EXHIBIT 52

[1991] 2 Q.B. 206 [1990] 2 W.L.R. 117 [1989] 3 All E.R. 853 [1989] 2 Lloyd's Rep. 144 (1990) 87(5) L.S.G. 39 (1990) 134 S.J. 426 Times, May 5, 1989 [1991] 2 Q.B. 206 [1990] 2 W.L.R. 117 [1989] 3 All E.R. 853 [1989] 2 Lloyd's Rep. 144 (1990) 87(5) L.S.G. 39 (1990) 134 S.J. 426 Times, May 5, 1989
(Cite as: [1991] 2 Q.B. 206)

[1990] 2 W.L.R. 117

*206 Irish Shipping Ltd. v Commercial Union Assurance Co. Plc. and Another

Court of Appeal

L.JJ. Purchas, Staughton, and Sir John Megaw

1989 March 1, 2, 3; April 27

Practice—Parties—Representative action—Marine insurance—Money claim against two insurers as representatives of all insurers of risk—Some insurers not within jurisdiction—Each insurer having separate contract with assured—Terms of contracts identical and including leading underwriter clauses—Whether all insurers having "same interest" in action—Whether action properly constituted—Whether representative character to be struck out—Parallel proceedings in Belgium—Appropriate forum—Whether English action to be stayed— R.S.C., Ord. 15, r. 12(1)

Ships' Names— **Irish** Rowan

1 The shipowners let their **ship** to the charterers by a time charter which provided, inter alia, that cargo claims were to be ***207** the liability of the charterers. The charterers took out insurance in respect of such liability in the Belgian insurance market. The policy was subscribed by 77 insurers, about one third of the risk being underwritten by English insurance companies. Each insurer contracted with the charterers on identical terms, which included a "leading underwriter clause" whereby each insurer undertook, inter alia, to be bound by acts of the leading underwriter and to be liable for its share for all decisions taken against the leading underwriter. The shipowners paid certain cargo claims and in arbitration proceedings sought an indemnity from the charterers, who by then were in liquidation. The arbitrator's interim awards were not honoured, and the shipowners began proceedings in England against the defendants, the leading underwriter and another insurer, "on their own behalf and on behalf of all other liability insurers," claiming from them "and those whom they represent in the respective proportions due from them as subscribing underwriters" the sums owed by the charterers under the awards, on the footing that the charterers rights against the insurers had been transferred to the shipowners by virtue of section 1(1) of the Third Parties (Rights against Insurers) Act 1930 . The defendants applied for the representative character of the proceedings to be struck out, so as to leave them as defendants for their own proportions of the risk only, and for the proceedings to be stayed pending determination of proceedings against all the insurers in Belgium, which they contended was the appropriate forum. Gatehouse J. dismissed the applications, holding that, in view of the leading underwriter clause, the proceedings were properly constituted and that England was the appropriate forum since the contracts were probably governed by English law and the dispute could be settled more quickly and cheaply here.

On the defendants' appeal:-

dismissing the appeal, that the inclusion in proceedings of claims for debt or damages did not of itself preclude those proceedings being begun or continued, under R.S.C., Ord. 15, r. 12(1) , by or against one or more persons as representing some or all of numerous persons having the same interest in the proceedings; that representative proceedings were not necessarily inappropriate where some of the class represented by a named defendant could not have been served within the jurisdiction if they had been named defendants, and it was generally appropriate that numerous insurers on one risk who, albeit scattered in numerous jurisdictions, had by mutually associated contracts each agreed with the assured to abide by judgments

[1991] 2 Q.B. 206 [1990] 2 W.L.R. 117 [1989] 3 All E.R. 853 [1989] 2 Lloyd's Rep. 144 (1990) 87(5) L.S.G. 39 (1990) 134 S.J. 426 Times, May 5, 1989 [1991] 2 Q.B. 206 [1990] 2 W.L.R. 117 [1989] 3 All E.R. 853 [1989] 2 Lloyd's Rep. 144 (1990) 87(5) L.S.G. 39 (1990) 134 S.J. 426 Times, May 5, 1989
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against one identified leader, should sue or be sued by a representative action; that all 77 insurers had the same interest in the proceedings, notwithstanding that there was a number of separate contracts of insurance, since the contracts were on identical terms, each insurer was bound by the leading underwriter clause, and the defence of all the insurers was that their obligations to the charterers had not been transferred to the shipowners, albeit that some of the insurers might have grounds for arguing that defence which were not available to others; that the questions whether the contracts were governed by English law or Belgian law or whether the Act of 1930 applied were not determinative as to what was the appropriate forum for trial, but there was no basis on which the court could interfere with the judge's exercise of his discretion in concluding ***208** that England was the appropriate forum; and that, accordingly, the judge had been right to allow the English action to continue as representative proceedings and to refuse the stay (post, pp. 227A-B, E-228D, 229A-C, 231C-E, H-232B, D-F, 233B-D, 239A-C, 240A-E, 244C-G, 248D-249B).Duke of Bedford v. Ellis [1901] A.C. 1, 8, H.L.(E.) ; dicta of Megarry J. in John v. Rees [1970] Ch. 345 , 370; E.M.I. Records Ltd. v. Riley [1981] 1 W.L.R. 923 and Spiliada Maritime Corporation v. CansulexLtd. [1987] A.C. 460, H.L.(E.) applied. Adair v. New River Co. (1805) 11 Ves. 429 ; Taff Vale Railway Co. v. Amalgamated Society of Railway Servants [1901] A.C. 426, H.L.(E.) and Prudential Asssurance Co. Ltd. v. Newman Industries Ltd. [1981] Ch. 229 considered. Markt & Co. Ltd. v. Knight Steamship Co. Ltd. [1910] 2 K.B. 1021, C.A. distinguished. *Per* Staughton L.J. The rules relating to conflict of laws ought to be, but are not, the same internationally. In so far as they are not there is a case for saying that English courts should regard the English conflict rules as the most appropriate (post, pp. 229H-230A).Decision of Gatehouse J. affirmed.

The following cases are referred to in the judgments:

- Abidin Daver, The [1984] A.C. 398; [1984] 2 W.L.R. 196; [1984] 1 All E.R. 470, H.L.(E.) .
- Adair v. New River Co. (1805) 11 Ves. 429
- Balfour v. Beaumont [1982] 2 Lloyd's Rep. 493
- Bank Leumi le Israel B.M. v. British National Insurance Co. Ltd. [1988] 1 Lloyd's Rep. 71
- Bedford (Duke of) v. Ellis [1901] A.C. 1, H.L.(E.) .
- Bromley v. Williams (1863) 32 Beav. 177
- CBS/Sony Hong Kong Ltd. v. Television Broadcasts Ltd. [1987] F.S.R. 262
- Cockburn v. Thompson (1809) 16 Ves. 321
- E.M.I. Records Ltd. v. Riley [1981] 1 W.L.R. 923 ; [1981] 2 All E.R. 838
- General Accident Fire and Life Assurance Corporation Ltd. v. Tanter (The Zephyr) [1984] 1 Lloyd's Rep. 58
- Hardie and Lane Ltd. v. Chiltern [1928] 1 K.B. 663 , Fraser J. and C.A. .
- Janson v. Property Insurance Co. Ltd. (1913) 19 Com. Cas. 36
- John v. Rees [1970] Ch. 345; [1969] 2 W.L.R. 1294; [1969] 2 All E.R. 274
- Markt & Co. Ltd. v. Knight Steamship Co. Ltd. [1910] 2 K.B. 1021, C.A. .
- Moon v. Atherton [1972] 2 Q.B. 435; [1972] 3 W.L.R. 57; [1972] 3 All E.R. 145, C.A. .
- Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd. [1988] 2 Lloyd's Rep. 505 ;

[1989] 1 Lloyd's Rep. 568, C.A.

- Prudential Assurance Co. Ltd. v. Newman Industries Ltd. [1981] Ch. 229; [1980] 2 W.L.R. 339; [1979] 3 All E.R. 507
- Roche v. Sherrington [1982] 1 W.L.R. 599; [1982] 2 All E.R. 426
- Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460; [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843, H.L.(E.)
- Taff Vale Railway Co. v. Amalgamated Society of Railway Servants [1901] A.C. 426, H.L.(E.)
- Temperton v. Russell [1893] 1 Q.B. 435, C.A.
- United Railways of the Havana and Regla Warehouses Ltd., In re [1960] Ch. 52; [1959] 2 W.L.R. 251; [1959] 1 All E.R. 214, C.A.
- Walker v. Sur [1914] 2 K.B. 930, C.A.
- Wood v. McCarthy [1893] 1 Q.B. 775, D.C. ***209**

The following additional cases were cited in argument:

- Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] A.C. 50; [1983] 3 W.L.R. 241; [1983] 2 All E.R. 884, H.L.(E.)
- Bonsor v. Musicians' Union [1956] A.C. 104; [1955] 3 W.L.R. 788; [1955] 3 All E.R. 518, H.L.(E.)
- Commissioners of Sewers of the City of London v. Gellatly (1876) 3 Ch.D. 610

INTERLOCUTORY APPEAL from Gatehouse J.

By a writ dated 29 December 1986 the plaintiff shipowners, **Irish Shipping** Ltd., claimed against the defendant insurers, Commercial Union **Assurance** Co. Ltd. and Alliance **Assurance** Co. Ltd. (each sued on their own behalf and on behalf of all other liability insurers subscribing to the insurances of the charterers, Cast **Shipping** Ltd.), (i) £220,147·28 plus Iraqi dinars 2,330 with interest from 1 January 1982 and (ii) £26,330·32 plus Iraqi dinars 130 with interest from 1 November 1983, under and by virtue of the Third Parties (Rights against Insurers) Act 1930, on the basis that the charterers were under liabilities in those amounts to the shipowners under interim awards of Mr. Bruce Harris dated 26 November 1985 and 11 December 1986 in an arbitration between the shipowners and the charterers, which remained wholly unsatisfied, and a winding up order had been made in the Companies Court in respect of the charterers. On 16 October 1987 the shipowners served points of claim. By two summonses dated 18 December 1987 the defendants sought orders that the action be stayed pending the determination of proceedings brought by the shipowners against the defendants in the Commercial Court of Antwerp by summons dated 22 August 1986, in which the shipowners sought the same relief as they sought in the action; and that the parts of the writ and of the points of claim which referred to the defendants as "(sued on their own behalf and on behalf of all other liability insurers subscribing to the insurances of the Cast Shipping Ltd.)" be struck out. On 15 April 1988, on the shipowners' undertaking on behalf of themselves and their protection and indemnity insurers that they would take all necessary steps within their power to effect discontinuance of their proceedings against the liability insurers in Belgium and would, if such discontinuance were obtained and agreed, indemnify the

defendants in respect of their costs of those proceedings, Gatehouse J. dismissed both summonses and gave the defendants leave to appeal.

By a notice of appeal dated 24 May 1988 the defendants appealed on the grounds that the judge (1) ought to have recognised that the defences available to those represented might be different in that, if it were held that the application of the Act of 1930 was dependent upon the situs of the chose in action represented by the claim under each of the several policies of insurance, the outcome of the proceedings would differ depending on the various places of domicile or residence of the underwriters; (2) had been wrong to place reliance on the "leading underwriter clause" in that the question whether the benefit of a contract containing such a clause had been transferred could not be answered by reference simply to the clause itself, and neither of the named defendants were leaders within the meaning of the clause for all the allegedly ***210** following underwriters; (3) had erred in allowing a representative action to be brought so as to purport to bind foreign defendants and thereby obviating the need for an application under R.S.C., Ord. 11 ; (4) had failed to give any or any adequate weight to the existence of a lis alibi pendens in Belgium; (5) ought to have concluded that in circumstances where all the relevant parties were before the Court in Antwerp and only three of them could properly be bound by the English action, the latter ought to be stayed pending the outcome of the Belgian proceedings; (6) ought to have concluded that the insurance policies were governed by Belgian law, or, alternatively, that they were, prima facie, governed by Belgian law, and ought to have given such conclusion considerable weight in the exercise of his discretion; (7) ought to have determined that the Act of 1930 was only applicable to a claim against a defendant resident within the jurisdiction, and/or where the policy was governed by English law; (8) had been plainly wrong to refuse to strike out the representative nature of the writ; and (9) had been plainly wrong to refuse to stay the proceedings either in respect of all the underwriters, or, alternatively, in respect of those not resident in the jurisdiction.

The facts are stated in the judgment of Staughton L.J.

Gordon Pollock Q.C . and *David Mildon* for the defendants. The Third Parties (Rights against Insurers) Act 1930 applies only where the situs of the insurer's obligation is in England: see In re United Railways of the Havana and Regla Warehouses Ltd. [1960] Ch. 52 . All the insurers could have been made parties to the action, and leave could have been obtained under R.S.C., Ord. 11, r. 1(1)(c) to serve them out of the jurisdiction. The procedure adopted by the shipowners evades and undermines the requirements of Order 11 .

The action is not within Ord. 15, r. 12 and therefore cannot be brought as a representative action. A case can never be within that rule where damages or debt are claimed severally against all those sought to be represented, and the court has no jurisdiction in a representative action to award damages: see Prudential Assurance Co. Ltd. v. Newman Industries Ltd. [1981] Ch. 229 , 244. The claim is against each insurer for its proportion of the loss and no insurer is liable for the proportion of any other, and therefore the insurers do not have the same interest in the action. Furthermore, the issues between the shipowners and the representative defendants may well not be the same as those between the owners and the represented insurers: each insurer could have a different defence. The "leading underwriter" clauses are irrelevant since they apply only to regulate internal relationships within each pool by appointing a leader for each pool.

An injustice might result from a representative action, since one or more of the insurers might wish to contend that it had no valid contract with the assured because of, e.g., lack of authority in the agent or fraud or misrepresentation. The conditions which a valid representative action must satisfy are

set out in Roche v. Sherrington [1982] 1 W.L.R. 599, from which it is clear that the propriety of a representative action is a matter of substance and the impropriety of such an action is not a mere irregularity capable of being waived by the parties. The relevant ***211** principles derive from Duke of Bedford v. Ellis [1901] A.C. 1, which was authoritatively explained in Markt & Co. Ltd. v. Knight Steamship Co. Ltd. [1910] 2 K.B. 1021, 1025, 1032 (Buckley L.J. dissented: see p. 1043); see, also, Hardie and Lane Ltd. v. Chiltern [1928] 1 K.B. 663, 685, 696, 698-699. From these cases it is clear that the requirement of common interest between the representative defendants and those sought to be represented is not satisfied by the mere existence of common issues of law and fact, where the defendants are alleged to be under several liabilities arising from the same factual basis. Even where the requirement of common interest is satisfied initially, the court should not allow a representative action to continue once it has become apparent that there is a risk of those interests diverging. [Reference was made to Commissioners of Sewers of the City of London v. Gellatly (1876) 3 Ch.D. 610, 617 and Temperton v. Russell [1893] 1 Q.B. 435.]

The Markt case, which is authority binding on the Court of Appeal, prevents the use of a representative action in a case such as this. In Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd. [1989] 1 Lloyd's Rep. 568 Lloyd L.J., purporting to rely on Duke of Bedford v. Ellis [1901] A.C. 1, brushed aside the Markt decision. However, his approach ignored the fact that the Markt case provided a binding explanation of Duke of Bedford v. Ellis [1901] A.C. 1. [Reference was made to the first instance decision in the Pan Atlantic case [1988] 2 Lloyd's Rep. 505.] E.M.I. Records Ltd. v. Riley [1981] 1 W.L.R. 923, 924-926 was also wrong in failing to follow the Markt decision.

It cannot be contended that the judge should have exercised his discretion differently: he had no discretion since the case does not fall within Ord. 15, r. 12 at all, and he should have struck out the representative aspect of the action on the basis that the action was not properly constituted.

In any event, the English action should be stayed, pending the determination of the Belgian proceedings, since Antwerp is the appropriate forum for the determination of the issues. The existence of a lis alibi pendens in Belgium cannot be relied on as a separate ground for a stay. It is relevant only where the plaintiff has acted abusively or vexatiously in starting actions in more than one jurisdiction. In such cases the plaintiff is put to his election and a stay is granted only if he fails to elect. It is not alleged that the plaintiffs acted vexatiously in pursuing two sets of proceedings or deliberately started the Belgian proceedings before those in England. However, the existence of a foreign lis is relevant in that if the foreign forum is the natural and appropriate forum for the trial of the suit the fact that a lis is already pending there will add weight to an application for a stay on the ground of forum non conveniens. That is the case here: the Belgian lis is a small additional factor in favour of a stay. However, a lis alibi pendens cannot convert a non-natural forum into a natural forum.

The tests to be applied on an application for a stay on the ground of forum non conveniens are set out in Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460, 465, 474, 475-478. The first question is whether there is available a competent foreign forum. The Antwerpen court is such a forum. The second question is whether that forum is the ***212** natural and appropriate forum for the trial of the action. If it is not, that is an end of the matter; the court has no jurisdiction to order a stay. In determining that question the court looks at the underlying connections of the parties and the dispute with the foreign forum and at the nature of the action itself. If the court concludes that the foreign forum be the natur-

al and appropriate forum it would grant a stay of the English proceedings unless to do so would unjustly deprive the plaintiff of a legitimate jurisdictional or personal advantage. What constitutes such an advantage varies from case to case; it could be a risk that he would not get a fair trial in the foreign court.

The connecting factors here begin with the proper law of the contracts. On that issue the judge made an error of law which vitiates his decision. He said that it was not necessary to decide what was the proper law but that his prima facie view was that English law governed the policies. It is always necessary, on a forum non conveniens application, for the court to form a view on the material available to it as to what the proper law is likely to be. At this stage everything points towards the proper law being Belgian and the appropriate forum Antwerp. In Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] A.C. 50 the House of Lords held that the use of an English insurance form by foreign parties did not make English law the proper law of the contract. The judge's decision, therefore, was plainly wrong; he should have concluded that Belgian law was the proper law of the contracts and that that law and the other connecting factors made Antwerp clearly the more appropriate forum.

Jonathan Gilman and *John Lockey* for the plaintiff shipowners. The court's power to strike out the representative part of the writ is discretionary and the judge's decision therefore should not be disturbed unless the defendants can show it to be plainly wrong. The burden on them is very high in relation to a striking out application since such an order should be made only in a plain and obvious case. The principles relating to the power to strike out under R.S.C., Ord. 18, r. 19 and the inherent jurisdiction (see note 18/19/3 in *The Supreme Court Practice 1988*) apply by analogy. Every point taken on the appeal, other than the Order 11 point, was fully argued below and the judge properly and rightly exercised his discretion having regard to those points; he could not be said to be plainly wrong.

The procedure for a representative action under R.S.C., Ord. 15, r. 12 is to be regarded as a "flexible tool of convenience:" see John v. Rees [1970] Ch. 345 . The condition to be fulfilled is that the plaintiff or defendant and those represented by him should have a common interest and that the relief should be beneficial to them all: see Duke of Bedford v. Ellis [1901] A.C. 1 . In Bromley v. Williams (1863) 32 Beav. 177 , 179, 187 a mutual insurance case, representative proceedings were used in an insurance claim in the Court of Chancery; it was cited with approval in Wood v. McCarthy [1893] 1 Q.B. 775 , 777, where a representation order was made against the will of the defendant. Damages were awarded against all the members of a trade union, as persons represented by the representative defendants, in Taff Vale Railway Co. v. Amalgamated Society of Railway Servants [1901] A.C. 426 . The requirements are to be ***213** broadly interpreted: see John v. Rees and the Pan Atlanticcase [1988] 2 Lloyd's Rep. 505 ; [1989] 1 Lloyd's Rep. 568 . In the latter case it was held that it was necessary to examine whether there was a common bond of interest between the representative parties and those represented. That is the correct approach. The better view, as the Court of Appeal held in the Pan Atlantic case, is that proceedings can be brought against representative underwriters as representing separate underwriters on the same risk and the plaintiff can obtain a monetary relief against them all; alternatively, the claim can be made for a declaration that the represented parties are each liable to indemnify the representative defendants in respect of their percentages of the risk. [Reference was made to Moon v. Atherton [1972] 2 Q.B. 435 and Janson v. Property Insurance Co. Ltd. (1913) 19 Com. Cas. 36 .]

The Order 11 point is miscon-

ceived. The representative action procedure in Ord. 15, r. 12 was developed to overcome the difficulties of there being numerous plaintiffs or defendants with a common interest: see the Prudential case. Part of its purpose is to cater for cases such as those involving unincorporated associations where there may well be numerous members of a class with differing places of residence who may be difficult to identify and/or trace: see Walker v. Sur [1914] 2 K.B. 930 and Roche v. Sherrington [1982] 1 W.L.R. 599. There was no suggestion in those cases that leave under Order 11 was required. That would be a wholly impracticable restriction on the use of the procedure: nearly every Lloyd's syndicate has some non-resident names and it cannot have been contemplated by the draftsman of Order 15 that a plaintiff should apply under Order 11 before bringing an action against a representative underwriter.

The fact that the represented insurers are bound by separate contracts from those which bind the representative defendants is no obstacle: see Balfour v. Beaumont [1982] 2 Lloyd's Rep. 493 (an aviation insurance dispute) and Prudential Assurance Co. Ltd. v. Newman Industries Ltd. [1981] Ch. 229. The effect of the leading underwriter clause is to enable the leading underwriter to be sued on behalf of all the underwriters. It is therefore entirely appropriate for him to be sued as a representative. The clause precludes separate defences. Thus the objection based on the possibility of separate defences and divergent interests falls away. Enforcement difficulties against non-resident following insurers could only arise if those insurers failed to honour their obligations under the clause. The court should not proceed on the assumption that they would break their contract.

Even if the leading underwriter clause did not preclude separate defences, this is not a case where the represented insurers are shown to have separate defences open to them. No separate defences have been pleaded in either the English or the Belgian proceedings. This is not a case where there is a large class of persons difficult to identify, as there was in Roche v. Sherrington [1982] 1 W.L.R. 599; all the represented insurers know of the proceedings and, if they have separate defences, the point should have been raised by them. The points taken by the defendants on the proper law of the contract and the applicability of the Act of 1930 are exactly the same points which they suggest are open ***214** to the following market. The proper law, whatever it is, must plainly be the same for all; likewise the defendants' argument that claims under the policy are situate in Belgium, and the defendants concede that all the insurers could be sued in Belgium. If any problem of separate defences were to arise, Ord. 15, r. 12 provides a mechanism to deal with it: it is open to a represented party who does not wish to be represented to apply to be joined as a party to the action, and the court has the power to vary the scope of the representation.

The effect of leading underwriter clauses was examined in General Accident Fire and Life Assurance Corporation Ltd. v. Tanter (The Zephyr) [1984] 1 Lloyd's Rep. 58, 66 and Bank Leumi le Israel B.M. v. British National Insurance Co. Ltd. [1988] 1 Lloyd's Rep. 71, 77. The leading underwriter clause is plainly not just of internal application within each group of subscribers: all the cover notes are expressed to be "subject to" the clause and in some cases that would be meaningless if it referred only to the internal affairs of subscribing pools. It is common practice for policies to confer authority on the leading underwriter and for others to agree to be bound; the present clause is not an unusual provision: see *MacGillivray & Parkington on Insurance Law*, 8th ed. (1988), para. 1384. Risks partly written on Lloyd's or in the London market and partly with other insurers or in overseas markets often contain "follow" clauses. "Follow the settlements" clauses are standard provisions in reinsurance. The concept of there being one "leading insurer" is recognised in article 8(3) of the amended Con-

vention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) ; the concept for which the defendants contend of there being several leading insurers on the same risks makes no sense. The leading underwriter clause, on its true construction, is a business-like provision of practical value, avoiding the need to sue mutiple defendants. The suggestion that it is merely a "declaration" on which a third party claimant or assignee cannot rely is unsound. The true analysis of the leading underwriter clause in this case is that the offer was made subject to all the underwriters agreeing to accept the leader as leader and all the contracts were concluded on that basis. There is a mutual interest therefore in the clause being obeyed and the underwriters co-operating. It follows that there is an obligation which cuts across any of the several distinct percentage liabilities and which can only be analysed as a single contract in which there are several liabilities to pay percentages of what has been determined to be due either by disposition of the leading underwriter on his assessment of the claim or under an award or judgment. Section 1(1) of the Act of 1930 applies either where the insolvency order against the insured is English or where English law is the proper law of the contract. The leading underwriters are English companies and the contracts are on English forms. English law is the proper law and accordingly Cast Shipping Ltd.'s rights against the insurers are transferred to the shipowners under the Act of 1930; the shipowners are therefore in the shoes of Cast Shipping Ltd. and are entitled to rely on the leading underwriter clause, with the result that the following insurers are obliged under their own contracts to follow a disposition by or judgment against the leading underwriter. ***215**

If situs were the test for the applicability of the Act of 1930, overseas insurers could have taken themselves out of the scope of the Act by writing in a foreign payments clause.

Pollock Q.C. in reply. Bromley v. Williams, 32 Beav. 177 does not assist since it was a decision of the Court of Chancery before it had any jurisdiction to give judgments in debt or damages.

A common subject matter is not enough. The representative parties and those represented must have a common interest in the relief sought, and it is at that that the court must therefore look. Taff Vale Railway Co. v. Amalgamated Society of Railway Servants [1901] A.C. 426 was a case of joint, not individual or several, liabilities and there was therefore no question of separate defences. In any event the scope of the Taff Vale case was limited by Bonsor v. Musicians' Union [1956] A.C. 104 , where the House of Lords said that it would be quite wrong for a representative action to result in a money judgment against represented individuals and that the liability could be enforced only against the funds of the union.

There is no satisfactory safeguard against a plaintiff suing a representative English defendant and entering judgment in default of appearance against a represented foreign defendant. It is difficult to see how representative proceedings could ever be allowed to be used against a represented foreign defendant in an action for a money judgment. Even after a full trial he could be liable under a judgment of a foreign court of which he had no knowledge. It would be possible, by leave under Order 11, to join all the foreign defendants and use the representative procedure against all the English defendants. That should be the rule applied where there are foreign defendants: it ought not to be possible to evade Order 11 by naming only the English defendants.

If the debt be situate in England and the Act of 1930 have transferred it to the shipowners and if situs be the relevant test, the debt owed by the insurers Alpina to Cast Shipping Ltd. could nevertheless be transferred to the shipowners only by virtue of the leading underwriter clause on the construction contended for by the shipowners, for the only cause of action against Alpina was contractual and the shipowners were not party to the contract

between Alpina and Cast Shipping Ltd. The cause of action was not transferred to the shipowners under the Act of 1930 merely because the liability had been. The leading underwriter clause could never have had the effect for which the shipowners contend.

Cur. adv. vult.

27 April. The following judgments were handed down

STAUGHTON L.J.

Irish Shipping Ltd., whom I shall call "the shipowners," let their vessel ***Irish** Rowan* by a time charter dated 19 May 1978 to Cast **Shipping** Ltd. ("the charterers"), a company incorporated in Bermuda. The charter period was about 11 to about 13 months, and the vessel was destined for liner trading. She would carry a large number of different parcels of goods between various ports, and in ***216** the nature of things cargo claims were to be expected. The contract provided that, with certain exceptions, such claims were to be the liability of the charterers.

The charterers took out insurance against liability in the Belgian insurance market at Antwerp. That was one of the two places where they managed their operations, the other being in North America; Bermuda was, as it has been put, merely a convenient country in which to be incorporated. I shall have to consider later how the contract or contracts of insurance (for there is an issue as to one or many) was or were concluded. In all there were 76 or 77 insurers, including Commercial Union Assurance Co. Plc. and Alliance Assurance Co. Ltd., the two named defendants in this action. Commercial Union were the largest single insurer, with 8.15 per cent. of the risk; Alliance had 6.6 per cent. In all about 33 per cent. of the risk was insured by English companies. The other insurers were connected with a variety of different countries.

It is said that in due course claims were made by the owners of cargo carried on the *Irish Rowan* and were paid by the shipowners, no doubt because they were liable under the terms of the bills of lading. The shipowners then sought to recover an indemnity from the charterers, but they were now in liquidation in Bermuda. Nevertheless the shipowners commenced arbitration proceedings, and Mr. Bruce Harris became sole arbitrator under section 7(b) of the Arbitration Act 1950. Neither the charterers nor their liquidator defended the proceedings. Mr. Harris made two awards in favour of the shipowners. The first, dated 26 November 1985, was for £220,147·28 and Iraqi Dinars 2,330; the second, dated 11 December 1986, for £26,330·32 and Iraqi Dinars 130. In each case there was also an award of interest and costs. The awards have not been honoured.

On 27 October 1986 a further winding up order was made in respect of the charterers, in this jurisdiction. That was preliminary to the claim which the shipowners make in this action, to recover from the insurers of the charterers under the Third Parties (Rights against Insurers) Act 1930.

However, before commencing this action the shipowners had on 22 August 1986 started proceedings in the Commercial Court at Antwerp against all 77 of the insurers, claiming from each its proportion of the liabilities owed by the charterers. The insurers accepted the jurisdiction of the Belgian court, and some modest progress has been made in those proceedings. Nevertheless Mr. Pollock accepts, for the purpose of this appeal, that the existence of those proceedings can be disregarded. I must explain in outline how that important concession comes to be made. The shipowners contend that they were wrongfully deprived of information as to the terms of the contract of insurance, and indeed that they were positively misled by the insurers or their solicitors. There are heated complaints on that topic in the evidence before us. It is said that the shipowners were induced to start the

Belgian action for fear that their claim might become time barred there. Without any confession Mr. Pollock avoids the effect of that reproach. He is content that this appeal be decided on the basis that the shipowners did not deliberately choose to sue first in Antwerp. For practical purposes that means that ***217** we can ignore the present existence of the Belgian action, although we must bear in mind that the insurers are ready and willing to submit to the jurisdiction of the Antwerp court.

On 29 December 1986 the present writ was issued in England. It is said that the date is significant, because in two or three days the Civil Jurisdiction and Judgments Act 1982 came fully into force, which would or might have entailed that the Antwerp proceedings had priority as the first in time.

The English writ is against

"Commercial Union **Assurance** Co. Plc. and Alliance **Assurance** Co. Ltd. (sued on their own behalf and on behalf of all other liability insurers subscribing to the insurances of Cast **Shipping** Ltd.) Defendants" In the prayer to the points of claim it is said: "and the plaintiffs claim against the defendants and those whom they represent in the respective proportions due from them as subscribing underwriters" the various sums that I have mentioned, with other relief.

By two summonses dated 18 December 1987 the defendants applied (i) that the action be stayed pending the determination of the proceedings in Antwerp, or (ii) that the words of representation in the title to the action be struck out, leaving Commercial Union and Alliance as defendants for their own proportions of the risk only.

Those applications were heard by Gatehouse J. in the Commercial Court, and he gave judgment on 15 April 1988. Both applications were dismissed. The judge's preliminary view was that the contract or contracts of insurance was or were governed by English law, and that this brought into operation the Act of 1930. He considered that the dispute would be resolved more quickly and at less expense in England than in Belgium, and refused a stay on the shipowners' undertaking to take all necessary steps in their power to discontinue the Belgian proceedings. As to the representative character of the action, he attached importance to a leading underwriter clause in the contract(s) and thought that the action should continue as then constituted. From those two orders the defendants now appeal, by leave of the judge. The shipowners have not, in fact, as yet attempted to discontinue the Antwerp action. That is understandable, because this appeal has been lodged and they would then lose all remedy if it were wholly successful. However, the importance of undertakings given to the court must never be overlooked; they ought to have asked for a stay of their undertaking or a variation of its terms by reference to the fresh factor of the bringing of this appeal.

The issues

Both counsel agreed that it was convenient to consider first the application to strike out the representative character of the action. Only after it has been decided what the nature of the English action should be can we consider whether it should continue here. I shall follow that course, and consider the two main issues in that order. But before doing so I must set out further facts as to the making of the contract or ***218** contracts of insurance, and also give some preliminary consideration to the territorial application of the Third Parties (Rights against Insurers) Act 1930
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The contract(s) of insurance

The charterers in April 1978 instructed Gault, Armstrong & Kemble Ltd., English insurance brokers in London Wall, to procure liability insurance on their behalf. They in turn approached Leon Van Eessel S.P.R.L., a Belgium concern carrying on business in Antwerp. It is apparent that Van Eessel reached

agreement with nine underwriting agents in Antwerp and three individual insurance companies, as to the share in the insurance which each would take and possibly as to the terms also. We do not know whether that was done orally, or by telephone, or in writing.

Then on 15 April 1978 Van Eessel prepared and distributed a number of copies of a document which was called a cover note. It contained the terms of the proposed insurance, including the following:

On Charterers' liability (primary).

Conditions Subject to non-entered form CL. 345. NE (1/74) as attached. . . .

Additional

clauses This insurance is subject to: War risks P. & I. Clauses SP-22B (amended)

as attached (subject to 7 days notice), Priority and Leading Company Signature

Clauses as attached.

Security

30.00 per J Haenecour & Co.

cent. (please indicate your co-insurance)."

J. Haenecour & Co. S.A. were a Belgian concern, carrying on business in Antwerp where they had a binding authority to underwrite insurance on behalf of the nine members of their pool. They were the leading underwriting agents on this risk. The cover note went on to list other percentages, and other underwriting agents or insurance companies, who had agreed to take a share in the insurance.

Each underwriting agent or insurance company signed or initialled a copy of the cover note, after inserting, where appropriate, the names and proportions of the members of its pool. Thus it came about, if no earlier, that the 77 insurance companies each contracted for a share of the risk. It is agreed for the purposes of this appeal that the leading underwriter was Alliance Assurance Co. Ltd., being the first name in the pool of Haenecour, the leading underwriting agent. That may or may not have been known at the time to the other underwriting agents or insurance companies. Finally a master cover note was prepared, dated 15 April 1978 and addressed by Van Eessel to Gault, Armstrong & Kemble Ltd. It repeated the terms of the insurance, although some were different such as the rate of premium and the brokerage; it is not said that anything turns on that. It also contained a non-disclosure clause, which caused a good of deal trouble later; but that is said to have been a mistake. ***219**

Of the documents incorporated in the insurance terms, form CL 345 NE (1/74) is a London market form concerning charterers' liability insurance. I can find nothing in it to suggest affirmatively that it is designed to be construed by English law, rather than by the law of any other nation which is active in the realm of marine insurance. However, there is a reference to the

"United Kingdom Mutual Assurance Association (Bermuda) Ltd. standard form of Certificate for Charterers' Risks for Dry Cargo Vessels published and in effect at the inception of this insurance." There is not, we are told, any such document; the United Kingdom Mutual Assurance Association (Bermuda) Ltd. would accept an entry for charterers' risks on the terms of its rules, which are expressly governed by English law. Form SP.22B, also incorporated, is headed "American Hull Insurance Syndicate War Risk Protection & Indemnity Clauses." It is an American form. But again there is no affirmative indication that it is designed to be construed by the law of any jurisdiction in the United States of America. It refers to something called the "Second Seamen's form of policy." We do not know what that is.

Finally, and most significantly, there are the Priority and Leading Underwriter Signature Clauses (which I shall call the "leading underwriter clause"), as follows:

"All extensions, reductions or cancellation of risks or of conditions, all fixing of premiums, all settlements of claims or contestations whatsoever and in general all dispositions of whatsoever nature taken by the leading underwriter, will be binding upon all underwriters and carry with them the unanimous consent of all the underwriters of this contract.

"All co-insuring underwriters hereby expressly authorise the leading company to sign policies or endorsements for their account and hereby undertake to consider documents so signed as having been signed by themselves.

"The undersigned insurance companies declare themselves liable for their respective share for all decisions taken against the leading company." I have described the insurance arrangements for the year beginning 15 April 1978. Insurance on the same terms was concluded in 1979 and 1980.

The territorial scope of the Third Parties (Rights against Insurers) Act 1930

It is often said that United Kingdom statutes do not normally have extraterritorial effect. But when the court is faced with a civil dispute, involving one or more foreign elements, the problem may require closer analysis. Given a rule of United Kingdom statute law - or for that matter of English common law - which may have a bearing on the case, one has to enquire (i) what connecting factor is laid down by the rules of conflict of laws as applicable to the legal dispute before the court, ***220** and (ii) which country's system of law is relevant to the dispute by reason of that connecting factor: see Dicey & Morris, The Conflict of Laws, 11th ed. (1987), p. 29.

Some statutes themselves provide the answer to these questions. Thus section 72(1) of the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61) provides, amongst other things, that the validity of a bill as regards requisites in form is determined by the law of the place of issue. Section 27(2) of the Unfair Contract Terms Act 1977 provides that the Act shall have effect, in certain circumstances, notwithstanding a choice by the parties of some foreign system of law as the proper law of the contract. Section 153(5) of the Employment Protection (Consolidation) Act 1978 provides:

"For the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom, or of a part of the United Kingdom, or not." Those are rules of the conflict of laws, enacted by statute. Where, as in this case and most others, the statute in question lays down no rule as to the connecting factor for its application, the answer must be found in the common law rules of conflict of laws.

There is a considerable field of choice. A statute may apply as part of the law of the forum, so that (for example) it would affect the enforcement here of a contract made abroad by two foreigners. A statute prohibiting the payment of bribes might be an example. Or the statute may apply only to conduct taking place in this jurisdiction: a German moneylender who lent money in Hamburg might have been able to recover here notwithstanding a failure to comply with the Moneylenders Acts, such as failure to obtain a certificate from the petty sessional court where his business was carried on. Again a statute may apply as part of the proper law of a contract: to take a simple example, I suppose that this would be the case with section 61 of the Law of Property Act 1925 , which laid down interpretation provisions such as a month meaning a calendar month. There are many other potential connecting factors. A further complication arises: just because two rules of law are enacted in the same statute, it does not follow that the same

connecting factor applies in each case. One cannot assume that the territorial application of the statute is wholly governed by the same test; one must examine separately each rule of law which it enacts.

The rival contentions in the present case are these. Mr. Gilman for the shipowners submits that section 1(1) of the Act of 1930, which effects a compulsory transfer to the injured third party of the insured's rights against his insurer, is applicable either (a) where the bankruptcy or winding-up order against the insured is an English order, or (b) where the proper law of the insurance contract is English law. Mr. Pollock, for the insurers, argues that the Act applies where the situs of the insurer's obligation is in England.

It is not necessary for this court to reach a final conclusion on the point at the present stage, and for my part I would refrain from doing so. However, I do consider that we should look at the arguments in ***221** outline, to see what plausible solutions there may be. Gatehouse J. apparently favoured the proper law of the contract as the appropriate connecting factor. He said:

"My prima facie view is in favour of Mr. Gilman's argument that English law governs the policies. If it does, the [shipowners] have title to sue by virtue of the Act of 1930 and from no other source, assuming that the Act of 1930 applies to foreign insurers. If Belgian law governs the policies, it has not yet been tested in the English courts whether the Act applies." The problem is considered in *Dicey & Morris, The Conflict of Laws*, 11th ed., pp. 1399-1400, where the proper law of the insurance contract is the preferred solution. However, the alternative considered is the choice-of-law rule in cases of tort, which is of no assistance where the third party's claim (as here) is based not on tort but on contract. We were not asked to consider the Australian cases referred to in Dicey & Morris, The Conflict of Laws, p. 1400.

In favour of the lex situs there is a dictum of Jenkins and Romer L.JJ. from In re United Railways of the Havana and Regla Warehouses Ltd. [1960] Ch. 52, 87:

"Mr. Megaw contended that if, as Arab Bank Ltd. v. Barclays Bank (Dominion, Colonial and Overseas) [1954] A.C. 495 and other cases show, the lex situs is regarded by our courts as decisive when, under that law, the rights of a creditor are compulsorily transferred to another, the same result should follow where one debtor is compulsorily substituted for another." The Lords Justices were evidently, in my view, accepting Mr. Megaw's premise although they rejected his conclusion. The point did not arise in the House of Lords.

I do not presently find any significant assistance in the other statutes cited by Mr. Gilman - the Merchant Shipping (Oil Pollution) Act 1971, the Road Traffic Act 1988 and the Marine and Aviation Insurance (War Risks) Act 1952.

There is, as it seems to me, a substantial argument against the proper law of the contract being the connecting factor. The Act contains provision in section 1(3) designed to override the contract of the parties. (There is another such provision in section 2(1), but as I have already said it is not necessarily right that the same connecting factor must apply to all the rules of law enacted in one statute.) The intention of Parliament could be frustrated if it were open to the parties to a contract of insurance to exclude the operation of section 1 by choosing a foreign proper law. But there is a limit to the importance of that point: for many if not most of life's activities insurance is not compulsory in the first place; and in such cases Parliament only provided that, if in fact there was insurance, it should be transferred to the injured third party.

It is fairly arguable that the lex situs gov-

erns the transfer of an obligation under section 1 of the Act, or the proper law of the contract (despite what I have just said), or the law governing the bankruptcy or liquidation. It is not necessary to say more for the purposes of this appeal. ***222**

The representative nature of the action

R.S.C., Ord. 15, r. 12(1) provides:

"Where numerous persons have the same interest in any proceedings . . . the proceedings may be begun, and, unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them." It is to be noticed that Ord. 15, r. 4 enables two or more persons to be joined in one action as plaintiffs or defendants where, if separate actions were brought, some common question of law or fact would arise in all the actions, and the rights to relief claimed all arose out of the same transaction or series of transactions. I do not doubt that all the insurers could, by virtue of that rule, have been joined in one action. It would have been necessary, in the case of those which cannot be served here, to obtain leave to serve them out of the jurisdiction under Order 11 . Mr. Pollock accepts that leave could have been obtained under Ord. 11, r. 1(1)(c) (necessary or proper party), subject always to the discretion of the court. So the practical question is whether it is necessary for the shipowners to go to the enormous labour and expense of joining all the insurers in one English action, or whether they may take advantage of the simplified procedure afforded by Ord. 15, r. 12 . This is not a case where the membership of the class represented is unknown, nor even where judgment may be given against a member without his having any opportunity to know of the action. It may well be true in practice that the others of the insurers will not know of the English action, if Commercial Union and Alliance choose not to tell them and they do not ask. But there is an organised channel by which they could obtain information - and stipulate for it - if they thought it necessary.

Mr. Pollock puts forward two grounds upon which he submits that the English action is not within the rule. Both turn on the meaning of the words "have the same interest in any proceedings." First it is submitted that a case can never be within the rule where damages or debt are claimed against all the defendants severally. Here the claim is against each of the insurers for its proportion of the loss, and none is liable for the proportion of any other. As it happens the sums claimed are different; but the argument would be the same if all the proportions were the same and an identical sum were claimed from each. For that reason, it is said, the insurers do not have "the same interest" in the action. That construction of the rule would exclude all cases where insurers are sued as defendants to a claim on one policy, although they could still claim as plaintiffs in a representative action for premium due to all of them jointly: see Janson v. Property Insurance Co. Ltd. (1913) 19 Com.Cas. 36 .

Mr. Pollock's second ground looks at the actual issues likely to arise in an action. If these are different in the case of the representatives and the represented, he submits that there should not be representative proceedings. That approach requires an analysis of what the issues are likely to be in this dispute. It is theoretically possible that any one of the 77 insurers may say that the cover note was subscribed without his authority, or that his percentage was not that written down, or that he ***223** and the other members of his pool were the victims of misrepresentation or non-disclosure. But there is presently no sign whatever of any such contention. If one did arise, I imagine that it could be dealt with under Ord. 15, r. 12(5) , which enables any member of the class to

"dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability." It is true that the sub-rule does not in express terms per-

mit the judgment to be set aside as against such a person; it may be that the court would have inherent power to take that course if it were appropriate.

Disregarding theoretical possibilities, I turn to what are likely in practice to be the issues in the English action. They are in my view the following: (1) What is the connecting factor between section 1 of the Third Parties (Rights Against Insurers) Act 1930 and a given contract of insurance? Is it the situs of the insurers' obligation, or the proper law of the contract, or the law governing the bankruptcy or winding up? (2) What is or are the situs of the insurers' obligations in this case? (3) What is the proper law of the insurance contracts(s)? (I leave out of account the possibility that there may be different proper laws; that seems to me so remote as to be negligible.) (4) If the shipowners have title to sue, do the insurers have a defence, for example on the ground that the charterers failed to defend the claims made in the arbitration? Or do the provisions as to deductibles in the insurance contract(s) have an impact on the shipowners' claim?

There will not, so far as I can detect, be any inconsistency between the case of the representatives and the represented on any of those issues; there will be no conflict of interest. But there may well be an area where the case of the foreign insurers goes further than that of the English insurers. Suppose that, upon issue (1), it is decided (as the insurers contend) that situs is the connecting factor. All the insurers will first argue that none of their obligations is situate in England, but rather in Antwerp. If they fail on that point, and the obligations of the English insurers are held to be situate in England, the foreign insurers will then argue that their obligations are situate somewhere else. The shipowners will counter that argument by saying that there can only be one situs for all the insurers' obligations, which by virtue of the leading underwriter clause must be that applicable to the obligation of the leading underwriter. During that particular aspect of the battle the English insurers, including the two representative defendants, will wish to stand on the side-line, so to speak.

There may well be cases where it would be undesirable to leave part of the argument in the hands of a representative, when the representative is not personally concerned in that aspect of the case. But I would not have any qualms about such a procedure in this instance, if the law allows it. In practice, I doubt if it will be disputed that the situs of the obligation of any individual foreign insurer would, apart from the terms of the contract, be overseas. The question will be whether the leading underwriter clause leads to the conclusion that it is here in England. ***224** The legal advisers of Commercial Union and Alliance are no doubt capable of arguing that point; and I am confident that the foreign insurers would trust them to argue it. If I am wrong about that, one or more of the foreign insurers can apply to be joined as defendants. The question is whether the law permits a representative action in such circumstances. On that the authorities are said to be in conflict, and indeed Mr. Pollock submits that there are inconsistent decisions of this court which we have to choose between.

We were referred to no less than 13 cases, including two which reached the House of Lords. Those are Duke of Bedford v. Ellis [1901] A.C. 1 and Taff Vale Railway Co. v. Amalgamated Society of Railway Servants [1901] A.C. 426 . The strongest authority for the insurers is the judgment of Fletcher Moulton L.J. in Markt & Co. Ltd. v. Knight Steamship Co. Ltd. [1910] 2 K.B. 1021 . There a number of shippers had shipped goods on board the defendants' ship, and the goods were lost in the same casualty. It was held that a representative action could not be brought on behalf of all the shippers as plaintiffs. Fletcher Moulton L.J. said, at p. 1035:

"But there is another objection which to my mind is absolutely fatal. I will take for the

purpose of this part of my judgment that which I consider to be the most authoritative statement as to the cases in which representative actions can be brought, i.e., the statement of Lord Macnaghten in the case of Duke of Bedford v. Ellis. It is as follows: 'Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.' These words shew that where the claim of the plaintiff is for damages the machinery of a representative suit is absolutely inapplicable. The relief that he is seeking is a personal relief, applicable to him alone, and does not benefit in any way the class for whom he purports to be bringing the action." As I read the judgment of Vaughan Williams L.J., it did not go as far as that passage. He said, at pp. 1029-1030:

"there is no common origin of the claims of those who shipped goods on board the *Knight Commander* - the contracts were constituted by the bills of lading, which manifestly might differ much in their form . . . These shippers no doubt have a common wrong in that their goods were lost by the sinking of the *Knight Commander* by the Russian warship; but I see no common right, or common purpose, in the case of these shippers who are not alleged to have shipped to the same destinations." Buckley L.J. took a third view; he held that the writ could be amended so as to be valid.

The observations of Fletcher Moulton L.J. were recorded in successive editions of the *Annual Practice* under Ord. 16, r. 9 with some prominence; they are still in *The Supreme Court Practice* under Ord. 15, r. 12, although now submerged (as tends to happen) in a mass of other material.
***225**

The Markt case was considered by Vinelott J. in Prudential Assurance Co. Ltd. v. Newman Industries Ltd. [1981] Ch. 229 . There a claim for a declaration was made in a representative action brought by one shareholder on behalf of itself and all other shareholders except two. The judge said, at pp. 254-255:

"In summary, in my judgment, it is clear on authority and principle that a representative action can be brought by a plaintiff, suing on behalf of himself and all other members of a class, each member of which, including the plaintiff, is alleged to have a separate cause of action in tort, provided that three conditions are satisfied. The first I have already stated. No order can properly be made in such a representative action if the effect might in any circumstances be to confer a right of action on a member of the class represented who would not otherwise have been able to assert such a right in separate proceedings, or to bar a defence which might otherwise have been available to the defendant in such a separate action. Normally, therefore, if not invariably the only relief that will be capable of being obtained by the plaintiff in his representative capacity will be declaratory relief, though, of course, he may join with it a personal claim for damages. . . . The second condition is that there must be an 'interest' shared by all members of the class. In relation to a representative action in which it is claimed that every member of the class has a separate cause of action in tort, this condition requires, as I see it, that there must be a common ingredient in the cause of action of each member of the class. In the present case that requirement is clearly satisfied. It was not satisfied in the Markt case [1910] 2 K.B. 1021 or in Lord Aberconway v. Whetnall, 87 L.J. Ch. 524 . The third and related condition is that the court must be satisfied that it is for the benefit of this class that the plaintiff be permitted to sue in a representative capacity. The court must, therefore, be satisfied that the issues common to every member of the class will be decided after full discovery and in the light of all the evidence capable of being adduced in favour of the claim. For unless this condition is satis-

fied it would be wrong - as Fletcher Moulton L.J. remarked in the Markt case [1910] 2 K.B. 1021, 1040 - to permit this representative plaintiff 'to conduct litigation on behalf of another without his leave, and yet so as to bind him.'"

In Roche v. Sherrington [1982] 1 W.L.R. 599 Slade J. held that a representative action against all the members of Opus Dei, worldwide, was not properly constituted. His reason was that separate defences might be open to some members of the class. Indeed it was highly probable that a large number would wish to take separate defences, and the judge evidently took the view, at p. 610, that in those circumstances "there can be no common interest within the rule."

Next I turn to some of the cases relied on by the shipowners. In Wood v. McCarthy [1893] 1 Q.B. 775 a member of the Amalgamated Stevedores' Labour Protection League claimed to recover 6d. from each of the 4000 members of the league in a representative action, he having ***226** been incapacitated by an accident. The Divisional Court upheld the proceedings, although it is true to say that the relief claimed appears to have been mandamus, and not a monetary remedy. I would echo what Wills J. said, at p. 777:

"The action is brought to enforce a contractual obligation, and the courts exist for the purpose of controlling a disposition, which is frequently met with, to endeavour to escape from liability."

In Taff Vale Railway Co. v. Amalgamated Society of Railway Servants [1901] A.C. 426, itself Lord Lindley said, at p. 443:

"The principle upon which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires. . . . I have myself no doubt whatever that if the trade union could not be sued in this case in its registered name, some of its members (namely, its executive committee) could be sued on behalf of themselves and the other members of the society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed." So too in John v. Rees [1970] Ch. 345, 370E, Megarry J. said: "the rule is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice." In Moon v. Atherton [1972] 2 Q.B. 435 the tenants of a block of flats sued an architect for damages for negligence in supervising its construction. Chapman J. held that this was a misconceived representative action, but it was admitted in the Court of Appeal that this point had been waived. However, Lord Denning M.R. added, at p. 442, ". . . I must say that I think it was perfectly proper to have this as a representative action for these tenants." That was quite contrary to what Fletcher Moulton L.J. had said in Markt & Co. Ltd. v. Knight Steamship Ltd. [1910] 2 K.B. 1021; thus is the law reformed.

In E.M.I. Records Ltd. v. Riley [1981] 1 W.L.R. 923 the plaintiffs sued on their own behalf and on behalf of all members of British Phonographic Industry Ltd. for an injunction and damages for infringement of copyright. The defendant conducted her own case. Dillon J. held, distinguishing Prudential Assurance Co. Ltd. v. Newman Industries Ltd. [1981] Ch. 229, that damages could be recovered in a representative action.

Finally in Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd., [1989] 1 Lloyd's Rep. 568, 570, 571, the members of a reinsurance syndicate by a representative plaintiff sued their own excess of loss reinsurer. Lloyd L.J. said:

"The rule was authoritatively expounded . . . in the House of Lords in Duke of Bedford v. Ellis [1901] A.C. 1 as requiring three conditions to be fulfilled. First,

the parties must have the same interest in the proceedings; secondly, they must have a common grievance; thirdly, the relief sought must be beneficial to all." And: ***227**

"That PARCO and the members of the syndicate have suffered a common wrong by reason of Pine Top's failure to pay is manifest. But they have not only suffered a common wrong; they also enjoy a common right."

In that state of the authorities it is not, in my judgment, the law that claims for debt or damages are automatically to be excluded from a representative action, merely because they are made by numerous plaintiffs severally or resisted by numerous defendants severally. The rule is more flexible than that. So I reject Mr. Pollock's first argument.

As to his second, there is (as I have already said) a dispute as to whether there was one contract of insurance or many in this case; and that may well have seemed to Lloyd L.J. to be a point of significance in the Pan Atlantic case. But for my part I would doubt whether the precise form of the contractual arrangements can be determinative. Section 24(2) of the Marine Insurance Act 1906 provides:

"Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured." Thus Hobhouse J. in General Accident Fire and Life Assurance Corporation v. Tanter (The Zephyr) [1984] 1 Lloyd's Rep. 58, 72 described the slip as "a document which purports to be a composite bundle of contracts." and Saville J. in Bank Leumi le Israel B.M. v. British National Insurance Co. Ltd. [1988] 1 Lloyd's Rep. 71, 77, said "each subscribing underwriter makes a separate contract for himself (or for those he represents)."

I see no reason to disagree with that analysis. So there were here 12 contracts, one by each of the underwriting agents and the insurance companies which signed on their own. But all 12 were on identical terms, save for the individual proportions of the risk. and to my mind the leading underwriter clause can be taken to provide that, at least for some purposes, they are to be considered as one contract. If there were a defence of misrepresentation, and perhaps also non-disclosure, it might be argued that an individual contract could be avoided; and in that event the leading underwriter clause would go with it. So too if there were a defence of lack of authority to sign. But no such issue appears likely to arise in this case.

For all practical purposes this is one claim upon one contract, which the shipowners have an interest in pursuing and the insurers all have the same interest in resisting, subject only to one point. Some of the insurers may, in certain circumstances, wish to resist the claim on a ground that is not available to others: this is that their obligation is not situate here, and that the leading underwriter clause does not have the effect that the obligations of all must be taken to be situate in the same place as that of the leading underwriter. I do not regard that circumstance as showing that all the insurers do not have "the same interest" in the English action, or that it is not within the rule; all defend because they say that the benefit of their obligation has not been transferred to the shipowners, and the foreign insurers merely have, or may have, an ***228** additional ground for arguing that defence. As I have said, I have no qualms about a proceeding which allows that ground to be argued on their behalf by others, if they do not wish to join in the action.

A separate point was argued by Mr. Pollock, that a representative action should not be permitted so as to allow a plaintiff to by-pass Order 11, where some of the class could not be served here as defendants. We were told that this point appears not to have been taken before.

Ord. 15, r. 12 contains no requirement that the members of a class represented by a defendant

should all be capable of being served within the jurisdiction. Furthermore it confers a discretion, by the words "unless the court otherwise orders," to discontinue the representative aspect of the action. and there is always a discretion to hold that some other forum is more appropriate. So I do not consider that a representative action is necessarily inappropriate where some of the class represented by a defendant cannot be served here. As to discretion, that is considered below.

It seems to me in general desirable that many insurance companies or underwriters on one risk should be capable of suing or being sued by a representative action. Time was when they would all readily agree to be bound by an action against one of their number for his proportion only, as appears from many cases in our books. Now that is apparently less common, and representative actions are brought both by and against insurers; see for example Balfour v. Beaumont [1982] 2 Lloyd's Rep. 493 . The law should allow that practice to continue in appropriate cases. I would dismiss the appeal in respect of the representative character of the action.

Whilst preparing this judgment I have come across the decision of Jones J. in the Supreme Court of Hong Kong in CBS/Sony Hong Kong Ltd. v. Television Broadcasts Ltd. [1987] F.S.R. 262 , by courtesy of the supplement to *The Supreme Court Practice 1988* . A different conclusion was there reached from E.M.I. Records Ltd. v. Riley [1981] 1 W.L.R. 923 in this country.

The appropriate forum

Since Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460 there can be no doubt as to the test to be applied in general. Lord Goff of Chieveley said, at p. 476:

"The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice." To that must be added, from p. 477E that the other available forum must be "clearly or distinctly" more appropriate.

It was not argued that any qualification of the test may be necessary where, as in the present case, a representative action is brought and some members of the defendant class are foreigners outside the ***229** jurisdiction. The action is then somewhat akin to proceedings under Order 11, when the burden is on the plaintiff to show that England is the appropriate forum rather than on the defendant to show that it is not. I am prepared to assume in favour of the insurers that in this case the burden is neutral, favouring neither the insurers nor the shipowners, or at any rate that the foreign character of some of the insurers is a factor to be taken into account.

Gatehouse J. attached importance to the proper law of the insurance contracts; his prima facie view was in favour of English law. For my part I do not wish to express any opinion on that issue; there are powerful arguments either way. Whether the answer be English law or Belgian law, I do not think that the difference ought to have a major influence on the choice of forum in this particular case. Nor was it argued that the convenience of witnesses is likely to be of importance. Mr. Pollock suggested that there would be evidence of market practice as to the effect of the leading underwriter clause. My present view is that such evidence is unlikely to be relevant, or admissible, or compelling if it is admitted.

As Lord Templeman said in the Spiliada case, at p. 465:

"Any dispute over the appropriate forum is complicated by the fact that each party is seeking an advantage and may be influenced by considerations which are not apparent to the judge or considera-

tions which are not relevant for his purpose." If one asks what those considerations are in this case, there is in my opinion one which is likely to be predominant. This is the possible difference between the English and Belgian rules of conflict of laws. The shipowners may consider that the English rules are likely to have the result that the English Third Parties (Rights Against Insurers) Act 1930 is applicable to this case, whilst the Belgian rules are not likely to have that result. Mr. Donithorn 2 in paragraph 12(i) of his first affidavit refers to the advice of a Belgian lawyer that

"if the matters were to proceed in Belgium, there could be no arguable basis, applying Belgian conflict of laws principles, for making any reference to any foreign system of law."

If that is right, and if the English rules of conflict of laws may lead to the application of the English statute, the shipowners have a motive for proceeding here, and the insurers would prefer a trial in Belgium.

In an ideal world there would be no difference between the conflict rules applied by all nations. A measure of harmonisation has already been undertaken in the E.E.C. Convention on the Law Applicable to Contractual Obligations . But unfortunately uniformity is far from achieved. It is by no means improbable that the Belgian and English conflict rules differ in their application to this case. In those circumstances, it seems to me fairly arguable that a plaintiff is entitled to claim the benefit of the conflict rules prevailing here. So far as concerns domestic law, it would be wrong for us to suppose that our system is better than ***230** any other. But in the case of conflict rules, which ought to be but are not the same internationally, there is a case for saying that we should regard our rules as the most appropriate.

However that may be, in the end I see no reason to depart from the conclusion which Gatehouse J. reached on this issue, for the reasons so clearly explained in the judgment which Sir John Megaw is about to deliver. Accordingly, I would also dismiss the appeal against the judge's refusal to stay the action in favour of the Belgian proceedings.

SIR JOHN MEGAW.

The first issue, as formulated on behalf of the insurers, Commercial Union and Alliance, is whether they have properly been sued in a representative capacity.

For the decision of that issue, it must be, provisionally, assumed that the English court is the proper forum. Otherwise, this question as to English procedural law cannot arise. On the other hand, it is not necessary to make any assumption as to whether or not the Third Parties (Rights against Insurers) Act 1930 applies to the contract, or contracts, with which we are concerned. For the decision of this first issue, it is proper to consider the legal position as it would be if the original assured party, the charterers, were the plaintiff in the English proceedings, claiming in its own right.

In considering this first issue, I propose also to assume, as the insurers contend, that there are here 77 separate contracts of insurance. The charterers, the assured, are a party to each of them. Each of them is made with an individual insurer. It may be described as "a bundle of contracts;" but it is not a single contract, or policy, of insurance with the assured on one side and 77 joint contractors on the other side. The concept of their being one single contract, whatever its attractions may be in business common sense, would appear to be inconsistent with the provisions of the Marine Insurance Act 1906 , which would be applicable if English law is the relevant proper law: see the judgment of Hobhouse J. in The Zephyr [1984] 1 Lloyd's Rep. 58 .

If there were here 77 separate contracts of insurance, with different insurance companies incorporated in a variety of different countries, and if

there were no legal constraint on the individual insurers, preventing them from following each his own chosen path in any dispute which might arise with the assured, the result, however tidy it might appear as a matter of legal theory, would seem to be potentially anarchic from the practical business point of view - certainly from the point of view of the assured, who would naturally regard himself as being the party to one single policy of insurance, not to 77 contracts. There are many paths which unconstrained and independent-minded insurance companies of varying nationalities might be disposed to tread; involving, conceivably, varying views and contentions as to the proper forum, the proper law, the situs of liability under its particular contract, the construction of the contractual terms, or question of fact affecting the existence or the quantum of liability. If only 10 per cent. of the separate contracting insurers saw fit to follow independent paths, the resulting situation ***231** would be, to put it at the lowest, seriously unsatisfactory both from the viewpoint of the international insurance market, and of the assured and of the non-diverging insurers.

In order to avoid such potential anarchy, a leading underwriter clause is commonly introduced. Its purpose is to impose a contractual restraint, binding each insurer as a result of his agreement, vis-à-vis the other insurers and vis-à-vis the assured, against, among other things, the taking of separate defences, or the assertion of separate claims, by individual insurers.

The terms of the leading underwriter clause here relevant are set out in Staughton L.J.'s judgment. It is hard to imagine a more comprehensive assertion of a contractual obligation, undertaken by each individual insurer, that he will accept, follow and be bound by decisions, including the settlement of claims or "contestations" (which I take to mean the rejection of claims in whole or in part) by the leading underwriter; and to accept liability for its proportionate share of "all decisions taken against the leading company" (which I take to mean, or to include, judicial decisions).

In the light of the inclusion of that clause in each of the 77 contracts of insurance (assuming them to be separate contracts), when an action is properly brought against the leading underwriter in an English Court, does R.S.C., Ord. 15, r. 12(1) entitle the assured to sue the named defendants who include the leading underwriter, in a representative capacity?

There is no doubt that there are here "numerous persons," so as to satisfy the first requirement of the rule. The only question is whether those "numerous persons" have "the same interest" in the proceedings as the two named defendants. I am unable to see how that requirement is not satisfied where, as here, each of the insurers has expressly agreed with the assured in the terms of the leading underwriter clause. The acceptance by all concerned of that clause as a term of each of the contracts provides a vital distinction from the decision in Markt & Co. Ltd. v. Knight Steamship Co. Ltd. [1910] 2 K.B. 1021 . It is true that in some cases there have been dicta which suggest that a representative action may not be used to found a money judgment against the persons represented. On the other hand, there are dicta, such as that of Megarry J. in John v. Rees [1970] Ch. 345 , 370 to the effect that the representative action rule is to be treated as a "flexible tool of convenience in the administration of justice." In this context, I refer also to the judgment of Lloyd L.J. in Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd. [1989] 1 Lloyd's Rep. 568 .

There may well be cases in which it would not be appropriate to allow the use of the representative action procedure where there are disputes as to the quantum of liability, if liability is established, of persons who come into the action by representation. In such a case, the discretion allowed by the rule enables the court to forbid the continuance of the representative action. But in the present case, where there is no suggestion of any argument as to

what are the respective proportionate shares, and where each of the insurers has expressly agreed to accept liability for its respective share "for all decisions taken against the ***232** leading company" there appears to be no good reason, even by way of technicality, why the court should hold itself to be precluded from giving effect, by way of judgments, to the various insurers' agreements to accept liability for their respective shares.

It has been suggested for the defendants that injustice might be caused by the application of the rule, since one or more of the insurers might wish to contend that it had no valid or binding contract with the assured because, for example, it had not given authority to an agent who had purported to contract on its behalf, or there had been fraud or misrepresentation inducing the making of the contract. There is no suggestion that in fact any such contention exists in the present case. But if it were to exist, there is ample protection in Ord. 15, r. 12 against the risk that a judgment could be enforced against an insurer who was not liable, without its having been given a proper opportunity to have its objection heard. There is no need to consider in this appeal what, if any, may be the legal obligations of the leading underwriter vis-à-vis those whom it leads in respect of proceedings by or against it as leading underwriter; but it is hard to believe that all the other insurers on the self-same risk would not in fact be made aware of the proceedings; or that they would not be aware, at least if they were interested in the matter, as to who was the leading underwriter for the purpose of the clause in their contracts.

In my opinion, the first issue falls to be decided in favour of the plaintiff shipowners. If the action has been properly brought in the English court, and should not be stayed, the representative action, as constituted, should be allowed to proceed.

The second issue concerns the application of the named defendants for a stay of the action on the ground that the Belgian court is the proper court; the forum conveniens, to use the Latin phrase. Gatehouse J. decided that issue also in favour of the shipowners.

I should say in parenthesis that for this issue also the parties accept that it is not necessary, and hence it is not desirable, that there should be decisions by this court as to the proper law of the contracts or as to whether the Third Parties (Rights against Insurers) Act 1930 applies.

It would seem that before the judge the main thrust of the argument for the defendants on this issue was the existence of the action instituted by the shipowners in Belgium before they began their action in England: lis alibi pendens. It is, however, now conceded on behalf of the defendants that no more than "little weight" can be placed by them on this factor. In view of the regrettable circumstances surrounding the prolonged reliance by the defendants on a non-existent "confidentiality" clause in the contracts of insurance, it would be patently unjust that the defendants should be able to claim any support for their submissions from the fact that the shipowners instituted the proceedings in Belgium. For the defendants' concession of "little weight," I would substitute "no weight." Nevertheless, in the court below, the defendants did rely on this contention. Not only did they rely on it, but, as the judge says, it was "the principal argument" on this issue. That must be a highly relevant matter in this appeal. ***233**

It is, no doubt, because that was the principal argument put forward on behalf of the defendants, that the judge, rightly rejecting it, did not find it necessary to go more fully into the other arguments which, before him, were subsidiary arguments. We are told by counsel for the shipowners that, with the exception of one point, all the points taken before this court on the appeal were taken before the judge. Leading counsel for the defendants, who did not appear in the court below, tells us that in the recollection of his junior even that point was taken in the court below, though not with as much emphasis as in this court.

In these circumstances, I see no reason to suppose that Gatehouse J. failed to have in mind the principles laid down by Lord Goff of Chieveley in his speech in Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460 , 474-478. I see no reason to believe that the judge took into account any irrelevant factor or failed to take into account any relevant factor. In the circumstances which I have mentioned, the absence of specific reference by the judge to various factors does not give rise to the fair inference that, though they had been put before him in argument, he forgot or ignored them. I see no reason to regard the judge's decision as plainly wrong. Whether I should have reached the same decision myself on the arguments which we have heard on the issue is not relevant.

This, in my opinion, is essentially a case in which effect must be given by this court to the forceful words used by Lord Templeman in the Spiliada case [1987] A.C. 460 , 465:

"In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is an affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of . . . Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere." It would seem to me that that must be particularly so where that which was the principal argument in the court of first instance in favour of the foreign jurisdiction is thereafter, in the appeal to this court, accepted as being of little weight, and is indeed, in my view, of no weight.

I agree that the appeal should be dismissed.

PURCHAS L.J.

This appeal raises two quite separate points of importance in the marine insurance world. The historical and commercial background has been fully set out in the judgment of Staughton L.J. whose exposition I gratefully adopt as well as the shortened titles which he has used. The shipowners, who under the terms of the charterparty have been obliged to meet claims by the receivers of cargo, were frustrated in exercising their contractual rights over against the charterers by the supervening insolvency of the charterers resulting in the ***234** appointment of liquidators in Bermuda. The shipowners now wish to claim against insurers with whom the charterers had effected cover, inter alia, for their liability to the shipowners in respect of such claims.

The shipowners started proceedings in August 1986 in the Commercial Court in Antwerp against all 77 of the assembled insurers who had underwritten the charterers' policy covering the liabilities involved, and they have also issued a writ against two of the main members of the group, namely the Commercial Union Assurance Co. Plc. and the Alliance Assurance Co., in the High Court of Justice in England. They have sued the Commercial Union and Alliance both on their own behalf and as representatives of all the other insurers involved under the provisions of R.S.C., Ord. 15, r. 12 . The first issue to be decided on this appeal relates to the suing of these two insurance companies as representatives of the group which has led to a summons to strike out that part of the writ showing the companies being sued as representatives of the group. The second issue arises, as has already been described by Staughton L.J., out of the duplication of proceedings resulting from the actions brought by the shipowners both in the Commercial Court in Antwerp and in the High Court in this country; this has led to a summons to strike out or to stay the action brought in the United Kingdom.

The representation issue

By common consent between the parties this issue was argued first. It involved considering the position as between the two named companies and the other insurers involved in the context of the provisions of Ord. 15, r. 12 which, for the sake of convenience of reference, I set out here again:

"(1) Where numerous persons having the same interest in any proceedings . . . the proceedings may be begun, and, unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them. . . . (3) A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom . . . the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the court. (4) An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order. (5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability. . . ."

The appeal raised a central issue as to the correct approach to be adopted by the court to the words "having the same interest in any proceedings." This phrase, simple to state, has, however, given rise to a good deal of authority and dispute as to whether it should be construed ***235** in a broad or narrow sense. Bearing in mind that the operation of Ord. 15, r. 12 takes place at an early stage in the development of proceedings, should the court have in contemplation all possible, even hypothetical, circumstances when considering whether the proposed class of defendants or plaintiffs fulfils the criterion of having the same interest, or should the court approach the problem in a more pragmatic manner? How are a conglomerate of different insurers having separate insurance contracts with the assured (see section 24(2) of the Marine Insurance Act 1906 and the judgment of Hobhouse J. in The Zephyr [1984] 1 Lloyd's Rep. 58 , 66) to be viewed in the context of insurance cover being afforded to an assured? Mr. Pollock argued forcibly to the effect that a group of insurers could not have a common interest when they were based, domiciled or resident in jurisdictions spread about the world each assuming a small or comparatively small percentage of liability directly to the assured, but having no contractual obligation, inter se. It is not impossible to envisage that some may have their own particular defences, rights of set-off or rights to repudiate liability, e.g. for non-disclosure, while others may have rights against the assured which are individual to themselves, such as money paid under a mistake of fact or premiums overdue, and so on; the catalogue of conceivable differences is a long one. In the Lloyd's insurance market, where situations of this kind must frequently arise between the names and the assured, matters are solved by the leading underwriter agreements or agreements under which the group of insurers or names agree to make available "a stalking horse" in the form of a leading underwriter or nominee for the purposes of litigation. But the circumstances of this contract are distinguishable as appears from the judgment of Staughton L.J.

Had there not been a particular provision which ordinary commercial convenience must have demanded should be included, the problem would be even more difficult than it is. This has been referred to as the leading underwriter clause. Its full terms have already been set out by Staughton L.J. and need not be repeated here. The genesis of Ord. 15, r. 12 in the old Chancery practice is ably described in the judgment of Vinelott J. in Prudential Assurance Co. Ltd. v. Newman Industries Ltd. [1981] Ch. 229 .

The operation of the practice can be seen in the judgment of Lord Eldon L.C. in Adair v. New River Co. (1805) 11 Ves. 429 , 444-445:

"There is one class of cases, very important upon this subject: viz. where a person, having at law a general right to demand service from the individuals of a large district, to his mill, for instance, may sue thus in equity. His demand is upon every individual, not to grind corn for their own subsistence except at his mill. To bring actions against every individual for subtracting that service is regarded as perfectly impracticable. Therefore a bill is filed to establish that right; and it is not necessary to bring all the individuals: why? Not, that it is inexpedient, but, that it is impracticable, to bring them all. The court therefore has required so many, that it can be justly said, they will fairly and honestly try the legal right between themselves, all other persons interested, and the plaintiff; and, when the legal right is so established at law, the ***236** remedy in equity is very simple: merely a bill; stating, that the right has been established in such a proceeding; and upon that ground a Court of Equity will give the plaintiff relief against the defendants in the second suit, only represented by those in the first. I feel a strong inclination that a decree of the same nature may be made in this case." and in Cockburn v. Thompson (1809) 16 Ves. 321 , 325-326 Lord Eldon L.C. repeated the rule:

"The strict rule is, that all persons, materially interested in the subject of the suit, however numerous, ought to be parties; that there may be a complete decree between all parties, having material interests: but that, being a general rule, established for the convenient administration of justice, must not be adhered to in cases, to which consistently with practical convenience it is incapable of application. . . . The same principle in a great variety of cases has obliged the court to dispense with the general rule as to persons, out of its jurisdiction; and there are many instances of justice administered in this court in the absence of those, without whose presence, as parties, if they were within the jurisdiction, it would not be administered; as it obviously cannot be so completely, as if all persons interested were parties: but the court does what it can." And, at p. 329:

"The principle being founded in convenience, a departure from it has been said to be justifiable, where necessary; and in all these cases the court has not hesitated to depart from it, with the view by original and subsequent arrangement to do all, that can be done for the purposes of justice; rather than hold, that no justice shall subsist among persons, who may have entered into these contracts."

