Anwar et al v. Fairfield Greenwich Limited et al Doc. 1048 Att. 12

EXHIBIT 25

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LLOYD'S LIST
LAW REPORTS

Editor:
E. S. MATHERS
of the Middle Temple, Barrister-at-Law

1962

Volume 1

PRINTED AND PUBLISHED BY LLOYD'S
AT LLOYD'S, LONDON, ENGLAND
1962

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Jan. 23, 24, 25, 26, 29, Feb. 15, 16, 19, 20, 21, 1962

ROSSANO v. MANUFACTURERS LIFE INSURANCE COMPANY

Before Mr. Justice McNAIR

Conflict of laws—Assurance policy—Garnishee order—Proper law of contract—"Situs" of debt—Law of place of performance—applicability of foreign exchange control legislation — Whether Court would give effect to foreign garnishee proceedings—Liability of insurers to pay assured.

Life assurance policies effected by plaintiff Egyptian national with defendant Ontario insurers, in 1940 and 1941, through their Cairo office, in order that if Egypt was invaded he could receive payment outside Egypt—Two policies payable in bankers' demand drafts on London in £ sterling — Third policy payable in bankers' demand draft on New York in U.S. dollars — All policies maturing on Mar. 15, 1960 — Application forms for policies (incorporated into policies) providing (*inter alia*): (a) that necessity for *mise en demeure* by *huissier* was waived; and (b) that policy was to be in English—Policies executed in Ontario—Plaintiff carrying on business in Alexandria in partnership (L.R. & Co.) when policies effected—Action commenced by plaintiff, to receive payment under policies, on Mar. 13, 1961 — Contention by insurers that garnishee orders were issued by Egyptian revenue authorities, on Nov. 16, 1960, and Jan. 23, 1962 (after writ), in respect of tax alleged to be due from plaintiff; and that payment by insurers to plaintiff would render insurers liable to penalties under Egyptian law or expose them to risk of having to pay moneys twice—Contention by plaintiff that tax was due from L.R. & Co., and that he was not liable for that tax — Allegation by plaintiff that each of garnishee orders was a nullity, and that, if Court recognized them, Court would be enforcing a foreign revenue law — Proper law of policies — Canadian and Egyptian insurance law—Applicability of Egyptian Exchange Control legislation — Effect of garnishee orders — *Situs* of debt — Validity of garnishee orders—Whether English Courts would give effect to foreign garnishee proceedings, (a) if, by law of place of attachment, *situs* of debt was in country of attachment; or (b) if, by law of place of attachment, there was jurisdiction over garnishee, debtor and his garnishor.

———*Held*, (I) that the proper law of the contract, in the absence of express provisions, was the system of law by reference to which the contract was made or that with which the transaction had its closest and most real connection, as at the making of the contract; (IX) that, applying that test, Ontario law was the proper law; (X) that nothing relevant could be inferred from provisions in application forms; (XI) that Egyptian Exchange Control legislation did not apply to policies as part of proper law of contracts; (XII) (a) that that legislation did not apply by reason of *situs* of debt being in Egypt; and (b) that, although Egypt was a permissible place of performance, insurers had no right to insist upon payment in Egypt; that, accordingly, Egypt was not the relevant place of performance; and that, therefore, Egyptian Exchange Control legislation did not apply; (XIV) that the fundamental objection to the recognition of the garnishee orders was that their recognition would offend against principle that English Courts will not recognize or enforce a foreign revenue law or claim; (*obiter*) (XV) that the *situs* of the debt was not in Egypt; (XVI) (i) assuming that the garnishee orders were valid, that the Court was not disposed on general principles to extend the recognition of garnishee orders further than garnishee orders made by a competent Court; (ii) that both orders were made after the maturity date of policies and insurers could not rely upon them, in that insurers would be benefiting from their own default; (XVII) that, even if attachment order had been an order of the Egyptian Court upon plaintiff personally, insurers had not proved that Egyptian Courts had jurisdiction over plaintiff so as to justify enforcement of that judgment at common law in English Courts—Judgment for plaintiff.*

The following cases were referred to:

Assunzione, [1954] P. 150; [1953] 2 Lloyd's Rep. 716;

Bonython and Others v. Commonwealth of Australia, [1951] A.C. 201;

Buchanan, Ltd., and Macharg v. McVey, [1955] A.C. 516n;

* Roman numerals refer to appropriate sections in Mr. Justice McNair's judgment.

F. & K. Jabbour v. Custodian of Absentee Property for the State of Israel, [1953] 2 Lloyd's Rep. 760; [1954] 1 W.L.R. 139;

Government of India, Ministry of Finance (Revenue Division) v. Taylor and Another, [1955] A.C. 491;

Holman v. Johnson, (1775) 1 Cowp. 341;

Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd., [1920] 1 K.B. 539;

Kahler v. Midland Bank, Ltd., [1950] A.C. 24;

Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft and Another, [1939] 2 K.B. 678;

Lever v. Fletcher, (1780) unreported;

Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society, Ltd., [1938] A.C. 224;

New York Life Insurance Company v. Public Trustee, [1924] 2 Ch. 101;

Pick v. Manufacturers Life Insurance Company, [1958] 2 Lloyd's Rep. 93;

Planché and Another v. Fletcher, (1779) 1 Doug. 251;

United Railways of Havana and Regla Warehouses, Ltd., *In re*, [1960] Ch. 52; [1961] A.C. 1007;

Zivnostenska Banka National Corporation v. Frankman, [1950] A.C. 57.

In this action, Mr. Charles Rossano, resident in Geneva, Switzerland, sued Manufacturers Life Insurance Company, of London, S.W., claiming £9906 9s. 10d. under three endowment life assurance policies, which matured on Mar. 15, 1960. The policies were effected by the plaintiff while he was resident in Egypt, in 1940. The defendants' head office was in Toronto, Canada. Liability was not in dispute. The defendants contended that by Egyptian law they were unable to pay on the policies without the permission of the Egyptian exchange control authorities. There was a secondary defence that some six or seven months after the policies matured the Egyptian authorities purported to make some sort of garnishee order against the policies, or some of them, as a means of enforcing an alleged tax liability of the plaintiff as a partner in a firm of cotton merchants.

According to the plaintiff's re-amended statement of claim, he claimed the payment of sums payable to him under certain policies of insurance which he entered into with the defendants.

Each of the policies was a 20-year endowment policy, payable on Mar. 15, 1960, or on earlier death, and was entered into in consideration of the payment of the premiums set out in the policy. The policies were as follows:

(a) Policy No. 800,054 dated Nov. 25, 1940, for a sum of £3000 sterling, payable on Mar. 15, 1960, such amount being expressly made payable in bankers' demand drafts on London for £ sterling.

(b) Policy No. 800,055 dated Nov. 25, 1940, for a sum of £4000 sterling, payable on Mar. 15, 1960, such amount being expressly made payable in bankers' demand drafts on London for £ sterling.

(c) Policy No. 800,241 dated Jan. 22, 1941, for a sum of 10,000 U.S. dols., payable on Mar. 15, 1960, such amount being expressly made payable in bankers' demand drafts on New York for United States dollars.

Each of the policies provided for (*inter alia*) the crediting to the plaintiff of dividends annually, and also an automatic loan by the defendants to the plaintiff in the event of a premium being unpaid after the policy had been three full years in force.

The sums duly became payable on the dates in accordance with the terms of the policies, but the defendants failed and refused to pay them.

The plaintiff alleged that the following sums were due and payable by the defendants to the plaintiff:

Policy No. 800,054 payable Mar. 15, 1960.

	£ s. d.	£ s. d.
Capital sum	3000 0 0	
Bonus dividends credited ...	125 7 2	
	3125 7 2	
Less premiums unpaid and advanced as loans by the Defendants	459 18 5	
		2665 8 9

Policy No. 800,055 payable Mar. 15, 1960.

	£ s. d.	£ s. d.
Capital sum	4000 0 0	
Bonus dividends credited ...	167 2 10	
	4167 2 10	
Less premiums unpaid and advanced as loans by the Defendants	613 4 6	
		3553 18 4

Policy No. 800,241 payable Mar. 15, 1960.

Capital sum	U.S.$10.000	
Bonus dividends credited ...	417.82	
	$10.417.82	
Less part of premium unpaid and advanced as loan by Defendants	93.83	
	$10.323.99	
Converted into Sterling at 2.80 dols. to the £		3687 2 9
		£9906 9 10

The plaintiff said that, in breach of the policies, the defendants failed on the due date to give to the plaintiff a bankers' demand draft on London for the amounts due under Policies Nos. 800,054 and 800,055 or to give to the plaintiff a bankers' demand draft on New York, U.S.A., for the amount due under Policy No. 800,241. Accordingly, as an alternative to payment of those sums under the policies, the plaintiff claimed a like amount as damages for breach of contract.

The plaintiff said that it was agreed between the plaintiff and the defendants that, in consideration of the plaintiff making an application or agreeing to an application being made to the Egyptian exchange control authorities for permission to transfer the records of the policies from Egypt to the United Kingdom, the defendants would meet the plaintiff's claim under the policies and pay the amounts due under the policies outside Egypt, whatever the results of the application. Alternatively, the plaintiff said that the agreement was that in consideration of the plaintiff making the application or agreeing to the application being made by the defendants to the authorities, the defendants would meet the plaintiff's claim under the policies and pay the amounts due under the policies outside Egypt, when the authorities had granted or refused, or alternatively finally granted or refused permission to transfer the records of the policies outside Egypt.

The plaintiff said that the agreement was made partly orally and partly in writing and/or was to be implied from the conduct of the parties. In so far as it was made orally it was made by Mr. May on behalf of the plaintiff, and one Gale, the secretary and actuary of the defendants' London office and/or Mr. Dell, the joint secretary of the London office, at a number of meetings between about February, 1960, and July, 1960; and in so far as it was in writing it was contained in or evidenced by certain letters between G. May, Ltd., on behalf of the plaintiff and the defendants, and from the defendants to the plaintiff.

In so far as the agreement was to be implied from conduct, the plaintiff said that the conduct relied on was that the defendants submitted the application to the Egyptian exchange control authorities when they well knew, and were informed by May in the letters, that the plaintiff agreed to make the application and/or made the application only on the understanding that his claims under the policies would be met, whatever the result of the application. The plaintiff further alleged that by submitting the application, with the declaration by the plaintiff forwarded with May's letter dated June 28, 1960, the defendants impliedly agreed to proceed in a similar manner to that which they were adopting in the case of the plaintiff's brother, Fernand Rossano, namely, the procedure set out in the defendants' letter dated May 24, 1960.

The plaintiff alleged that, in breach of the above agreement, the defendants failed to meet the plaintiff's claims under the policies or to pay the amounts outside Egypt, and the plaintiff had suffered loss and damage to the amount of the sums due under the policies.

The plaintiff alleged, further, that it was an express term of the agreement or agreements that the defendants should make and/or they in fact made the application and had the sole conduct of the application, and, accordingly, it was an implied term of the agreement, and/or the defendants impliedly warranted, that they would use reasonable diligence in the conduct of the application, and/or to secure a final decision from the authorities as to the application, and as to whether they would grant or refuse it. In breach of that term and/or warranty, the defendants did not use due diligence, but failed to proceed with reasonable or any diligence in the conduct of it. In particular, on June 28, 1960, the plaintiff supplied the defendants with a declaration enabling them to make the application; on June 30, 1960, he supplied a certificate of his residence in Geneva; on Sept. 8, 1960, he supplied additional information at the request of the defendants; and at no time thereafter was the plaintiff asked by the defendants for any further information, or to take any further action in relation to the said application.

On Aug. 8, 1960, the Bank of Alexandria, by a letter to the defendants, said that it was imperative that the proceeds of the policies should have been repatriated to Egypt, and in a letter dated Aug. 12, 1960, from the defendants' Cairo office to their head office, showed that thereby the Egyptian exchange control were practically refusing the transfer of the policies.

Letters from the defendants' head office to their Cairo office, dated Sept. 1, 1960, and the Cairo office's letters dated Oct. 7 and Dec. 23, 1960, showed that the defendants had abandoned the application and/or decided not to proceed with it with reasonable or any diligence.

Thereafter, the defendants failed to proceed with the application with reasonable diligence, and in fact took no adequate steps to secure a decision on it.

The plaintiff alleged that, accordingly, the defendants were in breach of the term and/or warranty by Oct. 7, 1960, or, alternatively, prior to Nov. 16, 1960, or in the further alternative prior to the date of the writ, and if, contrary to the plaintiff's contentions, he was not entitled to payment of the amounts due under the policies by reason of the fact that the authorities had not at the time of such breaches granted or refused such permission, the plaintiff claimed damages to the amount of the sums due under the policies for breach of that term and/or warranty.

The defendants, in their re-amended defence, said that each of the policies provided (*inter alia*):

> 1. This policy . . . shall not take effect until it has been delivered and the first premium paid to the Company in exchange for the official receipt . . .
>
> Payment of any sum required to keep this policy in force must be made at the Company's offices at Cairo or Alexandria —or to persons empowered to accept them—in exchange for the Company's official receipt signed by the General Manager and countersigned by an agent or cashier of the Company . . .
>
> 10. . . . When this policy becomes a claim it must be delivered to the Company with a valid discharge therefor.

The defendants admitted that they had not paid any of the sums and that they had not given to the plaintiff any bankers' demand drafts.

The defendants said that, if (which was not admitted) any agreement was made as alleged in the statement of claim, then it was an express term of the agreement that the defendants should not be obliged to meet the plaintiff's claim under the policies or pay the amounts due under the policies outside Egypt until after the Egyptian exchange control had finally granted or refused (as the case might be) permission to transfer the records of the policies outside Egypt. The authorities had not finally granted or refused such permission and the defendants contended that, accordingly, in the premises they were not liable under the alleged agreement (if any).

The defendants contended, alternatively, that it was an express term of the agreement that the plaintiff should maintain his application to the authorities and/or should continue to co-operate with the defendants in making the application and/or should refrain from enforcing any claim against the defendants until such permission was either refused or granted, and in breach of that term, the plaintiff had failed or refused to maintain his application, and/or had failed or refused to continue to co-operate, but had commenced this action to enforce his alleged claim. The defendants said that, by his conduct, he had repudiated the agreement, and, accordingly, the defendants were discharged therefrom.

Further or alternatively, the defendants contended that, by reason of the matters hereinafter set out they were not under any liability to the plaintiff under the policies.

The defendants contended that the proper law governing the contracts contained in each of the policies was the law of Egypt, or that the *situs* of each and every sum or debt due or becoming due to the plaintiff under the policies was Egypt.

By the law of Egypt, being the proper law of the contracts contained in each of the policies, and/or of the law of the *situs*, and/or the law of the place of performance under the policies and in particular by virtue of Art. I of Decree No. 893 dated Oct. 22, 1960, which enacted or incorporated the provisions of the Manual of Exchange Control Regulations in the Egyptian Province, it was provided as follows:

Chap. 1, Sect. 4, Art. 36

> Payments in foreign currency between residents are not permitted without the specific authority of the Central Exchange Control, except in those cases referred to in the second paragraph of Article 89.

Chap. 2, Sect. 5, Art. 89

Life Insurance Policies concluded in favour of residents must be issued in Egyptian Pounds.

Foreign residents may conclude Insurance Policies in a foreign currency provided that the person taking out the policy has sufficient foreign currency at his disposal in his own country, in accordance with the provisions of Exchange regulations for the payment of insurance premia due up to the end of the contract.

Transfers of Policies, in cases where the policy holder takes up residence in a foreign country, must not be allowed except with the approval of the Central Exchange Control.

Chap. 2, Sect. 6, Art. 108

The Central Exchange Control approval must be obtained in respect of contracts providing for payment in a foreign currency.

The defendants said that they would rely on Law No. 80 of 1947, as amended by Law No. 157 of 1950, and the Regulations in force thereunder at the respective dates when the policies matured, and, in particular, on Chap. 1, Sect. C, Arts. 1 to 8, and Chap. 2, Sect. F, Arts. 7 and 13 of the Regulations made thereunder in 1947.

The defendants said that no approval or authority for the transfer of the policies, or for the payment of any sums under the policies had been obtained from the Egyptian Central exchange control as required by the Regulations. Accordingly, by the proper law of the contracts contained in the policies and/or by the law of the *situs*, the defendants could not lawfully pay any of the sums or deliver the bankers' demand drafts to the plaintiff, and were discharged from all liability in respect thereof.

The defendants said, further, that the plaintiff at all material times resided and/or carried on business in Egypt and the defendants also carried on business in (among other countries) Egypt, and each of the policies was negotiated and/or delivered to the plaintiff in Egypt and/or the first premiums were paid thereon in Egypt. Accordingly, it was an implied term of the contracts contained in each of the policies (such implication arising from the facts above set out and/or from the express terms of contracts and/or as a matter of law) that the defendants should not be obliged to make payment to the plaintiff thereunder if and so long as there was any impediment to their so doing by the law of Egypt and/or if and so long as the defendants would or might, if they so made payment to the plaintiff, be infringing any order of any competent authority in Egypt and/or be exposed to the risks of having to make payment under the policies more than once. It was an implied term of each of the contracts (such implication arising as aforesaid) that the defendants should not be obliged to make payment to the plaintiff thereunder if the said impediment or order or risk should arise or should be alleged to arise by reason of any act, neglect or default of the plaintiff in Egypt.

The defendants said that on Nov. 16, 1960, they were served with a garnishee order in respect of an amount of £E5,677.296 alleged to be due from the plaintiff to the Egyptian tax department for the years 1950/51 to 1955/56, plus interest at six per cent. from Nov. 27, 1960. On or about Jan. 23, 1962, the defendants were served with a second garnishee order in respect of an amount of £E12,291.300 alleged to be due from the plaintiff to the Egyptian tax department for the years 1951 and 1952 exclusive of interest. Those orders purported to attach all securities belonging to the plaintiff in the hands of the defendants, and all sums of money falling due thereunder, and to require the defendants to remit the same to the department, or so much thereof as might be necessary to cover the amounts.

The defendants contended that by virtue of one or other or both of the garnishee orders there was an impediment to their making payment to the plaintiff under the policies and/or that by so making payment to the plaintiff they would be infringing an order of a competent authority in Egypt and/or be exposed to the risk of having to make payment thereunder more than once. The defendants further contended that the impediment or order or risk had arisen or was alleged to have arisen by reason of the act, neglect or default of the plaintiff in Egypt. Accordingly, and on the true construction of the contracts contained in each of the policies, the defendants were under no liability to the plaintiff.

The defendants contended, further, that, by reason of the above facts, payment to the plaintiff of any sum or debt due or becoming due to the plaintiff under any

of the policies would be illegal by Egyptian law as the proper law of the contracts contained in the policies, and/or as the law of the *situs*.

The defendants alleged that by Egyptian rules of private international law, the proper law of the contract contained in the policies was Egyptian law, and/or the *situs* of the sums or debts due or becoming due under the policies was Egypt, and, accordingly, the garnishee orders were valid and binding in Egyptian law, or the garnishee orders were valid and binding in Egyptian law by virtue of the fact that the defendants were resident within the jurisdiction of the Egyptian Courts. Alternatively, the defendants alleged that both the plaintiff and the defendants were by Egyptian law parties to the proceedings whereby the garnishee orders were served on the defendants, and were at the material time resident in Egypt and/or of Egyptian nationality. The defendants submitted that the effect and validity of the proceedings and/or of the garnishee orders should be recognized by the Court.

The defendants also contended that the defendants were compellable and/or liable and/or would be compelled to pay and discharge the plaintiff's liability to income tax in Egypt, and, accordingly, the plaintiff was legally liable to indemnify the defendants in respect thereof and the defendants claimed to set off against the plaintiff's claim the whole or such part of it due under the policies as might be necessary to recoup the defendants in respect of their liability under one or other or both of the garnishee orders.

The defendants said that it was an express term of the policies, by virtue of Clause 10, that the defendants should not be obliged to make any payment thereunder without delivery of the policies to the defendants. At the respective dates when the policies matured and at the date when the first of the garnishee orders was served upon the defendants, none of the policies had been delivered to the defendants, and, therefore, the defendants were not liable to the plaintiff upon the policies at their respective dates of maturity and/or prior to the time and date of service of the garnishee order. The defendants contended also that the plaintiff and the defendants expressly or impliedly agreed that the liability (if any) of the defendants under the policies should be postponed until after the final granting or refusal by the Egyptian exchange control authorities of the permission to transfer the records of the policies outside Egypt. No such permission had been finally granted or refused.

