveyed the clear impression that EMIF was the proposed purchaser of Hermes, that it was paying a price equivalent to the prices paid to the Claimants and that there was no further related transaction. These impressions were consistent with what both Ramu and Amit (AS) had said."

Accordingly, in my view, the importance of the second London meeting was plain from the appellants' own evidence.

62. Also at [29], the judge seems to indicate that the meeting on 24 August could not have been substantial or efficacious because neither Ramu nor Palani were present. That seems to me to be wrong in principle. The appellants have a clear case that AS was directly involved in this fraud as part of the Ramu and Palani team (a point borne out by the Wirecard evidence in the other action, at least as recorded in the judgment at paragraph 15), and Sarju was his co-director. Moreover, the fact that Ramu and Palani were acting through agents can hardly be fatal to the appellants' case in circumstances where the judge himself was of the view that the call of 22 August (which was again not made by either Ramu or Palani) was a substantial and efficacious act.

63. Accordingly, I conclude that the meeting on 24 August was part of the evolving fraud and again a substantial and efficacious act within the jurisdiction.

64. Thereafter, about a week later, the evolving fraud came to fruition and the appellants decided to sell their shares in Hermes to GIR. I am not persuaded that any events after the appellants' decision to sell, which was apparently taken on around 2 September 2015, can have a relevance to the tort gateway issue. In particular I do not accept Mr Midwinter's submission that, on 20 September, Ramu could have come clean and revealed what had actually been happening. At that date, the die was cast. Any consideration of "efficacy" in this case must come to an end once the irrevocable decision to sell had been taken. The even later sale to Wirecard must be wholly immaterial.

65. However, as a result of my analysis of the first and second meetings in London in August 2015, I consider that the appellants have demonstrated that they have the better argument that substantial and efficacious acts were committed by Ramu and Palani within the jurisdiction. The tort gateway is therefore made out.

7 OTHER MATTERS

66. As noted above, the judge did not address the three other arguments raised by Ramu and Palani. In view of this court's decision to allow the appeal under the tort gateway, they now arise for decision.

67. Mr Midwinter argued that these three arguments were not open to the respondents because they were not conventional Respondent's Notice points. He said that the arguments, if successful, would not lead to the upholding of the judge's order on different grounds, but would instead lead to a different order altogether. He said that therefore there should have been a cross-appeal and that, in the absence of a cross-appeal, the points were not open to the respondents.

68. This argument hinged on the point that the judge's order, before going on to set aside the order as to service out of the jurisdiction and the freezing order, declared that the court had no jurisdiction. Mr Midwinter said that, if the respondents were subsequently successful on one or more of their other arguments, that success would not go to jurisdiction, but to questions of discretion. In that event, he said, the order as to jurisdiction would need to be varied.

69. In my view, Mr Midwinter's premise was incorrect in law. In a case with foreign defendants, the English court only has jurisdiction if the claimant has permission to serve out. If the appellants in the present case do not have permission to serve out

(because, for example, of the success of the respondents' arbitration argument or because the court accepts their case on the *forum conveniens* issue), the English court would have no jurisdiction in any event. The order to that effect would stay the same. Accordingly, I reject the premise on which this argument was based. These three arguments were perfectly legitimate points for inclusion within the Respondent's Notice.

70. That then gave rise to a case management debate as to which court should deal with the three outstanding issues. Mr Midwinter wanted an order that the case be remitted back to the Commercial Court. Mr Collins argued that, since these points had properly been taken in a Respondent's Notice, it was for this court to deal with them. He made the telling point that, since he would have been entitled to raise these points if the judge had made adverse findings below, he must be entitled to raise them in a case where the judge had made no findings at all.

71. There have been significant delays in this case. That is not a criticism of the parties; we are in no doubt that the appellants, in particular, want this matter to be progressed as quickly as possible. Since these points were validly taken in a Respondent's Notice, it is appropriate for this court to accept the burden of dealing with them. The appeal will therefore be re-listed in front of the same constitution for those matters to be argued. It follows that nothing I have said in this judgment should be taken as having any bearing on those three outstanding issues.

LORD JUSTICE PHILLIPS:

72. I agree.

LORD JUSTICE UNDERHILL:

73. I also agree.