It was considered on demurrer in Bromley v. Williams (1863) 32 Beav. 177 . This involved an action by one of the members of a marine insurance club called "The St. Ives Shipping Insurance Club." The demurrer arose from a plea made on behalf of the club sued by one of their members whose ship had been lost at sea and who sued seven named members and the treasurer and secretary of the club. In the judgment of Sir John Romilly M.R. the demurrer is described in these terms, at p. 187:

"The second objection is, that the defendants (other than the treasurer and secretary) are not the persons to be sued. It is true they are members of the association and they have agreed among themselves to contribute to the losses; but it is said, that by the rules the association is to be governed by the finance committee, which is to carry on the whole business of the concern. The bill however alleges, that no finance committee has ever been appointed, and that, consequently, there is no body of management, and that being so, it is impossible to have any remedy against the association, except by suing the individual members." ***237**

The Master of the Rolls, however, dismissed the demurrer, at p. 188:

"The object of the defendants in raising this objec-

tion is, no doubt, by a side-wind, to avoid contesting the question of merits; but if I allowed it, the necessary effect would be, that it would depend upon the honor of the treasurer whether he put the money in his pocket or not. But I think that the other members might object and say, that he was bound to account and that they were entitled to have the funds of this association set apart and duly administered, according to the terms upon which they had contributed it. If that be so, provided all the members of the association were made parties, then this rule is well established:- that if they are so numerous that they cannot be made parties to the cause, with any chance of bringing it to a hearing, in consequence of abatements and the like difficulties, then you may make two or three of a class defendants to represent the interest of all of that class. Formerly that was not the practice of this court, but the rules have been modified and altered so as to suit the exigencies of modern practice, as was done by Lord Cottenham in several instances. But if there be three or four classes who have separate and conflicting interests, then you may select two or three from each class to represent that interest, in the same way as if the whole class had been brought before the court." The rule found formal expression for the first time in paragraph 10 of the Schedule to the Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66) in these terms:

"Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the court to defend in such action, on behalf or for the benefit of all parties so interested." In relation to the construction of this rule Vaughan Williams L.J. said that the old Chancery practice was not relevant when construing it in Markt & Co. Ltd. v. Knight Steamship Co. Ltd. [1910] 2 K.B. 1021 , 1029:

"What we have to do is to construe the rules under the Judicature Act which define the application of the practice as to representative actions for the Common Law Division and the Chancery Division alike, and which properly construed will, I suppose, govern the present practice, notwithstanding any prior practice in the Court of Chancery." This was not the approach which had earlier been adopted in the speech of Lord Lindley in Taff Vale Railway Co. v. Amalgamated Society of Railway Servants [1901] A.C. 426 , 443:

"The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires." ***238**

Earlier the old practice had been reviewed in the speech of Lord Macnaghten in Duke of Bedford v. Ellis [1901] A.C. 1 , 8:

"The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent." He continued, at pp. 10-11:

"As regards defendants, if you cannot make everybody interested a party, you must bring so many that it can be said they will fairly and honestly try the right. I do not think, my Lords, that we have advanced much beyond that in the last hundred years, and I do not think it is necessary to go further, at any rate for the purposes of this suit."

The wording of the rule, which remained substantially unaltered from its original 1873 wording in the ensuing Rules of the Supreme Court until 1964, has two important features, namely one or more of such parties having the same interest may be sued but that when so sued it is "for the benefit of all parties so interested." This wording remained substantially unaltered in Ord. 16, r. 9 in *The Annual Practice* (1963); in the new rules the equivalent provision in *The Annual Practice* (1964) was found in Ord. 15, r. 12. This replaced the old rule Ord. 16, r. 9 with a considerably expanded form which for all intents and purposes was the same as that in the present Ord. 15, r. 12 as cited earlier in this judgment. The significant additions or refinements for the purposes of the present appeal can be summarised: (1) Rule 12(1) provides that the class being sued may not necessarily cover the whole of the class of persons having the same interest as defendants or possible defendants in the proceedings. The former wording did not extend to this degree of flexibility; but as can be seen from the authorities already cited the old practice in Chancery did and the House of Lords applied the 1873 rule in the same way: see the speech of Lord Macnaghten in Duke of Bedford v. Ellis [1901] A.C. 1, 8, 10-11. (2) Although the judgment is to be binding upon those comprised in the class represented, protection is given to members of the class sued who may have been improperly joined in the class or who may have individual grounds of defence, since the judgment cannot be enforced until the plaintiff has complied with the requirements of Ord. 15, r. 12(3), (4) and (5). (3) However, the effect of rule 12(5) is merely to protect the member of the class sued from having the judgment enforced against him. The judgment is still valid for other purposes such as a counterclaim or other process in which that person may wish to rely upon allegations which will be ***239** denied to him by the findings of the judgment, the issues being res judicata for such purposes. It will be seen that there is nothing in the wording of the rule itself which would restrict the wide ambit in which the rule should operate, in line with the old Chancery practice; but there are now built-in safeguards to protect a member of the class who may have particular defences or may be able to distance himself from the class in other respects. This accords with the concept, as I see it, of the old rule, namely a broad rule of procedural convenience to be exercised with a wide but carefully used discretion. Apart from a deviation for a short period of time ensuing after the passing of the Act of 1873 (see Temperton v. Russell [1893] 1 Q.B. 435) the courts have reverted to a generous interpretation of the rule: see the speeches in Duke of Bedford v. Ellis [1901] A.C. 1, and *per* Lord Lindley himself, who had been party to the earlier narrow decision in Temperton v. Russell [1893] 1 Q.B. 435, which he criticised in Taff Vale Railway Co. v. Amalgamated Society of Railway Servants [1901] A.C. 426, 443. It will be necessary to consider shortly some ensuing decisions since the turn of the century; but, in my judgment, the problem is not the width of the operation of the rule but how it shall be applied in the particular circumstances of each case.

In the present case, the proposed represented class of defendants comprises a widely-spread group of insurers who have come together in circumstances which are not themselves irrelevant. As has been described by Staughton L.J. the contracts of insurance came into existence as a result of instructions given by the charterers to English insurance brokers in London. They in turn approached Belgian insurance brokers who in turn came to agreements with nine different underwriting agents in Antwerp and three individual insurance companies as to the shares of the liability under the policy to be issued to the charterers. The underwriting agents themselves had previously formed pools of insurers whose authority to engage without reference they held. The constituents of the pools varied from year to year but their membership would not change in relation to the policy in question. Each

member of that pool themselves took on an individual proportion of the pool's share of liability not as members of a joint enterprise but each individually themselves vis-à-vis the charterers. Thus it came about that 77 individual insurers each contracted with the charterers for their own respective shares of the liability under the policy. This intricate contractual arrangement has been fully set out in the judgment of Staughton L.J. and need not be developed here. The position does underline the basis upon which Mr. Pollock submitted that the individual members of the total group almost certainly would not know the identity of all the other members of the group until a late date, if at all, and certainly would not know until the policy was finally written and distributed, if in fact it was ever distributed, the proportionate degrees of liability assumed by each. Moreover, underwriters were spread over a number of different jurisdictions geographically spread. However, they had the leading underwriters clause in common in each of their individual contractual arrangements with the charterers. ***240**

At first blush, therefore, notwithstanding that the proposed represented class was such a diversified collection of insurers, all the members were identifiable and enjoyed identical contractual relationships created under the same commercial exercise, which itself in turn gave rise to a proportionate liability for a single identified loss. It would seem that the old Chancery practice would have undoubtedly found it procedurally convenient to dispense with the necessity of the assured having to bring 77 different insurers before the court from different parts of the world. It is true to say that the old rule in Chancery did not readily envisage a class of defendants some of whom were themselves outside the jurisdiction of the court. The reservation and difficulty found itself reflected in Mr. Pollock's submission that by issuing a representative action in the present case the plaintiffs had dispensed with the formalities required under Order 11 requiring leave of the court to serve the writ outside the jurisdiction. I believe that the position is in fact parallel. The court might well hesitate to join together separate contractors in different jurisdictions in a representative action unless there were some contractual structure common to them all under which a person or persons within the jurisdiction was or were nominated to be the person sued in the representative action. As under the old Chancery rule so under the present rules, these are matters for the consideration of the court when exercising a wide discretion in the particular circumstances as they appear to the court at the time of the application but not a valid ground for applying rigid limits to the jurisdiction given to the court. They do not, in my judgment, support the application of strict rules of construction so as to embrace the hypothetical or as yet undetermined individual who has special characteristics which might justify his exclusion from the class. The framing of the rule as it stands permits the court in the exercise of sub-rules (3) to (5) to deal with the matter from time to time as evidence becomes available or events occur.

One matter on the above approach which caused me some concern stems from the actual wording of the rule itself. Ord. 15, r. 12(2), which I have not set out previously, reads:

"At any stage of proceedings under this rule the court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant." It will be seen that the right to apply to the court under this rule at any stage of the proceedings to adjust the parties both to the action itself and to those represented lies only with the plaintiff and would, at first sight, not extend to protect a defendant discovering the existence of the

proceedings and wishing to be excused. However, the solution may well lie in the wording of rule 12(1) which in its expression "unless the court otherwise orders, continued" seems to envisage applications to the court from both sides of the proceedings to adjust those either appearing as ***241** parties or as members of the class represented, whether they be plaintiffs or defendants. It may be, however, that there is substance in Mr. Pollock's submission that if the rule is given too wide a sphere of operation there may be persons who are bound by a judgment in proceedings of which they are wholly unaware at any stage until process is taken under rule 12(3) and (4) . This is a defect but the danger of injustice to a party who has entered a contract to be represented by a leading underwriter whose identity, place of residence or nationality is unknown must be limited. He has only himself to look to having entered such a contractual arrangement. The benefits of a representative action, of course, in a multiple contractual arrangement of this kind are too obvious to require statement and on balance the convenience and expedition of litigation is far better served with a wide interpretation of the rule.

It is now necessary to refer shortly to one or two authorities to which reference was made during argument to see how the matter lies from the viewpoint of precedent. Mr. Pollock strongly relied upon the judgments in Markt & Co. Ltd. v. Knight Steamship Co. Ltd. [1910] 2 K.B. 1021 , and in particular the judgment of Fletcher Moulton L.J. This case involved claims by a number of plaintiffs who had shipped goods on a general ship of the defendants for a voyage from New York to Japan. Before arriving at its destination the ship was sunk by a Russian cruiser on the ground that she was carrying contraband of war and both ship and cargo were lost. The plaintiffs sued upon writs described as being issued "on behalf of themselves and others owners of cargo lately laden on board the steamship Knight Commander " and which were indorsed with a claim for "damages for breach of contract and duty in and about the carriage of goods by sea." There was, therefore, a class of plaintiffs whose claims had similarities in that they were in respect of the total loss at sea of various cargoes occasioned in the same incident. There were, however, points of distinction if, as was suggested, some of them were shipping contraband goods. Moreover, by virtue of the circumstances there were no agreements between the plaintiffs inter se in relation to prospective claims arising out of the shipment. Fletcher Moulton L.J. said, at pp. 1039-1040:

"The essential condition of a representative action is that the persons who are to be represented have the same interests as the plaintiff in one and the same cause or matter. There must therefore be a common interest alike in the sense that its subject and its relation to that subject must be the same. As I have already stated, Lord Macnaghten phrases it thus: 'Given a common interest and a common grievance, a representative suit is in order if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent.'

"Whether we start from the language of the rule or from this authoritative interpretation of it, the present actions, even if the writs be amended as suggested, fail in every particular to answer the necessary condition of a representative action. The counsel for the plaintiffs suggests that the people in the list are in similar circumstances, because they shipped goods under similar bills of ***242** lading in the same ship. Assuming, for the sake of argument, that this is so (although nothing of the kind appears on the record), each of these parties made a separate contract of shipment in respect of different goods entitling him to its performance by the defendants and to damages in case of non-performance. It may be that the claims are alike in nature, and that the litigation in respect of them will have much in common. But they are in no way connected; there is no common interest. Defences may exist against some of the shippers which do not exist against the others,

such as estoppel, set-off, &c., so that no representative action can settle the rights of the individual members of the class. But that which to my mind most strikingly indicates the fundamental error of the suggestion that the circumstances of these cases justify a representative action is that I can conceive no excuse for allowing any one shipper to conduct litigation on behalf of another without his leave, and yet so as to bind him. The proper domain of a representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject-matter. Here there is nothing of the kind." This passage marks the high point of authority in Mr. Pollock's favour. Buckley L.J. in a dissenting judgment did not support such a restricted view of "common interest" and the present case is distinguishable by reason of the leading underwriter clause agreed to by all the class. This dispenses at least with part of the objections raised by Fletcher Moulton L.J. in the passage cited and other parts of the judgment to which I hope I may be forgiven for nor referring.

The position as regards classes of person to be sued as defendants under R.S.C., Ord. 16, r. 9 was further considered in Walker v. Sur [1914] 2 K.B. 930 . In that case the plaintiff in a common law action of debt wished to sue, for professional services rendered, four named defendants "on their own behalf and on behalf of all other members" of an unincorporated religious society most of whom resided abroad. The evidence disclosed that there were over 1,800 members scattered over France, Germany, Spain, Italy and other parts of the world. The centre of government of the order was in Rome and there was a head described as the Superior General who with the assistance of a general council controlled and legislated about matters affecting the order. The Court of Appeal were considering an appeal against an order made by Bucknill J. allowing the writ. The Court of Appeal allowed the appeal, giving very short judgments. However, an extract from the judgment of Kennedy L.J. formed part of the ratio decidendi in the subsequent case of Hardie and Lane Ltd. v. Chiltern [1928] 1 K.B. 663 , 682-683. It is convenient to cite this part of Kennedy L.J.'s judgment [1914] 2 K.B. 930 , 936-937:

"I have come to the same conclusion. I wish that rule 9, so far as regards defendants, was clearer than it is, but I will confine myself to saying that this is an action of debt, and that such an action, where the person or persons sought to be sued are, as here, members of an unincorporated body which cannot itself be sued, will not lie, framed, as this action is sought to be, under the ***243** authority given by the learned judge. I admit that I feel a difficulty in saying what does, and in general terms what ought not to, fall within the terms of this permission; but of the body in the present case we know very little on the affidavits before us, and it is not pretended that, as was the case in the Taff Vale case, there are any funds vested in trustees. It is not alleged that there are any such trustees at all, and the claim is to my mind a claim in which it is sought to make a judgment for payment of money effective against a number of persons who belong to a named society but who have no common fund vested in trustees who could be joined as representing the society.

"When I consider the nature of a money claim, I think the case becomes for this purpose reasonably clear, because day by day, if this is a large body, one member is going out and another is coming in. The body is continually changing, and to give a judgment against all the members for debt would be to include the case of an incoming member, who would be made liable though he was not a member at the date of the contract and in the case of an outgoing member you would have to take the state of things at the date of the judgment. A judgment could not very well be given against one who had ceased to be a member, and yet they are all supposed to be those persons who are said to be represented. If this order stands, they would, I suppose,

be anybody who at the date - I do not know whether it would be at the date of the commencement of the action or of the judgment - is a member of the society."

In Hardie and Lane Ltd. v. Chiltern [1928] 1 K.B. 663 the plaintiff was a member of an unregistered trade union having for its object the protection of the motor industry, etc. who wished to sue three other named members of the association "on their own behalf and on behalf of all other members of the association" for damages caused to the plaintiff by conspiracy and fraud of the defendants in their commercial activities. The judgment of Fraser J. on appeal from the master was wholly accepted and approved in the Court of Appeal and it is to part of Fraser J.'s judgment that Mr. Pollock referred the court. Fraser J. extracted from the judgment of Kennedy L.J. in Walker v. Sur [1914] 2 K.B. 930 , 936-937 the statement that a judgment in a representation action against a body whose membership changed from day to day would be contrary to the rule and continued [1928] 1 K.B. 663 , 684-685 to refer to the judgment of Buckley L.J. in Walker v. Sur [1914] 2 K.B. 930 , 936:

"'The plaintiff has not asked for any declaration of right as between himself and all the members of a class, which, if affirmed in his favour, could be enforced against individual members of the class. He is only suing for money, for which he wants judgment against certain persons, and he wants by this order to be in a position to say that he is pursuing his remedy against persons who are not parties in the sense of being parties on the record. It is true that Mr. Lowenthal has disclaimed that if he got judgment in this action he could enforce it against a person who is not a party; but that is ***244** not the question for our determination. We have to determine whether this action ought to go on so as that execution could be maintained against all the persons represented. In my judgment that would be impossible. It is simply an action of debt against a large number of individuals and no judgment could be obtained which would be representative against all of them; there could only be a judgment individually against each of them. For these reasons I think that the order of the learned judge was wrong, and that the appeal must be allowed.'"

These cases underlined the difficulties in arriving at some general principle in the application of the rule. However, where there is not a representative class whose membership can be identified in some way or other and whose membership is liable to change over the material period, an order under the rule would clearly be inappropriate. The distinction drawn between several actions for debt as opposed to a representative judgment or declaration which would determine the rights between the plaintiff and all the members of the defendant class is, of course, fairly drawn in the circumstances prevailing in the cases to which I have made reference. They do not, however, establish, in my judgment, contrary to Mr. Pollock's submission, that an action will not lie in appropriate cases against a representative defendant class for debt or debts provided these can be directly associated within an identified group and can themselves be defined within the framework of the contractual association established. Thus, in the present case where a group of insurers, albeit scattered in numerous jurisdictions, have by mutually associated contracts all agreed with the assured to abide by judgments against one identified leader, a representative order may be made. This points the distinction, in my judgment, in the present case from the authorities relied on by Mr. Pollock. This approach is not inconsistent with that of Slade J. in Roche v. Sherrington [1982] 1 W.L.R. 599 , the judgment of Dillon J. in E.M.I. Records Ltd. v. Riley [1981] 1 W.L.R. 923 and the judgment of Lloyd L.J. in Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd. [1989] 1 Lloyd's Rep. 568 .

In summary I can find nothing inconsistent

in the authorities to which we were referred with the broad approach of applying Ord. 15, r. 12 to a group of underwriters, however constituted or wherever situated, provided they have amongst themselves agreed upon a leading underwriter clause or some other contractual arrangement of a similar nature. It remains only to mention the issue arising out of the right to sue if and in so far as it has any impact upon the resolution of the issue arising out of Ord. 15, r. 12. It is common ground between the parties that the application of the Act of 1930 to parties not resident or domiciled within the United Kingdom is an arguable point which does not have to be decided on this appeal. It may indeed be irrelevant to the issue whether there may be members of the class of defendants who have a defence on the basis that there is no right to sue them direct if all that can be relied upon is the United Kingdom Act of Parliament. This has not deterred the plaintiff shipowners from suing apart from the ***245** English statute all the class of defendants in the Antwerp Commercial Court presumably asserting that in the Belgian jurisdiction there is some equivalent law giving them a title to sue, although this is disputed by the defendant insurers. If it is open or would have been open apart from the leading underwriter clause to any member of the class of defendants to apply to be excluded from the class on the grounds that they had a defence arising out of the territorial restriction of the statutory powers granted by the Act of 1930 then this is a point that can be taken under Ord. 15, r. 12(1) and (2) by way of summons brought by any member of the class who seeks to be excluded from the class. Presumably, if any particular member of the class is unaware of the action then there is still the longstop provision against enforcement of the judgment. The overwhelming likelihood is, however, that they will know of the proceedings, in which case on my reading of the order it is open to such a party to apply to be discharged from membership of the class or joined as a named defendant.

Forum non conveniens

Mr. Pollock, in support of the appeal against the judge's refusal to stay or dismiss the action in England, acknowledged that the plaintiff shipowners were justified in starting proceedings in Antwerp, an action which otherwise would have formed a ground for staying the action in England on the basis of lis alibi pendens. The circumstances in which the shipowners started the proceedings in Antwerp have been described in the judgment of Staughton L.J. In my judgment Mr. Pollock very properly accepted that the commencement of these proceedings was justified by the failure on the part of the defendant insurers to disclose the details of the policy because they mistakenly believed that the policy included a non-disclosure clause. Mr. Pollock, however, submitted that he was entitled to rely upon the fact of the proceedings in Antwerp to establish that a cause of action was available there and that the defendants were identified and amenable to the jurisdiction of the Belgian court. For the purpose of considering the question of forum non conveniens the fact of the proceedings having been started in Antwerp was a factor upon which Mr. Pollock submitted he was entitled to rely.

Apart from this, however, this aspect of the appeal can be considered as if the court is dealing with a case where jurisdiction has been founded as of right. We have been helpfully referred to the speech of Lord Goff of Chieveley in Spiliada Maritime Corporation v. Cansulex Ltd. [1987] 1 A.C. 460 , 474-475 in which Lord Goff deals with the criteria involved under the heading "The fundamental principle." The judge dealt with this aspect of the case succinctly in the following terms, which I repeat for sake of convenience in this judgment:

"Both counsel agree that it is an open question whether the relevant policies are governed by English or Belgian law, and since it is unnecessary to decide the issue on the present applications, I do not propose to burden this judgment with a catalogue of all the relevant factors. They point both ways; I will only say that my prima facie view

is in favour of Mr. Gilman's argument that English law governs the policies. If it does, the plaintiffs have title to sue by ***246** virtue of the Act of 1930 and from no other source, assuming that the Act of 1930 applies to foreign insurers. If Belgian law governs the policies, it has not yet been tested in the English courts whether the Act applies.

"There can be no doubt that the Commercial Court in Antwerp is an appropriate forum for the resolution of the present dispute. So is this court. The advantage of this jurisdiction appears to be that it will probably lead to a resolution of the dispute more quickly than Belgian process and at less expense, because the issues on the plaintiffs' title to sue are more complex in Belgium. The attitude of the parties is unusual. The plaintiffs wish to discontinue the Belgian action, which they started essentially as a merely protective step, and pursue only the present action. The defendants (or at least leading underwriters who are represented on this application) wish to pursue the dispute only in the Belgian proceedings and to have this action stayed meanwhile. They say they will not consent to the discontinuance of the Belgian proceedings, and if discontinuance is refused by the Antwerp court, they will force the matter to a conclusion there, even though the plaintiffs prefer English litigation.

"It is a curious position. In the course of the hearing, Mr. Gilman was authorised to accept any costs order made on the discontinuance of the Belgian proceedings; as his clients would in any case be bound to accept this in Belgium, I take this to mean that he would not seek to recover those costs in this jurisdiction.

"The facts are far from the usual facts in such cases, which are typified by The Abidin Daver [1984] A.C. 398 . I think the right order in this exceptional case is to refuse a stay on conditions, as to which I will hear counsel. What I have in mind is that there should be an undertaking by the plaintiffs to take all necessary steps to discontinue the Belgian action and to hold the defendants indemnified as to their costs of that action."

Although I have cited the whole of this extract the ratio decidendi of the decision not to stay the English action is contained in the first paragraph and the first half of the second paragraph. The remainder relates to a commentary upon the unusual motives disclosed by the contesting parties. To be extracted from this part of the judgment are the following relevant points: (1) Whether or not the policies are governed by English or Belgian law is an open question which the judge specifically does not decide beyond giving what he described as his prima facie view. (2) If English law applies then there is no question mark over the title to sue by virtue of the Act of 1930 but there may be difficulties in relation to foreign insurers. (3) Whether or not the plaintiff shipowners have a right to sue if Belgian law is the proper law has not been tested in the English courts with regard to the application of the Act of 1930. As I have already remarked, it was common ground at the Bar that this obviously difficult question did not fall for determination on this appeal which could be decided on the common assumption that the matter could well be arguable both ways. (4) The Commercial Court in Antwerp is an appropriate forum for the resolution of the present ***247** dispute and so is the English court. But it seems very probable that the Belgian court would not have regard to the English statute. This might put the plaintiff shipowners to a juridical disadvantage. (5) The advantage of the English jurisdiction appears to be that it would lead to a more speedy and less expensive resolution of the dispute than the Belgian process.

This is an appeal against the exercise of the trial judge's discretion in which, accordingly, the grounds upon which the court may interfere are strictly limited: see *per* Lord Brandon of Oakbrook in The Abidin Daver [1984] A.C. 398 , 420:

"It can only interfere in three cases: (1) where the judge has misdirected himself with regard to the

principles in accordance with which his discretion had to be exercised; (2) where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (3) where his decision is plainly wrong."

Lord Brandon's criteria were referred to by Lord Goff in the Spiliada case [1987] A.C. 460, 471. The speech of Lord Templeman emphasised, if emphasis is required, the reason for this approach by an appellate court, at p. 465:

"The factors which the court is entitled to take into account in considering whether one forum is more appropriate are legion. The authorities do not, perhaps cannot, give any clear guidance as to how these factors are to be weighed in any particular case. Any dispute over the appropriate forum is complicated by the fact that each party is seeking an advantage and may be influenced by considerations which are not apparent to the judge or considerations which are not relevant for his purpose. . . . In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere."

Acknowledging the difficulty facing an appellant in this court in the light of these authorities, Mr. Pollock, however, submitted that the judge was plainly wrong in his assessment of the proper law of the contract. Whilst he conceded that the proper law was not a determinative factor, nevertheless the judge should have concluded without any doubt that Belgian law was the proper law of the contract and that had he reached this conclusion his approach to deciding the question of forum conveniens would have been entirely different. Mr. Pollock pointed with considerable force to the circumstances surrounding the creation of the ***248** insurance liability. Although the "producing broker," Gault Armstrong & Kemble Ltd., was based in London and received its instructions from the charterers there, it, acting on behalf of the charterers, elected to place the insurance with a "placing broker," Leon Van Eessel S.P.R.L., whose place of business was in Antwerp and with the intention, as occurred, that the whole of the insurance would be placed with Belgian underwriting agents or directly with separate insurers in the Antwerp market. Mr. Pollock recognised that the language of the contract and policy was English and that it included standard clauses contained in a form published by the United Kingdom Mutual Assurance Association (Bermuda) Ltd. whose reference was English law. At the same time, however, the policies included Form SP.22B headed "American Hull Insurance Syndicate War Risk Protection & Indemnity Clauses." Mr. Pollock submitted that there was little significance to be placed upon the language and origin of the various forms incorporated in the insurance contract, particularly where there was a well-developed local insurance market within the Belgian law operating, as it did, at Antwerp.

Mr. Pollock's answer to Mr. Gilman's submission that the leading underwriters, the Alliance Assurance Co. Ltd., had their headquarters in London was that they regularly operated in the Belgian market from their own establishment in Belgium whether by a branch office or through a subsidiary or associated company. Therefore, he submitted that no significance could be attached to the fact that the insurers' headquarters were in London.

In my judgment, there is a great deal of force in what Mr. Pollock submitted. This, however, only goes to establishing the proper law of the contract and this, as appears from the extract of the judg-

ment I have cited, was not the conclusive feature which determined the judge in exercising his discretion.

The answer to Mr. Pollock's submission is that the judge did not consider the resolution of the question: "What was the proper law of the contract" as a critical factor in deciding the question of forum non conveniens. He only expressed a prima facie view in any event. There were many other factors, not the least of which was his view of the balance of expediency and the possible loss of juridical advantage to the plaintiffs and the other matters which I have listed in this judgment. These were all features which it was open to the judge to take into account in his approach to the problem in accordance with the criteria laid down in the Spiliadacase [1987] A.C. 460 .

As I have already commented, I consider that the resolution of the proper law of the contract, the application of the statute of 1930, whether in England to affect foreign underwriters who are able in some way to distance themselves from the leading underwriter clause, or in Belgium should the matter be tried there and, if so, the application of the appropriate law, are matters of considerable difficulty; but fortunately do not fall for consideration at this point in this appeal. I refrain from expressing any views as to the manner in which I would attempt to resolve these problems or indeed how I would have exercised the discretion which was exercised by the judge should that task have fallen to me. It is sufficient for the purposes of this appeal for me to say that I ***249** can find no significant way in which the judge either took into account matters which he ought to have ignored, omitted to consider matters which he should have taken into account, was wrong in principle of law or arrived at a conclusion which was so plainly wrong that it would indicate an error in principle of some kind. Accordingly I see no reason to interfere with the exercise of discretion by the judge and in accordance with the speech of Lord Templeman in the Spiliada case I would decline from interfering with the exercise of his discretion and would dismiss this appeal. Appeal dismissed with costs. Leave to appeal refused. (C. R. S.)

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1. R.S.C., Ord. 15, r. 12(1) : see post, p. 222A.

2. Reporter's note. Mr. Donithorn was a partner in the insurers' solicitors' firm.

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EXHIBIT 53

[2001] EWCA Civ 998 [2001] 1 W.L.R. 1966 [2002] 1 All E.R. 192 [2001] C.P. Rep. 102 [2002] P.I.Q.R. P5 (2001) 98(29) L.S.G. 39 (2001) 145 S.J.L.B. 167 Times, July 11, 2001 Daily Telegraph, July 3, 2001 Official Transcript

(Cite as: [2001] 1 W.L.R. 1966)
[2001] EWCA Civ 998

***1966 Cachia and others v Faluyi**

Court of Appeal

MR Lord Phillips, Henry, and Brooke

2001 June 25, 27

Fatal Accidents Acts—Action—Right to bring—Writ claiming loss of dependency issued but never served—Second writ issued claiming same relief—Whether action commenced by unserved writ precluding bringing of action by second writ—Whether dependant's right of access to court barred— Fatal Accidents Act 1976 (c 30), s. 2(3) [footnote-text]Fatal Accidents Act 1976, s. 2(3): see post, p 1968D-E.[/footnote-text]— Human Rights Act 1998 (c 42), ss. 3(1), 6(1), Sch. 1, Pt I, art 6[footnote-text]Fatal Accidents Act 1976, s. 2(3): see post, p 1968D-E. Human Rights Act 1998, s. 3: "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. S 6: "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right. Sch 1, Pt I, art 6: "(1) In the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."/footnote-text]

In 1991 the plaintiff, who was the widower and executor of the deceased's estate, issued a writ claiming damages on behalf of her estate and loss for her dependants, being the plaintiff and the deceased's four children, under the Fatal Accidents Act 1976. The writ was not served and lapsed. In 1997 a second writ was issued and served upon the defendant in the name of the plaintiff claiming the same relief on behalf of the deceased's dependants. The claims of the three younger children ("the children") were brought within the primary limitation period but those of the plaintiff and eldest daughter had become statute-barred and were discontinued. The question arose whether the children were entitled to pursue their claims as dependants despite the issue of the earlier writ, or whether that was prohibited by section 2(3) of the 1976 Act, which provided that not more than one action should lie for and in respect of the same subject matter of complaint. On an application by the plaintiff on behalf of the children for a declaration that they were entitled to pursue their dependency claims, the judge held that section 2(3) provided that only one action could be brought, namely the action commenced by the issue of the first writ, and he struck out the action.

On appeal by the plaintiff—

Held, allowing the appeal, that, although by domestic rules of statutory interpretation it was not possible to construe "action" in section 2(3) of the 1976 Act as meaning "served process", since 2 October 2000 the court had been under a duty, by virtue of sections 3 and 6 of the Human Rights Act 1998, not to act incompatibly with a right afforded by the Convention scheduled thereto and was required, so far as possible, to read and give effect to primary legislation compatibly with those rights; and that, accordingly, "action" in section 2(3) of the 1976 Act was to be interpreted as meaning "served process" so as to give effect to the children's Convention right of access to the court to claim compensation for loss of dependency, and since the original writ had never been served section 2(3) of the 1976 Act did not bar the subsequent claim (post, pp 1970A–D, 1971H–1972D).

Decision of Judge Charles Harris QC sitting as a judge of the Queen's Bench Division reversed.
***1967**

[2001] EWCA Civ 998 [2001] 1 W.L.R. 1966 [2002] 1 All E.R. 192 [2001] C.P. Rep. 102 [2002] P.I.Q.R. P5 (2001) 98(29) L.S.G. 39 (2001) 145 S.J.L.B. 167 Times, July 11, 2001 Daily Telegraph, July 3, 2001 Official Transcript
[2001] EWCA Civ 998 [2001] 1 W.L.R. 1966 [2002] 1 All E.R. 192 [2001] C.P. Rep. 102 [2002] P.I.Q.R. P5 (2001) 98(29) L.S.G. 39 (2001) 145 S.J.L.B. 167 Times, July 11, 2001 Daily Telegraph, July 3, 2001 Official Transcript

The following cases are referred to in the judgment of Brooke LJ:

- Ashingdane v United Kingdom (1985) 7 EHRR 528
- Avery v London and North Eastern Railway Co [1938] AC 606; [1938] 2 All ER 592, HL(E)
- Cooper v Williams [1963] 2 QB 567; [1963] 2 WLR 913; [1963] 2 All ER 282, CA
- Farrell v Alexander [1977] AC 59; [1976] 3 WLR 145; [1976] 2 All ER 721, HL(E)
- Herbert Berry Associates Ltd, In re [1977] 1 WLR 1437; [1978] 1 All ER 161, HL(E)
- Stubbings v United Kingdom (1996) 23 EHRR 213

The following additional cases were cited in argument:

- de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69; [1998] 3 WLR 675, PC
- Golder v United Kingdom (1975) 1 EHRR 524
- Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850; [1970] 3 WLR 287; [1970] 2 All ER 871, HL(E)
- Pye (J A) Oxford) Ltd v Graham [2001] EWCA Civ 117; [2001] 2 WLR 1293, CA
- R v A (No 2) [2001] UKHL 25; [2001] 2 WLR 1546; [2001] 3 All ER 1, HL(E)
- R v Governor of Brockhill Prison, Ex p Evans (No 2) [1999] QB 1043; [1999] 2 WLR 103; [1998] 4 All ER 993, CA
- Wilson v First County Trust Ltd (No 2) [2001] EWCA Civ 633; [2001] 3 WLR 42; [2001] 3 All ER 229, CA

APPEAL from Judge Charles Harris QC sitting as a judge of the Queen's Bench Division

On 16 October 1991 solicitors issued a writ in the name of the plaintiff, Michael **Cachia** (as executor of his deceased wife's estate), against Francis Ola **Faluyi** as the defendant claiming, inter alia, damages for the deceased's dependants under the Fatal Accident Act 1976. The writ was not issued. By a second writ and statement of claim issued on 10 June 1997 and served on 1 July 1997 the plaintiff, Michael **Cachia**, suing as widower and administrator of his deceased wife's estate, claimed against the same defendant damages for personal injuries, losses and dependency under the 1976 Act for the deceased's dependants, arising from the defendant's negligence on 6 October 1988. The particulars pursuant to the 1976 Act stated that the action was brought for the benefit of the plaintiff and the children of the deceased, namely Monique Theresa Maria **Cachia** born on 3 October 1975, Caroline Josephine Michelle **Cachia** born on 24 June 1977, Joseph Carmel Gracieux **Cachia** born on 24 September 1980, and Sarah Jane Anne-Marie Blunt born on 17 February 1984. By a defence served on 1 July 1997 the defendant stated, inter alia, that the claims were statute-barred. By a notice of discontinuance dated 14 June 2000 the plaintiff and Monique Cachia discontinued those parts of the dependency claim relating to them.

By a notice of application dated 17 May 2000 the plaintiff sought a declaration that, despite the existence of the writ issued on 16 October 1991, the three youngest children had the right to pursue their claim for loss of dependency against the defendant.

By notice filed on 4 October 2000 the defendant applied, inter alia, to strike out the action. By an amended order dated 31 October 2000 the judge ordered that the defendant's application be allowed and the action was struck out.

By an appellant's notice filed on 10 November 2000 and pursuant to permission granted by the judge, the plaintiff appealed on the grounds, inter ***1968** alia, that the judge was wrong in law and misdirected himself as to the proper interpretation of section2(3) of the Fatal Accidents Act 1976, and that the word "action" in section 2(3) referred to more than proceedings which had been issued but not served. At the hearing of the appeal the court gave the plaintiff permission to amend the appellant's notice to advance the argument that section 2(3) should be interpreted compatibly with section 3 of and article 6 in Part I of Schedule 1 to the Human Rights Act 1998, so as not to deprive the children of their right to pursue their claim.

The facts are stated in the judgment of Brooke LJ.

Representation

- Patrick Lawrence for the plaintiff.
- Francis Treasure for the defendant.

BROOKE LJ

1 This is an appeal by the plaintiff Michael Cachia against an order of Judge Charles Harris QC sitting as a judge of the High Court dated 31 October 2000 whereby he directed that his claim in this action be struck out. The judge said that the application by the defendant to have the claim struck out raised an unusual point, on which there was no previous authority. He granted permission to appeal, commenting that the point at issue was a matter of some importance. Although in the events that have occurred in this court the defendant eventually conceded that the appeal should be allowed, the issue is of some general importance. I am therefore delivering this judgment to explain why we are taking the course of allowing this appeal.

2 Put shortly, the issue was this. Section 2(3) of the Fatal Accidents Act 1976 provides: "Not more than one action shall lie for and in respect of the same subject matter of complaint." Did this mean that, if a writ was issued in a Fatal Accidents Act claim brought on behalf of a deceased's dependants but never served, this automatically precluded the bringing of a new action some years later?

3 The facts of the case are simple. On 6 October 1988 Mrs Cachia was riding her bicycle in a road in south-east London when she was hit by a car driven by the defendant. She died 12 days later. Liability for the accident has never been admitted. The defendant claims that she caused the accident by veering in front of him. She left a husband and four children, who were aged 13, 11, 8 and 4 years at the date of her death.

4 On 16 October 1991, just before the three-year limitation period expired, a firm of solicitors issued a writ in her husband's name claiming damages both on behalf of the estate and on behalf of her dependants under the Fatal Accidents Act 1976. This writ was never served. There was evidence before the judge that this firm of solicitors represented the plaintiff up to the end of 1992, and after their last letter to the defendant's representatives on 10 December 1992 the plaintiff had some direct contact with them himself, although this contact came to nothing.

5 On 18 April 1997 a new firm of solicitors appeared on the scene on behalf of the plaintiff. On 10 June 1997 they issued a new writ, which was served ten days later. By this time the **Cachia's** eldest daughter had reached the age of 21: the claims of the other three children were not statute-barred

[2001] EWCA Civ 998 [2001] 1 W.L.R. 1966 [2002] 1 All E.R. 192 [2001] C.P. Rep. 102 [2002] P.I.Q.R. P5 (2001) 98(29) L.S.G. 39 (2001) 145 S.J.L.B. 167 Times, July 11, 2001 Daily Telegraph, July 3, 2001 Official Transcript

by any primary limitation period. The statement of claim was served on 2 July 1997, and the defence on 11 July 1997. On 1 August 1997 the ***1969** defendant's solicitors issued a summons, presumably in support of the pleas of limitation in paragraphs 1 to 3 of the defence, which did not at that time include any reliance on section 2(3). The plaintiff's solicitors, however, asked them to take no action on this summons pending the resolution of a claim they were pursuing against their client's former solicitors. It appears that liability was eventually conceded in relation to the claims made on behalf of the estate and the Fatal Accidents Act claims brought on behalf of the plaintiff and the couple's eldest daughter, but not in respect of the dependency claims of the three younger children.

6 On 17 May 2000 the plaintiff's solicitors issued an application for a declaration to the effect that the three younger children had the right to pursue their claim against the defendant despite the issue of the earlier writ. The defendant's solicitors riposted four months later with an application for an order that the claim be struck out, alternatively for such order limiting the defendant's exposure on liability and quantum as might be just. When Judge Charles Harris QC heard the matter in October 2000, he was concerned only with the question whether proceedings on the 1997 writ were barred pursuant to the effect of section 2(3) of the Fatal Accidents Act 1976. He said he did not propose to go on to consider the alternative application to strike out for want of prosecution or delay, although it seemed to him not unlikely that there must be some strength in the defendant's argument that it would not be possible at this length of time to have a fair trial.

7 I have set out the wording of section 2(3) in paragraph 2 of this judgment. The language of this provision has remained the same since it was first enacted as section 3 of the Fatal Accidents Act 1846 (9 & 10 Vict c 93), except that at that time the section read:

“Provided always, and be it enacted, that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within 12 calendar months after the death of such deceased person.” (Emphasis added.)

8 By the time the fatal accidents legislation was consolidated in 1976, the limitation provision had been siphoned off into other legislation. Most recently, the Limitation Act 1975 had introduced a revised code making new provision for personal injuries litigation. This code adopted the phraseology “an action… shall not be brought” when indicating that a primary limitation period had fully run.

9 On this appeal, before the introduction of a point on the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “Convention point”), the defendant adopted the argument which found favour with the judge. The judge held that, although it was certainly one of the aims of those who framed the 1846 legislation to ensure that all the dependants joined in a single action, the language of the Act was clear. An action had been brought on behalf of these dependants in 1991 and was allowed to die. It was not permissible in these circumstances to bring another action now. In this context he accepted the concession by counsel for the plaintiff to the effect that the words “shall lie” were the equivalent in modern language of the words “shall be brought” (see, for example, Avery v London and North Eastern Railway Co [1938] AC 603, 613 per Lord Atkin: “One action alone can be brought, and the persons who stand out stand out ***1970** for ever”). He also referred to a dictum of Lord Simon of Glaisdale in In re Herbert Berry Associates Ltd [1977] 1 WLR 1437, 1446 to the effect that: “The primary sense of ‘action’ as a term of legal art is the invocation of the jurisdiction of a court by writ”

10 Mr Lawrence originally submitted that it was unlikely that Parliament intended that dependants should be without a remedy in circumstances such as have arisen in this case. He suggested three possible routes by which justice might be done.

11 The first involved interpreting the word “action” as meaning “served process” in this context. He said that the fact that the word “action” in other contexts might refer to unserved proceedings was nothing to the point: this statute must be construed by reference to its purpose.

12 In my judgment, this route was not open to us. Although the House of Lords has said that, if the words of a consolidating statute are clear, one should not go backwards into the legislative history of the words used in it (Farrell v Alexander [1977] AC 59), an action naturally begins when initiating process is issued and a court thereby acquires jurisdiction to make orders against the defendant, notwithstanding that he has not yet been served with process. If there was any lack of clarity there, recourse to the 1846 Act would show that it was inconceivable that Parliament intended the word “action” to have two different meanings in a single short section.

13 Mr Lawrence's second route involved withdrawing the concession made in the court below about the meaning of the words “not more than one action shall lie”. He now sought to argue, notwithstanding Lord Atkin's dictum, that they should mean that there was only one cause of action, which would merge in any judgment given in any action, and which would be disposed of by any settlement. He conceded that this construction did not wholly deal with all the practical problems that might arise, since it was possible (see Cooper v Williams [1963] 2 QB 567) for one dependant to be prejudiced by the settlement of, or entry of judgment in, an action brought by another. He suggested, however, that this interpretation did provide a defendant with appropriate protection, in that if a defendant settles a claim, or if a claim goes to judgment, that defendant cannot be troubled by any further proceedings.

14 In my judgment, this route was equally illegitimate. If Parliament had wanted to give legislative effect to this concept it would have been easy for it to have found the appropriate language to give effect to its wish. The fact of the matter is that this provision had remained on the statute book for 130 years prior to 1976 without giving rise to any particular difficulty, and it may be that it was only the advent of extended limitation periods for minors, unaccompanied by any similar extension of the period of validity of an unserved writ, that gave rise to the problem that has surfaced in the present case. We must not turn ourselves into legislators if the language used by Parliament simply does not permit it.

15 Mr Lawrence's third route was slightly more promising. He suggested that we might be willing to interpret the words of the subsection as meaning that no action should be maintained. If it simply withered away because a protective writ was not served and the defendant had never been troubled with it, it would be a misuse of language to say it had ever been ***1971** maintained, or had ever “lain” in any real sense of the word. I might have been tempted down that imaginative route of statutory construction to right an obvious injustice to these children if a more orthodox route was not now provided by the Human Rights Act 1998.

16 Mr Lawrence raised a human rights point for the first time on the Friday before we were due to hear the appeal the following Monday. When we first heard the appeal we gave him permission to amend the notice of appeal to take the point, since the court would in any event have been obliged to consider it pursuant to our duty under section 6(1) of the Human Rights Act 1998. He opened the appeal on this extended basis, and we heard Mr Treasure's reply on the non-Convention points. We then adjourned the hearing for two days to enable Mr Treasure to prepare his response on the Convention point. In the event, he conceded that it was a good one, and that the appeal should be allowed on this basis.

17 The point arises in this way. The Convention gives these three children a right of access to a court to claim compensation for their loss of dependency following the death of their mother. Although the European Court of Human Rights recognises that the enactment of limitation periods rep-

 [2001] EWCA Civ 998 [2001] 1 W.L.R. 1966 [2002] 1 All E.R. 192 [2001] C.P. Rep. 102 [2002] P.I.Q.R. P5 (2001) 98(29) L.S.G. 39 (2001) 145 S.J.L.B. 167 Times, July 11, 2001 Daily Telegraph, July 3, 2001 Official Transcript

resents the pursuit of a legitimate aim (see Stubbings v United Kingdom (1996) 23 EHRR 213, 227, paras 53–55), these claims were not statute-barred when this writ was issued in 1997.

18 The European Court of Human Rights has also recognised the legitimacy of other restrictions on the right of access to a court that have been drawn to its attention from time to time. Cases involving vexatious litigants, persons under disability and the striking out of actions for want of prosecution are obvious examples. A fuller list can be found in standard textbooks on article 6(1): see, for example, *Clayton & Tomlinson, The Law of Human Rights* (2000), vol 1, pp 640–641, para 11.191. The governing test, set out in the judgment of the European Court of Human Rights in Ashingdane v United Kingdom (1985) 7 EHRR 528, 546, para 57, and repeated often in later cases, is that such restrictions must not impair the essence of the right of access; they must have a legitimate aim, and the means used must be reasonably proportionate to the aim sought to be achieved.

19 In my judgment, Mr Treasure was right not to seek to argue that the fortuitous effect of section 2(3) of the Fatal Accidents Act 1976 in a case where a writ has never been served and a new writ has been issued within the primary limitation period could have any legitimate aim. It was just a procedural quirk, brought about by the chance that Parliament had never considered this particular problem, and because our traditional English methods of interpreting statutes could not right an obvious injustice. He was also right to place no reliance on the words “within a reasonable time” in article 6(1) when Parliament permitted children an extended period in which to exercise their right of access to a court. Mr Treasure was also wise to accept, on reflection, that the right to rely on a procedural quirk as a bar to these children's right of access to a court could not possibly amount to a “possession” within the meaning of article 1 of the First Protocol to the Convention.

20 Since 2 October 2000 we have been under a duty not to act in a way which is incompatible with a Convention right (section 6(1) of the Human), and, so far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with the Convention rights (section 3(1)). It is certainly possible to interpret the word “action” as meaning “served process” in order to give effect to the Convention rights of these three children. Until the present writ was served in July 1997, no process had been served which asserted a claim to compensation by these children for their mother's death. Section 2(3) of the Fatal Accidents Act 1976 therefore presents no artificial bar to this claim.

21 This is a very good example of the way in which the enactment of the Human Rights Act 1998 now enables English judges to do justice in a way which was not previously open to us.

22 The appeal must therefore be allowed, and the matter remitted to the High Court so that a judge can consider the other issues arising on the defendant's application.

HENRY LJ

23 I agree.

LORD PHILLIPS OF WORTH MATRAVERS MR

24 I also agree.Appeal allowed. Case remitted to High Court.
END OF DOCUMENT

EXHIBIT 54

[2001] EWCA Civ 1899 [2002] 1 W.L.R. 1828 [2002] 1 All E.R. 620 [2002] C.P. Rep. 16 [2002] C.P.L.R. 74 [2002] C.L.C. 420 [2002] P.I.Q.R. P24 (2002) 152 N.L.J. 109 Times, January 24, 2002 Independent, January 16, 2002 Official Transcript [2001] EWCA Civ 1899 [2002] 1 W.L.R. 1828 [2002] 1 All E.R. 620 [2002] C.P. Rep. 16 [2002] C.P.L.R. 74 [2002] C.L.C. 420 [2002] P.I.Q.R. P24 (2002) 152 N.L.J. 109 Times, January 24, 2002 Independent, January 16, 2002 Official Transcript

(Cite as: [2002] 1 W.L.R. 1828)

[2001] EWCA Civ 1899

***1828 Goode v Martin**

Court of Appeal

LJJ Brooke, Latham, and Kay

2001 Nov 22; Dec 13

Practice—Pleadings—Amendment—Expiry of limitation period—Claimant seeking to amend statement of claim after receipt of defence to plead defendant's version of facts—Whether amendment new claim "arising out of the same facts or substantially the same facts"—Whether court having jurisdiction to allow amendment—Whether rules to be interpreted so as to avoid infringement of claimant's right of access to the court— Human Rights Act 1998 (c 42), s. 3(1), Sch. 1, Pt I, art 6 — CPR rr 1.2(b), 17.4(2)

On 24 August 1996 the claimant sustained severe head injuries whilst sailing as a guest on the defendant's yacht. She had no memory of how the accident had happened. On 21 October 1997 a writ and statement of claim was issued claiming damages against the defendant for alleged negligence based on a factual account given to the claimant by a fellow guest. On 23 January 1998 a draft amended defence was received which contained an account of the facts which differed from that pleaded in the statement of claim. The three-year limitation period expired on 24 August 1999. On 14 April 2000 the claimant served a draft amended statement of claim founded on the defendant's version of the facts and applied for permission to amend the statement of claim. The defendant opposed the application. The master refused to allow the amendment on the ground that CPR r 17.4(2)1 did not permit the claimant to amend a claim out of time in reliance on facts raised by the defence which had not been pleaded in the statement of claim. On the claimant's appeal the judge upheld the master's decision but suggested that the Rule Committee consider an amendment to rule 17.4(2) . The claimant appealed further contending that the refusal of leave to amend also impaired her right of access to the court under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms2 .

On the claimant's appeal—

Held , allowing the appeal and permitting the proposed amendment, that both the requirement under CPR r 1.2(b) to give effect to the overriding objective of dealing with cases justly and the requirement in section 3(1) of the Human Rights Act 1998 to give effect to subordinate legislation in a way which was compatible with the Convention rights enabled the court to interpret the language of a rule of court so as to produce a just result and avoid unjustifiable infringement of a litigant's right of access to the court; that to prevent the claimant from putting her amended claim before the court would restrict her access to the court in a way which could not be justified by any sound policy reason since the amendment involved the introduction of no new facts; that, if such a restriction could not be justified, the defendant could not then be heard to say that the claimant could always bring another action; and ***1829** that, accordingly, the court should interpret rule 17.4(2) as though it permitted an amendment whose effect would be to add or substitute a new claim where "the new claim arises out of the same facts or substantially the same facts as are already in issue on" an existing claim (post, paras 36 , 42 – 47 , 49 – 50).

Dicta of Lord Steyn in R v A (No 2) [2002] 1 AC 45, 67-68, para 44, HL(E)applied .

[2001] EWCA Civ 1899 [2002] 1 W.L.R. 1828 [2002] 1 All E.R. 620 [2002] C.P. Rep. 16 [2002] C.P.L.R. 74 [2002] C.L.C. 420 [2002] P.I.Q.R. P24 (2002) 152 N.L.J. 109 Times, January 24, 2002 Independent, January 16, 2002 Official Transcript [2001] EWCA Civ 1899 [2002] 1 W.L.R. 1828 [2002] 1 All E.R. 620 [2002] C.P. Rep. 16 [2002] C.P.L.R. 74 [2002] C.L.C. 420 [2002] P.I.Q.R. P24 (2002) 152 N.L.J. 109 Times, January 24, 2002 Independent, January 16, 2002 Official Transcript
(Cite as: [2002] 1 W.L.R. 1828)
Decision of Colman J. [2001] 3 All ER 562
reversed.

The following cases are referred to in the judgment of Brooke LJ:

- Ashingdane v United Kingdom (1985) 7 EHRR 528
- Cachia v Faluyi [2001] EWCA Civ 998; [2001] 1 WLR 1966; [2002] 1 All ER 192, CA
- Fannon v Backhouse The Times, 22 August 1987; Court of Appeal (Civil Division) Transcript No 829 of 1987 , CA
- Lloyds Bank plc v Rogers The Times, 24 March 1997; Court of Appeal (Civil Division) Transcript No 1904 of 1996 , CA
- Mitchell v Harris Engineering Co Ltd [1967] 2 QB 703; [1967] 3 WLR 447; [1967] 2 All ER 682, CA
- R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1, HL(E)
- Rodriguez v R J Parker (Male) [1967] 1 QB 116; [1966] 3 WLR 546; [1966] 2 All ER 349
- Weldon v Neal (1887) 19 QBD 394, CA
- Welsh Development Agency v Redpath Dorman Long Ltd [1994] 1 WLR 1409; [1994] 4 All ER 10, CA

The following additional cases were cited in argument:

- Colt Group Ltd v Couchman [2000] ICR 327, EAT
- Gregson v Channel Four Television Corpn (unreported) 11 July 2000; Court of Appeal (Civil Division) Transcript No 1290 of 2000, CA
- Stubbings v United Kingdom (1996) 23 EHRR 213

The following additional cases, although not cited, were referred to in the skeleton arguments:

- Alliance and Leicester plc v Pellys Hillyers (unreported) 9 July 1999 , Park J
- Broadley v Guy Chapman & Co [1994] 4 All ER 439, CA
- Darlington Building Society v O'Rourke James Scourfield & McCarthy [1999] Lloyd's Rep PN 33; [1999] PNLR 365, CA
- Grayan Building Services Ltd, In re [1995] Ch 241; [1995] 3 WLR 1, CA
- Grimsby Cold Stores Ltd v Jenkins & Potter (1985) 1 Const LJ 362, CA
- Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42, HL(E)
- Savings and Investment Bank Ltd v Fincken [2001] EWCA Civ 1639; The Times, 15 November 2001, CA
- Senior v Pearson & Ward [2001] EWCA Civ 229, CA
- South Cone Inc v Bessant (trading as Reef) The Times, 9 October 2001
- Steamship Mutual Underwriting Association Ltd v Trollope & Colls (City) Ltd (1986) 33 BLR 77, CA

APPEAL from Colman J

By a writ and statement of claim dated 21 October 1997 the claimant, Virginia **Goode**, claimed against the defendant, Hugh **Martin**, damages for personal injuries, loss and damage sustained as a result of the defendant's negligence on board his yacht on 24 August 1996. By a defence served on 25 November 1997 the defendant generally denied negligence and causation. A draft amended defence dated 22 January 1998 contained by amendment a limitation plea under section 185 of and Parts I and II of Schedule 7 to the Merchant Shipping Act 1995 which set out the defendant's account of how the accident happened. The claimant sought leave to amend the statement of claim in order to plead that account. On 16 October 1998 Moore-Bick J gave leave to amend fthe defence and also gave the claimant leave to serve an amended statement of claim. On 14 April 2000 the claimant applied to amend the statement of claim. On 16 June 2000 Master Miller refused that application on the ground, inter alia, that for the purposes of CPR r 17.4 the claim did not arise out of the same facts as the claim in respect of which the claimant had already claimed a remedy in the proceedings and that he therefore had no jurisdiction to allow the amendment. The claimant appealed from that decision, and on the additional ground that the relevant limitation period had not in fact expired because she had not acquired knowledge of the relevant facts within the meaning of sections 11 and 14 of the 1980 Act until 23 January 1998 when the draft amended defence was served. On 7 November 2000 Colman J heard the appeal and two further applications by the claimant for permission to amend under section 14 of the Limitation Act 1980 or alternatively under section 33 of the Limitation Act 1980 . Colman J dismissed the appeal with written reasons given on 20 November 2000.

By an appellant's notice dated 17 June 2000, and pursuant to permission granted by Rix LJ on 26 January 2001 in respect of the application under CPR r 17.4(2) and section 14 of the Limitation Act 1980, the claimant appealed on the grounds, inter alia, that (1) the judge should have held that CPR r 17.4(2) be interpreted to allow an applicant to amend outside the limitation period so as to include a claim based on facts already in issue on the claim by reason of matters specifically raised in the defence and/or which would, in any event, be investigated at trial; (2) the judge, having found that there was no apparent justification for the apparent restriction placed on section 35(5)(a) of the 1980 Act by CPR r 17.4(2) and that a strict interpretation of CPR r 17.4(2) could produce unfairness and shut a claimant out from advancing a legitimate claim, should have interpreted CPR r 17.4(2) to avoid such consequences and in failing to do so he failed to give effect to the overriding objective under rule 1.2(b) ; (3) having recognised that CPR r 17.4(2) operated unfairly on the claimant and that the rule should be amended by the Civil Procedure Rule Committee, the judge failed to interpret CPR r 17.4(2) in accordance with article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms , as scheduled to the Human Rights Act 1998 and thereby denied the claimant access to the court to bring her new claim and/or denied her a fair, or any, trial of her claim.

The facts are stated in the judgment of Brooke LJ.

Representation

- Peter Ralls QC and Stuart Hornett for the claimant.
- Jervis Kay QC and John Russell for the defendant.

BROOKE LJ

13 December. The following judgments were handed down.

1 This is an appeal by the claimant, Virginia **Goode**, against an order of Colman J [2001] 3 All ER 562 dated 7 November 2000 , dismissing her ***1831** appeal against an order of the Admiralty Registrar, Master Miller, dated 16 June 2000, refusing her permission to make certain amendments to her statement of claim. In this respect the appeal to this court is a second appeal. The judge also dismissed her application for permission to make these amendments on grounds not argued before the master, namely that they did not raise claims or causes of action in respect of which the relevant period of limitation had expired. She had contended in this context that she did not acquire knowledge of relevant facts for the purposes of sections 11 and 14 of the Limitation Act 1980 until 23 January 1998, when the defendant's solicitor "served" a draft amended defence. She also appeals against that part of the judge's order. She does not appeal against his refusal to exercise his discretion under section 33 of the 1980 Act to disapply the provisions of that Act in her favour if all her other arguments failed, and I need not say anything about that aspect of the case.

2 The claimant is now 28. She obtained a law degree at London University and completed the solicitor's legal practice course satisfactorily. She was due to start a training contract with a well known firm of London solicitors when she suffered a catastrophic accident on the defendant's yacht on the Solent on 24 August 1996.

3 The defendant Hugh **Martin** is a very experienced sailor and yachtmaster. Recently he was away from this country for about a year participating in the millennium round the world yacht race. In 1996 he owned an Oyster SJ35 racing yacht called the *Ocean Cavalier* . He invited a group of people to join him on the yacht over the August bank holiday weekend. They included Dominic Nicholls and his wife, Erica, and Erica Nicholls's brother, Miles Holberry, and his wife Helen. Mrs Nicholls was also allowed to invite two friends, the claimant and a girl called Sarah, to join the party of eight, which was completed by Elspeth Smedley.

4 Mr Nicholls had known the claimant's family for many years. His wife first met her in the summer of 1994, when they had worked together for the same firm. They then became close friends. Mr Nicholls had served in the army with the defendant, and he was a competent sailor himself. The defendant had invited Mr and Mrs Nicholls to go sailing with him on a few previous occasions, so that Mrs Nicholls had a basic knowledge of how things operated on a yacht. The claimant, on the other hand, was a novice so far as sailing was concerned.

5 It appears that the party sailed across to the Isle of Wight on the Friday evening and moored there. The following morning was sunny. They sailed on to Cowes, and had lunch on board. They were planning to stay overnight at Lymington or Yarmouth, but the weather deteriorated in the afternoon, and the defendant decided to alter course and sail up the Beaulieu river. It was while he was gybing that the accident happened.

6 The claimant suffered a near fatal head injury. Soon after the accident happened, she was taken by a naval helicopter to a local naval hospital. Mr and Mrs Nicholls joined her there, and they accompanied her that night to a hospital at Southampton, not leaving until 4 or 5 a m on the Sunday morning, by which time her parents had arrived. She was then in a coma for about four and a half days. She also suffered from ten minute's pre-accident amnesia. She has therefore always depended on others to tell her what happened. She was originally placed on a life-support machine; but she slowly recovered, and was discharged home from hospital on 9 September ***1832** 1996. Her left frontal lobe, left cerebral hemisphere and left labyrinth were all damaged. There was no question of her being able to pursue her career as a solicitor for the time being. When

she saw a consultant neurologist, Dr Savundra, a year later, her main concern was whether she would ever be able to return to her employment. She had problems with her concentration, she felt generally tired, and her physical and mental stamina were low. Dr Savundra believed that part of her symptoms were due to a failure to compensate for her peripheral vestibular lesion (which was susceptible to treatment), and part were due to her brain injuries for which no specific therapy was available.

7 During the first two years after the accident she was under the care of hospitals and clinics for much of the time. She then felt able to embark on her training contract, which she found extremely difficult. She was later to tell her solicitor that her life was entirely made up of working and sleeping. It was a daily struggle, and she never knew whether she would be able to work till the end of the week, or even for another day. On many occasions she had to be picked up from work because she was physically incapable of getting home by public transport. She focused on her work to the exclusion of everything else, because this was the only way she was able to carry on working. In July 2000 she told the court in a witness statement that it continued to be a great struggle for her to continue with her training contract. I mention these matters because it might otherwise have seemed strange that she did not pursue this litigation with the vigour that might have been expected of a trainee solicitor.

8 I turn now to the history of this litigation. It appears that the claimant picked up some information about what happened from friends and family who visited her in hospital. In October 1996 she received letters from Mrs Nicholls and Ms Smedley. The former gave her contact addresses for everyone who was on the yacht at the time of the accident. She also told her that Sarah, Ms Smedley and the defendant had all written statements the day after the accident, which were being kept at the defendant's parent's home. She suggested that her lawyer should ask the defendant for them. Finally, she wished her good luck and encouraged her to get everything she was entitled to. In the other letter Ms Smedley explained that she had been at the bow, and did not actually see the incident. She gave the claimant her telephone number in case she wanted to talk about the boat.

9 The claimant has engaged four firms of solicitors during the course of this litigation. She originally instructed a local firm of solicitors in Southgate, who wrote letters on her behalf to the defendant on 7 October and 8 November 1996. The defendant did not reply to either of them. The papers were then passed to a new firm, who wrote to him on 19 November. They urged him to furnish them immediately with the name, address and policy number of his insurers, and to confirm that he had notified them of their client's claim. They also required him to provide them with nine separate items of information or copy documents, and to undertake not to remove or interfere in any way with the boat, and in particular with the “car” which they understood to be the cause of their client's injuries. They also told him they had applied for legal aid. The defendant maintained his policy of not replying.

10 Nearly eleven months then elapsed before the writ was issued. It was endorsed with a statement of claim in which the accident was ascribed to the ***1833** “car” coming free of the guide-rail in which it was designed to travel and striking the claimant on the head. I will refer to the role of this “car” in paragraph 16 below. Seven different allegations of negligence were made, all concerned with different aspects of the defendant's failure to inspect the condition of the roller elements of the car, all four of which were so worn as to require replacement.

11 On 25 November the defendant finally broke his silence, although his defence was curt in the extreme. Paragraph 1 contained an admission that the claimant was on his yacht at his invitation on the day and in the place she had alleged. Paragraph 2 contained general denials of negligence and causation. Paragraph 3 contained a non-admission of per-

sonal injuries, loss and damage. Paragraph 4 contained a positive averment that the accident was all her own fault, alternatively that she was guilty of contributory negligence. Paragraph 5 contained a general denial of the claim, and paragraph 6 contained a general traverse. The only chink of light about the defendant's case was contained in the particulars of contributory negligence: (i) failing to heed the defendant's instructions to remain seated while the vessel was in the process of gybing towards the entrance to the Beaulieu river; (ii) failing to take any or any sufficient care for her own safety both generally and specifically whilst seated and in the vicinity of the mainsheet and traveller. On 26 November 1997 the claimant's solicitor served a notice to admit the fact that all four rollers of the car fractured just before the claimant suffered her injury. The defendant declined to admit anything.

12 The claimant was still in a very shaky state of health, as Dr Savundra's September 1997 report shows. She encountered, however, an almost unbroken wall of silence when her solicitors wrote on her behalf in October 1997 to five of the people who had been in the boat when she had her accident. Mr and Mrs Holberry did not reply to their letter. Nor did Ms Smedley. Mrs Nicholls, however, did respond, and on 24 October 1997 the claimant's solicitor visited her at her home near Stockbridge to take a witness statement from her. He sent a draft for her approval to her four days later.

13 In this draft statement Mrs Nicholls explained how the yachting party had been made up, and how the defendant had held a drill before they sailed, explaining how everything on the boat worked and how it was operated. She described the history of events until the weather deteriorated on the Saturday afternoon. She said that everyone became wet and miserable when it began to rain, and the wind got stronger. The defendant decided to head for Beaulieu, and he took over the helm from the claimant, who came to sit with Mrs Nicholls in the cockpit, directly in front of him. She then described the gybe, and said that as they were performing it, the ropes suddenly went slack. She now believed that this was because the car had shattered. Although she did not actually see the shattered car strike the claimant, she saw her from the corner of her eye fall backwards very quickly. As she turned around she saw her hit her head on the cockpit floor. She had no doubt in her mind that it was the car shattering that was the original cause of the accident.

14 In his covering letter dated 28 October 1997 the claimant's solicitor invited her either to approve the draft statement or to make any changes to it she wished to make. He added that while he fully appreciated Mr Nicholls's position, he would like the opportunity of having a brief discussion with him, and he invited her to ask him to telephone him at his own convenience. ***1834**

On 5 November 1997 Mrs Nicholls replied to the effect that she had decided to “withdraw” her witness statement. Whilst she fully appreciated the claimant's unfortunate position, she was no longer willing to be a part of any proceedings that might have “a negative effect” on the defendant. She added that her husband had also chosen to take no part in any case against the defendant. The wall of silence was now complete.

15 On 23 January 1998 the defendant's solicitors sent the claimant's solicitor a draft amended defence. This contained by amendment a limitation plea under section 185 of and Parts I and II of Schedule 7 to theMerchant Shipping Act 1995 , on which nothing at present turns, except that this plea contained for the first time the defendant's account of how the accident happened. It went along the following lines.

16 The *Ocean Cavalier* was approaching the vicinity of the mouth of the Beaulieu River on a starboard gybe, with the boom out to port. The foresail was lowered. The defendant was on the helm. He warned the crew that he was going to gybe and instructed them what to do during the gybe. He told them to be aware of the boom. The claimant was seated at the aft end of the cockpit to

the starboard of the helmsman and aft of the mainsheet traveller track. This track ran athwart the vessel, and the mainsheet block and tackle was attached to it by a moving "car". The defendant told the claimant she was fine where she was.

17 As the gybe commenced, Mrs Nicholls was situated in the cockpit, taking in the mainsheet in accordance with her instructions. The claimant then leaned over to help her, with the mass of her torso across the mainsheet track. The defendant shouted a warning to her, but the boom swung across at almost the same time, and the claimant was struck on her side by the mainsheet itself. She was knocked down as a result, and struck her head on the side of the cockpit.

18 The defendant's solicitors did not obtain leave to amend their defence until 16 October 1998 when Moore-Bick J also gave the claimant leave to amend her statement of claim as to the matters contained in the amended defence within 21 days of the service of that pleading. He directed a trial as to liability and/or limitation of damage first. The defendant's solicitors then waited for a further three and a half months before serving the amended defence.

19 A delay then occurred in the conduct of the proceedings between 2 February 1999, when the defendant's solicitors served their amended defence, and 10 March 2000 when the claimant's solicitors gave notice of intention to proceed. A third firm of solicitors came on the record on the claimant's behalf in February 1999, and that year appears to have been devoted to tidying up points of detail before the papers were submitted to counsel to consider amendments to the statement of claim. In May 1999 the defendant's solicitors told them that the damaged car could not be found after the incident, despite extensive searches. A delay of seven months then occurred before effective arrangements were made for the claimant's expert to inspect the boat. In February 2000 the claimant changed her solicitors again. On 14 April 2000 the claimant's new solicitors served on the defendant's solicitors the draft amended statement of claim which they were now seeking leave to serve.

20 The defendant's solicitors now contended that the claimants should not be allowed to make this amendment, notwithstanding that it was ***1835** founded on the version of the facts which their own client was setting out to prove at the trial. They relied in this context on CPR r 17.4(1) and (2) , which provides, so far as is material:

"(1)This rule applies where—(a)a party applies to amend his statement of case in one of the ways mentioned in this rule; and(b)a period of limitation has expired under—(i) the Limitation Act 1980 …
"(2)The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

21 On 16 June 2000 Master Miller refused to allow the amendment. He said that the defendant would suffer no prejudice from a factual point of view in dealing with the amendments, which flowed from what the defendant had said in his amended defence. He added that although there had been a remarkable delay in bringing the application, he would not have allowed this fact to tip the balance against the claimant so far as the exercise of his discretion was concerned. His difficulty, which he said he identified without any enthusiasm, was that the new claim did not arise out of the same facts as a claim in respect of which the claimant had already claimed a remedy. He said that he therefore had no jurisdiction to allow the amendment.

22 When the claimant appealed to Colman J she added a new contention that the relevant limitation period had not in fact expired because she had not acquired knowledge of the relevant facts within the meaning of sections 11 and 14 of the 1980 Act until 23 January 1998 when the draft

amended defence was served on her solicitors.

23 Colman J upheld Master Miller's decision but shared his lack of enthusiasm for the result. In dismissing the appeal, he also considered and rejected a new argument founded on section 35 of the 1980 Act. He also rejected the new section 14 argument.

24 In this context he applied a test set out in the decision of this court in Welsh Development Agency v Redpath Dorman Long [1994] 1 WLR 1409 , 1425. He said that the claimant should only be given leave to amend if she could show that the defendant did not have a reasonably arguable case on limitation which would be prejudiced if he allowed the amendment. The defendant had argued that the only two matters of which the claimant did not have actual knowledge before November 1997 (three years before the hearing before Colman J) were the fact that she had been struck by the mainsheet and, less importantly, the fact that there was a wind speed of force 7 from the west-south-west. Colman J held that it was arguable that if the solicitor then acting for the claimant had acted with reasonable diligence he would have been able to ascertain these two facts before that date. He was not willing to conclude that any earlier attempt that he had made to obtain additional evidence from those on board the yacht would necessarily have been futile.

25 On this further appeal Mr Ralls, who appears for the claimant, has sought to bolster his primary case by the addition of a new argument, based on article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms , which was not pursued before the judge. He says that if he fails in his contention that these amendments should be ***1836** allowed on a conventional interpretation of CPR r 17.4(2), then we ought to apply a more unconventional, yet possible, approach to interpretation. If we do not, the argument runs, his client's right of access to a court would be impaired by a restriction which impaired the essence of that right and did not have a legitimate aim. Even if a legitimate aim could be shown, the restriction employed means which were not reasonably proportionate to that aim: for these tests see Ashingdane v United Kingdom (1985) 7 EHRR 528 , 546, para 57. In order to consider the arguments on CPR r 17.4(2) it is first necessary to say something about the legislative history.

26 So far as primary legislation is concerned, it is necessary only to consider section 28 of the Limitation Act 1939 both in its original form and in its form as substituted by section 8 of the Limitation Amendment Act 1980 . So far as the court is aware, there were no changes to section 28 in the intervening years. In its original form, the section provided:

"For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded."

27 Between 1939 and 1980 no provision was made in primary legislation for the situation in which a party wished to add to its statement of claim a new cause of action founded on the same facts or substantially the same facts as had already been pleaded. Such provision was made for the first time in the greatly enlarged version of section 28 which was substituted in 1980, and consolidated in the same year as section 35 of the Limitation Act 1980 . The new section 35 (which is still in force) provides, so far as is material:

"(1)For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—(a)in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and(b)in the case of any other new claim, on the same date as the original action."(2)In this section a

new claim means any claim by way of set-off or counterclaim, and any claim involving either—(a)the addition or substitution of a new cause of action; or(b)the addition or substitution of a new party…"(3)Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any county court shall allow a new claim within subsection (1)(b) above… to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim…"(4)Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose."(5)The conditions referred to in subsection (4) above are the following—(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the ***1837** same facts as are already in issue on any claim previously made in the original action…"

28 So much for primary legislation. So far as the practice of the High Court was concerned, the rules governing amendments prior to the 1965 revision of the RSC were set out in the judgment of this court in Weldon v Neal (1887) 19 QBD 394 . In that case the court held that a plaintiff would not be permitted to amend a statement of claim by setting up fresh claims in respect of causes of action which had become statute-barred since the issue of the writ.

29 In 1965, RSC Ord 20, r 5 was introduced with the effect of changing this practice in certain ways. So far as is material, it provided:

"(2)Where an application to the court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.""(5)An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

30 The power of the Rule Committee to introduce these new rules without the assistance of primary legislation soon came under fire, but it was upheld in Rodriguez v R J Parker (Male) [1967] 1 QB 116 and Mitchell v Harris Engineering Co Ltd [1967] 2 QB 703 for reasons which it is not now necessary to describe.

31 The Law Reform Committee considered these rules in its Twenty-First Report (Final Report on Limitation of Actions) (1977) (Cmnd 6923). After explaining the terms of RSC Ord 20, r 5 it said, at p 67, para 5.12:

"The Senior Master, who has suggested to us that the discretion of the court to allow an amendment of pleadings should be stated much more widely than it now is, has helpfully drawn our attention to the terminology used in rule 15(c) of the American Federal Rules of Procedure , under which a new cause of action may be added by amendment if—'it arises out of the conduct, transaction or occurrence of events set forth or attempted to be set forth in the original proceeding's. We have considered whether some such words as these might be preferable to those used in the existing RSC ; but we doubt whether they add anything to the rule we have quoted above. The object of any such rule must, as we see it, be twofold. First, it ought to permit a plaintiff to amend his pleadings so as to make good the error of failing to tell the complete legal story at the outset. Secondly, it ought to be drawn sufficiently narrowly so as to prevent the plaintiff from instituting, under the guise of an amendment to an existing claim and after the limitation period

has run, proceedings which are wholly distinct from those covered by the writ as originally framed. On the whole, we think that the existing rule achieves this object and goes as far in giving the court a discretion as the substantive law does, or should, permit. The American formula is ***1838** probably consistent with our own substantive law, but we doubt whether its adoption would make any practical difference; nor do we think it is intrinsically superior to the existing words of the RSC"

32 It follows that the committee decided to make no change to the existing rules to cover a case like the present, where the claimant wishes to add a new cause of action which arises out of the occurrence of events set forth in the proceedings as they stood before the proposed amendment. It does not appear to have considered the kind of situation with which we are at present concerned.

33 The pre-consolidation Limitation Amendment Act 1980 was the vehicle by which many of the committee's recommendations were passed into law. I have already set out the new statutory scheme it introduced by way of substitution of section 28 of the 1939 Act. Changes were subsequently made to the wording of RSC Ord 20, r 5(4), but rule 5(5) remained unaltered. When the Civil Procedure Rules were introduced in 1999, CPR r 17.4(2) was in substantially the same terms as Ord 20, r 5(5), with the substitution of the word "claim" for the expression "cause of action".