By his reply, the plaintiff denied that the proper law governing the contracts contained in the policies was the law of Egypt, and contended that the proper law of each of the contracts was the law of Ontario, or, alternatively, that the proper law of the contracts contained in Policies Nos. 800,054 and 800,055 was the law of England, and the proper law of the contract contained in Policy No. 800,241 was the law of New York.

The plaintiff further denied that the *situs* of the sums or debts due to the plaintiff under the policies was Egypt, and alleged that the sums payable under Policies Nos. 800,054 and 800,055 were primarily payable in London, and the sums payable under Policy No. 800,241 were primarily payable in New York, U.S.A., or alternatively, that the sums payable under each of the policies were primarily payable in Toronto, Ontario.

The plaintiff said that, at all material times since Apr. 6, 1957, he had been resident in Switzerland, and he denied that at any time since Apr. 6, 1957, he had been resident in Egypt.

The plaintiff also alleged that the defendants had waived and/or abandoned their right to rely on, and/or were precluded from relying on, the term in the alleged agreement that the defendants should not be obliged to meet the plaintiff's claim under the policies until permission to transfer the records of the policies outside Egypt.

The plaintiff contended that, if (which was denied) the garnishee orders referred to in the re-amended defence were at any material time valid or binding, they became void, in that no copy of the garnishee orders or any notice of attachment relating thereto was served on the plaintiff within the eight days following the date of the orders or the date of the notices. No such service was effected on the plaintiff personally, and if (which was not admitted) any purported service was effected on any person at the offices or former offices of Levi Rossano & Co., at 5 Sharia Cherif Pasha, Alexandria, no such person had any authority to accept service on behalf of the plaintiff.

Mr. J. F. Donaldson, Q.C., and Mr. Adrian Hamilton (instructed by Messrs. Parker, Garrett & Co.) appeared for the plaintiff; Mr. Eustace Roskill, Q.C., and Mr. Anthony Lloyd (instructed by Messrs. Fladgate & Co.) represented the defendants.

Mr. Donaldson, for the plaintiff, said that, in view of the war, the plaintiff in 1940 wanted to effect some life assurance and discussed the matter with the defendants' district manager at Alexandria. The plaintiff had in mind that he might be forced to leave Egypt. He also wished to use, for life assurance purposes, some pre-war dollar funds he had in America. He completed three applications for the policies, one for each policy. So far as the dollar policy was concerned he arranged that the whole of the premiums should be paid in advance by a draft on the First National Bank of Boston, where he had this account. In the case of the sterling policies he intended to pay the greater part of the premiums in advance in a similar way.

After a change of mind, the premiums were paid in sterling in Egypt, by bankers' demand drafts in London, until in 1956 it was impossible to do so because he was not in Egypt and there were other difficulties. The plaintiff was of the Jewish faith. Many of his difficulties in this case might stem from that fact. In 1948, his property was sequestrated in Egypt, but the order was revoked in 1949. Since the Suez crisis in 1956 he had remained outside Egypt living in France, Switzerland or Italy, and he now had an Italian passport.

In June, 1959, he took up permanent residence in Geneva. In February, 1960, just before the maturity date of the policies, the plaintiff instructed a Mr. May, of G. May, Ltd., insurance brokers, to arrange or negotiate for the collection of the policy moneys from the defendants' London office. It was then that the present difficulties really emerged. The defendants took the view that they could only pay if they had permission from the Egyptian exchange control authorities to transfer the records and the policies outside Egypt. The plaintiff took the view that he was entitled to be paid outside Egypt—that was the whole point of the policies.

Counsel said that Mr. May's negotiations concerned not only the plaintiff's policies, but also policies of his brother, Mr. Fernand Rossano. The defendants agreed that if the brother made an application to the Egyptian exchange control authorities they would pay him, irrespective of whether the application was granted or not. The brother made the application. Counsel did not know whether the application was successful, but he was paid.

In the course of these negotiations Mr. May became satisfied that the defendants were saying to him on behalf of the plaintiff: "If the plaintiff makes this application we will see him paid in any event, although the exact mechanics of payment will have to be looked at."

Mr. Roskill, for the defendants, said that the real point in this case was whether the defendants could safely pay without having to pay a second time in Egypt.

Mr. Donaldson submitted:

1. Egyptian foreign exchange control legislation was irrelevant unless the proper law of the policies was Egyptian or the policies required payment to be made in Egypt;

2. The proper law of the policies was not Egyptian—it was probably that of Ontario in the case of all three policies; and

3. The policies did not require or permit payment to be made in Egypt.

Counsel said that the defence of foreign exchange control legislation was put forward in a previous case, *Pick v. Manufacturers Life Insurance Company*, [1958] 2 Lloyd's Rep. 93. That case was not binding on his Lordship or the defendants and Mr. Roskill was going to suggest that it was distinguishable from this case on its facts.

Counsel said that the three final policies, replacing (in the case of the sterling policies) interim policies, were issued by head office in Toronto.

The £3000 sterling policy, agreed by the parties as the basic policy the Court should examine, had a clause saying that payment of any sums required to keep the policy in force "must be made at the Company's offices at Cairo or Alexandria or to persons empowered to accept them." Instalment tables in the policy were Canadian dollar tables.

When the policy became a claim its surrender was required. In respect of the dollar policy it was clear on the correspondence that the United States funds were dealt with by head office.

COUNSEL said that the plaintiff discussed with the district manager of the defendants' office in Alexandria (Mr. Charles Harari) the importance of his being able to obtain payment anywhere in the world. One of the letters in the case was contemporary support for that recollection. There was a world war in existence at that time and it must have been present to everybody's mind that "over a 20-year period they might not be where they then were."

Mr. ROSKILL read an affidavit by Mr. Harari stating that he discussed the question of the endowment policies with the plaintiff in June, 1940.

The plaintiff declared at that time that he was an Egyptian national. On the same day that the plaintiff signed the proposal forms, the deponent wrote him a letter on the defendants' notepaper setting up the company's practice regarding payments. All the policies were delivered to the plaintiff in Egypt.

Mr. DONALDSON contended that the onus was on Mr. Roskill to show that the policies were governed by Egyptian law. His (Mr. Donaldson's) submission was that the Court should apply the test: What law would the parties, as just and reasonable men, have intended to apply, if they had thought about the matter at the time they made the contract?

Alternatively, what was the law by reference to which the contracts were made or to which the contracts had the closest connection?

COUNSEL invited the Court to answer both questions by saying the law of Ontario; alternatively, the law of England in respect of the sterling policies and the law of the State of New York in the case of the dollar policy.

All the policies, certainly the two sterling ones, were, in the defendants' submission, governed by Egyptian law and by that law it was legal for the company's Egyptian office to pay the plaintiff the sums due under the policies, whether in sterling or in dollars, without Egyptian exchange control permission.

In respect of the garnishee issue, COUNSEL submitted:

1. English law would not recognize an Egyptian garnishee order if the *situs* of the debt was not Egyptian;

2. The *situs* of the debt was Canadian, English or American, and not Egyptian;

3. The garnishee order was ineffective because no notice was given to plaintiff within eight days;

4. The order provided no defence because no payment had been made under it;

5. The order provided no defence because payments should have been made under the policies or under the collateral agreement; and

6. The Courts would not recognize the garnishee order because it was an attempt indirectly to enforce a foreign revenue law.

Mr. THEODORE STEPHEN PAGE, of the Inner Temple, Barrister-at-Law, giving evidence for the defendants, said that he practised in Cairo in the Mixed Courts and the British Consular Court before the last war and between 1949 and 1954 carried on practice in Egypt. He still practised in relation to matters of Egyptian law in London and went out to Egypt to advise clients.

A garnishee order made by the Egyptian authorities against the insurance policies to enforce an alleged tax liability of the plaintiff as a partner in a firm of cotton merchants, was a valid order.

WITNESS said both the garnishee orders concerned were valid in Egyptian law. The defendants were liable under both and if they paid under the policies then their own property, to the extent of the amount of the garnishee orders, could be seized by the Egyptian government.

Mr. ROSKILL submitted that the proper law governing the policies was that of Egypt. If that was so, the Egyptian exchange control legislation, part of that law, prohibited the payment of the policy moneys.

COUNSEL submitted that if the proper law was Egyptian he had plainly proved that payment without permission was illegal. Whatever the proper law of the contract the debt created by the policies was situated in Egypt and that debt had been validly attached or garnished in that country. English Courts would, as a matter of English private international law, recognize and give effect to the validity of that attachment and would not put the garnishee in peril of having to pay twice. For the purpose of that proposition it did not matter whether the garnishee proceedings were in respect of a revenue claim or not. The claim in Egypt was, of course, a revenue claim.

Counsel also submitted that if the debt was not situated in Egypt nevertheless the English Courts would, as a matter of comity, recognize and give effect to those proceedings and would not put the garnishee in peril of having to pay twice if the English Court was satisfied by either or both of two things. These were, first, that the law of the place of attachment, the *situs* of the debt, was that of Egypt; second, that by the law of the place of the attachment there was jurisdiction over the garnishee, the debtor and, of course, the garnishor, which, in the present case, was the Egyptian Government.

It was an implied term of these policies that the defendants should not be obliged to pay under the policies in country A. if by so doing they would be or might be exposed to the peril of having to pay a second time in country B.

Counsel said that his last point was that his clients were legally compellable to pay the tax claim against the plaintiff in Egypt and therefore had a *pro tanto* or full discharge against him if he tried to claim against the defendants here.

Counsel said that the first question was: What was the proper law of the contract? He took his stand on the modern test: With what country had the contract the most substantial connection? He submitted that the country with which these contracts had the closest connection was Egypt. The only thing to connect the policies with Ontario was that the defendants had their head office there and the policies themselves were brought into existence as documents there. They did not become contracts until they were physically delivered in Egypt.

Counsel submitted that Mr. Rossano made a contract in Egypt knowing Egypt was in the sterling area and knowing the hazards of having payment made in such an area. The policy made no reference to a place of payment and one would not expect any such reference having regard to the mode of discharge of the insurance company's obligation—a bankers' draft.

Mr. Justice McNair: It rather shocks me that a policy-holder cannot go to the place of the incorporation of the company—the only place where the company exists as a legal entity—to get payment.

Mr. Roskill: It may seem shocking, but there have been cases again and again where people have tried to get money in this country and the Courts here have held they cannot if the proper law is the law of the place where the contract was made. The Courts have gone a very long way to prevent people from collecting outside their own country if to do so involved a breach of the local regulations.

Counsel said that there was nothing in the policy which pointed to Ontario, except that the head office was there and that any notice of assignment or variation of the policy should be given there.

Putting it at its least, Egypt had a very much stronger connection than did Ontario. One had to bear in mind that in 1940, the company had its head office in Toronto and a branch in Cairo. Mr. Rossano was a national of, and was resident in, Egypt. At that time, the question of proper law could only have been answered one way. Since then, the person who had moved was not the debtor but the creditor, who had had the misfortune of not being able to live in Egypt any longer.

The company was now in the same position—head office in Toronto and a branch office in Cairo. That could not be altered because the plaintiff, through good reason or bad, left his residence.

All that had been agreed upon was that the plaintiff should have his money on the law of Egypt—the proper law of contract—which was subject to whatever relevant Egyptian exchange control regulations existed at the time.

Counsel said that the point of vital importance in the case was something that arose not only in relation to Egypt, but also to scores of other countries where the defendants carried on business. The difficulty was always in regard to policies that had been issued in foreign form and made the company liable to pay anywhere they were amenable to local jurisdiction, irrespective of the law of the country where the policies were negotiated and issued.

Counsel submitted that it was quite plain that the policies had been validly attached by Egyptian law. The evidence was all one way and the plaintiff had called no evidence to challenge that of Mr. Page.

Counsel contended that to gain the protection of a garnishee order it was enough for him to show that if the company was made to pay under a British order, it must also pay in Egypt. An

English Court could not ignore foreign garnishee proceedings, where the effect of doing so would make the company liable to pay a second time.

COUNSEL submitted that the first garnishee order carried him home on all the policies. Whatever the position between the parties, the order could be used as a defence at any time so long as the defendants' alleged debt to the plaintiff was unpaid.

Mr. DONALDSON submitted that the standstill agreement involved nothing more than an agreement that the plaintiff would not sue. It did not amount to an agreement that the defendants would cease to be liable; it did not touch that underlying obligation.

The second garnishee order suffered from all the vices of the first and it was not notified to the plaintiff's firm; neither did they consent to it.

There was no evidence that either of the garnishee orders were served within eight days or had been properly signed.

COUNSEL said that if the defendants paid before the garnishee orders were served, then they were not entitled to rely on the orders. That proposition could be justified on the general principle that a defendant was unable to take advantage of his own wrong, which was happening in the present case.

On the question of foreseeability, COUNSEL said that when a 20-year insurance policy was considered and the parties were asked what consequences they foresaw as a result of non-payment in 20 years' time, their answer would be: "We have no idea; anything might happen."

On the revenue point, COUNSEL said that English Courts would not directly, or indirectly, enforce foreign revenue law. To allow the garnishee orders to operate as a discharge in the present case would clearly be an indirect enforcement of Egyptian revenue law.

Regarding the *situs* point, COUNSEL submitted that assuming the garnishee was good, it could only operate if the *situs* of the debt was Egypt. The *situs* had to be decided by English and not Egyptian law since the Courts had never applied a conflict of laws but only the English doctrine. Were it otherwise, the Courts would be put in a position of completely circular reasoning. Counsel had been unable to find authority supporting a proposition contrary to his.

Mr. Roskill, he added, had invited the Court to start by applying Egyptian principles of private and international law. If English principles were applied, then the *situs* of the debt did not depend on the Egyptian definition, but on where the debt was payable or the terms of the contract or, if there were no terms to that effect, where it was payable in the ordinary course of business.

COUNSEL said that if the Court concluded that there was no express or implied place of payment, then it would have to consider where the policies would have been paid in the ordinary course of business. The *situs* of the debt could change, because the place where the debt created by the policy would have been paid in the ordinary course of business would vary during the policy's 20-year currency.

In the ordinary course of business, this policy would have been paid at whatever branch of the defendants the assured selected. To put it another way: by an express or implied term of the policy, place of payment was at head office, or such branch as the assured might choose.

COUNSEL submitted that the test was to find what system of law—and not what country—was connected closest to the transaction.

Mr. Justice MCNAIR said that the transaction was carried out in Egypt, subject to certain restrictions on the defendants.

COUNSEL replied that the restrictions only applied to the way they ran their business there. The restrictions had put statutory obligations on one party to the transaction as a result of them entering into the contract. It was a factor, but whether it pointed to Egyptian law was debatable.

COUNSEL submitted that if the Court looked at the systems of law, then the form of contract used coupled with an express reference to the statutory restrictions in the proposal form pointed to the Ontario legal system. The policy used in Ontario by the defendants, which was plainly governed by Ontario law, was virtually identical.

His LORDSHIP: Even if the contract had expressly provided for Ontario law, the transaction was carried out in Egypt, and

by Egyptian law it had to be retained on the Egyptian register and the defendants would be subject to that law and to the Egyptian exchange control regulations. That is a difficulty in your way.

COUNSEL: I am not saying this is a case where there are no factors which point to Egypt, but I maintain that the overwhelming balance points away from Egypt.

Judgment was reserved.

Wednesday, Mar. 7, 1962

JUDGMENT

Mr. Justice McNAIR: The plaintiff in this action, Mr. Charles Rossano, who in 1940 was an Egyptian national residing and carrying on business as a cotton merchant in Egypt, seeks to recover the sum of £9906 9s. 10d. which he claims to be due under three 20-year endowment policies dated respectively Nov. 25, 1940, Nov. 25, 1940, and Jan. 22, 1941, issued by the defendants, Manufacturers Life Insurance Company. This is a company incorporated according to the law of Canada, and having branches in many countries outside Canada, including a branch in Egypt, through which, as will appear later, the policies in question were negotiated. The policies matured on Mar. 15, 1960, and there is no dispute as to the amount due under the policies. The pleadings in their final form, however, raise issues of great complexity, but happily, owing to an agreement very sensibly reached by the parties during the hearing before me, it has been agreed that at this stage I should not be called upon to determine a number of complicated issues of fact arising as the result of negotiations between the parties which took place from a date shortly before the date of maturity of the policies and continued up to the issue of the writ herein on Mar. 13, 1961.

In brief, the defendants relied upon two main defences. First, that the proper law of the contracts being Egyptian law, or alternatively the *situs* of the debt being in Egypt, or, in the further alternative, the contractual place of performance, that is, payment of the policy moneys being Egypt, payment by the defendants would be illegal under the Egyptian Exchange Control laws if effected without the permission of the Egyptian Control authorities as it would involve a payment of foreign currency between two persons occupying the status of residents under that law. For the purpose of my present judgment it was admitted that no permission had been granted by the Exchange Control; but there was left over for further determination, should it be relevant, the question whether either the plaintiff or defendants were in default leading to the failure to obtain such permission.

Secondly, the defendants say that, by virtue of two garnishee orders, the one dated Nov. 16, 1960, and the second dated Jan. 23, 1962 (that is after the issue of the writ), served upon the defendants' branch in Egypt by the Egyptian revenue authorities in respect of tax alleged to be due by the plaintiff, payment by them of the policy moneys to the plaintiff would expose them to penalties under the law of Egypt, or expose them to the risk of having to pay the money twice, and that they are not liable to pay the sums claimed. The points under this head are put in a variety of ways in pars. 11, 12 and 12A of the re-amended defence which I need not set out in detail at this stage. The plaintiff denies that he is under any tax liability, but, in any event, submits that for a variety of reasons each of the orders is a nullity, and further, seeing that to give effect to them or either of them would be at least indirectly to enforce a foreign revenue law, this Court should not recognize them.

Seeing that the defendants carry on business in many countries outside Canada, it is urged by the defendants that the case is of the greatest importance to them far exceeding the money involved since they may, if the plaintiff's case is well founded, be involved in great difficulties in connection with other policies issued in Egypt or in many of the other countries in which they carry on business.

I

Proper law of the policies.

The first and most important matter which falls for my decision is as to the *proper law of the policies.* None of the policies contain any express provision as to what law is to govern the contract. On behalf of the defendants it is submitted that the proper law is Egyptian law; on behalf of the plaintiff it is submitted that the proper law of all three policies is the

law of Ontario, or alternatively as to two of the policies for £3000 and £4000 sterling, respectively, payable in bankers' demand drafts on London for £ sterling, the proper law is the law of England, and in respect of the third policy for 10,000 U.S. dols. payable in bankers' demand draft on New York for United States dollars, the proper law is the law of the State of New York.

The test to be applied in determining the proper law of the contract in the absence of any express provision in the policy or any provision in the policy as to jurisdiction has, in my judgment, been authoritatively determined in a manner binding upon me by the decision of the House of Lords in *In re United Railways of Havana and Regla Warehouses, Ltd., sub. nom. Tomkinson and Another v. First Pennsylvania Banking and Trust Company*, [1961] A.C. 1007, where their Lordships by a majority expressly accepted the test laid down in the opinion of Lord Simonds in *John Lavington Bonython and Others v. Commonwealth of Australia*, [1951] A.C. 201, at p. 219, as being "the *system of law* [*] by reference to which the contract was made or that with which the transaction has its closest and most real connexion". Later (*ibid.*, at p. 221), Lord Simonds says:

> The question, then, is what is the proper law of the contract, or, to relate the general question to the particular problem, within the framework of what monetary or financial system should the instrument be construed. On the assumption that express reference is made to none, the question becomes a matter of implication to be derived from all the circumstances of the transaction. . . .

In the *United Railways case, sup.* (a case of immense complexity), one of the issues was as to the proper law of a lease executed in New York of certain rolling stock used on a railway undertaking in Cuba, the lease forming the security for repayment of a loan raised in the United States of America for the purchase of the rolling stock. Lord Denning (*sup.*, at p. 1068) says:

> . . . the test is simply with what *country* [*] has the transaction the closest and most real connection: see *Bonython v. Commonwealth of Australia, sup.* Applying this test, I think the proper law of the transaction, including the lease, is the law of one of the United States . . .