34 I return now to section 35 of the 1980 Act (for its terms, see paragraph 27 above) in order to make two points. The first is that the language chosen by Parliament in section 35(5)(a) is apt to embrace the concept contained in rule 15(c) of the American Federal Rules of Civil Procedure and the situation that has arisen in the present case. The claimant's new cause of action does indeed arise out of the same facts as are already in issue on her claim. The second is that neither the former Rule Committee nor the Civil Procedure Rule Committee have ever evinced any intention or desire to use their power under section 35(4) to add any additional restrictions to the rules permitting post-limitation amendments. So far as the first of these points is concerned, it has received judicial support from Hobhouse LJ, with whom Peter Gibson and Simon Brown LJJ both agreed, in Lloyds Bank plc v Rogers The Times, 24 March 1997; Court of Appeal (Civil Division) Transcript No 1904 of 1996, when he said of section 35: "The policy of the section is that if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts"

35 We now possess more tools for enabling us to do justice than were available before April 1999. Since then, the CPR and the provisions of the Human Rights Act 1998 have come into force. By the former we must seek to give effect to the overriding objective of dealing with cases justly when we interpret any rule: see CPR r 1.2(b). By the latter we must read and give effect to subordinate legislation, so far as it is possible to do so, in a way which is compatible with the Convention rights set out in Schedule 1 of the 1998 Act: see section 3(1) of the 1998 Act.

36 It is commonplace that the claimant must not be impeded in her right of access to a court for the determination of her civil rights unless any hindrance to such access can be justified in a way recognised by the relevant European human rights jurisprudence: for the general principles, see Cachia v Faluyi [2001] 1 WLR 1966, 1971-1972, paras 17-20. All she wants to do is to say that even if the accident happened in the way the defendant says it happened, he was nevertheless negligent for failing to take appropriate steps, as an experienced yachtmaster, to protect her safety as a novice sailor. She ***1839** does not

want to rely on any facts which will not flow naturally from the way the defendant sets up the evidential basis of his defence at the trial.

37 Mr Kay, who appeared for the defendant, encouraged us to adopt a narrow interpretation of both CPR r 17.2 and section 35(5) of the 1980 Act. So far as the latter was concerned, he argued that the words "the same facts as are already in issue on any claim" were not apt to embrace facts that were in issue on the defence to such a claim.

38 He did not explain to us why, as a matter of policy, the meaning of the words should be restricted in this way. We suggested to him that it seemed to be unfair, if a defence was served at the end of, or just outside, the primary limitation period, a claimant could not riposte by saying: "Well even if, which I dispute, the accident happened in that way, you were negligent because…" His reply was that the claimant would have to issue a new claim, incorporating an appropriate plea under the Limitation Act 1980 , and consolidate that claim with her existing claim. It is hard to reconcile that expensive and cumbersome procedure with the philosophy of the overriding objective contained in the Civil Procedure Rules.

39 Mr Kay urged us to be cautious about relying on the dictum of Hobhouse LJ in Lloyds Bank plc v Rogers , because he was concerned with a quite different situation. He also took comfort from a dictum of Nourse LJ in Fannon v Backhouse The Times, 22 August 1987; Court of Appeal (Civil Division) Transcript No 829 of 1987 , when he said in a quite different factual context that he thought it clear that the words "in issue on" meant " 'material to' or the like". Again, Nourse LJ was not concerned with the situation which confronts us in the present case.

40 As for the interpretation of CPR r 17.4(2), Mr Kay encouraged us to adopt the narrow interpretation of the rule favoured by the judge and the master. The words "out of the same facts or substantially the same facts as a claim" did not allow the court to consider facts which were put in issue by a defendant. This interpretation, he said, could work no injustice now that sections 11, 14 and 33 of the 1980 Act permitted the court to do justice in ways which were not possible before the amendments to the limitation legislation which came into effect from 1963 onwards. Even if the statute now allowed for a wider rule, we must interpret the rule as it stands, he said, and assume that the Rule Committee had deliberately decided to restrict its scope pursuant to its power under section 35(4).

41 I have shown how there is no evidence that the committee ever did decide to introduce such a restriction. But for the introduction of the 1998 Act, however, an Act which was not in force when the master made his original ruling, I would have been of the view that Mr Kay's arguments on the construction of the rule (as opposed to the statute) were soundly based. Mr Ralls sought energetically to encourage us to read into the rule words which were not there. Without the encouragement of section 3(1) of the 1998 Act, I could see no way of interpreting the language of the rule so as to produce a just result.

42 The 1998 Act, however, does in my judgment alter the position. I can detect no sound policy reason why the claimant should not add to her claim in the present action the alternative plea which she now proposes. No new facts are being introduced: she merely wants to say that if the defendant succeeds in establishing his version of the facts, she will still win because ***1840** those facts, too, show that he was negligent and should pay her compensation.

43 In these circumstances it seems to me that to prevent her from putting this case before the court in this action would impose an impediment on her access to the court which would require justification. If it cannot be justified, the defendant cannot then be heard to say that she could always bring an-

other action. In such an action she would have to confront the argument that the six other people on the boat would probably have been willing to help her to understand what had happened if only her solicitor had approached them earlier, despite their later refusal to help her in any way. Why should she have to be troubled with this, one asks rhetorically, if there is no reasonable justification for the rule Mr Kay seeks to uphold?

44 I do not consider that the rule, as interpreted by the master and the judge, has any legitimate aim when applied to the facts of the present case. Whether the defendant put forward his version of events (which the claimant now wishes to adopt) before or after the expiry of the primary limitation period ought to make no difference to her ability to adopt it as part of her case and say that if that was indeed what had happened, he had nevertheless been negligent. If she delayed unreasonably in putting forward her amended pleading, the master could have blocked it on those grounds, but he made it clear that he would not have exercised his discretion against her if the rule had permitted him to allow the amendment. Even if the rule had any legitimate aim in the circumstances of this case, the means used by the rule-maker (if we have to interpret the rule in the way favoured by the court below) would not be reasonably proportionate to that aim.

45 The House of Lords has been showing us, most recently in R v A (No 2) [2002] 1 AC 45 , 67-68, how we should approach the interpretative task imposed on us by section 3(1) of the 1998 Act. It is not necessary to read into this judgment the whole of the relevant passage in Lord Steyn's speech. It is sufficient only to quote two sentences from paragraph 44:

"In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions."

46 Mr Ralls contended that we should interpret CPR r 17.4(2) as if it contained the additional words "are already in issue on". It would therefore read, so far as is material:

"The court may allow an amendment whose effect will be to add… a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings." (Emphasis added.) This would bring the sense of the rule in line with the language of the 1980 Act, which is the source of the authority to make the rules contained in CPR r 17.4 .

47 In my judgment it is possible, using the techniques identified by Lord Steyn in R v A (No 2) , to interpret the rule in the manner for which Mr Ralls contends. In this way there would be no question of a violation of the ***1841** claimant's article 6(1) rights, and the court would be able to deal with the case justly, as we are adjured to do by the Civil Procedure Rules. I would therefore permit the amendment and allow the appeal. A case management conference should be heard at an early date with a view to setting a timetable for an early trial after all the delays that have recently occurred.

48 In these circumstances it is not necessary to consider Mr Ralls's alternative arguments in any detail. I can say quite briefly, however, that I consider that the judge was correct to reject the arguments which placed the claimant's date of knowledge unarguably at the time when her solicitors received the amended defence. The defendant was entitled as a matter of law, if he chose to descend to that level, to run the unattractive argument that his loyal Trappist friends might have been disposed, after all, to help the grievously injured claimant if only her solicitor had approached them earlier. It would not have been right to shut out an argument along those lines, as would inevitably have been the case if permission had been granted for the amendment on the

basis of the claimant's new section 14 argument which was not before the master.

LATHAM LJ

49 I agree.

KAY LJ

50 I also agree.Appeal allowed. Permission to appeal refused.

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1. CPR r 1.2 : “The court must seek to give effect to the overriding objective [of enabling the court to deal with cases justly] when it—(a) exercises any power given to it by the Rules; or (b) interprets any rule. R 17.4(2) : see post, para 20 .

2. Human Rights Act 1998, s. 3(1) : “So far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with the Convention rights. Sch 1, Pt I, art 6 : “(1) In the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”

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EXHIBIT 55

CIVIL JUSTICE COUNCIL

REFORM OF COLLECTIVE REDRESS IN ENGLAND AND WALES:

A PERSPECTIVE OF NEED

A Research Paper

for submission to the

Civil Justice Council of England and Wales

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In addition, the author has derived benefit and assistance from numerous face-to-face and round-table discussions with interested stakeholders (practitioners, law reformers, industry representatives, judiciary, and governmental representatives) in England and in Europe. Sincere thanks are due to each of these parties for insightful and stimulating discussions. Where appropriate, specific acknowledgment of information provided by these parties is provided throughout the Research Paper.

A preliminary version of this Research Paper was presented for discussion at a conference arranged by the CJC on 28–29 November 2007, held at Theobalds Park, Cheshunt. The event, the attendees' contributions, and the written and oral feedback subsequently received, have enhanced the robustness of this research. As and where appropriate, due acknowledgment is also made of these contributions in this Paper.

Finally, any opinions expressed in this Research Paper are those of the author, and should not be taken to necessarily represent the views of the Civil Justice Council. In part, this Research Paper has been prepared to assist the Civil Justice Council in its consideration of possible reform of the collective redress mechanisms presently available in England and Wales. It is understood that the Civil Justice Council intends to publish its views on this matter in the near future.

EXECUTIVE SUMMARY

The remit of this particular research is to challenge whether there is an 'evidence of need' for reform of collective redress in England and Wales, and if so, what/where are the gaps, and how should the gaps be closed off so that any reform has substance, and is not merely 'a solution looking for a problem'?

Nineteen (19) building blocks add up to suggest that there is overwhelming evidence of the need for a further collective redress mechanism, in order to supplement presently-existing procedural devices available to claimants. (These numbers allotted to the building blocks in the Table below correspond to the substantive Sections which follow in the Paper hereafter. Sections 1 and 2 are addressed as Introduction and Methodology, respectively.)

The Building Blocks that Construct the Need

3. The GLO regime has certainly been used since its introduction in 2000 (62 actions thus far), indicating that collective redress for damages *is* pursued (most commonly so far, for alleged care home abuses and for environmental claims)	**4.** Whether English opt-in litigation has been run as *ad hoc* opt-in actions or under the GLO, such litigation inevitably suffers from a **rate of participation** of group members which is highly variable, but **typically low**, with many opt-in rates < 30%	**5.** The experience of those law firms who commence and conduct group litigation is that the key reasons as to **why opt-in did not suit the action** were the sheer task of identifying all group members at the outset, the barriers to litigation that some group members never surmounted in time, and the low value recoveries per group member (other reasons also figured)
6. Furthermore, a number of **procedural problems have manifested under the opt-in regime** of the GLO — eg, frontloading, a skewed costs–benefit analysis, the test case versus generic issue dilemma, the operation of limitation periods, the judicial attitude towards those who do not opt-in	**7.** The **'barriers to litigation'** that litigants face are extraordinarily diverse — legal practitioners' combined experiences gave rise to almost 20 separate reasons as to why group members may fail to come forward to join the class at the outset of the action	**8.** The **specialist regime under the Competition Act 1998, s 47B**, is a representative opt-in action, which has been notable for its attendant difficulties and lack of utility, largely caused by the opt-in principles upon which it operates

9. A lack of damages claims (whether follow-on or stand-alone), in respect of **widespread cartel and other anti-competitive conduct**, has also been notable in England — despite the existence of a specialist follow-on representative action for consumer claims arising from such conduct	**10.** There is a notable lack of private actions for class-wide damages incurred when a widely-utilised contract term is regarded by regulatory enforcers to be an '**unfair contract term**' — in circumstances where class-wide loss or damage has feasibly occurred as a result of the incorporation of and reliance upon that term	**11.** Data produced by the Legal Services Commission indicates that some categories of group actions have featured as **major or medium-sized funded applications** more so than, say, consumer-oriented group actions (apart from pharmaceutical cases) — perhaps arising from a combination of a lack of applications in those particular areas and applications not meeting necessary funding criteria
12. The number of disputes handled by the GLO regime are notably fewer, and the range of GLO claims is considerably less extensive, than the number/range of claims instituted under **opt-out collective redress regimes in Australia and in Ontario** over the same time period (2000–07)	**13.** The **opt-out regime in Portugal** has been in operation since 1995, and is Europe's longest-standing opt-out regime. The experience under it — particularly the ability to bring low-value but widespread consumer grievances — is salutary for any reform proposals which may be considered for England and Wales	**14.** There is an increasing **momentum across Europe** to facilitate collective redress using the **opt-out** mechanism (Spain, Denmark, Norway, the Netherlands), whilst avoiding the accoutrements of the 'US-style' class action
15. Attempts by English claimants to **'add-on' or take advantage of the US opt-out regime** (federally, under rule 23 of the FRCP) have met with a lack of success on several grounds (eg, *forum non conveniens*, US statute lacks extra-territorial effect, *res judicata* concerns)	**16.** With respect to global products, such as investment opportunities or pharmaceutical goods that are purchased/used by residents, both in England and elsewhere, it is relevant to compare the relative lack of litigation in England, where **the same product has been the subject of litigation under** opt-out class actions elsewhere	**17.** The **bank charges litigation** in English County Courts has been a recent reminder of how inefficient and burdensome widespread unitary litigation can be — with consequences ranging from embarrassing bailiff visits to banks because of a failure to file a defence due to 'administrative oversight' to the very real possibility of inconsistent judgments and delays

18. Widespread grievances in the employment sphere are also prevalent (eg, equal pay, national minimum wage, discrimination), giving rise to thousands of individual claims which have increased in number markedly over the past 24 months, for which an opt-out collective action would provide greater efficiencies	**19.** The reality is that the **GLO regime is a case management 'umbrella'** under which a conglomeration of individual actions is managed — in that regard, individual actions are not only encouraged, but they are required. Commencement of numerous unitary actions which must then be transferred to the 'umbrella' of the GLO is not unusual under this system	**20.** Empirical data from the United States and Victoria confirms that the **rates of participation under opt-out regimes are very high** (at least 87%); and where empirical data does not exist in other jurisdictions, opt-out rates noted in individual cases indicate that the rates of participation, whilst variable, exceeded 60% on the sample selected
21. Empirical data from the United States, plus individual case data from Europe and England, confirms that the **rates of participation under opt-in regimes**, whilst variable, tends to be **quite low** (in some cases, less than 1%), indicating that, on occasion, very few group members are caught in the litigation's net		**Summary of findings:** There is a 'gap' in the collective redress mechanisms available in England and Wales, which could be filled by a regime that is: • opt-out • generic (capable of procedurally handling a wide array of disputes that manifest common grievances), and • permissive of an ideological representative claimant.

PART I

INTRODUCTION

1. BACKGROUND TO RESEARCH PAPER

The Civil Justice Council of England and Wales (CJC) is currently investigating whether initiatives should be proposed in order to improve collective redress mechanisms, for consumers (and others) who allege grievances on a widespread scale. The CJC expects to report on the matter in 2008.

When considering any reform of collective redress, there are inevitably three matters that require consideration:

1. **Whether the regime is needed** (ie, whether there is a 'procedural gap' that requires filling), and if so;
2, **The design of the regime** (ie, its statutory drafting); and
3. How the litigation conducted pursuant to it will be **funded** (eg, by public fund, third party funders), and how **costs** will be dealt with (eg, whether costs-shifting will be retained, when that may be departed from).

This Research Paper addresses the **first** of these key components: is there a need for a new initiative for collective redress, over and above the mechanisms currently available to litigants (primarily, the group litigation order, and various representative rules)? The CJC's enquiry pertains to whether there is any 'evidence of unmet need' for claimant protection in England and Wales, especially given the non-availability of a generic opt-out mechanism in English civil procedure.

The research itself has been motivated by several factors: by the various reform proposals and studies at European level which are presently reviewing collective redress availability and efficacy; by a proliferation of English discussion papers issued by governmental bodies during 2006–7, which have either enquired about or voiced the need for better group and representative action procedures for this jurisdiction; by the CJC's relationship with key law representatives around the Commonwealth, whose lessons and insights continue to provide much assistance on the question of collective redress; and by the CJC's declared position to continue to develop effective, court-controlled, procedures for meritorious consumer claims. On the statutory front too, key developments have occurred recently, notably, the introduction of new collective redress procedures in some European jurisdictions as at 1 January 2008. The author and the CJC consider this Research Paper to be both timely and relevant within the domestic and European contexts.

In addition, a recent study by the Judiciary of England and Wales, entitled, *Report and Recommendations of the Commercial Court Long Trials Working Party* (December 2007), makes several recommendations concerning the commencement and conduct of 'heavy and complex cases', or 'large scale litigation', in the Commercial Court. The report was prepared to consider and respond to a series of criticisms of the procedures that were adopted in two major commercial trials — the *BCCI* case and the *Equitable Life Insurance Company* case — in which '*the claimants' cases had, effectively, collapsed after years of pre-trial procedures, then many months of trial, all at great expense*' (at para 22 of the Report). Many of the Working Party's comments in respect of, for example, judicial case-management, preliminary merits assessment, and the need for efficiencies in litigation, are of relevance to the commencement and conduct of group litigation, even though the comments were not *necessarily* directed toward that specific context, but to Commercial Court work generally. In any event, the Report reiterates the ongoing need to review the procedures available to litigants, and the court's vital role in case management of potentially resource-intensive cases.

The enquiry undertaken for the purposes of this Research Paper, as to any 'unmet need' for better collective redress in England and Wales, has been undertaken by having regard to both intra-jurisdictional and comparative perspectives. Comparatively speaking, the Research Paper is particularly informed by the experiences in Europe and in the Commonwealth. Notwithstanding that a tremendous amount of important jurisprudence on collective redress has emanated from the United States, particularly over the past four decades, the American jurisdiction does not form a particular focus of this Research Paper — given the differences in funding practices, substantive legal principles, costs-shifting rules, and cultural attitudes towards litigation evident in the US (eg, re the employment of jury trials, and the wider availability of exemplary damages), with which many English judiciary members, practitioners and law reformers feel inherently uncomfortable.

It will be suggested in the Summary of Findings that, both individually and cumulatively, the 19 sections of this Research Paper adduce emphatic evidence of 'unmet need' for more effective collective redress initiatives for litigants in England and Wales. It will further be suggested that the 'unmet need' could be satisfied by the introduction of an opt-out generic collective redress regime.

In this regard, the research undertaken for this Paper resonates with the sentiments and purposes expressed by Lord Woolf in his seminal report published more than a decade ago, ***Access to Justice: Final***

Report to the Lord Chancellor on the Civil Justice System in England and Wales (1996), where his Lordship said, at ch 17, para 6:

> *In this area of litigation more than any other my examination of the problems does not pretend to present the final answer, but merely to try to be the next step forward in a lively debate within which parties and judges are hammering out better ways of managing the unmanageable.*

With the above comments in mind, this Research Paper seeks to take another 'step forward' in this most important debate on procedural reform.

2. METHODOLOGY

The information contained in this Research Paper is derived from a variety of sources:

Questionnaire — On 27 October 2007, a Questionnaire was distributed to four law firms who conduct specialist group litigation practices in England and Wales, and of those, three firms participated in this study — Leigh Day & Co Solicitors, Irwin Mitchell Solicitors, and Hugh James Solicitors. Eleven practitioners from the respondent law firms completed the Questionnaire, who, between them, conducted some 97 group actions. All completed Questionnaires are on file with the author.

Divided into three sections, the Questionnaire sought to elicit information based upon the law firms' experiences in commencing and running group litigation over several years (both under the GLO regime and, prior to that, under *ad hoc* arrangements). The content of the Questionnaire was agreed in consultation with the Civil Justice Council. For the purposes of this Research Paper, the Questionnaire contained the following assumptions, or 'preliminary notes about the exercise':

> 'A. For the purposes of this questionnaire, please ***assume*** that the funding of the action *would* have been available from *some* source (to enable the focus of this questionnaire to be placed upon other procedural requirements).
>
> B. The questionnaire requires, for some questions, that you assume the role of a 'certification judge', ie, by considering whether the essential requirements of an opt-out class action were met in the action, in your view.
>
> C. Finally, the questionnaire seeks to gather information about actions that would have suited an opt-out regime. This assumes that the class members would have had to opt in *later down the track* in order to have their individual issues determined — but that, at the initial stage, it would have been sufficient to *describe the class*, with the appointment of a suitable representative claimant to litigate the common issues on behalf of the class.'

For the purposes of confidentiality, the names and certain other identifying characteristics of the litigation which were noted in the completed Questionnaires have been deleted when preparing sections of this Research Paper.

The information provided in the Questionnaires was, to some extent, based upon information known only to the participant lawyers, who have provided the information in good faith and with care and caution.

Where the participant lawyer could not provide an 'accurate-with-certainty' answer to a question, or where a 'round estimate' is all that could feasibly be provided (eg, with respect to the total class size in respect of a particular litigation), then the results of the survey in this Paper record that response.

Following receipt of the completed Questionnaires, the author followed up with some of the Respondents, either by face-to-face discussions or by telephone, to clarify some comments or responses contained in the Questionnaires.

Interviews and meetings — Apart from the follow-up meetings referred to above, over the period of Summer/Autumn 2007, the author met a number of governmental officials, legal practitioners, consumer and employee representatives, industry representatives, legal practitioners, those charged with law reform, and other persons interested in reform of English collective redress procedures, both in Europe and in England, from which information and insights were learnt and ideas were developed. Quotations attributed to particular individuals throughout this Research Paper have been checked with the authors prior to publication of the Paper.

Case law analysis — In several sections of the Research Paper, it has been necessary to closely examine case law on class proceedings in Canada, group litigation and other representative actions in England, and representative proceedings commenced and conducted under Australia's federal regime. Reference has also been made to decisions emanating from the United States, for example, in a section which considers those scenarios in which 'add-on' classes of English claimants have been involved. All references to case law herein have been derived from the author's perusal of relevant case law (both reported and unreported) on the following databases: Westlaw (both 'UK' and 'International' libraries); Lexisnexis Butterworths (various subscribed sources); Canlii; Austlii; and Bailii.

Secondary literature research — All government reports, journal articles, responses to consultation papers, newspaper reports, and the like, which are referred to herein, were sourced either via hard copy or via online copies. Where available online, the relevant URL has been provided, for readers' convenience.

Preliminary report — As mentioned in the Acknowledgments, on 28–29 November 2007, the author presented her findings, as at that date, to a conference of stakeholder participants, arranged by the Civil Justice Council, and attended by Sir Anthony Clarke, Master of the Rolls, and held at Theobalds Park,

Cheshunt. Feedback from such stakeholders derived both at, and since, that conference has been incorporated with attribution, where appropriate.

References to England — Importantly, the research undertaken for this Research Paper was derived from assistance given by legal practitioners and other stakeholders in both England and Wales, and from primary materials emanating from both jurisdictions; and the findings contained herein pertain to both England and Wales. Thus, any references to 'England' should be taken to mean 'England and Wales', unless otherwise indicated in the particular context.

The relevant terminology — The methodology undertaken to prepare and write this Research Paper has necessarily required that reference be made to a variety of jurisdictions, all of which tend to use different terminology to describe their generic, opt-out, procedural schemes. Ontario calls this a '*class proceeding*'; other Canadian provinces prefer the terminology of a '*class action*', as does the United States; and Australia adopts the terminology of a '*representative proceeding*'. In this Paper, all of these terms will be included under the umbrella term of '***collective action***'. A collective action means, where appearing in this Paper, a procedural scheme which is based upon opt-out, not opt-in, principles; which is generic in the sense that it can handle a variety of substantive law disputes; and which entails the use of either a direct claimant or an ideological claimant. By contrast, the term, '***group litigation order***', where appearing in this Paper, carries the meaning attributed to it by Part 19.III of the Civil Procedure Rules (CPR) — an opt-in regime whereby each claimant must file a claim form and be entered upon the group register. The use of the term, '*group action*', similarly connotes an opt-in arrangement.

PART II

COLLECTIVE REDRESS FOR DAMAGES IN ENGLAND AND WALES

3. THE LIMITED LITIGATION COMMENCED UNDER THE GROUP LITIGATION ORDER TO DATE

The main points:

- ❑ **there have been, according to records maintained by Her Majesty's Court Service, 62 group actions certified as GLO's since the regime's introduction on 2 May 2000**
- ❑ **on a percentage basis, the most common GLO category of claim has been care home abuses (21% of all GLO's), and the next most common category has been environmental claims (15%)**

(A) Constructing the GLO table. The GLO regime, implemented via Pt 19.III of the Civil Procedure Rules, has been in effect since 2 May 2000. Each GLO, once certified, is required to be entered on a group register (per Practice Direction 19B, para 6). A list of these group registers (one for each GLO) is maintained by Her Majesty's Court Service, and is available for perusal at: <http://www.hmcourts-service.gov.uk/cms/150.htm>.

In Table 1, the author has grouped the GLO's by type, indicating the percentage of GLO's represented by each category of claim. Further information has been sourced from the solicitors conducting the actions, where necessary, to describe the subject matter of the GLO actions. A couple of caveats about the GLO Table should be noted:

- ❑ a couple of the GLO cases appear to have been repeated on the Group Register (eg, the St Williams litigation), in which event they are counted in the Table as one GLO and not as two;
- ❑ a comparison between the list of GLO's at the URL noted above, and judgments and orders which pertain to GLO's available on legal databases, reveals the occasional discrepancy. For example, in a judgment on costs, ***Various Ledward Claimants v Kent and Medway HA*** [2003] EWHC 2551 (QB), reference is made to a GLO issued on 31 July 2002, but the date and subject matter of that GLO do not appear at the URL noted above.

TABLE 1 GLO's by category/type (2000–7)

Type of claim or allegation	No. of GLO's brought for this type of claim	% of GLO's represented by this type of claim	The GLO's name, number and brief description
Employment-related personal injuries	5	8%	Miner's Knee GLO – No. 62 – chronic knee injury resulting from underground work in mines Dexion Deafness GLO – No. 49 – industrial deafness claim Coal Mining Contractors GLO – No. 18 – respiratory injuries (right to contribution) Cape plc GLO – No. 4 – asbestosis-related diseases Havelock GLO – No. 25 – asbestosis-related diseases
Military-related claims against British Government	3	5%	Atomic Veterans GLO – No. 61 – claims by atomic veterans (military and civilians) who participated in the British programme of testing of nuclear explosive devices between 1952–58 Kenya Training Areas GLO – No. 29 – dispute about 'ordnance related incidents' in areas of Kenya Chagos Islanders GLO – No. 27 – dispute about exile of Chagos Islanders from homeland by the UK government to make way for a US military base
Disappointed holiday-goers (for loss and damage sustained during package holidays)	4	6%	Soviva Hotel GLO – No. 60 Torremolinos Beach Club GLO – No. 48 JMC Holidays / Club Aguamar GLO – Nos. 6 and 7

Type of claim or allegation	No. of GLO's brought for this type of claim	% of GLO's represented by this type of claim	The GLO's name, number and brief description
Taxation disputes – including disputes over VAT, refund entitlements, advanced corporation tax, and other taxation disputes	8	13%	VAT Interest Cars GLO – No. 59 – re refunds of VAT to motor vehicle dealers MTIC Damages GLO – No. 54 – dispute whether the raising of an assessment to VAT fell outside the scope of VAT and was in breach of the Sixth EC Council Directive FIDs GLO – No. 43 – dispute over entitlement to tax credits Franked Investment Income GLO – No. 35 – whether the inability to mitigate the incidence of ACT where profits were generated outside the UK was contrary to treaty or double taxation conventions CFC Dividend GLO – No. 34 – dispute whether certain provisions (by which dividends received by UK corporations from companies resident outside the UK were subject to corporation tax) were in breach of treaty or double taxation conventions Thin Cap GLO – No. 33 – dispute whether the thin capitalisation provisions of the corporate tax regime were in breach of treaty or double taxation conventions Loss Relief GLO – No. 30 – dispute whether certain provisions (of the corporation tax legislation relating to group relief for losses) were in breach of treaty or non-discrimination articles of double taxation conventions ACT GLO – No. 16 – whether payment of advanced corporation tax on dividends/distributions from UK subsidiaries to parent companies resident in other States breached treaty and double taxation conventions between UK and the other States

Type of claim or allegation	**No. of GLO's brought for this type of claim**	**% of GLO's represented by this type of claim**	**The GLO's name, number and brief description**
Product liability claims (whether under the Consumer Protection Act 1987 or otherwise)	7	11%	FAC GLO – No. 51 – re anti-convulsant medication taken by pregnant women DePuy Hylamer GLO – No. 50 – hip replacement components Sabril GLO – No. 40 – medication Vigabatrin, allegedly causing visual field constriction Scania 4 Series GLO – No. 28 – claims of defective design of tractor, causing personal injuries to the driver Trilucent Breast Implant GLO – No. 38 – breast implants Persona GLO – No. 21 – contraceptive device
Care home or school abuses and maltreatments	13	21%	Manchester Children's Home GLO – No. 22 St Williams GLO – No. 57 Staffordshire Children's Homes GLO – No. 47 St Georges GLO – No. 44 Calderdale GLO – No. 42 Kirklees GLO – No. 36 South Wales Children's Homes GLO – Nos. 32 and 31 St Leonard's GLO – No. 26 Lower Lea GLO – No. 17 Longcare GLO – No. 15 West Kirby GLO – No. 11 Redbank GLO – No. 1
Transport accidents	1	2%	Gerona Aircrash GLO – No. 14 – loss and damage suffered by crash of plane at Gerona Airport on 14 September 1999
Employment disputes	2	3%	British Telecommunications GLO – No. 45 – dispute re diminution in pension value available to ex-employees Prentice Ltd/Daimler Chrysler UK Ltd Litigation GLO – No. 0 – effectiveness of termination notices re members of dealer network

Type of claim or allegation	No. of GLO's brought for this type of claim	% of GLO's represented by this type of claim	The GLO's name, number and brief description
Environmental claims	9	15%	Abidjan PI GLO – No. 58 – re injury allegedly sustained as result of exposure to material from vessel which discharged at Abidjan Parkwood GLO – No. 56 – re odours, scavenging birds, pests, etc, connected with a landfill site Corby Group GLO – No. 53 – airborne contamination resulting from land reclamation Mogden GLO – No. 52 – re odours and mosquitoes from a sewage treatment works Newton Longville GLO – No. 39 – re management of landfill site Sandon Dock GLO – No. 23 – exposure to odour/emissions from a waste-water treatment plant Trecatti GLO – No. 19 – re management of a landfill site Nantygwyddon GLO – No. 13 – re management of a landfill site Gower Chemicals GLO – No. 5 – toxic fumes in sewage pumping station Misnamed GLO – No. 12 – re whether land should be treated as set-aside land for purpose of entitlement to compensation
Financial misstatement or financial negligence cases, financial entitlement disputes	4	6%	Evolution Film Group GLO – No. 46 – claims made by subscribers to a film partnership scheme re defendant as sponsor, promoter, etc Lloyds Names GLO – No. 41 – re Lloyds insurance and investment portfolio selection RyanAir GLO – No. 20 – dispute about outstanding commissions payable to agents on traffic documents Esso Collection GLO – No. 10 – disputes arising out of a partnership licence agreement

Type of claim or allegation	No. of GLO's brought for this type of claim	% of GLO's represented by this type of claim	The GLO's name, number and brief description
Personal injuries, allegedly negligently-caused	3	5%	DVT Air Travel GLO – No. 24 – whether onset of DVT was an 'accident' within the meaning of art 17 of the Warsaw Convention McDonald's Hot Drinks GLO – No. 8 – alleged personal injuries (scalding, etc) caused by dispensing and serving hot drinks in certain materials/containers Lincoln Prison GLO – No. 55 – claim for physical or psychiatric injuries as a result of a prison disturbance
Medical negligence / wrongdoing	3	5%	Nationwide Organ Retention GLO – No. 9 – retention of tissue and organs of stillborn and deceased children (at venues other than the Royal Liverpool Chidren's Hospital) causing parents psychiatric injury Royal Liverpool Children's Hospital GLO – No. 2 – retention of tissue and organs of stillborn and deceased children causing parents psychiatric injury Kerr / North Yorkshire GLO – No. 3 – alleged negligent and inappropriate treatment of patients by a psychiatrist
TOTAL	**62**	**100%**	

Note that the Table only refers to those actions which passed through the GLO certification criteria — it does not refer to those where application was made, unsuccessfully, for a GLO order. To recap for convenience, the relevant certification criteria under the GLO regime are as follows:

The five GLO certification criteria:

1. There must be a 'number of claims', per CPR 19.11(1) (the numerosity requirement);

2. These must give rise to 'common or related issues of fact or law', per CPR 19.10 and 19.11(1) (the commonality requirement);

3. Managing the litigation by means of a GLO must be consistent with the overriding objective of the CPR, which is to enable the court 'to deal with cases justly', per CPR 1.1(1) (a suitability requirement);

4. The consent of the Lord Chief Justice, the Vice-Chancellor, or the Head of Civil Justice (whichever is appropriate), is required before a GLO is possible, per PD 19B, para 3.3 (a preliminary merits, or screening, criterion);

5. A GLO will not be commenced if consolidation of the claims, or a representative proceeding, would be more appropriate, per PD 19B, para 2.3 (the superiority criterion).

(B) Comparison with other jurisdictions (later in the report). Notably, the *types* of GLO claims are not nearly as wide-ranging, and the numbers of private grievance claims are not nearly as frequent, as the types of claims which have been the subject of litigation under opt-out collective actions in Australia (under its federal regime) and in Ontario (under its provincial regime), over the same time period (described later in Table 12).

Indeed, some of the categories evident under opt-out regimes, for example:

- ❑ overcharge cases of small amounts recoverable per class member (or which are capable of being distributed in Canada by a *cy-près* order, upon satisfaction of certain criteria);
- ❑ claims on a widespread scale by lessees or purchasers of real estate;
- ❑ claims for cartel behaviour or other anti-competitive behaviour; or
- ❑ shareholder actions, on the basis of non-disclosure or misleading disclosure,

have made no appearance under the GLO regime to date. This topic will be revisited when the other jurisdictions are examined more closely in Part IV of the Paper.

4. PROBLEMS WITH OPT-IN ACTIONS IN ENGLAND: PARTICIPATION RATES

The main points:

- ❑ **the experience in English group litigation 'on the ground' (via practitioner feedback) indicates that, under an opt-in regime, the opt-in rates vary considerably, from very low percentages (<1%) to almost all (90%), or all, of class members opting to participate in the litigation**
- ❑ **in several instances, the percentages of opting-in cannot be determined because early cut-off dates were established, and the total number in the class was never able to be ascertained before the litigation was finalised**
- ❑ **in addition to the practitioner feedback, some judiciary have observed, on occasion, the large difference between the purported class size and the number of claimants identified under the relevant GLO action and who have opted in**

(A) The methodology for this Section. For this part of the Research Paper, a Questionnaire was sent to various law firms where employed legal practitioners are experienced in commencing and conducting group litigation (either under the Group Litigation Order regime, or prior to that, litigation conducted on an *ad hoc* basis by agreement among the court and parties). For further details, please refer to 'Methodology' in Part I hereof.

The Questionnaire sought to gather information about actions ('the Relevant Actions') that were conducted by the legal practitioners (hereafter, 'the Respondents') under an opt-in group litigation arrangement. For each of the Relevant Actions, the Respondents were asked to identify how many were in the class, in their best estimate; and how many were captured (ie, participated) in the litigation as identified class members?

For each Relevant Action, the title of the litigation, and the name of the conducting law firm, have been removed from the Table, for the purposes of confidentiality. The size of the Respondent group was 11; and collectively, these Respondents were responsible for the conduct of 97 group actions. Note that this cohort of 97 also includes pre-GLO cases; and the cohort does not include all the GLO cases noted in Table 1.

(B) The results. The results of the Questionnaire are shown in Table 2, following:

TABLE 2 Results of Questionnaire re English group litigation: participation rates

	Type of claim	No. of identified class members	Total number in class (estimated or actual)	% of opt-in (approx.)
1	negligent supply of essential services	160	20, 000	0.8%
2	employment-related injury	176, 000	Not precisely known	Unknown
3	alleged medical wrongdoing	1, 200	Not precisely known, but estimated to be in the thousands	Unknown
4	product liability	200	Not precisely known, but estimated to be in the thousands	< 20%
5	employment-related injury	560, 000	approx. 625, 000	90%
6	environmental claim	50	approx. 500	10%
7	employment-related injury	approx. 50	Not precisely known	Unknown
8	environmental claim	470	Small additional number of class members	>80%
9	product liability (drug)	400	approx. 50 came later	90%
10	product liability (drug)	1, 500	Not precisely known	Unknown
11	product liability (drug)	2, 000	Not precisely known	Unknown
12	product liability (device)	2, 000	Not precisely known	Unknown
13	product liability (drug)	17, 000	Not precisely known	Unknown
14	financial dispute	750	10, 000	7.5%
15	environmental claim	approx. 130	approx. 1, 000	13%
16	environmental claim	approx. 400	approx. 2, 000	20%

	Type of claim	No. of identified class members	Total number in class (estimated or actual)	% of opt-in (approx.)
17	environmental and human rights claim	approx. 1, 300	approx. 5, 000–10, 000	13%–26%
18	product liability (drug)	over 600	1, 200	50%
19	product liability (drug)	approx. 400	approx. 2, 000	20%
20	product liability (drug)	200	approx. 500	40%
21	transport accident	150	150	100%
22–74	personal injuries (illness sustained)	several actions: no. of identified class members ranged between 1,925 and 12, depending upon the action	in none of the actions was it possible to determine the precise number of class members, but it 'could be several hundred more claims' or 'could be many more claims', depending upon the action	Unknown
75	transport accident	25	approx. 50	50%
76	transport accident	15	30	50%
77	transport accident	11	25	44%
78	transport accident	8	20	40%
79	transport accident	3	55	5.5%
80	transport accident	7	35	20%
81	transport accident	11	15	73%
82	aircraft incident	50	200	25%
83–92	employment contractual disputes (pay)	several actions: no. of identified class members ranged between 50 and 1,000, depending upon the action	Not precisely known	Estimated as between 25%–50% of total classes
93	environmental claim (giving rise to personal injury)	40	approx. 1,000	4%

	Type of claim	No. of identified class members	Total number in class (estimated or actual)	% of opt-in (approx.)
94	environmental claim (giving rise to personal injury)	15–20	approx. 1, 000	2%
95	product liability (drug)	400–500	approx. 10, 000	5%
96	product liability (drug)	approx. 12	600–3, 000	at best, 2%
97	employment-related injury	250	approx. 1, 000	25%

(C) **Observations based upon these results.** Table 2 indicates a real disparity of rates of participation under opt-in actions in England — some relatively small classes having a very low opt-in rate (eg, action 79), whereas action 5 was a very large class with a high rate of participation.

However, it is evident that, in the majority of cases in which some approximation of the numerator and denominator of the equation could be made, the opt-in rate was less than 50%.

TABLE 3 Calculating the opt-in rates from the sample of responses

Opt-in rate	evidenced in X number of the Relevant Actions, where X equals:	evidenced in X % of the Relevant Actions, where X equals:
10% or less	8	8%
11%–50%	24	25%
more than 50%	5	5%
unknown	60	62%
TOTAL	**97**	**100%**

Of course, even under an opt-out regime, then in the majority of cases, the class members will ‘have to put their feet on the sticky paper’ and actively seek to establish individual entitlement to monetary recovery in the event that the common issues are decided in the class’s favour, or the action is settled. In only some cases, a direct refund to the class members in accordance with records

held by the defendant, or (in North America) a *cy-près* distribution to an analogous group of people (or organisation), may preclude opt-in altogether.

At this point, it must be said that an opt-out collective redress mechanism does not magically wave away the difficulties of resolving mass grievances. For example, by reference to a few illustrative Ontario cases: the method established for determining the individual issues, following the common issues being decided in the class's favour, may require tinkering with to prevent it becoming too expensive, given the issues and amounts at stake: ***Webb v 3584747 Canada Inc*** (2002), 24 CPC (5th) 76 (Div Ct). Alternatively, the take-up rate by class members following the resolution of the common issues in the class's favour may be less than 100% — eg, in ***Hislop v Canada (Attorney General)*** (Ont SCJ, 30 April 2004), it was about one-third, by the time that the question of the lawyers' fees came to be determined. Notably, the substantive points raised by this litigation subsequently proceeded on appeal to the Ontario Court of Appeal in 2004 and to the Supreme Court of Canada in 2007 — for present purposes, however, it is interesting to note the court's comments, in its judgment delivered in April 2004, that the take-up rate was, quite commonly, not more than 75% in those cases which depended upon the claimants coming forward at the end of the litigation (at para 17):

> *It is estimated that there are a maximum 1500 class members. ... However, the reality is that there has never been a class proceeding that has had 100% participation by class members. Class proceedings where there is a high level of participation generally involve cases where there is a known finite group such as patients of a physician. In those cases, class members are readily identified and contacted. Even in cases with high participation rates such as* Nantais v Telectronics Proprietary (Canada) Ltd *(1996), 28 OR (3d) 523 and* Anderson v Wilson *(1997), 32 OR (3d) 400 (certification motion), the participation rates did not exceed 75%. I accept [the] submission that it is rare that a class action has more than a 75% take-up rate. To date, despite a well-funded notification campaign and the notoriety of the trial judgment in this case only 500 class members have come forward.*

As a further difficulty, some class members may ask to join the class and claim their entitlement at some point *after* the cut-off date which the court has set (in Ontario, s 25(4) of the Class Proceedings Act provides that the court will set a reasonable time within which individual class members may make claims), as was evident in: ***Denis v Bertrand & Frere Construction Co*** (SCJ, 28 Aug 2002).

In addition, when a class can be legitimately *closed* under an opt-out regime, and on behalf of precisely *what described class* the collective action can properly be constituted, can give rise to real difficulties, as the Australian experience has demonstrated. For example, class members may be under an obligation, in effect, to take a positive act to join the class — by proactively entering into a client retainer with the law firm which has conduct of the matter, or by entering into a contract with the third party funder which is financing the litigation — because, from the outset, the class definition is worded so as to impose that 'tie'. A series of Australian decisions have grappled with this very point, with differing views. Some judges variously consider such a class definition to contravene the spirit of an opt-out regime, to subvert the legislation by imposing an opt-in requirement, and to define the class other than by reference to the cause of action itself (eg, ***Dorajay Pty Ltd v Aristocrat Leisure Ltd*** [2005] FCA 1483, Stone J; ***Rod Investments (Vic) Pty Ltd v Clark*** [2005] VSC 449, Hansen J; ***Jameson v Professional Investment Services Pty Ltd*** [2007] NSWSC 1437, Young CJ), whilst, on the other hand, the Full Federal Court has recently endorsed one version of a limited class definition by reference to those who entered into a litigation funding arrangement (***Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd*** [2007] FCAFC 200).

However, the key point about the participation rates under the English opt-in group litigation sampled in this Section is that opt-in rates can be extremely low when participation, *in the sense of a formal commencement of individual proceedings by each group member*, is required at the outset of the litigation, as the GLO stipulates.

(D) **Judicial observations about low opt-in rates.** In addition to the practitioner feedback outlined in this Section, a review of the case law determined under the GLO regime since its implementation in May 2000 reveals some judicial observations about the disparity between the purported total size of the class and the number who had opted in at the time that the GLO was being certified or when some other pre-trial interlocutory application was being determined by the court.

Under an opt-in regime, sometimes the focus — almost preoccupation — seems to be on the group register, and who, and how many, are on it, at those early stages. For example, some disparity between opt-in's and total class is noted in the following judicial comments arising out of English group litigation:

Autologic Holdings plc v Inland Revenue Commissioners [2005] UKHL 54, para 87:

> *[The GLO] was made on 23 May 2003 by the Chief Chancery Master. It has been amended several times. There are now a large and growing number of corporate groups on the group register (the Revenue's printed case puts the total at 89 groups and [Autologic's] printed case puts the total number of companies involved at over 1,000).*

Hobson v Ashton Morton Slack Solicitors [2006] EWHC 1134 (QB), para 10:

> *This has been brought by a number (currently less than 100) of Applicants who have all had sums withheld, or have paid, from their compensation recovered under one or more of the schemes either by firms of solicitors or the trades' union concerned. The precise number is a matter of some doubt, it lies between 65 and 156 together, it is said, with about 1,000 more who have expressed an interest in the proceedings and "wish to bring claims falling within the proposed GLO issues" [citing from a lawyer's statement].*

Multiple Claimants v Sanifo-Synthelabo Ltd [2007] EWCA 1860 (QB), para 21:

> *There are currently 39 claims on the group register. There are a further 29 claims where claim forms have been issued and served but claims have not yet been put on the register. There are something like 100 further claims where there has not yet been investigation.*

5. PROCEDURAL PROBLEMS WITH OPT-IN ACTIONS IN ENGLAND: IDENTIFIED BY PRACTITIONERS

The main points:

- ❑ **the Respondents indicated that the vast majority of the Relevant Actions sustained some procedural difficulties because they were conducted under an opt-in regime**
- ❑ **the most significant reasons identified for these difficulties were the task of identifying the sheer numbers of claimants at the outset, the low value recovery per class member, and the task of preparing individual pleadings/claim forms upfront**

(A) The methodology for this Section. This Section of the Research Paper is also based upon the Questionnaire which was sent to lawyers responsible for the commencement and conduct of group litigation in England (described in 'Methodology', Part I).

For each of the Relevant Actions, the Respondents were asked to consider what, if any, problems arose in the commencement of the actions under the GLO or under *ad hoc* arrangements, because the action was conducted in accordance with an 'individualised' opt-in approach. For the purposes of consistency, the Respondents were asked to choose from a key of reasons (denoted by letters A–I) in order to answer this question.

The sample group of Relevant Actions totalled 97. In a few of these Relevant Actions, Respondents indicated that these actions suited the opt-in procedure and, optimally, should not have been conducted under any different procedural mechanism.

(B) The results. The responses to this enquiry are summarised in Table 4 below.

Notably, by way of extra observation, in some cases, Respondents volunteered that, when all class members were not entirely aligned or similarly situated, the formation of two or more sub-classes, with a representative claimant for each sub-class, would have suited the litigation.

TABLE 4 Why opt-in did not suit the Relevant Actions

	Reasons why opt-in did not suit the litigation	No. of Relevant Actions where this reason was given	% of Relevant Actions affected by this reason
A	the sheer numbers of class members who had to be identified at the outset of the action	80	82%
B	the low-value recovery per class member	81	84%
C	actual or perceived barriers (whether economic, social, etc) to class members coming forward at the outset of the action	84	87%
D	insufficient commonality between the claims	4	4%
E	individual preparation of pleadings/satisfying pre-action protocols per class member too onerous, compared to one master pleading for a representative class member at the outset	15	15%
F	inconsistent judgments along the way for or against class members	8	8%
G	too much satellite litigation (whether about costs or procedure) about how individual claimants should be dealt with	8	8%
H	the amount of damages recovered per individual class members was a small proportion of the class-wide damages sustained by the class	7	7%
I	some other reason	7	7%

The actual or perceived barriers to which the Respondents refer as being disadvantageous under an opt-in regime (per Item C of the Table) are detailed more fully in Part II, Section 7, later in the Research Paper.

6. PROCEDURAL PROBLEMS WITH OPT-IN ACTIONS IN ENGLAND: IDENTIFIED IN JUDGMENTS

The main points:

- ❑ **a close analysis of judgments delivered on GLO actions since 2000 indicates that a number of problems are evident, many of which stem from the attempt to bring large-scale litigation under an opt-in regime**
- ❑ **the most significant difficulties are frontloading, difficulties with limitation periods, the use of the test case versus the generic issue approach, the costs–benefit analysis at the outset of an opt-in action, and the judicial attitude towards those who do not opt in at the early stages of the litigation**

(A) Judicial decisions indicating further procedural difficulties. In several judgments delivered in respect of GLO actions since May 2000, judicial comments have thrown up (either directly, or by implication) some of the procedural difficulties that are associated with the regime. Notably, many of these stem from the fact that the GLO is an opt-in regime, and a fairly light-handedly drafted one at that.

For reference, further details about some of the GLO's deficiencies have been previously discussed by the author in: '***Some Difficulties with Group Litigation Orders — and Why a Class Action is Superior***' (2005) 24 *Civil Justice Quarterly* 40–68; and '***Justice Enhanced: Framing an Opt-out Class Action for England***' (2007) 70 *Modern Law Review* 550–80.

(B) The various procedural difficulties. On the basis of the judgments to date, these may be summarised as follows:

- ❑ **maintaining the group register all-important** — entry of claimants' names and details onto the group register is essential upfront — the GLO regime anticipates and entails that investigations of all putative claimants' circumstances occur at the outset, in order to file a claim form for each claimant (note that para 6.1A of Practice Direction 19B provides that '*[a] claim form must be issued before it can be entered on a Group Register*'). See, for

example, the comment in: ***Multiple Claimants v Sanifo-Synthelabo Ltd*** [2007] EWCA 1860 (QB), para 21:

> *There are currently 39 claims on the group register. There are a further 29 claims where claim forms have been issued and served but claims have not yet been put on the register. There are something like 100 further claims where there has not yet been investigation.*

The group register also requires ongoing maintenance, even where the future of the litigation is uncertain, per: ***Re MMR and MR Vaccine Litigation Sayers v Smithkline Beecham plc*** [2006] EWHC 3179 (QB), para 62.

- ❑ **test cases versus generic issues** — both continue to be used, depending upon the circumstances (rendering the proceedings rather more unpredictable than an opt-out collective action which proceeds according to the procedure laid down in the relevant statute) — the test case approach was used in, eg, ***Pirelli Cable Holding NV v Revenue and Customs Commissioners*** [2007] EWHC 583 (Ch), in ***Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Her Majesty's Commissioners of Inland Revenue*** [2007] UKHL 34, and in ***Boake Allen Ltd and others v Her Majesty's Revenue and Customs; NEC Semi-Conductors Ltd and other Test Claimants v Inland Revenue Commissioners*** [2007] UKHL 25. On the other hand, the generic issues approach was used in, eg, ***Esso Petroleum Co Ltd v Addison*** [2003] EWHC 1730 (Comm).

  Recently, the device of trying a series of six preliminary issues, based upon a set of assumptions, failed in: ***Multiple Claimants v Sanifo-Synthelabo Ltd*** [2007] EWHC 1860 (QB) (re the use of the anti-epileptic drug Epilim by pregnant women).

- ❑ **frontloading** — whether sufficient commonality could be found among the claimants' claims may only be safely determined after **each** of the claimant group members has prepared and served 'particulars of their claim, together with a report from a medical expert in an appropriate field', as noted in: ***Re MMR and MR Vaccine Litigation Sayers v Smithkline Beecham plc*** [2006] EWHC 3179 (QB), para 3 (note that a practice direction giving effect to the litigation proceeding as group litigation was implemented in this case,

on 8 July 1999, rather than have the litigation proceed as a GLO, which practice direction was recently revoked on 11 July 2007 — for present purposes, however, the point about front-loading is the same, no matter how the litigation proceeded):

> *The thinking which lay behind these orders was that the relatively small number of claimants who were pressing ahead with their claims, and the variety of different disorders from which they are alleged to suffer, called into question whether their claims should continue in the context of group litigation. But a decision could only be made about that once the claims had been properly pleaded, and the link between the various disorders and the vaccines had been asserted.*

- **aggressive marketing of the action can draw the disapproval of the court** — under an opt-in regime, the onus is inevitably on the claimant lawyers to find, identify, name, and particularise the various claimants as early as possible in the action. On occasion, this has drawn adverse comment, as the following comment from ***Various Ledward Claimants v Kent and Medway Health Authority*** [2003] EWHC 2551 (QB) shows, at para 11 — (the claimants alleged that they had been raped or sexually assaulted by a gynaecologist formerly employed by the defendant health authority, and now deceased):

> *I am satisfied that this case is a classic example of litigation, driven by the lawyer acting for the Claimants in which there is a real risk that costs have been and will be incurred unnecessarily and unreasonably.*

- **cost–benefit analysis may look poor, under an opt-in regime** — in ***Hobson v Ashton Morton Slack Solicitors*** [2006] EWHC 1134 (QB) (in which certification of the action as a GLO was denied), Sir Michael Turner noted (para 12) that the size of the opt-in class at the time of this particular interlocutory application was fewer than 100; that the group's size was '*a matter of some doubt, it lies between 65 and 156 together, it is said, with about one thousand more who have expressed an interest in the proceedings*'; and that '*the sums claimed are modest, the largest being about £500, the mean is £357.50, although they are of obvious importance to the Claimants themselves.*' Hence, it was concluded that, on the size of the opt-in class at that point, and '*[f]rom the figures so far provided, it is manifest that the total recovery in respect of all present claims, assuming that the action is brought in the form which is now sought, and it succeeds, will be a sum less than £25,000.*' In addition to his view that some simpler form of dispute resolution (say, 2–3 test cases) would

be far superior to a GLO in this case, Sir Michael Turner also raised a cost–benefit analysis (paras 45–46):

> *If it be assumed that all the "would be" applicants came forward and were joined in the litigation, the total sum claimed would still be only about one half of the costs incurred to date, leaving aside the additional costs which would be incurred if the action were to proceed, as the Applicants' solicitors envisage. The Applicants sought to meet this obvious and grotesque imbalance by claiming that, if this application was to be successful, "there are many more potential Claimants who will be bringing like claims".*
>
> *The reality is that since July 2005 there has been very substantial publicity and media attention (newspapers, television and radio) quite apart from meetings sponsored by interested Members of Parliament and, yet, the numbers of Applicants to date are no greater than as set out above. ... It is, in these circumstances, highly speculative whether there will be any significant increase in "would be" Claimants coming forward to join in the litigation if a GLO were to be made.*
>
> *Even were there to be a number of "would be" Claimants who might be willing to join in the proceedings, it must be doubtful if the making of a GLO would be justified on such a speculative basis.*

This passage combines various potential threshold tests — a minimum numerosity threshold, a cost–benefit analysis, the 'need' for a group action which is a superiority criterion elsewhere under some opt-out regimes — in circumstances where the GLO regime is largely silent on all of these issues. The difficulties of satisfying a cost–benefit analysis on the basis of those claimants who have come forward, even before the GLO is ordered, is fully apparent from this case.

- **how limitation periods operate for those who have not opted in** — regardless of the certification of a group litigation order, the limitation period is not tolled for class members under an opt-in system until they have filed their claim forms, which can have serious ramifications for a claimant who does not commence individual proceedings and join the group register, as discussed in: ***Taylor v Nugent Care Society*** [2004] EWCA Civ 51, paras 15–16.

- **compulsion to join the class?** — in ***Taylor v Nugent Care Society*** [2004] EWCA Civ 51, para 15, the Court of Appeal noted that the GLO provisions:

> *have no requirement which would enable a court to make an order requiring a claimant to join a group action if the claimant chose not to do so. A claimant is perfectly entitled to decide to bring an action without taking that step. The fact that he has that right does not mean, however, that there are no good reasons why he should join a GLO which covers issues which will be involved in his litigation. If a claimant does not join such a GLO when it would cover his proceedings, then he is nonetheless subject to the management powers of the court. If he brings the proceedings in parallel to a GLO, the court is fully entitled to manage the proceedings which he brings in a way which takes account of the position of those who have joined the GLO.*

It was suggested by the Court of Appeal that, upon cold and considered reflection, claimants *should* join a GLO rather than pursue their own claim, for if they do not:

> *Those litigants who join the group action are entitled to have their interests (whether they are claimants or defendants) given higher priority than those of a claimant who does not take that course. This is because of the fact that they are likely to be large in number, but also because by joining the group action they are co-operating with the proper management of the proceedings, whereas the litigant who does not take that course is not so doing.*

It must be remarked, however, that no opt-out class action in the Commonwealth, nor the US class action, creates a mandatory class for damages recovery. The right to opt-out in such actions is either legislatively or judicially-enshrined; and those (generally few) who opt out may have opted out precisely because they think that they can do better individually. Opt-outs are not necessarily seen as being 'unco-operative'.

- ❑ **a multitude of individual claims** — the GLO regime adopts an essentially individualistic and potentially costly approach to group litigation, essentially because claimants must commence their proceedings as if they were unitary claimants. In ***Boake Allen Ltd and others v Her Majesty's Revenue and Customs; NEC Semi-Conductors Ltd and other test claimants v Inland Revenue Commissioners*** [2007] UKHL 25, Lord Woolf described the process in the following terms (at para 32):

> *Before a GLO can be made it is necessary for each individual potential member who wishes to join the GLO to make an individual claim under CPR Part 7 or Part 8. This in conjunction with the application to register enables the court to*

determine whether the respective litigants qualify to be a member of the GLO. It also prevents time continuing to run for purposes of limitation of actions. None the less the claim once made will usually almost immediately be of only limited historic interest because what matters is the application to register and the register of the GLO on which all proceedings subject to the GLO are registered. The purpose of a GLO is then 'to provide for the case management of claims which give rise to common or related issues of fact or law (the GLO issues') (CPR Part 19.10). Section III of Part 19 contains additional case management powers for GLOs which include directing that there shall be a group particulars of claim and specifying the details to be included in a statement of case (Part 19.13 (d)). Directions may also provide 'for one or more claims on the group register to proceed as test claims' as happened in the cases the subject of these proceedings (Part 19.13(b)). Where judgment is given on an issue on the group register in relation to a GLO, that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given, unless the court orders otherwise. (Part19.12 (1) (a)).

It follows that, under an opt-in regime, where there may be an absolute multitude of claim forms, then significant costs and logistical ramifications if any amendments are required to those claim forms, can easily follow. In ***Boake Allen***, Lord Woolf cautioned (paras 30–33) that:

GLOs can involve hundreds or thousands of different parties. In such a situation any step which each of the many parties has to take can cumulatively so effect the total costs, as to make them disproportionate both to the means of the parties to the action and the issues at stake. For this reason it is important that such steps generate the least possible costs.

... All litigants are entitled to be protected from incurring unnecessary costs. This is the objective of the GLO regime. Primarily, it seeks to achieve its objective, so far as this is possible, by reducing the number of steps litigants, who have a common interest, have to take individually to establish their rights and instead enables them to be taken collectively as part of a GLO Group. This means that irrespective of the number of individuals in the group each procedural step in the actions need only be taken once. This is of benefit not only to members of the group, but also those against whom proceedings are brought. In a system such as ours based on cost shifting this is of benefit to all parties to the proceedings.

In the context of a GLO, a claim form need be no more than the simplest of documents ... bearing in mind its place in the GLO process and the need to limit pre registration costs so far as this is possible. In this case the suggested deficiency in the claim forms are that they did not sufficiently identify the basis for the Revenue being under an obligation to repay the tax paid assuming this should not have been claimed by the Revenue. This is an area of the law the parameters of which are still evolving.

> *In my judgment it would be wholly inconsistent with the objective of the GLO to require the nature of the remedy claimed to be spelt out in detail in the claim forms of the taxpayers. The Revenue knew perfectly well the basis of the claims once the issues had been defined for the purpose of the GLO. For each of the parties to have to spell out details of the manner in which they would advance their claim at the outset would have caused substantial extra costs to be incurred in researching the law. Cumulatively this would have been grossly wasteful. The decision of the Court of Appeal should not be treated as requiring a claim to set out more than an outline of the claim.*

Here, then, is a judicial attempt to reduce the frontloading which the GLO inevitably entails, by instructing legal practitioners not to devote an over-abundance of detail and preparedness on each individual claim form. (Interestingly, the desirability of reducing the upfront costs and complexity of initiating proceedings was recommended also in the separate context of the ***Report and Recommendations of the Commercial Court Long Trials Working Party*** (December 2007), in Section D, 'Statements of Case and Lists of Issues').

Nevertheless, the reality is that opt-out regimes, by not requiring every individual case to be identified, pleaded and filed at the commencement of the litigation, do not entail the same time, resources and expenses as opt-in regimes do, and are back-loaded to a greater extent. To that end, the 'voice of experience' about the downside of front-loading, insofar as the opt-in regime implemented by s 47B of the Competition Act 1998 (in respect of follow-on actions for anti-competitive infringements) is concerned, is referred to shortly, in Section 8 of this Part.

7. REASONS FOR NOT OPTING-IN UNDER ENGLISH GROUP LITIGATION

The main points:

- ❑ **the experience in English group litigation indicates that there are almost twenty (20) reasons as to why class members may not opt in to litigation that is conducted on an opt-in basis**
- ❑ **these reasons may be conveniently grouped into: social and psychological reasons; reasons to do with the defendant; procedural reasons; and economic reasons.**

(A) Sources of information. When answering the Questionnaire which was circulated for the purposes of this Research Paper, some Respondents provided reasons as to what barriers class members perceived in declining to join the class (where the Respondents had noted that, in Table 4 previously, reason C was a factor).

This question was also teased out by the author with Respondents in follow-up meetings or correspondence, where the Respondents had indicated reason C.

Furthermore, some lawyers contacted the author following the presentation of the Interim Report at the Civil Justice Council conference held on 28–29 November 2007, with further information as to why, in their experience, some class members did not opt in.

The information in this Section is drawn from **all** of the abovementioned sources.

(B) The reasons. The following Table 5 represents a collated list of the barriers which Respondents have noticed to cause potential class members ('class members' in the Table) not to opt in to the litigation. The author has grouped the reasons given by category:

TABLE 5 Why class members may not opt in

Legal practitioners' feedback:

Social or psychological reasons:

1. some class members do not feel engaged with the legal process, do not feel that it 'is for them', are nervous about the law and being involved with the law, or have a very limited understanding or knowledge of the English legal system;

2. some class members are fully familiar with the English legal system (eg, they are lawyers themselves), but do not consider that the 'system will deliver' cheaply and efficiently, and hence disassociate themselves from the process;

3. some class members have language difficulties/cultural differences which puts them off contacting lawyers, or from being involved in litigation;

4. some feel antagonistic towards other class members and do not want to 'be in the same boat' as other class members;

5. some class members hold the view that they would *never* sue, either individually or collectively, because they don't believe that litigation is *ever* worthwhile;

6. some class members are ashamed or fear stigmatisation, because of the nature of the claim or of their own behaviour that has given rise to the claim (although were liability/the common issues to be decided in the class's favour, they may feel able to claim with a minimum of publicity, depending upon how the individual issues (if any) were to be determined);

7. some class members do not want to revisit a painful or traumatic episode in the past, out of which the litigation arises (ie, the death of a child) and would rather 'leave it alone', although again, as above, were some common issues or liability as a whole decided in the class's favour, they may feel sufficiently vindicated to pursue the individual issues necessary to complete their claim;

Reasons to do with the defendant:

8. some class members fear recriminations or reprisals from the defendant (especially in employment scenarios, but elsewhere as well) if they file a claim form;

9. some class members are approached directly by the defendant to accept an offer in settlement of their dispute, or are offered some 'goodwill' gesture, that excludes them from the litigation thereafter;

10. some class members retain both goodwill and loyalty toward the defendant, and do not wish to sue that defendant under any circumstances;

Continued overpage ...

TABLE 5 (*cont*).

Procedural reasons:

11. some class members do not know of the existence of the litigation, despite advertising's best efforts, and these class members who do not come forward may be difficult for the lawyers to find;

12. some class members perceive that, somehow, they are actually in an opt-out regime where, despite taking no proactive step, they will receive a beneficial outcome from someone else's litigation;

13. some class members believe that they will gain compensation via some other avenue (eg, a criminal compensation fund, public enforcement) without their having to, themselves, be involved in litigation;

14. some would prefer that others 'bore the grief' of the litigation, but are willing to 'piggy back' in any subsequent litigation if that proves worthwhile (ie, if liability has been determined in other group members' favour);

15. some class members believe (correctly or incorrectly) that their claims are statute-barred (bearing in mind that, in actual fact, the statute of limitations does not toll for them if other members of the group file claims);

16. some believe (correctly or incorrectly) that their claims will be disallowed if they cannot locate documentary proof of damage (eg, receipts in the case of price-fixed goods), and hence, do not bother to pursue the claim to ascertain whether other means of proof (eg, sworn statements) are acceptable, should liability be established in the class's favour;

Economic reasons:

17. some class members are worried about having to bear costs in proving the common issues, let alone their individual issues;

18. some consider that the litigation is 'not worth it' in this particular instance, given their own individual small amount at issue;

19. some class members will not opt-in because they deliberately wish to sue individually, primarily because they think that they will recover more compensation if they 'go it alone'.

(C) **'Opting-in' later in the action.** There are three scenarios, at least, where an opt-out action ***never*** 'converts' to an opt-in action: (a) where the class loses on common issues relevant to liability, (b) where the class wins on common issues/liability, and thereafter damages are awarded upon an aggregate basis and distributed *cy-près*, or (c) where the class wins the common issues/liability, and thereafter the damages can be awarded without any proactive steps being taken by the claimants because the defendant has the information on class members and direct credits/refunds can be facilitated without any intervention of the claimants at all.

Otherwise, if the class members win on common issues relevant to liability, or (more likely), the action settles and the settlement agreement requires the class members to come forward to claim their damages amounts, the class members are going to have to take a proactive step to assert their entitlements *at some point*. This has the hallmarks of opting in — although, under an opt-out regime, the class members already enjoy the status of 'absent class members' if they fall within the class definition and have not opted out. As mentioned in a previous Section, the number of class members who do assert their right to recovery after the common issues have been determined in their favour is often referred to as the 'take-up rate'.

Some of the reasons given in Table 5 (eg, nos. 3 and 5) would presumably apply to some class members to preclude their taking that step to assert their individual entitlements, irrespective of whether the litigation was conducted on an opt-in or an opt-out basis. However, several of the reasons provided in response to the Questionnaire are particularly applicable to the class members' unwillingness to opt in *at the outset* of the action. As one participant noted from the floor at the Civil Justice Council conference (28–29 November 2007):

> *nothing would make class members come forward more than the carrot of monetary recovery after the hard work in proving or settling liability has already happened, courtesy of the representative claimant.*

8. A 'SPECIALIST' OPT-IN REGIME IN ENGLAND: FOLLOW-ON ACTIONS

The main points:

- ❑ **a 'specialist' representative action, on behalf of consumers who have been the victims of infringing anti-competitive conduct, has been permitted by legislation since 2003 — this action operates on opt-in principles**
- ❑ **to date, there has been only one representative action instituted under this provision, in respect of price-fixing of England and Manchester United football shirts**
- ❑ **in addition to the paucity of representative actions, problems have been evident because of — the opt-in regime, low participation rates, and the limitations upon class members and ideological claimant that the legislation imposes**

(A) The representative action explained. Section 47B of the Competition Act 1998, c 41, permits a representative action to be brought by a specified body, in respect of 'consumer claims made or continued on behalf of at least two individuals' which are follow-on actions for damages in respect of previously-proven anti-competitive breaches.

This 'specialist' representative action has only been available since 20 June 2003 (the provision itself was inserted by the Enterprise Act 2002, c 40, s 19).

The only 'specified body' to date is Which? (the Consumers' Association), pursuant to: Specified Body (Consumer Claims) Order 2005, SI 2005/2365. This designation occurred on 1 October 2005, and it is only since then that 'consumer claims' have been possible to pursue under s 47B via this representative action.

The representative action operates on opt-in principles, whereby the consent of each consumer is required before that consumer can be a member of the class.

Moreover, insofar as the claimant and class are concerned, there are two important limitations. The representative action can only be instituted by a specified body as ideological claimant (and not by a directly-affected consumer as representative claimant); and only consumers

can be included within the class (not businesses who have suffered detriment as a result of anti-competitive conduct).

The representative action is a true follow-on action. No representative claim is possible under s 47B until an anti-competitive infringement (as defined in s 47A(5)) has been established. Under s 47A(6), such a decision, which then paves the way for a follow-on action if there is a desire to bring one, may be made by the Office of Fair Trading (OFT), by the Competition Appeal Tribunal (CAT), or by the European Commission (EC).

The consumers represented in the class are immunised from any adverse costs order, should they lose.

The relevant legislation, which permits the representative action, provides as follows:

47B Claims brought on behalf of consumers

(1) A specified body may (subject to the provisions of this Act and Tribunal rules) bring proceedings before the Tribunal which comprise consumer claims made or continued on behalf of at least two individuals.

(2) In this section 'consumer claim' means a claim to which section 47A applies which an individual has in respect of an infringement affecting (directly or indirectly) goods or services to which subsection (7) applies.

(3) A consumer claim may be included in proceedings under this section if it is—
(a) a claim made in the proceedings on behalf of the individual concerned by the specified body; or
(b) a claim made by the individual concerned under section 47A which is continued in the proceedings on his behalf by the specified body;
and such a claim may only be made or continued in the proceedings with the consent of the individual concerned.

(4) The consumer claims included in proceedings under this section must all relate to the same infringement.

The representative action has suffered from a number of difficulties, four of which are referred to in the following sections.

(B) **Paucity of actions thereunder.** In the four years since s 47B was enacted, there has been just ***one*** case instituted under it:

The Consumers Association v JJB Sports plc (case number: 1078/7/9/07).

The relevant Notice of a Claim for Damages, dated 12 March 2007, is available at: <http://www.catribunal.org.uk/archive/casedet.asp?id=127>

The consumers in this case purchased either replica Manchester United football shirts, or replica England shirts, in circumstances where there were price-fixing arrangements among the manufactures and distributors of these football shirts during 2000 and 2001. As a result of this cartel in operation, the price uplift per replica football shirt was approximately £15. The OFT found JJB Sports plc and its co-defendants guilty of price-fixing and imposed a substantial fine on JJB Sports of £18.6 million (together with lesser fines on the co-defendants). However, the number of consumers named in the claim form was low, as recent press describes:

> '***Which? action to settle***' (*The Lawyer*, 10 December 2007):
>
> 'An intense media campaign in early 2007 by Which? promised redress for hundreds of thousands of customers, but the time-lag between the price-fixing and the action meant that many people no longer possessed vital evidence such as receipts. Ultimately, the action named just 144 customers aiming to secure compensation of £20 each.
>
> DLA Piper client JJB Sports had already been fined £18.6m, after being found guilty of price-fixing by the Office of Fair Trading.'

One reason for the paucity of actions is that, under s 47B(7), the 'consumer claim' must be concerned with goods (or services) received as a consumer, and not in a business context. This very much restricts the type of scenario that lends itself to an action by Which? for follow-on damages. Indeed, in its Discussion Paper, ***Private Actions in Competition Law: Effective Redress for Consumer and Business*** (Apr 2007, OFT916), the OFT makes the following points:

OFT Competition Law Discussion Paper:

Para 4.6	... no provision is currently made for representative follow-on actions to be brought on behalf of businesses.
Para 4.13	The scope for representative actions could be extended by allowing duly authorised bodies to bring both follow-on and stand-alone actions, on behalf of consumers or businesses, as appropriate. A statutory basis would be needed for stand-alone representative actions. The same applies for all follow-on representative actions in the ordinary courts, and claims brought on behalf of businesses before the Competition Appeal Tribunal (as section 47B of the Competition Act 1998 only deals with representative actions on behalf of consumers).

Another reason for the lack of actions is the resource-intensive nature of the litigation, especially for a consumer organisation to be compelled to bring, as mentioned further in section (E) below.

(C) Opt-in may not suit the circumstances. Those who were influential in both paving the way for the commencement and for the subsequent conduct of the action in *The Consumers Association v JJB Sports plc* have expressed doubts about the exclusively opt-in principles to which s 47B adheres, which require the action to be pursued from the very commencement as an action on behalf of named consumers, rather than on behalf of a class described:

- Per the OFT in: ***Private actions in competition law: effective redress for consumers and business: Recommendations from the Office of Fair Trading*** (OFT916, 26 November 2007), para 7.12:

OFT, Private Actions Nov 2007 Paper:

'The current evidence suggests that representative actions exclusively on behalf of named consumers continue to fail to optimise economies of scale and give rise to unnecessary costs and complexity. There is a risk that meritorious cases may not be brought or may only be brought by, or on behalf of, a small number of those who have been harmed. [citing, in fn 28, the JJB Sports case]'

❑ Per the representative claimant itself, Which?: this view is contained in the ***Submission by Which?*** to the OFT's Discussion Paper of April 2007 — Which?'s response is dated 2 July 2007, and was prepared by Ms Ingrid Gubbay, former Principal Campaigns Lawyer for Which?, in light of Which?'s experiences garnered under the *JJB Sports case* by that time. In the following extract, Ms Gubbay explains the 'front-loading' consequences that any opt-in scheme entails:

Which?'s response:

'Para 5.1.	The single biggest hurdle to the effectiveness of the current statutory representation procedure is the requirement to name claimants on the claim form. We believe that there should be a high degree of flexibility in this area.
Para 5.2.	Currently the claim form in s 47B damages claims are front loaded, they must contain a concise statement of the relevant facts, legal issues, and amount claimed in damages. All essential documents must be annexed to the form. In practice, settling the claim form and supporting documents is a substantial amount of work.
Para 5.8.	... There is in our view a compelling case for an opt out provision to be made available.
Para 5.17.	Making available an opt out procedure in appropriate cases and calculating damages on established guidance, must be an important step in calibrating the balance so that representing parties and business have some certainty about the process and principles underlying the calculation of damages, and public and private enforcers can combine expertise and resources to produce a sustained and chilling effect on unlawful anti trust activity.'

❑ Per the representative claimant's lawyers, Clyde & Co: the Litigation Partner responsible for the conduct of the action, Mr Philippe Ruttley, gave a presentation on 25 October 2007 at the EU Civil Justice Day, at Chancery House, Law Society of England and Wales, London, entitled: ***The Lessons of the UK Consumers' Association case (2007)***. The presentation, and the accompanying slides, contained many interesting insights and observations by Mr Ruttley, including the following 'key lessons' and 'conclusions' (per slides 26 and 31, respectively):

Clyde & Co presentation at EU Civil Justice Day, 25 Oct 2007:

'Key lessons:

- Evidential obstacles:
  consumer claims against e.g. airlines or computer manufacturers easier because (a) claimants' names likely to be retained by Defendants for longer periods (e.g. for security reasons); and (b) records of payments for larger sums are likely to exist – fewer cash payments
- Cartels having small individual impact on consumers are unlikely to be sued:
  e.g. 2007 OFT allegations against dairy producers and supermarkets – no-one is going to sue over a litre of milk!
- Consumer representative actions are likely to be of limited practical use.'

'Conclusions:

- Consumer actions against cartels only possible in cases where evidence is easy to obtain
- Procedural obstacles remain
- Level of damages likely to be small
- Costs and complexity of litigation process likely to deter'

❑ Per the Head of Legal Affairs, Which?, Dr Deborah Prince, via email correspondence between Dr Prince and the author dated 6 December 2007, and reproduced with approval:

Observation by the Head of Legal Affairs, Which?:

'One of the biggest issues with the current legislation is that it only allows an opt-in system. Because of the generally low level of uptake, the opt-in system will invariably result in proportionality issues. To make it attractive for designated bodies to bring follow-on actions in all competition redress cases, the system must be changed so that opt-out systems can be used. As most representative bodies will be charities, there will always be concerns about proportionality if an opt-in system prevails — both from a cost and time perspective. The only real, practical way to get over this is to introduce an opt-out system.'

❑ Hence, bearing in mind these various comments, it is striking how much more effective the

follow-on 'football shirts' case may have been, had it been possible to litigate such an action under an opt-out regime which permitted an aggregate class-wide assessment of damages, and thereafter, a *cy-près* order for damages distribution.

The same thoughts occur in respect of the milk price-fixing case (referred to in Mr Ruttley's presentation, above), where the profits made from the cartel clearly outstrip the fines imposed, where the purchasers have no prospect of proving the fact of purchase, where the amount per claim is very small, but where the aggregate profits have no realistic prospect of being stripped without aggregate damages assessment and *cy-près* distribution:

> '***Supermarkets guilty of milk price-fixing***' (*The Lawyer*, 7 December 2007):
>
> 'Supermarket mega-chains Asda, J Sainsbury and Safeway have pleaded guilty to fixing milk and dairy prices following a probe by the Office of Fair Trading (OFT). The trio will have to pay a total of £116m in fines.
>
> The supermarkets could now face the prospect of follow-on actions by wronged consumers or competitors.
>
> The watchdog said that in setting the fines it had "taken into account information provided by the parties involved in the early resolution discussions which demonstrated the pressures they were under at this time to support dairy farmers."
>
> The admissions followed the OFT's September findings that said major UK supermarkets fixed the price of milk and other dairy products between 2002 and 2003. The cartel cost the consumer around £270m, said the OFT.'

(D) Low participation rates. The number of replica football shirts subject to the price-fixing arrangement in 2000–01 was huge. Around the time that the litigation was commenced, it was reported in the media that:

> '***Compensation claim for rip-off football kits***' (*The Telegraph*, 9 Feb 2007):
>
> 'The [Consumers' Association, Which?] believes that as many as a million people could have been overcharged between £15 and £20 for the replica shirts.'

and:

'***JJB Sports faces legal action over price-fixing***' (*The Times*, 8 Feb 2007):

'Hundreds of thousands of consumers could receive payouts after Which?, the consumer group, announced that it was intending to sue JJB Sports on behalf of fans who were overcharged for football shirts.

The consumer body said that the case applied to total of one million shirts, and is appealing to the hundreds of thousands of customers who bought them to come forward.'

Thereafter:

- ❑ the Notice of Claim for Damages referred to the fact that 130 consumers were noted in the Appendix to the Claim form;

- ❑ the number who opted in to the action was reduced by the fact that the defendant JJB Sports made an offer to affected purchasers, shortly after the action commenced:

'***JJB offers free football shirts***' (*BBC News*, 13 Feb 2007):

'Retailer JJB Sports has issued details of how customers can claim a free England shirt and mug from their shops. It is a response to threatened legal action over the firm's price-fixing of football shirts several years ago. Customers who can prove they bought a 1999/2001 England shirt or a Manchester United home or Centenary shirt of 2000/2002 will qualify. ...

However, consumers choosing to claim their free England shirt and mug from the firm instead will not be able to be part of the consumer group's action. To make a claim at a JJB shop, buyers will have to present evidence of a purchase, such as the receipt or the old shirt itself.'

- ❑ at the ***EU Civil Justice Day presentation***, Mr Philippe Ruttley noted (slide 18 of the presentation) that '*JJB claim over 12,000 customers took up this offer*'.

Hence, even allowing for those consumers who took up the free shirt and mug offer, the opt-in rate in this action has been low.

(E) The ideological claimant. Which? remains the only 'specified body' permitted to bring representative actions under s 47B. This creates resource problems for Which? itself, and removes any ability for other interested ideological claimants (or, indeed, any well-financed individual who

has a direct claim) to pursue an action on behalf of consumers. Both aspects have been the subject of some notable comment, for example:

- By Mr Philippe Ruttley, Partner of Clyde & Co, responsible for the conduct of the football shirts case, in the presentation, '***The Lessons of the UK Consumers' Association case (2007)***', slide 28:

> **Clyde & Co presentation at EU Civil Justice Day, 25 Oct 2007:**
>
> 'Consumers' Association is a registered charity with limited financial resources compared to large multi-nationals.'

- By former Principal Campaigns Lawyer for Which?, Ms Ingrid Gubbay, in the ***Submission by Which?*** to the OFT's Discussion Paper of April 2007:

> **Which?'s response:**
>
> 'Para 3.1. We have always supported the proposal that the private enforcement regime should be opened up to other bodies for designation. The current system simply offers little real threat to would-be cartelists ...
>
> Para 3.6. We believe that confining designation to statutorily appointed 'specified bodies' such as those suggested [by the OFT in its Discussion Paper] for the purposes of representative actions to effective private action could be counterproductive. We continue to favour a system where private enforcement is opened up to a wider group with appropriate checks and balances in place.'

(F) **The recent settlement.** On 9 January 2008, Which? announced that it had settled the football shirts case with JJB Sports. Which? described the terms of settlement in the following manner (per its announcement, available at: <http://www.which.co.uk/reports_and_campaigns/consumer_rights/reports/Ripoffs,%20scams%20and%20fraud/JJB_agree_shirts_deal_news_article_557_128985.jsp>):

'***JJB to pay fans over football shirt rip-off***' (*Which?'s website announcement*, 9 Jan 2008):

'Sports chain JJB Sports has agreed to pay consumers who were unlawfully overcharged for football shirts.

It's agreed to give payments to fans after Which? took legal action against the high street chain.

Fans who paid up to £39.99 for certain England and Manchester United football shirts during specific periods in 2000 or 2001 and joined our case against JJB Sports will receive a payment of £20 each.

However, if you bought one of the affected shirts but didn't join the case, you can still claim back £10. To do this, you must present either proof of purchase or the shirt itself, with its label intact, at a JJB store before 5 February 2009.

Which? Head of Legal Deborah Prince said: 'The agreement reached with JJB Sports is a good deal for the hundreds of consumers who purchased football shirts and joined our case against JJB.

'Many of those who purchased the relevant shirts still have the whole of next year to take their shirt or proof of purchase into a JJB store, so we encourage them to do so.'

If you present a shirt, the payment is reduced to £5 if the label is missing, and any shirt presented will be indelibly marked.'

Two features lacking in the settlement contrast with the powers that would be available under Ontario's opt-out class action regime, for example:

- no aggregate assessment of class-wide damages derived from the price-fixing;
- no *cy-près* distribution of the aggregate sum, either on a price roll-back or organisational *cy-près* basis.

This, of course, renders the settlement rather less painful for JJB Sports than it *might* otherwise have been under an opt-out class action regime. The relatively modest amounts for which JJB may be liable (depending upon how many come forward to claim their individual entitlement), and some other interesting consequences which this settlement may entail, were reiterated in recent press:

'***Everyone's a winner in football shirts settlement***' (*The Times*, Michael Herman, 9 Jan 2008):

'Which? and its lawyers at Clyde & Co have negotiated a settlement that covers anyone who bought one of the relevant football shirts from any of the price-fixing retailers regardless of whether they have already signed-up and they don't even need to produce a receipt. This is good news for a number of reasons. First, the pool of people who can now be compensated has vastly increased. Since the fundamental principle of consumer class actions is to compensate the individuals who lost out, this has to be a good thing. That people may not bother to make a claim is a valid but secondary point. The fact is Which? have made it possible and reasonably easy for them to do so. We cannot blame Which? for consumer inertia.

Likewise, we cannot blame Which? for the numbers. While its fair to say that £10 for a shirt with a label and £5 for one without is not going to raise the pulses of any JJB executives or shareholders, in light of recent events it's not a bad deal. Which? had originally asked for exemplary — or punitive — damages that would fetch consumers a much higher sum. But a recent High Court case on a similar issue in the vitamins market [see *Devenis Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch)] made this much less likely after a judge ruled that those who had been cheated were not entitled to exemplary damages. So, although Which? could have fought all the way and demanded higher compensation, this was always far from guaranteed.

... It has also established a useful precedent for how such cases can be dealt with in the future. That does not mean that British Airways, Virgin or any other businesses that may face consumer lawsuits over price-fixing will agree to settle on the same terms, but it shows it can be done where the numbers make sense.

The fact that JJB has agreed to an all-inclusive settlement may also help convince Parliament that it is not such a bad thing. The Office of Fair Trading — aware of the limitations of the "must sign up in advance regime" — has asked the Government to allow all-inclusive settlements in appropriate cases. Businesses said this was unfair and raised the spectre of the American system (and its abuses) to argue against such a move. But if JJB has made a commercial decision to agree to it in this case, then it sends a powerful message that it cannot be such a terrible, unthinkable policy.

As for JJB, they must also be smiling. Yes, they will have to pay £20,000 up front and that amount could rise substantially - but it probably won't. And even if it does, JJB has essentially bought itself legal certainty that the matter is behind it for what must be a relatively modest sum. ...

PART III

‘MISSING’ COLLECTIVE REDRESS FOR DAMAGES IN ENGLAND AND WALES: LOOKING INWARDS

9. LACK OF PRIVATE ENFORCEMENT: ANTI-COMPETITIVE CONDUCT

The main points:

- ❑ **between 2001–7, both the OFT and the EC have imposed numerous fines/penalties where infringing behaviour (anti-competitive conduct) has been proven on the part of one or more defendants**
- ❑ **however, private actions for damages — whether 'follow-on' actions or independent liability + quantum claims — are rare in the UK, a fact which has recently been acknowledged in a survey conducted by the OFT**
- ❑ **the relative paucity of actions is highlighted further by the poor cost–benefit prospects of bringing action under unitary or opt-in arrangements, and by the contrast with the opt-out anti-competitive actions brought elsewhere**

(A) The role of the State as enforcers. The Office of Fair Trading (OFT) has an investigative responsibility under the Competition Act 1998, to determine whether any infringement of one or more of Articles 81 and 82 and the Chapter I and Chapter II prohibitions has occurred.

The OFT notes, of its role in Competition Act 1998 investigations, that its function is to achieve enforcement and deterrence, and **not** to achieve compensation for those injured by anti-competitive conduct, per the ***OFT website***:
(see remarks at: <http://oft.gov.uk/advice_and_resources/resource_base/ca98/>):

The OFT's enforcement role:

'When carrying out investigations under the Competition Act, we focus on outcomes that add value to both markets and consumers through effective prioritisation, investigation and improved legal certainty. We will use the entire range of policy and enforcement instruments available to the OFT in tackling problems within markets.

Following an investigation under the Competition Act, the OFT may make a decision establishing that one or more of Articles 81 and 82 and the Chapter I and Chapter II prohibitions have been infringed. In such cases, the OFT may impose penalties on the undertakings committing the infringement and give directions to bring the infringement to an end.'

This has again been acknowledged in the recent publication of the OFT, ***The Deterrent Effect of Competition Enforcement by the OFT*** (see both Discussion Document, OFT963, November 2007, and the report on the same topic prepared for the OFT by Deloitte, OFT962, November 2007). As the OFT notes, some of the ramifications of its enforcement role and of its penalties upon cartels, for example, are the conferral of benefits on society in general, from lower prices and increased productivity. However, this is benefit on a 'macro scale'; individualised compensation to those affected, from a 'micro' perspective, is not within the OFT's remit. For example, p 5 of the Discussion Paper notes:

OFT Deterrent Effect Paper, Nov 2007:

'This is the first time the OFT has commissioned research into the wider benefits of competition enforcement. The research confirms that the OFT's merger control and competition law enforcement work plays an important role in preventing other anti-competitive behaviour from taking place and that the benefits of OFT work go well beyond the direct financial benefits in terms of lower prices that consumers get as a direct result of our merger and infringement decisions.

Activity that deters cartels or abuse of dominance leads to major benefits: lower prices, wider choice, higher productivity and higher innovation. To put a price on all of this is difficult, but as the direct effect of competition enforcement in 2006/7 was £116m, the OFT estimates that, given the scale of the deterrence effect, the benefits to consumers from OFT work may be at least a further £600m per year. This compares to an OFT total annual budget of about £70m.'

Most recently, in its paper, ***Private actions in competition law: effective redress for consumers and business: Recommendations from the Office of Fair Trading*** (OFT916, 26 November 2007), the OFT noted (at para 5.7) that all competition authorities have finite resources, that resources are already consumed in the OFT's case in order to establish infringements that enable consumers to bring follow-on actions, and that —

OFT Private Actions Paper, Nov 2007:

'it is not realistic to expect that a competition authority could investigate all cases where consumers have been harmed and then take on the role of securing redress for them'.

Similarly, insofar as the EC is concerned, art 81 of the Treaty establishing the European Community prohibits agreements and concerted practices between firms that distort competition within the Single Market. Fines of up to 10% of their worldwide turnover may be imposed on the guilty parties. The purpose of EC penalties is one of deterrence, not compensation, as the EC notes (in ***Memo/06/415***, dated 8 November 2006, and ***Memo IP/01/1892***, dated 20 December 2001, respectively):

> **EC's role, per Memos:**
>
> 'The amount of the fines is paid into the Community budget. The fines therefore help to finance the European Union and reduce the tax burden on individuals.'
>
> ...
>
> 'The federations have three months in which to pay the fines, which are entered into the general budget of the European Union once they have become definitive. The overall EU budget is fixed in advance and so any unscheduled revenues are deducted from the contributions made by Member States to the EU budget, ultimately to the benefit of the European taxpayer.'

(B) **OFT decisions.** Between 2001–7, the cases of anti-competitive conduct, in which the OFT imposed penalties for culpable behaviour, are summarised in Table 6 below.

Note that decisions in which the OFT found infringing behaviour but where the decisions were set aside by CAT — *Attheraces* and *Mastercard UK Members Forum Ltd* — are *not* included in Table 6.

The details in this Table are sourced from the ***CA98 Public Register of Decisions***, available at: <http://oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/>, with some further details about individual cases drawn from individual relevant decisions by the Competition Appeal Tribunal, at: <www.cattribunal.org.uk>:

TABLE 6 OFT Infringement decisions, 2001–7

Case	Type of conduct	Date of OFT decision	Any appeal to CAT?	Eventual penalty imposed
Aberdeen Journals Ltd	abuse of dominant market power; predatory pricing	16 Jul 2001; remitted and decided 29 Sep 2002	yes, two appeals; last heard 23 May 2003; OFT upheld	£1,328,040
Aluminium spacer bars	price-fixing/market-sharing	28 Jun 2006	no	across 4 companies, and after leniency: £898,470
Arriva plc and FirstGroup plc	market-sharing	30 Jan 2002	no	across both companies, and after leniency: £203,632
English Welsh and Scottish Railway Ltd	predatory pricing, discriminatory pricing, excluding competition	(Office of Rail Regulation) 17 Nov 2006	no	£4,100,000
felt and single ply flat-roofing contracts in NE England	collusive tendering	16 Mar 2005	no	across 7 companies, and after leniency: £559,985
felt and single ply roofing contracts in Western-Central Scotland	collusive tendering	8 Jul 2005	no	across 6 companies, and after leniency: £138,515
flat roof and carpark surfacing contracts in England and Scotland	collusive tendering	22 Feb 2006	no	across 13 companies, and after leniency: £1,557,471
flat-roofing services in the Midlands	collusive tendering	16 Mar 2004	yes, appeal 24 Feb 2005; OFT decision upheld	across 9 companies, and after leniency: £297,625.54
Replica football kit	price-fixing	1 Aug 2003	yes, appeals 1 Oct 2004, upheld most of OFT decision; also CA decision 19 Oct 2006	across 10 companies, and after leniency: £18,587,000
Genzyme Ltd	abuse of dominant position	27 Mar 2003	no	£6,800,000

Case	Type of conduct	Date of OFT decision	Any appeal to CAT?	Eventual penalty imposed
Harwood Park Crematorium	refusal to allow access	29 Jun 2004	yes, and OFT decision replaced by CAT 6 Jul 2005	not noted in CAT decision
Hasbro UK Ltd/Argos Ltd/Littlewoods Ltd	price-fixing	21 Nov 2003	yes, two appeals, in last, OFT decision upheld; also CA decision 19 Oct 2006	across 3 companies, and after leniency: £22,650,000
Hasbro UK Ltd and distributors	price-fixing	6 Dec 2002	yes, but withdrawn	after leniency: £4,950,000
John Bruce (UK) Ltd/Fleet Parts Ltd/EW (Holdings) Ltd	price-fixing	–	no	across 3 companies, and after leniency: amounts not published in OFT judgment
Lladro Comercial SA	bi-lateral price-fixing agreements	31 Mar 2003	no	£0
Mastic asphalt flat-roofing contracts in Scotland	collusive tendering	15 Mar 2005	no	across 4 companies, and after leniency: £87,353
Napp Pharmaceutical Holdings Ltd	abuse of dominant position	30 Mar 2001	yes, OFT decision mostly upheld on 15 Jan 2002	£3,200,000
Northern Ireland Livestock and Auctioneers' Association	fixing of commissions	3 Feb 2003	no	£0 (due to 'wholly exceptional circumstances')
Schools: exchange of information on future fees	agreement to prevent, etc, competition on school fees	20 Nov 2006	no	across numerous Participant Schools (bar one): £10,000 per school
Stock check pads	price-fixing/ market-sharing	31 Mar 2006	no	across 3 companies, and after leniency: £168,318.75

Case	Type of conduct	Date of OFT decision	Any appeal to CAT?	Eventual penalty imposed
UOP Ltd/UKae Ltd/Thermoseal Supplies Ltd/Double Quick Supplyline Ltd/Double Glazing Supplies Ltd	fixing minimum resale prices	8 Nov 2004	yes	across 5 companies, and after leniency: £1,707,000

(C) **EC infringement decisions.** Since January 2000, the Commission has imposed fines in almost 50 cases in which cartel behaviour has been proven. Over the period 2003–7, the following cases in Table 7 resulted in the nominated respective fines.

The information in Table 7 is sourced from: '***Commission Action against Cartels: Questions and Answers***', dated 18 April 2007, and by reference to the various press releases noted therein:

TABLE 7 EC infringement decisions, 2003–7

Sector affected	Date of decision	Fine (in Euros)
Dutch beer market	18th Apr 2007	273,783,000 against 4 companies
elevators and escalators	21st Feb 2007	992,312,200 against 4 groups, including 17 subsidiaries
gas insulated switchgear cartel	24th Jan 2007	750,512,500 against 11 companies
alloy surcharge cartel	20th Dec 2006	3,168,000 against one company
synthetic rubber (producers and traders)	29th Nov 2006	519,050,000 against 6 companies
price-fixing and market sharing cartel for steel beams	8th Nov 2006	10,000,000 against one company
price-fixing of copper fittings	20th Sep 2006	314, 781,000, against 11 companies
price-fixing of road bitumen in the Netherlands	13th Sep 2006	366,717,000 against 14 companies
price-fixing of acrylic glass	31st May 2006	344,500,000 against 5 companies

Sector affected	Date of decision	Fine (in Euros)
cartels involving hydrogen peroxide	3rd May 2006	388,129,000 against 7 companies
rubber chemical cartel	21st Dec 2005	75,860,000 against 4 companies
industrial bags cartel	30th Nov 2005	290,000,000 against 16 companies
Italian raw tobacco market cartel	20th Oct 2005	56,000,000 against 6 companies
industrial thread cartel	14th Sep 2005	43,487,000 against 11 companies
MCAA chemicals cartel	19th Jan 2005	216,910,000 against 5 companies
animal feed vitamin cartel	9th Dec 2004	66,340,000 against 6 companies
needle and other haberdashery market cartel	26th Oct 2004	60,000,000 against 3 companies
Spanish raw tobacco market cartel	20th Oct 2004	20,038,000 against 9 companies
cartel in French beer	29th Sep 2004	2,500,000 against 2 companies
sodium gluconate cartel	19th Mar 2002	19,040,000 against one company
copper plumbing tubes cartel	3rd Sep 2004	222,291,100 against 9 companies
industrial copper pipes cartel	16th Dec 2003	78,730,000 against 5 companies
organic peroxides cartel	10th Dec 2003	69,531,000 against 6 companies
carbon and graphite products cartel	3rd Dec 2003	101,440,000 against 6 companies
sorbates cartel	2nd Oct 2003	138,400,000 against 5 companies
French beef	2nd Apr 2003	16,680,000 against 6 companies

Some of these infringements clearly did not operate in the United Kingdom. For example, the lift and escalator cartel was specifically noted to operate in Belgium, Germany, Luxembourg, and The Netherlands only; and the French beef decision only pertained to unlawful agreements by six French federations in the beef sector to set minimum prices for some types of beef and limit or suspend imports of beef into France. However, plainly some of the cartels nominated above *did* affect consumers in England and Wales.

(D) The types of follow-on actions. In respect of follow-on actions for damages:

❑ ***individual*** actions are permitted by the Competition Act 1998, in respect of OFT decisions and EC decisions finding infringing behaviour. Section 47A was introduced by the Enterprise Act 2002, s 18, and came into effect on 20 June 2003:

> **Relevant provisions of s 47A:**
>
> (4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.
>
> (5) But no claim may be made in such proceedings—
> (a) until a decision ... [of the OFT, Competition Appeal Tribunal or EC] has established that the relevant prohibition in question has been infringed; ...

Of this provision, the Competition Appeal Tribunal has observed, in ***BCL Old Co Ltd v Aventis SA*** [2005] CAT 2, para 28, that:

> *this specialised jurisdiction under section 47A has been created by Parliament with a view to facilitating claims for damages or restitution on the part of those who have suffered loss as a result of infringements of domestic or European competition law.*

❑ Furthermore, ***representative*** actions by a specified body, brought in respect of 'consumer claims made or continued on behalf of at least two individuals' are also possible, under s 47B of the Competition Act 1998. However, as discussed previously in Section 8, the utility of s 47B to date has been extremely limited. The only 'specified body' to date is Which?, pursuant to the Specified Body (Consumer Claims) Order 2005, SI 2005/2365, and the only action brought pursuant to s 47B has been the case of ***The Consumers Association v JJB Sports plc*** (case number: 1078/7/9/07).

❑ regardless of the type, follow-on actions have distinct advantages to a claimant over stand-alone actions for anti-competitive conduct, as the CAT explained recently in: ***Cityhook Ltd***

v Office of Fair Trading [2007] CAT 18 [205]–[210]. The advantages outlined include:

- explicit evidence of unlawful conduct can be difficult to identify by a stand-alone claimant;
- a claimant cannot use the investigatory powers available to the OFT in respect of obtaining documents and information;
- funding a stand-alone private action against a defendant with substantial resources can be challenging; and
- there may be extra-jurisdictional service problems or language barriers for the stand-alone claimant.

(E) **Paucity of follow-on actions.** However, there have been very few follow-on actions brought in England, in respect of either OFT or EC infringement penalty decisions, so far, since these provisions were introduced in June 2003. The follow-on actions to date are shown in Table 8 below:

TABLE 8 'Follow-on' actions brought in England

Case	Notice for damages filed	Current status
ME Burgess, JJ Burgess and SJ Burgess (trading as JJ Burgess & Sons) v W Austin & Sons (Stevenage) Limited and Harwood Park Crematorium Ltd	23 Aug 2007 (under s 47A)	time for serving defence extended; case management conference fixed for 11 April 2008
Emerson Electric Co v Morgan Crucible Company plc	28 Feb 2007 (under s 47A)	there have been disputes about whether claim brought within time. Last development noted was a case management conference on 13 Dec 2007
Healthcare at Home Ltd v Genzyme Ltd	13 Apr 2006 (under s 47A)	interim relief order made 15 Nov 2006; claim withdrawn 11 Jan 2007 by order of CAT following settlement
BCL Old Co Ltd (2) DFL Old Co Ltd (3) PFF Old Co Ltd v (1) Aventis SA (2) Rhodia Ltd (3) F Hoffman-La Roche AG (4) Roche Products Ltd	Approx. 27 Feb 2004 (under s 47A)	consent orders by which proceedings against all defendants dismissed
Deans Foods Ltd v (1) Roche Products Limited (2) F Hoffman-La Roche AG (3) Aventis SA	Approx. 26 Feb 2004 (under s 47A)	proceedings against all defendants either dismissed or discontinued
Borders (UK) Ltd v Commissioner of Police of The Metropolis	not known; appeal delivered 3 March 2005	exemplary damages against infringer upheld
Devenish Nutrition Ltd v Sanofi-Aventis SA (France)	not known; judgment delivered 19 Oct 2007	preliminary points of law decided against the claimants, re exemplary and restitutionary damages
The Consumers' Association v JJB Sports plc	12 Mar 2007 (under s 47B)	the matter settled on 9 January 2008

(F) Interaction with the substantive law. The paucity of follow-on actions for anti-competitive infringements in England, when compared with the number of infringement decisions given by the OFT and by the EC, is noteworthy.

However, one substantive law reason for the difficulty in bringing such actions, which must be remarked upon in the context of this Section, is the potential availability of the passing-on

defence. This defence, where available, is a significant substantive law barrier to any party in the supply chain from bringing a follow-on action.

In the first action commenced under s 47A — ***BCL Old Co Ltd v Aventis SA*** [2005] CAT 2 — the claimants brought a follow-on action for damages in respect of a vitamin-pricing cartel, for which the defendants had been fined by the EC for infringement of art 81(1) of the EC Treaty. The claimants argued that the defendants cartelists had caused each of the claimants to pay higher prices than would otherwise have been the case for vitamins manufactured and supplied into the UK. The defendants, on the other hand, argued that it was only if they could not succeed in establishing the 'passing-on defence' that the claimants would be able to prove any 'damage'. In that respect, the defendants argued that:

- the claimants passed on any overcharge to their customers and accordingly suffered no loss by any overcharge made to them; and

- the claimants would not be able to establish that any overpayment was passed onto them by those who supplied them, where such intermediate suppliers existed between the defendants and the claimants.

On the question of the passing-on defence, the Competition Appeal Tribunal remarked (when hearing a security for costs application), at para 23, upon both the legal and evidential difficulties confronting those claimants in the supply chain where follow-on actions are concerned:

> *The Defendants, however, rely on what is known as the 'passing on defence', which is that the Claimants have suffered no loss, either because any higher prices resulting from the cartel (which is not admitted) were absorbed by the first line purchasers who then sold on at normal prices to the Claimants, or because the Claimants themselves passed on any higher prices they may have paid to sub-purchasers. ... questions of whether the defendants are entitled to raise the 'passing on defence' (either upstream or downstream), what is the effect of any such defence, and who bears the burden of proof, are novel and important issues both in this case and for future cases. ... These issues are as yet undecided in the United Kingdom nor, as far as we know, definitively decided in any other European jurisdiction. In addition in this case there are important evidential matters to be resolved, such as whether the buying power of supermarkets prevented any 'passing on', even if the 'passing on defence' is available.*

The author is indebted to Mr David Greene, Litigation Partner of Edwin Coe LLP, a practitioner experienced in conducting actions arising out of anti-competitive infringements, for pointing out the difficulties confronted by the passing-on defence in England. Mr Greene gives, by way of further example, the copper cartel which related to the supply of copper tubing (referred to in Table 7 above). This example arose during the course of discussions at the Civil Justice Council Theobalds Park conference, and in written correspondence between Mr Greene and the author subsequently in December 2007 (quote reproduced with approval):

David Greene, Litigation Partner, Edwin Coe LLP:

'That was the subject of proceedings started in Texas, but it was virtually impossible to pursue any claim here because everyone would be met in the supply chain with a passing on defence. The ultimate loser (which rather reinforces the consumer action process) was the consumer fitting copper tubing in their central heating system. Even for them, however, the supply chain is of such a length and complexity that it would be very difficult to prove causation and ultimate damages.'

On this point of substantive law, and looking towards an opt-out regime of relevance to this Research Paper, it is also worth noting the fact that the passing-on defence has been raised in Ontario price-fixing class actions to date. Its availability and potential application certainly impacted upon the eventual denial of certification in ***Chadha v Bayer Inc*** (2003), 63 OR (3d) 22 (Ont CA), affirming 54 OR (3d) 520 (Div Ct), where the claimant purchasers claimed that the defendants had conspired to fix prices of iron oxide pigments used to colour concrete bricks and paving stones.

The representative claimants, representing a class of homebuyers and other end-users of bricks, had bought a new home and alleged that they were indirect purchasers of bricks containing the price-inflated iron oxide pigments. Certification in this case was denied on appeal. There was no evidence that the full measure of the inflated prices brought about by the price-fixing would have been passed on through the various links in the chain of distribution to have a price impact upon the homebuyer class, the ultimate consumers. A model that calculated damages on the basis of that assumption was not permitted to go forth — and liability could therefore not be a common issue — because the Court of Appeal was not satisfied the assumption was provable by some method on a class-wide basis (s 24 of Ontario's Class Proceedings Act permits aggregate assessment of damages after liability has been established, but not the *fact of damage*, said the Court). Although there were

other common issues pertinent to the price-fixing conspiracy case, it was concluded that a class action was not the 'preferable procedure', and certification was denied.

Certification was also denied in the price-fixing case of ***Price v Panasonic Canada*** (2002), 22 CPC (5th) 379 (Ont SCJ).

However, since *Chadha*, certain price-fixing class actions have indeed been certified in Ontario, as Table 12 (later, in Part IV, Section 12), illustrates. Note, especially, the very recent comments about *Chadha* and *Price*, and points of particular relevance about the passing-on defence, in: ***Axiom Plastics Inc v EI Dupont Canada Co*** (Ont SCJ, Hoy J, 27 Aug 2007), paras 123ff, one of the certified decisions referred to in Table 12.

(G) Recent acknowledgments by OFT and the EU of lack of private enforcement. Notwithstanding the substantive law problem noted above, the lack of follow-on actions for compensation has been a cause of governmental concern in both England and the EU.

❑ In a recent November 2007 report, ***The Deterrent Effect of Competition Enforcement by the OFT***, prepared for the OFT by Deloitte and Touche LLP (and available at: <http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf>), at paras 5.84–5.96, the authors of the report discuss the problem by reference to a questionnaire distributed to a sample group of companies.

The key findings of that report, insofar as damages actions are concerned, may be summarised thus:

- private damages actions for anti-competitive infringements was ranked 5th (out of 5), in terms of importance in deterring infringements, by both competition lawyers and by companies who responded to Deloitte's survey — hence, '*the threat of private damages actions is seen as a relatively unimportant factor in creating a deterrent effect*' (para 5.84)

- 22% of all company respondents (group 1) considered that their company had been harmed by breach of a competition law by someone else — but of group 1, more than half (56%, representing group 2) did not consider bringing a private action for damages — and 70% of group 2 stated that the reason that they did not consider it was that the expected costs outweighed the expected benefits of the litigation. More particularly, the reasons given by the respondents for not pursuing private actions for damages were as follows:

  - the time-consuming process of litigation;
  - potentially damaging a commercial relationship with a supplier;
  - lack of evidence or satisfying burden of proof;
  - lack of clarity in the law;
  - the 'David v Goliath' scenario of taking on well-funded defendants;
  - lack of an OFT decision upon which to 'piggy back' was crucial;
  - damages would be 'eaten up' by costs;
  - the adverse outcome, award of a contract to a rival, would not be reversed by any litigation.

  It is interesting to note that some of the abovementioned reasons coalesce with the reasons for not opting-in that were elicited in the Questionnaire distributed to law firms for the purposes of this Research Paper, and which are summarised in Table 5, earlier.

- Deloitte's conclusions with respect to anti-competitive infringements are sobering, as the following passage shows (footnotes omitted):

Deloitte's Deterrent Effect paper prepared for the OFT, Nov 2007:

'Para 5.95 The questions of what are the main obstacles for companies bringing private actions, and how these can be reduced, are complex and multi-faceted.

Para 5.96 We make two observations based upon the results of the survey:

[First], the results provide an indication of the scale of use of damages actions for competition infringements in the UK. Five of the 202 companies in the sample (just over 2%) had brought an action.

[Second], companies have many reasons why they do not bring a case, even when they consider that they have been harmed by a breach of a competition law by someone else. The most important are the cost and delay, concern about damage to commercial relationships, lack of evidence, lack of clarity in the law, the size of the counter-party, and the limited perceived benefits in the event of success.'

- This scenario of a bereft private-action landscape was earlier acknowledged by the EU in the Green Paper, ***Damages Actions for Breach of the EC Antitrust Rules*** (19 December 2005), SEC 2005/1732, at para 1.2:

EC Green Paper on Damages Actions for anti-competitive breaches:

'While Community law therefore demands an effective system for damages claims for infringements of antitrust rules, this area of the law in the 25 Member States presents a picture of "total underdevelopment"' [citing its earlier study of the Working Group on the same matter].

- The most recent word on the topic in England has been given by the OFT, in its paper, ***Private actions in competition law: effective redress for consumers and business: Recommendations from the Office of Fair Trading*** (OFT916, 26 November 2007):

OFT Private Actions Paper, Nov 2007:

'Para 2.2 ... private actions have not played the role that was envisaged for them ... : there remain significant barriers to those who have suffered loss (consumers and small and medium-sized businesses, in particular) taking a private action, such that the likelihood of obtaining compensation remains remote and that incentives for business to comply with competition law are more limited than was intended. This impedes the overall effectiveness of the competition regime in the UK, such that the regime is not yet delivering the productivity and competitiveness benefits to the UK economy that were originally contemplated.

Para 3.3 A system which incorporates effective public enforcement and a real possibility of private actions will increase the likelihood that anti-competitive behaviour is detected and addressed, whether by way of a complaint to the competition authorities, an approach to the infringing undertaking(s), or through the issuing of legal proceedings.'

In this latest Paper, the OFT has suggested 'beefing up' private enforcement by recommending that the Government should consult on whether (and, if so, how best) to allow representative bodies to bring stand-alone and follow-on representative actions for damages or injunctions on behalf of consumers and businesses in competition law (paras 5.13 and 6.8)

(H) Costs–benefit difficulties of bringing liability + quantum anti-competitive issues. This Section of the Research Paper would not be complete without mentioning the difficulties which confront those wishing to commence actions for the purposes of establishing both liability for anti-competitive infringements, and the quantum of damages flowing therefrom.

- ❑ various disincentives to bringing private stand-alone actions, where an anti-competitive infringement is claimed to have occurred, have already been pointed out in the ***Deloittes study***, previously;

- ❑ a more effective ability to bring stand-alone actions, on behalf of consumers and businesses, by representative bodies, has also been adverted to previously, in the OFT's Discussion Paper, ***Private Actions in Competition Law: Effective Redress for Consumers and Business*** (Apr 2007), Section 4, 'Representative Actions';

- ❑ furthermore, in some cases, the amount of damages per group member will be fairly small, rendering the cost–benefit analysis of bringing the action under an opt-in regime (such as the GLO) of dubious worth. It is one thing to particularise and prove infringement in respect of the representative claimant, with determinations on common issues then applying to all members of the described group, but it is quite another to have to particularise these in respect of each group member from the outset.

With respect to the ***Questionnaire*** distributed by the author to practitioners for the purposes of this study, a few Respondents commented on whether any grievances had 'crossed their desk' which were not litigated under the available opt-in regimes (and at all), but which they consider *may* have suited an opt-out regime. Obviously, it was not possible for the Respondents to provide a closely considered view on the certification tests employed (with some variation) elsewhere; particularly bearing in mind, for example, the abovementioned Canadian case law which illustrates how carefully certification courts will scrutinise price-fixing actions to determine whether they should proceed as class actions or not. One Respondent, however, provided the following interesting example (in Table 9 below):

TABLE 9 Example of action not brought

Type of claim	What the claim was about	Why it did not suit opt-in or unitary litigation
price-fixing action	both liability and quantum on price-fixing of a particular brand of motor vehicle was at issue	the amount per claimant purchaser would have been approx. £4,000–£5,000 per claimant; approx. 10,000–15,000 claimants were affected; the 'cost–benefit' ratio did not warrant the action being brought; identifying the asset owners at the outset would have been difficult (but if the class had been able to establish liability for price-fixing, and if the defendant had been ordered to hand over sales records by which to identify class members, identification would have been more straightforward).

10. LACK OF PRIVATE ENFORCEMENT: UNFAIR CONTRACT TERMS

The main points:

- ❑ **where unfair terms are identified as standard terms being used by businesses in consumer contracts, the OFT and other qualifying bodies have the legal authority to apply for an injunction to prevent reliance upon that term (in practice, the OFT has mainly negotiated for the redrafting or deletion of the offending term)**
- ❑ **however, it is not the OFT's or other qualifying bodies' roles to seek compensation on behalf of consumers adversely affected by unfair terms**
- ❑ **the Citizens' Advice Bureau has recently suggested that a lack of enforcement exists, in respect of both (a) the widespread use of unfair terms or potential unfair terms on which its advice is sought, and (b) the continued use of unfair terms by businesses, even where similar-type terms have been publicised to be unfair by the OFT.**

(A) Enforcement means injunctive, not compensatory, relief. In its recent Consultation, ***Unfair Contract Terms Guidance: Consultation on Revised Guidance for the Unfair Terms in Consumer Contracts Regulations 1999*** ('the *Guidance*') (OFT311, April 2007), the OFT noted that:

- ❑ the enforcement of the Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCR') is a task shared among the OFT, local authorities, utilities regulators, and the Consumers' Association (see Sch 1 'Qualifying Bodies');
- ❑ 'enforcement' is used here in the sense of injunctive relief, to prevent the continued use of unfair terms; the OFT (and the other qualifying bodies) do not have the power to seek compensation on behalf of individuals (p 2);
- ❑ the purpose of the *Guidance* is to explain what might be considered (by the OFT, at least — as the OFT notes, it cannot speak definitively for other qualifying bodies in this regard) to be fair or otherwise about particular kinds of standard contractual terms (p 1) — of course, only a court can declare a particular standard contractual term to be unfair. The purpose of the *Guidance* (at page 54):

The OFT Guidance on unfair contract terms:

'is ... to illustrate, in a practical way, how the OFT interprets the Unfair Terms in Consumer Contract Regulations 1999, and so help businesses to ensure that their terms are fair and enforceable. The examples have been selected from cases where the Director General of Fair Trading took action under the Regulations.'

(B) But what if compensation is due to the claimants, on a widespread scale, where the unfair terms are used? Several scenarios arising out of the OFT's *Guidance*, Annexure A, could feasibly give rise to collective claims of compensation, if the contractual terms concerned were used across an industry in a widespread and repetitive manner.

Of particular interest are the types of clauses where the claimant consumer may have paid over money or forgone property, and may have the right to restitution of monies paid over or compensation for property foregone, if the relevant clause is struck out as of no effect.

By way of selecting a round figure, **ten** examples of potential collective claims for compensation arising out of 'unfair clauses' are listed in Table 10 below (these are sourced and summarised from Annexure A of the *Guidance*):

TABLE 10 Examples of OFT action on unfair terms

	Type of term	**Examples of contracts identified in Annexure A that contained that type of term**	**Why collective redress for compensation could feasibly arise on the term's wording**
1	Additional charges imposed by supplier	Cable and Wireless Communications Ltd (Bulletin 7)	Interest was charged at 'appropriate' rate; clause reworded so as to be charged at 'Barclays Bank base rate' after OFT action
2	Cancellation fees imposed on consumer by supplier	Homestyle (UK) Northern Ltd (Bulletin 5)	Cancellation fee of 30% of the order was charged under the contract; the term was deleted after OFT action

	Type of term	Examples of contracts identified in Annexure A that contained that type of term	Why collective redress for compensation could feasibly arise on the term's wording
3	Unfair charges imposed on consumer by supplier	Kirkplan Kitchens and Bathrooms (Bulletin 5)	Supplier charged 'survey fee' and 'administration charge' in the event that the supplier was denied access to the customer's premises; these were deleted, and other charges reduced, as a result of OFT action
4	Payments required on part of consumer, even if supplier defaulted or suspended service	Vodacall Ltd (Bulletin 4)	Consumer remained liable for fees throughout any period in which the Network Services was suspended unless the supplier determined otherwise in its discretion; a refund of such charges was required, after OFT action
5	Charges for return of goods to be borne by consumer	Time Computer Systems (Bulletin 4)	Defective goods/parts returned to the supplier had to be transported at the consumer's cost; the consumer was only liable for transport costs where the failure arose from the consumer's misuse, after OFT action
6	Call-out charges to be borne by consumer	Certes Security Ltd (Bulletin 5)	Any visit other than a scheduled maintenance visit would be charged on a 'time and material basis'; a lesser charge could be imposed, after OFT action.
7	Credit notes issued by supplier instead of refund of purchase price	Bennetts (Retail) Ltd (Bulletin 4)	If product was faulty, supplier could 'issue a credit note to cover the cost'; supplier required to repair/replace/refund purchase price, after OFT action.
8	Clauses stated that the supplier was not liable for consequential or 'associated' losses	British Sky Broadcasting Ltd (Bulletin 5)	Supplier sought to exclude all liability for 'any indirect or consequential loss resulting from negligence or any other tort' on the part of the supplier; supplier rendered liable for any foreseeable loss or damage, as a result of rewording by OFT action.
9	Cancellation without refunds	Connections Introduction Agency (Bulletin 8)	Membership could be withdrawn without refund; fees had to be refunded, less a reasonable amount for costs and expenses incurred in administration and management of the membership, after OFT action
10	Disproportionate penalties upon consumer's breach	A&S Domestic Services (Bulletin 10)	If consumer breached and legal action was required by supplier, then consumer liable for supplier's legal fees on a 'full indemnity basis'; consumer only liable for 'all costs allowable by the courts if an award is made in A&S's favour', after action by OFT.

(C) **Lack of enforcement.** It would appear, however, that the cases listed in Annexure A of the *Guidance*, as examples of those in which the OFT has successfully taken action to challenge as unfair, are only the 'tip of the iceberg'.

The lack of enforcement of the UTCCR 1999 has recently been noted by the Citizens' Advice Bureau's Response to 'Unfair Contract Terms Guidance' (response dated 14 June 2007) (hereafter, the '***CAB Response***'), and available at: <http://www.citizensadvice.org.uk/index/campaigns/social_policy/consultation_responses/cr_consumerandebt/unfair_contract_terms_guidance>.

The Citizens' Advice Bureau expressed concern with respect to the number, and widespread use, of standard contract terms which may be unfair and thus unlawful:

> **CAB Response:**
>
> 'In the first three quarters of 2006/7 we estimate CAB in England and Wales received 18,700 enquiries about terms and conditions. These are made up of: in relation to goods and services (6,373); for utilities & communications (2,707); for travel & transport (153); and on financial services (9,462). We fear that this indicates the shortfall in enforcement.'

(D) **Continuing use of unfair terms.** Furthermore, even in respect of those terms which have been indicated to be 'unfair', the Citizens' Advice Bureau provides specific examples whereby reliance upon such terms is continuing. Notably, these particular scenarios, reproduced below, could, by reason of their facts, give rise to *collective actions for compensation*, if the term was proven to be unfair and unlawful:

CAB Response:

'We are concerned that the guidance contains a large number of terms that are reported by CABx as being in use but which are defined as unfair, for example:

1. A CAB client from Central London, who lives abroad, sought advice when a lettings agency she was using wanted a tenancy introduction fee for tenancy renewals. The adviser thought this might fall foul of Regulation 5(1) of the UTCCR 1999. The local authority's contact with OFT revealed that the term imposes an unfair contingent liability on the landlord to pay a significant commission, in exchange for which the agency may not provide any service.

...

3. A CAB in Cambridgeshire reported their client on Income Support had been assured of a two month period for the cancellation of a gym contract. But when he tried to cancel he was told the written terms did not provide for cancellation. He was only provided with a copy of the terms when the adviser requested it. It does say that the agreement is non-cancellable and the gym claims he is due to pay the total amount of £396.72, to which debt collection charges will be added.

4. A CAB client from Lancashire had been repaying a loan from her bank in accordance with a CCJ made against her. She has not defaulted. At the same time, the client had reclaimed unfair bank charges and had eventually agreed a refund. The bank assured her verbally the refund on charges would be hers to dispose of as she saw fit and she intended to use it to pay off other debts. When the refund was made, it was, instead, deducted from the outstanding balance under the CCJ and telephone and personal appeals in the branch failed to release the sum to the client.

This suggests to us that there is insufficient enforcement.'

(E) **Compensation for unfair terms elsewhere under opt-out regimes.** It should be noted that seeking redress for unfair terms in standard contracts (overcharges and the like) has been evident under the Commonwealth opt-out collective action regimes (see, eg, the examples given in Table 12, later in the Research Paper) and under the Portuguese opt-out regime (discussed later in Section 13).

Notably, seeking compensation in respect of unfair or misleading contract terms is also one of the areas in which the Danish Ombudsman considers that the new Danish regime may be used (see Part IV, Section 14). As will become evident, such actions are only permitted to proceed under opt-out in respect of individual claims which are of low value.

The facilitation of low-value but widespread claims via an opt-out collective redress mechanism, as described above, highlights the importance of being able to 'sweep in' class members

where the incentive to bring individual actions is very low. Further, many of these contracts are not able to be individually negotiated, thus rendering the class members more vulnerable than contracting parties who negotiate terms at arms' length and with the benefit of legal advice.

11. FUNDING APPLICATIONS FOR GROUP LITIGATION

The main points:

- ❑ **in monetary terms, the Legal Services Commission has funded a large amount of Major group actions and Medium group actions over the past decade or so**
- ❑ **two points are notable, from the data available: (a) the low number of group actions now recorded by the Legal Services Commission in comparison with previous years, and (b) the areas in which legal aid funding has been concentrated for funded Major and Medium group actions — after grouping these actions into categories, it is apparent that, apart from the category of pharmaceutical/medical claims, consumer-type claims do not largely feature as funded group actions (either because of a lack of applications or because they did not meet the Commission's funding criteria)**

(A) **Information about funding.** One aim of this Research Paper has been to identify avenues by which to determine where 'common grievances' may not have progressed to court or settlement — not because of funding difficulties (although, of course, these do undoubtedly exist), but more because of procedural difficulties with the sorts of group actions available to claimants in England and Wales at the present time.

It will be recalled, from the 'Background to Research Paper' in Pt I, that funding represents one of a trio of issues that any procedural law reformers will need to consider (the other two being 'evidence of need' for such reform — the subject of this Research Paper — and the design of such a regime, both with respect to the commencement and conduct of actions). The author has considered the various potential funding avenues and costs-shifting rules for an opt-out collective action regime elsewhere, in: ***The Class Action in Common Law Legal Systems: A Comparative Perspective*** (Hart Publishing, Oxford, 2004), ch 12; and in a joint article with Dr Peter Cashman, '***Litigation Funding: A Changing Landscape***' [2008, forthcoming]. Briefly, in addition to the provision of legal aid — which is the responsibility of the Legal Services Commission in this jurisdiction — other possible avenues include: a special fund created with seed money and thereafter, self-funding upon contributions from successful class actions; funding from ideological claimants; funding from third party 'strangers to the litigation'; the implementation of an equivalent of the 'common fund doctrine'; and contingency fees (either multiplier or percentage of recovery).

However, for present purposes — this study about 'evidence of need' — enquiries were made of the Legal Services Commission (LSC), with respect to the levels and types of funding which have been provided to group actions over recent years. Via the provision by the LSC of certain FOI information, two pointers are of interest.

(B) **A reduction in recorded MPA's at the LSC.** The Legal Services Commission divides applications for funding for group litigation (termed 'Multi-Party Actions' or 'MPA's' by the Commission) into three categories: (i) major MPA's (where the gross costs are likely to exceed £5 million); (ii) medium MPA's (where the gross costs are likely to sit between £250,000 and £5 million); and (iii) minor MPA's (for which the gross costs are likely to be less than £250,000).

According to a report released by the LSC, dated 1 March 2005, entitled '***Multi-Party Actions: Freedom of Information Disclosure for the Association of Personal Injury Lawyers***', of those LSC-funded actions which could be 'traced as completed', the LSC funded 10 such major MPA's over the ten years prior to 2005 (some of which obviously pre-dated the GLO regime). These actions cost the Fund, in gross terms, £110,900,000. The equivalent figure for Medium MPA's, over the same period, for a total of 18 actions (again, many of which pre-dated the GLO regime's implementation in 2000), was £23,700,000. The LSC does not produce data regarding the cost breakdown of minor MPA's, nor particulars of the MPA's which it has rejected over this period (applications for funding may fail because of a poor cost–benefit analysis or an assessment of poor merits).

More recently, in a document entitled, '***Multi-Party Actions — FOI Information Sept 2007***', dated 14 September 2007, some interesting data is provided by the Commission with respect to recorded actual or potential MPA's, which is reproduced below. The data covers the period during which the GLO regime has been operative (2000–):

Legal Services Commission Information Sheet, Sep 2007:

'Following the introduction of the Access to Justice Act in 2000, the volume of Multi-Party Actions recorded by the LSC has been as follows:

Year	***Number of actions***
2000/01	133
2001/02	67
2002/03	45
2003/04	16
2004/05	20
2005/06	8
2006/07	4

NB. The year on year reduction is primarily due to the decrease in the number of child abuse actions being brought. There were substantial police investigations in the 1980s and 1990s following the identification of abuse in children's homes. These police investigations and criminal prosecutions resulted in claims. The peak in these actions has now passed.

Of the 293 actions, the main categories of action are:

Child Abuse	156
Health, Medical and Pharmacological	34
Prisoner Actions	27

There have been a limited number of major MPA's, defined namely those which are either likely to cost the Fund more than £1,000,000 or where the total *inter partes* costs are likely to exceed £5,000,000, assuming in each case that the action proceeded at least as far as a contested trial.

The LSC has funded in part or full each of the following major MPA's:

– Veterans of the UK Atomic Tests (veteran suffering from cancer and other problems — action discontinued) [GLO No. 61 in Table 1 of the Research Paper];
– Vigibatrin (an anti-epileptic drug that causes eye damage) [GLO No. 40 in Table 1];
– Seroxat (an anti-depressant drug with withdrawal effects) [not certified as a GLO as yet];
– Miner's Knee (industrial injury to miners from their working conditions) [GLO No. 62 in Table 1]; and
– Foetal Anti-Convulsant Syndrome (injury to children in the womb caused by sodium valproate based anti-epileptic drugs taken by the mother) [GLO No. 51 in Table 1].

David Keegan
Director, High Cost Case Contracting'

The most notable feature of the data reproduced above is the sharp decline in recorded MPA's over the 7-year period. Apart from the decreased number of child abuse claims being brought now in comparison with previous years, as referred to, anecdotal evidence received from Respondents during the course of receiving the Questionnaires, and from various practitioners during

the Theobalds Park conference, indicate that applications for legal aid funding may not be made now as regularly as in previous years.

It does not seem possible, however, to infer from a lower level of recorded MPA's that there is a lack of presently-existing 'common grievances' when, for example, there are continuing attempts by English claimants to 'add on' to US class actions (see Part IV, Section 15 of the Research Paper); and when experienced practitioners (both those quoted in this Research Paper at various junctures and some who contributed to the Questionnaire responses on an anonymous basis) continue to express concerns that some alleged common grievances are not reaching the stage of a hearing on the merits at all.

(C) Lack of consumer group actions funded by legal aid. Furthermore, apart from some notable medical and pharmaceutical cases, the types of Major and Medium group claims which have been funded via legal aid tend not to be consumer-focused claims whereby a grievance about a widely-available good or service is the subject of the dispute.

To illustrate this proposition, it is interesting to have regard to the 28 Major and Medium MPA's that were funded by the LSC in the ten years prior to 2005 and which had been traced as completed by that time, which are the subject of discussion in the Commission's document, '***Multi-Party Actions — Freedom of Information Disclosure for the Association of Personal Injury Lawyers***', dated 1 March 2005. It will be recalled that several of these actions were not the subject of any GLO order, having been commenced and case-managed prior to the GLO regime coming into force. In Table 11 below, the author has grouped the funded actions according to categories of grievance, to highlight the areas in which legal aid funding has been concentrated over that period, at least insofar as completed Major and Medium MPA's are concerned:

TABLE 11 Legally-aided group litigation, 1995–2005

Title of litigation accorded by LSC	Gross cost (in millions)	Outcome, noted by LSC	No. of claimants (approx)
Medical and pharmaceutical – treatment or products			
Benzodiazepene	£30.0	Proceedings abandoned	7, 000
Third generation contraceptive pill side-effects	£11.5	Lost at trial	300
MMR vaccine side-effects	£21.0	Proceedings abandoned	1, 350
Infected blood products (Hepatitis or HIV)	£5.3	Won at trial	450
Infected HGH with variant CJD	£5.0	Partially won at trial	450
Myodil	£2.6	Won	250
breast radiation injury litigation	£2.8	Lost at trial	100
Christies' Hospital Radiation overdoses	£0.3	Proceedings abandoned	15
cervical smear test failures	£0.3	Settled	40
LSD treatment of psychiatric patients	£0.5	Settled	100
Norplant contraceptive implants	£1.4	Proceedings abandoned	350
steroids	£0.9	Proceedings abandoned	340
Employment-related claims			
BCCI employees	£13.5	Settled	700
emphysema for miners	£5.6	Won at trial	3, 000
CAPE employees with asbestos	£8.0	Settled	6, 000
Gulf War syndrome	£5.0	Investigations abandoned	800
post-traumatic stress disorder for servicemen	£6.0	Lost at trial	450
vibration-induced white finger syndrome	£2.2	Won at trial	1, 000
Thor mercury poisoning of miners	£0.5	Won	20

Title of litigation accorded by LSC	Gross cost (in millions)	Outcome, noted by LSC	No. of claimants (approx)
Abuse claims			
Leicester child abuse	£1.7	Won	90
Stoke Place	£1.0	Settled	50
Danesford	£0.8	Settled	40
Kilrie	£0.4	Settled	20
Forde Park	£0.7	Settled	80
Financial claims			
Home Income Loans	£4.3	Won	1, 000
Environmental claims			
Volclay Plant pollution	£1.0	Won	3, 000
Docklands nuisance claim	£1.7	Lost during proceedings	1, 000
Flexsys Plant pollution	£0.6	Won	250

The absence of consumer-type claims in the Table above (except for the medical and pharmaceutical category, and the Home Income Loans case) does not prove, of course, that such actions are not brought via other funding means, nor that there is an absence of 'common grievances' in the consumer-oriented category. What the Table does demonstrate, however, is that there are areas in which legal aid funding has not been quite as prevalent for Major or Medium MPA's, either because funding was not applied for, or because the actions did not meet the various funding criteria set by the Commission.

PART IV

‘MISSING’ COLLECTIVE REDRESS FOR DAMAGES IN ENGLAND AND WALES: LOOKING OUTWARDS

12. CONTRAST GRIEVANCES PURSUED UNDER OPT-OUT REGIMES IN AUSTRALIA AND CANADA

The main points:

- ❑ **several categories of common grievances brought in Australia and Ontario have no equivalent under the GLO regime**
- ❑ **alternatively, where some equivalent GLO claims have been evident within the same category (eg, in the product liability claims category), the range and number of claims litigated in Australia and Ontario have not been reproduced under the GLO, over the same time period (2000–7)**
- ❑ **several of the claims in Australia and Ontario have been, individually, non-recoverable claims, in which individual litigation was extremely unlikely — however, the opt-out systems of these jurisdictions have also been used for collective actions in which large-value individual claims have been encompassed by the action**

(A) The comparative table. Table 12 in this Section encompasses data on collective actions brought under the opt-out Australian federal regime; and under the opt-out provincial common law regime of Ontario, Canada.

Australia's federal regime and Ontario's provincial regime have been deliberately chosen for the purposes of this Section, rooted as they are in two countries which have strong parallels with the litigious landscape and culture, and substantive law, of England and Wales.

Both of the opt-out regimes under consideration commenced prior to 2000 — Australia's 'representative proceedings' regime commenced on 3 March 1992, when Pt IVA of the Federal Court of Australia Act 1976 came into force; and Ontario's 'class proceedings' regime commenced on 1 January 1993, pursuant to the Class Proceedings Act, SO 1992. However, for the purposes of comparison, only the actions that have been certified/commenced as opt-out collective actions in these jurisdictions from 2000 onwards have been noted in Table 12. The aim of this restriction is to more usefully compare and contrast the activity under these regimes with that evidenced under England's GLO regime (which commenced operation in May 2000).

The purpose of Table 12 in this section is two-fold: to contrast —

- ❑ the ***number*** of actions commenced under the Australian federal and Ontario provincial regimes between 2000–7 (**164** separate actions are noted in Table 12), and the number certified under the GLO in that same time period (which was **62** — see Table 1); and

- ❑ the ***range*** of disputes which have been brought by means of the opt-out collective action in Australia and Ontario between 2000–7.

Notably, the number and range of collective actions instituted in Australia and Ontario arise in jurisdictions with a combined population which is far lower than that of England and Wales. The respective populations (to the nearest thousand, and derived from Statistics Canada, the Australian Bureau of Statistics, and UK Statistics, respectively) are as follows: Ontario: 12,160,000; Australia: 20,434,000; England and Wales: 52,042,000.

(B) **Private law grievances.** One of the principal purposes of constructing Table 12 is to highlight an awareness of the number of private law grievances that are aired under opt-out collective actions — actions which do not rely upon the activity of a regulator to enforce or act for the claimants, but disputes that arise out of private causes of action (breach of contract, negligence, breach of fiduciary duty, for example). The reality is that regulators differ from jurisdiction to jurisdiction in their ability and willingness to commence compensatory actions on behalf of a class of aggrieved persons — but private law grievances inevitably depend upon a representative claimant stepping forward to assume (at least, tacitly) the responsibility for the litigation. In any event, for the purposes of comprehensive coverage, *all* certified class actions have been included in Table 12.

If an opt-out collective action was part of English civil procedure, Table 12 is illustrative of both the types and range of grievances which class members *might* seek to prosecute by way of private enforcement. Furthermore, it is notable that many of the grievances noted in the Table are generic, rather than linked to a particular geographical area.

(C) **The different attitudes towards certification.** For the purposes of Ontario, Table 12 only includes the actions which survived certification, that is, where the representative claimant could prove each

of the following certification criteria, pursuant to s 5(1) of the Class Proceedings Act:

Ontario's Class Proceedings Act, SO 1992, c 6, s 5(1):

The court shall certify a class proceeding ... if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,
(i) would fairly and adequately represent the interests of the class,
(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

In the case of Australia's federal regime, by contrast, there is no formal certification regime. Instead, there are certain 'threshold requirements' which must be satisfied under s 33C of the Federal Court of Australia Act, failing which the defendant may challenge the proceedings as being improperly constituted as representative proceedings. There are further powers vested in the court to discontinue representative proceedings under any of ss 33L, 33M or 33N, at least in that form, where the scenarios stipulated in those sections are met. At the outset, section 33C requires that:

Australia's Federal Court of Australia Act 1976, s 33C(1):

Subject to this Part, where:

(a) 7 or more persons have claims against the same person; and

(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

(c) the claims of all those persons give rise to a substantial common issue of law or fact;

a proceeding may be commenced by one or more of those persons as representing some or all of them.

Certification, in Canada's case, or survival of a discontinuance application (because either s 33C was not met or that 33L, 33M or 33N require discontinuance) in Australia's case, are crucial in procedural terms. As Cullity J remarked in ***Stewart v General Motors of Canada Ltd*** (Ont SCJ, 8 June 2007), at para 3: '*As a practical matter, the effect of a denial of certification will often terminate the proceeding.*'

(D) **Included cases.** Certification is not a decision on the merits of the action, and hence, Table 12 **includes** cases that may have ultimately **failed** in proving liability on the substantive law. Certification merely means that those cases had (at least, at the date of the Table's compilation) a tenable basis in law. Were English courts to implement an opt-out regime, they might see the question of substantive liability differently from the decisions in these other jurisdictions. Hence, all cases which had an arguable cause of action on their face, and which survived the certification hurdle, are included herein.

In addition, Table 12 includes those decisions in which certification was made out, in conjunction with an application for judicial approval of a settlement agreement. In these circumstances, '*certification is on consent [but] the court must be satisfied that the requirements of s 5 have been met*': per ***Gilbert v Canadian Imperial Banks of Commerce*** (2004), 3 CPC (6^{th}) 35 (Ont SCJ), at para 8. Indeed, where a conjoint application of this type is brought, then, per ***Toronto Transit Commission v Morganite Canada Corp*** (Ont SCJ, 6 Feb 2007), at para 11:

> *The requirements are the same in a settlement context as in a litigation context, although it is generally accepted that they need not be as rigorously applied in a settlement context as a litigation context.*

(E) **GLO claims which have no equivalent.** Although the incontrovertible impression that one derives from a perusal of Table 12 is the range and number of actions which have no equivalent under the GLO regime, it would be remiss not to mention that the position can, occasionally, be reversed!

It will be recalled, from Table 1, that GLO #55 concerned a claim for physical or psychiatric injuries as a result of a prison disturbance at Lincoln Prison. Coincidentally, a class action also

arising out of a prison riot was filed in Ontario in: ***R v Nixon*** (2002), 21 CPC (5th) 269 (SCJ). Prisoners at the Kingston Penitentiary set fire to items and property one evening on 31 October 1999, and it was alleged in the claim that correctional officers failed to respond to fires appropriately and treated inmates in inhumane manner, and that the Crown failed to maintain proper safety equipment, inspections and procedures. The representative plaintiff proposed a class action encompassing all inmates who were present, except those who consented to be excluded or those who were proven to have been involved in fire setting. However, certification of the class proceeding was denied, because of problems with: the adequacy of the representative claimant; the class definition; conflicts with the class; and the small class size, making individual actions feasible.

Thus, it may be that, when the facts and circumstances of certified GLO's are tested against suitably drafted statutory certification criteria of an opt-out regime, the claim may not achieve certification. Certification criteria in an opt-out regime certainly do not permit all collective grievances to go forth in class action form.

(E) **Comprehensiveness and dates.** It should be noted that Table 12 is prepared on an 'E&OE' basis. It does not purport to be a complete list of competent collective actions in the two jurisdictions selected, but has been prepared on the following basis:

Notes about Ontario. In order to compile the Ontario column of the Table, the author has trawled through the decisions handed down by the Ontario first instance and appellate courts since 2000, and has sought to identify which actions were certified (after lengthy appeals in some cases). However, omissions whereby an action was missed or a certification appeal was overlooked may have occurred during the Table's preparation, for which the author apologies in advance. The following Ontario actions have been **excluded** from the Table:

- ❑ actions which were not certified because one or more of the certification criteria failed;
- ❑ actions which were certified at first instance, but then the certification decision was overturned on appeal;
- ❑ actions which were certified, but then the certification order was set aside and the

proceedings stayed, because another dispute forum (eg, arbitration) was mandated;

- ❑ actions which were not certified, but that decision was overturned on appeal and the case remitted back to the trial judge to re-examine certification in light of the appeal decision, but no further decision could be located, according to the author's searches.

The year designated against the Ontario case signifies when the action was certified by judicial hearing (reiterating that it is the purpose of the Table to only incorporate proceedings that were certified after 1 January 2000).

Notes about Australia. The Australian column is, with absolute certainty, an incomplete record of all competent Pt IVA actions between 2000 and the present, because in the absence of a certification hearing, the only ways in which to track class actions in the Australian federal arena are to (a) trawl law databases to ascertain where a discontinuance or other interlocutory motion may have been brought in the matter; (b) check media outlets as to actions which have been filed, according to press or news reports (reports about likely or anticipated class actions have not been included); and (c) check the websites of claimant law firms, and other websites of interest (see, eg, the shareholder class actions listed at: <http://www.delisted.com.au/legal.aspx>), to ascertain already-filed actions which are being publicised on such websites. Whilst the author has undertaken each of these exercises, unfortunately the end result does not, and cannot, purport to be a complete list of Pt IVA actions.

However, whilst the caveat of likely incompleteness remains, the range and number of Pt IVA actions shown in Table 12 is sufficient to substantiate the comparison with the GLO regime which is the object of this Section of the Research Paper.

Inclusion of Australian actions in the Table indicates that the judgment itself or other source mentions a filing date of 2000 or later.

In respect of ***both*** jurisdictions, the Table seeks to exclude actions in which:

- ❑ a court discontinued the class proceeding as a class proceeding;

- ❑ the court struck out the action on the basis that it disclosed no cause of action against the defendant on the face of the pleadings (where the cause of action was not one known to law, or where the action represented an innovative attempt to push the boundaries of the limits of a duty of care, say, which the court would not permit on the current state of the law of proximity or for policy reasons);

- ❑ the court struck out the action on the basis that it was instituted frivolously or vexatiously; or

- ❑ the court granted summary judgment on the application of the defendant against the representative claimant.

TABLE 12 Actions litigated in Australia and Ontario, 2000–7

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
Negligence/misleading and deceptive/misrep/ breach of statutory duty claims brought by consumers re products/services: consumers complaining of misleading and deceptive conduct in respect of the nature of a product/service	Williams v FAI Home Security Pty Ltd (No5) (home alarm systems) Petrusevski v Bulldogs Rugby League Club Ltd (2003) (those betting on the outcome of a football sports competition) .Au Domain Administration Ltd v Domain Names Aust Pty Ltd (2003) (dispute over conduct in relation to domain names)	Lee Valley Tools Ltd v Canada Post Corp (2007) (parcel shipping charges) Currie v McDonald's Restaurants of Canada Ltd (2007) (promotional games and contests) Farkas v Sunnybrook and Women's College Health Services Centre (2005)
Actions for defective products (excluding pharmaceutical and medical devices): against manufacturers for personal injuries, property damage, or economic losses allegedly caused, whether under breach of contract, negligence, statutory actions	Lowe v Mack Trucks Australia Pty Ltd (2001) (design and construction of Mack truck components) Nendy Enterprises Pty Ltd v New Holland Australia Pty Ltd (2001) (alleged defects in combine harvesters)	Gariepy v Shell Oil Co (2002) (leaky pipes and fittings) Bondy v Toshiba of Canada Ltd (2007) (laptop computers) Bonanno v Maytag Corp (2005) (front-load washing machines)

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
Actions for defective medical devices or pharmaceutical products:	Courtney v Medtel Pty Ltd (2002) (heart pacemakers and accelerated battery depletion) Darcy v Medtel Pty Limited (No 3) (2004) (also pacemakers) Bright v Femcare Ltd (2002) (Filshie clip calibration) Bates v Dow Corning (Australia) Pty Ltd (2005) (breast implants)	Tesluk v Boots Pharmceutical plc (2002) (sale and marketing of Synthroid) Knowles v Wyeth-Ayerst Canada Inc (2001) (diet drug Pondimin) Wilson v Servier Canada Inc (2000) (Ponderal and Redux diet drugs) Taylor v Canada (Minister of Health) (2007) (temporomandibular joint implants) Andersen v St Jude Medical Inc (2003) (artificial heart valves coated with Silzone) Peter v Medtronic Inc (2007) (defect in batteries used in implantable cardioverter defibrillators) Heward v Eli Lilly & Co (2007) (Zyprexa, antipsychotic medication) Coleman v Bayer Inc (2004) (Baycol medication) Boulanger v Johnson & Johnson Corp (2007) (Prepulsid) Serhan Estate v Johnson & Johnson (2006) (testing strips for blood glucose levels; constructive trust allegation)

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
Breach of contract claims by purchasers/lessees of real property: to distinguish such category from consumer-type transactions above	1059/05 Francey v Sharpe Development Group Pty Limited (2004) (complaint that resort did not contain day spa, as represented to purchasers of units) McBride v Monzie Pty Ltd (2007) (alleged backdating of contracts) Overton Investments Pty Ltd v Murphy (2001) (dispute about liability for outgoings) McIntyre v Eastern Prosperity Investments Pte Ltd (No 4) (2000) (disputes between lessor and lessee re shopping centre management) Revian v Dasford Holdings Pty Ltd (2002) (disputes between lessor and lessee re shopping centre management)	Despault v King West Village Lofts Ltd (2001) (disputes over realty taxes) Vitelli v Villa Giardino Homes Ltd (2001) (dispute over design of condominium units) Politzer v 170498 Canada Inc (2005) (burst water-pipe in apartment complex) Cheung v Kings Land Development Inc (2001) (incompleted condominium project and refund of monies) Denis v Bertrand & Frere Construction Co (2000) (crumbling foundations due to fly ash) Lewis v Cantertrot Investments Ltd (2006) (maintenance fees payable in condominium) Ward-Price v Mariners Haven Inc (2002) (dispute about deposit interest under an interim occupancy agreement in condominium)

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
Claims arising out of insurance or insurance practices:		Mandeville v Manufacturers Life Insurance Co (2002) (conversion from mutual insurance company to share corporation) Directright Cartage Ltd v London Life Insurance Co (2001) (dispute about policy coverage) MacRae v Mutual of Ohama Insurance Co (2000) (dispute over 'premium offset' options) Gibbs v Jarvis (2001) (dispute over 'premium offset' options) Hague v Liberty Mutual Insurance Co (2004) (use of non-original manufacturer parts to repair cars damaged in collisions) McNaughton Automotive Ltd v Co-operators General Insurance Co (2003) (insurance industry practice re salvage value payout less deductible) (however, this case had a chequered path with intervening changes in the law and re-interpretation of the crucial standard insurance term, and eventually certification was set aside in 2006)
Consumers of food: personal injury caused by consumption or purchase of food, allegedly due to negligence, breach of contract, statutory actions, etc	Graham Barclay Oysters Pty Ltd v Ryan (2002) (contaminated oysters) consumers v Knispel Fruit Juices (2001) (salmonella contamination of fruit juice) Georgiou v Old England Motel Pty Ltd (2004) consumers v Sofia's Restaurant (salmonella outbreak) (2005)	Vezina v Loblaw Cos (2005) (infected employee; food contaminated by Hep A)

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
Medical negligence: personal injury (including psychiatric injury and human rights infringements) claims alleged against medical service providers		Bellaire v Daya (2007) (surgery for fertility problems) Barbiero v Pollack (2004) (cosmetic surgery and use of liquid silicone) Rose v Pettle (2004) (skin infections following acupuncture treatments) McCarthy v Canadian Red Cross Society (2001) (contaminated blood, Hep C) Phaneuf v Ontario (2007) (treatment of those on remand) Healey v Lakeridge Health Corp (2006) (TB exposure in hospital)
Agricultural negligence: economic loss claims	Dovuro Pty Ltd v R&E Wilkins (2000) (canola seed merchants)	
Environmental claims: claims for negligence, nuisance, strict liability, statutory actions, etc, brought by residents/landowners/ businesses	Tongue v Council of the City of Tamworth (2004) (alleged failure to supply water from dam fit for purpose) Grinberg v Roads and Traffic Authority (2007) Glenelg Residents (re failure of sluice gates, causing flooding) (2007) Residents v operators of Stuart Shale oil project (2004)	Pearson v Inco Ltd (2005) (contaminated land near refinery) Ludwig v 1099029 Ontario Ltd (2007) (factory fire forcing evacuations) McLaren v Stratford (City) (2005) (severe rainstorm, backed-up sewers)

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
Employment pensions: employee (or ex-employee) actions against pension fund operators, for lost or reduced pension entitlements, health and medical benefits, discriminatory practices between different pension-holders, etc	Levitt v United Medical Protection Ltd (2001)	National Trust Co v Smallhorn (2007) McMaster University v Robb (2001) Givogue v Burke (2003) Burleton v Royal Trust Corp of Canada (2003) CSL Equity Investments Ltd v Valois (2007) Hislop v Canada (Attorney General) (2004) (re the Canadian Pension Plan and same sex survivors' entitlements) Kranjcec v Ontario (2004) Lacroix v Canada Mortgage and Housing Corp (2001) Markle v Toronto (City) (2004) Vivendi Canada Inc v Philp (2007) Vivendi Universal Canada Inc v Jellinek (2006) Dhillon v Hamilton (City) (2006) Hislop v Canada (Attorney General) (2005) Mortson v Ontario (Municipal Employees Retirement Board) (2004) (subject to amendments to statement of claim and submissions on preferable procedure) Paramount Pictures (Canada) Inc v Dillon (2006) Ontario Public Service Employees' Union v Ontario (2005) Sutherland v Hudson's Bay Co (2005)

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
Employment disputes: against employer (or third party, eg, Crown) for lost jobs, discriminatory practices, sexual abuse, wrongful dismissal, wrongful collection of union fees, withheld remuneration, unpaid wages	Schanka v Employment National (Administration) Pty Ltd (2001) Smith v University of Ballarat (2006) Batten v Container Terminal Management Services Ltd (2001) Finance Sector Union of Australia v Commonwealth Bankof Australia (2000) Various aircraft personnel v Australian Federal Govt (2005) (personal injury; cleaning F-111 fuel tanks) Non-union workers v Patrick Corp (2002) Automotive Food Metals Engineering Printing and Kindred Industries Union v The Age Company (2004)	Isaacs v Nortel Networks Corp (2001) Downey v Mitel Networks Corp (2004) Englefield v Wolf (2005) Ormrod v Etobicoke (City) Hydro-Electric Commission (2001) Elliott v Currie (2001) Kanagaratnam v Li (2005) Berry v Pulley (2001)
Overcharges in financial transactions: debtors suing credit card companies, store credit operators, banks, service providers, alleging overcharges in interest on loans, on overdraft facilities, unlawful fees, unlawful interest charges, etc		Cassano v Toronto Dominion Bank (2007) (foreign exchange transaction fees) Gilbert v Canadian Imperial Bank of Commerce (2004) Nehme v Civil Service Co-operative Credit Society Ltd (2004) (early payout penalties on mortgages when house is sold) Smith v National Money Mart Co (2007) (‘payday loan’ fees) Joseph v Quik Payday Inc (2006) (‘payday loan’ fees) McCutcheon v Cash Stores Inc (2006) (‘payday loan’ fees) Markson v MBNA Canada Bank (2007) (credit card cash advances) Naintais v Easyhome Ltd (2005)

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
Student claims: for negligence, breach of contract, negligent misstatement, etc, in performance of educational courses, etc		Hickey-Button v Loyalist College of Applied Arts & Technology (2006)
Transport accidents: giving rise to personal injury/death on the part of class members		Nunes v Air Transat AT Inc (2003) (plane emergency landing) Brimner v VIA Rail Canada Inc (2001) (train derailment)
Anti-competitive conduct: actions for price-fixing, abuse of market power	Bray v F Hoffman-La Roche Ltd (2002) (vitamins for human consumption and treatment) Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2) (2006) (vitamins for animal consumption and treatment) Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd (2006) (cardboard and packaging products) Air freight price fixing action (2007)	Axiom Plastics Inc v E I Dupont Canada Inc (2007) (engineering resins in automotive parts) Alfresh Beverages Canada Corp v Hoechst AG (2002) (sorbates) Minnema v Archer Daniels Midland Co (2003) (lysine) Toronto Transit Commission v Morganite Canada Corp (2007) (electrical carbon products) Ford v F Hoffmann-La Roche Ltd (2005) (vitamins) Bona Foods Ltd v Ajinomoto USA Inc (2004) (monosodium glutamate)
Agency and franchise disputes: between principal and agents/franchisees (regarding termination, failed commissions, etc)	Leonie's Travel Pty Ltd v International Air Transport Association (2006) (re commission on surcharges) Leung v American International Assurance Co (Aust) Ltd (2004) Jarrama Pty Ltd v Caltex Australia Petroleum Pty Ltd (2004)	1176560 Ontario Ltd v Great Atlantic & Pacific Co of Canada Ltd (2004) Al-Harazi v Quizno's Canada Restaurant Corp (2007) Wilson v Re/Max Metro-City Realty Ltd (2003)

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
Shareholder actions for non-disclosure or misleading disclosure: against company for misrepresentations in prospectus, directors' statements, or other public documents, allegedly causing the shareholders economic loss from reduced share value	Dorajay Pty Limited v Aristocrat Leisure Ltd (2003) Guglielmin v Trescowthick (re Harris Scarfe Holdings Ltd) (2002) P Dawson Nominees Pty Ltd v Multiplex Ltd (2006) Johnstone v HIH Insurance Ltd (2002) Shareholders of Sons of Gwalia Ltd v Sons of Gwalia Pty Ltd (2006) Cadence Asset Management v Concept Sports Ltd (2004) Crosbie, in the matter of Media World Communications Ltd (Admin Appointed) (2005) ASIC v Chemeq Ltd (2006) Taylor v Telstra Corporation Ltd (2006) Shareholders v Village Life Ltd (2007) Shareholders v Westpoint Group (2007) Watson v Australian Wheat Board Ltd (2007)	Kerr v Danier Leather Inc (2001) Gould v BMO Nesbitt Burns Inc (2007) Frohlinger v Nortel Networks Corp (2006) Gallardi v Nortel Networks Corp (2006) Elliott v Boliden Ltd (2006) CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman (2002)
Other shareholder actions: for alleged misconduct or mismanagement of the company or its affairs	King v AG Aust Holdings Ltd (formerly GIO Aust Holdings Ltd) (2000) (hostile takeover bid, action on behalf of former minority shareholders) Milfull v Terranora Lakes Country Club Ltd (2002) (management of redeemable preference shares)	

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
Investor actions *(excluding the shareholder actions noted previously)**:*** investors against operators of investment vehicle (property developer, brokers, promoters of investment schemes, solicitors, etc) for misconduct/ mismanagement/poor choices/bad advice (eg, misrepresentations in prospectus, undisclosed fees, losing investors promised tax relief, etc)	Hunter Valley Community Investments Pty Ltd v Bell (2001) Patrick v Capital Finance Corp (Australasia) Pty Ltd (2001) Sereika v Cardinal Financial Securities Ltd (2001) Haslam v Money for Living (Aust) Pty Ltd (Administrators Appointed) (2005) (converting real property ownership into life tenancies) Australian Competition & Consumer Commission v Bio Enviro Plan Pty Ltd (2003) (worm farming schemes) Reiffel v ACN 075 839 226 Ltd (2003) (property investments) Lean v Tumut River Orchard Management Ltd (2002) (scheme for growing and selling peaches and nectarines) Lukey v Corporate Investment Aust Funds Management Pty Ltd (2000) (tracknet project) Spangaro v Corporate Investment Australia Funds Management Ltd (2003) (cotton project)	Toevs v Yorkton (2006) (fraudulent schemes) Carom v Bre-X Minerals Ltd (2000) (salted mineral samples) Hurst v Berkshire Securities Inc (2006) (referrals to Portus) Murphy v BDO Dunwoody LLP (2006) (financial projections prepared by accountants) Lau v Bayview Landmark Inc (failed real estate investment scheme)
Residents of care homes/residential schools who allege physical, sexual and/or emotional abuse		Cloud v Canada (A-G) (2004) Baxter v Canada (Attorney General) (2006)
Misfeasance of public office: and unlawful interference by a public authority in the class's economic interests	Wotton v State of Queensland (2007) (not entirely clear from court report, although indicated, in respect of civil unrest on Palm Island)	

Category of alleged grievance of class	Australia (federal)	Ontario (provincial)
Professional negligence and/or breach of contract and/or unconscionable behaviour: alleged against accountants, lawyers, banks	Hunter Valley Community Investments Pty Ltd v Bell (2001) Crawford v Bank of Western Australia Ltd (2005)	
Defamation: alleged defamation of providing misleading information about class members	Bailey v Veda Advantage Information Services and Solutions Ltd (2007) (credit-worthiness references)	
Taxation disputes:	Pantral Pty Ltd v Commissioner of Taxation (2002) (sales tax on motor vehicle instruction manuals) Meredith v Commissioner of Taxation (2001) (re tax scheme)	
Disputes arising out of native title:	Holt v Manzie (2000)	

To reiterate, the total number of collective redress actions in Table 12 — representing (a necessarily incomplete tally of) the actions certified/commenced without striking-out or discontinuance in Ontario and Australia — is 164. This contrasts to a mere 62 certified group actions over the same period under the Group Litigation Order regime in England and Wales.