It may be observed that Lord Denning probably *per incuriam* has substituted the word "country" for "system of law" in Viscount Simonds's test, but it is clear that no change was intended. Lord Morris of Borth-y-Gest (*sup.*, at p. 1081) says:

> . . . If, then, the question is posed as to what is the law "by reference to which the contract was made or that with which the transaction has its closest and most real connection" (see the words used by Viscount Simonds in *Bonython v. Commonwealth of Australia, sup.*) I would answer — the law of Pennsylvania . . . .

Viscount Simonds (*sup.*, at p. 1035) stated that he was wholly in agreement with Lord Morris of Borth-y-Gest's conclusion of law upon the question of the law to be applied. Lord Reid (*sup.*, at p. 1050) expressed his agreement with the reasons given by Lord Denning and Lord Morris of Borth-y-Gest for adopting the law of Pennsylvania. Lord Radcliffe (*sup.*, at p. 1058) took a rather different view when he said:

> . . . I do not think that the tests for determining the proper law of a contract can ever be comprehended under a single phrase, so various are the situations and considerations that have to be taken account of; but this is a case in which, in my opinion, the law of the place of performance ought to be regarded as of preponderating importance, and of those two possible places Pennsylvania which is both the home of the trustee and the place where the capital is to be repaid seems to me clearly the natural choice.

In the course of the argument I was referred to the test formulated in rather different terms in the Court of Appeal in *The Assunzione*, [1954] P. 150; [1953] 2 Lloyd's Rep. 716 (Court of Appeal), adopting a passage from the judgment of Lord Wright in *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society, Ltd.*, [1938] A.C. 224, at p. 240 (Privy Council), that the duty of the Court is "to determine for the parties what is the proper law which, as just and reasonable persons, they ought . . . [to] have intended if they had thought about the question when they made the contract". (See per Lord Justice Singleton

* Emphasis by Mr. Justice McNair.

(*sup.*, at pp. 175 and 727 of the respective reports) and per Lord Justice Birkett (*sup.*, at pp. 186 and 734 of the respective reports).) It does not appear from the reports that the *Bonython case, sup.*, was cited in the argument in the Court of Appeal in *The Assunzione, sup.*, or that the latter was cited in the argument in the *United Railways of Havana case, sup.* In these circumstances, I propose to apply the test as laid down by Lord Simonds in the *Bonython case, sup.*, and accepted by the House of Lords in the *United Railways of Havana case, sup.*

One further preliminary point. The proper law must be determined as at the making of the contract, though the Court will, of course, give effect to changes in that proper law which arise after the making of the contract. See *Kahler v. Midland Bank, Ltd.*, [1950] A.C. 24, and *Zivnostenska Banka National Corporation v. Frankman*, [1950] A.C. 57, both cases in which the proper law of the contract being a foreign law including its Exchange Control law, the English Courts gave effect to subsequent changes in that law.

II

The facts of the case.

I now turn to the facts. In 1940, Mr. Charles Rossano was an Egyptian national by birth residing in Egypt where with others he carried on business in Alexandria as a partner in a limited partnership firm by the name of Levi Rossano & Co. At that time the Italian forces were threatening Egypt, and it was clear that Egypt might become the seat of war. In these circumstances, discussions took place between Mr. Rossano and Mr. Harari, the district manager of the defendants' Alexandria office, which ultimately resulted in the issue of the policies sued upon.

At all material times the defendants had an office in Cairo which was responsible for all business transacted by the defendants over a wide area in the Middle East including Egypt, the Sudan, Palestine, Cyprus, Lebanon, Syria and Iraq. This office was under the control of Mr. Baird, who held a direct power of attorney from the defendants. By this power (Exhibit D.1) Mr. Baird was empowered (*inter alia*):

> 1. To establish and manage agencies of the company;
>
> 2. To canvass for and solicit applications for insurance with the company on the lives of individuals;
>
> 3. To countersign and issue interim policies of insurance and official premium receipts under the conditions sanctioned by the Company and on the forms having the signatures of the proper officers of the Company;
>
> . . . . . .
>
> 7. To receive and collect all vouchers, proofs and documents of what kind soever which shall concern any loss; and to institute all necessary inquiries and examinations touching every such loss and to adjust and settle the same with the respective claimants . . .

From the evidence of Mr. McNab, now the vice-president and chief agency officer of the defendants, and at the material time the agency superintendent for the defendants covering the Middle East area, it appears that, in practice, the authority of the Cairo office in the person of Mr. Baird to issue interim policies was probably restricted as to amount and some degree of control from head office; that in the case of final policies the decision whether to issue them or not was taken in Toronto where the policy was sealed, and that it was merely transmitted to the branch for handing over (McNab, p. 6); that claims, whether under an interim policy or a final policy presented by the insured in Egypt, would be dealt with by the Cairo office subject to corroboration or authorization from Toronto, though Cairo may have had authority to pay claims of a certain amount by themselves (McNab, p. 5). Furthermore, apart from Exchange Control regulations, an assured, to obtain payment, could in practice go to the head office or any branch for payment wherever the policy was issued (*ibid.*). Indeed for Mr. Rossano one of the attractions in dealing with the defendant company was that they were a foreign insurance company abroad, and that if Egypt was invaded, and he was not in occupied territory, he would be able to draw his policy moneys anywhere in the world (Day 1, p. 14). Confirmation that Mr. Harari so understood the position is to be found in two letters which he wrote to the plaintiff under date June 11, 1940, in which he stated that payments due in connection with the policies would be made by drafts on London for sterling policies or draft on New York for United States dollar policies, and such payments would be made through any of the company's branch offices in any country in which the company operated

provided that the company was not prevented from doing so by legal restrictions or exchange regulations of the Governments concerned. This evidence of the attitude of Mr. Rossano and Mr. Harari I regard as significant and admissible not for the purpose of importing into the contract any contractual terms to the effect stated, but as part of the surrounding circumstances in which the policies were negotiated.

III

The applications for policies.

As the result of these negotiations Mr. Rossano on June 11, 1940, signed three application forms addressed to the defendants by which he applied for three 20-year endowment policies for £3000, £4000 and 10,000 U.S. dols., respectively. These application forms, which were ultimately incorporated into the final policies, contained (*inter alia*) the following provisions: (a) the necessity for *mise en demeure* by *huissier* is expressly waived; (b) policy to be written in English; (c) a declaration by Mr. Rossano that in the event of his death the insurance was to be paid to his wife; and (d) a declaration that he reserved the right to change the beneficiary subject to statutory restrictions. The significance, if any, of these provisions I shall refer to later.

IV

Payment of Premiums.

The total 20 years' premiums under the dollar policy were paid in advance by Mr. Rossano with the application direct to the defendants' head office in Toronto by means of a draft on the First National Bank of Boston where Mr. Rossano had dollar funds since before the war. These dollars had been duly declared by Mr. Rossano to the Egyptian Exchange Control authorities. As regards the sterling policies, Mr. Rossano likewise in the first instance paid the full 20-year premium with the application amounting to just under £5000 by sterling cheque to the defendants' Cairo office, but subsequently £2700 of this sum was repaid to Mr. Rossano.

V

Issue of Interim Policies.

On Oct. 26, 1940, Mr. Baird, of the defendants' Cairo office, cabled to the defendants in Toronto for permission to issue interim policies covering the plaintiff's application for the sterling policies. On Oct. 28, the defendants in Toronto instructed their Cairo office to discuss with the Exchange Control authorities the question of the prepaid premiums, and to secure their written permission to the issue of each of the policies, including the dollar policy, showing the amount of the policy and the amount of the prepaid premium, and for permission for the delivery of the policies in the United States as had been requested by the plaintiff on June 19. No evidence was tendered as to what was done on these instructions except that on Dec. 10, 1940, Mr. Rossano made a formal declaration that the dollars paid for the premiums of the dollar policy formed part of a pre-war balance to his credit at New York; but I infer that no objection was taken by the Exchange Control authorities as to the issue of any of these policies provided they were delivered in Egypt. On Oct. 31, 1940, the defendants' Cairo office issued to Mr. Rossano a single interim policy for a period of five months for £7000 covering the two applications for the sterling policies under the counter-signature of Mr. Baird. These policies provided (so far as is material) as follows:

> This Interim Policy shall cease to be effective when a policy issued to supersede the insurance hereunder is accepted. This Interim Policy may be cancelled at any time during the said period of five months . . .

No interim policy for the dollar insurance appears to have been issued.

VI

Issue of final policies sued upon.

On Nov. 25, 1940, three policies for £3000, £4000 and 10,000 U.S. dols. were executed at Toronto in favour of the plaintiff bearing the signatures of the general manager and of the president, and under the seal of the defendant company. The dollar policy was apparently lost in transit, and a new policy so signed and sealed was executed on Jan. 22, 1941. Subject to variations necessary in the dollar policy to take account of the dollar obligations as to the payment of the premiums and of the amount insured, each of the policies was in identical form, this being the form used by the company for foreign business.

The policy for £3000 recited:

THE MANUFACTURERS LIFE INSURANCE COMPANY HEAD OFFICE, TORONTO, CANADA hereby insures the life of CHARLES ROSSANO . . . under this policy of insurance, the particulars of which are as follows:

1. Plan of Insurance	*TWENTY* YEAR ENDOWMENT.
2. Sum Insured	*** *THREE THOUSAND POUNDS STERLING* *** (subject to the War Risks clause herein)
3. When Payable	(a) On the *fifteenth* day of *March, 1960,* if the life insured is living and this policy is in force, or (b) On receipt and approval of due proof of the prior death of the life insured while this policy is in force.
4. Beneficiary	If the policy becomes payable as provided in (a) above *the Insured*; ****** If the policy becomes payable as provided in (b) above *the Insured's wife, MARY ROSSANO;* subject to the provisions on the succeeding pages hereof.
5. Premium Payable and Due Date	*** *ONE HUNDRED and THIRTY-SIX POUNDS TEN SHILLINGS STERLING* *** ****** payable in advance every *twelve* months commencing on the *fifteenth* day of *March, 1940,* and continuing until premiums for *twenty* full years have been paid or until the prior death of the life insured.
6. Policy Years	Computed as from the *fifteenth* day of *March, 1940,* during the continuance of this policy.
7. Insurance Age	*Thirty-three* Years.
8. Surplus	Apportioned annually in accordance with the Annual Dividend Options on the succeeding pages hereof.

The provisions and options printed and written by the Company on the succeeding pages hereof form a part of this contract as fully as if stated over the seal and signatures hereto affixed. [*]

Overleaf there are set out a number of printed conditions and two added rubber stamp clauses to which reference will be made.

It is only necessary to set out in this judgment certain of these clauses as follows:

1. THE CONTRACT. This policy and the application therefor, a copy of which is attached hereto, constitute the entire contract.

This policy shall not take effect until it has been delivered and the first premium paid to the Company in exchange for the official receipt, no change having taken place in the insurability of the life insured subsequent to the completion of the application.

No provision or condition of this policy may be waived or modified except by an endorsement hereon signed by the President, Vice-President or General Manager.

. . . . . .

* The words in italics were typewritten into the policy form.

2. INCONTESTABILITY. . . .

3. PAYMENT OF PREMIUMS. A grace of one month (of not less than 30 days) from the actual due date of the premium stated herein will be allowed for the payment of renewal premiums . . .

(The first sentence of this clause dealing with payment of the first premium had been struck out in view of the payments of the premiums in advance above referred to.)

4. CURRENCY. All amounts payable under the terms of this policy, either to or by the Company, are payable in bankers' demand drafts on London, England, for Pounds Sterling.

(In the case of the dollar policy the final words read "bankers' demand drafts on New York, U.S.A., for United States Dollars.")

5. AUTOMATIC PREMIUM LOAN. . . .

6. LOAN VALUES. . . .

7. CASH AND PAID-UP INSURANCE VALUES. . . .

8. EXTENDED INSURANCE. . . .

9. REINSTATEMENT. . . .

10. PAYMENT OF CLAIM. When this policy becomes a claim it must be delivered to the Company with a valid discharge therefor. The amount of any lien or indebtedness on the policy will be deducted from the amount payable.

11. SUICIDE. . . .

12. PROOF OF AGE. . . .

There then follow provisions dealing with annual dividend options which are not material.

Next follows a printed clause dealing with appointment of beneficiary, and finally (so far as is material) a printed clause dealing with assignment in the following terms:

Any assignment of this policy shall be in duplicate and both copies sent to the Head Office, Toronto, Canada. . . .

Of the added clauses appearing by rubber stamp two are or may be relevant:

WAR RISKS

Notwithstanding anything herein contained to the contrary, this policy is issued on condition that the total sum payable hereunder shall not be greater than the net amount of the premiums paid . . . with interest . . .

(a) If the life insured serves in any military, naval or air force and the death of the life insured results directly or indirectly from war . . .

(b) If the life insured travels or resides beyond the geographical boundaries of Egypt and Palestine and the death of the life insured results directly or indirectly from war . . .

Payment of any sum required to keep this policy in force must be made at the Company's offices at Cairo or Alexandria —or to persons empowered to accept them—in exchange for the Company's official receipt signed by the General Manager and countersigned by an agent or cashier of the Company . . .

On the back of the policy the following notice is printed:

IMPORTANT

When it is desired to obtain payment of any benefit under this contract write direct to the Manufacturers Life Insurance Company, Toronto, Canada, or communicate with the nearest authorized representative of the Company. By so doing time and expense may be saved, as the Company will furnish, free of charge, the required forms for completion together with any necessary advice and instructions.

The policies having been executed in Canada were sent to the company's branch in Egypt and there delivered to Mr. Rossano. They remained in Egypt until January or February, 1961, when they reached this country.

VII

Canadian Insurance Law.

(a) The Manufacturers Life Insurance Company as an insurance company is subject to the Canadian and British Insurance Companies Act, a Dominion Statute broadly similar to the English Assurance Companies Acts containing provisions designed to secure their financial stability, their deposits and the rights of different classes of policy-holders in winding up.

(b) In Part V of the Insurance Act of Ontario (Chapter 183 in the Revised Statutes of Ontario, 1950) there are some 60 sections (Sects. 131-191) containing detailed provisions relating to the rights and obligations arising under contracts of life assurance. Sect. 132 provides as follows:

(1) Notwithstanding any agreement, condition or stipulation to the contrary, this Part shall apply to every contract of life insurance made in the Province after the 1st day of January, 1925, and

any term in any such contract inconsistent with this Part shall be null and void.

. . . . . .

(3) This Part shall apply to every other contract of life insurance made after the 1st day of January, 1925, where the contract provides that this Part shall apply or that the contract shall be construed or governed by the law of the Province.

Mr. McVitty, a member of the Ontario Bar, and a partner in the firm of J. K. Henry and Associates, of Toronto, who act for the defendants in this case, was called on behalf of the defendants to speak as to the effect of this Act, and I am indebted to him for his careful and informed evidence. As to the effect of this law, and as to forms of contract in practice used by the defendants, it appears that the defendants use five types of policy forms: The Canadian form, the United States form, the United Kingdom form, the foreign general form and the foreign (British Commonwealth) form. The policies issued to Mr. Rossano were on the foreign general form. Accordingly, unless the policies were on the facts stated above made in Ontario, and unless on their true construction they provided that Part V should apply, or that the contract should be construed or governed by the law of the Province, Part V would not as a matter of law apply to them. Mr. McVitty, however, agreed that the agreement of the parties that Part V should apply, or that it should be governed and construed by the law of the Province, might be express or implied. A comparison between the terms of the home or Canadian policy and the terms of the foreign general policy showed that they were almost identical, and admittedly the terms of the home or Canadian policy were founded upon the compulsory requirements of Part V. The only points of difference at all between the plaintiff's policy and the home or Canadian policy which were relied upon were (1) the war risk clause; (2) the second of the rubber stamp clauses dealing with payments of sums required to keep the policy alive, and (3) the clause entitled "Appointment of Beneficiary".

Very considerable discussion arose on the terms of this last clause which according to Mr. McVitty would be void under the Ontario statute in so far as it would or might permit Mr. Rossano to substitute another beneficiary for his wife. Under the Ontario statute, the wife is within the class of preferred beneficiaries whose rights are safeguarded by this statute. Inasmuch, however, as in the application form which formed part of the policy Mr. Rossano reserved the right "to change the beneficiary, subject to statutory restrictions", the effect of reading these two provisions together is in my judgment that the proviso to the printed beneficiary clause to which objection was taken would not operate if the change of beneficiary was not permitted by the statutory restrictions, which I think can refer only to the statutory restrictions contained in the Ontario Act. I did not understand Mr. McVitty to say anything to the contrary, though he did say that the proviso offended against the law of Ontario (Day 3, p. 13) and that the reservation of the right to change the application form would not be of any particular value to Mr. Rossano (Day 3, p. 37). I think it is quite plain that the foreign form is in all essentials based upon the terms of the Ontario statute even though that statute may not as a matter of law apply to all insurances effected on the foreign form. Before leaving this branch of the case I should just note that, according to Mr. McVitty, a policy issued in Toronto providing for payment in sterling would normally or not unusually provide in the currency clause for payment by bankers' draft on London or New York as the case may be (Day 3, p. 29).

VIII

Egyptian Insurance Law.

By Law No. 156 of 1950, which re-enacted with amendments Law No. 92 of 1939 which applies to Egyptian undertakings and foreign undertakings which transact in Egypt (*inter alia*) life assurance, it is provided by Art. 16 that every undertaking shall maintain a register of policies transacted by the undertaking, and by Art. 20 that they shall maintain in Egypt assets of value at least equal to the mathematical liability in respect of operations transacted or fulfilled in Egypt. These assets by Art. 24 are (subject to certain conditions) made available to holders of such policies. Mr. Rossano's policies were in accordance with this law registered on the company's register in Egypt, and the necessary deposits maintained in Egypt (McNab, p. 2), but there was no evidence that Mr. Rossano had any knowledge of any of the matters referred to in this paragraph.

IX

Proper law of the contract.

I have now set out at some length the material evidence in this case bearing upon the issue of the proper law of the contract. If the test had been (as was argued by Mr. Roskill) with what *country* had the transaction the closest and most real connection, following the language used by Lord Denning, as I think *per incuriam*, in the *United Railways of Havana case, sup.*, it may well be that there was much to be said for the view that the transaction had its closest and most real connection with Egypt seeing that the policies were negotiated between two parties in Egypt and were delivered in Egypt. But, if the real question is what intention as to the proper law is to be imputed to the parties, and if the answer to this question is to be tested by consideration of what is the *system of law* by reference to which the contract was made or that with which the transaction has its closest connection, I think the answer must quite clearly be *not* the law of Egypt but rather the law of Ontario.

The policy form is clearly based on the law of Ontario. The defendant corporation had its head office in Ontario. The negotiations for the assurance conducted in Egypt could never have led to a policy unless the terms of the application had been accepted by the superior officers of the company in Toronto. No alteration or modification of the printed conditions of the policy could be effected unless expressly agreed to in writing by the officers of the company in Toronto. No assignment could be effective unless notice was given to the company in Toronto. There is no provision in the policy requiring the policies to be presented to the company for payment in Egypt. Both the policy moneys and the premiums are expressed in a currency other than Egyptian. The notice on the back of the policy advises the policy-holder who wishes to obtain payment to write direct to the head office in Canada or communicate with the nearest authorized representative of the company.

Further, it seems to me that where a resident in a territory seeks life assurance from a foreign insurance company through its local agent in that territory, it is manifest that normally he chooses the foreign company because he has faith not only in that company, but in the system of law under which it operates,

One further observation may be added. It seems clear that under the *Bonython* test the question is still what intention is to be imputed to the parties; see the speech of Lord Simonds, [1951] A.C., at pp. 219, 221 and 222.

X

Provisions in application forms.

Earlier in my judgment I reserved for later consideration the relevance (if any) of two special provisions in the application form as follows: (a) "The necessity of *mise en demeure* by *huissier* is expressly waived", and (b) "Policy to be written in English". As to (a) the evidence was that *mise en demeure* relates and relates only to a procedural provision of the Mixed Courts in Egypt (abolished in 1947) which required that before proceedings could be instituted a formal claim (similar to a solicitor's letter before action) should be served upon the alleged debtor by an official process server. It was submitted that this indicated that the parties had in mind that, in the event of dispute, resort would be made to the Mixed Court. Even if this be so, I had evidence that the Mixed Court applied a wide variety of laws by no means confined to the law of Egypt. I am unable to infer anything relevant from this provision. (b) "Policy to be written in English". There was evidence that in 1940 the normal commercial language in Egypt was French. From this it was argued that but for Mr. Rossano's election to have the policies in English, the policies would have been in French, the commercial language of Egypt. It could be equally argued that Mr. Rossano's choice of English indicated that he wanted to secure that the language used should not be the commercial language of Egypt, but should be the language of Ontario.

XI

Pick v. Manufacturers Life Insurance Company.

I am fortified in the conclusion which I have reached by the decision of Mr. Justice Diplock (as he then was) in *Pick v. Manufacturers Life Insurance Company*, [1958] 2 Lloyd's Rep. 93, and by the reasoning expressed by that learned Judge for his conclusion that the policy in question in that case was not governed by the law of Palestine (now Israel), but by the law of Ontario.

It was submitted by Mr. Roskill that that case was distinguishable from this case, as I understand it, on three grounds. First, that in *Pick's case, sup.*, the assured, a

German refugee in Palestine, had "at the back of his mind that he might eventually return to Germany if circumstances made that country again a congenial place of residence" (*ibid.*, at p. 95), whereas Mr. Rossano was an Egyptian born and bred, permanently residing there, with no intention in 1940 of leaving Egypt; but it is clear from Mr. Rossano's evidence (which I accept) that, at the time when the policies were negotiated, there was war on the Egyptian border, and, being of Jewish faith, he feared that he might have to leave the country, and wished, accordingly, to have policies payable anywhere in the world. (Day 1, p. 2). Secondly, that in *Pick's case, sup.*, there was no evidence that anyone had power to issue interim policies in Palestine. This appears to be true, but in my view is irrelevant. Thirdly, that in *Pick's case, sup.*, the first sentence of the clause relating to payment of premiums had not been struck out. As I have already stated, in the present case, Mr. Rossano paid the whole 20 years' premiums on the dollar policy direct to the defendants in Toronto, and the premiums on the sterling policies by a sterling cheque to the defendants' Cairo office. Such payments made the first sentence of the clause unnecessary and inappropriate in the present case. I cannot appreciate that this factor provided any valid ground of distinction. In my judgment, accordingly, the Egyptian Control legislation does not apply to these policies as part of the proper law of the contracts.

XII

Applicability of Egyptian Exchange Control legislation.

I next have to consider where they apply (a) by reason of the *situs* of the debt being in Egypt, or (b) by reason of the fact that Egypt is the contractual place of performance. Though it is pleaded in par. 6 of the re-amended defence that the Egyptian Control legislation would apply as part of the law of the *situs* of the debt under the policy, that *situs* being Egypt, I did not understand from the argument addressed to me that the *lex situs* was advanced as a ground for applying the Egyptian Control legislation independent of the law of the place of performance. So far as I recall, no authority was cited to me on this branch of the case supporting such distinction, and I know of none. It may be observed that the *lex situs* is not stated to be such a ground in Rule 178 of Dicey's Conflict of Laws, 7th ed., at p. 919, which provides as follows:

> (1) A contractual obligation may be invalidated or discharged by exchange control legislation if—
>
> (*a*) such legislation is part of the proper law of the contract; or
>
> (*b*) it is part of the law of the place of performance; or
>
> (*c*) it is part of English law and the relevant statute or statutory instrument is applicable to the contract.

In a note on p. 921, the learned editors observe:

> The mere fact that exchange control legislation is in force at the place at which a party to the contract resides or carries on business or in the State of which he is a national and that the performance of the contract is excused or made illegal . . . is no defence to an action on the contract, unless either the law to which this legislation belongs is the proper law of the contract, or the contract was to be performed at a place where the legislation is in force. . . .

This passage is, in my judgment, abundantly supported by the decision in the Court of Appeal in *Kleinwort, Sons & Co., Ltd. v. Ungarische Baumwolle Industrie Aktiengesellschaft and Another*, [1939] 2 K.B. 678 (Court of Appeal).

Accordingly, I have next to consider what was the place of performance of these contracts, and for this purpose the relevant act of performance is the payment of the policy moneys; for a contract may contain obligations which have to be performed in different countries so that the law of the place of performance of one obligation may be different from the law of the place of performance of another. The policies do not expressly provide for the place of performance; the mode of performance of the material obligation is stated in Condition 4 of the policies to be, in the case of the sterling policies, "in bankers' demand drafts on London, England, for pounds Sterling", or in the case of the dollar policy "in bankers' demand drafts on New York, U.S.A., for United States Dollars". Both these modes of payment are normal or not unusual modes of payment in Ontario of sterling or dollar obligations. They may be (though there was no direct evidence on this point) also normal modes of payment in Egypt.

Reliance was placed upon the fact that the policies were physically in Egypt at maturity date. I attach no significance to

this. Perhaps rather more weight should be given to the fact that the policies were on the defendants' Egyptian register and backed by deposits in Egypt, albeit they were also backed by deposits in Canada. But I can find no express or implied term in the policies which justifies the defendants in saying that the policy moneys are payable only in Egypt. Indeed, there is no express term in the policy or any term necessarily to be implied to require the defendants to maintain a branch in Egypt authorized to pay. Furthermore, the notice on the back of the policies clearly invites the policy-holder who desires to obtain payment to write direct to the head office or the nearest authorized representative of the company. Though Egypt was a permissible place of performance, the defendants had no right to insist upon payment only in Egypt, and accordingly Egypt was not the relevant place of performance.

In *Pick's case, sup.*, Mr. Justice Diplock (*ibid.*, at p. 99) says this:

> . . . I apprehend that the principal obligation of the defendants is to pay sterling, the currency in which the policy is expressed, and that bankers' drafts when delivered amount to conditional payment only, and, if dishonoured on payment [—query "presentation"—] in London, do not discharge the contract. The contract is finally discharged only when the draft is honoured in London, which is, in my view, the primary place of payment in the strict sense of that word.

This may well be so.

XIII

Egyptian Exchange Control legislation.

Though as stated above I have reached the conclusion that the Egyptian Control legislation does not apply either as part of the proper law or as part of the law of the place of performance, it is probably desirable that I should state shortly my understanding as to the Egyptian Control legislation on the assumption that it does apply to the facts of this case in view of the evidence which was called by the defendants on this point.

For this purpose it is necessary to state certain further facts. As stated above, in 1940, Mr. Rossano was an Egyptian national residing and carrying on business as a cotton merchant with others as a partner in a limited partnership firm by the name of Levi Rossano & Co. He is a member of the Jewish community. In the course of his business he had occasion to make many visits abroad. In 1948, while Mr. Rossano was out of Egypt for health reasons, his property in Egypt was sequestrated for a short time until July 3, 1949. He returned to Egypt in March, 1950, and remained there (apart from short business trips abroad) until Aug. 4, 1956, when he left Egypt again on a business trip, having obtained a tax clearance from the Egyptian revenue authorities before leaving. In November, 1956, the Suez crisis arose. Fearing that he would be subject to further discrimination on the grounds of his faith, Mr. Rossano abandoned any intentions of returning to Egypt. His Egyptian passport was withdrawn, and he assumed Italian nationality by tracing descent from his grandfather (a registered Italian national) and thereafter severed his connection wholly from Egypt so far as to do so was within his power.

No evidence as to Egyptian law was called on behalf of the plaintiff, but, on behalf of the defendants, there was called Mr. Theodore Page, a member of the Inner Temple, who practised before the Mixed Courts and British Consular Court in Egypt until they ceased to function as such in 1949. Since that date Mr. Page had no right of audience before any Egyptian Courts, but has continued to advise clients both in London and Egypt on matters of Egyptian law and has done his best to keep his knowledge of Egyptian law up to date. No objection was taken as to the qualification of Mr. Page to give evidence on Egyptian law as it exists to-day.

On the basis of Mr. Page's evidence it is, I think, clear that (a) Mr. Rossano, notwithstanding his attempt to sever his connections with Egypt, would be regarded as a "resident" for the purpose of the Egyptian Control law; and (b) that a payment by the defendants' branch in Egypt to Mr. Rossano of sterling or dollar currency would be illegal without the permission of the Exchange Control authorities. (See the statutory provisions relied upon by the defendants by way of amendment in par. 6 of the re-amended defence which were in force at the material date of the policies, namely, Mar. 15, 1960, when they were replaced by decree No. 893 of 1960 which came into force on Oct. 22, 1960.) Mr. Page further stated that a payment of sterling or dollars by the

defendants in Toronto would also be illegal by the same laws, and would expose the defendants' Cairo branch and its personnel to penalties under Egyptian law (Day 4, pp. 33 to 35).

It seems clear that under Art. 24 of Chap. I, Sect. 3 of the Exchange Control Regulations of 1960, the defendant company would rank as a "non-resident"; but their Egyptian branch being "a branch or office of a foreign institution carrying out any activity in the Egyptian Province" would rank as a resident. The basis of Mr. Page's theory that payment by the defendant company abroad would involve the branch in Egypt in illegality was that, from the Egyptian point of view, the liability of the company is the liability of the branch and the branch is a resident, and that the only place in the Egyptian view where the policies could be paid being Egypt, a payment by the head office outside Egypt would be a payment by the head office as agent for the Cairo office (Day 4, p. 36). I confess that I find the greatest possible difficulty in following this theory, and had it been necessary for my decision I should have held that I was left in doubt whether as a strict matter of Egyptian law, as distinct from the practice of the Exchange Control authorities, a payment by the defendants' head office outside Egypt would be illegal. In so stating my view I am not unmindful of the limitation on the power of the Court to draw conclusions as to foreign law where the evidence of an expert on foreign law has been given. (See Dicey's Conflict of Laws, 7th ed., at p. 1112, "Use of foreign sources", and the cases there cited.)

XIV

Garnishee orders.

I now turn to the defence based upon the alleged garnishee orders. The facts as to the garnishee orders are pleaded in par. 10 of the re-amended defence as follows:

> On the 16th November 1960 the Defendants were served with a Garnishee Order [—which I shall refer to as the "first garnishee order"—] in respect of an amount of £E5,677.296 alleged to be due from the Plaintiff to the Egyptian Tax Department for the years 1950/51-1955/56 plus interest at 6% from 27th November 1960. Further or alternatively on or about 23rd January 1962 the Defendants were served with a second Garnishee Order in respect of an amount of £E12,291.300 alleged to be due from the Plaintiff to the Egyptian Tax Department for the years 1951 and 1952 exclusive of interest. The said Orders purport to attach all securities belonging to the Plaintiff in the hands of the Defendants, and all sums of money falling due thereunder, and to require the Defendants to remit the same to the said Department, or so much thereof as might be necessary to cover the said amounts.

In support of this plea, the defendants put in (without objection as to their formal proof) two documents in Arabic purporting to be the garnishee orders (Exhibits P.10 and D.10) relied upon, together with English translations. I accept that orders in this form were served on the defendants in Cairo. The English translation of the first garnishee order (p. 97) so far as is material provides as follows:

> . . . in accordance with the authority empowered legally to us;
>
> We hereby have levied an Executory Attachment against the taxpayer Charles Rossano in the hands of the Manufacturers Life Insurance Company of 20 Sharia Adly Pacha, Cairo, on all what it would have in its Custody such as; money, securities, goods or otherwise. We have notified the Company not to effect payment of what it would have in its hands or to hand over same to the said taxpayer. We have asked the said Company to file a Declaration—within 15 days from the date hereof—regarding what it would have in its custody and to show therein an accurate and detailed description thereof as well as its number and measures or its weight or amount; and remit same within forty days from the date hereof or remit what would cover the said taxes plus interest re late payment or deposit same with the Treasury of the Inspectorate in case the date of settlement has fallen due, otherwise it should be withheld in its hands until such date falls due when the Company should remit same or deposit it with the Treasury of the Inspectorate.

The document bears the signatures of a tax inspector and of a controller. Pursuant to this notice the defendants' Cairo office on Nov. 29, 1960, wrote to the controller setting out particulars of the three policies sued upon showing the maturity date to be Mar. 15, 1960, and stating with regard to remitting the amounts as requested by the inspectorate:

> . . . we wish to draw your attention firstly that the above numbered policies are expressed in foreign currencies and payable to a non-resident person and that the matter necessitates obtainment of approval from the Exchange Control before we effect any payment in accordance with the prevailing Laws and Regulations.

In spite of further requests for payment by the tax authorities no payments have been made. For completeness I should add that the tax in question is alleged to be a liability of Charles Rossano in his capacity as partner of Levi Rossano & Co.

On behalf of the defendants, it was submitted:

(1) that whatever be the proper law of the contract, the debt is and was situated in Cairo and that debt has been validly attached in the country where it was situated;

(2) that an English Court will as a matter of private international law recognize and give effect to the validity of that attachment and not put the garnishee in peril of having to pay twice, and that it does not matter whether the attachment proceedings are in respect of a revenue claim;

(3) that if the debt is not situated in Egypt, the English Court will as a matter of comity give effect to the proceedings and will not put the garnishee in peril of having to pay twice if the Court is satisfied (a) that by the law of the place of attachment the *situs* of the debt is in that place, that is, Egypt; or (b) that by the law of the place of attachment there is jurisdiction over the debtor, the garnishee and the garnishor.

The plaintiff on the other hand by his Counsel submitted:

(1) that the *situs* of the debt was not Egypt;

(2) that the garnishee orders were invalid, (a) because not signed by the Minister of Finance or his duly authorized deputy, and (b) because not served on the debtor within six days as required by Art. 28 of the relevant law;

(3) that the garnishee orders provide no defence since (a) no payment has been made under either or (b) neither of them was made until after the maturity date on which the defendants should have paid;

(4) that this Court should not recognize the garnishee as to do so would be indirectly at least to enforce a foreign revenue law; and

(5) that the orders being in the nature of administrative orders and not orders of any Court, an English Court will not enforce them.

Many of the points raised in these submissions raise difficult questions of private international law upon which English authority is scanty. But, as I have reached the conclusion that the fundamental objection to the recognition of these orders is that their recognition would offend against the well-settled principle that the English Court will not recognize or enforce directly or indirectly a foreign revenue law or claim, it is not necessary for me as a matter of decision to deal with many of the other points raised. The basic principle underlying the proposition stated above is to be found stated with characteristic trenchancy by Lord Mansfield, C.J., in *Planché and Another v. Fletcher*, (1779) 1 Doug. 251; *Holman et al. v. Johnson*, (1775) 1 Cowp. 341; and *Lever v. Fletcher*, (1780) unreported, that "no country ever takes notice of the revenue laws of another". (See the speech of Viscount Simonds in *Government of India, Ministry of Finance (Revenue Division) v. Taylor and Another*, [1955] A.C. 491, at p. 503, which is a direct authority, if authority be needed, that the English Courts will not entertain a suit by a foreign State to recover a tax.) But, in the speech of Lord Keith of Avonholm (*ibid.*, at p. 510) reference is made with approval to the judgment of Mr. Justice Kingsmill Moore in the High Court of Eire in the case of *Peter Buchanan, Ltd., and Macharg v. McVey*, [1955] A.C. 516n, as illustrating the position which is relevant to the present case "that in no circumstances will the Courts directly or indirectly enforce the revenue laws of another country".

In the course of the judgment above referred to, Mr. Justice Kingsmill Moore (*ibid.*, at p. 529) says this:

> If I am right in attributing such importance to the principle, then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority. In every case the substance of the claim must be scrutinized, and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected. . . .

In my judgment, for this Court to allow the defendants to set up in diminution or extinction of the plaintiff's claim a foreign garnishee order or attachment served upon them by the Egyptian tax authorities would clearly be contrary to the principles above stated.

Another application of the same principle is to be found in the case of *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.*, [1920] 1 K.B. 539, where the defendant guarantors of certain gold bonds issued by a railway company in the United States, who undertook to pay the principal money and interest in London, sought to deduct from the annual payment under the bonds an income tax of two per cent. imposed under the United States Government tax legislation which required the railway company to deduct this tax on payment of interest. Mr. Justice Sankey, in rejecting the defence, says (*ibid.*, at p. 549):

> . . . There is no Act of Parliament which allows payment of income tax to another country to be reckoned as a discharge.

If in the present case the defendants had actually remitted the amount of the tax to the Egyptian authorities, this would not, on the basis of Mr. Justice Sankey's judgment, have been reckoned a discharge. Still less, if no payment has been made, can a mere attachment of a debt by a foreign revenue authority amount to a defence.

It is perhaps not without significance to observe that if this Court by its judgment decreed that the defendants were not liable on the policies by reason of these orders, theoretically at least there would be nothing to prevent the Egyptian revenue authorities from recovering their alleged debt from some other property of Mr. Rossano's in Egypt and not persisting in their claim against the defendants under these orders. I am, of course, not suggesting for a moment that the defendants, if released from the claim under the garnishee, would not pay Mr. Rossano in spite of the discharge of their policy debt by the judgment.

Though I have preferred to rest my rejection of the defendants' defence based upon the garnishee orders upon the ground stated above, it is probably convenient that I should deal with at least some of the other points debated before me on this branch of the case.

XV

Situs of debt.

In *New York Life Insurance Company v. Public Trustee*, [1924] 2 Ch. 101, the question arose whether moneys due under life policies of a New York insurance company signed by the president and secretary of the company and countersigned by the general manager for Europe, which had been issued in London to German nationals before the First World War, were caught by the charge imposed pursuant to the Treaty of Versailles. The policy money was expressed to be paid in London. The Court of Appeal, basing themselves primarily upon the provision in the policies as to payment in London, held that the debt was situated here and so subject to the charge. There is no such express provision in the policies here in suit. There being no express provision in these policies as to the place of payment, the defendants accordingly relied upon the statement of principle by Mr. Justice Pearson (as he then was) in *F. & K. Jabbour v. Custodian of Absentee Property for the State of Israel*, [1953] 2 Lloyd's Rep. 760, at p. 776; [1954] 1 W.L.R. 139, at p. 146, in the following terms:

> Where a corporation has residence in two or more countries, the debt or chose in action is properly recoverable and therefore situated in that one of those countries where the sum payable is primarily payable, and that is where it is required to be paid by an express or implied provision of the contract, or, if there is no such provision, where it would be paid according to the ordinary course of business . . .

In the policies here sued upon there is no express provision as to the place of payment. The mode of payment is prescribed as "in bankers' demand drafts on London", or in the case of the dollar policy "on New York". In *Pick's case* above referred to Mr. Justice Diplock (*sup.*, at p. 98) expressed the view that the primary place for the delivery of the bankers' draft on London was the head office in Toronto, but that until the draft was honoured in London the delivery of the draft was conditional payment only, and the primary place of payment was London. The plaintiff, if all had gone well, would have collected his money by presenting his bankers' draft in London and New York though he might of course have discounted the draft elsewhere. But

in the ordinary course of business he would not, I think, have collected sterling or dollars from the defendants in Egypt. I should accordingly hold that the *situs* of the debt was not in Egypt.

It was argued, however, that even if this is so by English law, the debt for the policy moneys was by Egyptian law situated in Egypt. According to the uncontradicted evidence of Mr. Page, this is so. But I am by no means certain that by English law or by English principles of private international law this is in any way relevant. In *New York Life Insurance Company v. Public Trustee, sup.*, Lord Justice Warrington says (*ibid.*, at p. 117):

> . . . according to the law of one country it may be that these debts which we are prepared to hold are localised in England might be held to be localised elsewhere, but what we have to do is to give our decision upon the municipal law of this country and upon the facts and circumstances of this particular case . . .

It is true that the Court there were considering the application of an English statute, but I am not sure that this is the critical point. Furthermore, there is some authority (though tentatively expressed) that an English Court would not be debarred from determining on its own principles that the proper law of a contract is the law of A. by the fact that the Courts of B. have held or would hold that the proper law of the contract was the law of B. or some law other than the law of A. (See *In re United Railways of Havana and Regla Warehouses, Ltd.*, [1960] Ch. 52, per Lord Justice Jenkins, at p. 97, and per Lord Justice Willmer, at p. 114.) By parity of reasoning it would seem to me that I should not be deterred from holding that the *situs* of the debt was not in Egypt on the evidence of Mr. Page that by Egyptian law the *situs* of the debt was Egypt.