13. THE LEAD TAKEN BY THE OPT-OUT REGIME IN PORTUGAL

The main points:

- ❑ **Portugal's opt-out regime has been in operation since 1995, and the consumer organisation DECO has obtained valuable experience in bringing actions under it**
- ❑ **DECO's view is that the regime has worked well, although the limited number of collective actions for damages is a direct result of the limited resources which DECO has to prosecute such actions**
- ❑ **DECO notes that certain features of the Portuguese opt-out regime may be worth re-visiting for clarification and operational efficacy — observations which provide very useful lessons for English lawmakers**

(A) **Europe's oldest opt-out regime.** An opt-out system has been implemented in Portugal since 1995. The relevant laws facilitating the regime are: Law No 83/95 of 31st August, Right of Proceeding, Participation and Popular Action; and Law No 24/96 of 31st July, Establishing the Legal System Applicable to Consumer Protection.

(B) **Features of the Portuguese opt-out legislation**: **DECO**, the Portuguese Association for Consumer Protection, and in particular, Mr Nuno Oliveira, formerly Legal Advisor, and Mr Luis Silveira Rodrigues, Director, have kindly assisted with this Research Paper by providing written materials describing the operations and efficacy of the opt-out laws, and by meeting with both Mr Bob Musgrove, Chief Executive of the Civil Justice Council and with the author, on 8 November 2007, to discuss the Portuguese experience in further detail.

The author has also referred to DECO's presentation, '***Group Action: Experience from Portugal***' (paper presented to the Conference on Collective Redress, Lisbon, 9 November 2007) for the purposes of compiling this Section. Another useful publication on the background, content, and pro's and con's of the Portuguese opt-out action is that by J Pegado Liz, '***Notion and Regime of the "Popular Action" in Portugal***' (paper presented to the conference, *Group Action: Taking Europe Forward*, 11 October 2007, copy on file).

Features of the Portuguese opt-out regime, which may be of interest to English law-makers, include the following:

- ❑ the regime has no certification requirement, but the court has the ability to discontinue;

- ❑ standing: any consumer, and any association or foundation, has the right to initiate a collective action, provided that the association has legal existence and its purposes are within the interests at stake (hence, a consumer association such as DECO can bring an action with respect to consumer protection, even though it is 'not directly affected' by the culpable behaviour);

- ❑ the subject matter of the collective regime is wide-ranging, eg, public health, the environment, quality of life, consumer protection and consumer services, cultural heritage, and public domain;

- ❑ the usual requirements to strike out frivolous litigation (when the 'source of the request is manifestly improbable') are maintained;

- ❑ the association does not require an express mandate to represent consumers;

- ❑ the court stipulates a period for opting out, and arranges how the opt-out notice is to be advertised (this is usually by media and press conference; individual notice to class members is not required);

- ❑ where damages cannot be individually assessed, the court has the power to fix an aggregate sum for class-wide damages;

- ❑ the decision of the court is binding upon all consumers, except those who opted out; the decision is published in the two main newspapers;

- ❑ a consumer organisation bringing the claim is exempt from an adverse costs order, should it lose.

(C) **The lessons of experience.** The following observations about how the regime might be improved have been provided by Mr Nuno Oliveira, formerly Legal Advisor at DECO (***'Collective Redress: An Overview of the Portuguese Legislation'***, August 2007, copy on file with the author). Based upon DECO's experiences, some areas of the regime may require re-visiting:

> **DECO's overview of suggested refinements and improvements:**
>
> 'The general overview of the present opt-out framework might be considered positive for consumers, and it has been a quite useful tool in order to protect their interests. Notwithstanding this overall appreciation for the merits of the regime, issues still remain that require improvements, namely:
>
> - *concept of the citizen* — it is not clear under collective redress law whether the foreign citizen might be able to participate in the lawsuit;
> - ad hoc *groups* — [re the requisite legal standing to commence opt-out suits], the current laws only include associations and foundations with legal existence, and do not include *ad hoc* groups of interests;
> - *effects of the public announcements about collective redress lawsuits* — the reality has demonstrated that the opt-out mechanism does not always assure opting-out rights, which can be particularly relevant when decisions are unfavourable;
> - *unclaimed compensatory damages* — the law should stipulate some governing rules, whenever consumers do not claim their compensatory damages, creating a Fund with goals which are aligned with consumers' affairs, similar to 'fluid recovery' in the United States [termed '*cy-près*' in this Research Paper];
> - *execution of the court's decision* — the law does not contain any provisions that govern the case of breach or violation of the court's decision. Therefore, in spite of the recognition of consumers' rights by the court, sometimes it can be difficult to enforce the court's decision, and the consumers may then not be able to benefit from the decision;
> - *calculation of damages* — the law should state clear rules for calculating different types of damages (liquidated, general, reliance, restitution, punitive, expectation, etc), and include also a provision for damages distribution between consumers as well as a partial distribution for the plaintiff consumers' association.'

(D) **Actions brought under the opt-out regime.** Since the inception of the Portuguese opt-out regime, DECO has instituted three opt-out actions for damages, as the following Table 13 shows:

TABLE 13 Portuguese opt-out collective actions for damages

Action against …	How many actions?	Notes about actions
Portugal Telecom	3 (1/1998, 2/1999)	Class included almost all Portuguese consumers (almost 2 million consumers) and involved damages of about 120M Euros. Its purpose was to disgorge/compensate for the consumers' payment of over-charges. Portugal Telecom and DECO reached a settlement agreement that allowed consumers to make free phone calls every Sunday for one year and also on consumers' international day.
Language school, Academia Opening	1 (in 2003)	Action for breach of contract in demanding credit payments of fees in advance, after the language school closed down suddenly. About 42,000 students were affected by fact that, after closure, students were requested to continue their credit payments to the financial providers. The action is presently under appeal in Portugal. A similar action was brought against Academia Opening in Spain by consumer organisation, OCU.
Water provider	1 (in 2003)	Action to recover extra charges that company demanded from consumers to repair malfunctioning water meters (they exploded in cold weather). Five councils were sued, and the action settled.

As the above cases demonstrate, the Portuguese opt-out regime has certainly coped with large class sizes and relatively low-value individual recoveries. It has also witnessed an effective *cy-près* settlement distribution of damages (in the form of price-rollback *cy-près* with respect to telephone charges).

The relatively small number of actions commenced for damages is largely due to the reality that DECO has finite resources with which to prosecute collective actions of this sort, rather than due to the efficacy of the regime itself.

For further information and analysis about the various Portuguese collective redress regimes, please refer to the following National Report by Prof. Henrique Antunes, '***Class Actions, Group Litigation and Other Forms of Collective Litigation (Portuguese Report)***', prepared for the *Globalization of Class Actions* conference, Oxford, December 2007, and available for perusal at: <http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf>.

14. 'NEARBY' OPT-OUT REGIMES BEING IMPLEMENTED IN EUROPE

The main points:

- ❑ **there are two long-standing opt-out regimes in Europe — in Portugal (as discussed in Section 13 above) and in Spain**
- ❑ **several other European jurisdictions (Denmark, Norway, the Netherlands) have recently introduced opt-out regimes of various types**

(A) Using opt-out for low-value claims: Denmark's lead. Some European jurisdictions have considered that, especially for low-value claims, opt-out regimes are superior.

In particular, Denmark has just introduced an opt-out collective action regime, to be implemented as a 'secondary model' to an opt-in model, pursuant to the Administration of Justice Act (Denmark), Pt 23, Act No. 181 of 28 Feb 2007 [in force 1 Jan 2008].

According to the Ministry of Justice's publication, '***New Rules on Class Action under Danish Law***' (26 June 2007, copy on file with the author), together with relevant information and helpful insights derived from discussions with Mr Henrik Oe (the Danish Ombudsman), and from the Ombudsman's publications, '***Collective Redress***' prepared for the Leuven Brainstorming Event, 29 June 2007, and also '***Collective Redress***' prepared for the Conference on Collective Redress at Lisbon, 9–10 November 2007, the following are pertinent points to note about the Danish regime:

- ❑ the legislation is derived from Report No. 1468/2005 of the Standing Committee on Procedural Law, on reform of civil justice IV (Class actions etc);
- ❑ opt-in is the 'main model' under the legislation;
- ❑ but an opt-out model will be permitted by the court upon two conditions being satisfied:

The pre-requisites for Danish opt-out actions:

(a) the claims are so low-value that it cannot be expected that they would be pursued through individual actions — according to the explanatory notes to the Bill, this first condition should normally only be satisfied if the individual claim does not exceed approx DKK 2,000 (about £200); **and**

(b) the opt-in model is considered an inappropriate method of dispute resolution — presumably, this will be especially able to be satisfied in the case of a very large class, where the distribution of opt-in notices would be a practically burdensome requirement and where identification of the class members may be difficult at the outset.

- ❑ only a public authority (and not individual class members) can institute an opt-out action, and presently, the Danish Consumer Ombudsman is the sole recipient of this status under the legislation — the justifications for this are that '*public authorities, as opposed to, eg, private associations, etc, are subject to a general objectivity requirement which applies when the relevant authority is to decide whether there is a basis for bringing the class action according to the opt-out model*' (p 8 of the MoJ's publication), and also, that '*public authorities in some respects are bound by obligations of professional secrecy and impartiality*' (presentation by Mr Henrik Oe, Leuven, 29 June 2007);

- ❑ whilst the Standing Committee on Procedural Law acknowledged the possibility that some small minority of class members might not become aware of an opt-out notice, that '*cannot be deemed to be a major interference with the freedom of action, etc of the persons concerned, and taking part in such class action does not imply any financial risk for the individual class member*';

- ❑ the Danish collective action does not require identical claims — only that the claims arise from the same factual circumstances and the same legal basis;

- ❑ the Danish collective action contemplates a split trial of common issues (for which a declaratory judgment is issued), and thereafter (if necessary), individual claims for compensation or to determine other individual issues relevant to liability;

- ❑ the Danish class action contains 'adequate representative' and 'superiority' requirements typically found in opt-out regimes;

- ❑ a certification/screening stage is included in the regime;

- ❑ individual notice is the optimal, and is preferred when it would not entail disproportionate expenses, otherwise, press advertisements or public announcement will suffice;

- ❑ the adjudicating court may decide that the class representative must provide security for costs (although this would be considered to be unnecessary against the Danish Ombudsman, or indeed, against any public authority);

- ❑ when the Bill was being examined by the Danish Parliament, a 'sunset' clause was inserted, whereby revision of the collective action regime must be conducted when the Act has been effective for three years (ie, in the Parliamentary year 2010–11);

The Danish Ombudsman, Mr Henrik Oe, anticipates that the opt-out collective action may be particularly useful for certain types of claims. At the presentations at Leuven and Lisbon, noted previously, the following uses were foreshadowed (per slide #11):

Danish Ombudsman's presentation on the new legislation:

'Future application:
Examples of potential collective redress actions initiated by the Consumer Ombudsman:

- collection of an unlawful fee;
- contracts concluded on the basis of misleading marketing activities (eg, the UCP Directive); and
- unfair terms of contract (eg, the Directive on unfair terms in consumer contracts).

For further information about the Danish opt-out regime, please see: Prof. E Werlauff, '***Class Actions in Denmark — from 2008***' (National Report prepared for conference, *The Globalisation of Class Actions*, Oxford, 12–14 December 2007, and available for perusal at: <http://www.law.stanford.edu/display/images/dynamic/events_media/Demark_Legislation.pdf>

(C) Other European opt-out regimes of interest. Opt-out regimes of one form or another have also appeared on the European landscape in recent times. To summarise

❑ Civil Procedure Code (**Norway**) [in force 1 Jan 2008]

- opt-in is the 'main model', but an opt-out model will be permitted if two conditions are satisfied: (a) the claims represent such small values that a clear majority of them could not be expected to be pursued individually, and (b) the claims are not foreshadowed to raise individual issues.

- For further information, please see: '***Norway Introduces Class Actions Legislation***' (Wiersholm Mellbye & Bech, Oslo, 2007)); and also: Prof. C Bernt-Hamre, '***Class Actions, Group Litigation and Other Forms of Collective Litigation in the Norwegian Courts***' (National Report prepared for conference, *The Globalisation of Class Actions*, Oxford, 12–14 December 2007, and available for perusal at: <http://www.law.stanford.edu/display/images/dynamic/events_media/Norway_National_Report.pdf>).

❑ Act on Collective Settlement of Mass Damages (**The Netherlands**) [in force 27 July 2005]

- an opt-out regime for settlement agreements for 'mass disaster accidents';

- it has only been used three times to date: for product liability (the Dutch DES hormone case); for financial services (Dexia Bank Nederland re securities leasing); both had court-approved settlements; and a third case pending: securities litigation re Royal Dutch Shell plc, described in detail in: '***The Shell Settlement and the Dutch Act on Collective Settlement of Mass Damages***' (Cleary Gottlieb, Brussels, 16 April 2007));

- for further information on The Netherlands regime, please see: DL Scheuleer, '***Collective Claims and Settlements in the Dutch polders***' (paper presented to the Conference on Collective Redress, Lisbon, 9–10 November 2007); and the Dutch

Ministry of Justice, '***The Dutch "Class Action (Financial Settlement) Act***' (paper presented to the Conference on Collective Redress, Lisbon, 9–10 November 2007); and, in addition, for detailed discussion and analysis, please see: Prof. I Tzankova, '***Class Actions, Group Litigation and Other Forms of Collective Litigation Dutch Report***' (National Report prepared for conference, *The Globalisation of Class Actions*, Oxford, 12–14 December 2007, and available for perusal at: <http://www.law.stanford.edu/display/images/dynamic/events_media/Netherlands_National_Report.pdf>.

❑ the Spanish Law of Civil Judgment 1/2000 (**Spain**) [in force 1 Jan 2001]

- permits an action on behalf of unidentified individuals; the action must be brought by consumer or user organisations; and the regime is only available for recovery of damages sustained by consumers and users;

- unidentified individuals have five years in which to come forward to seek enforcement of a judgment of general damages in their favour;

- for further information on the Spanish regime, please see: Prof. P Gutiérrez de Cabiedes, '***Group Litigation in Spain National Report***' (National Report prepared for conference, *The Globalisation of Class Actions*, Oxford, 12–14 December 2007, and available for perusal at: <http://www.law.stanford.edu/display/images/dynamic/events_media/spain_national_report.pdf>.

For a recent overview of the European collective actions landscape, see the comprehensive discussion in: Freshfields Bruckhaus Deringer, '***Class Actions and Third Party Funding of Litigation: An Analysis Across Europe***' (June 2007, and distributed at a conference, *Third Party Funding*, arranged by the British Institute of International and Comparative Law, 22 January 2008).

15. PROBLEMATICAL ENGLISH 'ADD-ON CLASSES' TO UNITED STATES CLASS ACTIONS

The main points:

- ❑ **where English claimants have sought to 'add on' to class actions instituted in the United States, or have sought to bring a stand-alone claim in the US, some difficulties have ensued, that have resulted in the English claimants being 'dumped out' of the actions, or being treated unfavourably in comparison with domestic US claimants**
- ❑ **many of these actions had a 'connection' with the English jurisdiction that may have permitted an action to be brought in England — but in the absence of an opt-out collective redress regime in England, joining or commencing US opt-out actions has had some unhappy outcomes for English claimants**

(A) Joining class actions in other jurisdictions. There have been instances in which English residents have sought to comprise 'add on' classes of 'foreign' residents to opt-out class actions elsewhere, with attendant difficulties. This has been especially evident in some litigation conducted pursuant to rule 23 of the US Federal Rules of Civil Procedure (FRCP).

This section concentrates specifically upon the problem of English residents being 'dumped out' of US class actions.

(B) Problems encountered. The number of actions in foreign countries in general, and in US class actions in particular, which have involved English residents, is impossible to quantify. However, a perusal of relevant case law (summarised in Table 14) indicates a *sample* range of problems that have been faced by English class members who have sought to join class actions in the United States:

TABLE 14 Problems experienced by English claimants under US class actions

The case:	The outcome:	The problem for English add-on claimants (or European claimants generally):
In re Parmalat Securities Litigation, 487 F Supp 2d 526 (SDNY, 24 July 2007)	claims of foreign purchasers of Parmalat securities (including English investors) dismissed against defendant auditors and two banks	• Securities Exchange Act of 1934 (US) did not have sufficient extra-territorial application to include claims of these foreign purchasers • the evidence was that fraud took place in England, where Eureka UK purchased receivables, so the 'essential core' of the fraud took place away from the US
F Hoffmann-La Roche Ltd v Empagran SA, 542 US 155 (2004)	claims of foreign purchasers of vitamins in Ukraine, Australia, Ecuador and Panama not permitted to proceed in the class action	• as a general rule, the Sherman Act did not apply to conduct involving trade and commerce with foreign nations; exceptions are created where that conduct significantly harms imports, domestic commerce or American exporters; here, the general rule, and no exceptions, applied • in any event, several non-US countries (UK, Germany, Canada, Japan) filed briefs citing that to apply US private treble-damages remedies to anti-competitive conduct taking place abroad was undesirable, that it would 'unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody.'
Kruman v Christie's plc, 284 F 3d 384 (2nd Cir, 2003)	foreign class members (including English purchasers of items at Christie's and Sotheby's) had to file pleadings and fight on against defendant's motion to dismiss; domestic US class settled on favourable terms (over $500 million in cash and discount benefits to the domestic class)	• judicially noted that legal work to prepare an English-equivalent action in London was commenced but not pursued, due to a later settlement

The case:	The outcome:	The problem for English add-on claimants (or European claimants generally):
In re Factor VIII or IX Concentrate Blood Prod Liab Litig, 408 F Supp 2d 569 (2006) aff'd ***Gullone v Bayer Corp (In re Factor VIII or IX Concentrate Blood Products)*** 484 F 3d 951 (7th Cir, 2007)	hemophiliac residents of United Kingdom had their suit against manufacturers of blood-clotting products ('second generation' claims) dismissed	• dismissed on *forum non conveniens* grounds • UK an adequate forum because: all defendants consented to UK courts' jurisdiction; the *Fairchild* exception to causation was potentially applicable to enable the causal link to be proven; legal representation in the UK was no difficulty, and financial difficulties of mounting such cases 'more apparent than real'; and costs-shifting did not compromise the adequacy of the UK forum
In re Vioxx Products Liability Litigation, 2007 US Dist Lexis 23164 (ED La)	classes of Italian and French consumers of drug dismissed	• dismissed on *forum non conveniens* grounds
In re Vioxx Litigation, 395 NJ Super 358, 928 A 2d 935 (2007), on appeal from Judge Higbee	class of 98 consumers residing in England and Wales had their claims for personal injuries against Merck & Co (developers and manufacturers) dismissed	• dismissed on *forum non conveniens* grounds • the facts: that a cause of action available in NJ was not available to the claimants in UK; that punitive damages were not available in the UK; that less generous discovery and no jury trial were available in the UK; that costs-shifting in the UK could put the claimants at a disadvantage compared to the 'American costs rule'; and that public funding could be difficult or challenging to obtain for product liability group actions in the UK — did not render NJ the appropriate or convenient forum, nor did these facts indicate that the UK was an inadequate forum for this litigation
In re Vivendi Universal SA Securities Litigation, 242 FRD 76 (SDNY, 2007)	defendants disputed that class of foreign shareholders (from France, England, the Netherlands) *could* bring a US securities fraud class action against the defendants	• several observations as to the fact that there 'is no clear authority addressing the *res judicata* effect of a US class action judgment in England' • 'while the issue is hardly free from doubt, based on the affidavits before it, the court concludes that English courts, when ultimately presented with the issue, are more likely than not to find that US courts are competent to adjudicate with finality the claims of absent class members and, therefore, would recognise a judgment or settlement in this action'

The case:	The outcome:	The problem for English add-on claimants (or European claimants generally):
In re Daimler Chrysler AG Securities Litigation, 216 FRD 291 (D Del, 2003)	certification of the class action proceeded, but only on the basis of 'domestic investors'; foreign class of shareholders was excluded from the class action	• there were a 'significant number of foreign investors', of whom the court said that there were 'practical difficulties involved in maintaining a class comprising foreign investors' • issues of concern to the court were how the foreign investors' damages on foreign exchanges were going to be quantified, and how the class would be managed

Notably, the reasons given for dumping English/foreign claimants out in many of these cases was that there was some, or some substantial, connection between the English jurisdiction and the claimants (provoking the thought that, had an opt-out action been available in England, these claimants may not have felt it necessary or desirable to turn to the US for class action membership).

(C) A practitioner viewpoint. These various difficulties are especially crucial in pharmaceutical product liability claims, according to practising lawyers who are experienced in such claims.

For example, to quote ***Mr Mark Harvey, Partner of Hugh James Solicitors, Cardiff***, per written correspondence with the author, and reproduced with approval:

Mark Harvey, Hugh James Solicitors:

'There is currently little prospect of getting a pharmaceutical product liability case quickly to the UK courts, unlike in the US. An example of the contrast is Vioxx, with enough litigation in the US to force settlement and the adamant refusal of the defendant to compensate UK claimants who Merck know can't or won't sue, with the costs risks. The same applies to Lipobay, where last year, one UK claimant who had made his own way to the US was barred on *forum non conveniens* grounds there, and despite Bayer paying out over $1Billion in damages for the same proven injury in the US, there is no prospect of that UK claimant being able to pursue his action on his own.'

Further, to quote ***Mr John Pickering, Partner and Head of Personal Injury at Irwin Mitchell Solicitors, London***, from written correspondence and oral discussions with the author, and reproduced with approval:

John Pickering, Irwin Mitchell Solicitors:

'There are quite a number of cases involving products of one form or another, particularly pharmaceutical devices, where litigation has been successfully pursued in the United States but for various reasons has not been pursued in this jurisdiction. To just give a couple of examples in which I have personally acted:

DES. This litigation was successfully pursued in the US and also in other jurisdictions, notably Holland. I am currently acting on behalf of a group of DES victims but no litigation has been possible in this jurisdiction, mainly because of key differences in the substantive law between the US and the UK, and we are currently exploring whether there may be other political-style remedies.

Haemophilia/HIV. In general terms, the litigation in the United States has been successful and the litigation in this country has been much more patchy. We are, however, currently acting on a group of cases that were returned to this country, having fallen down in the United States. [On that point, see, further, Table 14 above, and the decision of the 7th Circuit US Court of Appeals of 4 May 2007.]

The reasons behind the successes and failures of group actions are varied — some relate to lack of funding/costs benefits problems and others relate to what may be described as deficiencies within the law.

Nevertheless, if courts are to be able to effectively deal with all types of multi-party actions, many of them raising difficult issues and complex facts, then it is important that the courts have a full range of procedural tools upon which to draw, depending upon which procedural framework is most appropriate in all the circumstances of the case.'

Both practitioners consider that an opt-out regime, by which the common issues in dispute between the class of users of a product and the defendant manufacturer could be determined initially, followed by a resolution of the individual issues (if necessary), would assist the ability to viably commence and conduct pharmaceutical product liability claims in this jurisdiction. There are, however, some circumstances where the lead case approach may work very well (eg, John Pickering refers to the British Coal litigation arising out of the Vibration White Finger condition, ***Armstrong v British Coal Corp*** [1996] EWCA Civ 1049, as one such instance, where nine cases were selected as lead cases) — it is not a case of 'one cap fits all'.

(D) **US to UK: 'It's your problem'.** Note the robust views recently taken by the US state appellate court in the *Vioxx* litigation, and by the United States Court of Appeals for the Seventh Circuit in the contaminated blood litigation, respectively, regarding the prospect of bringing complex litigation in the UK, and reproduced below. Although the comments pertain specifically to the costs-shifting rule which applies in the UK, and the disincentive to litigation that it presents, the view of the

practitioners above — that the lack of an opt-out system also hampers litigants' attempts to bring such actions — renders the US courts' comments relevant to the availability of the procedural laws in the UK, *in general*:

> ***In re Vioxx Litigation***, 395 NJ Super 358, 373–74 (Sup Ct NJ, App Div, 2007):
>
> 'In sum, we have difficulty accepting the position of a group of residents of the UK that perceived inadequacies in the tort and damages laws and the rules for funding and cost allocation of their countries of residence entitle them to seek justice in New Jersey where the law and fee arrangements are more favorable. By this argument, plaintiffs essentially contend that the UK provides an inadequate forum for the resolution of the disputes of the English and Welsh living within its borders.
>
> We do not regard the claimed inadequacies of one country's system of funding suits and allocating costs as a ticket to relief elsewhere, but rather, as a subject for legislative or court reform, should such be warranted. ... the UK constitutes an adequate alternative forum for plaintiffs' litigation.'
>
> ***Gullone v Bayer Corp (In re Factor VIII or IX Concentrate Blood Products)***, 484 F 3d 951, 958 (7th Cir, 2007):
>
> 'Plaintiffs argue that there are "extreme impediments" to their funding of the litigation, if it were to proceed in the United Kingdom, largely because the English legal system uses a "loser pays" rule for attorneys fees and because compensatory damages tend to be low. We do not see how the use of a different fee-shifting rule for attorneys' fees can weigh against dismissal, however ...
>
> Obviously the English Rule is less favorable to plaintiffs whose chances of losing are too great (which, for risk-averse plaintiffs, might even be 30% or 40%), but we believe that must be regarded as the kind of unfavorable difference in legal system that carries little weight. In fact, the United States stands almost alone in its approach toward attorneys' fees, and so if we were to find that dismissal was wrong for this reason, we would risk gutting the doctrine of *forum non conveniens* entirely.'

16. ACTIONS BROUGHT ELSEWHERE RE GLOBAL PRODUCTS/SERVICES WITH NO EQUIVALENT LITIGATION IN ENGLAND AND WALES

The main points:

- ❑ **due (it is said) to a lack of familiarity with the process by which an opt-out system works, some English claimants are failing to claim their entitlements under US class action settlements, a matter which has drawn adverse comment from the National Association of Pension Funds recently**

- ❑ **in respect of some pharmaceutical products that have recently been the subject of litigation in Canada under its provincial opt-out regimes, and where those products are also sold and used in England, there has been no equivalent litigation in England to test whether or not liability can be established in respect of those products**

(A) A lack of pursuit of compensatory entitlements by English claimants. One problem — the converse of that considered in the previous Section in which willing English class members were 'dumped out' of US class actions — which has manifested in some quarters in England is an apparent reluctance to become involved in US class actions.

The lacuna has been recently highlighted by the National Association of Pension Funds, when English residents *do* comprise part of the described class in a class action commenced in the US, but fail to pursue the compensation which has been set aside for them pursuant to class actions settlements. According to the NAPF's report, '***Pension Funds' Engagement with Companies***' (Aug 2007), at page 26:

> **NAPF 2007 Report:**
>
> 'Class actions can enable investors to recover losses incurred owing to an act of fraud or to change corporate governance practices. In 2006, $18.3 billion was paid out by US companies under class actions settlements, Institutional Shareholder Services estimate. Following suggestions that some $2.4 billion remains unclaimed by UK and European investors, the NAPF published a guide to help trustees ensure their funds were not missing out on significant sums.'

In a publication issued in March 2007, the National Association of Pension Funds reiterated that, in its view, a trustee of a pension fund has a duty to protect pension scheme assets, and that part of this duty entails ensuring that securities class actions in the US are monitored. In '***Securities Litigation — Questions for Trustees***' (March 2007) (available for perusal at: <http://www.napf.co.uk/DocumentArchive/Policy/Reports%20and%20Responses%20to%20Consultations/10_2007/20070315_Securities%20Lititgation%20-%20Questions%20for%20Trustees%20-%2015%20Mar%202007.pdf>), the NAPF stated:

NAPF Advice, March 2007:

'The principal potential benefits of joining a lawsuit are twofold: to gain compensation for real financial losses inccurred; and to encourage reform of corporate governance practices at a company, thus protecting or enhancing shareholder value in the longer term. ...

As far as we can ascertain, no UK trustee has been sued for not joining a securities class action. Even in the US a recent case against a group of mutual funds alleging that leaving money on the table was a breach of their fiduciary duties , did not come to court. That said, it seems self-evident that trustees have a duty to protect the assets in their scheme and that they should therefore at the very least not neglect opportunities to recoup losses, where the cost and effort are commensurate with the expected return.'

Furthermore, at the ***NAPF's annual Investment Conference***, held at Edinburgh on 15 March 2007, the NAPF's Head of Corporate Governance, Mr David Paterson, indicated that part of the reason for the lack of pursuance of compensatory amounts was a lack of familiarity of English pension trustees with the US class action system:

'***NAPF urges pension funds to monitor US lawsuits***' (*Reuters*, 15 Mar 2007):

'UK pension schemes should monitor U.S. securities class actions more closely to ensure they don't miss out on potentially big settlements, the National Association of Pension Funds (NAPF) said on Thursday. The industry body, which is holding its annual Investment Conference in Edinburgh this week, said UK schemes have a duty to recoup losses for members from securities class-action suits and should set out policies to monitor them. ...

"If a class action is settled and all you need to do is make a claim, I don't see why you shouldn't make it. If you've got investments in the U.S. you ought to be asking the question," the NAPF's Head of Corporate Governance David Paterson told Reuters.

Many UK and European pension schemes have failed to file claims when settlements are reached in U.S. courts, where class actions tend to be concentrated because of a more plaintiff-friendly legal structure. This often stemmed from a lack of familiarity with the system, Paterson said. "The big ones (pension funds) are very much aware of the issue and do take it seriously," Paterson said. "We're saying to pension funds more broadly that you, as trustees, ought to be thinking about how to tackle this and have a policy about how to monitor class actions."

"At a time when pension scheme deficits are a matter of ongoing concern, scheme members could be forgiven for asking why trustees are not taking every available opportunity to recoup funds to which they are rightfully entitled," he added.'

Of course, whether such pension funds could commence their actions in the UK, were the UK to have an opt-out collective redress action, would depend upon the requisite nexus being established between claim, claimants and jurisdiction. However, at the very least, the *availability* of an opt-out regime in the UK would increase the familiarity of English business and consumer residents with the process by which to seek to recover group entitlements to compensation.

(B) **Lack of equivalent pharmaceutical product and medical device litigation in England.** A more claimant-friendly litigious environment in the United States — particularly the general absence of costs-shifting, the availability of jury trials, and the possibility of punitive damages awards — together with differences in substantive law between jurisdictions, do not wholly explain the relative paucity of pharmaceutical product and medical device claims in England. According to Table 1 previously, only five of these actions have been certified under the GLO regime since its implementation (FAC, DePuy Hylamer, Sabril, Trilucent implants, and Persona).

An opt-in regime in which unitary litigation must be commenced in respect of each user of the product, rather than in the name of a representative claimant on behalf of a class described at the outset, may also partially explain the fewer number of such actions in England. This proposition is

particularly borne out by the fact that several pharmaceutical and medical class actions have received certification in Canada, under various of the provincial opt-out regimes in operation there — where the opportunities giving rise to claimant access are not nearly as prevalent as in the United States.

During the course of the research undertaken for this Paper, several actions were mentioned as examples of pharmaceutical products being litigated elsewhere under opt-out collective actions, without any parallel litigation being yet witnessed in England, but where putative class members who had used the product were English residents. The practitioners concerned referred to the difficulties in mounting the actions, where the opt-in regime frontloaded the litigation and where adequate funding was difficult to achieve. The *Vioxx* litigation, which has recently settled in the United States, has already been mentioned in the previous Section within this context. Other examples referred to by ***lawyers Mark Harvey, Partner, Hugh James Solicitors, and John Pickering, Partner and Head of Personal Injury, Irwin Mitchell Solicitors***, in discussions with the author, included: Seroxat / Paxil; hormone replacement therapy; DES; and Lipobay / Baycol.

It is pertinent to consider, by way of contrast with the English position, the number and variety of *pharmaceutical product and medical device* litigation that has been certified thus far under the various Canadian opt-out provincial common law regimes (Quebec is excluded from consideration). In most cases, there has not been any trial of the litigation (most have either settled or are still *sub judice*). However, the important point for present purposes is that the fact of certification permits it to proceed as a collective action whereby, procedurally, a representative user of the product or device represents a described class, without the difficulties that accompany opt-in group litigation on a large and complex scale.

Note that medical negligence actions, *per se*, are <u>not</u> included in Table 15 below (with the exception of the tainted blood cases) — the aim is to focus upon pharmaceutical products and medical devices that have a global presence. In addition, the Table does <u>not</u> include actions concerning pharmaceutical products or medical devices where proceedings were filed, but where no certification decision was locatable on databases of reported and unreported judgments which the author searched for the purposes of compiling this Table:

TABLE 15 Certified Canadian pharmaceutical and medical actions

The product or device	The Canadian class action certification decision
cardioverter defibrillators ('ICDs') and cardiac resynchronization therapy defibrillators ('CRT-Ds')	***Peter v Medtronic Inc*** (Ont SCJ, 6 Dec 2007)
Baycol — a cholestorel-lowering prescription drug	***Walls v Bayer Inc*** [2005] MBQB, (2005), 189 Man R (2d) 262
Baycol	***Coleman v Bayer Inc*** [2004] OJ No 1974 (SCJ)
Synthroid — for treatment of underactive thyroid	***Tesluk v Boots Pharmceutical plc*** (2002), 21 CPC (5th) 196 (SCJ)
Ponderal and Redux — prescription weight-loss drugs	***Wilson v Servier Canada Inc*** (2000), 50 OR (3d) 219 (SCJ)
silicon gel breast implants	***Harrington v Dow Corning Corp*** [2000] BCCA 605, (2000), 82 BCLR (3d) 1
Baycol	***Bouchanskaia v Bayer Inc*** [2003] BCSC 1306
Baycol	***Wheadon v Bayer Inc*** (2004), 46 CPC (5th) 155 (Nfld and Lab SC, Trial Division)
Baycol	***Bayer Inc v Pardy*** [2005] NLCA 20
Prepulsid (cisapride) — for the treatment of gastroesophageal reflux disease	***Boulanger v Johnson & Johnson Corporation*** (Ont SCJ, 18 Jan 2007)
Zyprexa — an antipsychotic medication	***Heward v Eli Lilly & Co*** (Ont SCJ, 6 Feb 2007), appealed on other grounds
Device to test for presence of Chlamydia and Gonorrhea	***Cardozo v Becton, Dickinson & Co*** [2005] BCSC 1612
Vitek Temporomandibular Joint Implants	***Sawatsky v Societe Chirurgicale Instrumentarium Inc*** (BCSC, 4 Aug 1999)
Surestep System (for monitoring blood glucose levels)	***Serhan Estate v Johnson & Johnson*** (2006) (Ont) (testing strips for blood glucose levels; constructive trust allegation)
heart pacemaker leads	***Nantais v Telectronics Ltd*** (1995), 25 OR (3d) 331 (SCJ)
tainted blood (Hepatitis C)	***Endean v Canadian Red Cross Society*** (1999), 68 BCLR (3d) 350 (SC)
tainted blood (Hepatitis C)	***Killough v Canadian Red Cross Society*** [2001] BCSC 1060
tainted blood (Hepatitis C)	***Parsons v Canadian Red Cross Society*** [1999] OJ No 3572 (Ont SCJ)
Pondimim (diet drug)	***Knowles v Wyeth-Ayerst Canada Inc*** (2001), 16 CPC (5th) 330 (SCJ)

The product or device	The Canadian class action certification decision
Vioxx — anti-inflammatory drug to reduce pain and swelling	***Wuttunee v Merck Frosst Canada Ltd*** [2007] SKQB 29 (certification hearing deferred)
Vitek TMJ implants (in the temporomandibular joints of class members' jaws)	***Taylor v Canada (Health)*** (Ont SCJ, 5 Sep 2007)
silicon gel breast implants	***Bendall v McGhan Medical Corporation*** (1993), 14 OR (3d) 735 (Gen Div)
silicon-coated mechanical heart valves, or annuloplasty rings	***Andersen v St Jude*** (2003), 67 OR (3d) 136 (SCJ)
the leads component of an artificial cardiac pacing system	***Hoy v Medtronic Inc*** [2003] BCCA 316
temporal mandibular joint implants	***Bisignano v La Corporation Instrumentarium Inc*** [1999] OJ No 4346 (SCJ)

(C) Judicial perspectives. Perhaps the most pertinent reason underlying the robust attitude which the Canadian courts have adopted towards pharmaceutical and medical class actions — and their preparedness to allow them to proceed under opt-out regimes — is the willingness to sever the individual from the common issues, and conduct a 'common issues trial'. In the TMJ implant case of ***Taylor v Canada (Health)*** (Ont SCJ, 5 Sep 2007), at para 85, Cullity J explained the reasoning:

> *Plaintiff's counsel did not dispute the expert evidence tendered by the Attorney General that related, among other things, to the numerous individual factors that could affect the issue of causation. In their submission, however, these should not be considered to overwhelm, or outweigh, the advantages to be achieved from a single trial of the common issues. I accept that submission. A determination of the common issues would resolve most of the contentious issues relating to the defendant's liability in favour of the plaintiff, or it would terminate the litigation.*
>
> *The manageability of the proceedings is always a concern that must be addressed but it has not been found to raise an insuperable obstacle in cases of pharmaceutical products and surgical implants of various kinds in which similar objections have been raised on behalf of defendants.*

A further interesting judicial perspective — this time, about the global nature of the law's problems — was provided recently by Chief Justice Spigelman, in a ***recent interview*** with the ***Australian Financial Review***, reported on 12 January 2008:

Interview with Chief Justice Spigelman (as reported in: '***Big Litigators should foot the bill: judge***', *Australian Financial Review*, 12 January 2008, p 12):

'This year, for the first time, judges involved in commercial litigation from around Asia will meet in Sydney to discuss ways of harmonising court proceeses and practices, particularly cross-border insolvencies, and create international protocols between courts.

Justice Spigelman said different court practices and procedures in different countries acted as "non tariff" trade barriers and an impost on international commerce. They were also being used by lawyers to hinder the speedy resolution of major commercial litigation.

According to Justice Spigelman, the growth of international hedge funds over recent years gave rise to complicated legal issues and the ability to tie up capital through legal battles over venues had the potential to significantly affect the prospects of economic recovery.'

Although the Chief Justice was discussing, in this interview, methods of harmonising court processes and practices, especially in the context of cross-border insolvencies, the remarks reproduced above are of potential application when having regard to the global use of products and services generally, and the problems which have been faced by English claimants in seeking cross-border redress — specifically when their own procedural regimes lack utility.

PART V

A PLETHORA OF UNITARY ACTIONS FOR DAMAGES IN ENGLAND AND WALES

17. THE BANK CHARGES LITIGATION IN COUNTY COURTS

The main points:

- ❑ **since March 2006, the English county court system has been increasingly overwhelmed by an exponential number of bank charges complaints being filed by bank customers (that followed a consumer awareness campaign by Which? in the same month)**
- ❑ **the various litigation strategies adopted have been beset with difficulties, and the lack of cross-jurisdictional binding application of the test case to be heard by the Commercial Court in the matter has been noted elsewhere (eg, in Scotland);**
- ❑ **the bank charges litigation brought *en masse* in the English county courts has also raised other dangers associated with numerous individual suits — the risk of inconsistent judgments, delays in outcome, and adverse publicity for the defendant who misses a judgment against it through 'administrative error'**

(A) The source of the dispute. Generally, the bank charge complaints the subject of this section have arisen in a scenario whereby bank customers had been levied charges by banks which fell within one or more of the following categories:

- ❑ charges for overdrawn accounts when there was no overdraft facility;
- ❑ charges for exceeding an agreed overdraft limit;
- ❑ charges levied when there was not enough money in the account for the bank to honour a direct debit, standing order mandate, or a cheque drawn on the account; or
- ❑ charges levied when the bank wrote to demand that an overdrawn balance be reduced.

Bank customers claimed that the charges were not lawfully levied.

In March 2006, the English Consumers' Association, Which?, campaigned on this issue, and thereafter, bank customers started claiming refunds *en masse*, by filing claims in the county courts. The details of the Which? campaign are outlined at: <http://www.which.co.uk/reports_and_campaigns/money/campaigns/Banking%20and%20credit/Bank%20charges/bank_charges_campaign_559_74996.jsp>.

Which?'s website announcement:

'The Unfair Terms in Consumer Contract Regulations 1999 state that charges can't be disproportionate to the costs incurred by the bank. These charges cannot be used as a deterrent or a profit stream by the bank.

The banks argue that the Regulations don't apply to these terms and that the charges are fair. Which? thinks bank charges are disproportionate to the amount it actually costs the bank to deal with an account in the red. We have called on the banks to open their books and justify their charges – something they haven't done so far.'

(B) **The number of claims**. In order to separate the bank claims cases from other cases brought in the county courts over the period from March 2006 onwards, figures have been obtained from IMAGE, the statistics branch of Her Majesty's Court Service. These figures have been previously published as representing the number of cases where known named banks are defendants.

Prior to March 2006, there were a handful of general claims against banks (ie, where banks were named defendants). The average figure for claims against banks prior to March 2006 was 81 claims per month. Therefore, this figure has been subtracted from the overall number of bank claims commenced since March 2006, to identify (by estimation) the number of claims that have been brought against the banks on the bank charge claims.

The relevant number of estimated claims is shown in Table 16 as follows:

TABLE 16 Bank charges: claims per month

Month	No. of claims issued against bank defendants		New total (notionally bank charges cases)
March 2006	191		110
April 2006	249		168
May 2006	380		299
June 2006	665		584
July 2006	737		656
August 2006	1, 264		1, 183
September 2006	1, 452		1, 371
October 2006	1, 818		1, 737
November 2006	2, 108	**Subtract 81 claims per month**	2, 027
December 2006	1, 815		1, 734
January 2007	3, 127		3, 046
February 2007	4, 514		4, 433
March 2007	7, 839		7, 758
April 2007	8, 333		8, 252
May 2007	8, 927		8, 846
June 2007	6, 226		6, 145
July 2007	3, 969		3, 888
August 2007	925		844
TOTAL:	**54, 539**		**53, 081**

The number of actions above do not take into account the recourse which many bank customers had to the Financial Ombudsman Service (as discussed, eg, in: '***Bank Charges: The Jury is Still Out***' (*The Telegraph*, 22 May 2007).

(C) Litigation strategies. For the court actions themselves, the litigation strategies for dealing with these individually-prosecuted bank charges claims varied:

❑ From March 2006 until July 2007, the banks defended claims by filing lengthy stock

defences, and then awaited the listing for hearing by District judges (who tended to list them in blocks as small claims hearings), only to settle with the claimant either a few days before the hearing or on the morning of the hearing itself.

- On 26 July 2007, the OFT set down a test case in the Commercial Court against seven banks, in order to obtain a determination as to whether the provisions of the Unfair Terms in Consumer Contracts Regulations that deal with unfairness apply to unauthorised overdraft charges. The banks who are parties to the test case are: Abbey National plc, Barclays Bank plc, Clydesdale Bank plc, HBOS plc (includes Halifax and Bank of Scotland) , HSBC Bank plc, Lloyds TSB Bank plc, Royal Bank of Scotland Group plc (including Natwest), and Nationwide Building Society.

  The background and details of this strategy are explained by the OFT at: <http://www.oft.gov.uk /advice_ and_resources/resource_base/market-studies/personal2>). The Commercial Court hearing commenced in mid-January 2008.

  After the test case was set down for hearing, the banks issued defences with applications for stays of proceedings pending the Commercial Court hearing. The District Judges again listed these in blocks to provide an opportunity for the claimants to resist the application. District Judges have indicated that about 30% of applications for stays are resisted by claimants.

- Another feature of the bank charges cases is that it is one field in which non-lawyer claims management companies have been particularly active, collecting large numbers of claims through aggressive advertising campaigns. Prior to the test case being announced, claims management businesses were bringing claims on behalf of individual claimants. Issues have arisen about how such actions were funded (no-win-no-fee, and some appeared to be funded by contingency fee arrangements, noted to be in excess of 25%, according to *The Telegraph* article noted above), and whether the claims firms were acting *ultra vires* in bringing the claim on behalf of those with the direct cause of action.

In recognition of the substantial role that claims management businesses were playing in the litigation, the Ministry of Justice took the step of publishing a document, '***Claims Management Services Regulation: Claims in Respect of Bank Charges: Guidance Note 2007***', on 27 July 2007. The MoJ cautioned, at page 4:

> **MoJ Bank Charges Guidance Note 2007:**
>
> 'The Financial Ombudsman Service has announced that pending the outcome of the [test] case, it has put its own work on hold; a similar response is expected from the county courts. This means that where a consumer has made a complaint through a claims management company then no further action is likely to be taken on the complaint until the test case is settled. Claims managements businesses are being reminded that they must act in accordance with the contract that they have with their clients. In many cases, this will mean the claims management company putting the case on hold until the test case is settled.'

- finally, where a plethora of individual litigation of this sort occurs, individual claimants cannot always serve as 'torch bearers' for the general bank customer class in the absence of a properly-constituted collective action, as Pitchford J recently noted in: ***Brennan v National Westminster Bank Plc*** [2007] EWHC 2759 (QB) (27 Nov 2007), para 42 (the claimant bank customer sought to amend his pleadings, which application was denied):

> *The claimant made it quite clear in his witness statement what was his motivation for keeping the action alive at all costs. It was to enable him to act as standard bearer for other customers and to expose the unfairness of the bank's terms and conditions. This was not an adequate reason for permitting the action to proceed if the claimant's arguable claim had been fully satisfied by the bank, since consumer interests in general are the concern of OFT which is taking action to protect them and not the claimant. I accept that OFT would not, even if minded to seek a declaration, be able to bring surrogate proceedings on behalf of individual consumers. The fact is, however, that the public interest is represented by the OFT. On the other hand, if the claimant has reasonably arguable claims to a declaration, account, aggravated damages or exemplary damages he should not be prevented from pursuing them merely because he has a "public interest" motive for doing so.*

However, the claimant had no reasonable claims to those remedies.

Furthermore, any declaration in this claimant's favour, that the imposition of bank charges levied on his account was unfair and/or a penalty, was to be judged by reference to

all the circumstances and terms of *his* contract — and in the circumstances, Justice Pitchford considered that such a declaration would serve no useful purpose, at para 44:

> *The claimant could not obtain a declaration in the terms sought because regulation 6 required the court to assess the fairness of the term, amongst other things, in the circumstances attending the conclusion of the contract, that is the contract between the bank and the claimant. The trial judge could not make a declaration determinative of other contracts made with other consumers at other times.*

The point about the non-utility of a declaration in the case of this particular customer is interesting, for had this bank charges dispute been litigated under an opt-out collective action, it may have been feasible for a variety of 'representative bank customers' to be chosen, to test the efficacy of different terms used in standard bank–customer contracts as common issues, and also to resolve some of the questions which, as Pitchford J mentioned, are not to be the subject of the test case (para 21):

> *OFT has not decided whether or not to litigate the fairness of historical terms and will not in any event be litigating the question whether consumers can establish liability in tort and/or are entitled to damages, interest, consequential loss, and exemplary and aggravated damages.*

(D) **The risk of inconsistent judgments.** On 15 May 2007, District Judge Cooke handed down a decision on one bank charges case, in ***Berwick v Lloyds TSB Bank plc*** (Birmingham County Court). Mr Berwick had sought the recovery of £1,982.37 in bank charges levied on his account since 5 October 2000. The judgment was largely favourable to the defendant bank.

A convenient summary of the judgment is provided by Anderson Strathern Solicitors, via newsletter update, '***Bank Charges Update***', available for perusal at: <http://www.andersonstrathern.co.uk/pdfs/343.pdf>.

However, the risk of inconsistent judgments is evident from the facts that:

- ❑ the decision by Cooke DCJ is not a precedent which would bind any District or Circuit or High Court judge who hears a later case — later judges are obliged to have regard to

previous decisions of the County Court, but are not obliged to follow them, and could reach a different decision on the same contract wording — only a High Court or further appellate judgment would be binding;

- ❏ even if a superior court does hand down a decision (say, the test case being heard in the Commercial Court), a different charges scenario or a different contract wording could give rise to a different outcome;

- ❏ the bank charges cases involved mixed questions of fact and law, and the different facts governing the imposition of, or giving rise to, the charges could feasibly lead to a different outcome.

(E) **Risk of delays in outcome**. Significant delays have been incurred because of the way in which the bank charges disputes have evolved:

- ❏ it took a considerable period of litigation *en masse* before a test case was ordered to be heard, during which time many bank customers were enmeshed in a cycle of applications, holding defences, and stays, in the county courts;

- ❏ as noted previously, a hold has been placed on bank charges cases, pending the outcome of the test case in the Commercial Court. In the county courts, from August 2007, all live bank charge claims have been subject to applications for stays pending hearing of the test case. Once the Commercial Court has given judgment, all those thousands of cases will return to the county courts for determination. This will involve considerable further judicial and administrative time;

- ❏ should the test case then be the subject of appeal, further judicial and administrative time will be involved in considering further stay applications (the author understands that there would be a likely delay of around two years for any appeal to come before the Court of Appeal and be decided), and that cycle could be repeated for a third time, should the case then proceed to the House of Lords.

(F) **Risk of adverse publicity.** Individual actions requiring individual defences can put the defendant banks at risk of an embarrassing error, as the following newspaper report demonstrates:

> '***Bailiffs Raid Royal Bank of Scotland***' (*The Guardian*, 20 January 2007):
>
> 'It's a heart-warming tale for anyone who thinks it is impossible to fight back against unfair charges by big banks. Last week, bailiffs raided a Royal Bank of Scotland branch in London to take control of computers, fax machines and a cash till after a customer won a court judgment over more than £3,000 in overdraft charges.
>
> The unprecedented raid followed a long battle by RBS account holder Declan Purcell, 48, who had been an RBS customer for more than 20 years and ran a motorcycle business until recently.
>
> He says: "Each time I exceeded my limits, the bank hit me with penalties of around £30. From 2002 to 2004 it added up to £3,000 on my business account alone."
>
> Following advice from Guardian Money and website Consumer Action Group, Mr Purcell challenged the penalties, citing legal precedents to show the bank could not take more from him than the actual costs incurred with his unauthorised overdraft.
>
> He also asked for copies of bank statements using a Data Protection Act "subject access request". He sent £10 for each account.
>
> "The bank ignored all this so I took out a small claims court action in Bow County Court in late October. The bank did not respond in the 14 days allowed. The court gave me default judgment. The court then gave the bank a second chance but it did not enter a defence. So I asked the court to send in debt enforcers. By now, I was owed £3,369, including interest and court fees. This month, I went back to the court to get my money," he says.
>
> The bailiffs enforced a "walk-in possession", effectively putting a sticker on items which would be grabbed and sold later if the bank did not cough up the judgment monies.
>
> The bank admits the bailiff visit took place. It says: "Unfortunately, due to an administrative error, the bank failed to defend the claim, leading to a default judgment and a resulting warrant. The bank has since organised payment. No goods were actually taken."

On a similar note, see also: *BBC News Online*, 9 July 2007, '***Bailiffs go in at Abbey Branch***'

(G) **The potential extra-jurisdictional reach of an opt-out collective action.** Were these bank charge cases to be litigated under an opt-out regime, where the opt-out regime was governed by a statute pertinent to England and Wales, one question which may arise is whether class members residing in another jurisdiction, and who allege that they were damaged by the same defendants, would have the scope to join the class (possibly as an opt-in class to thereby signify their submission to the court's jurisdiction) or otherwise fall within the class definition.

As it happens, a plethora of bank charges cases has arisen in Scotland too, as noted in ***Coleman v The Clydesdale Bank*** [2007] Scot SC 49 (7 Sep 2007), where it was stated:

> *Counsel explained that banks, such as the defenders, have received a large number of claims for the refund of bank charges. The usual grounds for refund are the same as in the present case. In Scotland there have to date been 350 claims, of which 57 are in this sheriffdom.*

In this case (where the two defendants were also defendants in the OFT test case in the Commercial Court of the High Court of England and Wales), a stay of certain Scottish bank charges cases had been sought, pending the outcome of the OFT test case, but this was ultimately refused:

> *My understanding of the law of precedent is that the Commercial Division of the High Court in England ranks equally to an Outer House judge in the Court of Session whose decision is not binding on a sheriff but should be treated with respect. Whether or not that means the same as persuasive or highly persuasive is perhaps an exercise in semantics. ... What does matter is that whatever respect is given to the Commercial Division's decision, it is not binding on the Scottish courts. ...*
>
> *In my opinion, it is one thing to seek to sist an action pending a decision by a court which is binding on the courts below; it is quite another to seek to sist an action pending a decision in a foreign jurisdiction which does not have that force. Putting to one side for the moment what the defenders will do in the event that they do not achieve the result they seek before the High Court in England, it is in my view unsatisfactory to compel a pursuer to be delayed in the remedy he seeks merely for a decision of a foreign court, which will guarantee no certainty in defining the law which ought to be applied.*

Although the point was not relevant whatsoever to the present procedural landscape in England and Scotland, the facts do raise an interesting issue about extra-jurisdictional reach of any opt-out collective action that may be enacted, where the defendants in the two jurisdictions are the same, where the contractual terms at issue were identical, and where the relevant regulations (UTCCR 1999) have UK-wide application. Further discussion, however, lies outside the scope of this Paper.

(H) Capacity to be pursued under an opt-out regime. The recent certification decision in ***Cassano v Toronto Dominion Bank*** [2007] ONCA 781, in which the Ontario Court of Appeal certified an action brought on behalf of a class of credit-card holders (and overturned the trial judge's refusal of certification), provides an insight into how an opt-out action can serve to assist the resolution of the type of litigation that the bank charges customers have been attempting to pursue in English courts.

The claim arose out of foreign currency transactions conducted with Visa credit cards issued by the Toronto-Dominion Bank. The card-holders claimed that the Bank breached its contract with them by charging undisclosed and unauthorised fees — a so-called 'conversion fee' and an 'issuer fee' — in respect of those foreign currency transactions, fees which were undisclosed under the standard cardholder agreement. The cardholders and the Bank disagreed over what, precisely, was covered within the ambit of the contractual phrase, '*Foreign currency transactions are converted to Canadian dollars at the exchange rate determined by the Bank*', or whether such fees were covered as '*service fees*'.

The class action was certified by the Court of Appeal on the basis that:

- ❑ whether the Bank had charged its card-holders an unauthorised fee when converting the debits and credits incurred in a foreign currency to Canadian dollars was an issue that could be resolved on a class-wide basis, because it depended on the interpretation of the standardised documents provided by the Bank to card-holders;

- ❑ the card-holders' damages for breach of contract (if such were proven) could be assessed on an aggregate, class-wide basis (the scenario fulfilled the precondition for aggregate assessment stipulated by s 24(1) of the Class Proceedings Act), and would not require proof of damages on an individualised basis, and thus, the class action would not be overwhelmed by the extent of individual issues;

- ❑ an opt-out class action was the preferable means of resolving the common issues because, at para 57:

> *[t]he relatively small amounts of money that are likely to be at stake in individual claims and the disproportionately high costs associated with litigating claims on an individual basis overwhelmingly favour a class proceeding.*

Table 12 gives details of further decisions, arising out of similar overcharge scenarios, which have been certified in Ontario. In ***Gilbert v Canadian Imperial Banks of Commerce*** (2004), 3 CPC (6^{th}) 35 (Ont SCJ) too, the relatively small amounts at issue was one of the key factors that prompted

certification of the suit (at para 8):

> *[t]he amounts of the individual settlements to class members is relatively small, from less than one dollar to almost $15, making it clear that a class proceeding advances the goals of the Act of access to justice and judicial economy.*

18. EMPLOYMENT CLAIMS (EQUAL PAY, ETC)

The main points:

- ❑ **there are presently over 44,000 equal pay disputes which have been individually lodged at the Employment Tribunal, an increase of about 150% on 2006 figures, with a similar explosion of other compensatory-type claims before the Employment Tribunal**
- ❑ **whilst a recent governmental Consultation Paper does not perceive any need for opt-out or representative actions in employment disputes, this has been strongly rebutted by both the Equality and Human Rights Commission and trade union representatives, all of whom have called for the introduction of representative actions so as to provide better access to justice for employees**
- ❑ **an opt-out collective procedure has been called for in respect of equal pay disputes, backpay disputes, and the like — claims which do not merely require injunctive relief, but entail some compensatory amount to be paid to the claimants**

(A) Explosion of some types of employment claims in recent times. Statistics from the Employment Tribunal demonstrate the explosion of particular types of claims in the past year in England — viz, equal pay, national minimum wage, sex discrimination claims, and working time directives — in which compensatory (monetary) relief has been sought by claimants. Table 17 below sets out the figures denoting the number of individual claims brought in these categories of employment claims:

TABLE 17 Employment claims in England: extract

Nature of Claim	2004/5	2005/6	2006/7
Equal pay	8, 229	17, 268	44, 013
Working Time Directives (pertaining to lack of holidays, rest breaks, or pertaining to hours of work — all of which can give rise to compensatory claims)	3, 223	35, 474	21, 127
Sex discrimination (which frequently give rise to compensatory claims)	11, 726	14, 250	28, 153
National minimum wage (NMW) claims	597	440	806

See, for source of this table: ***Annual Report: Employment Tribunal and EAT Statistics (GB), 1 April 2006 to 31 March 2007*** , Table 1, p 2, 'Jurisdiction Mix of Claims Accepted', available for perusal at: <http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAS06-07.pdf>).

Plainly, the Employment Tribunal is presently bearing a considerable burden under this welter of individual litigation *en masse*. This fact was acknowledged in a news release published by the Tribunals Service on 3 September 2007:

> '***Employment Tribunal Cases Rise by 15 Per Cent***' (*Tribunals Service News Release*, Sept 2007):
>
> 'The number of cases brought to employment tribunals in Great Britain in 2006–07 rose by 15%, from 115,039 in 2005–06 to 132,577, according to figures published today. ...
>
> There was an increase of 26% in multiple cases [cases where a number of people bring cases against one employer on the same or very similar grounds and these individual cases are progressed together] ... Multiple cases now make up 60% of all cases received, compared to 55% last year and 36% in 2004–05. ...
>
> With the exception of race discrimination, all [categories of claim] showed an upward trend, with equal pay claims showing a 155% increase on 2005–06.'

Added to this conglomeration of individual claims has been the long-running saga of the part-time worker pensions, the history of which is described by the Employment Tribunal at the following site: <http://www.employmenttribunals.gov.uk/pensions/history.htm>. A brief history, extracted from this website, is as follows:

The part-time workers pension cases:

'In 1994, two European Court of Justice judgments ***(Vroege v NCIV Instituut Voor Volkshuisvesting BV***, 1994 : IRLR651 and ***Fisscher v Voorhuis Hengelo BV***, 1994 : IRLR 662) were published which said that an occupational pension scheme which excluded part-time workers contravened European equal pay laws if the exclusion affects a much greater number of women than men, unless the employer shows that the exclusion of part-timers can be objectively justified on grounds unrelated to sex. Subsequently, unions in England and Wales from the health, local Government, education, banking and electricity supply sectors lodged a number of test cases with the Employment Tribunal on behalf of members who worked part-time.

In November 1995, the test cases, referred to as ***Preston v Wolverhampton Healthcare NHS Trust***, came before a tribunal which found that:

– Pension rights should be granted to part-time workers
– Rights should be back-dated two years
– Rights should only be granted where the claimant had commenced their Employment Tribunal claims within six months of leaving their employment.'

[Thereafter, various appeals (up to the House of Lords), tribunal hearings, and settlement models, occurred, as described on the website].

It is estimated that approximately 60,000 proceedings have been lodged with the Employment Tribunal in this matter since 1994.

(B) Why an opt-out collective redress mechanism would suit these types of dispute. Employment cases are, in many respects, a paradigm example of the features of the class, the claim, and the defendant, which particularly 'fit' the dispute to an opt-out collective redress mechanism.

In an ***interview between Mr John Usher, Trade Union Legal Consultant, and Mr Richard Arthur, Partner of Thompsons Solicitors,*** who represents employees in many of these disputes, and the author, held on 13 December 2007 at Congress House, London, the practicalities of why an opt-out collective redress regime would suit employment claims of the types canvassed in Table 17 were discussed in detail. The results of that interview are summarised, with approval of the interviewees, in the box below:

Interview, 13 December 2007, with John Usher and Richard Arthur, contrasting the present employment litigation scenario with the benefits of an opt-out regime:

- the ***type of claimants*** in employment disputes about equal pay and national minimum wage, for example, are likely to come from a demographic which would be most unlikely to sue individually to enforce the national minimum wage; such claimants may be foreign, unable to speak English particularly well, with significant cultural differences of view and of the role of the law, etc — the group members, as a whole, are not sophisticated, and in some cases, are extremely vulnerable. HOWEVER, if these class members could be described, and not have to come forward at the outset of the litigation, this would be very beneficial for the class as whole;

- under the unitary litigation scheme at present, ***upfront claim preparation costs for each claimant*** (and for the defendant employer) can be substantial. HOWEVER, under an opt-out regime, this could be reduced to the preparation for claims for those representatives per class or sub-class, at least until the common issues were determined;

- there will invariably be individual issues arising out of employment disputes — eg, the quantum of pay entitlement depends upon the period of employment. HOWEVER, under an opt-out regime, if the common issues were decided in the class's favour, the vast majority of ***individual issues could realistically be handled 'on the papers'***, without the need for formal hearings, thus rendering the process more streamlined and efficient than is presently possible;

- the ***expiry of limitation periods*** is a very big concern in employment disputes which are run on a unitary basis — the period is only six months 'after the last day on which the woman was employed in the employment', pursuant to the Equal Pay Act 1970, c 41, s 2(4), when read together with s 2ZA — an onerous restriction when taking into account that changing employment can occur merely by the employee accepting a promotion with the same employer. The period is only three months in unfair dismissal claims, per Employment Rights Act 1996, c 18, s 111(2), and in many other Employment Tribunal claims. HOWEVER, under an opt-out regime, where the limitation period is tolled by the filing of proceedings by the representative claimant, many more employees would be protected than is presently the case;

Cont. overpage ...

Interview, 13 December 2007, with John Usher and Richard Arthur (*cont.*):

- where union members have to be identified as litigants in order to commence proceedings, it reveals their union membership status, a point that can be somewhat inconsistent with the fact that whether a person is a member of a trade union comprises ***'personal sensitive data'*** under s 2 of the Data Protection Act 1998, c 29. HOWEVER, although an opt-out regime would not preclude such membership being discovered if the class won on the common issues and needed to come forward to claim their entitlement, such sensitive data would not necessarily need to be disclosed, if the class lost on the common issues;

- the ***binding effect of a collective action***, at least as far as the common issues are concerned, is attractive, to enforce a ratified collective pay agreement — otherwise, in the present unitary system of litigation, the reality is that individual litigation can be used to 'unpick' collective pay agreements in a haphazard manner — the non-binding nature of test cases has also proven unsatisfactory in the past;

- an opt-out action would counter the increasing tendency for ***unions*** to be ***sued in negligence*** for failing to ensure that all members apply within a limitation period that may follow an unfair dismissal or an unequal pay scenario. HOWEVER, if the proceedings could be filed by a representative employee claimant, thereby tolling the limitation period for all, that would protect unions from these types of suits in negligence;

- the ***class*** in employment disputes concerning equal pay, etc, can be ***large, but finite*** — hence, if the common issues were determined in favour of the class, it would be a relatively straightforward matter to identify the individual claimants who would need to come forward to seek to prove their individual issues;

- unitary equal pay litigation can have the effect of ***setting employees in one firm against each other***, to the detriment of morale at the workplace. HOWEVER, in an opt-out action, all employees in the class would be 'in the same boat', unless they consciously and deliberately did not wish to join the litigation;

- some employees will not countenance equal pay litigation for ***fear of reprisals*** from the employer (or experience difficulties with their employer when they choose to persist with a claim). HOWEVER, such employees would benefit from remaining anonymous, whilst the common issues were being resolved one way or the other.

This point about reprisals can be a very real concern in the employment context. Indeed, it was amply demonstrated recently in ***St Helens BC v Derbyshire*** [2007] UKHL 16. A useful summary of the circumstances giving rise to this litigation is contained in a newsletter by Thompsons Solicitors dated 10 May 2007, '***Victimising the Victims***', available at: <http://www.thompsons.law.co.uk/ltext/lelr-weekly-015-victimising-the-victims.htm>, an extract of which reads as follows:

> **Thompsons' summary of the *St Helens* case:**
>
> 'Section 4 of the 1975 Sex Discrimination Act says that victimising someone for bringing a claim under the Equal Pay Act is, in itself, a discriminatory act.
>
> In *St Helens MBC v Derbyshire*, the House of Lords said that the women were victimised by their employer when they were sent letters warning them of the implications for the school meal service if they continued with their equal pay claims. The women's union — the GMB — instructed Thompsons to act on their behalf. Almost 500 female catering staff brought equal pay claims against the Council in 1998.
>
> The vast majority settled, but 39 (including Mrs Derbyshire) successfully pursued their claim. However, two months before their claim was heard in 2001, they received a letter from the Council, asking them to withdraw and warning them that it could not absorb the cost of their claims. The second (sent to all catering staff) warned that the cost of school meals would rise and everyone's job would be at risk, if the 39 were successful.
>
> The women were distressed by the letters, but the Council justified them by saying that the purpose was to get the women "to face facts and to take a responsible view of reality". ...
>
> The Lords ... agreed ... that the women had been victimised ... They said that although employers had a right to send out letters pointing out the possible consequences of a successful claim, the letter sent by the Council was "intimidating".'

(C) **Effectiveness of present 'representative' devices could be bolstered.** Certain representative devices currently on the statute books with respect to employment disputes have some problems or limitations associated with them, viz:

- ❑ s 189 of the Trade Union and Labour Relations Act 1992 (re a failure to inform and consult in relation to collective redundancies); and reg 15 of TUPE (re a failure to inform or consult in relation to a TUPE transfer) — the claim is brought by the trade union, in each scenario, in its capacity as the 'appropriate representative' of any affected employees.

However, these are not truly representative proceedings, because the right to information and consultation is the union's, not the employees'. Thus, the employees' entitlements are derived from the primary entitlements of the trade union.

Procedural problems in bringing action under these provisions have occurred, for example, in: ***Nottinghamshire Healthcare NHS Trust v Prison Officers Association, R Adams & 716 Others*** (Employment Appeal Tribunal, Case No EAT/757/02/DA, 4 Apr 2003), where a union and 717 of its members sued re enforced change of working hours and unfair dismissal. The defendant sought to strike out the pleadings on the basis that the proceedings were issued without all of the members' authority, and that the union had no express or implied authority to issue proceedings on behalf of union members who had not ratified the commencement of proceedings (some members had ignored letters sent to them by the union, informing them of the intent to issue proceedings). Although the dispute was resolved largely in favour of the union, the procedural spat indicates that ratification/agency/authority issues can arise under these provisions.

❑ s 19(1) of the National Minimum Wage Act 1998 empowers officers to issue enforcement notices and, in the event of non-compliance, present complaints to the Employment Tribunal or the civil courts on behalf of members to whom the enforcement notice relates. Furthermore, s 19(3) provides that:

> **National Minimum Wage Act 1998, s 19(3):**
>
> An enforcement notice may relate to more than one worker (and, where it does so, may be so framed as to relate to workers specified in the notice or to workers of a description so specified).

The problems:

- trade unions are not 'officers' for the purposes of this representative device' — HMRC are the enforcers — this limits a trade union's powers to protect its employees significantly;

- the provision has been used, eg, in: ***Leisure Employment Services Ltd v Commissioners of Inland Revenue*** [2007] IRLR 450, ***Commissioners of Inland Revenue v Post Office Ltd*** [2003] IRLR 199, and ***British Nursing Association v Inland Revenue*** [2002] IRLR 480;
- these cases indicate an 'evidence of need' for collective redress generally in respect of NMW disputes, but it would be helpful for standing to be widened from the specialist representative action available under s 19(3).

(D) Recent consultation paper does not favour further collective redress. In June 2007, a Consultation Paper was produced by the Department for Communities and Local Government, entitled: ***Discrimination Law Review —A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*** (12 June 2007) ('the Equality Consultation Paper').

In this Consultation Paper, the Department sought views on '*the retention of the current approach on representative or class actions for discrimination cases in goods and services cases*'. Its preliminary views were as follows (at paras 7.28–7.30; p 122):

Equality Consultation Paper:

'7.28. We have considered the approach in other legal systems, where a body such as an equality commission or trade union may be empowered to bring a claim on behalf of a group of individuals – often known as a representative action. This can take one of two forms: action on behalf of a group of unnamed individuals who have some defining characteristic but are not identified (sometimes known as a class action), or action on behalf of a group of named individuals.

7.29. Some argue that representative actions brought by such bodies can provide a useful route for people to bring their cases to court when they are unwilling or unable to bring claims themselves. However, a number of stakeholders, including business, have expressed reservations about creating a further mechanism for litigation. Representative actions are often seen as a major factor in developing an undesirable 'litigation culture'. Although they may assist those with legitimate claims, the system can also benefit those with spurious claims, who may not even have felt aggrieved until encouraged to join a representative action. Representative actions on behalf of a group of unnamed individuals are also particularly difficult to quantify, making it hard for an organisation to consider early settlement proposals which would keep legal costs down.

7.30. Having considered the arguments carefully, we are not persuaded that there is a good case for establishing this further mechanism.'

This governmental view, however, has met with strong opposition, from stakeholders and public authorities. Instead, there have been several suggestions for the implementation of a representative action under which any type of employment dispute could proceed, and under which a trade union would have standing to sue as an ideological claimant, as the following sections demonstrate.

(E) **The Equality and Human Rights Commission perceives a need.** The stance put forward in the Government's Equality Consultation Paper received strong rebuttal by the Equality and Human Rights Commission, in its formal Response to the Consultation Paper. In a reply dated September 2007 (the '***EHRC Response***'), the Commission states (at pp 37–38):

> **The EHRC Response:**
>
> 'For certain types of cases, representative claims should be permitted. This was anticipated in the EC directives, all of which require member states to ensure that 'associations, organisations or other legal entities, which have … a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either **on behalf of** [our emphasis] or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive'. ...
>
> In relation to discrimination or harassment, the new equality act could provide for representative actions requiring similar safeguards – such as designating the Commission and registered trade unions, and allowing the Secretary of State to designate voluntary sector organisations with a demonstrated interest in discrimination and equality. The Commission, a trade union or other organisation could bring a representative action on behalf of a group of people who have shared the same unlawful discrimination and who would otherwise all make an identical complaint.'

(F) **The TUC perceives a need.** The TUC, representing 59 affiliated trade unions with a total 6.5 million members, also disagreed with the governmental view that no representative action would be useful. The TUC took this stance, in its formal Reponse dated September 2007) (the '***TUC Response***'), for three reasons which primarily focus upon the equal pay dispute (although these reasons are not necessarily limited to that type of claim) —

- ❑ first, collective redress means more efficient redress;
- ❑ secondly, it is doubtful whether the presently-existing procedures enable the Government

to comply with art. 141 of the EC Treaty; and

- ❑ thirdly, the complexities of equal pay disputes, in particular, would be suited to collective groups of claimants being handled/managed by a trade union which is knowledgeable and well-resourced.

These reasons are expanded in the TUC's own words, as follows:

The TUC Response:

'p 4: we believe the mass of current equal pay litigation would be far more efficiently dealt with by allowing trade unions and other suitable bodies to bring representative actions on behalf of groups of women. Such actions would also more accurately reflect the collective nature of the problem and ensure better remedies, compliance and understanding of equal pay in the long term.

p 25–26: Article 141 of the EC Treaty places an obligation on member states to 'ensure that the principle of equal pay for male and female workers for equal work or work of equal value *is applied'* (emphasis added). It is quite plain that the current system is not delivering equal pay for work of equal value because of its individual focus, complexity, and the absence of proactive obligations on employers to review their pay systems. Jacqui Smith, then deputy minister for women, acknowledged to the Select Committee on Trade and Industry that 'Equal pay legislation, being designed to tackle discrimination, would not address the fundamental problem of the undervaluing of women's work'. The Government appears to overlook that, to the extent that this is correct, it is the Government's job to come up with a legislative approach which will deliver its obligations under Article 141. In our view such an approach must include some form of proactive obligation on employers and scope for representative actions in equal pay cases.

p 27: Equal pay claims are not straightforward, with many taking many years to reach resolution as numerous appeals on different points of law are made to the higher courts. Co-ordinating such a vast number of individual claims, involving similar points of law or relating to similar facts, is an immense task, which we believe would be greatly facilitated by enabling representative actions.'

Notably, there is considerable support for the notion that, arguably, the present UK law on equal pay being pursued by unitary action means that the UK may be in breach of art. 141.1. For example, John Usher, Trade Union Legal Consultant, Unite, notes (in discussions with the author during the course of this study, reproduced with approval) that —

The principle of equal pay is not applied if the legislation does not work effectively. Certainly, in my view, class or representative actions would help UK compliance.

(G) **The new Chair of the EHRC also perceives a need.** In addition, and following release of the governmental *Equality Consultation Paper*, the new Chair of the Equality and Human Rights Commission, Mr Trevor Phillips, mooted the desirability of more effective collective redress mechanisms for employment disputes, in a speech delivered in Cardiff on 23 October 2007 (at the annual ***Bevan Foundation lecture***). Relevant parts of the speech are as follows:

The Bevan Foundation lecture:

'One way to give more people power is to allow them to act collectively. We know that many people face discrimination, but fail to act because they feel that the trouble involved for them as an individual far outweighs the potential gain. They nurse their hurt and sense of injustice, which is bad enough. But even more importantly, the offender gets away with it. That is why the National Employment Panel reported last week that 83% of employers for example now believe that they will never face any sanctions for discrimination.

Access to justice through the courts is a luxury good for many of those experiencing discrimination. Many cases are meritorious, many have had an experience which has been intolerable, and who should have their day in court – but there is just no way to fund them. ... In truth, taking action against discrimination today is the business of heroes. It should not be.

These are powerful reasons for shifting the burden away from individuals taking a case, towards organisations such as the Equality and Human Rights Commission, taking a case on behalf of a group of individuals.

We call this representative action. By using representative action the Commission could bring a claim on behalf of a number of identified individuals, and use the full weight of our force to fight their battle. In financial terms, this provides real access to justice. It also protects the individual from having to stand up and fight his or her own case, living in fear of victimisation for doing so.

One area where this could make a real, practical difference is in terms of equal pay. A couple of City sex discrimination claims taken by individual women, receiving a great deal of media attention and record compensation payouts, have overshadowed the fact that many victims of unequal pay are women working alongside other women doing the same kinds of work – school catering assistants; local government administrators – and it really doesn't make sense to deal with this kind of situation as a series of disconnected individual claims. It disadvantages the citizen and clogs up the tribunals. There are currently over 44,000 equal pay claims lodged with the employment tribunal, an increase of about 150% on last year – this is in no-one's interest. ... Representative actions would provide quicker and more effective access to justice.'

(H) **A practical insight into equal pay claims brought on a unitary basis.** The practicalities of employees bringing unitary actions for equal pay can be rather unfortunate on three bases — the prospect of inconsistent judgments, delays, and costs — as John Usher, Trade Union Legal Consultant, Unite, explains (in ***meeting between John Usher and the author*** on 26 November 2007, reproduced with approval):

> **The practical points about equal pay disputes:**
>
> - 'the 'material factor' defence is raised repeatedly by employers who are sued for contravention of equal pay – often on entirely different fact scenarios from previous instances where the defence was relied upon – this gives rise to a concern as to inconsistent judgments being issued in respect of material factors;
>
> - the delays in equal pay cases are so extensive that this results in justice denied – there are, for example, too many cases being run in the name of the personal representatives of those that have died – hardly 'equal pay';
>
> - it is lawful to charge contingency fees in equal pay disputes, as these are considered 'non-contentious' for the purpose of fees — that has permitted contingency fees of approximately 30% at times, which substantially reduces the compensation available to the employee (as discussed in: ***Bainbridge v Redcar & Cleveland BC***, UKEAT/0424/06/LA, 23 March 2007, paras 55–56) and, because of the way in which the contingency fee agreement is drafted, may also undermine a settlement (***Bainbridge***, paras 58–59)' [note that this third point is also forcefully made in: ***Amicus Section of Unite: The Union Response to the DTI Consultation on Dispute Resolution*** (2007), para 8.10].

(I) **Opt-out regimes facilitate employment claims.** It will be recalled that, when considering the types of opt-out collective actions brought in Australia and Ontario and outlined in Table 12, employment disputes featured very strongly. These disputes included, for example: disputes over loss or reduction of pension entitlements; the availability of health or medical benefits; discrimination allegations, giving rise to differential pension entitlements; terminations or redundancies; wrongful collection of union fees; unpaid or withheld pay; and discrimination-based employment practices.

Similarly, one would expect all manner of employment claims to be handled effectively under a generic collective action regime, were such a regime to be introduced into English civil procedure.

19. UNITARY LITIGATION *EN MASSE* UNDER THE GLO REGIME

The main points:

- ❑ **the purpose of the GLO regime is to provide for the case management of claims which give rise to common or related issues of fact or law — unlike an opt-out regime, the GLO regime requires that each party opt in by issuing a claim form, and litigation commenced prior to the formation of the GLO register will be vacuumed up under the umbrella of that GLO**

- ❑ **some judicial comments have noted the volume and administrative burden of handling the unitary litigation that has been commenced prior to a GLO's formation**

(A) The emphasis is upon 'individualism' under the GLO regime. The GLO regime does not merely require litigants to opt in, but it also requires that each litigant issue a claim form, by virtue of para 6.1A of Practice Direction 19B. Hence, individual litigation is required; and furthermore, given the notion that litigants must opt in, the filing of claims is all-important to protect both the prospect of being handled under any eventual GLO order that might ensue, and to protect limitation periods.

As the GLO is intended as a case management tool, and not brought as the one action by a representative claimant on behalf of a number of unnamed but described class members, the GLO serves as an 'umbrella' under which a number of claims are managed — those claims *have* to be filed, and in some cases, litigation has ensued before the GLO is formed — and, on occasion, the claims are filed across many courts, which then have to be transferred into the one court, adding to the administrative burden in gathering those claims back under the one 'umbrella'.

Under an opt-out regime, by contrast, the class member does not bear the same onus of filing individual proceedings, for he is caught by the collective action, if he falls within the class description and if he does not take some proactive step to disassociate himself from the collective action by opting out.

(B) **Judicial comments about the extent of individual litigation.** Multiple unitary litigation before any GLO order is made, with attendant burdens for case transference, etc, is not unusual, as the following judicial comments show:

- ***R (A and others) (Disputed Children) v Secretary of State for the Home Department*** [2007] EWHC 2494 (Admin), para 9 — the case concerned a challenge to the legality of the policy of the Secretary of State that an asylum seeker would be treated as an adult, even if he claims to be a child, if his appearance and/or demeanour "strongly suggested" that he was over 18:

  > *During 2005 and 2006 a significant number of actions raising this generic issue were commenced: some in the Administrative Court by way of judicial review; others in the Queen's Bench Division or in the County Court as simple actions in tort claiming damages for unlawful detention.*

  In this case, a GLO was applied for, but denied by Beatson J.

- ***Re Claimants under Loss Relief Group Litigation Order*** [2004] EWCA Civ 680, para 2 — re advance corporation tax and double tax conventions:

  > *The decision in Hoechst has spawned a huge number of claims against the Revenue totalling many billions of pounds as international groups of companies seek to take advantage of the implications of the decision. ... Many cases have been brought in the High Court. We are told that a group litigation order (GLO) has been made for each of five different classes of cases.*

- ***Esso Petroleum Co Ltd v Addison*** [2003] EWHC 1730 (Comm), para 5 — re Esso promotion schemes:

  > *A large number of claims were made against individual licensees in courts across the country, but eventually a group litigation order was made with a view to enabling this court to determine issues common to all those licensees whose disputes with Esso had not been resolved.*

PART VI

‘CRUNCHING THE NUMBERS’ ON OPT-IN VERSUS OPT-OUT

20. OPT-OUT REGIMES ATTRACT A HIGHER DEGREE OF PARTICIPATION

The main points:

- ❑ **for those jurisdictions for which modern empirical data exists, opt-out rates have been as low as 0.1%, and no higher than 13%**
- ❑ **for those jurisdictions for which empirical data does not exist as yet, judicial summations of opt-out rates indicate a range of opt-outs between 40% and none at all**
- ❑ **rates of participation under opt-out regimes are typically very high**

(A) Availability of empirical data. In two cases of opt-out regimes, empirical data of opt-out rates is available — in respect of Victoria's state regime and the United States' federal regime.

VICTORIA

The opt-out regime: Supreme Court Act 1986, Pt 4A

Source of data: Professor Vince Morabito, ***Draft Empirical Study of Victoria's Class Action Regime: Preliminary Findings*** (dated 17 September 2007, with a fuller report to follow in due course. Professor Morabito welcomes enquiries with respect to his study: Vince.Morabito@buseco.monash.edu.au). Further information in relation to this empirical study is also available in Professor Morabito's National Report: '***Group Litigation in Australia — "Desperately Seeking" Effective Class Action Regimes: National Report for Australia Prepared for the Globalisation of Class Actions Conference, Oxford University, December 2007***', available for perusal at: <http://www.law.stanford.edu/display/images/dynamic/events_media/Australia_National_Report.pdf>.

Opt-out rates: At the time that Professor Morabito conducted his study, class members had been provided with an opportunity to opt out in 11 of the Victorian actions on foot. The data thereby obtained was as follows (quoting directly from p 4 of the study):

Professor Morabito's empirical study:

- ❑ 'The median opt-out rate is 12.90%.
- ❑ The average opt-out rate is 24%.
- ❑ The significant difference between these two figures is attributable to the fact that in one proceeding, the opt-out rate was around 94% whilst in another proceeding the opt-out rate was around 75%. The incredibly high opt-out rates in these two proceedings were in turn due to the aggressive implementation by the defendants in question of a strategy that entailed contacting individual class members directly, for the purpose of settling their individual claims without the involvement of the court or of the solicitors for the class representative.
- ❑ The more accurate statistic is the median opt-out rate. This becomes apparent when one considers that, after the two cases mentioned in the preceding paragraph, the next highest opt-out rate in a Part 4A proceeding was 22%. Furthermore, in none of the remaining 8 opt-out proceedings, did the opt-out rate reach 14%.'

Hence, rate of participation in the litigation: **the median level of participation was 87% of class members**

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UNITED STATES

The opt-out regime: Federal Rules of Civil Procedure, rule 23(b)(3)

Source of data: Willging *et al*, ***Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*** (Federal Judicial Centre, 1996)

Opt-out rates: The authors of the report note as follows (quoting directly from pp 52–54 of the report):

The Willging empirical study:

The study identified 407 class actions in the four districts; of those, 152 were certified as class actions. Of those 152, the authors noted of opt-out rates:

- ❑ 'in all four districts, the median percentage of members who opted out was either 0.1% or 0.2% of the total membership of the class;
- ❑ 75% of the opt-out cases with opts-outs had fewer than 100 total opt-outs;
- ❑ this left 7 cases in the study with more than 100 opt-outs (and of these, three were securities actions);
- ❑ at the certification stage, the percentage of certified class actions with one or more class members opting out was 21%, 11%, 19% and 9% in the four districts [hence, in 79%, 89%, 81% and 91%, of these class actions, respectively, no-one opted out at all]
- ❑ comparison of the opt-out rates in this study with those in the [earlier 1974 study, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 Georgetown LJ 1123], published more than 20 years ago, showed no increase in the rate of opting out. The levels of opting out reported in the Georgetown study, in fact, indicate that opting out may have declined considerably'

Hence, rate of participation in the litigation: the median level of participation was at least 99.8% of class members

(B) Lack of empirical data. In the case of the provincial regime of Ontario, and Australia's federal regime (both selected for comparison in Table 12), no empirical studies have, as yet, been conducted on opt-out rates, so far as the author can ascertain.

In these circumstances, the best that can be done *pro tem* is to peruse Canadian and Australian case law databases to obtain a sample of those cases in which, judicially, it has been noted as to how many opted out of the action, in order to give at least some 'feel' for opt-out rates. In the case of the opt-out regimes in Portugal and in the Netherlands, individual case data is also available, as some indication of the opt-out rate. It must be noted, however, that for all of these jurisdictions, the case sample is very small indeed:

CANADA

The opt-out regime: the provincial regimes in Ontario and British Columbia

Source of data: perusal of judgments, obtaining a sample of cases

Opt-out rates: ***Jeffery v Nortel Networks Corp*** [2007] BCSC 69 — about 5,000 class members in British Columbia; 13 opt-out requests lodged to be excluded from the class action settlement (para 54)

Fischer v Delgratia Mining Corp (1999, BC SC [In Chambers]) — 5,000 class members approximately; 9 opt-outs from the settlement agreement (para 20)

K Field Resources Ltd v Bell Canada International Inc (SCJ, 1 Sep 2005) — no opt-outs (para 3)

Nunes v Air Transat AT Inc (2005), 20 CPC (6th) 93 — of 291 original class members, 115 opted out of the action (para 3)

1176560 Ontario Ltd v Great Atlantic & Pacific Co of Canada Ltd (Ont SCJ, 4 Oct 2004) — of the 29 class members, one opted out (para 2)

Hence, rate of participation in the litigation: between 60% and 100%

***

AUSTRALIA

The opt-out regime: Federal Court of Australia Act, Pt IVA

Source of data: perusal of judgments, obtaining a sample of cases (and in addition, the information about the opt-outs in *Courtney* has been supplemented by information kindly

received and reproduced, with approval, from the defendant's solicitors, Mr S Stuart Clark, Managing Partner, Litigation and Dispute Resolution, Clayton Utz Solicitors, Sydney, and Ms Christina Harris, Senior Associate, Clayton Utz Solicitors, Sydney)

Opt-out rates:

King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd) [2002] FCA 872 — original total shareholder group was 67,224; about 17,800 opted out; representative group thus equalled about 50,000 (GIO put the number at 49,399) (para 5) — so opt-out rate was approximately 27%

Guglielmin v Trescowthick (No 5) [2006] FCA 1385 — 3,893 group members to begin with; 35 opted out; 26 persons to whom the notice had been given but the notice was returned as undelivered, and attempts to secure identification of the whereabouts of those persons unsuccessful, and common ground that those persons were also be treated as having opted out of settlement; total number of opt-outs was 61; so represented group was 3,832 (para 23) — so opt-out rate was approximately 1.6%

Courtney v Medtel Pty Ltd [2003] FCA 36 and [2004] FCA 1598 — the original class consisted of some 1,048 members who had a Pacemaker surgically implanted in Australia; 432 group members opted out initially, leaving the group size as 616 persons; thereafter another group member opted out, taking the opt-outs to 433 persons (this information is collectively derived from both the judgments and from the assistance of Clayton Utz lawyers Mr S Stuart Clark and Ms Christina Harris, as noted above, who represented the defendants in this matter) — so opt-out rate was approximately 41%

Reiffel v ACN 075 839 226 Pty Limited (No 2) [2004] FCA 1128 — 146 members to begin with; 23 group members opted out; final class size was 123 — so opt-out rate was approximately 16%

Hence, rate of participation in the litigation: between 59% and 98.4%

PORTUGAL

The opt-out regime: Law No 83/95 of 31 st August, *Right of Proceeding Participation and Popular Action*

Source of data: Mr Nuno Oliveira, formerly Legal Advisor, and Mr Luis Silveira Rodrigues, Director, DECO (Portuguese Association of Consumer Protection)

Opt-out rates: ***DECO v Portugal Telecom*** — the class included almost all Portuguese consumers (approx. 2 million people); 5 opted out of the action

DECO v Academia Opening — re language school fees — the class consisted of about 1,200–1,500 persons; no opt-outs known

DECO v Water provider company — re exploding water counters — the class consisted of about 1,000–2,000 persons; no opt-outs known

Hence, rate of participation in the litigation: almost 100%

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THE NETHERLANDS

The opt-out regime: Act on Collective Settlement of Mass Damages (in force 27 July 2005)

Source of data: BEUC, ***Private Group Actions — Taking Europe Forward*** (8 October 2007), p 15

Opt-out rates: ***Dexia Bank Nederland NV*** (aka the Legiolease case), in which Dexia and other companies were sued for damages resulting to private investors from investing in securities lease products offered by Dexia and others. A settlement agreement was reached in April 2005, and following introduction of the new Act, a request was made to have the settlement agreement declared collectively binding. That

declaration was made in January 2007, with the possibility to opt out. The total class size was approximately 715,000 consumers. The opt-outs totalled approximately 25,000.

Hence, rate of participation in the litigation: approximately 97%

(C) Take-up rates impossible to determine. Under many opt-out collective actions, if the common issues are determined in favour of the class and individual issues are then to be resolved on a case-by-case basis, or if a settlement agreement provides that certain monetary compensation will be payable to the class members who come forward to claim their entitlement by proof of individual (including quantum) issues, the class members will need to seek to assert that entitlement in the manner decreed.

This degree of participation at the 'back end' of the litigation (termed, earlier in this Research Paper, the 'take-up rate') is very difficult, if not impossible, to quantify, for the numbers of persons coming forward is usually a matter of private, not public, record. Hence, when this Section refers to 'rate of participation', it should be taken to only refer to the rate of participation that is consequential upon the number of opt-outs that occurred during the opt-out period.

(D) Summary of figures. To recap this Section:

TABLE 18 Rates of participation for opt-out regimes

Jurisdiction from which empirical studies/cases emanated	**Rate of participation in the litigation ...**
Victoria	approx. 87%
United States	approx. 99.8%
Canada	approx. 60%–100%
Australia	approx. 59%–98%
Portugal	almost 100%
Netherlands	approx. 97%

21. OPT-IN REGIMES ATTRACT A LOWER DEGREE OF PARTICIPATION

The main points:

- ❑ **the experience in English group litigation indicates that, under an opt-in regime, the opt-in rates vary considerably, from very low percentages (<1%) to almost all class members opting to participate in the litigation**
- ❑ **European experience indicates a very low rate of participation (less than 1%) where resort to opt-in was necessary in consumer claims and the class sizes were very large (>100,000)**
- ❑ **the number of cases in the US sample is extremely small, but indicates a much lower participation rate under opt-in than under opt-out**

(A) Individual case data. In respect of the English group litigation, the information supplied by the Respondents to the Questionnaire provides a useful insight into opt-in rates in English group litigation.

ENGLAND

The opt-in regime: either the Group Litigation Order under CPR 19.III, or group litigation conducted on an *ad hoc* basis by agreement between the parties and the court

Source of data: Questionnaire completed by law firms acting for claimant classes in group litigation

Opt-in rates: the rates are shown in Table 2 earlier in the Research Paper (note, also, the very low opt-in rates evident in ***Consumers' Association v JJB Sports plc***, referred to in Sections 8 and 9)

Hence, rate of participation in the litigation: opt-in rates varied between <1% and 100%

(B) Individual data elsewhere. Under other opt-in regimes in Europe, or where the US class action was

'judicially converted' into an opt-in regime in a limited number of early cases, some opt-in data is available.

UNITED STATES

The opt-in regime: Federal Rules of Civil Procedure, rule 23(b)(3)

Source of data: Willging *et al*, ***Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*** (Federal Judicial Centre, 1996), citing, in this aspect: BI Bertelsen et al, ***The Rule 23(b)(3) Class Action: An Empirical Study*** (1974) 62 *Georgetown LJ* 1123

Opt-in rates: The authors of the report note as follows (quoting from pp 10, 54–55 of the report):

> **The Willging empirical study:**
>
> 'None of the certified class actions [in the Willging study] required that class members file a claim as a precondition to class membership. Many cases in the study used a claims procedure to distribute any settlement fund to class members.
>
> The Georgetown study found that judges in three cases required an opt-in procedure and found that it reduced the class size by 39%, 61% and 73%. In that study, the opt-out procedure generally reduced class size by 10% or less.'

Hence, rate of participation in the litigation: the median level of participation ranged between 27% and 61%

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EUROPE

The opt-in regime: Various opt-in collective redress mechanisms

Source of data: BEUC, ***Private Group Actions — Taking Europe Forward*** (8 October 2007), 4–5, 14; and UFC Que Choisir, '***Representative Action: Experience from France***' (paper presented to Conference on Collective Redress, Lisbon, 9–10 Nov 2007)

Opt-in rates: ***Altroconsumo v Parmalat*** in Italy: 3,000 class members opted in, out of a class of hundreds of thousands of investors

UFC Que Choisir v Orange France, SFR and Bouygues Telecom in France: 12,521 class members opted in, out of a class of 20 million phone subscribers

Hence, rate of participation in the litigation: less than 0.03% of all class members opted in to these actions

(C) Summary of figures. To recap this Section:

TABLE 19 Opt-in rates

Jurisdiction from which empirical studies/cases emanated	**Rate of participation in the litigation ...**
England	approx. 0.8%–100%
United States	approx. 27%–61%
Europe	less than 0.03%

22. SUMMARY OF FINDINGS

1. Overall conclusion

In the author's view, the research which underpins this Paper demonstrably evidences an 'unmet need' for reform of collective redress mechanisms in English civil procedure. Whether this is to be achieved by the introduction of a new collective redress mechanism or by the supplementation of an existing procedure, 'something more' is required to facilitate the litigation and testing of widespread grievances, in circumstances where, presently, these grievances are not being addressed nor compensated.

On the basis of this current research, and supported by earlier in-depth comparative analyses into collective action regimes in common law jurisdictions elsewhere (***The Class Action in Common Law Legal Systems: A Comparative Perspective*** (Hart Publishing, Oxford, 2004), ***The Modern Cy-près Doctrine: Applications and Implications*** (Routledge Cavendish, London, 2006), and most recently, '***Justice Enhanced: Framing an Opt-Out Class Action for England***' (2007) 70 *Modern Law Review* 550, the author considers that an opt-out collective redress regime would provide much utility in the present procedural landscape. A number of scenarios discussed in this Research Paper appear to be eminently suited to such a regime.

It is essential, however, that any supplementary regime be drafted in a measured and balanced fashion, with 'brakes', and with in-built requirements to provide procedural fairness to both claimants and defendants. One of those 'in-built' criteria *must* be a 'superiority' analysis — an opt-out collective redress action should only be permitted to go forth by the court if it is indeed preferable to decide the dispute in that way, rather than via one of the other procedural tools presently available to litigants. As many practitioners mentioned throughout the course of this study, no procedural tool is going to be 'the cap that fits all heads' — flexibility is the key.

A collective action procedure would enable class members who are, technically speaking, non-parties (or 'absent claimants'), and who are merely described at the outset, to have the ability to opt-out, rather than being required to opt-in as identified parties at the point when the litigation commences. As is presently the case under the GLO, the proceedings themselves would require that the court act as both 'gate-keeper' and 'case manager'. Hands-on judicial control is already a feature that is permitted, indeed encouraged, under

the Civil Procedure Rules (rules 1.4(2) and 3.1, especially the wide powers conferred by rule 3.1(2)(m)), notwithstanding that case management of such actions is a resource-heavy judicial tool — a fact recently acknowledged, for example, by the Commercial Court Long Trials Working Party in its December 2007 Report (at para 163).

The implementation of a further collective redress mechanism would assist both (a) the ability of aggrieved persons to 'have their day in court' (or be considered when a settlement is being negotiated); and (b) the efficiency and effectiveness of the judicial resources at the State's disposal. Notably, a third possible objective — to achieve better deterrence of culpable behaviour — was mentioned frequently by stakeholders and interested parties with whom discussions were held in the course of preparing this Research Paper.

2. Substantiating reasons for this conclusion

Since the GLO was introduced in 2000, there have been notably fewer group actions than the number of collective actions which have been commenced in Australia. Similarly, the number of class proceedings in Ontario (where certification is required at the outset, on criteria which are somewhat more discerning than the GLO's certification requirements) far exceeds equivalent litigation over the same time period under the GLO regime.

However, it is not just a question of numbers. The *types* of collective actions are also far wider under the opt-out regimes of Australia and Ontario than the types of group claims brought so far under the GLO regime — in circumstances where, feasibly, the same or similar grievance could exist among UK citizens too. Indeed, several categories of grievance brought in Australia/Ontario have no equivalent under the GLO regime (for example, the very small over-charge cases, or real estate disputes involving, say, a dispute between the landlord of a shopping centre and the tenants). Notably, several of the claims in Australia/Ontario were, individually, non-recoverable claims, in which case individual litigation was extremely unlikely — however, the opt-out systems of these jurisdictions have also been used for collective actions in which large-value individual claims have been encompassed by the suit.

There is, in reasonable proximity to England and Wales, the long-standing Portuguese opt-out regime, entitled the *Right of Proceeding, Participation and Popular Action.* It has been in operation since 1995, and the consumer organisation DECO has obtained valuable experience in bringing actions under it.

DECO's view is that the regime has worked well, although the limited number of collective actions for damages is a direct result of the limited resources which DECO has available to it to prosecute such actions. As always, when turning one's attention to the second of the trio of issues which were outlined in the 'Background' earlier (at p 2) — need, design and costs/funding — the lessons to be learnt from other jurisdictions' legislative design and experiences thereunder are of paramount importance. In that respect, the refinements and improvements proposed by DECO are most interesting for English law reformers.

Other opt-out regimes have recently been introduced in Europe (Spain, Denmark, Norway, the Netherlands), each of which has different features and pre-conditions for use.

Where English claimants have sought to 'add on' to class actions instituted in the United States (under rule 23 of the Federal Rules of Civil Procedure), problems have sometimes ensued, that have resulted in the English claimants being 'dumped out' of the action or treated unfavourably by comparison. Although some of these actions had a 'connection' with the English jurisdiction that would have permitted an action to be brought in England, nevertheless, claimants sought to be joined to a US opt-out action, in the absence of any opt-out regime in England under which the action could have been commenced. This has not always ended happily for the English claimants, as both judicial decisions under rule 23, and the practical experience of UK law firms, will attest to.

Since March 2006 (when Which? launched a direct campaign of consumer awareness), the English county court system has been increasingly overwhelmed by a multitude of bank charges claims being filed by bank customers. The bank charges litigation has also raised other dangers associated with numerous individual suits. For all litigants, there are the risks of inconsistent judgments and delays in outcome. For the defendant, there is the added risk of embarrassing and adverse publicity if it overlooks the need to enter a defence to one or more of these unitary actions.

Other contexts in which 'unmet need' is evident are: compensation for loss or damage incurred where unfair terms are identified as standard terms being improperly used by businesses in consumer contracts; where infringing behaviour has been identified and punished by way of fines/penalties in respect of anti-competitive conduct, but where neither 'follow-on' actions nor stand-alone (liability + quantum) claims have been brought by injured parties; and in the employment context, where the numbers of individual claims filed for equal pay, sex discrimination and working time directives, have 'exploded' in the past 1–2

years. In each of these contexts, a collective opt-out regime would provide better access to justice and judicial efficiency. Furthermore, calls for better private enforcement procedures have been made by public bodies or publicly-funded bodies in each of these categories — in some instances, by entities that could feasibly act as an ideological claimant in collective actions.

Having regard to these particular contexts, the author does not intend to suggest in this Research Paper that different collective action frameworks should be implemented in each context — these contexts are merely provided by way of example, to show an 'unmet need'. A ***generic***, ***statutory***, 'build the field and they will come'-type regime, which covers all types of scenarios potentially giving rise to collective actions, is preferable, in this author's view.

A Questionnaire distributed to Respondents who have had experience in conducting opt-in group litigation in England produced some interesting insights during the course of preparing this Research Paper. The experience in English group litigation indicates that, under an opt-in regime, the opt-in rates vary considerably, from very low percentages (<1%) to almost all (90%), or all, of group members opting to participate in the litigation. In several instances, however, the percentages of opting-in could not be determined because early cut-off dates were established, and the total number in the group was never able to be ascertained before the litigation was finalised. Respondents indicated that the vast majority of the Relevant Actions sustained *some* procedural difficulties because they were conducted under an opt-in regime — and the tasks of identifying and communicating with large classes, together with pleadings requirements at the outset, were especially difficult.

Furthermore, the experience derived from English group litigation indicates (per Table 5) that there are almost twenty (20) reasons as to why group members may not opt in to litigation — reasons that are as diverse as is human nature. While some of these reasons will preclude these claimants *ever* choosing to litigate their grievances, many of the reasons for not opting-in that emerged in the study for this Research Paper are particularly pertinent when the litigation is in its 'infancy', prior to any determination or settlement of the common issues, and when the litigation inevitably retains such an 'individualised' hue.

The exercise of 'crunching the numbers' on opt-in versus opt-out confirms the anecdotal evidence that opt-out '*catches more litigants in the fishing net*'. Where modern empirical data exists, the median opt-out rates have been as low as 0.1%, and no higher than 13%. Where widespread empirical data does not exist as yet, judicial summations of opt-out rates indicate a range of opt-outs between 40% (which is rare, on the

cases surveyed) and 0%, with a tendency for the rates of participation under opt-out regimes to be high (that does not, however, guarantee that all class members will come forward to claim their individual entitlements following the resolution of the common issues, hence, the less-than-100% take-up rates referred to earlier in this Paper). On the other hand, whilst the experience in English group litigation indicates that, under its opt-in regime, the opt-in rates vary considerably, from very low percentages (<1%) to almost all group members opting to participate in the litigation, European experience sometimes indicates a *very* low rate of participation (less than 1%) where resort to opt-in was necessary in consumer claims and where the class sizes were very large. In the United States too, a much lower participation rate has been evident under opt-in than under opt-out. In that respect, the dual pillars — access to justice and judicial efficiency in disposing of the dispute once and for all — are enhanced by an opt-out regime.

3. Concluding remarks

The various 'building blocks' which have been the subject of examination in this Research Paper point toward the incontrovertible conclusion that, in England and Wales, there is an 'unmet need' for better redress of common grievances which have allegedly given rise to monetary loss and damage to a class of claimants. This is *not* a 'solution in search of a problem'. The need for progressive procedural reform exists, and a more effective method of collective redress in England and Wales is urgently required to address it.

EXHIBIT 56

Court of Justice of the European Communities

Falco Privatstiftung and another *v* Weller-Lindhorst

(Case C-533/07)

2008 Nov 20;
2009 Jan 27;
April 23

President of Chamber K Lenaerts,
Judges T von Danwitz, E Juhász, G Arestis, J Malenovský
Advocate General V Trstenjak

Conflict of laws — Jurisdiction under Council Regulation — Special jurisdiction — Courts for place of performance of obligation having jurisdiction in matter relating to contract — Special rule for place of performance of "provision of services" — Grant by owner of intellectual property right of licence to use right in return for remuneration — Whether contract for "provision of services" — Whether jurisdiction under general rule to be determined by reference to Court of Justice case law on Brussels Convention — Council Regulation (EC) No 44/2001, art 5(1)

The claimants, a foundation established in Austria which managed the copyright of a deceased Austrian rock singer, and a former member of the rock group, domiciled in Austria, entered into a licence agreement with the defendant, domiciled in Germany, whereby the defendant obtained the right to sell recordings of a concert given by the singer and his group. The claimants brought proceedings in Austria for an account by the defendant of sales made by her and the payment of royalties by her. The question of the jurisdiction of the Austrian courts having arisen, one issue concerned article 5(1) of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[1], which provided by sub-paragraph (a) that a person domiciled in a member state could, in another member state, be sued, in matters relating to a contract, in the courts for the place of performance of the obligation, and, by the second indent of sub-paragraph (b) that, for the purposes of that provision, the place of performance of the obligation was "in the case of provision of services, the place in a member state where, under the contract, the services were . . . or should have been provided". In the course of the action, the Oberster Gerichtshof referred to the Court of Justice of the European Communities for a preliminary ruling the questions, inter alia, whether the grant by the owner of an intellectual property right of the right to use that right came within "provision of services" in article 5(1)(b) of the Regulation, and if not, whether, in determining the question of jurisdiction under article 5(1)(a) in relation to the payment of royalties, reference was still to be made to the case law of the Court of Justice on the Convention of September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as amended) ("the Brussels Convention").

On the reference for a preliminary ruling—

Held, that the second indent of article 5(1)(b) of Regulation No 44/2001 was to be interpreted to the effect that a contract under which the owner of an intellectual property right granted its contractual partner the right to use that right in return for remuneration was not a contract "for the provision of services" within the meaning of that provision; and that, in order to determine, under article 5(1)(a), the court having jurisdiction over an application for remuneration owed pursuant to such a contract, reference continued to have to be made to the principles resulting from the case law of the Court of Justice on article 5(1) of the Brussels Convention (post, judgment, paras 44, 57, operative part).

[1] Council Regulation (EC) No 44/2001, art 5: see post, judgment, para 11.

A The following cases are referred to in the judgment:

ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS) (Case C-283/05) [2007] All ER (Comm) 949; [2006] ECR I-12041, ECJ

Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG (Wabag) (Case C-256/00) [2003] 1 WLR 1113; [2004] 1 All ER (Comm) 521; [2004] All ER (EC) 229; [2002] ECR I-1699, ECJ

B *Color Drack GmbH v Lexx International Vertriebs GmbH* (Case C-386/05) [2008] 1 All ER (Comm) 169; [2008] All ER (EC) 1044; [2007] ECR I-3699, ECJ

Custom Made Commercial Ltd v Stawa Metallbau GmbH (Case C-288/92) [1994] ECR I-2913, ECJ

de Bloos (Ets A) SPRL v Société en commandite par actions Bouyer (Case 14/76) [1976] ECR 1497, ECJ

GIE Groupe Concorde v The Master of the vessel Suhadiwarno Panjan (Case C-440/97) [1999] 2 All ER (Comm) 700; [2000] All ER (EC) 865; [1999] ECR

C I-6307, ECJ

Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV (Case C-111/01) [2003] ECR I-4207, ECJ

Industrie Tessili Italiana Como v Dunlop AG (Case 12/76) [1976] ECR 1473, ECJ

Leathertex Divisione Sintetici SpA v Bodetex BVBA (Case C-420/97) [1999] 2 All ER (Comm) 769; [1999] ECR I-6747, ECJ

Reisch Montage AG v Kiesel Baumaschinen Handels GmbH (Case C-103/05) [2006]

D ECR I-6827, ECJ

Shenavai v Kreischer (Case 266/85) [1987] ECR 239, ECJ

Verein für Konsumenteninformation v Henkel (Case C-167/00) [2003] 1 All ER (Comm) 606; [2003] All ER (EC) 311; [2002] ECR I-8111, ECJ

The following additional cases are referred to in so much of the opinion of the Advocate General as is published in this report:

E *Ciola v Land Vorarlberg* (Case C-224/97) [1999] ECR I-2517, ECJ

Cura Anlagen GmbH v Auto Service Leasing GmbH (ASL) (Case C-451/99) [2002] ECR I-3193, ECJ

FBTO Schadeverzekeringen NV v Odenbreit (Case C-463/06) [2008] 2 all ER (Comm) 733; [2007] ECR I-11321, ECJ

Freeport plc v Arnoldsson (Case C-98/06) [2008] QB 634; [2008] 2 WLR 853; [2007] ECR I-8319, ECJ

F *Glaxosmithkline v Rouard* (Case C-462/06) [2008] ICR 1375; [2008] ECR I-3965, ECJ

Hassett v South Eastern Health Board (Case C-372/07) [2008] ECR I-7403, ECJ

Ilsinger v Dreschers (Case C-180/06) 11 September 2008, Opinion of Advocate General Trstenjak

West Tankers Inc v Allianz SpA (Case C-185/07) [2009] AC 1138; [2009] 3 WLR 696; [2009] 1 All ER (Comm) 435; [2009] All ER (EC) 491; [2009] 1 Lloyd's Rep

G 413, ECJ

REFERENCE by the Oberster Gerichtshof (Supreme Court), Austria

By order of 13 November 2007, in proceedings between the claimants, Falco Privatstiftung and Thomas Rabitsch, and the defendant, Gisela Weller-Lindhorst, the Oberster Gerichtshof referred to the Court of Justice for a preliminary ruling under articles 68EC and 234EC four questions (see post,

H para 17) on the interpretation of article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L12, p 1). Article 5(1) of Regulation No 44/2001 replaced article 5(1) of the Brussels Convention of 27 September 1968 on jurisdiction and the

enforcement of judgments in civil and commercial matters (OJ 1978 L304, p 36), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L304, p 1, and—amended version—p 77), the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L388, p 1), the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L285, p 1), and the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C15, p 1); consolidated version of 26 January 1998 in OJ 1998 C27, p 1.

The Judge Rapporteur was Judge Lenaerts.

The facts are stated in the parts of the Advocate General's opinion which have been included in this report.

M Walter for the claimants.

T Wallentin for the defendant.

J Kemper and *M Lumma*, agents, for the German Government.

W Ferrante and *IM Braguglia*, agent, for the Italian Government.

C Gibbs, agent, for the United Kingdom Government.

A-M Rouchaud-Joët and *S Grünheid*, agents, for the Commission of the European Communities.

27 January 2009. **ADVOCATE GENERAL TRSTENJAK** said, at paras 12–21 and 86–100 of her opinion:

Facts, procedure in the main proceedings and the questions referred for a preliminary hearing

12 It is apparent from the order for reference that the first of the two claimants, Falco Privatstiftung, is a foundation established in Vienna, Austria, which manages the copyright of the deceased Austrian singer Falco. The second claimant is Mr Thomas Rabitsch, domiciled in Vienna, a former member of that singer's rock group. The defendant, Ms Gisela Weller-Lindhorst, who is domiciled in Munich, Germany, sold video (DVD) and audio (CD) recordings of a concert given by the singer and his group in 1993. The defendant signed a licence agreement with the claimants relating to the video recordings of that concert, under which she obtained the right to sell the recordings in Austria, Germany and Switzerland. Although the parties to the dispute agreed on a single edition of a promotional compact disc (CD) bearing an audio recording of the concert in question, the defendant did not sign any licence agreement with the claimants relating to the audio recordings. The purpose of the promotional CD was solely to advertise the video recording of the concert.

13 In the proceedings before the Handelsgericht Wien (Commercial Court, Vienna), the court of first instance, the claimants requested first that the defendant be ordered to pay royalties amounting to €20,084·04 on the basis of partially known numbers of sales of the video recordings of the concert, and secondly that the defendant be ordered to provide an account of all the sales of video and audio recordings, to pay further royalties for video recordings on the basis of that account and to pay adequate compensation and damages for the audio recordings. The claimants requested payment of

A the above amounts on the video recordings on the basis of the licence agreement, whereas for the audio recordings they claimed infringement of their copyright in the recordings of the concert.

14 The court of first instance took the view that it had jurisdiction under article 5(3) of Regulation No 44/2001, which governs jurisdiction in matters relating to tort, delict or quasi-delict. On the basis of that provision, it declared that it was competent to hear an action alleging infringement of
B copyright relating to the audio recordings, in that the latter were also sold in Austria. Given the close connection between the action for payment of royalties on the video recordings under the licence agreement and the action alleging infringement of copyright, the court of first instance ruled that it also had jurisdiction to hear the action based on that agreement.

15 In the appeal judgment, the Oberlandesgericht Wien (Higher
C Regional Court, Vienna) confirmed its jurisdiction with regard to the payment of appropriate compensation for damages for infringement of copyright under article 5(3) of Regulation No 44/2001. In contrast, it ruled that it did not have jurisdiction to decide on the action for payment of royalties for the video recordings under the licence agreement and therefore dismissed the appeal to that extent. It asserted that judgment on that application should be given by the court having jurisdiction within the
D meaning of article 5(1)(a) of Regulation No 44/2001, which governs jurisdiction in matters relating to a contract. In that regard, the appeal court emphasised that the main obligation arising out of the licence agreement is an obligation to pay a sum of money, which, under both Austrian and German law, is to be performed at the domicile of the debtor, for which reason jurisdiction to hear the action rests with the German courts. It also
E stated that jurisdiction cannot be determined on the basis of article 5(1)(b) of Regulation No 44/2001, in that the licence agreement does not relate to the provision of services within the meaning of that provision. The claimants appealed against that judgment of the appeal court to the Oberster Gerichtshof (Supreme Court).

16 In the order for reference, the Oberster Gerichtshof states that
F article 5(1)(b) of Regulation No 44/2001 does not contain a definition of the term "services". In view of the broad meaning attributed to that concept in the case law on the freedom to provide services (the referring court cites *Ciola v Land Vorarlberg* (Case C-224/97) [1999] ECR I-2517 and *Cura Anlagen GmbH v Auto Service Leasing GmbH (ASL)* (Case C-451/99) [2002] ECR I-3193) and in Community law on value added tax (in that context, the referring court mentions article 6(1) of Sixth Council Directive
G 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the member states relating to turnover taxes—Common system of value added tax: uniform basis of assessment (OJ 1977 L145, p 1) and article 25 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L347, p 1)), the referring court asks whether the contract under which the owner of intellectual property rights grants to the counterparty to the contract the right to exploit that right (in
H other words, a licence agreement) may constitute a contract for the provision of services within the meaning of article 5(1)(b) of Regulation No 44/2001.

17 If the licence agreement could constitute a contract for the provision of services within the meaning of article 5(1)(b) of Regulation No 44/2001,

the referring court also asks where those services were performed under the said contract. In that connection, it indicates that the licence was granted to the defendant for two member states (Austria and Germany) and one third country (Switzerland). The claimants, who granted the licence, have their central administrative offices and their personal domicile respectively in Austria, whereas the defendant, who obtained the licence, is domiciled in Germany.

18 The referring court maintains that there are two places that may be considered as being the place in which the provision of services takes place. First, that place may be any place within the member state in which use of the right is authorised under the licence agreement and where that right is also actually used. Secondly, the place in which the services are provided may also be the place in which the central administrative offices or domicile of the person granting the licence is located. The referring court points out that in either case jurisdiction to hear the action lies with the Austrian courts. However, in its opinion, a decision to that effect may conflict with the Court of Justice's ruling in *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG (Wabag)* (Case C-256/00) [2003] 1 WLR 1113 that article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as amended by the Accession Conventions of 1978, 1982, 1989 and 1996) ("the Brussels Convention") is not applicable where the place of performance of the obligation in question cannot be determined because the contested contractual obligation consists in an undertaking not to do something which is not subject to any geographical limit and is therefore characterised by a multiplicity of places for its performance. In such a case, jurisdiction can be determined only by application of the general criterion laid down in the first paragraph of article 2 of the Convention. (It is clear that the referring court implicitly assumes here that the case law relating to article 5(1) of the Brussels Convention is also applicable for the purposes of interpreting article 5(1) of Regulation No 44/2001.)

19 In that context, the referring court also asks whether the court whose jurisdiction is recognised in that way is also competent to rule on royalties for the use of copyright in another member state or in a third country.

20 If jurisdiction cannot be determined on the basis of article 5(1)(b) of Regulation No 44/2001, the referring court considers that it is necessary, in accordance with article 5(1)(c) of that Regulation, to establish jurisdiction within the meaning of sub-paragraph (a) of article 5(1). In that case, in keeping with the judgment in *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* (Case 14/76) [1976] ECR 1497, the decisive factor for determining jurisdiction is the place of performance of the contested obligation, that is to say, the obligation which forms the subject of the dispute between the parties. As is evident from the judgment in *Industrie Tessili Italiana Como v Dunlop AG* (Case 12/76) [1976] ECR 1473, the place of performance of the contested obligation is established by reference to the substantive law applicable to the contractual relationship under the rules of conflict of laws of the court before which the matter is brought. In that case, the Austrian courts would not have jurisdiction, since under both Austrian and German law the contested obligation to pay a sum of money must be performed at the domicile of the defendant, hence in Germany, and for that reason jurisdiction would lie with the German courts.

A **21** In those circumstances, by order of 13 November 2007, the Oberster Gerichtshof stayed proceedings and referred the following questions to the Court of Justice under articles 68 and 234EC for a preliminary ruling: [the questions are set out in para 17 of the judgment, post] . . .

The third question

B **86** It is apparent from article 5(1)(c) of Regulation No 44/2001 that, for the purpose of determining jurisdiction, if sub-paragraph (b) does not apply then sub-paragraph (a) applies. Since when examining the first question I ascertained that in the present case jurisdiction cannot be determined on the basis of sub-paragraph (b) of article 5(1), it must be established according to sub-paragraph (a) thereof. Article 5(1)(a) provides that a person domiciled in a member state may, in another member state, be sued, C "in matters relating to a contract, in the courts for the place of performance of the obligation in question". In my opinion, the starting point for an interpretation of that provision should be the correspondence between article 5(1)(a) of Regulation No 44/2001 and the first sentence of article 5(1) of the Brussels Convention, the continuity between Regulation No 44/2001 and the Convention, and the relevance of the historical interpretation.

D **87** It should be noted first of all that the wording of article 5(1)(a) of Regulation No 44/2001 is identical in every way with that of the first sentence of article 5(1) of the Brussels Convention. That fact, in conjunction with the *principle of continuity* of interpretation between Regulation No 44/2001 and the Brussels Convention, means that, in my view, article 5(1)(a) of the Regulation must be interpreted in the same way as article 5(1) of the Convention.

E **88** The importance of the principle of continuity in the interpretation of Regulation No 44/2001 is apparent from recital 19 in the Preamble to the Regulation, which states that continuity between the Brussels Convention and the Regulation should be ensured and that the Court of Justice is also required to ensure such continuity. In its case law, the court has already emphasised the importance of interpreting the two above-mentioned pieces of legislation in an identical fashion.

F **89** The importance of a uniform interpretation of the Brussels Convention and Regulation No 44/2001 was highlighted by the court in *Verein für Konsumenteninformation v Henkel* (Case C-167/00) [2003] 1 All ER (Comm) 606, in which, admittedly, it interpreted not the Regulation but the Convention, which was applicable to that case ratione temporis. The judgment was delivered after Regulation No 44/2001 had come into force. G (The *Henkel* judgment was delivered on 1 October 2002, and Regulation No 44/2001 came into force on 1 March 2002.) The court based its interpretation of article 5(3) of the Brussels Convention partly on the more clearly formulated wording of article 5(3) of Regulation No 44/2001 (article 5(3) of the Brussels Convention enshrined jurisdiction "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred", whereas article 5(3) of Regulation No 44/2001 H determines jurisdiction "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred *or may occur*" (emphasis added)), and pointed out that in the absence of any reason for interpreting the two provisions differently, article 5(3) of the Brussels Convention should be given a scope identical to that of the equivalent

provision of Regulation No 44/2001 (*Henkel*, para 49). The court also stated, in that paragraph, that that was all the more necessary given that the Regulation replaced the Brussels Convention in relations between member states with the exception of Denmark. A

90 In *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* (Case C-103/05) [2006] ECR I-6827, the court did not make express reference to the principle of continuity of interpretation, but it based its interpretation of Regulation No 44/2001 on the case law relating to the Brussels Convention: see paras 22–25. It took a similar position in *Freeport plc v Arnoldsson* (Case C-98/06) [2008] QB 634, paras 39, 45 and 53; *ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)* (Case C-283/05) [2006] ECR I-12041, para 24; *FBTO Schadeverzekeringen NV v Odenbreit* (Case C-463/06) [2007] ECR I-11321, para 28 and *Hassett v South Eastern Health Board* (Case C-372/07) [2008] ECR I-7403, paras 19 and 22. Nevertheless, the advocates general in numerous cases have expressly drawn attention to the importance of continuity between the Brussels Convention and Regulation No 44/2001: see, for example, the opinions of Advocate General Léger in *ASML Netherlands* [2006] ECR I-12041, para 10; Advocate General Bot in *Color Drack GmbH v Lexx International Vertriebs GmbH* (Case C-386/05) [2007] ECR I-3699, para 7; Advocate General Mengozzi in *Freeport* [2008] QB 634, para 4 and Advocate General Kokott in *West Tankers Inc v Allianz SpA* (Case C-185/07) [2009] 1 AC 1138, para 28. B C D

91 In its case law to date, the Court of Justice has decided to move away from the principle of continuity and to adopt an interpretation of Regulation No 44/2001 that differs from that of the Brussels Convention, for example in *Glaxosmithkline v Rouard* (Case C-462/06) [2008] ICR 1375, relating to jurisdiction over individual contracts of employment. Under the Brussels Convention, jurisdiction for such contracts was governed by article 5(1), whereas Regulation No 44/2001 devotes a special section to this issue (articles 18 to 21). As ground for the different interpretation of the new provisions, the court relied on the appreciable amendments introduced by the Regulation, which were further confirmed by the travaux préparatoires relating to the Regulation: paras 15 and 24 of the judgment. E F

92 In my opinion in *Ilsinger v Dreschers* (Case C-180/06) 11 September 2008, I proposed that, with regard to jurisdiction over consumer contracts, the court should interpret article 15(1)(c) of Regulation No 44/2001 differently from article 13(3) of the Brussels Convention, by reason of the partial difference in wording between the provision of the Regulation and the latter article of the Convention. G

93 However, in the present case, the prerequisites for an interpretation of article 5(1)(a) of Regulation No 44/2001 that differs from the interpretation of article 5(1) of the Brussels Convention are not met, not only because the two provisions are identically worded, as I have already mentioned, but also because it can be seen from a historical analysis of the legislative texts that this corresponds to the express intention of the Community legislature. H

94 The *historical interpretation* shows that the wording of article 5(1)(a) of Regulation No 44/2001, as finally adopted, is the result of a compromise between those who intended to maintain the rules on the determination of jurisdiction developed by the Court of Justice in its case law

A in *Ets A de Bloos SPRl v Société en commandite par actions Bouyer* (Case 14/76) [1976] ECR 1497 and *Industrie Tessili Italiana Como v Dunlop AG* (Case 12/76) [1976] ECR 1473 and those who wished to change that case law. Among the contrasting proposed wordings of the above provision —which ranged from confirmation of the status quo to the determination of jurisdiction on the basis of the place of performance of the characteristic obligation for all contracts—a compromise solution finally prevailed which B provided for jurisdiction to be determined on the basis of the place of performance of the characteristic obligation for two categories of contract, that is to say, contracts for the sale of goods and those for the provision of services, but retained the existing rules for all remaining contracts. (On the various options for amending article 5(1), see C Kohler, "Revision des Brüsseler und Luganer Übereinkommens" in *P Gottwald (ed), Revision des* C *EuGVÜ—Neues Schiedsverfahrensrecht* (2000), pp 12 et seq. Council document No 5202/99 of 19 January 1999 "Revision of the Brussels and Lugano Conventions—Draft Convention" shows that one of the possible wordings of the first sentence of article 5(1) of the new Regulation was the following: "in matters relating to a contract, in the courts for the place of performance of the obligation which is *characteristic* of the contract" (emphasis added). Another option was to maintain the status quo: PR D Beaumont, "The Brussels Convention Becomes a Regulation: Implications for Legal Basis, External Competence and Contract Jurisdiction" in *J Fawcett (ed), Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (2002), pp 16 and 17, states, for example, that the United Kingdom had expressed a preference for maintaining the status quo.) That compromise, which in fact divided E article 5(1) of Regulation No 44/2001 into two parts, is precisely the means by which it was possible to reform that provision (thus, P Mankowski in *U Magnus and P Mankowski (eds), Brussels I Regulation* (2007), p 153, para 131).

95 The will of the legislature is therefore clear: to make independent provision for the place of performance of the obligation for contracts for the sale of goods and the provision of services, and to maintain the rules on the F determination of jurisdiction resulting from the Court of Justice's interpretation of article 5(1) of the Brussels Convention for other types of contract. (That intention is also clear from the Preamble to the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 Final, p 15).) If the legislature had wished that jurisdiction for all G contracts be determined, for example, on the basis of the place of performance of the characteristic obligation of the contract, it would have worded article 5(1) of Regulation No 44/2001 accordingly. In the light of the current text of that provision, however, it is abundantly clear from some language versions that for the purposes of determining jurisdiction the decisive factor is the obligation giving rise to the proceedings between the H parties. (The Italian version of article 5(1)(a) of Regulation No 44/2001 states that in matters relating to a contract, jurisdiction lies with the court for the place where the obligation that is the subject of the proceedings was or should have been performed ("in materia contrattuale, davanti al giudice del luogo in cui l'obbligazione dedotta in giudizio è stata o deve essere eseguita"), while according to the German version, if the proceedings relate

to a contract or rights deriving from a contract, jurisdiction lies with the court for the place where the obligation was or should have been performed ("wenn ein Vertrag oder Ansprüche aus einem Vertrag den Gegenstand des Verfahrens bilden, vor dem Gericht des Ortes, an dem die Verpflichtung erfüllt worden ist oder zu erfüllen wäre").) A

96 In truth, this compromise solution is not flawless. By amending the rules on the determination of jurisdiction only for contracts for the sale of goods and the provision of services, Regulation No 44/2001 removed for those two types of contract the disadvantages deriving from the rules developed in the case law of the Court of Justice in *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* (Case 14/76) [1976] ECR 1497 and *Industrie Tessili Italiana Como v Dunlop AG* (Case 12/76) [1976] ECR 1473; however, the disadvantages remain for all other types of contract, jurisdiction for which is determined on the basis of article 5(1)(a) of the Regulation. Apart from that, the amendment of the rules for determining jurisdiction creates two new difficulties. B C

97 First, the wording of article 5(1) of Regulation No 44/2001 has raised the problem of distinguishing those contracts for which jurisdiction is determined on the basis of sub-paragraph (b)—in other words, contracts for the sale of goods and the provision of services—from contracts for which jurisdiction is determined on the basis of sub-paragraph (a) of that provision. The present dispute shows clearly that such delimitation is not easy, so that it will be necessary in each case to establish the category into which a particular contract falls. (For many contracts, it is not evident prima facie whether they should be treated according to the rule laid down in sub-paragraph (a) or that contained in sub-paragraph (b) of article 5(1); leasing or rental contracts and loan contracts come to mind. Moreover, even within sub-paragraph (b) of the provision in question the demarcation between contracts for the sale of goods and contracts for the provision of services will not always be clear-cut: for example, H Gaudemet-Tallon in *Compétence et exécution des jugements en Europe: Règlement No 44/2001, Conventions de Bruxelles et de Lugano*, Librarie générale de droit et de jurisprudence, Paris, 3rd ed (2002), p 147, mentions franchise agreements in that context. It is none the less true that, given the uniform criterion for determining jurisdiction under sub-paragraph (b) of article 5(1) of the Regulation, delimitation between contracts for the sale of goods and those for the provision of services will not give rise to problems.) D E F

98 Secondly, maintaining the interpretation of sub-paragraph (a) of article 5(1) of Regulation No 44/2001 as it derives from the *De Bloos* and *Tessili* case law will lead to inconsistency in the interpretation of sub-paragraphs (a) and (b) of that provision, since jurisdiction is determined, in the instances provided for in sub-paragraph (b), on the basis of the place of performance of the characteristic obligation, whereas in the cases covered by sub-paragraph (a) determination will be based on the place of performance of the contested obligation. G

99 Because of the above-mentioned disadvantages, which are perpetuated or directly created by amendment of the rules on jurisdiction in matters relating to a contract, a new and different interpretation of sub-paragraph (a) of the provision in question may perhaps be desirable (thus, P Mankowski, op cit in para 94 above, p 158, para 138), but that would circumvent or contradict the clear intent of the legislature. In so doing, the H

A Court of Justice would be abrogating the role of the legislature and exceeding the limits of its jurisdiction. Hence, in my opinion, as far as sub-paragraph (a) of article 5(1) of Regulation No 44/2001 is concerned, the interpretation developed by the court in *De Bloos* and *Tessili* with regard to article 5(1) of the Brussels Convention must be upheld.

100 As indicated by the referring court, in the present case the
B determination of jurisdiction on the basis of the interpretation deriving from the *De Bloos* and *Tessili* case law will in practice mean that the power to hear the action for the payment of licence fees for video recordings of the concert in question under the licence agreement will lie with the court for the place where the licensee is domiciled, in other words, with the German court. [The remainder of the Advocate General's opinion is not reproduced in this report.]
C

23 April 2009. **THE COURT** (**Fourth Chamber**) delivered the following judgment in Luxembourg.

1 This reference for a preliminary ruling concerns the interpretation of article 5(1)(a) and the second indent of article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition
D and enforcement of judgments in civil and commercial matters.

2 The reference was made in proceedings between the claimants, Falco Privatstiftung, a foundation established in Vienna, Austria, and Mr Rabitsch, residing in Vienna, on the one hand, and Ms Weller-Lindhorst, domiciled in Munich, Germany, on the other hand, concerning, first, the performance of a contract pursuant to which the claimants have licensed the defendant to market, in Austria, Germany and Switzerland, video recordings
E of a concert and, secondly, the marketing, without any contractual basis, of audio recordings of the same concert.

Legal context

The Brussels Convention

F 3 Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as amended by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic [sic]) ("the Brussels Convention") provides: "A person domiciled in a contracting state may, in another contracting state, be sued: (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question . . ."
G

Regulation No 44/2001

4 Recital 2 in the Preamble to Regulation No 44/2001 states:

"Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal
H market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from member states bound by this Regulation are essential."

5 Recital 11 is worded:

"The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor . . ."

6 Recital 12 provides: "In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice."

7 Recital 19 states:

"Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities . . ."

8 The rules on jurisdiction laid down by Regulation No 44/2001 are set out in Chapter II thereof, consisting of articles 2 to 31.

9 Article 2(1) of Regulation No 44/2001, which forms part of section 1 of Chapter II, entitled "General provisions", states: "Subject to this Regulation, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state."

10 Article 3(1), which appears in the same section, provides: "Persons domiciled in a member state may be sued in the courts of another member state only by virtue of the rules set out in sections 2 to 7 of this Chapter."

11 Article 5, which appears in section 2 of Chapter II, entitled "Special jurisdiction", provides:

"A person domiciled in a member state may, in another member state, be sued: (1)(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question; (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:—in the case of the sale of goods, the place in a member state where, under the contract, the goods were delivered or should have been delivered,—in the case of the provision of services, the place in a member state where, under the contract, the services were provided or should have been provided, (c) if sub-paragraph (b) does not apply then sub-paragraph (a) applies; . . . (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur . . ."

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 It is apparent from the order for reference that the claimants request payment of royalties, calculated by reference to the, partially known, amount of sales of video recordings of a concert. They also request that the defendant be ordered to provide an account of all sales of video and audio recordings and to pay the resulting supplementary royalties. In support of their claims, the claimants rely, with regard to the video recordings, on the provisions of the contract between them and their contractual partner and,

A with regard to the sales of audio recordings, on a copyright infringement, there being no contractual basis in that regard.

13 At first instance, the Handelsgericht Wien (Commercial Court, Vienna), before which the claimants brought the matter, held that it had jurisdiction to rule on those claims, pursuant to article 5(3) of Regulation No 44/2001. It considered that, in view of the close link between the rights relied on, its jurisdiction also covered the fees owed for the video recordings B pursuant to the contract at issue, a finding which was challenged by the defendant.

14 On appeal, the Oberlandesgericht Wien (Higher Regional Court, Vienna) held that article 5(3) of Regulation No 44/2001 was not applicable to contractual rights, nor was the second indent of article 5(1)(b) applicable, since the contract in question was not a contract for the provision of services C within the meaning of that provision.

15 An appeal on a point of law having being brought before the Oberster Gerichtshof (Supreme Court), concerning only the claims in relation to the distribution of the video recordings, that court noted that the concept of "provision of services" is not defined in Regulation No 44/2001. Referring to the case law of the Court of Justice on the D freedom to provide services and to certain Directives on value added tax favouring a broad interpretation of the concept of services, the referring court asks whether a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is a contract regarding "the provision of services" within the meaning of the second indent of article 5(1)(b) of Regulation No 44/2001. Should that be the case, the referring court raises the E question of the place of provision of that service and the question whether the competent court can also rule on the payments in relation to the use of the intellectual property rights in question in another member state or in a third country.

16 If jurisdiction cannot be based on the second indent of article 5(1)(b), the referring court considers that, by virtue of article 5(1)(c), F the rule set out in article 5(1)(a) should be applied. According to the referring court, in matters involving article 5(1)(a) of Regulation No 44/2001, the decisive factor is the place of performance of the contested obligation, pursuant to *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* (Case 14/76) [1976] ECR 1497; the place of performance must be determined in accordance with the law applicable to the contract at issue in the main proceedings, in accordance with *Industrie Tessili Italiana* G *Como v Dunlop AG* (Case 12/76) [1976] ECR 1473.

17 In the light of all of the above considerations, the Oberster Gerichtshof decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

> "(1) Is a contract under which the owner of an intellectual property right grants the other contracting party the right to use that right (a H licence agreement) a contract regarding 'the provision of services' within the meaning of article 5(1)(b) of Regulation No 44/2001?
>
> "(2) If question 1 is answered in the affirmative: (a) is the service provided at each place in a member state where use of the right is allowed under the contract and also actually occurs; or (b) is the service provided

where the licensor is domiciled or at the place of the licensor's central administration; (c) if question 2(a) or question 2(b) is answered in the affirmative, does the court which thereby has jurisdiction also have the power to rule on royalties which result from use of the right in another member state or in a third country?

"(3) If question 1 or questions 2(a) and 2(b) are answered in the negative: is jurisdiction as regards payment of royalties under article 5(1)(a) and (c) of Regulation No 44/2001 still to be determined in accordance with the principles which result from the case law of the Court of Justice on article 5(1) of the Brussels Convention?"

The questions referred for a preliminary ruling

The first question

18 By its first question, the national court asks, essentially, whether a contract under which the owner of an intellectual property right grants its contractual partner the right to use the right in return for remuneration, is a contract for the provision of services within the meaning of the second indent of article 5(1)(b) of Regulation No 44/2001.

19 First of all, it should be noted that the wording of the second indent of article 5(1)(b) of Regulation No 44/2001 does not of itself enable an answer to be given to the question referred, since it does not define the concept of a contract for the provision of services.

20 Consequently, the second indent of article 5(1)(b) must be interpreted in the light of the origins, objectives and scheme of the Regulation: see, to that effect, *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* (Case C-103/05) [2006] ECR I-6827, para 29; *ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)* (Case C-283/05) [2006] ECR I-12041, paras 16 and 22 and *Color Drack GmbH v Lexx International Vertriebs GmbH* (Case C-386/05) [2007] ECR I-3699, para 18.

21 In that regard, it is apparent from recitals 2 and 11 in its Preamble that Regulation No 44/2001 seeks to unify the rules of conflict of jurisdiction in civil and commercial matters by way of rules of jurisdiction which are highly predictable.

22 Accordingly, Regulation No 44/2001 pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Community, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued: see *Reisch Montage* [2006] ECR I-6827, paras 24 and 25, and *Color Drack* [2007] ECR I-3699, para 20.

23 The rules of jurisdiction laid down by Regulation No 44/2001 are founded on the principle that jurisdiction is generally based on the defendant's domicile, as provided in article 2 thereof, complemented by the rules of special jurisdiction: see *Reisch Montage*, para 22, and *Color Drack*, para 21.

24 Thus, the rule that jurisdiction is generally based on the defendant's domicile is complemented, in article 5(1) of Regulation No 44/2001, by a rule of special jurisdiction in matters relating to a contract. The reason for that rule, which reflects a desire for proximity, is the existence of a close

A link between the contract and the court called on to hear and determine the case.

25 Under that rule of special jurisdiction, the defendant may also be sued in the court for the place of performance of the obligation in question, since that court is presumed to have a close link to the contract.

26 In order to reinforce the primary objective of legal certainty which
B governs the rules of jurisdiction which it sets out, that criterion of a link is defined autonomously by Regulation No 44/2001 in the case of the sale of goods.

27 By virtue of the first indent of article 5(1)(b) of the Regulation, the place of performance of the obligation in question is the place in a member state where, under the contract, the goods were delivered or should have been delivered.

C **28** It is in the light of those considerations that it must be determined whether a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is a contract for the provision of services within the meaning of article 5(1)(b) of Regulation No 44/2001.

29 In that respect, as the German, Italian and United Kingdom
D Governments have argued in the written observations which they have submitted to the Court of Justice, the concept of service implies, at the least, that the party who provides the service carries out a particular activity in return for remuneration.

30 It cannot be inferred from a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration that such an activity is involved.

E **31** By such a contract, the only obligation which the owner of the right granted undertakes with regard to its contractual partner is not to challenge the use of that right by the latter. As pointed out by the Advocate General in para 58 of her opinion, the owner of an intellectual property right does not perform any service in granting a right to use that property and undertakes merely to permit the licensee to exploit that right freely.

F **32** In that respect, it is immaterial whether the licensee of an intellectual property right holder is obliged to use the intellectual property right licensed.

33 That analysis cannot be called into question by the arguments concerning the interpretation of the concept of "services" within the meaning of article 50EC or secondary Community legislation other than
G Regulation No 44/2001 and the broad logic and scheme of article 5(1) of that Regulation.

34 First, no element in the broad logic and scheme of article 5(1) of Regulation No 44/2001 requires that the concept of "provision of services" set out in the second indent of article 5(1)(b) be interpreted in the light of the Court of Justice's approach to the freedom to provide services within the meaning of article 50EC.

H **35** While that field requires, in certain circumstances, a broad interpretation of the concept of services, that approach is aimed at ensuring that as many economic activities as possible which do not fall within the scope of the free movement of goods, capital or persons do not, by virtue of being so excluded, fall outside the scope of application of the EC Treaty.

A **36** Under the scheme laid down by Regulation No 44/2001, the fact that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for the payment of remuneration, is not a contract for the provision of services within the meaning of article 5(1)(b) of the Regulation, does not preclude that contract being subject to the Regulation, in particular, to its other rules governing jurisdiction.

B **37** The broad logic and scheme of the rules governing jurisdiction laid down by Regulation No 44/2001 require, on the contrary, a narrow interpretation of the rules on special jurisdiction, including the rule contained, in matters relating to a contract, in article 5(1) of the Regulation, which derogate from the general principle that jurisdiction is based on the defendant's domicile.

C **38** For similar reasons, it is not necessary, secondly, to interpret the concept of the "provision of services" set out in the second indent of article 5(1)(b) of Regulation No 44/2001 in the light of the definition of the concept of "services" in the Community Directives on VAT.

39 As the Advocate General observed in paras 71 and 72 of her opinion, the definition of that concept provided by the Directives on VAT is a negative definition which is, by its very nature, necessarily broad, since the concept of "provision of services" is defined as any transaction which does not constitute a supply of goods. Therefore, those Directives consider only two categories of economic activity as taxable transactions within the territory of the Community, namely the delivery of goods and the supply of services.

D

E **40** Under article 5(1) of Regulation No 44/2001, when a contract for the sale of goods is not involved, jurisdiction is not determined, however, only on the basis of the rules which apply to contracts for the provision of services. In accordance with article 5(1)(c) of the Regulation, article 5(1)(a) is applicable to contracts which are neither contracts for the sale of goods nor contracts for the provision of services.

F **41** Thirdly and last, the argument that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the provision of services, within the meaning of the second indent of article 5(1)(b) of Regulation No 44/2001, cannot be called into question by the requirement, put forward by the Commission of the European Communities, that the scope of application of article 5(1)(b) be broadly delimited in relation to article 5(1)(a).

G **42** It should be noted that it is apparent from the scheme of article 5(1) of Regulation No 44/2001 that the Community legislature adopted distinct jurisdiction rules, first, for contracts for the sale of goods and contracts for the provision of services and, secondly, for all other kinds of contracts which are not covered by specific provisions of the Regulation.

H **43** Extending the scope of application of the second indent of article 5(1)(b) of Regulation No 44/2001 would amount to circumventing the intention of the Community legislature in that respect and would have a negative impact on the effectiveness of article 5(1)(c) and (a).

44 Having regard to all the above considerations, the answer to the first question referred is that the second indent of article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that a contract under which the

owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the provision of services within the meaning of that provision.

The second question

45 In the light of the answer given to the first question, it is not necessary to answer the second question.

The third question

46 By its third question, the national court asks whether, in order to determine, pursuant to article 5(1)(a) of Regulation No 44/2001, the court having jurisdiction over an application for remuneration owed pursuant to a contract under which the owner of an intellectual property right grants to its contractual partner the right to use that right, reference must still be made to the principles which result from the case law of the Court of Justice relating to article 5(1) of the Brussels Convention.

47 The national court wishes to know, in particular, whether article 5(1)(a) of Regulation No 44/2001 must be interpreted to the effect that, first, the concept of "obligation" used in that article refers to the obligation which arises under the contract and the non-performance of which is relied on in support of the action and, secondly, the place where that obligation has been or should be performed is to be determined in accordance with the law governing that obligation according to the conflict rules of the court before which the proceedings have been brought, as the Court of Justice has already held with regard to article 5(1) of the Brussels Convention: see, respectively, with regard to the concept of "obligation" referred to in article 5(1) of the Brussels Convention, *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* (Case 14/76) [1976] ECR 1497, para 13; *Shenavai v Kreischer* (Case 266/85) [1987] ECR 239, para 9; *Custom Made Commercial Ltd v Stawa Metallbau GmbH* (Case C-288/92) [1994] ECR I-2913, para 23; *Leathertex Divisione Sintetici SpA v Bodetex BVBA* (Case C-420/97) [1999] ECR I-6747, para 31 and *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG (Wabag)* (Case C-256/00) [2003] 1 WLR 1113, para 44, and with regard to the place of performance of that obligation within the meaning of article 5(1) of the Brussels Convention, *Industrie Tessili Italiana Como v Dunlop AG* (Case 12/76) [1976] ECR 1473, para 13; *Custom Made Commercial* [1994] ECR I-2913, para 26; *GIE Groupe Concorde v The Master of the vessel Suhadiwarno Panjan* (Case C-440/97) [1999] ECR I-6307, para 32; *Leathertex* [1999] ECR I-6747, para 33 and *Besix* [2003] 1 WLR 1113, paras 33 and 36.

48 It is clear that the wording of article 5(1)(a) of Regulation No 44/2001 is identical in every respect to that of the first sentence of article 5(1) of the Brussels Convention.

49 In that regard, Regulation No 44/2001 is very largely based on the Brussels Convention, and in adopting that approach the Community legislature aimed to ensure true continuity, as is apparent from recital 19 in the Preamble to Regulation No 44/2001.

50 While Regulation No 44/2001 is intended to update the Brussels Convention, it seeks at the same time to retain its structure and basic principles and to ensure its continuity.

51 In the absence of any reason for interpreting the two provisions differently, consistency requires that article 5(1)(a) of Regulation No 44/2001 be given a scope identical to that of the corresponding provision of the Brussels Convention, so as to ensure a uniform interpretation of the Brussels Convention and Regulation No 44/2001: see, to that effect, *Verein für Konsumenteninformation v Henkel* (Case C-167/00) [2003] 1 All ER (Comm) 606, para 49.

52 As the Italian Government has argued in its observations, the provisions of the Brussels Convention which were taken up without amendment by Regulation No 44/2001 should receive the same interpretation under the Regulation, and that is all the more necessary given that the Regulation replaced the Brussels Convention in relations between the member states: see, to that effect, *Henkel*, para 49 and *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* (Case C-111/01) [2003] ECR I-4207, para 28.

53 As the United Kingdom Government has stated in its observations, the continuity of interpretation is, moreover, consistent with the requirements of legal certainty which dictate that the long-standing case law of the Court of Justice, which the Community legislature did not intend to alter, should not be called into question.

54 In that regard, and as pointed out by the Advocate General in paras 94 and 95 of her opinion, it is apparent from the legislative history of Regulation No 44/2001, and from the structure of article 5(1), that it was only in relation to contracts for the sale of goods and the provision of services that the Community legislature intended, first, no longer to refer to the contested obligation, but to determine the characteristic obligation of those contracts and, secondly, to define, independently, the place of performance as a connecting factor to the competent court in matters relating to a contract.