XVI

Validity of the garnishee order.

This question was debated at great length in the evidence of Mr. Page. In summary, the effect of his evidence was as follows: In the case of an ordinary non-governmental debt it is open to the creditor A. to go to the Judge in Chambers, and on production to him of *prima facie* evidence of a debt due from B. to apply for an order against C. attaching by way of "precautionary execution" or cautionary sequestration any debt due by C. to B. By the practice of the Egyptian Courts such attachment will be valid unless and until the debtor B. satisfies the Judge in Chambers that no debt is due by him to A. In the case of governmental debts the department concerned may proceed by "the administrative way"; that is to say, without any application to the Judge in Chambers they may, by an order signed by the Minister or his duly authorized deputy, or, in the case of a tax liability, on the basis of a tax assessment signed by the Minister or his duly authorized deputy, issue a similar attachment order on a third party who holds funds belonging to the debtor (for example, in the case of a banker and customer) or who owes money either *in presenti*, or subject to a condition requiring the person upon whom the order is served to declare to the department what funds of the debtor he holds or what moneys he owes the debtor either *in presenti* or subject to a condition, and further requiring him to pay the money over to the department within 40 days of the service of the notice in the case of a present debt, or on the fulfilment of the condition in the case of a conditional debt.

Two major points were taken on this topic by the plaintiff (i) that neither the tax assessment referred to in the attachments relied upon nor the attachment orders were proved to have been signed by the Minister or his duly authorized deputy; and (ii) that it was not proved that Art. 29 of the Law 308 of 1955 requiring notice to the debtor within eight days had been complied with. As to (i), Mr. Page's evidence was to the effect that, by a general directive issued by the Minister of Finance soon after the law was made, tax inspectors and controllers of the relevant tax departments were authorized to sign the relevant tax assessments and to issue and sign such orders; but no such general directive was produced or otherwise proved before me.

As to (ii), the material part of Art. 29 in the certified true translation put before the Court provided as follows:

> . . . A copy of this Attachment Notice must be notified to the Debtor within 8 days following the date of the Notice served to the 3rd party whereby it should be mentioned the date on which the Notice was served on the 3rd party *otherwise the Attachment will be void.*[*]

Though Mr. Page at first accepted this translation as accurate (Day 4, p. 8), subsequently he said that the true translation

* Emphasis by Mr. Justice McNair.

or meaning of the concluding words was that "it is voidable at the instance of the alleged debtor" (Day 4, p. 22) or "under the sanction of the garnishee or seizure being voidable at the instance" of the debtor (Day 4, p. 23), this being Mr. Page's translation of the French words "*sous peine de nullité de la saisie-arrêt.*

I find some difficulty in accepting either of these expressions as being true translations of the French text. Mr. Page was, however, quite definite in his view that the garnishee himself has no right to challenge the validity of the order and that it was binding upon him unless the alleged debtor applies to the Court to set it aside. No provision of the statute or any decision of the Court was produced in support of this view, but it was said to be based upon the practice of the Court. According to Mr. Page, this result would follow even if the debtor being abroad had in fact received no notice of the alleged tax assessment or of the garnishee order. There being no evidence to the contrary I feel constrained to accept this as the true view, however unreasonable it may be, though I confess I have reached this conclusion with considerable reluctance and hesitation, especially as I formed the view that Mr. Page (under the pressure of cross-examination) perhaps unconsciously was at times inclined to depart from the position of a dispassionate expounder of the law and assumed the role of an advocate.

But, on the assumption that the garnishee orders or either of them are valid by Egyptian law, and by that law binding upon the defendants, two further points remain for consideration. First, being garnishee or sequestration orders imposed by the act of the Executive, and not the result of any judicial proceedings, must or should an English Court afford them recognition? I have been referred to no authority of our Courts in which the effect of administrative garnishee has been discussed. The learned editors of Dicey* when stating in Rule 92 that the validity and effect of an attachment or garnishment of a debt is governed by the *lex situs* of the debt are clearly referring to garnishee orders made by a competent Court. (See the discussion in the note following that Rule and the case there cited.) I should not be disposed on general principles to extend the recognition further.

* 7th ed., at p. 558.

Secondly, it is submitted, on behalf of the plaintiff, that, on the facts of this case, the defendants should not be held entitled to rely upon them since both of them are later in date than the maturity dates of the policies upon which date, upon my previous findings, the policy moneys should have been paid. If allowed now to rely upon them, they would, it is said, in effect be taking advantage of their own wrong or default. In my judgment, this plea is well-founded, and should be accepted.

XVII

Foreign garnishee proceedings.

I now turn to the third submission advanced on behalf of the defendants. This may be stated as follows: That the English Courts will as a matter of comity give effect to foreign garnishee proceedings if the Court is satisfied (a) that by the law of the place of attachment the *situs* of the debt is in the country of attachment, namely, Egypt, or (b) that by the law of the place of attachment there is jurisdiction over the garnishee, the debtor, and his garnishor.

As to the first limb of this proposition I have already stated my views as to the *situs* of the debt and need not develop this point further since so far as I know no separate authority was relied upon under this branch of the argument.

As to the second limb of this submission based upon the jurisdiction of the foreign Court over the debtor, the garnishee and the garnishor, as at present advised I should not be prepared to accept that on the facts proved the Egyptian Court had jurisdiction over Mr. Rossano. At the time in question, Mr. Rossano, though according to Egyptian law still an Egyptian national (albeit also an Italian national by Italian law) and "resident" for the purpose of Egyptian Exchange Control regulations, was not physically in Egypt, had no intention of returning to Egypt, and so far as lay in his power had severed his connections with Egypt. He personally had no knowledge of the orders. The limited partnership firm of Levi Rossano & Co. had ceased to be registered on the Egyptian commercial register and had ceased to be a legal entity, and it was not proved to my satisfaction that anyone in Egypt had any authority from him to accept service of any proceedings or documents in relation to any personal liability of his. Even if the attachment order had been an order of the

Egyptian Court upon Mr. Rossano personally so as to have the status of a judgment of a foreign Court, as at present advised I should not have concluded that the Egyptian Courts had such jurisdiction over Mr. Rossano as to justify enforcement of that judgment at common law in the English Courts.

Though the Foreign Judgments (Reciprocal Enforcement) Act, 1933, has no application even to a judgment of an Egyptian Court, seeing that the Act has not been applied to Egypt, the provisions of Sect. 2 of that Act, which set out the grounds upon which a foreign Court is to be deemed to have jurisdiction, were designed to reproduce the common law rules appropriate to the enforcement of a foreign judgment at common law, and according to the learned editors of Dicey at p. 1019 may be relied upon as stating the rules of the common law. If this is so, it is to be observed that in this section neither nationality nor allegiance is stated as founding jurisdiction, nor would submission merely for the purpose of protecting or otherwise obtaining the release of property seized, or threatened with seizure, have founded jurisdiction. I should not be disposed to accept the third submission as well founded.

I am much indebted to Counsel for the help they have given to me in this case by their wide-ranging arguments. In case this case should go further, it is right that I should state that there were a number of points taken in the arguments before me with which I have not thought it necessary to deal specifically.

There will be judgment for the plaintiff for the sum of £9906 9s. 10d., together with interest thereon at the rate of five per cent. per annum from Mar. 15, 1960.

EXHIBIT 26

[1977] 1 W.L.R. 510 [1977] 3 All E.R. 54 [1977] F.S.R. 301 (1977) 121 S.J. 157 [1977] 1 W.L.R. 510 [1977] 3 All E.R. 54 [1977] F.S.R. 301 (1977) 121 S.J. 157

(Cite as: [1977] 1 W.L.R. 510)

***510 Gleeson v J. Wippell & Co. Ltd.**

1975 G. No. 5065

Chancery Division

V.-C. Megarry

1977 Jan. 13, 14, 17

Estoppel—Per rem judicatam—Issue estoppel—Previous action by plaintiff against different defendants—Present defendants not made parties—Issue whether plaintiff's copyright infringed determined in previous action—Whether issue estoppel—Whether privity of interest between present defendants and defendants in previous action

Practice—Affidavits—Form—Method of preparation—Need for endorsement—Content—Inclusion of opinions of counsel and legal aid committee undesirable—R.S.C., Ord. 41, rr. 1 (5), 9 (5)

In 1959 the plaintiff designed a special type of collar-attached shirt for use by the clergy. In 1970 she commenced proceedings against D Ltd. for breach of copyright in her drawings, the essence of her claim being that D Ltd. had copied a shirt supplied to them by W Ltd., the defendants in the present proceedings, who had indirectly infringed the plaintiff's copyright by copying a shirt manufactured for the plaintiff, which was itself a copy of the plaintiff's drawings. W Ltd. was not a party to the action. The plaintiff failed in that action, the court holding that there was no infringement of the plaintiff's copyright, and that decision was upheld by the Court of Appeal. In 1975, the plaintiff issued a writ against W Ltd., the present defendants, alleging infringement of copyright in relation to the same shirt and claiming relief by way of declaration, injunction, damages and delivery up of infringing copies.

On the defendants' application, under R.S.C., Ord. 18, r. 19 (1) (b) and (d) and the court's inherent jurisdiction, for an order striking out the indorsement on the plaintiff's writ, the statement of claim, and the reply, on the grounds that since it had already been held in the D Ltd. action that W Ltd.'s shirt did not infringe the plaintiff's copyright, it was frivolous, vexatious and an abuse of the process of the court, for the plaintiff to seek to litigate all over again what had already been decided against her: —

Held, that while there was a trade relationship existing between the present defendants, W Ltd., and the defendants, D Ltd., in the first action, that was not a ground for holding that there was any privity of interest existing between them, and accordingly since the present defendants had not been parties to the D Ltd. action there was nothing to make the doctrine of issue estoppel applicable; that further, since the remedy of striking out should only be used in plain and obvious cases and was a discretionary remedy, the court should leave the matter to be resolved at the trial and should not exercise its discretion to strike out (post, pp. 516D–F, H–517B, 518E–519A).

Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853, H.L.(E.) and Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 3) [1970] Ch. 506 considered.

Yat Tung Investment Co. Ltd. v. Dao Heng Rank Ltd. [1975] A.C. 581, P.C. distinguished.

Observations on the form and contents of affidavits.

The following cases are referred to in the judgment:

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- Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536, H.L.(E.).

***511**

- Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 3) [1970] Ch. 506: [1969] 3 W.L.R. 991; [1969] 3 All E.R. 897.
- Gleeson (J. C.) v. H. R. Denne Ltd. [1975] R.P.C. 471; [1975] F.S.R. 250, C.A.
- Higgins v Woodhall (1889) 6 T.L.R. 1, C.A.
- Marginson v. Blackburn Borough Council [1939] 2 K.B. 426; [1939] 1 All E.R. 273, C.A.
- Mercantile Investment and General Trust Co. v. River Plate Trust, Loan, and Agency Co. [1894] 1 Ch. 578.
- Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] A.C 581; [1975] 2 W.L.R. 690, P.C.

The following additional case was cited in argument:

- Stephenson v. Garnett [1898] 1 Q.B. 677, C.A.

PROCEDURE SUMMONSES

By a writ dated December 17, 1975, the plaintiff, Joanna Christine **Gleeson**, claimed against the defendants, J. **Wippell** & Co. Ltd., an injunction to restrain them from infringing the plaintiff's copyright in drawings of clerical shirts or from converting to their own use infringing copies of such drawings; a declaration that the defendants had infringed such copyright, and had converted such infringing copies to their own use; and damages and an order for the delivery up of all infringing copies in the defendants' possession. By a summons dated June 22, 1976, the defendants sought an order under R.S.C., Ord. 18, r. 19 first, that the endorsement on the writ, the statement of claim and the reply be struck out on the ground that the major and central issue raised in the statement of claim, namely, whether the defendants' "combination clerical shirt/stocks" were indirectly reproductions of two pages of drawings referred to in the statement of claim, had been adjudicated upon and determined in an action between the plaintiff and Gleeson Shirt Co. Ltd., as plaintiffs, and H. R. Denne Ltd., as defendants, in the Chancery Division [entitled 1970 G. No. 3873], and on the ground that they were frivolous, vexatious and otherwise an abuse of the process of the court and that the action be stayed or dismissed accordingly; and secondly, that the costs of the action including the costs of the application be paid by the plaintiff. By a summons dated July 13, 1976, the plaintiff applied for an order that lists of documents be exchanged within 14 days and be verified by affidavit.

At the hearing the defendants contended that the plaintiff was estopped from alleging that the defendants' shirts were reproductions of any of the plaintiff's drawings, through a copying of one of the plaintiff's shirts, and that privity of interest existed between them and H. R. Denne Ltd., the defendants in the previous action. The defendants further contended that the plaintiff's solicitors had made a complaint against the defendants' actions before issue of the writ in the Denne action; that the plaintiff could have joined them as defendants in the Denne action and should have done so, having regard to the Privy Council decision in Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] A.C. 581 and R.S.C., Ord. 15, r. 6 (2) (b) (ii), and that the plaintiff was well aware of the defendants' involvement by reason of the pleadings in the Denne action ***512** and, as was apparent from her evidence, had decided as a matter of policy not to sue them.

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The facts are stated in the judgment.

Representation

- E. P. Skone James for the defendants.
- Robin Jacob for the plaintiff.

MEGARRY V.-C.

This is litigation about a special type of collar-attached shirt, designed for use by the clergy. This shirt makes it unnecessary to wear a white clerical collar or a vestock. A vestock, I may say, is a form of black bib with a stand-up collar that is worn over an ordinary shirt. The special shirt also has the advantage of a tidy appearance when the jacket is removed. Put briefly, the shirt is black, and buttons up centrally down the front, with a fly strip covering the buttons. The shirt has attached to it a special kind of collar consisting of a double thickness of material with a space called a "tunnel" running all round between the two thicknesses. At the centre of the front a rectangle is excised from the outer thickness, and a strip of white plastic is inserted in this rectangle, with the ends projecting each side into the tunnel to hold it in position. This gives the appearance of a white clerical collar which is visible only in the rectangle and is concealed elsewhere by a black vestock. I need not describe the shirt in any greater detail as this has already been done by Whitford J. and by the Court of Appeal in J. C. Gleeson v. H. R. Denne Ltd. [1975] R.P.C. 471. I shall call that action "the Denne action": it lies at the heart of the present proceedings. I may add that the hearing before Whitford J. took place not on the dates in October 1972 slated by the report, nor on the dates in October 1973 stated by [1975] F.S.R. 250 (dates which, if right, would mean that the notice of appeal was given over six months before the hearing at first instance had begun: see p. 254), but on December 11, 12, 13 and 14, 1972.

The claim in the Denne action was for breach of copyright. In 1959, the plaintiff, Miss Gleeson, had the idea of making the type of shirt in question, and made a number of drawings of it. In due course she had shirts manufactured to her design, and sold them. She had left it too late to obtain any protection from a patent or a registered design, but the effect of the Design Copyright Act 1968 was to enable her to sue for any infringement of copyright in her sketches, notwithstanding that they related to industrial designs.

I do not propose to set out the detailed facts; they will be found in the judgment of Whitford J., whose decision was affirmed by the Court of Appeal. I am concerned with two manufacturers who made shirts which the plaintiff claims were made in breach of her copyright. One manufacturer is the defendant in the present proceedings, J. **Wippell** and Co. Ltd., which I shall call "**Wippell**." The other is the defendant in the Denne action, H. R. Denne Ltd., which I shall call "Denne." They are linked to each other by the fact that Denne, who I think manufacture on a larger scale than **Wippell**, began to manufacture shirts of this type at the request of **Wippell**, who supplied Denne with a shirt of theirs to copy. In the Denne action, the plaintiff sued not **Wippell**, but Denne. The essence of the claim was not that **Wippell** or Denne had directly copied the drawings, but that Denne had copied the **Wippell*513** shirt (which was not disputed), and that **Wippell** had indirectly copied the plaintiff's drawings by copying **Gleeson** shirts which were copies of the drawings. A central issue was thus whether the **Wippell** shirt infringed the plaintiff's copyright: and this fell to be decided in proceedings to which **Wippell** was not a party.

In those proceedings the plaintiff failed. The shirtmaker for **Wippell** was Mr. E. J. Davies, and it was he who designed the **Wippell** shirt in question. In the Denne action it was held that when he designed the **Wippell** shirt he knew nothing of the plaintiff's

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shirt, and so had not copied her drawings, either directly or indirectly. That was accordingly an end of the Denne action: for what Denne had copied was no infringement of the plaintiff's copyright. The Denne action, begun by writ on November 16, 1970, thus came to an end in the Court of Appeal on December 20, 1974.

Almost a year later, on December 17, 1975, the plaintiff issued the writ against Wippell, claiming an injunction, a declaration, damages and delivery up of offending copies. The claim is in large degree based on the same allegations as in the Denne case. The pleadings have reached the stage of the reply, accompanied by bevies of further and better particulars. What is before me is a summons by Wippell to strike out the endorsement on the writ, the statement of claim, and the reply. The application is made under R.S.C., Ord. 18, r. 19 (1) (b) ("frivolous or vexatious") and (d) ("otherwise an abuse of the process of the court"), and under the inherent jurisdiction. The central core of the application is, of course, that since in the Denne action it had already been decided that the Wippell shirt did not infringe the plaintiff's copyright, it is frivolous, vexatious and an abuse of the process of the court for the plaintiff to seek to litigate all over again what has already been decided against her. This contention naturally led into territory entitled res judicata, estoppel per rem judicatam, issue estoppel, and what, for want of a better name, was called quasi res judicata. This last expression, I should say, was treated during the argument as being a label, inelegant but of convenient brevity, for the wider sense in which the doctrine of res judicata can be appealed to, where although there is no mandatory bar to the proceedings on the footing of res judicata or issue estoppel, there is a discretionary bar under the jurisdiction to strike out the proceedings as being an abuse of a process of the court: see Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] A.C. 581, 590.

The basic difficulty in the way of Mr. Skone James, who appeared for Wippell, is that Wippell was not a party to the Denne action. The decision in that case was thus a decision in which Wippell played no part. At one stage Mr. Skone James seemed disposed to contend that Wippell had played some part in that action, since evidence had been given by employees of Wippell: but I do not think that the discharge of the function of a witness by a servant or officer of a company can possibly be taken to mean that the company is taking a part in that action.

I propose first to consider the general head of res judicata. It was common ground that the only relevant form of this was issue estoppel. Mr. Skone James referred to the three requirements set out by Lord Reid in Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 ***514** A.C. 853, 909, 910; and see at p. 935, per Lord Guest. The first requirement, that of a final judgment in the earlier proceedings, is plainly satisfied. So is the second requirement, that of identity of subject matter, here the question whether or not the Wippell shirt is an indirect copy of the plaintiff's drawings. It is the third requirement, that there should be identity of parties in the two sets of proceedings, that creates the difficulty. There was identity of plaintiffs in the two proceedings; the presence of the plaintiff company as a co-plaintiff in the Denne action plainly makes no difference for this purpose. But for the doctrine of issue estoppel to apply there must also be identity of defendants (which there plainly is not) or else the existence of privity between Denne, the defendant in the earlier action, and Wippell, the defendant in the present action. Such privity, said Mr. Skone James, does exist in the present case, whereas Mr. Jacob on behalf of the plaintiff said it did not. The question, then, is the meaning of "privity" in this context.

The requisite privity is said to be a privity either of blood, of title, or of interest: see *Zeiss No. 2*, at p. 910, *per* Lord Reid. Plainly there is no question of blood or title in this case, and so only privity of interest can be in question. One difficulty about this is the protean nature of the word "interest," a term

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which at times seems almost capable of meaning all things to all men. Another difficulty is that, as Lord Guest pointed out in *Zeiss No. 2*, at p. 936, "There is a dearth of authority in England upon the question of privies." From such authorities as there are, it is by no means easy to distil any principle. In Mercantile Investment and General Trust Co. v. River Plate Trust, Loan, and Agency Co. [1894] 1 Ch. 578, a plaintiff had sued an American company. Under an indemnity given to that company by an English company the English company assisted the American company in the litigation and paid its costs. The plaintiff won, and then sued the English company, contending that the English company was really the defendant in the first action, and so was estopped from disputing the plaintiff's claim. Romer J. however, rejected this contention; and in *Zeiss No. 2*[1967] 1 A.C. 853, Lord Reid's reference to this decision, at p. 911, was certainly not in terms of disapproval. The fact that there would be an estoppel as between the indemnifier and the indemnified does not produce an estoppel quoad third parties. In that respect, an agreement to indemnify creates no privity.