55 Consequently, it must be considered that the Community legislature intended, in relation to Regulation No 44/2001, to maintain, for all contracts other than those concerning the sale of goods and the provision of services, principles established by the Court of Justice in relation to the Brussels Convention, regarding, in particular, the obligation to take into consideration, and the determination of, the place of its execution.

56 Therefore, the scope to be given to article 5(1)(a) of Regulation No 44/2001 should be identical to that of article 5(1) of the Brussels Convention.

57 Having regard to all the foregoing considerations, the answer to the third question is that, in order to determine, under article 5(1)(a) of Regulation No 44/2001, the court having jurisdiction over an application for remuneration owed pursuant to a contract under which the owner of an intellectual property right grants to its contractual partner the right to use that right, reference must continue to be made to the principles which result from the Court of Justice's case law relating to article 5(1) of the Brussels Convention.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is

A a matter for that court. Costs incurred in submitting observations to the Court of Justice, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1 The second indent of article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters is to be interpreted to the effect
B that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the provision of services within the meaning of that provision.

2 In order to determine, under article 5(1)(a) of Regulation No 44/2001, the court having jurisdiction over an application for remuneration owed
C pursuant to a contract under which the owner of an intellectual property right grants to its contractual partner the right to use that right, reference must continue to be made to the principles which result from the case law of the Court of Justice on article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as amended by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic).
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EXHIBIT 57

[1994] 1 A.C. 438 [1993] 3 W.L.R. 756 [1993] 4 All E.R. 456 [1994] 1 Lloyd's Rep. 1 [1994] I.L.Pr. 678 (1993) 143 N.L.J. 1479 (1993) 137 S.J.L.B. 239 Times, October 15, 1993 Independent, October 20, 1993 [1994] 1 A.C. 438 [1993] 3 W.L.R. 756 [1993] 4 All E.R. 456 [1994] 1 Lloyd's Rep. 1 [1994] I.L.Pr. 678 (1993) 143 N.L.J. 1479 (1993) 137 S.J.L.B. 239 Times, October 15, 1993 Independent, October 20, 1993
(Cite as: [1994] 1 A.C. 438)

[1993] 3 W.L.R. 756

***438 Seaconsar Far East Ltd Appellants v Bank Markazi Jomhouri Islami Iran Respondents**

House of Lords

Lord Templeman, Lord Griffiths, Lord Goff of Chieveley, Lord Browne-Wilkinson, and Lord Mustill

1993 June 14, 15, 16; Oct. 14

Practice—Writ—Service out of jurisdiction—Application to set aside leave granted ex parte—Establishment of merits of claim—Whether serious issue to be tried—Whether substantial question of fact or law arising on affidavits—R.S.C., Ord. 11, rr. 1(1), 4(1)(2)

By a contract dated 30 June 1986, the plaintiffs agreed to sell a quantity of artillery shells to the Iranian Ministry of Defence. Payment was to be by letter of credit, and on 15 January 1987 the defendant bank opened a letter of credit in favour of the plaintiffs. As amended, it was payable at sight on presentation to a London bank of specified documents and compliance with certain conditions. The plaintiffs made two shipments of shells pursuant to the contract and made a presentation of documents to the London bank in respect of each shipment. The defendant bank failed or refused to make payment in respect of both presentations on the ground that the documents presented were not in conformity with the requirements of the letter of credit. The plaintiffs brought proceedings against the defendant bank for damages for breach of contract, and Hobhouse J. granted them leave ex parte to serve the proceedings on the bank outside the jurisdiction under R.S.C., Ord. 11 . 1 Saville J. dismissed the bank's application to set aside Hobhouse J.'s order in relation to the first presentation but set it aside in relation to the second. The plaintiffs appealed and the bank cross-appealed. The Court of Appeal by a majority dismissed the appeal on the ground that the plaintiffs had failed to establish a good arguable case on any of the issues raised by it. They unanimously dismissed the cross-appeal.

On appeal by the plaintiffs:-

allowing the appeal, that in considering whether the jurisdiction of the court had been sufficiently established under one or more of the paragraphs of R.S.C., Ord. 11, r. 1(1) the standard of proof was that of the good arguable case; but that in respect of the merits of the plaintiff's claim under rules 1(1) and 4 it was sufficient for the plaintiff to establish that there was a serious issue to be tried in that there was a substantial question of fact or law or both arising on the facts disclosed by the affidavits that the plaintiff bona fide desired to have tried; that the plaintiffs' asserted cause of action gave rise to serious issues to be tried; and that, no question arising as to the jurisdiction of the court, they should have leave to serve the proceedings out of the jurisdiction (post, pp. 446G, 452C-D, 453F, 454C-D, 457A-C, G-H, 458B).Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks (1904) 90 L.T. 733, H.L.(E.) and Vitkovice Horni a Hutni Tezirstvo v. Korner [1951] A.C. 869, H.L.(E.) applied . *Per curiam* . The assessment of the merits of the plaintiff's claim and the application of the principle of forum conveniens are separate and distinct elements in the exercise of the court's discretion under Order 11 (post, pp. 446G, 456A-C, 458A-B).Decision of the Court of Appeal [1993] 1 Lloyd's Rep. 236 reversed .

The following cases are referred to in the opinion of Lord Goff of Chieveley:

[1994] 1 A.C. 438 [1993] 3 W.L.R. 756 [1993] 4 All E.R. 456 [1994] 1 Lloyd's Rep. 1 [1994] I.L.Pr. 678 (1993) 143 N.L.J. 1479 (1993) 137 S.J.L.B. 239 Times, October 15, 1993 Independent, October 20, 1993 [1994] 1 A.C. 438 [1993] 3 W.L.R. 756 [1993] 4 All E.R. 456 [1994] 1 Lloyd's Rep. 1 [1994] I.L.Pr. 678 (1993) 143 N.L.J. 1479 (1993) 137 S.J.L.B. 239 Times, October 15, 1993 Independent, October 20, 1993
(Cite as: [1994] 1 A.C. 438)

- Badische Anilin und Soda Fabrik v. Chemische Fabrik vormals Sandoz (1903) 88 L.T. 490, C.A. ; sub nom. Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks(1904) 90 L.T. 733, H.L.(E.) .
- Badische Anilin und Soda Fabrik v. W. G. Thompson and Co. Ltd. (1902) 88 L.T. 492n., C.A. .

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- Bankers Trust Co. v. State Bank of India [1991] 2 Lloyd's Rep. 443, C.A. .
- Banque Paribas v. Cargill International S.A . [1991] 2 Lloyd's Rep. 19, C.A. .
- Great Australian Gold Mining Co. v. Martin (1877) 5 Ch.D. 1, C.A. .
- Korner v. Witkowitzer (unreported), 28 July 1949, Slade J.; [1950] 2 K.B. 128; [1950] 1 All E.R. 558, C.A. ;
- sub nom.Vitkovice Horni a Hutni Tezirstvo v. Korner [1951] A.C. 869; [1951] 2 All E.R. 334, H.L.(E.) .
- Malik v. Narodni Banka Ceskoslovenska [1946] 2 All E.R. 663, C.A. .
- Overseas Union Insurance Ltd. v. Incorporated General Insurance Ltd. [1992] 1 Lloyd's Rep. 439, C.A. .
- Société Commerciale de Réassurance v. Eras International Ltd.(formerly Eras (U.K.)) [1992] 1 Lloyd's Rep. 570, C.A. .
- Société Générale de Paris v. Dreyfus Brothers (1885) 29 Ch.D. 239; (1887) 37 Ch.D. 215, C.A. .
- Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460; [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843, H.L.(E.) .

The following additional cases were cited in argument:

- American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.) .
- Atlantic Underwriting Agencies Ltd. v. Compagnia di Assicurazione di Milano S.p.A . [1979] 2 Lloyd's Rep. 240
- Attock Cement Co. Ltd. v. Romanian Bank for Foreign Trade [1989] 1 W.L.R. 1147; [1989] 1 All E.R. 1189, C.A. .
- Banque de l'Indochine et de Suez S.A. v. J. H. Rayner (Mincing Lane) Ltd. [1983] Q.B. 711; [1983] 2 W.L.R. 841 ; [1983] 1 All E.R. 468
- Commercial Banking Co. of Sydney Ltd. v. Jalsard Pty. Ltd. [1973] A.C. 279; [1972] 3 W.L.R. 566, P.C. .
- Equitable Trust Co. of New York v. Dawson Partners Ltd. (1926) 27 Ll.L.Rep. 49, H.L.(E.) .
- Hagen, The [1908] P. 189, C.A. .
- Holland v. Leslie [1894] 2 Q.B. 346, C.A. .
- Johnson v. Taylor Brothers & Co. Ltd. [1920] A.C. 144, H.L.(E.) .
- Kuwait Asia Bank E.C. v. National Mutual Life Nominees Ltd. [1991] 1 A.C. 187; [1990] 3 W.L.R. 297; [1990] 3 All E.R. 404, P.C. .

[1994] 1 A.C. 438 [1993] 3 W.L.R. 756 [1993] 4 All E.R. 456 [1994] 1 Lloyd's Rep. 1 [1994] I.L.Pr. 678 (1993) 143 N.L.J. 1479 (1993) 137 S.J.L.B. 239 Times, October 15, 1993 Independent, October 20, 1993 [1994] 1 A.C. 438 [1993] 3 W.L.R. 756 [1993] 4 All E.R. 456 [1994] 1 Lloyd's Rep. 1 [1994] I.L.Pr. 678 (1993) 143 N.L.J. 1479 (1993) 137 S.J.L.B. 239 Times, October 15, 1993 Independent, October 20, 1993
(Cite as: [1994] 1 A.C. 438)

- Kwik Hoo Tong Handel Maatschappij (N.V.) v. James Finlay & Co. Ltd. [1927] A.C. 604, H.L.(E.) .
- Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc . [1990] 1 Q.B. 391; [1989] 3 W.L.R. 563; [1989] 3 All E.R. 14, C.A. .
- Mölnlycke A.B. v. Procter & Gamble Ltd. [1992] 1 W.L.R. 1112; [1992] 4 All E.R. 47, C.A. .
- Monro (George) Ltd. v. American Cyanamid and Chemical Corporation [1944] K.B. 432; [1944] 1 All E.R. 386, C.A. .
- Ninemia Maritime Corporation v. Trave Schifffahrtsgesellschaft m.b.H. und Co. K.G . [1983] 2 Lloyd's Rep. 600
- Pendal Nominees Pty. Ltd. v. M. & A. Investments Pty. Ltd. (1989) 18 N.S.W.L.R. 383
- Polly Peck International Plc. v. Nadir (No. 3), The Times, 22 March 1993; Court of Appeal (Civil Division) Transcript No. 563 of 1993, C.A. .
- Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo) [1949] A.C. 326; [1949] 1 All E.R. 294, H.L.(E.) .

APPEAL from the Court of Appeal.

This was an appeal by the plaintiffs, Seaconsar Far East Ltd., by leave of the Court of Appeal (Lloyd, Stuart-Smith and Beldam L.JJ.) from their ***441** majority judgment (Stuart-Smith L.J. dissenting) [1993] 1 Lloyd's Rep. 236 given on 28 October 1992 dismissing the plaintiffs' appeal from the order of Saville J. dated 10 April 1991 that service of the plaintiffs' writ of summons on the defendants, Bank Markazi Jomhouri Islami Iran (a body corporate), be set aside in so far as it related to the plaintiffs' claim in respect of the second presentation of documents for the payment of U.S.$4,118,660. The Court of Appeal unanimously dismissed a cross-appeal by the defendants in respect of the first presentation, which was not pursued in the House of Lords.

The facts are stated in the opinion of Lord Goff of Chieveley.

Sydney Kentridge Q.C. and *Simon Rainey* for the plaintiffs. Under R.S.C., Ord. 11 , a plaintiff seeking leave to serve out of the jurisdiction is required to satisfy one requirement: rule 4(2) . This requirement has been said to possess three different aspects: see Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. [1990] 1 Q.B. 391 . A plaintiff must show (i) that his claim falls within the letter and spirit of a particular head or heads of jurisdiction set out in rule 1(1); (ii) that England is "clearly the most appropriate forum" in which the case can suitably be tried (Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460 , 481); and (iii) that his claim is sufficiently arguable on its merits. The first aspect springs directly from the wording of Order 11. The second and third do not and are derived from judicial precedents in which the discretion to permit service under Order 11 has been considered: Société Commerciale de Réassurance v. Eras International Ltd. (formerly Eras (U.K.)) [1992] 1 Lloyd's Rep. 570 , 587-588.

In the final analysis, however, there is only one test to be satisfied by a plaintiff: in all the circumstances, given that jurisdiction is established, is the case a proper one for service out of the jurisdiction? See the Eras International case [1992] 1 Lloyd's Rep. 570 , 588 and Overseas Union Insurance Ltd. v. Incorporated General Insurance Ltd. [1992] 1 Lloyd's Rep. 439 , 448.

In relation to the sufficiency of the plaintiff's case on the merits, until recently the cases spoke in terms of the plaintiff's establishing a "good arguable case." The first issue turns on the content and

[1994] 1 A.C. 438 [1993] 3 W.L.R. 756 [1993] 4 All E.R. 456 [1994] 1 Lloyd's Rep. 1 [1994] I.L.Pr. 678 (1993) 143 N.L.J. 1479 (1993) 137 S.J.L.B. 239 Times, October 15, 1993 Independent, October 20, 1993 [1994] 1 A.C. 438 [1993] 3 W.L.R. 756 [1993] 4 All E.R. 456 [1994] 1 Lloyd's Rep. 1 [1994] I.L.Pr. 678 (1993) 143 N.L.J. 1479 (1993) 137 S.J.L.B. 239 Times, October 15, 1993 Independent, October 20, 1993
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meaning of that phrase and whether it is to be taken as a correct description of what a plaintiff needs to show. Decisions on whether a claim falls within a head of jurisdiction apply a stricter and accordingly, a different test: see the Eras International case, p. 587; Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. [1990] 1 Q.B. 391 ; Vitkovice Horni a Hutni Tezirstvo v. Korner [1951] A.C. 869 and Attock Cement Co. Ltd. v. Romanian Bank for Foreign Trade Ltd. [1989] 1 W.L.R. 1147 . One does not look at the weight of the case on the merits in abstraction but asks whether it is a proper case for trial in England. Where England is the proper forum, that must weigh heavily: see Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460 . It is sufficient if a plaintiff establishes that his case on the merits is one that is "worthy of consideration by the court" or "arguable but not unarguable;" beyond that, the court is not concerned with an assessment of the relative merits of the claim or of defences to it: see Overseas Union Insurance Ltd. v. Incorporated General Insurance Ltd. [1992] 1 Lloyd's Rep. 439 , 447-448; Banque Paribas v. Cargill International S.A. [1991] 2 Lloyd's Rep. 19 , 25; the Eras International case, pp. 587-588; Vitkovice Horni a Hutni Tezirstvo v. Korner [1951] A.C. 869 , 889 and *per* Stuart-Smith L.J. [1993] 1 Lloyd's Rep. 236 , 248. The majority of the Court of Appeal held that the test to be applied was one of "good arguable case" and considered that, in relation to the merits of his claim, that required that a plaintiff show at the Order 11 stage that he had "a good chance of success." That decision was incorrect in principle and inconsistent with the authorities. Accordingly, Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. [1990] 1 Q.B. 391 , 434, should not be followed. [Reference was also made to Ninemia Maritime Corporation v. Trave Schifffahrtsgesellschaft m.b.H. und Co. K.G. [1983] 2 Lloyd's Rep. 600 , 604.]

Jurisdiction requires, perhaps, more scrutiny than the merits. The court has to make up its mind once and for all, so the test is higher. There must be a sufficiently cogent case to satisfy the court that it is a proper case for service out. Whether there is jurisdiction or not may be an easy question, but where, for example, there is a conflict of fact, the courts seem to want to be satisfied that there is a good arguable case, a case with a fair prospect of success. The test cannot be balance of probabilities, because the court will not have all the evidence before it: see Korner's case.

The plaintiffs have satisfied two aspects of the Ord. 11, r. 4(2) requirement: (i) the claim falls within two heads of jurisdiction; and (ii) since no challenge has ever been made to it, England can be taken to be clearly the most appropriate forum for trial. In these circumstances, the threshold applicable to the merits of the plaintiffs' case will be at its lowest, and, provided that the case has passed "a minimum level of conviction" and unless the case is "too weak" to justify bringing the defendants here, leave should be granted: see the Eras International case [1992] 1 Lloyd's Rep. 570 , 588. Questions of comity do not come into this: see Pendal Nominees Pty. Ltd. v. M. & A. Investments Pty. Ltd. (1989) 18 N.S.W.L.R. 383 , 394.

The plaintiffs' case on the merits is sufficiently arguable and leave to serve out should accordingly be granted. There are four headings to consider.

(1) The documents were not discrepant. The case is that (i) the discrepancy was trivial and within the allowable margin; (ii) the discrepancy was cured or curable by reference to the other documents presented that showed a clear and sufficient linkage of the procès-verbal to the letter of credit, i.e. by its identification of the goods, the statement of contract number, its date, the vessel and its counter-signature by the principal: see Banque de l'Indochine et de Suez S.A. v. J. H. Rayner (Mincing Lane) Ltd. [1983] Q.B. 711 , 721.

[1994] 1 A.C. 438 [1993] 3 W.L.R. 756 [1993] 4 All E.R. 456 [1994] 1 Lloyd's Rep. 1 [1994] I.L.Pr. 678 (1993) 143 N.L.J. 1479 (1993) 137 S.J.L.B. 239 Times, October 15, 1993 Independent, October 20, 1993 [1994] 1 A.C. 438 [1993] 3 W.L.R. 756 [1993] 4 All E.R. 456 [1994] 1 Lloyd's Rep. 1 [1994] I.L.Pr. 678 (1993) 143 N.L.J. 1479 (1993) 137 S.J.L.B. 239 Times, October 15, 1993 Independent, October 20, 1993
(Cite as: [1994] 1 A.C. 438)

(2)Bank Melli had no authority to reject. The case is that (a) Bank Melli had no authority pursuant to the provisions of the Uniform Customs and Practice for Documentary Credits, 1983 revision ("U.C.P.") which was incorporated into the letter of credit, to reject documents on behalf of the defendants; (b) Bank Melli had no special or specific authority conferred on it by the defendants outside the U.C.P. to do so. That follows the reasoning and approach of Stuart-Smith L.J.***443** (3)There was no rejection by Bank Melli. The telex of 8 December 1987 was not a rejection.(4) Alternatively, there was no rejection in time. Rejection must be communicated to the beneficiary within two days in London practice: see Bankers Trust Co. v. State Bank of India [1991] 2 Lloyd's Rep. 443 ; Paget's Law of Banking, 10th ed. (1989), pp. 642-643 and Professor E. P. Ellinger, "Reasonable time for examination of documents:" [1985] J.B.L. 406.

The court has a wide discretion under Order 11 to permit service in any case where in all the circumstances it is a proper case for service out. Since the same issues will arise for trial in the jurisdiction in any event in relation to the first presentation, and it is not questioned that England is the most appropriate forum for the resolution of the disputes between the parties under the letter of credit, the threshold that the plaintiffs have to surmount in relation to the merits of the claim on the second presentation is very low indeed, acting only as a filter to exclude cases that at a glance can be seen to be hopeless or unarguable. The approach of Stuart-Smith L.J. is correct in principle and accords with the approach to Order 11 followed in Overseas Union Insurance Ltd. v. Incorporated General Insurance Ltd. [1992] 1 Lloyd's Rep. 439 and the Eras International case [1992] 1 Lloyd's Rep. 570 , i.e. that the paramount consideration in the exercise of the discretion is whether "the case is a proper one for service out."

Nicholas Chambers Q.C., Mark Hapgood and *Alan Roxburgh* for the defendants. There is a threefold burden on a plaintiff who seeks Order 11 leave for service out of the jurisdiction. (1) He must establish that he has a good arguable case on the merits and on any additional matters on which he relies to bring his claim within the relevant paragraph of rule 1(1). (2) He must show that his claim falls clearly within the letter and the spirit of the relevant paragraph of rule 1(1). (3) He must make it sufficiently appear to the court that the case is a proper one for service out of the jurisdiction. This requires the plaintiff to establish that England is clearly the appropriate forum for the trial of the action: Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460 , 481D. [Reference was also made to Société Générale de Paris v. Dreyfus Brothers (1885) 29 Ch.D. 239, 243; (1887) 37 Ch.D. 215 ; Great Australian Gold Mining Co. v. Martin (1877) 5 Ch.D. 1 and Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks (1904) 90 L.T. 733 , 734-735.]

The nature of the test has been characterised as "a good arguable case" see Vitkovice Horni a Hutni Tezirstvo v. Korner [1951] A.C. 869 , 875, 880, 884. This standard provides the "minimum level of conviction about the soundness of the claim" (the Eras International case [1992] 1 Lloyd's Rep. 570 , 588) and is "the [necessary] threshold of persuasion:" Polly Peck International Plc. v. Nadir (No. 3), The Times, 22 March 1993; Court of Appeal (Civil Division) Transcript No. 563 of 1993 . Korner's case also confirmed that the test of a good arguable case applies not only to the merits of the claim but also to any other matter on which the plaintiff relies to bring his claim within one of the paragraphs of Ord. 11, r. 1(1) . If this were not so, the court would have to apply a different standard to the same questions according to the stage of the inquiry at which they arise. The principle that there is no dual standard has the ***444** further effect that the standard is the same whether or not an issue that is essential to jurisdiction will arise again at trial. The Order 11 jurisdiction in its present form has stood for a considerable time and worked well.

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[Reference was made to The Hagen [1908] P. 189, 201; Johnson v. Taylor Brothers & Co. Ltd. [1920] A.C. 144; George Monro Ltd. v. American Cyanamid and Chemical Corporation [1944] K.B. 432; Malik v. Narodni Banka Ceskoslovenska [1946] 2 All E.R. 663 and Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo) [1949] A.C. 326, 353-354.]

Before the Court of Appeal, the plaintiffs took three points in relation to the test of a good arguable case: (i) that, on merits, the threshold of a good arguable case is low; (ii) alternatively, that, if the plaintiff establishes that England is the appropriate forum, on the merits he need only establish a claim worthy of consideration; (iii) that a deficiency in the merits of a claim can be made good by the existence of another claim raising similar issues in relation to which Order 11 leave has been or will be granted. The plaintiffs are wrong on each of these points.

As to (i), (1) a good arguable case is a case of the nature described by Mustill J. in Ninemia Maritime Corporation v. Trave Schifffahrtsgesellschaft m.b.H. und Co. K.G. [1983] 2 Lloyd's Rep. 600, 604-605; by the Court of Appeal in the Eras International case [1992] 1 Lloyd's Rep. 570, 588; and by Lloyd L.J. [1993] 1 Lloyd's Rep. 236, 242-243. It is a case which is better than merely arguable, yet not necessarily one which is shown to have a better than evens chance of success. The plaintiff must establish something more than a case which would survive an application to strike out. [Reference was made to Attock Cement Co. Ltd. v. Romanian Bank for Foreign Trade [1989] 1 W.L.R. 1147.] (2) This standard accords with many other ways in which the test was judicially formulated between 1883 and 1951: see Société Générale de Paris v. Dreyfus Brothers, 37 Ch.D. 215, 223; Badische Anilin und Soda Fabrik v. W. G. Thompson and Co. Ltd. (1902) 88 L.T. 492n., 494, Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks, 90 L.T. 733, 735 and Vitkovice Horni a Hutni Tezirstvo v. Korner [1951] A.C. 869, 884. (3) The expression "good arguable case" has acquired a currency both here and in other common law jurisdictions (see Kuwait Asia Bank E.C. v. National Mutual Life Nominees Ltd. [1991] 1 A.C. 187) that attributes to it a certain weight.

There are powerful reasons why the test of a good arguable case is the appropriate test. (1) Without being unduly onerous, it gives substance to the requirement that the plaintiff must depose to a belief in a good cause of action. However genuine the plaintiff's belief, it is obviously appropriate that the court should judge for itself whether the cause of action is good. (2) The test properly reflects the principle that has long been recognised in England that a foreigner resident abroad will not lightly be subjected to the local jurisdiction: see Société Générale de Paris v. Dreyfus Brothers, 29 Ch.D. 239, 242-243; Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. [1990] 1 Q.B. 391, 435 and Kuwait Asia Bank E.C. v. National Mutual Life Nominees Ltd. [1991] 1 A.C. 187, 211. (3) It is one that can appropriately be applied at both the jurisdiction and the merits stages of the inquiry and is therefore the test most likely to avoid dual standards. There is no reason why the court should not apply the same ***445** test, high or low, to every aspect that it has to consider in considering whether it has jurisdiction: see Ninemia Maritime Corporation v. Trave Schifffahrtsgesellschaft m.b.H. und Co. K.G. [1983] 2 Lloyd's Rep. 600 and Atlantic Underwriting Agencies Ltd. v. Compagnia di Assicurazione di Milano S.p.A. [1979] 2 Lloyd's Rep. 240, 241. (4) In circumstances where a formula is to be of repeated application, it is essential, in the interests of fairness and clarity, that those applying it should be aware of a consistent basis for its application. [Reference was made to Mölnlycke A.B. v. Procter & Gamble Ltd. [1992] 1 W.L.R. 1112 and Overseas Union Insurance Ltd. v. Incorporated General Insurance Ltd.

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[1992] 1 Lloyd's Rep. 439 .]

As to (ii), the plaintiffs' argument amounts to saying that a plaintiff who has a strong case on forum need not show a good arguable case on merits. This is wrong for two reasons. (1) The effect of Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460 is that a plaintiff seeking Order 11 leave must show that England is *clearly* the appropriate forum for the trial of the action. If a plaintiff satisfies this test, it is difficult to see how much stronger his case on forum can be. (2) There is no obvious connection between the strength of a case and the appropriateness of a particular forum for its determination. If England is not the appropriate forum, it does not become so because the claim is strong on the merits. Neither does a strong case on forum assist the plaintiff to show a good case on merits. The correct approach is that the plaintiff must discharge the threefold burden described above. This approach is simple, fair and conducive to consistency.

As to (iii), it is clearly not the law: see Holland v. Leslie [1894] 2 Q.B. 346 and N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co. Ltd. [1927] A.C. 604 . The court examines each claim before it for which Order 11 leave is sought: see Vitkovice Horni a Hutni Tezirstvo v. Korner [1951] A.C. 869 , 880-881, and Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc ., pp. 401E, 435B, 436D. It is not unfair that a person who cannot establish a good arguable case should be left to pursue his claim elsewhere if he so wishes.

On an application for leave under Order 11, and on an application to set aside under Order 12 , the court does not try the action. It applies a standard which, however defined, is not exact and is therefore one in the application of which different judges may reasonably differ. Accordingly, an appellate court should be slow to interfere unless it is apparent that the court below applied the wrong test or that its assessment of the merits was manifestly wrong: see Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks, 90 L.T. 733 , 734, 735. The Court of Appeal applied the correct test and their view on the merits was plainly within their discretion. In any event, they held that the plaintiff had failed to meet the lower test on the merits for which they contended: see [1993] 1 Lloyd's Rep. 236 , 244, 256.

On the discrepancy point, the procès-verbal did not comply with the terms and conditions of the credit that all documents should bear the letter of credit number and the name of the defendants' principal and clearly did not satisfy the standard of strict compliance by which documents presented under letters of credit are judged: see Equitable Trust Co.of New York v. Dawson Partners Ltd. (1926) 27 Ll.L.Rep. 49 and Commercial Banking Co. of Sydney Ltd. v. Jalsard Pty. Ltd. [1973] A.C. 279 . The process of linkage for which the plaintiffs contend is not applicable to a situation in which there has been a failure to observe an express condition of the credit. Since the plaintiffs failed to present conforming documents they are prima facie not entitled to be paid under the credit and are left to such remedies as they may have against the buyer or other parties, e.g., the carrier.

Bank Melli's telex of 8 December 1987 was unarguably a notice of refusal within article 16(d) of the U.C.P. The plaintiffs' point that Bank Melli had no authority to reject the documents was correctly described by Lloyd L.J. [1993] 1 Lloyd's Rep. 236 , 241 as "incredible." As to their point that the rejection was too late, they conceded before Saville J. and in their amended notice of appeal to the Court of Appeal that as a matter of London banking practice five days was a reasonable period for the examination and rejection of documents by Bank Melli. In any event, the documents arrived in the post (it is not clear whether by first or second post) on Thursday, 3 December 1987, and the rejection telex was sent out at 9.48 a.m. on Tuesday, 8 December, i.e. the process of

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examination and rejection took about three working days.

Kentridge Q.C. in reply. Vitkovice Horni a Hutni Tezirstvo v. Korner [1951] A.C. 869 concerned only jurisdiction. Hoffmann L.J. in Polly Peck International Plc. v. Nadir (No. 3), The Times, 22 March 1993 was wrong in thinking that that case went on the merits. The majority test (on jurisdiction) was "good arguable case," i.e. "capable of serious argument," not probable success. It is at that stage that discretion comes in. Mustill L.J. in Société Commerciale de Réassurance v. Eras International Ltd. (formerly Eras (U.K.)) [1992] 1 Lloyd's Rep. 570 , said that the test was flexible, but in general it should be no higher than that in American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396 , 407: whether there is "a serious question to be tried." Is the case too weak to put the defendant to the trouble of coming here, however strong the other factors are?

On the merits, it is not right to speculate without evidence about the bank's authority. Saville J. said that only the issuing bank had authority. There must be a serious case to go to trial. It should not be assumed that the advising bank has authority to reject.

Their Lordships took time for consideration. 14 October. LORD TEMPLEMAN.

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley, and for the reasons he gives I, too, would allow the appeal.

LORD GRIFFITHS.

My Lords, for the reasons given in the speech to be delivered by my noble and learned friend, Lord Goff of Chieveley, which I have had the opportunity of reading in draft and with which I agree, I would allow this appeal.

LORD GOFF OF CHIEVELEY.

My Lords, this appeal is concerned with an application for leave, under R.S.C., Ord. 11 , to serve a writ out of the ***447** jurisdiction; and it raises in particular the question of the extent to which the plaintiff has to establish, in relation to such an application, a sufficiently strong case on the merits of his claim.

The appellant, **Seaconsar** Far East Ltd. ("**Seaconsar**"), is a Hong Kong company which deals in arms. The respondent, Bank **Markazi** Jomhouri Islami Iran ("Bank **Markazi**"), is an Iranian bank. Under a contract of sale dated 30 June 1986 **Seaconsar** agreed to sell a large quantity of artillery shells to the Iranian Deputy Ministry of Defence for Logistics for a total price of U.S.$193m. Payment was to be made by letter of credit. On 15 January 1987 Bank **Markazi** opened a letter of credit in favour of **Seaconsar**, covering shipment of "special equipments" (i.e. artillery shells), in a sum of U.S.$18,600,000, valid until 17 March 1988. The letter of credit was unconfirmed, and was available at sight in London at the counters of Bank Melli Iran. It permitted partial shipments, and was expressed to be subject to the Uniform Customs and Practice for Documentary Credits, 1983 revision (International Chamber of Commerce Publication No. 400) ("the U.C.P."). Bank Melli advised Seaconsar of the opening of the credit by letter dated 16 January 1987.

The credit (as amended) was payable at sight on presentation to Bank Melli in London of the original set of a number of specified documents, including "process verbal of goods confirmed by orderer's authorised rep. who will be fully identified later on."

Under the heading "other conditions," there appeared (inter alia) the following provision: "Our L.C. no. and our principal's name should appear on all docs. and packages."

It is this latter provision which is the principal source of the controversy in the present case, a question having arisen from the fact that the details

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there specified were omitted from the "process verbal of goods," which was interpreted as meaning a list of the goods shipped.

Pursuant to the contract of sale, Seaconsar made two shipments of artillery shells from Setubal in Portugal to Bandar Abbas in Iran. The first shipment was made on 29 September 1987, and the second on 1 December 1987. Seaconsar made a presentation of documents to Bank Melli in London in respect of each shipment, the first presentation being made on Thursday, 1 October 1987, and the second on Thursday, 3 December 1987. Bank Markazi has failed or refused to make payment in respect of both presentations, on the ground that the documents presented were in certain respects not in conformity with the requirements of the letter of credit. So far as appears from the material before your Lordships, both consignments have been discharged in Iran but neither has been paid for, and the balance of the contract has been cancelled.

The present proceedings are concerned with a claim by **Seaconsar** against Bank **Markazi** for damages for breach of contract in respect of Bank **Markazi's** failure to pay against both presentations. Leave to serve the proceedings on Bank **Markazi** outside the jurisdiction was granted to **Seaconsar** ex parte by Hobhouse J. Bank **Markazi** then applied to set aside the order of Hobhouse J. in respect of both presentations. Saville J. dismissed Bank **Markazi's** application so far as it related to the first presentation, but he set aside the order of Hobhouse J. in relation to the ***448** second. **Seaconsar** then appealed to the Court of Appeal against the latter part of Saville J.'s order, and Bank **Markazi** cross-appealed against the former. The Court of Appeal (Lloyd, Stuart-Smith and Beldam L.JJ.) [1993] 1 Lloyd's Rep. 236 dismissed both **Seaconsar's** appeal and Bank **Markazi's** cross-appeal, Stuart-Smith L.J. dissenting on the dismissal of **Seaconsar's** appeal. **Seaconsar** now appeals to your Lordships' House, with leave of the Court of Appeal, against the dismissal of its appeal. Bank **Markazi** no longer pursues its cross-appeal. It follows that your Lordships' House is directly concerned only with the second presentation.

Seaconsar applied for leave to serve proceedings out of the jurisdiction under either paragraph (d) or paragraph (e) of R.S.C. , Ord. 11, r. 1(1) . The application under paragraph (d) was made either under sub-paragraph (i), on the basis that the contract was made within the jurisdiction, or under sub-paragraph (ii), on the basis that the contract was made by or through Bank Melli, as agent trading within the jurisdiction, for Bank **Markazi**, which was outside the jurisdiction. The application under paragraph (e) was on the basis of breach of contract within the jurisdiction, viz. refusal to pay at the counters of Bank Melli in London. Bank **Markazi** has never disputed that the case fell under either paragraph (d) or paragraph (e), its sole contention being that **Seaconsar** had not established a sufficiently strong case on the merits of its claim. On this point, the issues which have arisen in respect of both presentations are very similar. In substance, they are as follows. (1) What is the test of a sufficiently strong case on the merits to justify the grant to a plaintiff of leave to serve proceedings out of the jurisdiction under Order 11 ? (2) Whether Seaconsar has satisfied this test in relation to the merits of the following issues: (a) whether the documents were in conformity with the requirements of the letter of credit and/or did not give rise to a right of rejection by Bank Markazi; (b) if not, whether Bank Melli had the authority of Bank Markazi to reject the documents; (c) if so, whether Bank Melli did in fact reject the documents; (d) if so, whether such rejection took place within a reasonable time as required by article 16 of the U.C.P.

In addition, in relation to the second presentation there has arisen a third issue, viz. (3) whether the court should take into account, in exercising its discretion in respect of the second presentation, the fact that Seaconsar's claim relating to the first presentation will be determined in England in any

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event.

So far as the first presentation was concerned, the crucial point which persuaded Saville J. to refuse to set aside the order order of Hobhouse J. was that, in his opinion, **Seaconsar** had established a sufficient case on the merits that there was no rejection of the documents by Bank Melli at the material time. In the case of the second presentation, however, he held that **Seaconsar** had failed to establish a sufficient case on the merits on any of the four issues listed above as (2)(a) to (d), and so he allowed Bank **Markazi's** application.

In the Court of Appeal, however, it was held that Saville J. had erred in applying too strict a standard on the question whether **Seaconsar** had established a sufficient case on the merits, Saville J. having proceeded on the basis that **Seaconsar** must establish its case on the balance of ***449** probabilities. The Court of Appeal, which was united in the opinion that Saville J. had applied too strict a standard, was divided on the proper standard to apply. Lloyd and Beldam L.JJ. considered that **Seaconsar** had to establish a good arguable case on the merits, whereas Stuart-Smith L.J. was of the opinion that it was enough for **Seaconsar** to show that it had a case on the merits which was worthy of consideration. All were agreed, however, that in any event Bank **Markazi's** cross-appeal on the first presentation must fail. On **Seaconsar's** appeal, the majority held that **Seaconsar** had failed to establish a good arguable case on any of the four issues raised by it. Stuart-Smith L.J. however considered that **Seaconsar** had established a case worthy of consideration on all four issues. He also considered, in disagreement with the majority, that it was relevant to take into account the fact that proceedings in respect of the first presentation would in any event take place in England, and that this factor provided an additional and cogent reason why the court should exercise its discretion in favour of Seaconsar in relation to the second presentation.

In argument before the Appellate Committee, attention was was concentrated upon the question of the strength of the case on the merits which a plaintiff has to establish in order to justify the grant of leave to serve proceedings out of the jurisdiction under Order 11. On this matter your Lordships had the benefit of a full citation of authority, and were much assisted by the admirable arguments presented to them, both by Mr. Kentridge for Seaconsar and by Mr. Chambers for Bank Markazi. It became apparent, however, in the course of argument that this point cannot be considered in isolation, but must be examined in its context, together with the other matters which fall for consideration by the court when it is called on to exercise its jurisdiction under Order 11. It is necessary therefore to look at the jurisdiction as a whole, before reaching a conclusion on the question directly at issue in the present case.

I start, as I must, with the relevant provisions of Order 11. Ord. 11, r. 1(1) provides that, subject to certain specified exceptions, "service of a writ out of the jurisdiction is permissible with the leave of the court if in the action begun by the writ," and there follows a list of 20 specified circumstances, set out in paragraphs lettered (a) to (t) respectively, in which service out of the jurisdiction is permissible. These lettered paragraphs cover a wide range of circumstances. The paragraphs most commonly invoked are (d) and (e), concerned with contractual claims; indeed many of the decided cases are concerned with one or other or both of these two paragraphs. But the problem which has arisen in the present case is not confined to these two paragraphs and may, in theory at least, arise under others. For this reason alone, it is essential not to consider the problem only in relation to the facts of the present case, or to paragraphs (d) and (e), but also in relation to other fact-situations and other paragraphs of rule 1(1) . I myself have found this exercise both helpful and revealing, especially as it so happens that paragraphs (d) and (e) are, for present purposes, more complicated in their effect than most, if not all, of the other paragraphs of the rule.

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The other rule in Order 11 which is relevant for present purposes is rule 4 , of which we are only concerned with paragraphs 1 and 2. These provide as follows: ***450**

"(1) An application for the grant of leave under rule 1(1) must be supported by an affidavit stating - (a) the grounds on which the application is made, (b) that in the deponent's belief the plaintiff has a good cause of action, (c) in what place or country the defendant is, or probably may be found, and (d) where the application is made under rule 1(1)(c), the grounds for the deponent's belief that there is between the plaintiff and the person on whom a writ has been served a real issue which the plaintiff may reasonably ask the court to try. (2) No such leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order."

When construing the relevant provisions of these rules, and in particular the relationship between rules 1(1) and 4 , it is helpful first to look at the historical background to the rules in their present form. Order 11 in its original form was one of the Rules of Court scheduled to the Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66) . Rule 1 contained a list of circumstances (shorter than the present list) in which service of a writ outside the jurisdiction might be allowed in the discretion of the court, and rule 3 required an affidavit to be sworn in support of an application for leave for such service, in which the deponent was required to state, inter alia, the grounds upon which the application was made. At first there was doubt whether evidence must be provided of the existence of the cause of action relied upon, a doubt accentuated by the differing practices on this point previously applicable respectively in the Chancery and common law courts. It was decided that such evidence was required, as part of the affidavit evidence required to state the grounds on which the application was made; and that such statement must identify and substantiate a cause of action falling within one of the authorised heads of jurisdiction. For that purpose, however, it was considered that very probably it would be sufficient if an appropriate deponent swore an affidavit identifying the relevant cause of action, and stating that there was in his belief a good cause of action: see Great Australian Gold Mining Co. v. Martin (1877) 5 Ch.D. 1 , especially *per* Bramwell J.A., at pp. 16-18,and the report of the further hearing of the Court of Appeal, at pp. 18-19. When Order 11 came to be revised in 1883, it is plain that the former rule 3 was amended (in the new rule 4) to give effect to the decision of the Court of Appeal in that case. In the result, the affidavit was required in addition to state that in the belief of the deponent the plaintiff had a good cause of action; and there were added to the rule the words now found in the present rule 4(2). From this it follows that the grounds upon which the application is made, required to be stated in the affidavit, were understood to embrace not merely the head of jurisdiction relied upon but also the cause of action invoked by the plaintiff as falling within that head of jurisdiction. However, although under the new rule 4 the deponent had to state his belief that the plaintiff had a good cause of action, it was later held that that would not necessarily be enough for this purpose to establish the existence of the relevant cause of action, because the court had still to decide whether it should exercise its discretion to give leave; and for that purpose it had to consider whether the evidence showed that ***451** the cause of action relied upon by the plaintiff was sufficiently firmly established: see Société Générale de Paris v.Dreyfus Brothers (1885) 29 Ch.D. 239; (1887) 37 Ch.D. 215 . In this connection, the concluding words of the new rule 4 (now rule 4(2)) were not regarded as relevant, for they are directed not to the existence of the cause of action but to the question whether the plaintiff has sufficiently established that the case falls within one of the heads of jurisdiction specified in rule 1 .

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For the purpose of considering whether the existence of the relevant cause of action has been sufficiently established, a number of different tests have been stated by judges as being apposite. For example, in the Dreyfus case, which appears to have been the first reported case after the amendment of Order 11 in 1883, Pearson J. at first instance considered (see 29 Ch.D. 239 , 245-246) that it was enough that there was "a very serious question to be tried between the parties." In the Court of Appeal, both Cotton and Lindley L.JJ. preferred the test of "a probable cause of action" and Lopes L.J. the test of "a prima facie case" (see 37 Ch.D. 215 , 222-223, 225 and 226 respectively). We find a comparable divergence of opinion in the judgments in the Badische Anilin litigation: see Badische Anilin und Soda Fabrik v. W. G. Thompson and Co. Ltd. (1902) 88 L.T. 492n. (Court of Appeal); Badische Anilin und Soda Fabrik v. Chemische Fabrik vormals Sandoz (1903) 88 L.T. 490 (Court of Appeal) and Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks (1904) 90 L.T. 733 (House of Lords). This divergence of opinion reflects a number of conflicting considerations. Perhaps the clearest and most authoritative statement of the position is to be found in the speech of Lord Davey, 90 L.T. 733 , 735, where he said:

"An injunction is sought to restrain the defendants from doing some act within the jurisdiction. Rule 4 of [Order 11] prescribes that the application is to be supported by evidence stating that in the belief of the deponent the plaintiff has a good cause of action, and no such leave is to be granted unless it be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this Order. This does not, of course, mean that a mere statement by any deponent who is put forward to make the affidavit that he believes that there is a good cause of action is sufficient. On the other hand, the court is not, on an application for leave to serve out of the jurisdiction, or on a motion made to discharge an order for such service, called upon to try the action or express a premature opinion on its merits, and where there are conflicting statements as to material facts, any such opinion must necessarily be based on insufficient materials. But I think that the application should be supported by an affidavit stating facts which, if proved, would be a sufficient foundation for the alleged cause of action, and, as a rule, the affidavit should be by some person acquainted with the facts, or, at any rate, should specify the sources or persons from whom the deponent derives his information. A more difficult question is where it is in dispute whether the alleged or admitted facts will, as a matter of law, entitle the plaintiff to the relief which he seeks. If the court is judicially satisfied that the alleged facts, if proved, will not support the action, I think the court ***452** ought to say so, and dismiss the application or discharge the order. But where there is a substantial legal question arising on the facts disclosed by the affidavits which the plaintiff bona fide desires to try, I think that the court should, as a rule, allow the service of the writ. The words at the end of the Order do not, I think, mean more than that the court is to be satisfied that the case comes within the class of cases in which service abroad may be made under the first rule of the Order." On this approach, if in support of the plaintiff's ex parte application an affidavit is sworn in proper form deposing to facts which, if proved, provide a sufficient foundation for the alleged cause of action, that should generally be enough for present purposes. This is no doubt what a number of judges have referred to when they have used the expression "prima facie case" in this context. The problem arises from the fact that the court will consider, on an application to set aside leave so given, affidavit evidence on the part of the defendant, and will take such evidence into account when deciding whether or not to exercise its discretion in favour of the plaintiff. But the court cannot resolve disputed questions of fact on affidavit evidence; and it is consistent with the statement of the law by Lord Davey that if, at the end of the day, there re-

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mains a substantial question of fact or law or both, arising on the facts disclosed by the affidavits, which the plaintiff bona fide desires to try, the court should, as a rule, allow the service of the writ. If this approach is correct, the standard of proof in respect of the cause of action can broadly be stated to be whether, on the affidavit evidence before the court, there is a serious question to be tried.

The question arose again, though indirectly, before your Lordships' House in Vitkovice Horni a Hutni Tezirstvo v. Korner [1951] A.C. 869, which was concerned, primarily at least, not with the strength of the plaintiff's case on the merits, but with the standard of proof applicable when considering whether the jurisdiction of the court has been sufficiently established under one or more of the paragraphs of Ord. 11, r. 1(1). The plaintiff's claim was advanced under what is now paragraph (e), it being alleged that the claim was brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction. The plaintiff brought an action in 1946 claiming arrears of pension and salary which he said were due to him from the defendant company, which was incorporated in Czechoslovakia. In support of his case that his claim fell within paragraph (e), he relied on an oral agreement which he said had been made early in January 1929, in Czechoslovakia, with the general manager of the defendant company, that he should receive payment of his pension from the defendants in the country in which he might be living at the time when it accrued. It was on this basis, inter alia, that he contended that the defendant company was bound to pay him his pension in London and that its failure to do so constituted a breach of contract within the jurisdiction. Slade J. (unreported), 28 July 1949 refused his application for leave to serve the proceedings outside the jurisdiction. In so doing, he relied upon a statement of the law by Lord Goddard C.J. in Malik v. Narodni Banka Ceskoslovenska [1946] 2 All E.R. 663, a case also concerned with what is now paragraph (e) of Ord. 11, r. 1(1), in which Lord ***453**

Goddard, at pp. 664-665, appears to have drawn a distinction between, on the one hand, the questions (1) whether there was a contract and (2) whether there had been a breach of the contract, and on the other hand the question (3) whether such breach had been committed within the jurisdiction. Lord Goddard stated that, so far as the first two questions were concerned, the plaintiff was only required to show "a case which can be properly put before the court and argued;" but so far as the third question was concerned, Slade J. understood him to say that the plaintiff had to satisfy the court on the civil burden of proof. Applying the latter test, Slade J. considered that the plaintiff had not so satisfied him that the alleged breach had been committed within the jurisdiction. In the Court of Appeal (Korner v. Witkowitzer [1950] 2 K.B. 128), there was some difference of opinion between the members of the court as to the applicable principle; but the majority of the court held that the plaintiff's appeal must be allowed.

The case was therefore in some disarray when it came before the House of Lords. This House took the view that Lord Goddard's statement of the law in Malik, or at least Slade J.'s understanding of it, was erroneous in so far as it required that the plaintiff must satisfy the court on the civil burden of proof that his case fell within one of the heads of jurisdiction in Ord. 11, r. 1(1). The applicable standard was laid down in Ord. 11, r. 4(2), which required no more than that it should be made sufficiently to appear to the court that the case was a proper one for service out of the jurisdiction, a requirement which was inconsistent with a standard of proof "which in effect amounted to a trial of the action or a premature expression of opinion on its merits:" see *per* Lord Simonds, at p. 879. Equally, the expression "prima facie case" was rejected as inappropriate, because a conflict may arise on the material before the court, which has to reach a conclusion on all the materials then before it. In an endeavour to assist on the degree of sufficiency required by rule 4(2) Lord Simonds (with whom Lord Normand, at

p. 881, agreed) said, at p. 880, that "the description 'a good arguable case' has been suggested [by counsel for the plaintiff] and I do not quarrel with it;" and Lord Radcliffe (with whose statement of principle Lord Tucker, at p. 890, agreed) used the expressions "a strong argument," at pp. 883 and 885, and "a strong case for argument," at p. 884. There is no reason to suppose that there is any material difference between these various expressions, from which is derived the "good arguable case" test which has been applied in innumerable cases since. At all events, the House of Lords held unanimously that, on that test, the plaintiff was entitled to succeed, and so dismissed the appeal.

For present purposes, it is relevant to consider to which elements in what is now paragraph (e) of Ord. 11, r. 1(1) the House of Lords concluded that the "good arguable case" test should be applied. Lord Radcliffe, at pp. 883-884, was of the opinion that he was unable to be "satisfied as to where a breach of contract had taken place without being at any rate as much satisfied that the contract existed and had been broken." On this approach (with which, as I understand it, Lord Tucker was in agreement) it will be necessary for the purpose of establishing jurisdiction under paragraph (e) not merely to show (to the extent required ***454** by rule 4(2)) that, if there was a contract and it had been broken, such breach was committed within the jurisdiction (which had been the view of Lord Goddard C.J. in Malik) but so to establish all three elements of contract, breach and place of breach. Likewise, Lord Simonds considered, at p. 879, that the plaintiff's prospects of establishing the existence of the oral agreement on which he relied were relevant to the question of jurisdiction. Lord Normand agreed generally with Lord Simonds; and Lord Oaksey expressed no opinion on the point. It follows that four members of the Appellate Committee must be taken to have decided that, when considering what is now paragraph (e), all three elements of contract, breach and place of breach must be established, to the extent required by rule 4(2), before the plaintiff can successfully invoke the jurisdiction of the court under that paragraph. It also follows that, under that paragraph, no separate issue will arise on the merits of the plaintiff's claim to which a lower standard of proof might be applied; and for that reason no question arose directly as to the standard of proof applicable to the merits of the plaintiff's claim in Korner's case, though the point was adverted to by Lord Tucker. I wish to record in parenthesis my suspicion that a failure to appreciate this point has led to a belief that the "good arguable case" test established in Korner's case is as applicable to the merits of the plaintiff's case as it is to the question of jurisdiction under Ord. 11, r. 1(1) - as indeed has been stated in successive editions of *The Supreme Court Practice* : see the 1993 edition, para. 11/1/6, p. 85.

But the same does not apply in the case of other paragraphs of rule 1(1). Under many paragraphs, once the plaintiff's claim is shown to have been made under a certain statutory provision, the jurisdiction of the court is established; and a separate question will arise as to the merits of the plaintiff's claim: see, e.g., paragraphs (q), (r) and (s). Another obvious example is to be found in paragraph (a), concerned with relief sought against a person domiciled within the jurisdiction. There, once the plaintiff has established, to the standard required by rule 4(2), that the defendant is domiciled within the jurisdiction, jurisdiction under paragraph (a) is established and a separate question will arise as to the merits of his claim. Paragraph (d), the other paragraph concerned with contractual claims, and one which is relevant in the present case, is more complex. It provides:

"(d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) and contract which - (i) was made within the jurisdiction, or (ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a

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principal trading or residing out of the jurisdiction, or (iii) is by its terms, or by implication, governed by English law, or (iv) contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of the contract; . . ."

As I read the paragraph, however, and having regard to the view formed in Korner's case [1951] A.C. 869 , I am of the opinion that what has to be sufficiently shown by the plaintiff for the purpose of establishing jurisdiction is, in the case of, for example, sub-paragraph (i), not merely ***455** that (1) there was a contract, and (2) such contract was made within the jurisdiction. Likewise, under sub-paragraphs (ii), (iii) and (iv), the existence of the relevant contract has to be sufficiently proved. But, once that is done, there arises a separate question as to the merits of the plaintiff's claim relative to that contract. That question was however not addressed by their Lordships in Korner's case, with the exception of Lord Tucker, who expressed the opinion, at p. 889 (with reference to claims founded on a tort under paragraph (*ee*), now paragraph (f)), that a lesser burden will fall on the plaintiff with regard to the merits of his claim, viz. whether the affidavits disclose a case which appears to merit consideration at the trial - a test consistent with the approach of Lord Davey in the Badische Anilin case, 90 L.T. 733 , and indeed with that of Lord Goddard C.J. in Malik in so far as he was not concerned with the question of jurisdiction under rule 1(1).

This approach is consistent with rule 4(1)(d) of Order 11 , concerned with applications made under rule 1(1)(c) . Moreover, support for this approach is to be derived from the development of the requirement of forum conveniens as an element in the exercise of the court's discretion under Order 11. It has been consistently stated, at least since the judgment of Pearson J. in the Dreyfus case, 29 Ch.D. 239 , that it is a serious question whether the jurisdiction under Order 11 ought to be invoked, to put a person outside the jurisdiction to the "inconvenience and annoyance of being brought to contest his rights in this country:" pp. 242-243. It is, of course, true to say that any inconvenience involved has been much reduced by modern methods of communication; but the point of principle remains. This is however very largely met by the application in this context of the principle of forum conveniens (as to which see Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460 , 481-482). The effect of this development is that, given that jurisdiction is established under one of the paragraphs of rule 1(1) and that proper regard is paid to the principle of forum conveniens, it is difficult to see why the fact that the writ is to be served out of the jurisdiction should have any particular impact upon the standard of proof required in respect of the existence of the cause of action. On this point, I find myself in respectful disagreement with the opinion expressed by Lloyd L.J. to the contrary in the Court of Appeal [1993] 1 Lloyd's Rep. 236 , 242. I prefer the approach of Stuart-Smith L.J. when, at p. 248, he commended his preferred view as consonant with common sense and policy, and continued:

"It seems to me to be wholly inappropriate once the question[s] of jurisdiction and forum [conveniens] are established for there to be prolonged debate and consideration of the merits of the plaintiffs' claim at the interlocutory stage."

It has been suggested that, since both the assessment of the merits of the plaintiff's claim and the principle of forum conveniens fall to be considered as elements in the exercise of the court's discretion, these should be regarded as interrelated in the sense that "the more conspicuous the presence of one element the less insistent the demands of justice that the other should also be conspicuous:" see Société Commerciale de Réassurance v. Eras International Ltd.(formerly Eras (U.K.)) [1992] 1 Lloyd's Rep. 570 , 588, *per* Mustill

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L.J. This approach originated in the speech of Lord Oaksey in Korner's case, at pp. 881-882, to the effect that the strength of the evidence in that case as to forum conveniens was such that only the slightest evidence was required of there having been a breach of contract within the jurisdiction. Lord Oaksey's speech also provided the inspiration for an expression of opinion by Parker L.J. to the effect that, if there is overwhelming evidence that England is the appropriate forum, it will be enough that, on the merits, the plaintiff's case is worthy of serious consideration: see Overseas Union Insurance Ltd. v. Incorporated General Insurance Ltd. [1992] 1 Lloyd's Rep. 439, 448, and see also Banque Paribas v. Cargill International S.A. [1991] 2 Lloyd's Rep. 19, 25. I must however express my respectful disagreement with this approach. Suppose that, for example, the plaintiff's case is very strong on the merits. If so, I cannot see that a case particularly strong on the merits can compensate for a weak case on forum conveniens. Likewise, in my opinion, a very strong connection with the English forum cannot justify a weak case on the merits, if a stronger case on the merits would otherwise be required. In truth, as I see it, the two elements are separate and distinct. The invocation of the principle of forum conveniens springs from the often expressed anxiety that great care should be taken in bringing before the English court a foreigner who owes no allegiance here. But if jurisdiction is established under rule 1(1), and it is also established that England is the forum conveniens, I can see no good reason why any particular degree of cogency should be required in relation to the merits of the plaintiff's case.

I wish also to refer to the view expressed by Stuart-Smith L.J. in the Court of Appeal that it was relevant to take into account the fact that proceedings in respect of the first presentation would in any event take place in England, and that this factor provided an additional and cogent reason why the court should exercise its discretion in favour of Seaconsar in relation to the second presentation: see at p. 250. However, if the plaintiff's case is not sufficiently strong on the merits, I cannot see that that weakness can be compensated for by the fact that other related proceedings are to proceed within the English jurisdiction. That is a matter which may be relevant to the question whether England is the forum conveniens for the proceedings in question. In the present case, however, there is no issue between the parties on forum conveniens, and I cannot therefore see that the fact that the proceedings in respect of the first presentation are going to proceed in this country in any event has any bearing on the issues in the present appeal.

Once it is recognised that, so far as the merits of the plaintiff's claim are concerned, no more is required than that the evidence should disclose that there is a serious issue to be tried, it is difficult to see how this matter, although it falls within the ambit of the court's discretion, has not in practice to be established in any event. This is because it is very difficult to conceive how a judge could, in the proper exercise of his discretion, give leave where there was no serious issue to be tried. Accordingly, a judge faced with a question of leave to serve proceedings out of the jurisdiction under Order 11 will in practice have to consider both (1) whether jurisdiction has been sufficiently established, on the criterion ***457** of the good arguable case laid down in Korner's case, under one of the paragraphs of rule 1(1), and (2) whether there is a serious issue to be tried, so as to enable him to exercise his discretion to grant leave, before he goes on to consider the exercise of that discretion, with particular reference to the issue of forum conveniens.

For these reasons I have come to the conclusion that, at least so far as sub-paragraphs (d)(i) or (ii) of rule 1(1) are concerned, the majority of the Court of Appeal erred when they held that Seaconsar had to establish under either of those sub-paragraphs a good arguable case on the merits. In my opinion, it was enough for Seaconsar to establish under either of those sub-paragraphs

that there was, in respect of one or more of the four points arising on the second presentation, a serious issue to be tried. It follows that the Court of Appeal erred in the exercise of their discretion when they refused leave to Seaconsar to serve proceedings out of the jurisdiction, and it and it is now necessary for your Lordships to consider whether, in the exercise of your discretion, such leave should be given.

As I have already indicated, the four points which arose on the second presentation were (1) whether the documents conformed to the letter of credit; (2) if not, whether Bank Melli had the authority of Bank Markazi to reject the documents; (3) if so, whether Bank Melli did in fact reject the documents; and (4) if so, whether such rejection took place within a reasonable time as required by article 16 of the U.C.P.

I can deal with this aspect of the appeal quite briefly. I take first point (2). It appears that the U.C.P. do not positively confer authority on the advising bank to reject the documents. Indeed, article 16(d) speaks in terms of the decision to refuse the documents being made by the issuing bank. If that is right, the question whether Bank Melli had the necessary authority from Bank Markazi is a matter of evidence; and, on the evidence presently available, I am not prepared to hold that there is no serious issue to be tried as to the existence of the relevant authority. Turning next to point (4), Seaconsar first put forward its case on the basis that a reasonable time for rejecting the documents under article 16(c) of the U.C.P. was five working days. But, before the Court of Appeal, it indicated that it wished to argue that a period of five working days was in fact too long a time, and that a reasonable time for objection in the circumstances of the present case was no more than two working days. If this latter proposition is correct, it appears on the evidence that the rejection was not made in time. In support of this proposition Seaconsar seeks to rely on Bankers Trust Co. v. State Bank of India [1991] 2 Lloyd's Rep. 443 , and on passages in certain textbooks, in particular Paget's Law of Banking, 10th ed. (1989), p. 643. I myself do not consider that Seaconsar should be shut out from advancing this second proposition, even though it may be handicapped by its previous stance as to the relevant period of time; and on this basis, I consider that there is a serious issue to be tried on point (4) as well. For these reasons, the claim identified by Seaconsar gives rise to serious issues to be tried, and in the circumstances, it is unnecessary for me to say anything about points (1) and (3).

I would therefore allow the appeal, and I propose that leave be given to Seaconsar to serve the proceedings outside the jurisdiction in respect of ***458** the second presentation, as well as the first. From this it follows that the orders of Saville J. and of the Court of Appeal should be set aside. I also propose that Bank Markazi be ordered to pay the costs of Seaconsar before your Lordships' House, but that costs incurred at first instance and in the Court of Appeal be costs in the cause.

LORD BROWNE-WILKINSON.

My Lords, for the reasons given in the speech prepared by my noble and learned friend, Lord Goff of Chieveley, I, too, would allow the appeal.

LORD MUSTILL.

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley, and for the reasons which he gives I, too, would allow the appeal.Appeal allowed with costs in House of Lords. Order of Hobhouse J. restored. Costs at first instance and in Court of Appeal to be costs in cause. (M. G.)

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1. R.S.C., Ord. 11, r. 1(1) : see post, p. 449E-F. R. 4(1)(2): see post, p. 450A-B.

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EXHIBIT 58

[2001] UKHL 64

***440 Donohue v Armco Inc & ors.**

House of Lords

Lord Bingham of Cornhill, Lord Mackay of Clashfern, Lord Nicholls of Birkenhead, Lord Hobhouse of Woodborough, and Lord Scott of Foscote

Judgment delivered 13 December 2001

Conflict of laws—Anti-suit injunction—Service out of jurisdiction—Exclusive jurisdiction clause—Forum non conveniens—Claimant sought to restrain US proceedings on basis of exclusive English jurisdiction clauses—US plaintiffs undertook not to enforce any award of multiple or punitive damages—Extent to which claims and parties in US proceedings were within and bound by jurisdiction clauses—Whether US defendants could be joined as claimants in English proceedings for anti-suit injunction—Whether US proceedings vexatious—Whether England natural forum—Whether US defendants had cause of action entitling them to service out against US plaintiffs—Whether ends of justice best served by single trial in New York—Whether English court should grant anti-suit injunction.

This was an appeal by the plaintiffs in US proceedings from a majority decision of the Court of Appeal ([2000] CLC 1090) granting the claimant an anti-suit injunction restraining the US plaintiffs' proceedings in New York.

The plaintiffs in New York were Armco Inc and four other companies in the Armco group ('AFSC', 'AFSIL', 'APL' and 'NNIC'). The Armco group formerly included a group of insurance companies ('BNIG') which were in run-off. Armco agreed to sell BNIG to its management and negotiations were conducted by 'R' and 'S', two senior and long-serving Armco executives, both of them US citizens and residents. The prospective buyers were the claimant 'D' and 'A', also senior and long-serving Armco executives, but UK citizens resident in Singapore and England respectively. The sale of the business was effected by incorporating a new company 'CISHL' to which the BNIG assets would be transferred. The shares in BNIG were held by AFSIL and another Armco subsidiary 'AFSEL'. AFSC injected US$32.5m in cash and securities into CISHL. A further US$10m was transferred from AFSEL to CISHL. In 1991 AFSIL and AFSEL executed transfer agreements transferring all their assets in BNIG into CISHL. On the same day all the shares in CISHL were sold to 'Wingfield' under a sale and purchase agreement. After the sale BNIG was renamed 'NAIG', the leading company of the group being 'NAIC'.

The parties to the agreements on the Armco side were AFSIL, AFSEL and AFSC and on the buyers' side CISHL, Wingfield, D and A. On the later dissolution of AFSEL, Armco Inc succeeded to the rights and obligations of that company, and so was to be treated as a party to one of the transfer agreements and to the sale and purchase agreement. Each of the agreements contained an express stipulation that the contract was governed by English law, made provision for service on a nominated agent of the vendor's solicitors in England, and provided for the exclusive jurisdiction of the English court.

In 1997, NAIC went into provisional liquidation with other group companies and a winding-up petition was presented to the High Court. At that time Armco received certain information from A, who had resigned from NAIG in 1995. On the basis of that information, proceedings were issued in 1998 by the five Armco appellants in New York against NAIC, D, A, R and S and their respective companies, 'ITRS' and 'IROS', Wingfield, CISHL, and NPV Ltd (a Nevis company). The proceedings were based on what the amended complaint described as

an international fraud of immense proportions. The Armco companies contended that a secret agreement had been made ***441** between D, A, R and S in New York in April 1991. Pursuant to that agreement Armco would be fraudulently induced to inject an extra-large sum into BNIG and the four would then buy BNIG through Wingfield, a Jersey company which they (or some of them) owned. Since R and S were Armco executives negotiating on behalf of their employer their conduct was a breach of the duty they owed to their employer. The plan was implemented. Much of the money injected into the group had allegedly, been siphoned off by the four for their own ends. Armco also contended that, as part of the secret plan, the group of four fraudulently induced Armco (by APL) to enter into debt collection contracts with NPV, the Nevis company which they owned: those contracts were said to have been unduly favourable to NPV and to have enabled the four to take exorbitant fees for themselves. It was further alleged that the four fraudulently obtained money from two trust funds set up earlier to give financial protection to NNIC against claims by policyholders of an insurer whose business NNIC had taken over. A further complaint was that, between 1991 and 1997, the four diverted funds from NAIG to themselves by means of various commission, consultancy and dividend payments. The New York proceedings also included claims under the Federal Racketeer Influenced and Corrupt Organizations Act ('RICO'), which enabled a successful plaintiff to recover triple, punitive and exemplary damages.

R and S and ITRS and IROS and Wingfield and CISHL moved to dismiss the New York proceedings against them on various grounds. That motion was denied. D did not take part in that proceeding, but instead applied to the English court for an anti-suit injunction to enforce the exclusive jurisdiction clauses ('EJCs') in the transfer and sale and purchase agreements. Application was also made in the action to join R and S and ITRS and IROS and Wingfield and CISHL as claimants ('the potential co-claimants' or 'PCCs'). APL and NNIC applied to set aside service upon them.

Aikens J ([1999] CLC 1748) ordered that service on APL and NNIC be set aside. That decision was upheld by the Court of Appeal ([2000] CLC 1090). The judge further decided that the PCCs should not be joined as claimants in the English action. The majority in the Court of Appeal took a different view and held that they should be joined. The judge held that an injunction restraining proceedings in New York should not be granted to D on the basis of his finding that many of the claims in the New York proceedings did not come within the exclusive jurisdiction clauses in the agreements. The New York proceedings against D were not vexatious and oppressive. The Court of Appeal granted an injunction against the first three Armco defendants (Armco Inc, AFSC and AFSIL) restraining them from commencing or continuing proceedings against any of the claimants (D, R and S, IROS, ITRS, Wingfield and CISHL) in any court other than those of England and Wales regarding any dispute arising out of the management buy-out, defined to mean the 1991 disposal of BNIG. The injunction did not apply to APL and NNIC, the joinder of which companies had been disallowed, and was limited to the causes of action held to fall within the exclusive jurisdiction clauses. But the benefit of the exclusive jurisdiction clauses was extended to the four PCCs who were not party to them (R and S and their respective companies). The object of the injunction was to give effect to the exclusive jurisdiction clauses and to ensure trial in England of the issues arising out of or connected with the management buy-out between all the parties involved. The Armco companies appealed challenging the joinder of the US PCCs and offering not to enforce against D, Wingfield or CISHL any multiple or punitive damages awarded in the New York proceedings.

Held, allowing the appeal:

1 CISHL was a party to the transfer agreements and Wingfield was party to the sale and purchase agreement. The agreements contained EJCs and the court

had power to add those companies as claimants if it considered it desirable to do so under CPR, r. 19.2 . Whether it was desirable depended on whether the US PCCs should be joined and whether the grant of an anti-suit injunction to D was upheld.

2 The other PCCs were in a different position to Wingfield and CISHL since they were not party to the agreements and did not have the benefit of the EJCs. None had any cause of action that would entitle the court to give leave to serve out of the jurisdiction and thus none could bring proceedings against Armco companies in England unless those companies submitted to the jurisdiction. The judge was right that England was not the natural forum for the proceedings and that the New York proceedings against the US PCCs were not vexatious and oppressive. (Siskina v Distos Compania Naviera SA [1979] AC 210, Societe Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871 and Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 applied.)

3 Since the PCCs could not have obtained leave to serve out, the fact that the three Armco companies were amenable to the jurisdiction by virtue of their contractual relationship with D did not enable the US PCCs to take advantage of that relationship to effect service on the solicitors nominated by those companies pursuant to the agreements. A foreign party could only be made subject to the jurisdiction to the extent that the rules permitted. The majority of the Court of Appeal was wrong to have allowed joinder of the US PCCs. (Holland v Leslie [1894] 2 QB 450, Johnson v Taylor Bros and Co Ltd [1920] AC 144 applied.)

4 The court would normally enforce D's contractual right as against the three Armco appellants to submit disputes between them within the scope of the EJCs to the English court. However the court could decline to grant an injunction where the interests of other parties not bound by the clauses or the existence of other claims meant that other proceedings would anyway take place with the risk of inconsistent decisions. In the instant case D's right against the three Armco companies had to be balanced against the fact that the five Armco plaintiffs in New York had successfully founded jurisdiction there against the US PCCs as defendants and that the two Armco companies which were not subject to the jurisdiction of the English court by virtue of the EJCs had successfully founded jurisdiction in New York against D, Wingfield and CISHL. Further, the three Armco companies had successfully founded jurisdiction in New York against D, Wingfield and CISHL in respect of claims that were not within the EJCs. That amounted to a strong reason for not giving effect to the EJCs in favour of D on the basis that the ends of justice would be best served by a single trial in New York. The Court of Appeal had erred in the exercise of its discretion and the court would exercise the discretion afresh. It would set aside the injunction on the basis of the undertaking by the Armco plaintiffs not to enforce against D, Wingfield or CISHL any multiple or punitive damages awarded in the New York proceedings.

The following cases were referred to in the speeches:

- Aggeliki Charts Compania Maritima SA v Pagnan SpA (‘The Angelic Grace’) [1995] 1 Ll Rep 87.
- Airbus Industrie GIE v Patel [1998] CLC 702; [1999] 1 AC 119.
- Akai Pty Ltd v People's Insurance Co Ltd [1997] CLC 1508.
- Aratra Potato Co Ltd v Egyptian Navigation Co (‘The El Amria’) [1981] 2 Ll Rep 119.
- Beck v Value Capital Ltd (No. 2) [1975] 1 WLR 6; [1976] 1 WLR 572 (CA).
- Bremen M/S v Zapata Off-Shore Co (1972) 407 US 1.

- British Aerospace plc v Dee Howard Co [1993] 1 Ll Rep 368.
- British Airways Board v Laker Airways Ltd [1985] AC 58.
- Castanho v Brown and Root (UK) Ltd [1981] AC 557.
- Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334.
- Citi-March Ltd v Neptune Orient Lines Ltd [1996] 1 WLR 1367.
- Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 588.

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- Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd [1999] CLC 579.
- DSV Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar ('The Sennar') (No. 2) [1985] 1 WLR 490.
- Eleftheria, The [1970] P 94.
- Evans Marshall & Co Ltd v Bertola SA [1973] 1 WLR 349.
- FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association (1997) 41 NSWLR 559.
- Fehmarn, The [1958] 1 WLR 159.
- Holland v Leslie [1894] 2 QB 450.
- Johnson v Taylor Bros & Co Ltd [1920] AC 144.
- Kidd v van Heeren [1998] 1 NZLR 324.
- Mackender v Feldia AG [1967] 2 QB 590.
- Mahavir Minerals Ltd v Cho Yang Shipping Co Ltd ('The M C Pearl') [1997] CLC 794.
- Mercedes-Benz AG v Leiduck [1995] CLC 1090; [1996] AC 284.
- Siskina v Distos Compania Naviera SA [1979] AC 210.
- Societe Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871.
- South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provincien' NV [1987] AC 24.
- Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460.
- Ultisol Transport Contractors Ltd v Bouygues Offshore SA [1998] CLC 1526.
- Unterweser Reederei GmbH v Zapata Off-Shore Co ('The Chaparral') [1968] 2 Ll Rep 158.
- Volkswagen Canada Inc v Auto Haus Frohlich Ltd [1986] 1 WWR 380.

Representation

- Lord Grabiner QC and Daniel Toledano (instructed by Freshfields) for the appellant.
- Peter Leaver QC and Robert Howe (instructed by Simmons & Simmons) for the respondent.

SPEECHES

Lord Bingham of Cornhill:

1 The issue in this appeal is whether an injunction should have been granted to restrain the prosecution of proceedings in New York and, if so, in whose favour it should have been granted.

2 By a summons issued on 8 March 1999 Mr Donohue, the respondent to this appeal, sought such an injunction against the five companies, all of them in the Armco group, which are named as the appel-

lants before the House. Aikens J at first instance declined to grant an injunction: [1999] CLC 1748. His decision was reversed by a majority of the Court of Appeal (Stuart-Smith and Sedley L JJ, Brooke LJ dissenting) [2000] CLC 1090, who granted an injunction. The facts giving rise to this appeal were helpfully summarised by the judge and Stuart-Smith LJ: see at p. 1750 et seq and 1092 et seq of the respective judgments. Stuart-Smith LJ also appended to his judgment, at p. 1188, an annex giving details of the companies and individuals involved in the proceedings and an explanation of the acronyms used in his judgment. Both the factual summary and the annex should be treated as incorporated in this opinion, which permits more economical reference to be made to the background history.

3 The parties fall into two camps. One camp comprises Armco Inc, the parent company of the Armco group, a conglomerate based in the US, and four other companies known by their initial letters (‘AFSC,’ ‘AFSIL’, ‘APL’ and ‘NNIC’). These five companies are plaintiffs in the New York proceedings already mentioned and defendants (or potential defendants) in this English action and are named as appellants before the House. This camp also included Armco Financial Services Europe Ltd (‘AFSEL’), a company which has now been dissolved.

4 The second camp comprises, first of all, Mr Donohue, a defendant in the New York proceedings and the claimant here. It also comprises a number of potential co-claimants (‘PCCs’), all of them defendants in the New York proceedings: Mr Rossi and his Ohio ***444** company known as ‘ITRS’; Mr Stinson and his Ohio company known as ‘IROS’; Wingfield Ltd, a Jersey company; and another Jersey company known as ‘CISHL’. Another defendant was sued in New York, Mr Atkins, but he settled the claim against him.

5 The Armco group formerly included several insurance companies together known as the British National Insurance Group (‘BNIG’). BNIG ceased to write new business and entered run-off status in 1984. It thus represented a liability to Armco, since claims under existing policies had to be met, and negotiations for the sale of the business were set in train. On the Armco side, the negotiations were conducted by Rossi and Stinson, two senior and long-serving Armco executives, both of them US citizens and residents. The prospective buyers were Mr Donohue and Mr Atkins, also senior and long-serving Armco executives, but UK citizens resident in Singapore and England respectively.