It has also been held that a judgment against A in one capacity does not bind in another capacity. Thus a finding of negligence against him in proceedings in which he is concerned in his personal capacity does not bind him in proceedings in which he engages in his capacity as his wife's personal representative: Marginson v. Blackburn Borough Council [1939] 2 K. B. 426. Again, if A purports to act as agent for B, and the plaintiff then sucessfully sues A for breach of warranty of authority, B cannot be regarded as privy to A in those proceedings: Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No.3) [1970] Ch. 506. In that case, at p. 541, Buckley J. said that he had been referred to

"… no authority which indicates at all clearly what kind of interest in earlier litigation relied upon as constituting a res judicata is sufficient to render someone, who was not a party and is not a successor in title to a party to that litigation, privy to a party for the purposes of the doctrine."***515** Privity for this purpose is not established merely by having "some interest in the outcome of litigation." So far as they go, I think these authorities go some way towards supporting the contention of Mr. Jacob that the doctrine of privity for these purposes is somewhat narrow, and has to be considered in relation to the fundamental principle nemo debet bis vexari pro eadem causa.

I turn from the negative to the positive. In *Zeiss No. 2*[1967] 1 A.C. 853, 911, 912, Lord Reid suggested that if a plaintiff sued X and established some right in that action, a servant or third party employed by X to infringe the right and so raise the whole question again should be regarded as being a privy of X's in subsequent proceedings, for it would be X who would be "the real defendant." Lord Reid agreed with a statement which applied the rules of res judicata to subsequent proceedings brought or defended "by another on his account," that is, on X's account.

This is difficult territory: but I have to do the best I can in the absence of any clear statement of principle. First, I do not think that in the phrase "privity of interest" the word "interest" can be used in the sense of mere curiosity or concern. Many matters that are litigated are of concern to many other persons than the parties to the litigation, in that the result of a case will at least suggest that the position of others in like case is as good or as bad as, or better or worse than, they believed it to be. Furthermore, it is a commonplace for litigation to require decisions to be made about the propriety or otherwise of acts done by those who are not litigants. Many a witness feels aggrieved by a decision in a case to which he is no party without it being suggested that the decision is binding upon him.

Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this

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provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase "privity of interest." Thus in relation to trust property I think there will normally be a sufficient privity between the trustees and their beneficiaries to make a decision that is binding on the trustees also binding on the beneficiaries, and vice versa.

Third, in the present case, I think that the matter may be tested by a question that I put to Mr. Skone James in opening. Suppose that in the Denne action the plaintiff, Miss **Gleeson**, had succeeded, instead of failing. Would the decision in that action that **Wippell** had indirectly copied the **Gleeson** drawings be binding on **Wippell**, so that if sued by Miss **Gleeson**, **Wippell** would be estopped by the Denne decision from ***516** denying liability? Mr. Skone James felt constrained to answer Yes to that question. I say "constrained" because it appears that for privity with a party to the proceedings to take effect, it must take effect whether that party wins or loses. As was said by Buckley J. in Zeiss No. 3 [1970] Ch. 506, 541 (where the question was rather different) "The relationship cannot be conditional upon the character of the decision." In such a case, **Wippell** would be unable to deny liability to Miss **Gleeson** by reason of a decision reached in a case to which **Wippell** was not a party, and in which **Wippell** had no voice. Such a result would clearly be most unjust. Any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest of suspicions. A defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him. Even if one leaves on one side collusive proceedings and friendly defendants, it would be wrong to enable a plaintiff to select the frailest of a number of possible defendants, and then to use the victory against him not merely in terrorem of other and more stalwart possible defendants, but as a decisive weapon against them.

With those considerations in mind, I turn to the case before me. I cannot see any ground for holding that Wippell is in privity of interest with Denne, or that they are linked in such a way as to make any doctrine of res judicata applicable. There was a trade relationship between the two, in the course of which Denne, at Wippell's request, copied a Wippell shirt: but that is all. If the plaintiff had succeeded against Denne, there would, in my judgment, have been no ground whatever for saying that Wippell should be bound by the decision against Denne. On the footing that the relationship of privity operates whether the decision is for or against the party in question, that seems to me to be conclusive.

Let me, however, leave that on one side, and consider matters on the footing that, as in fact occurred, the plaintiff failed against Denne. No question can thus arise whether Wippell, conducting its own case, could do better than Denne did; for Denne won. What is uncertain is whether the plaintiff can do better against Wippell than she did against Denne; and the real question is not so much what will in fact happen, but whether, by reason of the Denne decision, the plaintiff ought to be deprived of the right to attempt to do better against Wippell than she did against Denne. The result of the Denne action certainly suggests that the plaintiff has an uphill task in suing Wippell; but not

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every uphill task results in failure. It must also be considered whether the plaintiff ought to be precluded from having discovery against Wippell and the right to cross-examine the Wippell witnesses merely because, after having discovery against Denne and cross-examining the Denne witnesses, she failed to establish against Denne that Wippell had indirectly copied her drawings. I cannot see why she should.

In the result, it does not seem to me that Wippell is in any such privity with Denne as to make it possible to invoke the doctrine of ***517** issue estoppel against the plaintiff. I am conscious that I have been unable to state any clear principle as to what does and does not constitute privity of interest for this purpose; but this is merely a procedure summons, and the subject is indeed difficult. Whatever the test, and wherever the line will finally be drawn, the plaintiff seems to me to be on the right side of any reasonable line that could be drawn — right, that is, from the plaintiff's point of view. That contention of Mr. Skone James accordingly fails.

I turn to the other way in which Mr. Skone James put the matter. As this finally emerged, the contention centred on a combination of the Yat Tung case [1975] A.C. 581 and R.S.C., Ord. 15, r. 6 (2) (b) (ii) . The rule in question confers a power on the court, either on application or of its own motion, to order any person to be added as a party to litigation if between him and any party to the proceedings there is some question or issue which arises out of any relief or remedy claimed in the proceedings, or relates to or is connected with it, and in the opinion of the court it is just and convenient to determine it as between that person and that party as well as the parties to the proceedings. Mr. Skone James contended that in the Denne proceedings it was so plain that Wippell was at the heart and core of the case that the plaintiff ought to have joined Wippell, and that as she failed to do so, she ought not now to be permitted to sue Wippell. In the Yat Tung case, the question was one not of failure to add a party, but of failure to advance a contention. There was a sufficient identity of parties in the two sets of proceedings, but the Judicial Committee of the Privy Council held that the statement of claim in the second action should be struck out as being an abuse of a process of the court because it was founded on a contention which ought to have been advanced in the first action, but which had not been. Mr. Skone James very properly accepted that he was seeking to extend the Yat Tung case, but urged that there was no great difference between adding contentions and adding parties.

It seems to me that the difference is very considerable. Where there is a chain of possible defendants, running perhaps from a designer to a manufacturer, and thence to a wholesaler, and then to a retailer, with some degree of dependence of one upon another, a plaintiff may be put in a position of some difficulty. Some defendants may be more worth powder and shot than others; but if Mr. Skone James is right, the failure to join a possible defendant in the chain may mean that, whatever additional evidence or acquisition of riches subsequently emerges, that possible defendant cannot be sued in subsequent proceedings. At least for those in the chain, those not sued initially will be released. Furthermore, if the plaintiff succeeds against those whom he sues, then those in the chain who have not been sued may be told that they are bound by the decision. Mr. Skone James' s riposte was that they could avoid being condemned unheard by applying to be joined as defendants; but this seems to me to be unrealistic. If this were the law, there would no doubt be what some would regard as bigger and better litigation, with a multiplication of parties.

I fully accept, of course, that it will often be desirable not to have a series of successive actions in place of one action with many parties; but circumstances vary greatly, and it is impossible to lay down rules for ***518** every case. Sometimes a multiplicity of parties would make litigation too cumbersome, protracted and expensive. The doctrine for which Mr. Skone James contends seems to me to be one that will put litigants into a position of some

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peril, requiring them to judge correctly whether or not the case is one in which under Ord. 15, r. 6 (2) (b) (ii) a court would or would not add parties. Mr. Jacob realistically accepted that with hindsight it would have been better to have joined Wippell in the Denne action, and Mr. Skone James very properly stressed that he was concerned not with long chains of possible defendants, but merely with a case in which it was plain that one additional party ought to have been joined in the Denne action. Nevertheless, one cannot decide cases in a vacuum, and without regard to other cases which differ in their facts but fall within the same principle. I can well see the justice of refusing to permit a plaintiff who has failed to take an obvious point against the defendant to have a second bite at the cherry by suing the defendant a second time in order to take that point. What I cannot see is the justice of refusing to permit a plaintiff to sue a person at all because the plaintiff failed to join him as a defendant in other proceedings against another person. Such a failure may provide material for cross-examination in the second proceedings, and it may also sound in costs, especially if the second proceedings have the same result as the first; but the drastic step of striking out the proceedings is quite another matter.

It will be seen that I regard with considerable suspicion the marriage between R.S.C., Ord. 15, r. 6 (2), and R.S.C. Ord. 18, r. 19, for which Mr. Skone James contends, and that I am apprehensive of the permissive provisions of the former rule being forged into a weapon which requires some parties to resort to it ann correctly judge its effect at their peril. However, it seems to me that there are two other considerations that are decisive under this head. First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt. Second, *Zeiss No. 3*[1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial. In the present case, I may say, the defence duly pleads res judicata. The inherent jurisdiction, too, is discretionary: see Higgins v. Woodhall (1889) 6 T.L.R. 1 *per* Lord Halsbury L.C.

In those circumstances, I feel no doubt. I certainly cannot say that it is in the least plain, obvious or clear beyond doubt that the action cannot succeed, or is an abuse of the process of the court. Nor, as a matter of discretion, do I consider that it would be right to strike out the writ or pleadings; indeed, I think it would be wrong to do so. That conclusion makes it unnecessary for me to explore a question of alleged inconsistency in the explanations put forward by Wippell as to the origin of the design of the Wippell shirt, and how far it could and should have been explored in the Denne action, and whether there was now a convincing explanation of the inconsistency. These are matters that can be explored at the trial. I also leave it as open as I can how far anything that I have decided or said in this judgment can or should affect anything ***519** that arises for decision by the trial judge. Accordingly, in my judgment, this application fails.

I must add a word about the affidavits. It is obviously desirable that it should be possible to file affidavits economically and with convenience. The rules accordingly provide that both sides of the paper must be used, anil that exhibits, which of course are not filed, should not be annexed to the affidavits: see R.S.C., Ord. 41, rr. 1 (5) and 11 (1). All six of the defendant's affidavits before me are typed on one side of the paper only, and three of them have exhibits which are clamped to the affidavit by a pair of plastic strips about an eighth of an inch thick which run the full length of the spine. These strips are also used on two more of the defendant's affidavits. I have na doubt that this was well-meant; but the use of such strips or of anything else which adds materially to the thickness of affidavits is undesirable as increasing the problems of filing. Further, I observe that none of the defendant's affi-

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davits comply with the requirement of endorsement under R.S.C., Ord. 41, r. 9 (5). I shall accordingly hear what proposals the defendant has to put matters in order.

The plaintiff's affidavits avoid these defects of form, though only partially as to R.S.C., Ord. 41, r. 9 (5); but one of them displays undesirable features that I think ought not to be allowed to pass unchecked. In Mr. Brown's affidavit he quotes a passage from an opinion of a silk, and he exhibits an article in a journal concerned with patents. The object appears to be to demonstrate that the plaintiff has prospects of success against Wippell if her action is not halted. The main objection to the extracts from the article is that they do not appear to me to constitute any evidence; and the purpose of affidavits is, or should be, to provide evidence. As I told Mr. Jacob, I would listen with pleasure to any submission upon the subject that he chose to put before me, whatever his source of inspiration, but I would not listen to the words of a Queen's Counsel, however eminent, or the author of an article, when proffered as evidence of the legal rights and prospects of a litigant. A court does not hear expert evidence on what the law of England is, or what the rights of parties are under that law. In any case, extracts from counsel's opinion are usually valueless, or worse, without the rest of the opinion and the instructions on which it was based, to show what the opinion was founded on and what reservations and qualifications there are. The function of counsel's opinion in cases where litigation concerning an infant is being compromised, and so on, is, of course, quite different.

There is one other feature in Mr. Brown's affidavit that also seems to me undesirable. He states that where an action on similar facts has been lost, the legal aid committee “would need to be well convinced that there was a genuine issue to be tried,” and that the committee in this case “based their decision to grant the plaintiff legal aid in these proceedings at least in part” on the opinion of the Queen's Counsel that I have mentioned. Again, I cannot see how that constitutes any sort of evidence. Further, it seems to me to be most undesirable to attempt to sway the court by referring to the view that the committee is said to have taken. If such views were admitted, then, where both parties were legally aided, the court would have to weigh the imperfectly known views of one committee, based on materials unknown to the ***520** court, against the corresponding views of the other committee; and a litigant who had no legal aid would lack one of the weapons of his legally aided opponent. I propose to hear what the plaintiff has to say about the costs of this affidavit. Subject to these matters, this application fails, and the summons will be dismissed.Defendants' summons dismissed. Plaintiff's costs in any event, subject to disallowing costs in respect of Mr. Brown's affidavit and striking out parts thereof. Leave to appeal refused, but leave to file further affidavit and if the matter should go further. Bindings to he removed from defendants' affidavits, and such affidavits to be endorsed in accordance with R.S.C., Ord. 41, r. 9 (5). Order, as sought, on plaintiff's summons for exchange of lists of documents.
END OF DOCUMENT

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EXHIBIT 27

[1985 H. No. 2355]; [1990] 3 W.L.R. 347

***241 House of Spring Gardens Ltd. v Waite and Others**

Court of Appeal

L.JJ. Fox, Stuart-Smith, and McCowan

1990 March 20, 21, 22; April 11

Conflict of Laws—Foreign judgment—Jurisdiction to enforce—Judgment of foreign court for damages against defendants—Subsequent judgment of same court that prior judgment not obtained by fraud—Whether defendants estopped from alleging in English proceedings that judgment in question obtained by fraud—Whether abuse of process to re—litigate issue of fraud

The plaintiffs, in an action in Ireland against the three defendants for misuse of confidential information and breach of copyright, obtained judgment for some £3m. damages. Following the dismissal of the defendants' appeal by the Supreme Court, the first and second defendants brought an action in Ireland to set aside the judgment, alleging that it was obtained by fraud. The action was dismissed. On the plaintiffs' claim against all three defendants in respect of the sum awarded by the Irish court, the judge, in the absence of any new evidence, held that the defendants were estopped from alleging in the present proceedings that the judgment in question was obtained by fraud.

On appeal by the third defendant: -

dismissing the appeal, that, on the facts, the judge had correctly held that the first and second defendants were estopped from alleging that the prior Irish judgment was obtained by fraud and, since that judgment was a judgment against the defendants jointly and severally, the third defendant, even though he did not join in the Irish proceedings to set it aside, was well aware of those proceedings and was privy to them and, ***242** therefore, in the absence of any new evidence affecting the issue of fraud, the third defendant was similarly estopped (post, pp. 251F-G, 253F, H, 254A-B, D, 255G-H, 259E, F).Nana Ofori Atta II v. Nana Abu Bonsra II [1958] A.C. 95 , P.C. and Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853 , H.L.(E.) applied. Abouloff v. Oppenheimer & Co. (1882) 10 Q.B.D. 295 , C.A. and Vadala v. Lawes (1890) 25 Q.B.D. 310 , C.A. distinguished.

further, that even if the judgment did not create an estoppel, it was an abuse of the process of the court and contrary to justice and public policy for the issue of fraud to be re-litigated in the English court after the issue had been tried and decided by the Irish court (post, pp. 251H, 255A-B, 259E, F).Decision of Sir Peter Pain, sitting as a judge of the High Court, affirmed.

The following cases are referred to in the judgment of Stuart-Smith L.J.:

- Abouloff v. Oppenheimer & Co. (1882) 10 Q.B.D. 295, C.A. .
- Ashmore v. British Coal Corporation [1990] 2 Q.B. 338; [1990] 2 W.L.R. 1437; [1990] I.C.R. 485; [1990] 2 All E.R. 981, C.A. .
- Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536, H.L.(E.) .

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- Defries, In re; Norton v. Levy (1883) 48 L.T. 703
- Gleeson v. J. Wippell & Co. Ltd. [1977] 1 W.L.R. 510; [1977] 3 All E.R. 54
- Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529; [1981] 3 W.L.R. 906; [1981] 3 All E.R. 727, H.L.(E.) .
- Jet Holdings Inc. v. Patel [1990] 1 Q.B. 335; [1988] 3 W.L.R. 295; [1989] 2 All E.R. 648, C.A. .
- Langton, decd., In the Estate of [1964] P. 163; [1964] 2 W.L.R. 585; [1964] 1 All E.R. 749, C.A. .
- Marginson v. Blackburn Borough Council [1939] 2 K.B. 426, C.A. .
- Nana Ofori Atta II v. Nana Abu Bonsra II [1958] A.C. 95; [1957] 3 W.L.R. 830; [1957] 3 All E.R. 559, P.C. .
- Vadala v. Lawes (1890) 25 Q.B.D. 310, C.A. .

The following additional cases were cited in argument:

- Castrique v. Imrie (1870) L.R. 4 H.L. 414, H.L.(E.) .
- Codd v. Delap (1905) 92 L.T. 510, H.L.(E.) .
- Khan v. Golechha International Ltd. [1980] 1 W.L.R. 1482; [1980] 2 All E.R. 259, C.A. .
- North West Water Authority v. Binnie & Partners , The Independent, 24 November 1989 , Drake J.
- Osman v. Commissioner of Police of the Metropolis , The Independent, 12 January 1990 , Drake J.
- Outram v. Morewood (1803) 3 East 346
- Ramsay v. Pigram (1968) 118 C.L.R. 271
- Sennar, The (No. 2) [1985] 1 W.L.R. 490; [1985] 2 All E.R. 104, H.L.(E.) .
- Syal v. Heyward [1948] 2 K.B. 443, C.A. .
- Townsend v. Bishop [1939] 1 All E.R. 805
- Yorke (M.V.) Motors v. Edwards [1982] 1 W.L.R. 444; [1982] 1 All E.R. 1024, H.L.(E.) .

APPEAL from Sir Peter Pain sitting as a judge of the Queen's Bench Division. ***243**

By a writ and a statement of claim dated 21 March 1985, the plaintiffs, **House** of **Spring** Gardens Ltd., Armourshield Ltd. and Michael Sacks, claimed against the defendants, William Edward **Waite**, Seamus **Waite** and Gordon Stuart McCleod, £3,179,673.52, being damages awarded against the defendants by Costello J. in the High Court of Ireland. Each defendant by his defence pleaded that the judgment was obtained by fraud. On 9 October 1987, Egan J., in the High Court of Ireland, dismissed the first and second defendants' action to set aside the judgment for fraud. On 28 October 1987, the plaintiffs issued a summons for judgment under R.S.C. , Ord. 14 . Master Lubbock referred the summons to the judge, who made an order for entry of summary judgment for the plaintiffs.

By an amended notice of appeal, the third defendant appealed on the grounds that the judge erred in holding that Egan J.'s decision raised an estoppel which prevented all the defendants from raising the

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defence of fraud in the present proceedings; the judge erred in failing to give any or any sufficient weight to the evidence of Colonel Richard Warren Piper contained in an affidavit of 5 December 1988 and to the fact that Colonel Piper's evidence had not been before Egan J. or Costello J.; the judge erred in holding that, if Egan J.'s decision did raise an estoppel, such an estoppel was binding upon the third defendant; and the judge erred in holding that the affidavit of Nicholas William Parish, dated 11 December 1984, raised no triable issue of fraud because of the adverse findings of fact made by Egan J. on 9 October 1987.

The facts are stated in the judgment of Stuart-Smith L.J.

Lionel Swift Q.C. and *Michael Harington* for the third defendant. Where an action is brought to enforce in England a foreign judgment alleged to have been obtained by fraud, the English court must itself consider whether the fraud is established, even if the relevant evidence is the same as that on which the foreign court has rejected the allegation of fraud. There can be no estoppel in such a case: see Abouloff v. Oppenheimer & Co. (1882) 10 Q.B.D. 295 , 300-302; Vadala v. Lawes (1890) 25 Q.B.D. 310 , 316, 317; Syal v. Heyward [1948] 2 K.B. 443 , 447-449 and Jet Holdings Inc. v. Patel [1990] 1 Q.B. 335 , 347. For if in fact there has been fraud, the judgment is vitiated: see Castrique v. Imrie (1870) L.R. 4 H.L. 414 , 433.

The third defendant was not a party to the proceedings before Egan J., nor was there privity between him and the plaintiffs in those proceedings. Therefore, even if Egan J.'s judgment created an estoppel, the third defendant would not be bound by it. [Reference was made to Outram v. Morewood (1803) 3 East 346 , 354; Marginson v. Blackburn Borough Council [1939] 2 K.B. 426 , 429, 437; Townsend v. Bishop [1939] 1 All E.R. 805 ; Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853 , 910, 928-929, 936-937; Ramsay v. Pigram (1968) 118 C.L.R. 271 ; Gleeson v. J. Wippell & Co. Ltd. [1977] 1 W.L.R. 510 , 513-517; Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529 and The Sennar (No. 2) [1985] 1 W.L.R. 490 .]

The third defendant was not obliged in law to participate in the proceedings before Egan J., for those proceedings were not, and did not ***244** purport to be, brought on his behalf: cf. Nana Ofori Atta II v. Nana Abu Bonsra II [1958] A.C. 95 . On the contrary, he was entitled to wait and do nothing until steps were taken against him by way of enforcement.

Where it is sought to impeach a foreign judgment for fraud, there should be leave to defend and summary judgment should not be entered, unless the allegation is obviously frivolous: see Codd v. Delap (1905) 92 L.T. 510 , 511. On the evidence now before the court, some of which was not before Egan J., there is clearly a triable issue raised as to fraud and, accordingly, there should be leave to defend.

Gavin Lightman Q.C. and *Alan Boyle* for the plaintiffs. The general principle that there must be an end to litigation means that once a claim or an issue has been determined by a court of competent jurisdiction, that claim or issue cannot be re-litigated: see Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853 , 946; Khan v. Golechha International Ltd. [1980] 1 W.L.R. 1482 , 1490, 1493 and The Sennar (No. 2) [1985] 1 W.L.R. 490 , 501. The claim before Egan J. was the same as that now relied on as a defence. The matter was determined by him on the merits in a competent court. The interests of the plaintiffs in those proceedings were identical with those of the third defendant, but he deliberately stood by and did not participate in the proceedings; yet he was willing to adopt those proceedings as his own by seeking to rely on their outcome in the defence pleaded in the present proceedings. In those circumstances, the

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third defendant is barred by the rules of res judicata or issue estoppel from raising again the matter determined by Egan J. [Reference was made to In re Defries; Norton v. Levy (1883) 48 L.T. 703 , 704; Nana Ofori Atta II v. Nana Abu Bonsra II [1958] A.C. 95 , 101-102; Gleeson v. J. Wippell & Co. Ltd. [1977] 1 W.L.R. 510 , 515-516 and North West Water Authority v. Binnie & Partners, The Independent, 24 November 1989 .]

Alternatively, it would be an abuse of the process of the court to allow the third defendant to re-litigate the issue determined by Egan J. Accordingly, since his present defence relies solely on that issue, the defence should be struck out. [Reference was made to In the Estate of Langton, decd. [1964] P. 163 , 178; Ashmore v. British Coal Corporation [1990] 2 Q.B. 338 and Osman v. Commissioner of Police of the Metropolis, The Independent, 12 January 1990 .] There is thus no triable issue and leave to defend should be refused. But if leave is to be given, it will be just, as a condition of the leave, to require that the full amount of the judgment against the defendants should be paid into court. They have at their disposal vast amounts the whereabouts of which they have refused to reveal. A similar condition was imposed in M. V. Yorke Motors v. Edwards [1982] 1 W.L.R. 444 .

Swift Q.C. replied.

Cur. adv. vult.

11 April. The following judgments were handed down.

STUART-SMITH L.J.

This is an appeal by the third defendant, Mr. McLeod, from a judgment given by Sir Peter Pain, sitting as a High ***245** Court judge, against all three defendants on 2 February 1989, pursuant to R.S.C., Ord. 14 , in the sum of £3,179,673.52 plus interest. The first and second defendants, Mr. William **Waite** ("Mr. **Waite**") and Mr. Seamus **Waite** respectively, have not appealed.

The plaintiffs obtained a judgment against all three defendants in the Republic of Ireland for £3,474,570 and interest of £78,337. That was a judgment given by Costello J. initially on 20 December 1982, when he determined the question of liability in favour of the plaintiffs, and on 7 March and 27 April 1983, when he assessed damages in their favour. An appeal by the three defendants to the Supreme Court of Ireland was dismissed with costs on 11 January 1985, save that the amount of interest was, to a small extent, reduced. No money has been paid by any of the defendants in satisfaction of the judgment, though sums totalling some £950,000 have been recovered from other sources.

The purpose of the present proceedings in this country is to enforce the judgment of Costello J. The Civil Jurisdiction and Judgments Act 1982 does not apply to that judgment. The answer put forward by the defendants in these proceedings is that the judgment of Costello J. was obtained by fraud, namely misrepresentation as to the plaintiffs' entitlement to the confidential information and copyright in issue in the action. Each of the defendants in the present action pleaded that on 28 January 1985 Mr. Waite and Mr. Seamus Waite commenced an action in Ireland to set aside the judgment of Costello J. on this ground of fraud. At the time those defences were served that action had not been tried in Ireland. However, on 9 October 1987, after a 21-day hearing on the merits, Egan J. dismissed the action. On 10 June 1988 the Supreme Court of Ireland dismissed an appeal by Mr. Waite and Mr. Seamus Waite for default in setting down the appeal. It is the plaintiffs' case that having regard to the result of the action before Egan J., the defence of fraud is no longer available to the defendants.

Background

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In the late 1970s the third plaintiff, Mr. Sacks, invented a bullet-proof vest. According to Costello J., a great deal of expertise went into the design. Mr. Sacks' information about the construction of the vest represented a valuable asset. In late 1978 Mr. Sacks met Mr. **Waite** and they discussed establishing a joint venture. The aim was that Mr. Sacks would provide the technical know-how and Mr. **Waite** would provide the manufacturing capacity and the marketing skills and contacts. Mr. **Waite** had connections in North Africa, particularly in Libya; and Mr. **Waite's** son, Mr. Seamus **Waite**, and his son-in-law, Mr. McLeod, were involved in Mr. **Waite's** business. Mr. **Waite** induced Mr. Sacks to impart all the valuable information which he had developed, as regards the bullet-proof vests, on the faith of an oral agreement by Mr. **Waite** that he would enter into a joint venture for the supply of vests to Libya and that the profits of the joint venture would be equally divided between them. From an early stage there was the prospect of a very substantial contract for the sale of 50,000 vests to the Libyan army at a price of some £20m. Mr. Sacks went out to Libya to demonstrate his product, and the Libyans were greatly impressed. But Mr. Waite ***246** deceived the Libyans into thinking it was his own company, Molex Ltd., which had developed the vest, and that it was already being manufactured by Molex. This was untrue.

On 11 August 1979 Mr. Waite signed a contract for the sale of £5m. worth of vests to the Libyan army, using an Isle of Man company called Emory Ltd. But he deceived Mr. Sacks into thinking that negotiations with the Libyans had broken down. Mr. Waite secretly established a manufacturing plant at Cork, at which the vests were manufactured by a company known as Point Blank Ltd., a subsidiary of Emory Ltd. Production started in January 1980. In February 1980 Mr. Waite told Mr. Sacks that the contract with the Libyans had collapsed. This was also a lie. However, Mr. Sacks subsequently discovered the deception, and this led to the first of four rounds of litigation between the parties.

The first round

In June 1980 the plaintiffs launched actions in this country and the Republic of Ireland for damages for misuse of confidential information and breach of copyright. Those proceedings were settled by an fffagreement dated 10 September 1980 (the settlement agreement). The principal terms of that agreement were that Mr. Waite and his companies would pay a royalty on the vests sold to the Libyans of 11.58 per cent., and that Mr. Waite and his companies would notify any further contract which might be entered into with the Libyans. Mr. Waite and his companies paid the royalty on the first contract, but they did not notify a further contract for £5m. worth of vests. Instead, they engaged on a second round of deception. The second contract was entered into on 22 January 1981; but it was effectively concealed from Mr. Sacks until early 1982. When he did discover it, the defendants denied that it was a notifiable contract within the meaning of the settlement agreement. Manufacture of the vests to fulfil the second contract had begun in Cork in July 1981, and was still continuing at the time of the discovery by Mr. Sacks of its existence. This discovery led to the second round of litigation.

The second round

In February 1982 the plaintiffs launched two main actions, one in the Republic of Ireland and one in this country. There were subsidiary proceedings in Guernsey, Jersey and the Isle of Man. The proceedings in the Republic of Ireland proceeded to trial, which lasted for 16 days in October 1982. They culminated in the judgment of Costello J. in favour of the plaintiffs. Costello J. made the following findings, amongst others.

(1) Mr. Waite had tricked Mr. Sacks into parting with valuable confidential information about the design of the vests.

(2) Mr. Waite had deceived Mr. Sacks about the existence of the first Libyan contract.

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(3) The second Libyan contract was clearly notifiable under the settlement agreement. He rejected the defendants' suggestion that the vest was sufficiently different from that supplied under the first contract not to be notifiable under the settlement agreement. The contract was ***247** not notified because of a dishonest decision by Mr. Waite not to pay royalties on it.

(4) Mr. Waite had created a fictitious contract with a bogus company with a view to concealing the truth; he had suppressed the original contract with the Libyans and the invoice and letter of credit because these would have shown that the vests supplied under it were the same as those supplied under the first contract.

(5) The judge disbelieved Mr. **Waite's** evidence that he had no financial benefit from the second contract, and he recorded that both Mr. **Waite** and Mr. Seamus **Waite** had given evidence which they knew to be false in the course of the trial. On the other hand, he found Mr. Sacks to be a truthful witness blessed with a good and accurate memory.

(6) He held that a deliberate decision had been taken not to call Mr. McLeod as a witness. He would have been able to explain the true circumstances of the second contract. The judge held that he did not attend in order to avoid answering questions about it.

(7) He held that the Waites were in breach of the settlement agreement and that all three defendants had wrongfully used confidential information imparted by Mr. Sacks to make the vests, and that they had been in breach of copyright in respect of the cutting patterns for the vests.

After damages had been assessed at a later hearing, the defendants appealed to the Supreme Court of Ireland. The appeal was heard in November 1984, and after it was over, the defendants made an application to adduce fresh evidence and launched a motion for a new trial. The application was based on the evidence of a Mr. Parish and a Mr. Waldie, as well as on the evidence of Mr. Waite. Affidavits from those two witnesses were placed before the Supreme Court. The defendants claimed, on the basis of their evidence, that Mr. Sacks had deceived Costello J. regarding the role which he played in developing the armoured vest. The Supreme Court allowed the defendants' motion for a new trial on terms that £3,750,000 was paid into court, representing the amount of damages and costs. The court took into account the fact that Costello J. had held that the defendants had had the money from the second contract, the gross proceeds of which amounted to some £5m. The defendants did not bring the money into court, so the new trial did not take place. The appeal proceeded to judgment on the basis that there would be no new trial, and it was dismissed on 11 January 1985.

So far as the proceedings launched in this country in February 1982 were concerned, apart from certain Mareva relief which was granted against Mr. Waite and his companies and consequential interlocutory proceedings dependent upon that, they proceeded no further.

The third round

This round did not directly involve Mr. McLeod. On 28 January 1985 Mr. Waite and Mr. Seamus Waite launched proceedings in the Republic of Ireland against the three plaintiffs, claiming that Mr. Sacks had obtained the judgment given by Costello J. in 1982 by fraud. This action was based on exactly the same allegations as those that had been ***248** put before the Supreme Court in connection with the motion for a new trial, and on the same allegations as have, at all times, constituted the defence in the present action.

That matter came for trial between 29 April and 24 July 1987. It lasted 22 days. Neither Mr. Waite nor Mr. Seamus Waite gave evidence. But both Mr. Parish and Mr. Waldie were called as witnesses. Egan J. rejected the Waites' case that the previous judgment had been obtained by fraud, and on 9 October 1987 he dismissed the action with costs. He

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held that Mr. Parish had in a number of respects given evidence which he knew to be false. He found that Mr. Parish was giving evidence in circumstances in which he had been promised money by Mr. Waite if the judgment of Costello J. was set aside. The amount which he stood to gain was £300,000 plus a 50 per cent. royalty. He reached the same conclusion as Costello J. on the evidence, and found that the Waites had failed to show any likelihood that Costello J. would have arrived at a different conclusion if all the additional evidence had been heard by him, and that the Waites had failed to prove that the judgment had been obtained by fraud. The Waites appealed against Egan J.'s judgment, but they failed to set the appeal down in time and it was dismissed on 10 June 1988.

The fourth round

On 21 March 1985 the plaintiffs issued the writ in this action, seeking to enforce the judgment of Costello J. Defences were filed on behalf of all three defendants claiming that his judgment had been obtained by fraud. The matters relied upon were the allegations of Mr. Parish. All three defences referred to the proceedings in Ireland to set aside Costello J.'s judgment. Paragraph 7 of Mr. McLeod's defence read:

"On 28 January 1985 the first and second defendants commenced an action in the Republic of Ireland to set aside the judgment on the ground it was obtained by fraud as particularised in paragraph 1 of the first defendant's defence herein."

Whilst the Waites' action to set aside the judgment of Costello J. proceeded in Ireland, the plaintiffs took no further step in the English proceedings. But, following Egan J.'s judgment, they issued a summons under Order 14 for judgment. That summons was issued on 27 October 1987, but it was held in abeyance until after the Waites' appeal was dismissed.

The hearing before Sir Peter Pain

The case made by the plaintiffs before Sir Peter Pain was as follows.

(1) The judgment of Egan J. finally determined the claim to set aside the judgment of Costello J. for fraud. Accordingly, it was not now possible for any of the defendants to reopen the matter. Each defendant was estopped by cause of action or issue estoppel.

(2) Alternatively, it would be an abuse of the process of the court for the defendants to re-run the same claim of fraud which had already been determined by Egan J. ***249**

(3) On the evidence, there was no reasonable possibility of the alleged fraud being established. Accordingly, there was no triable issue.

(4) If leave to defend were granted, it would only be upon condition that the full amount of the judgment debt should be brought into court.

Mr. Waite and Mr. Seamus Waite appeared in person. Mr. McLeod appeared by counsel, being legally aided. The greater part of the submissions was made on behalf of all the defendants by counsel. His main points were as follows.

(i) There should be leave to defend because there was a triable issue whether the judgment of Costello J. was obtained by fraud.

(ii) In considering whether a foreign judgment could be impeached for fraud, it was well established that special caution was required before summary judgment was entered. Leave to defend should be given unless it was obvious that the allegation of fraud was frivolous.

(iii) The decision of Egan J. in October 1987 that the judgment of Costello J. had not been obtained by fraud was irrelevant because the English court must itself consider whether there was fraud; that was so, even if the relevant evidence was precisely the same as that which had been rejected in the foreign court, whether that evidence was in fact heard in the original proceedings or (as here) was heard

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by another judge in subsequent proceedings.

(iv) That even if Egan J.'s decision was relevant to the present proceedings, it could not affect the position of Mr. McLeod, as he was not a party to the action tried by Egan J.

Sir Peter Pain held as follows.

(1) Mr. Waite and Mr. Seamus Waite were estopped from alleging fraud on the basis of Mr. Parish's evidence by the judgment of Egan J.

(2) It was very doubtful whether it was open to Mr. McLeod to raise the allegation that the judgment of Egan J. was obtained by fraud, having regard to the documents and affidavits, and the absence of any attempt to define the nature of the fraud practised on Egan J. But even if the point was available to Mr. McLeod, it did not stand up.

(3) Mr. McLeod, although in a different position from the Waites because he was not party to the proceedings before Egan J., was, nevertheless, bound by the estoppel because of privity of interest between him and the Waites.

(4) In view of the foregoing it was unnecessary for the judge to consider the alternative argument put forward by the plaintiffs to the effect that it was an abuse of the process of the court for the defendants to seek to re-litigate the fraud allegation.

(5) In any event, no triable issue had been shown.

In the Court of Appeal

In this court the same submissions of law have been made on behalf of Mr. McLeod as were made before the judge. But whereas before the judge the case was based on the evidence of Mr. Parish, in the forefront of Mr. Swift's argument on the appeal has been the evidence of Colonel Piper. This is indeed remarkable, because although the affidavit of Colonel Piper was read to the judge, no submission whatever was made upon it by Mr. Harington, who appeared for Mr. McLeod; and, not ***250** surprisingly, the judge made no mention of it in his judgment. The matter does not stop there because there was no reference to this evidence in the notice of appeal. However, since it was referred to in the appellant's skeleton argument, we gave leave to amend the notice of appeal. The amendment reads:

"1. .. (d) The. .. judge erred in failing to give any or any sufficient weight to the evidence of Colonel Richard Warren Piper, contained in his affidavit of 5 December 1988, and to the fact that Colonel Piper's evidence had not been before Egan J. or Costello J." The short answer to this ground of appeal is that the judge could hardly be said to have erred when he was never invited to attach any weight or significance to the evidence. However, since the matter has been argued before us on the basis that this evidence shows a triable defence, we must, in due course, deal with it. I would only add at this stage that the circumstances in which this evidence was placed before the court were highly unsatisfactory, and raised very many questions to which no answer is provided by Mr. McLeod.

Three matters call for comment. First, although Colonel Piper's affidavit was sworn on 5 December 1988, it was not served on the plaintiffs until 27 January 1989, two working days before the hearing before the judge. No explanation for the delay was forthcoming. Secondly, it is a reasonable inference from the nature of the cross-examination of Mr. Sacks before Costello J. that the defendants had the substance of Colonel Piper's evidence available to them at that time. Thirdly, not the slightest attempt has been made to explain why, if it be the case that his evidence was available, it was not adduced in either of the Irish trials. And, indeed, in the light of the second point which I have just made, I think the conclusion must be that it was available to them but they chose not to use it. We are told by Mr. Lightman that one of the Waites gave an oral explanation of his non-attendance before Costello J., this being that his then employers, Alcan/Armoflex, would not agree to his doing so unless the Waites entered into

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a licensing agreement with them. It is difficult to see how this can be correct, since Colonel Piper, according to his own evidence, left his employment with Alcan in 1979.

I then turn to consider the issues that arise in this appeal.

Were the Waites estopped by the judgment of Egan J. from contending that the judgment of Costello J. was obtained by fraud?

It is common ground that in proceedings in this country to enforce a foreign judgment as a debt at common law, the defendant can set up a defence that the judgment was obtained by fraud. If, on a summons under Order 14, the evidence of the defendant discloses a triable issue that the foreign judgment has been so obtained, leave to defend should be given. But a foreign judgment that is final and conclusive on its merits and is not impeachable on the ground of fraud (or other grounds that are not material) is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error of fact or law: see Dicey & ***251** Morris, The Conflict of Laws, 11th ed. (1987), p. 460, rule 42. .But for the judgment of Egan J., Costello J.'s judgment could have been impeached on the ground of fraud. But the plaintiffs contend that the judgment of Egan J. is final and conclusive on the issue whether or not the prior judgment was obtained by fraud, and cannot itself be impeached. It established both cause of action estoppel and issue estoppel. Not so, argued Mr. Swift, because of a rule peculiar to foreign judgments. This is because the foreign judgment can be impeached for fraud even though no newly discovered fraud is relied upon and the fraud might have been, and was, relied upon in the foreign proceedings: see Abouloff v. Oppenheimer & Co. (1882) 10 Q.B.D. 295 and Vadala v. Lawes (1890) 25 Q.B.D. 310 .

These cases have been considerably criticised over the years; they were decided at a time when our courts paid scant regard to the jurisprudence of other countries. Nevertheless, we are bound by them and they were recently followed in this court in Jet Holdings Inc. v. Patel [1990] 1 Q.B. 335 . But in my judgment the scope of these decisions should not be extended, and they are clearly distinguishable. In none of these cases was the question, whether the judgment sued upon here was obtained by fraud, litigated in a separate and second action in the foreign jurisdiction. Unless Egan J.'s decision is itself impeached for fraud, it is conclusive of the matter thereby adjudicated upon, namely, whether Costello J.'s judgment was obtained by fraud: see *Dicey & Morris* , rule 42. Some attempt was made before Sir Peter Pain to argue that Egan J.'s judgment was itself impeachable for fraud. This was not supported by any evidence, save a bare assertion in an affidavit sworn by Mr. Waite on the second day of the hearing before the judge. It does not warrant consideration.

Mr. Swift argued that if Mr. Parish's and Mr. Waldie's evidence had been tendered before Costello J. and had been rejected, it would still have been open to the defendants, in enforcement proceedings in this country, to set up an allegation, based upon that evidence, to the effect that Mr. Sacks had given perjured evidence and so procured his judgment by fraud. Why, then, should it make any difference that the evidence is adduced and the issue contested in a second action in Ireland? The answer is that no question of fraud on the part of Mr. Sacks was in issue in the Costello action; it was in the Egan action. I have no doubt that the judge was correct to hold, on the material and argument before him, that the Waites were estopped from alleging that the judgment of Costello J. was obtained by fraud, based, as that allegation was, on the evidence of Mr. Parish and Mr. Waldie. I propose to consider later in this judgment the effect of Colonel Piper's evidence.

The judge did not find it necessary to consider the question of abuse of process, and it is per-

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haps unnecessary for me to do so either. But I have no doubt whatever that, even if the judgment of Egan J. did not create an estoppel, it would be an abuse of process for the Waites to re-litigate the very same issue in the English courts upon which they failed in Ireland, not least because they themselves chose that forum, which was the natural forum in which to challenge the judgment of Costello J. ***252** They could, if they had wished, merely have waited for enforcement proceedings to be taken here and then attempt to set up fraud. They did not do so. They cannot try again here to obtain a different verdict.

Is the appellant, Mr. McLeod, bound by Egan J.'s decision ?

He was not a party to the action; but an estoppel will bind those who are privy to the parties bound: Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853 . The requisite privity is said to be a privity of either blood, title or interest: *per* Lord Reid in the Carl Zeiss case, at p. 910. The only relevant one is privity of interest. It is not easy to detect from the authorities what amounts to a sufficient interest. It has been held that judgment against a defendant in one capacity does not bind him in another capacity (Marginson v. Blackburn Borough Council [1939] 2 K.B. 426), though I would wish to reserve my opinion as to whether on the facts of that case the plaintiff's representative claim might not have been struck out as an abuse of process. A mere interest in the outcome of the litigation is not sufficient. In Gleeson v. J. Wippell & Co. Ltd. [1977] 1 W.L.R. 510 , 515, Sir Robert Megarry V.-C. propounded this test:

"but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest.'" He continued, at p. 516:

"A defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him. Even if one leaves on one side collusive proceedings and friendly defendants, it would be wrong to enable a plaintiff to select the frailest of a number of possible defendants, and then to use the victory against him not merely in terrorem of other and more stalwart possible defendants, but as a decisive weapon against them."

There is a further principle which in my judgment supplements what was said in that case by the Vice-Chancellor. It is to be found in the judgment of the Privy Council in Nana Ofori Atta II v. Nana Abu Bonsra II [1958] A.C. 95 , 102-103, where Lord Denning said:

"Those instances do not however cover this case, which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question the West African Court of Appeal quoted from a principle stated by Lord Penzance in Wytcherley v. Andrews (1871) L. R.2 P. & D. 327 , 328. The full passage is in these words: 'There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons inter- ***253**

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ested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened.' Mr. Phineas Quass argued before their Lordships that the principle stated by Lord Penzance was confined to wills and representative actions and has never been extended further. No decision, however, was cited to their Lordships which confines the principle to wills and representative actions. Their attention was indeed drawn to one case where a like principle was applied to mortgages in somewhat special circumstances: see Farquharson v. Seton (1828) 5 Russ. 45 . But assuming, without deciding, that the English decisions have hitherto been so confined, their Lordships would point out that there is nothing in the principle itself which compels it to be limited to wills and representative actions. The principle, as Lord Penzance said, is founded on justice and common sense." It is true that in In the Estate of Langton, decd. [1964] P. 163 both Dankwerts and Diplock L.JJ. suggested that this rule was peculiar to the Probate Division, but this was not necessary for the decision in the case, and Nana Ofori Atta II v. Nana Abu Bonsra II was not cited. The rule may have originated in the special position in probate but I cannot see that justice and common sense require it to be so confined.

How are these principles to be applied in this case? All three defendants were joint tortfeasors, having acted in breach of the duty of confidence in relation to the confidential information imparted to them and in breach of the plaintiffs' copyright in the cutting patterns for the vest. The judgment against them was joint and several. If the Waites' action to set aside Costello J.'s judgment had succeeded, that judgment would have been set aside in toto, not just against the Waites; it obviously could not stand. Even if (which I do not accept) the judgment against Mr. McLeod did not automatically fall in the event of the Waites' succeeding, it is plain that in the English proceedings the plea of estoppel or abuse of process would have prevented the plaintiffs pursuing the claim on Costello J.'s judgment against Mr. McLeod.

Mr. McLeod was well aware of those proceedings. He could have applied to be joined in them, and no one could have opposed his application. He chose not to do so and he has vouchsafed no explanation as to why he did not. Mr. Swift says he was not obliged to do so; he was not obliged to go to a foreign jurisdiction; he could wait till he was sued ***254** here. He speaks as if Mr. McLeod was required to go half-way round the world to some primitive system of justice. That is not so. He had to go to Dublin, whose courts, as the judge said, are perfectly competent to deal with this matter. Moreover, it was a process that was good enough for the Waites. Instead, he was content to sit back and leave others to fight his battle, at no expense to himself. In my judgment that is sufficient to make him privy to the estoppel; it is just to hold that he is bound by the decision of Egan J.

But there is a further point upon which Mr. Lightman relied, and it is the pleading in Mr. McLeod's defence which I have already quoted, referring to the Waites' proceedings to set aside the judgment. Mr. Lightman submitted that that was a plea of estoppel by Mr. McLeod and that since estoppels were mutual, it could be relied upon against Mr. McLeod. Mr. Lightman cited In re Defries; Norton v. Levy (1883) 48 L.T. 703 , 704, where Pollock B. said:

"But the defendants cannot be said to have waived the estoppel by not pleading this judgment, for it was not in existence when the pleadings closed. I think it will be found that there is an old decision that it is sufficient to plead pendency of another action in order to enable the party pleading to put the judgment in such action in evidence by way of estoppel." In my judgment, the plea in the defence was a plea of estoppel; and as I have already

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said, had the Waites succeeded it was a plea that would have availed Mr. McLeod. It is plain that he was asserting that although he was not a party to those proceedings, he was privy to them. He was right.

Abuse of process

The judge did not find it necessary to deal with the question of abuse of process. In my opinion the same result can equally well be reached by this route, which is untrammelled by the technicalities of estoppel. The categories of abuse of process are not closed: see Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529, 536, where Lord Diplock said:

"My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

That was a case where the court would not permit a collateral attack on the decision of a court of competent jurisdiction. The principle has ***255** recently been applied in this court to analogous cases, where issues of fact have been litigated exhaustively in sample cases; it is an abuse of process for a litigant, who was not one of the sample cases, to re-litigate all the issues of fact on the same or substantially the same evidence: see Ashmore v. British Coal Corporation [1990] 2 Q.B. 338.

The question is whether it would be in the interests of justice and public policy to allow the issue of fraud to be litigated again in this court, it having been tried and determined by Egan J. in Ireland. In my judgment it would not; indeed, I think it would be a travesty of justice. Not only would the plaintiffs be required to re-litigate matters which have twice been extensively investigated and decided in their favour in the natural forum, but it would run the risk of inconsistent verdicts being reached, not only as between the English and Irish courts, but as between the defendants themselves. The Waites have not appealed Sir Peter Pain's judgment, and they were quite right not to do so. The plaintiffs will no doubt proceed to execute their judgment against them. What could be a greater source of injustice, if in years to come, when the issue is finally decided, a different decision is in Mr. McLeod's case reached? Public policy requires that there should be an end of litigation and that a litigant should not be vexed more than once in the same cause.

Colonel Piper's evidence

So far I have dealt with the case on the same basis as that which was presented to the judge, namely, that it was from the evidence of Mr. Parish and Mr. Waldie that the case of fraud against Mr. Sacks was constructed. But as I have already indicated, Mr. Swift has placed the evidence of Colonel Piper in the forefront of this appeal. He relies upon it to impugn both the judgment of Costello J. and that of Egan J., and he submits that both on its own and in addition to that of Messrs. Parish and Waldie it raises a sufficiently arguable case of fraud.

An allegation of fraud is a most serious charge to make, not least by those who have themselves been found to have acted dishonestly. In my judgment, before such a submission was made to this court it required a careful analysis of the statements or representations to be found in the evidence of Mr. Sacks in each trial that was said to be false, and the respects in which, in reliance on Colonel Piper's evidence, it could be said to be false. That is what

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was done in the defences in relation to Mr. Parish's evidence. It was not done in relation to Colonel Piper's evidence. Mr. Swift submitted that he did not need to do so because Colonel Piper's evidence was before the court and under Order 14 proceedings the court should not look too closely at it, provided it was in conflict with Mr. Sack's evidence. That, he said, would be a matter for the trial judge when leave to defend was given. I cannot too strongly deprecate this approach. It is crucial that the court be satisfied that the defence put forward is not a bogus one. That is all the more essential here where no submissions whatever were addressed to the judge based upon this evidence.

Mr. Boyle, to whom the court is greatly indebted, did subject the submissions made and the evidence given at the trials and the evidence ***256** of Colonel Piper to close analysis. In the result, in my judgment, the evidence of Colonel Piper does not come within a mile of establishing a prima facie case of fraud on the part of Mr. Sacks. The essence of what Mr. Sacks claimed, and the judge held was confidential to him, was the combination of laminated Kevlar material coupled with ceramic tiles to provide protection against high velocity bullets, both ball and armour-piercing (AP) for personal protection. He never claimed to have invented the use of Kevlar for body armours or ceramic tiles. It was the successful combination of the two in a vest to form body armour against high velocity bullets, overcoming the difficult problem of blunt trauma, that was the essence of his claim. Nowhere in his affidavit does Colonel Piper expressly repudiate this. Indeed, in the affidavit he says:

"I said [to Mr. Sacks] we could provide high velocity (HV) ballistic panels [the ceramic tiles] which could defeat NATO 7.62 mm ball and lower levels of attack for a vest and that we could also stop NATO 7.62 mm AP but this had not yet been tested on body armour." Even if by implication Colonel Piper was claiming they had successfully combined the ceramic HV pack with Kevlar to produce body armour effective against all HV bullets, this was contrary to the evidence of Mr. Brown, who was entirely impartial and whose evidence much impressed Costello J. In the course of his evidence before that judge, Mr. Brown had said:

"412. Q. Would you consider next the high velocity pack, do you think he made any contribution in that field? A. In as much as he has taken a material which the relevant manufacturer thought would not work and turned it into what is, according to the Home Office, a highly efficient body armour, yes I do.

"413. Q. Who were the people? A. Alcan, also an import agent for Armoflex at first. The gentleman promoting it, Warren Piper, came to my range, the date I have there. I asked him to do a trial of the Armoflex against the plaster base and we did that and he said it was no good for body armour." This evidence entirely corroborated Mr. Sacks' claim. Mr. Swift does not suggest that Mr. Brown was committing perjury in giving this evidence. How it can be suggested that Mr. Sacks is, when he says the same thing, I do not understand. The only matter which Colonel Piper expressly contradicts in his evidence is to be found in his affidavit, where he said:

"I believe it was in 1983 that I was informed that a judge in Ireland had concluded that Michael Sacks could properly claim that copyright existed in his favour in the design of the HV ballistic panel which was used in his vest. This is contrary to the facts as I know them." Mr. Sacks had never claimed anything of the sort. His claim to copyright related to the cutting patterns for the Kevlar making up the vest. The nature of the confidential information is as I have already described.

It is important to see for what purpose Colonel Piper's evidence was sought to be introduced and relied upon by Mr. Waite. He claimed it was in support of an assertion he had made in an earlier affidavit. The actual ***257** reference is

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to cross-examination of Mr. Sacks about discovery in the second trial, and I can see no relevance in this. I assume, in fact, he means to refer to a part of his affidavit where he says:

"During the fraud trial other quite dramatic non-disclosures in the 1982 trial came to light. The name of Ed Elkins of Armoflex the supplier of the most important part of Mr. Sacks vest was only dragged out of Mr. Sacks under cross-examination. Mr. Sacks gave evidence. .. that having met the Libyan officer in my office the officer was only interested in the high velocity pack which was capable of stopping 5.56 A.P. rounds. Mr. Sacks' relationship with Alcan who were Armorflex U.K. agents was kept very much a secret in the 1982 trial. Mr. Sacks continued to maintain he was the author of the vest without revealing his association with Alcan." These last two sentences are quite false, as even a cursory examination of the evidence given by Mr. Sacks at the fraud trial will reveal.

In my judgment there is no basis whatever in the evidence of Colonel Piper to suggest that Mr. Sacks had committed perjury in either trial. Mr. Harington was wise not to found any submission on this evidence before Sir Peter Pain.

I would dismiss the appeal.

MCCOWAN L.J.

The sequence of events and the part, or absence of a part, played in them by Mr. McLeod are of considerable significance in this case.

Ending on 20 December 1982 Costello J. tried an action in the Irish courts brought by the plaintiffs for damages for misuse of confidential information, breach of contract and infringement of copyright relating to a bullet-proof vest. The defendants to that action were the two Waites and Mr. McLeod. Mr. McLeod did not give evidence in or even attend those proceedings. In giving judgment for the plaintiffs, Costello J. commented that Mr. McLeod, if the Waites were right, was the one person who might have cleared up all the mysteries in the case and, in particular, explained where important missing documents were. The judge went on to say:

"I can reach no other conclusion but that. .. Mr. McLeod did not attend court so as to avoid answering questions which would have resulted in damage to the case now advanced by the defendants.. ."

On 28 January 1985 the two Waites, but not Mr. McLeod, brought an action in Ireland against the plaintiffs seeking to set aside the judgment of Costello J. on the ground that it had been procured by one of the plaintiffs, Mr. Sacks, by falsely pretending that he was responsible for the design of the bullet-proof vest when in truth it was a Mr. Parish who deserved the credit for that.

On 31 March 1985 the plaintiffs issued the writ in the present English action seeking to enforce the judgment of Costello J. On 9 April 1985 Mr. Waite served a defence to that action claiming that the judgment had been obtained by fraud in the same respects as he was alleging in the action he had brought in Ireland. Mr. Seamus Waite served a similar defence, and on 20 August 1985 Mr. McLeod served his defence relying on the fraud alleged by Mr. Waite in his defence, and adding this significant paragraph: ***258**

"On 28 January 1985 the first and second defendants commenced an action in the Republic of Ireland to set aside the judgment on the ground it was obtained by fraud as particularised in paragraph 1 of the first defendant's defence herein." As Sir Peter Pain was later to say, "one must assume that this plea had some relevance to the proceedings." In my judgment, the wording of that paragraph of Mr. McLeod's defence was tantamount to saying: "Let the Irish courts decide the issue of whether the judgment was obtained by fraud, and until they have, let not this action proceed." In taking that line Mr. McLeod was, I consider, not merely acquiescing in, but positively encouraging a

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decision of this issue by the Irish courts in an action to which he was not a party. That was a very clever tactic. If the judgment of Costello J. were set aside as against the Waites, he would certainly have benefited because in practical terms it could never have been enforced against him. If, on the other hand, the Waites failed in their Irish action, he could do what he has in fact now done, which is to say that he is not bound by the decision in that action since he was not a party to it, and have another bite at the cherry of alleging fraud against the plaintiffs.

The hearing of the Irish action brought by the Waites lasted some 22 days, followed by a judgment on 9 October 1987. Mr. McLeod once again did not give evidence and this time the Waites did not either. However, Mr. Parish, the alleged true designer of the bullet-proof vest, did. In giving judgment for the plaintiffs, Egan J. rejected the evidence of Mr. Parish that he and not Mr. Sacks was responsible for the design of the vest. Indeed, the judge found that Mr. Parish had given evidence before him which he knew to be false, on the promise by Mr. Waite of financial reward if the judgment of Costello J. were set aside.

There followed, on 1 and 2 February 1989, the hearing of the plaintiffs' Order 14 summons before Sir Peter Pain. The Waites appeared in person, and Mr. Waite read to the court an affidavit from Colonel Piper, sworn on 5 December 1988 but not served on the plaintiffs until 27 January 1989. Mr. McLeod was represented by Mr. Harington and it is not disputed that in his submissions on behalf of his client he placed not one word of reliance on the affidavit of Colonel Piper. The same is true of the grounds of appeal. It is right to say, however, that Colonel Piper figured prominently in Mr. Swift's skeleton argument, and by the time he opened the appeal to us, Colonel Piper's affidavit had become the foundation of his case, as providing the new evidence of fraud which was not before Egan J. Challenged by Mr. Lightman as to the absence of mention of Colonel Piper in the grounds of appeal, Mr. Swift sought and obtained from this court leave to amend them by adding a paragraph alleging: "The. .. judge erred in failing to give any or any sufficient weight to the evidence of Colonel Richard Warren Piper, contained in his affidavit of 5 December 1988.. ." I am bound to say that I do not consider this amendment an appropriate method of putting Mr. Swift's argument before this court, since I fail to see how the judge can be blamed for attaching no weight to a document to which Mr. McLeod's counsel plainly attached no weight either.

Should we attach any weight to it? Colonel Piper's name did indeed figure in the trial before Costello J. Mr. Sacks and his wholly independent witness, Mr. Brown, were cross-examined about him by counsel for the Waites. This was in the context of asking whether Mr. Sacks had not in fact used in ***259** the bullet-proof vest materials made by a company called Armoflex. He never denied this. His case was that his contribution had been to think of using Armoflex products as part of a bullet-proof vest. Colonel Piper, he said, had not believed that those products could usefully be employed in a bullet-proof vest, and Mr. Brown gave supporting evidence that that was indeed Colonel Piper's attitude at the time. The nature of the cross-examination of those two witnesses suggests strongly that counsel had a proof from Colonel Piper, but the colonel was not called as a witness before Costello J.

In the proceedings before Egan J., Colonel Piper again did not give evidence. There was indeed no reason why he should, since it was not being suggested in those proceedings that he or Armoflex were the true designers of the vest, or that Mr. Sacks had fraudulently misled Costello J. in respect of them. The Waites' case then still was that Mr. Parish was the real designer and that Mr. Sacks had deceived Costello J. in respect of him.

The important passages in Colonel Piper's affidavit are to be found in the final paragraph:

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"I believe it was in 1983 that I was informed that a judge in Ireland had concluded that Michael Sacks could properly claim that copyright existed in his favour in the design of the HV ballistic panel which was used in his vest. This is contrary to the facts as I know them.. .. the design of the HV ballistic insert used by Sacks, remains the property of Mr. Elkins and Armoflex Inc." If that was what Colonel Piper was informed about the trial before Costello J., he was misled. Mr. Sacks was not claiming that he had copyright in Armoflex's HV ballistic panel, and the judge never held that he had any such copyright. Accordingly, I have no hesitation in concluding that the material in Colonel Piper's affidavit is valueless in any attempt to establish that the plaintiffs obtained judgment from Costello J. by fraud. No triable issue has, in my judgment, been shown on behalf of Mr. McLeod. I am further of the view that the history of this whole matter, and not least Mr. McLeod's part in it, makes it plain that the attempt now being made on his behalf to defend this action in the manner indicated is an abuse of the process of the court. I would therefore dismiss this appeal.

FOX L.J.

I have read in draft the judgments of Stuart-Smith and McCowan L.JJ. I agree with them and would dismiss this appeal accordingly.Appeal dismissed with costs on indemnity basis. Legal aid taxation of third defendant's costs. Leave to appeal refused. (B. O. A.)
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