6 The shares in BNIG were owned by AFSIL and AFSEL. To effect the sale of the business Armco sold its shares in BNIG. To this end it incorporated CISHL. AFSC injected US$32.5m in cash and securities into CISHL. A further US$10m was transferred from AFSEL to CISHL. On 3 September 1991 AFSIL and AFSEL each executed an agreement (referred to as ‘the transfer agreements’) transferring all their assets in BNIG into CISHL. On the same day Wingfield acquired all the shares in CISHL under a sale and purchase agreement bearing the same date under which Wingfield was named as the purchaser. After the sale BNIG was renamed the North Atlantic Insurance Group (‘NAIG’), the leading company of which was called the North Atlantic Insurance Company Ltd (‘NAIC’).

7 Many of the facts surrounding these transactions are the subject of acute controversy between the parties. But two points central to this appeal are not in doubt. First, the only parties to these three agreements were (on the **Armco** side) AFSIL, AFSEL and AFSC and (on what may be called the **Donohue** side) CISHL, Wingfield, Mr **Donohue** and Mr Atkins. It is now accepted that, on the dissolution of AFSEL, **Armco** Inc succeeded to the rights and obligations of that company, so it also is to be treated as a party to one of the transfer agreements and to the sale and purchase agreement. But the other companies in the **Armco** group (APL and NNIC) and several of the PCCs (Rossi and Stinson and their respective companies ITRS and IROS) were not parties to any of the three agreements.

Secondly, each of the three agreements contained an express stipulation that the contract was governed by English law, made provision for service on a nominated agent of the vendor's solicitors in England and, most importantly, provided for the exclusive jurisdiction of the English court. In the sale and purchase agreement it was provided that 'the parties hereby irrevocably submit themselves to the exclusive jurisdiction of the English courts to settle any dispute which may arise out of or in connection with this agreement'. The exclusive jurisdiction clause in each of the transfer agreements was differently worded, but no point has been taken on the difference of wording.

8 Several years passed before, in early 1997, NAIC went into provisional liquidation with other group companies and a winding-up petition was presented to the High Court. From about this date, it appears that there were a series of discussions between a lawyer representing Armco and Mr Atkins, who had resigned from NAIG in 1995. Mr Atkins made a series of statements, the last of them in evidence dated September 1998. On this statement Armco strongly rely in support of their case.

9 On 5 August 1998 proceedings were issued by the five Armco appellants in New York against NAIC, Mr Donohue, Mr Atkins, all the six PCCs (Rossi and Stinson and their respective companies, Wingfield and CISHL), and NPV Ltd (a Nevis company). The proceedings were based on what the amended complaint described as 'an international fraud of immense proportions'. The amended complaint is a substantial document, running to more than 70 pages and including 17 specific counts. It is not easily summarised, but the broad thrust of the Armco companies' case is clear enough. They contend that a secret agreement (recorded in writing) was made between Donohue, Atkins, Rossi and Stinson in New York in April 1991. Pursuant to this agreement Armco would be fraudulently induced to inject an extra-large sum ***445** into BNIG and the four would then buy BNIG, thus enriched, through Wingfield, a Jersey company which they (or some of them) owned. Since Rossi and Stinson were Armco executives negotiating on behalf of their employer their conduct was a flagrant breach of the duty they owed to their employer. The plan was implemented. Much of the money injected into the group has, it is alleged, been siphoned off by the four for their own ends. But the alleged fraud did not end there. Armco also contend that, as part of the secret plan, the group of four fraudulently induced Armco (by APL) to enter into debt collection contracts with NPV, the Nevis company which they owned: these contracts are said to have been unduly favourable to NPV and to have enabled the four to take exorbitant fees for themselves. It is further alleged that the four fraudulently obtained money from two trust funds set up earlier to give financial protection to NNIC against claims by policyholders of an insurer whose business NNIC had taken over. In this way, it is said, the four fraudulently depleted the trust funds by some US$16m after the 3 September 1991 agreements. A further complaint is that, between 1991 and 1997, the four diverted funds from NAIG to themselves by means of various commission, consultancy and dividend payments. The New York proceedings also included claims under the Federal Racketeer Influenced and Corrupt Organizations Act 18 USC §1962(c) ('RICO'), which enables a successful plaintiff to recover triple, punitive and exemplary damages.

10 All the PCCs (Rossi and Stinson and their respective companies, Wingfield and CISHL) moved to dismiss the New York proceedings against them on various grounds, a motion denied by Judge Schwartz sitting in the District Court of the Southern District of New York on 30 September 1999. Mr Donohue did not take part in that proceeding, but had instead issued the present summons applying for an injunction on 8 March 1999. Application was also made in the action to join the PCCs as claimants. APL and NNIC applied to set aside service upon them.

11 These three applications came before Aikens J who gave his reserved judgment on 15 July 1999.

On the third summons he ordered that service on APL and NNIC be set aside ([1999] CLC 1748, para. 68). This decision was upheld by the Court of Appeal ([2000] CLC 1090, para. 46 and 80). It has not been challenged before the House.

12 On the second summons, the judge decided that the PCCs should not be joined as claimants in the English action (para. 50, 67). The majority in the Court of Appeal took a different view and held that they should be joined (para. 52–53, 98). Brooke LJ held that there were no grounds for allowing any of the American PCCs (Rossi and Stinson and their respective companies) to be joined as claimants: para. 89–92. The propriety of joining the PCCs as claimants in this action is one of the major issues before the House.

13 On the first summons, the judge held that an injunction restraining proceedings in New York should not be granted to Mr Donohue. In reaching that conclusion he made two important findings. The first was expressed in para. 42 and 43 of his judgment (p. 1760):

‘42.1have decided that the claims raised in the NY proceedings based on a pre-existing conspiracy to defraud Armco are not claims that “arise out of either the SPA [sale and purchase agreement] or the transfer agreements. They “arise out of the [alleged] agreement to conspire against Armco to defraud it. I have also concluded that the claims concerning the collection agreement did not arise out of or in connection with the SPA or the transfer agreements. I doubt the trust fund claims come within the EJCs [exclusive jurisdiction clauses] too, but I was told that the trust fund claims may not be relevant now that the NNIC/NAIC disputes have been settled subject to ratification by the court. Thus at least the issues raised in counts 1–8 and 9–12 [of the amended complaint in the New York proceedings] are not within the EJCs.

43.This means that much of the disputes raised in the NY proceedings are outside the scope of the EJCs …’

The second important finding was that Armco Inc had never succeeded to the rights and obligations of AFSEL under the transfer agreement and the sale and purchase agreement to ***446** which AFSEL had been party and so had never become bound by the exclusive jurisdiction clause in those agreements (para. 28). The judge accordingly approached Mr Donohue's application by considering whether the New York proceedings against him were vexatious and oppressive and concluded that they were not (para. 65–66). All three members of the Court of Appeal disagreed with these two findings, although with some qualifications by Brooke LJ concerning the first (para. 30–31, 27, 67, 97). The Court of Appeal held that these errors vitiated the judge's exercise of discretion and so entitled the Court of Appeal to exercise its discretion afresh (para. 32, 87).

14 The Court of Appeal's conclusions on these two points have not been in issue before the House. Armco Inc accepts that as the successor to AFSEL it is bound by the exclusive jurisdiction clauses in the transfer agreement to which AFSEL was party and in the sale and purchase agreement to the extent that AFSEL would itself have been bound had it not been dissolved. Armco Inc also asserts that as the ultimate victim of the alleged conspiracy it has claims independent of those derived from AFSEL, an assertion challenged by Mr Donohue and the PCCs. On the scope of the clauses, the Armco companies accept that the clauses cover claims based on the conspiracy which preceded the making of the agreements as well as the misrepresentations and concealment which procured them to be made. The scope of the clauses was not the subject of argument before the House and I do not think it appropriate to give detailed consideration to this aspect of the case. The exclusive jurisdiction clause in the sale and purchase agreement, quoted above, was in wide terms. The practice of the English courts is to give such clauses, as between the parties to them, a generous interpretation.

15 The Court of Appeal granted an injunction against the first three Armco defendants (Armco

Inc, AFSC and AFSIL) restraining them from commencing or continuing proceedings against any of the claimants (Donohue, Rossi and Stinson, IROS, ITRS, Wingfield and CISHL) in any court other than those of England and Wales regarding any dispute arising out of the management buy-out, defined to mean the 1991 disposal of BNIG. The injunction was expressed to apply in particular to the Armco companies' New York proceedings already referred to, and to the numbered counts which were held to cover the 1991 management buy out. Thus the injunction did not apply to APL and NNIC, the joinder of which companies had been disallowed, and was limited to the causes of action held to fall within the exclusive jurisdiction clauses. But the benefit of the exclusive jurisdiction clauses was extended to the four PCCs who were not party to them (Rossi and Stinson and their respective companies). The object of the injunction was plainly to give effect to the exclusive jurisdiction clauses and to ensure trial in England of the issues arising out of or connected with the management buy-out between all the parties involved.

16 The grant of an anti-suit injunction, as of any other injunction, involves an exercise of discretion by the court. To exercise its discretion reliably and rationally, the court must have the fullest possible knowledge and understanding of all the circumstances relevant to the litigation and the parties to it. This is particularly true of an anti-suit injunction because, as explained below, the likely effect of an injunction on proceedings in the foreign and the domestic forum and on parties not bound by the injunction may be matters very material to the decision whether an injunction should be granted or not. Thus although the two main issues before the House cannot be regarded entirely independently of each other, it is preferable to consider the issue of joinder of the PCCs before considering the grant of an anti-suit injunction more generally.

Joinder of the Pccs

17 CISHL was party to each of the transfer agreements. Wingfield was party to the sale and purchase agreement. All three agreements contained an English exclusive jurisdiction clause. Both companies have been sued by Armco in New York. Both have claims falling within RSC, O. 11, r. 1(1)(d)(iii) and (iv) (now CPR, r. 6.20(5)(c) and (d)) entitling them to seek leave to ***447** serve proceedings out of the jurisdiction. Under RSC, O. 15, r. 6(2)(b)(ii) (now CPR, r. 19.2(2)) the court has power to add these companies as claimants if it considers it desirable to do so. Thus if the court should consider it desirable to do so there is no jurisdictional objection to the grant of leave to add CISHL and Wingfield as claimants in Mr Donohue's action and to give leave (if it were needed) to CISHL and Wingfield to serve AFSIL and Armco Inc (as the successor to AFSEL) out of the jurisdiction. The basis of their claim is in principle the same as that of Mr Donohue, but since they seek to be added to existing proceedings they must persuade the court that it is desirable to add them. The decision whether it is desirable to add them will be heavily influenced by the decision whether to join the other PCCs and whether Mr Donohue upholds his claim to the grant of an anti-suit injunction.

18 The other four PCCs (Rossi and Stinson and their respective companies) are in a different position. None was a party to either transfer agreement or to the sale and purchase agreement and so none has the benefit of the English exclusive jurisdiction clause. It is common ground that none has any cause of action which would entitle the court to give leave to serve proceedings out of the jurisdiction under RSC, O. 11, r. 1 or CPR, r. 6.20, and thus none could bring independent proceedings against any Armco company in England unless that company submitted to the jurisdiction. But these PCCs rely on the broad power of the court under RSC, O. 15, r. 6 and CPR, r. 19, which is said to be unconstrained by the rules on service out of the jurisdiction, and it is said to be desirable to add them because they have a substantial cause of action entitling them to seek an anti-suit injunction. The Armco companies reply that a foreign party, even if already properly sued within the jurisdiction, may

not be subjected to a claim for which leave to serve out could not be granted and further that, in the absence of any contractual right to rely on an exclusive jurisdiction clause, these PCCs have on the material before the House no cause of action entitling them to seek an anti-suit injunction. The first issue between the parties is whether these PCCs can show any cause of action which would entitle them to claim an injunction.

19 The jurisdiction of the English court to grant injunctions, both generally and in relation to the conduct of foreign proceedings, has been the subject of consideration by the House of Lords and the Privy Council in a series of decisions in recent years which include Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA [1979] AC 210; Castanho v Brown & Root (UK) Ltd [1981] AC 557; British Airways Board v Laker Airways Ltd [1985] AC 58; South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provincien' NV [1987] AC 24; Societe Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871; and Airbus Industrie GIE v Patel [1998] CLC 702; [1999] 1 AC 119. Those decisions reveal some development of principle and there has in other decisions (for example, Mercedes-Benz AG v Leiduck [1995] CLC 1090; [1996] AC 284) been some divergence of opinion. But certain principles governing the grant of an injunction to restrain a party from commencing or pursuing legal proceedings in a foreign jurisdiction, in cases such as the present, as between the Armco companies and these PCCs, are now beyond dispute. They were identified by Lord Goff of Chie veley giving the opinion of the Judicial Committee of the Privy Council in Aerospatiale (at p. 892):

- (1)The jurisdiction is to be exercised when the ends of justice require it.
- (2)Where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.
- (3)An injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy.
- (4)Since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution.

In Aerospatiale the issue was whether proceedings in Texas should be restrained in favour of Brunei, and (at p. 896) Lord Goff summarised the guiding principles: ***448**

'In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English or Brunei court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action; and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. Fortunately, however, as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction upon appropriate terms; just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is, prima facie, inappropriate, can likewise often be solved by granting a stay upon terms.'

20 If these principles are applied to the present case it is in my opinion plain that an anti-suit injunction could not properly be granted in favour of these PCCs. The judge (considering the position of Mr Donohue and all the PCCs) concluded that England was not the natural forum for these proceedings, that the connections with England were slim and that the New York proceedings were not vexatious and oppressive (para. 65–66). Stuart-Smith LJ observed that if this were an alternative forum case he would not necessarily disagree with the judge (para. 38)). Brooke LJ considered that the convenient forum for the resolution of all disputes between Rossi and Stinson and their former employers was clearly situated on the other side of the Atlantic (para. 92). Judge Schwartz concluded that: 'Permitting this trial to proceed in New York would be neither oppressive nor vexatious to defendants', and further said:

'This court concludes that this action, involving US plaintiffs, mostly US or non-English defendants, and a fraudulent scheme that allegedly arose in New York, is far removed from the facts of those cases where courts granted the extraordinary remedy of forum non conveniens.'

The Armco companies are incorporated in Ohio, Delaware, Wisconsin and (in the case of APL) Singapore. Rossi and Stinson and their companies have no English links. The dispute between them and the Armco companies concerns the alleged breach of the fiduciary duty they owed to their employers. It is plain that England is not the natural forum for resolution of this dispute and that the New York proceedings by the Armco companies against these PCCs are neither vexatious nor oppressive.

21 There is another more technical objection to the joinder of these PCCs. In stating the third of his basic principles in Aerospatiale, Lord Goff made reference to 'a party who is amenable to the jurisdiction of the court'. This echoed the language of Lord Diplock in his important statement of principle in The Siskina [1979] AC at p. 256, which has been understood to mean that the court may only grant an injunction where it has personal jurisdiction over the defendant in the sense that he could be served personally or under RSC, O.11 (other than subr. (i)): see Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 at p. 342, per Lord Browne-Wilkinson. These PCCs could not, as already noted, have obtained leave to serve out of the jurisdiction on any of the Armco companies in independent proceedings. Service on APL and NNIC has been set aside. Does the amenability of Armco Inc, AFSC and AFSIL to the jurisdiction of the English court by virtue of their contractual relationship with Mr Donohue enable these PCCs to take advantage of that relationship to effect service on the solicitors nominated by those companies pursuant to the transfer and sale and purchase agreements, and thus to prosecute a claim which could not otherwise have been prosecuted in this forum? In my opinion it does not. Since Holland v Leslie [1894] 2 QB 450 the view has prevailed that the court should refuse to allow an amendment of proceedings which would introduce a new cause of action against a foreign defendant in respect of which the court would have refused leave for service out of the jurisdiction (see, for instance, Beck v Value Capital Ltd (No. 2) [1975] 1 WLR 6, affirmed, although not on this point, [1976] 1 WLR 572). This view seems to me to accord with principle. The jurisdiction of the English court is territorial. A party resident abroad may be subjected to the jurisdiction of the court to the extent (and only to the extent) that statute or rules made under statute permit. It would emasculate that salutary rule if such a party, properly served with notice of a claim falling within RSC, O. 11, r. 1 or CPR, r. 6.20 were then to be exposed to claims falling outside the relevant rule. In exercising its discretion to give leave to serve out of the jurisdiction the court will have regard to the substance of a claimant's complaint and not permit jurisdiction to be obtained by a mere device: Johnson v Taylor Bros & Co Ltd [1920] AC 144. It would be wrong in principle to allow these PCCs to use Mr Donohue's action as a Trojan horse in which to enter the proceedings when they could

have shown no possible ground for doing so in their own right.

22 The majority of the Court of Appeal were in my opinion wrong to allow the joinder of these four PCCs, and I would accordingly set aside that order and refuse joinder.

The grant of an injunction to Mr Donohue

23 I turn to the question whether an anti-suit injunction should be granted to Mr Donohue, recognising that as between him and the first three Armco appellants (Armco Inc, AFSC and AFSIL) there is a contractual obligation to submit any dispute which may arise out of or in connection with the sale and purchase agreement to the exclusive jurisdiction of the English court. It is plain that while some of the claims made by the Armco companies in the New York proceedings fall outside the scope of this clause, some claims central to the Armco companies' complaint fall within it. In this situation, exercise of the broad discretion conferred on the court by s. 37 of the Supreme Court Act 1981 to grant an injunction in all cases in which it appears to the court to be just and convenient to do so is controlled by principles to be derived from a substantial line of authority here and abroad.

24 If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in The Eleftheria [1970] P 94, at pp. 99–100, Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion, and his judgment has been repeatedly cited and applied. Brandon J did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material. (I am mindful that the principles governing the grant of injunctions and stays are not the same: see Aerospatiale at p. 896. Considerations of comity arise in the one case but not in the other. These differences need not, however, be explored in this case.)***450**

25 Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause. That was the result in Mackender v Feldia AG [1967] 2 QB 590; Unterweser Reederei GmbH v Zapata Off-Shore Co ('The Chaparral') [1968] 2 Ll Rep 158; The Eleftheria [1970] P 94; DSV Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar ('The Sennar') (No. 2) [1985] 1 WLR 490; British Aerospace plc v Dee Howard Co [1993] 1 Ll Rep 368; Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 588; Aggeliki Charis Compania Maritima SA v Pagnan SpA (''The Angelic Grace') [1995] 1 Ll Rep 87; and Akai Pty Ltd v People's Insurance Co Ltd [1997] CLC 1508. A similar approach has been followed by courts in the US, Canada, Australia and New Zealand: see, for

example, M/S Bremen v Zapata Off-Shore Co (1972) 407 US 1; Volkswagen Canada Inc v Auto Haus Frohlich Ltd [1986] 1 WWR 380; FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association (1997) 41 NSWLR 559; and Kidd v van Heeren [1998] 1 NZLR 324.

26 The Fehmarn (Cargo owners) v Fehmarn (Owners) [1958] 1 WLR 159 shows that this is not an invariable result. This was one of the earlier cases in the modern series. The Russian exclusive jurisdiction clause was a condition in a bill of lading, no doubt part of a standard form, and certainly not the subject of negotiation between the parties to the eventual dispute. That was between English owners of the bill and German owners of the vessel. The dispute was held to have a much closer connection with England than with Russia, and it was thought that the German owners did not object to the dispute being decided in England if they could avoid giving security. On those grounds, the judge having declined to stay the proceedings in England, the Court of Appeal upheld his decision.

27 The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions. These decisions are instructive. In Evans Marshall & Co Ltd v Bertola SA [1973] 1 WLR 349 there was a tripartite dispute but only two of the parties were bound by a clause conferring exclusive jurisdiction on the court in Barcelona. Kerr J at first instance was impressed by the undesirability of there being two actions, one in London and the other in Barcelona (pp. 363–364). The Court of Appeal took a similar view (pp. 377, 385). Sachs LJ thought separate trials particularly inappropriate where a conspiracy claim was in issue (p. 377). In Aratra Potato Co Ltd v Egyptian Navigation Co (‘The El Amria’) [1981] 2 Ll Rep 119 the primary dispute was between cargo interests and the owner of the vessel, both parties being bound by a clause in the bill of lading conferring exclusive jurisdiction on the courts of Egypt. But the cargo interests had also issued proceedings against the Mersey Docks and Harbour Co, which was not bound by the clause. The Court of Appeal upheld the judge's decision refusing a stay. In the course of his leading judgment in the Court of Appeal Brandon LJ said (at p. 128):

‘I agree entirely with the judge's view on that matter, but would go rather further than he did in the passage from his judgment quoted above. By that I mean that I do not regard it merely as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries. See as to this Halifax Overseas Freighters Ltd v Rasno Export (“The Pine Hill”) [1958] 2 Ll Rep 146 and Taunton-Collins v Cromie [1964] 1 WLR 633.’

Citi-March Ltd v Neptune Orient Lines Ltd [1996] 1 WLR 1367 also involved third party interests and raised the possibility of inconsistent decisions. Colman J regarded separate trials ***451** in England and Singapore as not only inconvenient but also a potential source of injustice and made an order intended to achieve a composite trial in London despite a Singaporean exclusive jurisdiction clause: see at pp 1375–1376. Mahavir Minerals Ltd v Cho Yang Shipping Co Ltd (The M C Pearl) [1997] CLC 794 again involved third parties and raised the possibility of inconsistent findings. Despite a clause conferring exclusive jurisdiction on the courts of Seoul, Rix J refused to stay proceedings in England. He regarded the case as on all fours with Citi-March (see p. 805) and at p. 798 observed:

‘It seems to me that so far the plaintiffs have shown strong cause why the jurisdiction clause should not be enforced. This is indeed a paradigm case for the concentration of all the relevant parties' disputes in

a single jurisdiction. If in such a case a host of different jurisdiction clauses were to be observed, the casualty at the root of the action would become virtually untriable. The action would fragment and reduplicate, at vast cost … ’

A similar approach is discernible in Ultisol Transport Contractors Ltd v Bouygues Offshore SA (‘The Bos 400’) [1998] CLC 1526, in which the disputes involved four parties only two of whom were bound by an English exclusive jurisdiction clause. Although the effect of the clause was described by Evans LJ as ‘near-conclusive’ (para. 29), an injunction to restrain proceedings in South Africa was refused. In para. 27 of his judgment Evans LJ said:

‘In my judgment, two questions arise, one a matter of principle. First, should the court, when deciding whether or not to enforce the exclusive jurisdiction clause by means of an injunction which prevents Bouygues from continuing with its proceedings against Ultisol in South Africa, take into account the effects of such an injunction on persons who are not parties or entitled to enforce the contract containing the jurisdiction clause, Portnet and Caspian here, but who are both necessary and proper parties to the litigation wherever it is held? In my judgment, the clear answer to this question is “yes”. Clarke J did so in his judgment and the contrary has not been argued before us. The relevance of the potential effects on third parties has been recognised in other authorities … ’

Sir John Knox also held that proceedings should be allowed to continue in South Africa because, among other reasons (see p. 1537),

‘this is the only way in which to minimise, if not avoid altogether, the risk of inconsistent decisions in different jurisdictions.’

28 Not all cases can be so neatly categorised. In Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd [1999] CLC 579 Rix J dealt with a case in which there were four potential parties and three different agreements (or classes of agreement) but only two of the parties were bound by an English exclusive jurisdiction clause under one of the agreements. There were proceedings by C against A (the two parties to the clause) in England and proceedings by A against C, B and D in New York alleging statutory breaches relating to the agreement containing the clause and also under an agreement not containing an exclusive jurisdiction clause, and including other claims such as a claim for conversion. The judge gave leave, on their application, for B and D to be joined to C's action against A in England (p. 588). A's application to stay the proceedings by C in England was not pursued, but if it had been it would have failed (p. 596). On an application by C, B and D for an injunction to restrain A suing them in New York, the judge granted an injunction but only to restrain the prosecution of claims covered by the exclusive jurisdiction clause (p 598). The judge was confronted in this case with a difficult procedural and jurisdictional tangle which permitted no wholly satisfactory solution. It was however important to his decision that he did not judge it possible to make an order which would ensure trial of all proceedings arising out of all the agreements in one forum. At p. 596 he said (interpolating schematic references for the references he made to named parties):

- ‘(5)An important fact in this case, as it seems to me, is that, whether I enforce [the exclusive jurisdiction clause] or not, I cannot ensure that all litigation between [A] and [B, C and D] is carried forward in one jurisdiction unless I would be prepared to extend my injunction to all the claims against [B, C and D] in New York. That is because [the ***452** exclusive jurisdiction clause] does not bind [B and D]. That remains the case even if I assume that all the claims against [C] come within [the exclusive jurisdiction clause], but I have already stated that in my judgment that is not the case. It follows that unless I am prepared not only to

enforce [the exclusive jurisdiction clause] but also to injunct [A's] claims against [B and D] and [A's] claims against [C] outside [the exclusive jurisdiction clause], [A's] complaint in New York will continue in any event. On the other hand [counsel] has not pursued [A's] application for a stay of [C's] action, but if he had, it would fail for the reasons for which [counsel] cited British Aerospace plc v Dee Howard Co [1993] 1 Ll Rep 368. Thus the continuation of the proceedings in England is inevitable too.

- (6)I would not, however, injunct the claims against [B and D] because, however undesirable it is in principle to have parallel litigation in two jurisdictions, it seems to me the duplication of litigation does not in itself make it in the interests of justice to injunct the New York proceedings in so far as claims against [B and D] are concerned …'

29 In seeking to apply this body of authority to the present case the first point to be made is that Mr Donohue has as against the first three Armco appellants a strong prima facie right not to be the subject elsewhere than in England of claims by those companies falling within the scope of the clause. Some of the claims made against him by those companies in New York do fall within the clause. This is an important and substantial, and not a formal or technical, right. At an earlier stage of this English litigation **Armco** sought to impeach the exclusive jurisdiction clauses on the ground that they had been induced by the fraud of the four conspirators. The judge not only rejected the contention that **Armco** executives had been misled but also found that **Armco's** English and US lawyers had known all about the clauses and their consequences and that **Armco** had had its own good reasons for inserting English law and jurisdiction clauses in the contracts (para. 35–40). There was no appeal against these conclusions. Thus **Armco**, having agreed to these clauses to serve their own ends, are now seeking to be released from their bargain. To permit them to do so exposes Mr **Donohue** to an obvious risk of injustice. This risk does not derive from the venue alone: Mr **Donohue** might, as a UK citizen, prefer to be sued in London rather than New York if he has to be sued anywhere, but to him, as a resident of Singapore, New York is not in itself an obviously more inconvenient forum than London. A more substantial objection may be founded on the perceived procedural disadvantages to him of being sued in New York: as the evidence suggests, the cost would be greater, trial would be by jury and costs would be very largely irrecoverable even if he were to succeed. But there are always points of this kind to be made when comparing one forum with another, and the standing, authority and expertise of the forum in which the New York proceedings are being pursued cannot be questioned. Much more significant, from Mr Donohue's viewpoint, are the RICO claims made against him. They could not be pursued against him in England. They could, if established in New York, lead to the award of swingeing damages against him. On agreement of the exclusive jurisdiction clause he could reasonably have felt confident that no RICO claim arising out of or in connection with the agreements could be pursued against him and it would represent an obvious injustice if he were now to be exposed to those claims.

30 There is, as always, another side to the coin. All five Armco appellants have a clear prima facie right to pursue against Rossi and Stinson and their respective companies any claim they choose in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. There is, as I have already concluded, no ground upon which this court could properly seek to restrain those proceedings. It would not be appropriate for the English courts to form any judgment, however tentative, on the merits of the Armco companies' claims, beyond noting that lack of merit was not one of the grounds on which the PCCs invited Judge Schwartz to dismiss the proceedings in New York. It must be assumed that the claims made by the Armco companies against their former employees Rossi and Stinson, including the RICO claims, are serious and substantial claims. There is nothing whatever to suggest that these

claims will not proceed in New York whether or not an injunction is granted to Mr Donohue.***453**

31 It must further be noted that APL and NNIC have a clear prima facie right to pursue against Mr Donohue, Wingfield and CISHL also any claim they choose in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. I have already recorded that service of the English proceedings on APL and NNIC has been set aside. There is no ground upon which the English court could properly restrain their proceedings in New York. It appears, as Stuart-Smith LJ held (para. 54(3)) that the claims of APL and NNIC relate to the collection agreement and the trust fund withdrawals rather than the allegedly fraudulent management buy-out, but these claims also cannot be treated as lacking merit. They are proceeding in New York, and everything suggests that they will continue in New York whether or not the English court grants an injunction to Mr Donohue.

32 Similarly, the first three Armco appellants have a clear prima facie right to pursue against Mr Donohue, Wingfield and CISHL any claim not covered by the exclusive jurisdiction clauses in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. To the extent that the claims of these Armco companies do not arise out of or in connection with the transfer agreements and the sale and purchase agreement, they fall outside the exclusive jurisdiction clauses, and there is no ground upon which the English court could properly restrain these proceedings. Everything suggests that they will continue in New York whether or not the English court grants an injunction to Mr Donohue.

33 Thus Mr Donohue's strong prima facie right to be sued here on claims made by the other parties to the exclusive jurisdiction clause so far as the claims made fall within that clause is matched by the clear prima facie right of the **Armco** companies to pursue in New York the claims mentioned in the last three paragraphs. The crucial question is whether, on the fact of this case, the **Armco** companies can show strong reasons why the court should displace Mr **Donohue's** clear prima facie entitlement. If strong reasons are to be found (and the need for strong reasons is underlined in this case by the potential injustice to Mr **Donohue**, already noted, if effect is not given to the exclusive jurisdiction clauses) they must lie in the prospect, if an injunction is granted, of litigation between the **Armco** companies on one side and Mr **Donohue** and the PCCs on the other continuing partly in England and partly in New York. What weight should be given to that consideration in the circumstances of this case?

34 I am driven to conclude that great weight should be given to it. The Armco companies contend that they were the victims of a fraudulent conspiracy perpetrated by Donohue, Atkins, Rossi and Stinson. Determination of the truth or falsity of that allegation lies at the heart of the dispute concerning the transfer agreements and the sale and purchase agreement. It will of course be necessary for any court making that determination to consider any contemporary documentation and any undisputed evidence of what was said, done or known. But also, and crucially, it will be necessary for any such court to form a judgment on the honesty and motives of the four alleged conspirators. It would not seem conceivable, on the Armco case, that some of the four were guilty of the nefarious conduct alleged against them and others not. It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice.

35 Stuart-Smith LJ (at para. 42-A4) regarded the subject matter of the collection agreement complaints as ‘quite different’ from that involving the first three Armco appellants in relation to the trans-

fer agreements and the sale and purchase agreement. He discounted the significance of the trust fund withdrawal claims on the ground that they had almost certainly been settled (para. 45), although it is noteworthy that the settlement agreement made with NAIC expressly preserved the right of NNIC to pursue claims against Rossi, Stinson, Donohue and Atkins, ITRS, IROS, Wingfield, NPV and CISHL in the New York proceedings. It is true that the collection agreement and the trust fund withdrawals give rise to different grounds of claim. But ***454** the principal actors are the same, and Armco contends, rightly or wrongly, that these were further manifestations of the plot made by the four conspirators to enrich themselves at the expense of Armco. I cannot for my part accept that the ends of justice would be well served if Armco's allegations concerning the transfer and sale and purchase agreements were determined in England and its allegations concerning the collection agreement and trust fund withdrawals were determined in separate proceedings in New York. The judgment made of the motives and honesty of the four alleged conspirators in the one context would plainly have an important bearing on the judgment made in the other.

36 In my opinion, and subject to an important qualification, the ends of justice would be best served by a single composite trial in the only forum in which a single composite trial can be procured, which is New York, and accordingly I find strong reasons for not giving effect to the exclusive jurisdiction clause in favour of Mr **Donohue**. In New York proceedings Mr **Donohue** will be entitled to claim that the sale and purchase agreement is governed by English law. And Lord Grabiner, representing **Armco**, has accepted that **Armco's** breach of contract in suing elsewhere than in the contractual forum could found a claim by Mr **Donohue** for any damage he has suffered as a result. The qualification is that he should be protected against liability under the RICO claims made against him because of the obvious injustice to him which such liability would in the circumstances involve. But before considering whether such a protection can and should be afforded to Mr Donohue it is necessary to address an important preliminary question.

37 The discretion whether or not to grant an injunction was in the first instance that of the judge. His exercise of discretion was entitled to be respected unless, on grounds of his error or misdirection, the Court of Appeal was entitled to exercise its discretion afresh. The Court of Appeal held, rightly, that such grounds existed, and did exercise its discretion afresh. But the exercise of discretion is not at large in this House: the Court of Appeal's exercise of discretion must in its turn be respected unless on grounds of error or misdirection the House is entitled to exercise its own discretion. Having regard to the long and closely reasoned leading judgment of Stuart-Smith LJ, I would not lightly disregard the majority's conclusion.

38 I am however persuaded that the discretionary judgment made by the Court of Appeal is fundamentally vitiated by an incorrect view of the future shape of this litigation. In his judgment, Stuart-Smith LJ considered the grant of an injunction to Mr Donohue before considering whether Rossi and Stinson and their respective companies should be joined as claimants, and this enabled Mr Donohue to contend in argument that the Court of Appeal's decision on grant of an injunction should stand despite its conclusion, incorrect as I have held it to be, on joinder. But this reading of Stuart-Smith LJ's judgment cannot in my opinion be sustained. I think it is plain, in particular from para. 42 of his judgment, that Stuart-Smith LJ contemplated that all disputes between the Armco companies and Donohue, Rossi and Stinson relating to the transfer and sale and purchase agreements would be resolved in the English forum. This enabled him to say:

‘The issues in the claim of AFSC, AFSIL and the derivative claim of Armco Inc in relation to the MBO [management buy-out] are whether there was the secret agreement alleged, whether Mr Rossi and Mr Stinson were beneficially interested in Wingfield at the time, whether US$30m was an excessive sum and whether US$10m worth of AFSEL's

assets were secretly and fraudulently transferred. If these allegations are made out, Mr Donohue, Mr Rossi, Mr Stinson and Wingfield will be liable … '

He was not there recognising the possibility that different conclusions might be reached in the cases of Mr Rossi and Mr Stinson on the one hand and Mr Donohue and Wingfield on the other, a very unlikely event in the case of a single composite trial but an entirely possible outcome if parallel trials relating to the management buy-out took place in both England and New York. This incorrect view was in my opinion compounded by his treatment of the collection and trust fund withdrawal claims as different and separate from the management ***455** buy-out claims. For reasons already given I cannot accept this view. Had Stuart-Smith LJ reached the view which I have reached on the joinder of Rossi and Stinson and their companies, I feel sure that he would have been gravely concerned at the prospect of the same issue being determined in different tribunals, with the obvious and highly undesirable risk of inconsistent findings and decisions. For these reasons I am of the opinion that members of the House are entitled and bound to exercise their discretion afresh.

39 The interests of justice are in my judgment best served if an anti-suit injunction is denied to Mr **Donohue** but an undertaking proffered on behalf of the **Armco** companies (defined to include the five **Armco** appellants) is accepted in the following terms:

'The **Armco** companies … confirm that they undertake not to enforce against Mr **Donohue**, Wingfield or CISHL any multiple or punitive damages awarded in the New York proceedings whether awarded pursuant to the RICO statute or common law.

For the avoidance of doubt, the above undertaking (i) shall not restrict the **Armco** companies from seeking to enforce any award made in the New York proceedings for damages which are not multiple or punitive; (ii) shall relate only to enforcement; and (iii) as against any defendant in the New York proceedings other than Mr Donohue, Wingfield or CISHL, shall have no effect whatsoever in respect of the Armco companies pursuing or enforcing any claim or award in the New York proceedings whether for multiple or punitive damages or otherwise.'

If there were any doubt about the efficacy of this proffered undertaking in relation not only to Mr Donohue but also Wingfield and CISHL, I would order the joinder of those companies. But I am satisfied that this is an unnecessary step which would serve no useful purpose. I would accordingly refuse the application of these parties to be joined as claimants in the present action. In the result, I would allow the appeal, on the undertaking just recited, and set aside the orders of the Court of Appeal joining the PCCs as claimants and granting an injunction to Mr Donohue.

Lord Mackay of Clashfern:

40 I have had the advantage of reading in draft the speech delivered by Lord Bingham of Cornhill. For the reasons he gives with which I agree, I also would allow the appeal on the terms he has proposed.

Lord Nicholls of Birkenhead:

41 I have had the advantage of reading in draft the speech of Lord Bingham of Cornhill. For the reasons he gives, and with which I agree, I too would allow this appeal.

Lord Hobhouse of Woodborough:

42 I agree that the appeal should be allowed on the terms stated in the speech of Lord Bingham of Cornhill with which I agree. This appeal has not involved any disputed question of principle but has turned upon the application of established principles to the factual complexities of international multi-party disputes as exemplified by the facts of this particular case. It is because we are exceptionally differing from the Court of Appeal on a question of discretion that I will briefly add my own

reasons for doing so.

43 The case has two aspects. The primary aspect is whether Mr Donohue should be granted the 'anti-suit' injunction for which he has asked the court to restrain proceedings in New York or anywhere else other than in London. This ultimately turns upon the exercise of the court's discretion. The Court of Appeal were undoubtedly right to conclude (at para. 30–32) that, as the judge had made an error in holding that Armco Inc was not bound by the exclusive jurisdiction clause and had construed the clause as not having a wide enough scope to cover the disputes being raised in New York against Mr Donohue, this meant that his exercise of the ***456** discretion was wrongly based and the Court of Appeal were obliged to address the exercise of the discretion afresh. By a majority, the Court of Appeal decided to grant the injunction in a limited form, limited to the first three defendants and excluding claims in relation to the 'collection agreement' and the trust funds.

44 The second aspect involves the subsidiary question whether Mr Rossi and Mr Stinson and their two companies, the four of the so-called 'PCCs', should be joined as plaintiffs in Mr Donohue's English action and, if so, likewise granted an injunction. Formally, I agree that the question of joinder was dealt with by the majority of the Court of Appeal only after they had decided the primary question of whether Mr Donohue should be granted an injunction and that therefore it could be said, and the respondents so argued before this House, that the reversal of the Court of Appeal's decision on the second aspect would not invalidate their decision on the primary question. This however faces the respondents and the Court of Appeal with a dilemma. A central factor in the exercise of the discretion whether or not to grant any injunction was an assessment of what will be the position in New York and London if an injunction is granted. (If no injunction is granted the position is simple: the proceedings in New York will continue and there will be no proceedings, anyway at this stage, in London.) If the Court of Appeal have arrived at their decision of the primary question without fully carrying out that assessment they have been in error; they have left out of account a material factor. On the other hand, if they did carry out that assessment but made an error in doing so, proceeding on the basis that the four PCCs on would have to be sued in London and not in New York, their exercise of the discretion is likewise open to attack. I will therefore take the joinder issue first.

45 The London action was an action brought by Mr Donohue. It was an action based upon the contractual right given by that clause to hold the other parties to that contract, and those claiming through them, to their promise only to sue Mr Donohue in England. Mr Donohue was entitled to sue and serve the first three defendants in accordance with that clause. Those defendants as they were bound to do acknowledged service and placed solicitors on the record to act on their behalf in the action. The four PCCs (and CISHL and Wingfield, who are not relevant for this purpose) then applied to be joined in the action. They simply relied upon the ground: 'The basis of the application is that England is the most appropriate forum for the resolution of the disputes between the applicants and the defendants.' Such an application is made by issuing and serving a summons or 'application notice' asking the court to order such joinder. The summons/notice had to be served on the existing parties by sending the summons to their solicitors on the record. No problem of service arises at that stage. But in order to obtain an order (save by the consent of all parties) for their joinder the applicants have to make out a case for their joinder. If they say, as did the four PCCs, that they should be joined because they too wish to claim 'anti-suit' injunctions against the existing defendants, they must be able to show that they could properly have brought proceedings against the defendants claiming that relief. It is at this stage that their application became unsustainable. The four PCCs had no procedural or contractual right to sue the defendants in the English jurisdiction; the English courts had no natural

jurisdiction over the defendants. The applicants could not satisfy the tests laid down in Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460. They could not show that London was clearly the appropriate forum (in contrast to New York) so as to justify them in commencing proceedings against the defendants in London (Spiliada at p. 481). Further, by the same token, they could not show that they had any viable claim to an anti-suit injunction against the defendants based upon the contention that the defendants' chosen forum, New York, was a forum non conveniens to such a degree that it was vexatious for them to have sued the PCC parties there (SNIAS v Lee Kui Jak [1987] AC 871). New York was not an inappropriate forum (cf. Spiliada, p. 477) nor could they show that they needed an injunction to protect proceedings in this country: Airbus Industrie v Patel [1998] CLC 702; [1999] 1 AC 119. The application by these parties to be joined in the action was misconceived and should have been refused. The majority of the Court of Appeal seem to have considered that the ***457** joinder and the grant of an anti-suit injunction to them followed from their decision to grant Mr Donohue an injunction. This was not correct. The position of a party who has an exclusive English jurisdiction clause is very different from one who does not. The former has a contractual right to have the contract enforced. The latter has no such right. The former's right specifically to enforce his contract can only be displaced by strong reasons being shown by the opposite party why an injunction should not be granted. The latter has to show that justice requires that he should be granted an injunction. The Court of Appeal should have refused the application of the four PCCs to be joined and should likewise have refused their application for an injunction.

46 The Court of Appeal clearly had in mind that some proceedings would continue in New York, including some involving Mr Donohue himself. The limitations which they included in the injunction both as regards parties and as regards subject matter demonstrate this. The correct decision on the application of the four PCCs—that it should be dismissed—would have added to this prospect. The true balance between New York and London, therefore, was not that which must have been visualised by the majority of the Court of Appeal. The arguments in favour of refusing Mr Donohue the injunction for which he was applying would have been very materially strengthened.

47 The Court of Appeal rightly attached importance to the fact that in New York Mr Donohue would be subject to ‘RICO’ claims and a liability in triple damages. To be protected against such a possibility was a legitimate concern of Mr Donohue to which a court should give weight in considering how to exercise its discretion. Lord Grabiner QC for the defendants recognised this and met it by offering the undertaking to which Lord Bingham has already referred. The offer of this undertaking does alter the position and indeed a court could have met the point by imposing equivalent terms upon the defendants as a condition of refusing to grant Mr Donohue an unqualified injunction. This too has changed the balance between the two jurisdictions and should be taken into account.

48 Lord Grabiner took his argument one step further. He acknowledged that some breaches of the exclusive jurisdiction clause have taken place and will continue, if the appeal is allowed and the injunction refused, and he likewise recognised that, if this leads to Mr Donohue incurring a greater liability or being put to a greater expense (e.g. for unrecovered costs) in New York than would have been the case in London, Mr Donohue may have a claim in damages against the defendants for breach of contract—breach of the exclusive jurisdiction clause. This does not appear to have been a point put to the Court of Appeal and it was only raised by Lord Grabiner in this House during his reply, no doubt as a result of his further consideration of the RICO point. I am prepared to accept this submission and proceed on the basis that, if Mr Donohue can hereafter show that he has suffered loss as a result of the breach of the clause, the ordinary remedy in damages for breach of contract would be

open to him. I say no more than this since the position is complex. The litigation in New York includes parties who are not parties to the jurisdiction agreement and against whom, and in relation to whom, Mr Donohue is not entitled to rely upon the clause. Further, when the issues of fact have been fully tried in New York, a situation may be established whereby Mr Donohue's right to rely upon the contract as against the defendants may be affected or situations of circuity of action may arise. That is not presently the position but Lord Grabiner's point has merit and relevance in this exceptional and finely balanced case.

49 The basis on which the exercise of the discretion has to be exercised is different from that before the Court of Appeal. In part this is because of a wrong decision on the joinder question and in part because of further arguments advanced by the defendants before this House. In my judgment in this case they exceptionally suffice to justify the House in deciding that the discretion should be exercised afresh by your Lordships and against the grant of the injunction.

50 I therefore agree that the appeal should be allowed on the terms proposed.***458**

Lord Scott of Foscote:

51 I have had the advantage of reading in draft the opinion of Lord Bingham of Cornhill, and gratefully adopt his recital of the relevant facts.

52 There seem to me to be two main issues that must be decided in the present case. They to some extent overlap one another. They are (i) whether the contractual exclusive jurisdiction clauses, contained in the transfer agreements dated 3 September 1991 under which AFSIL and AFSEL transferred their respective shares in BNIG to CISHL and in the sale and purchase agreement of the same date under which AFSIL and AFSEL transferred their shares in CISHL to Wingfield, should be enforced by injunction so as to bar proceedings in New York that fall within the scope of those clauses, properly construed; and (ii) if the answer to issue (i) is 'yes', whether an injunction should be granted in order to bar also the prosecution in New York of proceedings that are not themselves caught by the exclusive jurisdiction clauses but are closely associated with those that are.

53 The principles to be applied in order to decide on the one hand whether an exclusive jurisdiction clause should be enforced by an injunction and on the other hand whether the commencement or continuation of foreign proceedings which are not caught by an exclusive jurisdiction clause should be barred by an injunction seem now well settled and have not been the subject of any real disagreement before your Lordships. It is accepted that a contractual exclusive jurisdiction clause ought to be enforced as between the parties to the contract unless there are strong reasons not to do so. Prima facie parties should be held to their contractual bargain: see The Fehmarn [1958] 1 WLR 159; The Chaparral [1968] 2 Ll Rep 158; The El Amria [1981] 2 Ll Rep 119; The Sennar (No. 2) [1985] 1 WLR 490; The Angelic Grace [1995] 1 Ll Rep 87. If, on the other hand, there is no contractual bargain standing in the way of the foreign proceedings, 'the … court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive': per Lord Goff of Chieveley in Societe Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871 at p. 896.

54 There has been some debate before your Lordships as to the order in which the two issues referred to above should be considered but it seems to me convenient to start with the exclusive jurisdiction clauses and to try and decide what part, if any, of the New York proceedings the clauses cover, who is and who is not entitled to their benefit and who is and who is not bound by them.

The exclusive jurisdiction clauses

55 In the transfer agreements, the parties to which were AFSIL and AFSEL, as transferors, and

CISHL, as transferee, the exclusive jurisdiction clause said, simply, that 'each party submits to the exclusive jurisdiction of the Supreme Court of Judicature of England' (para 15.2).

56 In the sale and purchase agreement the exclusive jurisdiction clause said that:

'the parties hereby irrevocably submit themselves to the exclusive jurisdiction of the English courts to settle any dispute which may arise out of or in connection with this agreement.'

57 The parties to the sale and purchase agreement, in addition to AFSIL, AFSEL and Wingfield, included AFSC, Mr Atkins and Mr Donohue.

58 The terms of the sale and purchase agreement clause are very wide, 'any dispute which may arise out of or in connection with this agreement', but it has not been suggested that the terms of the clauses in the transfer agreements should be given any lesser scope. So I propose to concentrate on the sale and purchase agreement clause and treat it as applicable also to any dispute arising out of or in connection with the transfer agreements.***459**

59 Armco Inc was not a party to any of these agreements but, on the dissolution of AFSEL, the assets of AFSEL, including its assignable choses in action, became vested, as I understand it, in Armco. It is accepted, rightly in my opinion, that, in respect of any causes of action vested in Armco as successor of AFSEL, Armco is subject to the same contractual inhibitions under the exclusive jurisdiction clause as AFSEL was subject to. But in respect of causes of action to which Armco is entitled in its own right, i.e. otherwise than as successor to AFSEL, Armco is not bound by the exclusive jurisdiction clause, whether or not the causes of action relate to a dispute arising out of or in connection with one or other of the agreements.

60 There is a point of construction of the exclusive jurisdiction clause that it is convenient to deal with at this point. It is accepted that the clause is not restricted to contractual claims. A claim for damages for, for example, fraudulent misrepresentation inducing an agreement containing an exclusive jurisdiction clause in the same form as that with which this case is concerned would, as a matter of ordinary language, be a claim in tort that arose 'out of or in connection with' the agreement. If the alleged fraudulent misrepresentation had been made by two individuals jointly, of whom one was and the other was not a party to the agreement, the claim would still be of the same character, although only the party to the agreement would be entitled to the benefit of the exclusive jurisdiction clause. The commencement of the claim against the two alleged tortfeasors elsewhere than in England would represent a breach of the clause. The defendant tortfeasor who was a party to the agreement would, absent strong reasons to the contrary, be entitled to an injunction restraining the continuance of the foreign proceedings. He would be entitled to an injunction restraining the continuance of the proceedings not only against himself but also against his co-defendant. The exclusive jurisdiction clause is expressed to cover 'any dispute which may arise out of or in connection with' the agreement. It is not limited to 'any claim against' the party to the agreement. To give the clause that limited construction would very substantially reduce the protection afforded by the clause to the party to the agreement. The non-party, if he remained alone as a defendant in the foreign proceedings, would be entitled to claim from his co-tortfeasor a contribution to any damages awarded. He could join the co-tortfeasor, the party entitled to the protection of the exclusive jurisdiction clause, in third party proceedings for that purpose. The position would be no different if the claim were to be commenced in the foreign court with only the tortfeasor who was not a party to the exclusive jurisdiction clause as a defendant. He would be able, and well advised, to commence third party proceedings against his co-tortfeasor, the party to the exclusive jurisdiction clause.

61 In my opinion, an exclusive jurisdiction clause in the wide terms of that with which this case is

concerned is broken if any proceedings within the scope of the clause are commenced in a foreign jurisdiction, whether or not the person entitled to the protection of the clause is joined as defendant to the proceedings. An injunction restraining the continuance of the proceedings would not, of course, be granted unless the party seeking the injunction, being someone entitled to the benefit of the clause, had a sufficient interest in obtaining the injunction. It would, I think, be necessary for him to show that the claim being prosecuted in the foreign jurisdiction was one which, if it succeeded, would involve him in some consequential liability. It would certainly, in my opinion, suffice to show that if the claim succeeded he would incur a liability as a joint tortfeasor to contribute to the damages awarded by the foreign court.

62 This point is of direct relevance in the present case. In the New York proceedings, which I must analyse more fully in a moment, several claims are made but most of them are based upon the allegation that Mr Donohue, Mr Atkins, Mr Rossi and Mr Stinson conspired together fraudulently to extract in various ways substantial sums of money from the Armco group of companies. If the allegations can be made good, the liability of the conspirators would be a joint and several liability. There are substantial issues as to which of the claims fall within the language of the exclusive jurisdiction clause but I think it is clear that some of them do. Of the four alleged conspirators only Mr Donohue and Mr Atkins are contractually entitled to the ***460** benefit of the exclusive jurisdiction clause. Mr Atkins has settled with Armco, so it was Mr Donohue alone who commenced an action in this country for an injunction enforcing the clause. If Mr Donohue is entitled to an injunction enforcing the clause he is entitled, in my opinion, to an injunction that bars the continuance of the claims in question not only against himself but also against Mr Rossi and Mr Stinson with whom he is jointly and severally liable. If claims against Mr Donohue are within the clause, then so too are the corresponding claims against Mr Rossi and Mr Stinson. Mr Rossi and Mr Stinson are not contractually entitled to enforce the clause, but Mr Donohue is, in my opinion, entitled to ask the court to enforce it by restraining the prosecution in New York of all claims within its scope in respect of which Mr Donohue would be jointly and severally liable.

The New York proceedings

63 It is necessary to analyse with some care the nature of the claims made in the New York proceedings in order to decide which of them are caught by the exclusive jurisdiction clause and which are not.

64 The amended complaint filed in New York describes the parties and then, in para. 25–63 sets out the ‘Facts'. Under the sub-heading ‘The secret agreement’ it is alleged that the four individual defendants entered into a secret agreement under which Mr Rossi and Mr Stinson, who owed Armco fiduciary duties as directors and were responsible on behalf of Armco for negotiating with Mr Donohue and Mr Atkins the terms under which the latter would purchase BNIG from Armco, became secret partners with them in that purchase. It is alleged that pursuant to the secret agreement Mr Rossi and Mr Stinson agreed on behalf of Armco to excessive sums being injected into CISHL before its shares were sold to Wingfield. Recovery of the sums is sought. This claim seems to me a fairly clear example of a ‘dispute arising out of or in connection with’ the sale and purchase agreement.

65 The amended complaint goes on to allege that ‘other aspects of the sale were similarly tainted by the fraud’ (para. 41). Reference is made, as an example, to the extraction of sums of money from two trust funds that had been established in the United States to support insurance liabilities of NAIC. I find it difficult to follow how this dispute could be brought within the exclusive jurisdiction clause. The only ‘connection’ seems to me to be that if BNIG had not been purchased the scheme for milking the trust funds would not have been implemented. It is a causa sine qua non, a ‘but for’, connec-

tion and I doubt whether that is enough.

66 The amended complaint alleges, also, that 'as part of their secret agreement' the four conspirators extracted funds from APL via a debt collection agreement between APL, acting by Mr Rossi, and NPV, acting by Mr Donohue and Mr Stinson, under which NPV obtained unjustifiably inflated rates of commission. I cannot see any basis on which the claims based on this debt collection agreement can be regarded as falling within the exclusive jurisdiction clause.

67 In respect of each of the claims to which I have referred the plaintiffs in the New York proceedings claim punitive as well as compensatory damages.

68 In addition it is alleged that the defendants' conduct constituted racketeering, wire fraud and mail fraud for the purpose of the 'RICO' Act (Federal Racketeer Influenced and Corrupt Organisations Act 18 USC § 1962(c)). Under the RICO Act claims triple damages are sought. In so far as the RICO Act claims are based on conduct in connection with the transfer agreements or the sale and purchase agreement, it might seem that they, too, fall within the language of the exclusive jurisdiction clause. But it is common ground that a RICO Act claim could not be brought in an English court. It cannot, in my opinion, be supposed that in submitting to the exclusive jurisdiction of the English courts the parties had in mind claims which an English court would have no jurisdiction to entertain. The contractually expressed ***461** purpose of the submission to the English courts was 'to settle any dispute which may arise', etc. How can this language be sensibly thought apt to cover a dispute that the English courts would be jurisdictionally unable to settle? The choice of law provision that, in the sale and purchase agreement, immediately preceded the exclusive jurisdiction clause, in my opinion, underlines the point: 'this agreement shall be governed by and construed in accordance with' English law. The parties could not have intended that RICO Act claims would be governed by English law. English law does not recognise such claims. Nor can it be supposed that the parties, by the use of a fairly commonplace choice of law provision and exclusive jurisdiction clause, were intending to contract out of any RICO Act liability that might be connected with the agreement. In my opinion, any such contractual intention would need to be clearly expressed. Accordingly, in my opinion, as a matter of construction of the exclusive jurisdiction clause, the RICO Act claims are not caught.

69 The amended complaint included also breach of fiduciary duty claims against Mr Rossi and Mr Stinson. These claims arise in part out of conduct of Mr Rossi and Mr Stinson in negotiating the terms of the sale by Armco of BNIG. But I do not think a claim by Armco against its own officers for breach of fiduciary duty represents a 'dispute' caught by the exclusive jurisdiction clause. 'Dispute' in the clause means, in my opinion, a dispute in respect of which there is, on each side, a party, or a person claiming through a party, to the agreement. A claim by Armco for breach of fiduciary duty by its directors is, in my opinion, no more caught than would be a claim by Armco for negligence by its lawyers whether or not the conduct complained of related to the transfer agreements or the sale and purchase agreement.

70 There are, in addition, other claims made in the New York proceedings but most of them are different formulations of the claims to which I have already referred. I think I have mentioned all those that bear upon the issues that arise on this appeal.

Should injunctions be granted?

71 Virtually all the claims in the New York proceedings are based upon the alleged secret agreement between the four individual defendants. Some of the claims, those made against Mr Donohue and those relating to the allegedly excessive funds injected into CISHL, are within the scope of the exclusive jurisdiction clause. Others seem to me to be plainly outside the scope of the clause.

72 The Court of Appeal granted injunctions restraining the continuance of claims 'to the extent that the claims arise out of or are connected with the management buy-out'. The injuncted claims included the RICO Act claims in so far as so arising or so connected. They included the breach of fiduciary duty claims against Mr Rossi and Mr Stinson in so far as so arising or so connected. For the reasons I have given I do not think that any of these claims were within the scope of the exclusive jurisdiction clause on its true construction. But the injuncted claims did not include the claims relating to the alleged milking of the trust funds nor those relating to the APL/NPV debt collection agreement. The Court of Appeal's refusal to extend the injunction so as to bar these claims is not the subject of any cross-appeal and it is accepted by Mr Donohue that the prosecution in New York of these claims against him and the other defendants will continue.

73 So the injunction as granted by the Court of Appeal has left the alleged secret agreement to be litigated both in the New York courts and in England. The possibility of inconsistent conclusions on the facts is plain. The injunction has barred the prosecution in New York of a part of the RICO Act claim. The claim cannot be litigated in England and it follows that the part of the RICO Act claim that arises out of or in connection with the 'management buy-out' cannot be litigated anywhere. The injunction has required Armco, an American company, to prosecute in England a claim against its officers, Mr Rossi and Mr Stinson, for breach of the fiduciary duty that they owe under Armco's domestic law. ***462**

74 Many of the claims made in the New York proceedings, including the RICO Act claims and the breach of fiduciary claims in so far as they do not arise out of or in connection with the management buy-out as well as all the trust fund claims and the debt-collection agreement claims, will be proceedings in New York in any event. The common sense in all the claims based on the alleged secret agreement being dealt with in the same court and at the same time seems to me overwhelming. There are undoubted disadvantages to Mr Donohue in being sued in New York instead of in England. These have been referred to by Lord Bingham. And the prosecution in New York of the claims, not only against Mr Donohue but against Mr Rossi and Mr Stinson as well, that fall within the exclusive jurisdiction clause constitutes a breach of a contractual term that Mr Donohue is prima facie entitled to require to be observed. It is relevant to take into account, however, that the New York claims that do fall within the exclusive jurisdiction clause on its true construction are somewhat peripheral, if measured against the sort of contractual and tortious claims that the parties might reasonably be supposed to have had in mind when agreeing to that clause. The conspiracy constituted by the alleged secret agreement was aimed at extracting money from the Armco group by using, or misusing, the authority of two of Armco's own officers who had become co-conspirators. It is one thing to conclude that those claims based upon the conspiracy that arise out of or in connection with the management buy-out are caught by the exclusive jurisdiction clause properly construed; it is quite another to suppose that the parties would have had claims of that sort in mind when agreeing to the clause.

75 In my opinion, however, it is the evident absurdity of requiring some claims resulting from the alleged secret agreement to be litigated in England notwithstanding that the rest will be litigated in New York that is the overriding factor. There are, in my estimation, very strong reasons indeed for the normal injunctive protection that the exclusive jurisdiction clause would warrant to be withheld in this case. I would have come to this conclusion in any event but the undertaking offered by Armco to which Lord Bingham has referred confirms it. If it should transpire that Mr Donohue is successful in the New York proceedings but is unable to recover his costs, being costs that he would have expected to have been awarded if he had successfully defended in England, I can see no reason in principle why he should not recover, as damages for breach

of the exclusive jurisdiction clause, such part of those costs as he incurred in his successful defence of the claims that fall within that clause.

76 For these reasons I would allow the appeal and make the orders that Lord Bingham has suggested. As I have endeavoured to explain, I regard the exclusive jurisdiction clause, correctly construed, to the benefit of which Mr Donohue is but Mr Rossi and Mr Stinson are not contractually entitled, as covering some of the claims made against Mr Rossi and Mr Stinson whether or not Mr Donohue is a co-defendant and as not covering any of the RICO Act claims. Subject to that, I am in respectful and complete agreement with the reasons given by Lord Bingham for allowing the appeal.(Appeal allowed) ***463**

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EXHIBIT 59

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(Cite as: [2005] 1 W.L.R. 3055)

[2005] EWCA Civ 655

***3054 Arkin v Borchard Lines Ltd and Others (Zim Israel Navigation Co Ltd and Others, Part 20 Defendants) (Nos 2 and 3)**

Court of Appeal

LJJ Lord Phillips of Worth Matravers MR, Brooke, and Dyson

2005 March 7, 8, 9; May 26

Costs—Discretion of court—Application against non—party—Professional funder agreeing to fund expert evidence for impecunious claimant—Judge dismissing claim—Whether funder to pay successful defendants' costs— Supreme Court Act 1981 (c 54), s. 51 (as substituted by Courts and Legal Services Act 1990 (c 41), s. 4)— CPRr 44.3

Costs—Discretion of court—Part 20 proceedings—Part 20 claim dismissed following successful defence in main action—Part 20 claimant unable to enforce costs order against impecunious claimant—Successful Part 20 defendants seeking costs against Part 20 claimant—Whether order to be made—CPR r 44.3

1 2 The claimant sought substantial damages against four defendants, members of shipping conferences, who, he alleged, had destroyed his own shipping business through anti-competitive conference activities which infringed the Treaty of Rome. Having no means of his own and legal aid having been withdrawn, the claimant entered into a conditional fee agreement with his lawyers. In order to be able to pursue his claim he also entered into a non-champertous agreement with a professional funding company, MPC, who agreed to fund the cost of the necessary expert evidence for a contingent fee of 25% of the first £5m damages recovered and 23% thereafter. MPC took no part in making decisions on the conduct of the litigation and made no attempt to control it. The cost to MPC of their funding was £1.3m. Shortly before the trial the first defendant, B, brought Part 20 contribution proceedings against the second and third defendants and other members of the shipping conferences including three Part 20 defendants, Z, DNOL and KNSM. The second and third defendants and the three Part 20 defendants took part, with B, in the trial of the main action and incurred substantial costs in preparing and adducing expert evidence. B incurred no such costs, relying at trial on the expert evidence adduced by the others. In the event the judge dismissed the claim and the Part 20 claim and ordered the claimant to pay 90% of B's costs and 80% of the other defendants' costs: see [2003] 2 Lloyd's Rep 225 . Being unable to recover their costs from the impecunious claimant, the defendants and the three Part 20 defendants applied for orders under section 51 of the Supreme Court Act 1981 that MPC should pay their costs. The judge dismissed the applications, holding that litigation support by professional funders furthered the important public policy objective of facilitating access to justice, and that the court ought not to discourage such support, provided it was not champertous, by making adverse costs orders against them. The judge subsequently ordered B, as the unsuccessful Part 20 claimant, to pay 90% of Z's costs and 80% of each of DNOL and KNSM's costs incurred in preparing and adducing expert evidence for the trial.

On appeal by the defendants and Part 20 defendants in the costs applications against MPC and on B's appeal against the costs orders in the Part 20 proceedings-

(1) allowing the appeal for costs against MPC, that while it was important to help ensure access to justice, the judge had failed to give appropriate weight to the ***3055** general rule in CPR r 44.3 that a successful party should recover his costs; that having regard to that rule, it was unjust that a funder who purchased a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party failed

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in the action; that a more just and practicable approach, which neither denied a successful opponent all his costs nor deterred commercial funders from providing help to impecunious claimants seeking access to justice, was that a professional funder, who financed part of the claimant's costs of litigation in the expectation of reward if the claimant succeeded, and who did so through a non-champertous and otherwise unobjectionable agreement which left the litigating party in control of the litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided; that MPC were aware that they risked a costs order against them if the claim failed and they would, accordingly, be ordered to contribute £1.3m to the defendants' and Part 20 defendants' costs (post, paras 38, 41, 43, 45, 83).Hamilton v Al Fayed (No 2) [2003] QB 1175, CA;R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8) [2003] QB 381, CA and Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Associated Industrial Finance Pty Ltd, Third Party) [2004] 1 WLR 2807, PC considered . *Per curiam.*

(i) It does not follow that it will never be appropriate to order that those who, for motives other than profit, have contributed to the costs of unsuccessful litigation, should contribute to the successful party's costs on a similar basis (post, para 44).(ii) A funder who enters into a champertous agreement will be likely to render himself liable for the opposing party's costs without limit should the claim fail (post, para 40).(2) Allowing the Part 20 costs appeal, setting aside the judge's order and substituting its own order, that the court would usually consider the incidence of costs in the main proceedings quite separately from the incidence of costs in the Part 20 proceedings and in the ordinary run of cases, in accordance with the general rule in CPR r 44.3(2)(b) , a successful Part 20 defendant ought not to be deprived of his prima facie right to an order for costs against a Part 20 claimant merely on the ground of the impecuniosity of the claimant in the main action; that, however, having regard to the overriding objective in CPR r 1 of dealing with cases justly, the judge erred in the exercise of his discretion in failing to give due consideration to the unusual circumstances of the claim in which, inter alia, all the conference members bore collective responsibility for the alleged conference activities; and that in all the circumstances justice demanded that B, the second and third defendants, and the three Part 20 defendants should each bear one sixth of the costs of instructing the expert witnesses but that otherwise the parties should bear their own costs in the Part 20 proceedings (post, paras 74, 75, 77-80, 82).Decision of Colman J in **Arkin** v **Borchard** Lines Ltd (No 2) [2003] EWHC 2844 (Comm); [2004] 1 Lloyd's Rep 88 reversed .

Decision of Colman J in **Arkin** v **Borchard** Lines Ltd (No 3) [2003] EWHC 3088 (Comm); [2004] 1 Lloyd's Rep 636 reversed .

The following cases are referred to in the judgment of the court:

- Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965; [1986] 2 WLR 1051; [1986] 2 All ER 409, HL(E)
- Arkin v Borchard Lines Ltd [2003] EWHC 687 (Comm); [2003] 2 Lloyd's Rep 225
- Chapman (TGA) Ltd v Christopher [1998] 1 WLR 12; [1998] 2 All ER 873, CA
- Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Associated Industrial Finance Pty Ltd, Third Party) [2004] UKPC 39; [2004] 1 WLR 2807, PC
- Edginton v Clark [1964] 1 QB 367; [1963] 3 WLR 721; [1963] 3 All ER 468, CA
- Gulf Azov Shipping Co Ltd v Idisi [2004] EWCA Civ 292, CA
- Hamilton v Al Fayed (No 2) [2002] EWCA Civ 665; [2003] QB 1175; [2003] 2 WLR 128; [2002] 3 All ER 641, CA

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- Hill v Archbold [1968] 1 QB 686; [1967] 3 WLR 1218; [1967] 3 All ER 110, CA
- Johnson v Ribbins [1977] 1 WLR 1458; [1977] 1 All ER 806, CA
- McFarlane v EE Caledonia Ltd (No 2) [1995] 1 WLR 366; [1995] 1 Lloyd's Rep 535
- Murphy v Young & Co's Brewery plc [1997] 1 WLR 1591; [1997] 1 All ER 518, CA
- R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8) [2002] EWCA Civ 932; [2003] QB 381; [2002] 3 WLR 1104; [2002] 4 All ER 97, CA
- Roache v News Group Newspapers Ltd [1998] EMLR 161, CA
- Sanderson v Blyth Theatre Co [1903] 2 KB 533, CA

The following additional cases were cited in argument:

- Abraham v Thompson [1997] 4 All ER 362, CA
- Arundel Chiropractic Centre Pty Ltd v Deputy Comr of Taxation (2001) 179 ALR 406
- Bankamerica Finance Ltd v Nock [1988] AC 1002; [1987] 3 WLR 1191; [1988] 1 All ER 81, HL(E)
- Centro Latino Americano de Commercio Exterior SA v Owners of the Ship Kommunar (No 3) [1997] 1 Lloyd's Rep 22
- Condliffe v Hislop [1996] 1 WLR 753; [1996] 1 All ER 431, CA
- Faryab v Smyth (Izzo, Third Party) (unreported) 27 November 2000; Court of Appeal (Civil Division) Transcript No 2090 of 2000, CA
- Globe Equities Ltd v Globe Legal Services Ltd [1999] BLR 232, CA
- Gore (t/a Clayton Utz) v Justice Corpn Pty Ltd [2002] FCA 354; (2002) 189 ALR 712
- Kebaro Pty Ltd v Saunders [2003] FCAFC 5
- Metalloy Supplies Ltd v MA (UK) Ltd [1997] 1 WLR 1613; [1997] 1 All ER 418, CA
- Philips Electronics v Aventi [2003] EWHC 2589 (Pat)
- Phillips v Symes [2004] EWHC 2329 (Ch); 101/44 LSG 29
- Steel and Morris v United Kingdom The Times, 16 February 2005
- Taylor v UK Fertilisers Ltd (unreported) 1 November 1988; Court of Appeal (Civil Division) Transcript No 881 of 1988, CA
- Tolstoy-Miloslavsky v Aldington [1996] 1 WLR 736; [1996] 2 All ER 556, CA

The following additional cases, although not cited, were referred to in the skeleton arguments:

- Arklow Investments Ltd v MacLean (unreported) 19 May 2000, High Court of New Zealand
- Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil [1985] QB 966; [1984] 3 WLR 726; [1984] 3 All ER 766
- Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343, CA
- Body Care (Health and Beauty) Ltd, In re [2003] EWHC 1516 (Ch)
- Bowring (CT) & Co (Insurance) Ltd v Corsi Partners Ltd [1994] 2 Lloyd's Rep 567, CA
- Carborundum Abrasives Ltd v Bank of New Zealand (No 2) [1992] 3 NZLR 757

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[2005] EWCA Civ 655 [2005] 1 W.L.R. 3055 [2005] 3 All E.R. 613 [2005] 2 Lloyd's Rep. 187 [2005] C.P. Rep. 39 [2005] 4 Costs L.R. 643 (2005) 155 N.L.J. 902 Times, June 3, 2005 Independent, June 7, 2005 Official Transcript
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- Cardile v LED Builders Pty Ltd [1999] HCA 18; (1999) 198 CLR 380
- Chessells v British Telecommunications plc (unreported) 20 December 2001, Laddie J
- Dal Sterling Group plc v WSP South and West Ltd (unreported) 18 July 2001, Judge Richard Seymour QC
- Eurocross Sales Ltd v Cornhill Insurance plc [1995] 1 WLR 1517; [1995] 4 All ER 950, CA
- G v G (Minors: Custody Appeal) [1985] 1 WLR 647; [1985] 2 All ER 225, HL(E)
- Giles v Thompson [1994] 1 AC 142; [1993] 2 WLR 908; [1993] 3 All ER 321, HL(E)
- Hollins v Russell [2003] EWCA Civ 718; [2003] 1 WLR 2487; [2003] 4 All ER 590, CA
- Knight v FP Special Assets Ltd (1992) 174 CLR 178
- Red Sea Insurance Co Ltd v Bouygues SA [1995] 1 AC 190; [1994] 3 WLR 926; [1994] 3 All ER 749, PC
- Ridehalgh v Horsefield [1994] Ch 205; [1994] 3 WLR 462; [1994] 3 All ER 848, CA

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- Symphony Group plc v Hodgson [1994] QB 179; [1993] 3 WLR 830; [1993] 4 All ER 143, CA
- Tanfern Ltd v Cameron-MacDonald (Practice Note) [2000] 1 WLR 1311; [2000] 2 All ER 801, CA
- Taly NDC International NV v Terra Nova Insurance Co Ltd [1985] 1 WLR 1359; [1986] 1 All ER 69, CA
- Thomas v Times Book Co Ltd [1966] 1 WLR 911; [1966] 2 All ER 241
- Trepca Mines Ltd, In re (No 2) [1963] Ch 199; [1962] 3 WLR 955; [1962] 3 All ER 351, CA

APPEALS from Colman J

By writ issued on 18 April 1997 and statement of claim served on 2 May 1997 and amended on 17 November 1999, the claimant, Yeheskel Arkin (suing as the assignee of BCL Shipping Line Ltd, in liquidation), claimed damages against the first to fourth defendants, Borchard Lines Ltd ("Borchard"), Camomile Lines plc ("Camomile"), Furness Withy (Shipping) Ltd ("Furness") and Manchester Liners Ltd ("Manchester"), in respect of alleged breaches of articles 81 and 82 of the EC Treaties (formerly articles 85 and 86 of the Treaty of Rome). Each of the defendants denied liability. By a CPR Part 20 claim form issued on 10 August 2001 with the permission of Colman J dated 27 July 2001, Borchard sought contribution or indemnity, in the event that it was held liable to the claimant, from ten Part 20 defendants including the first and sixth Part 20 defendant Zim Israel Navigation Co Ltd ("Zim"), the third Part 20 defendant Deutsche Nah-Ost Linien GmbH & Co ("DNOL"), the fifth Part 20 defendant KNSM-Kroonburgh BV ("KNSM"), the eighth Part 20 defendant Furness, and the tenth Part 20 defendant Camomile, each of whom denied the contribution claim. None of the other Part 20 defendants took part in the trial in the main action. By a judgment dated 10 April 2003 Colman J, inter alia, dismissed the claimant's claim against the defendants, ordered the claimant to pay 90% of Borchard's costs and 80% of the costs of Camomile, Furness and Manchester, and dismissed Borchard's contribution claim against the Part 20 defendants: see [2003] 2 Lloyd's Rep 225 .

By three separate application notices dated respectively 2 May, 30 April and 4 July 2003 (i) Borchard, (ii) Camomile, Furness, Manchester, DNOL and KNML, and (iii) Zim, sought orders pursuant to section 51 of the Supreme Court Act 1981 for the payment of their costs by Managers and Processors of Claim Ltd ("MPC"), who had funded part of the claimant's costs of the action under an agreement dated 2 August 2000. MPC, who was joined in the action as the eleventh Part 20 defendants for the purposes of costs only, resisted the applications. By a judgment dated 27 November 2003 and order dated 19 January 2004 Colman J, inter alia, dismissed the applications and gave permission to appeal: see **Arkin** v **Borchard** Lines Ltd (No 2) [2004] 1 Lloyd's Rep 88 .

Following the dismissal of the main action and the Part 20 proceedings, Zim, DNOL and KNSM addi-

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tionally sought an order that **Borchard** should pay their costs of the Part 20 proceedings. By judgment dated 16 December 2003 and order dated 26 January 2004 Colman J ordered that **Borchard** pay 90% of Zim's costs and 80% of the costs of DNOL and KNSM, such costs to be added to claimant's costs liability to **Borchard** in the main action: see **Arkin** v **Borchard** Lines Ltd (No 3) [2004] 1 Lloyd's Rep 636 . The judge refused **Borchard** permission to appeal. ***3058**

By an appellant's notice filed on 12 February 2004 **Borchard** appealed against Colman J's refusal of its applications for costs against MPC on, inter alia, the following grounds. (1) The judge erred in holding (i) that professional funders were in general allowed to underwrite litigation for profit, provided that they did not exercise too much control over it, without facing the risk of adverse costs consequences if the litigation failed; (ii) that it would be appropriate to impose non-party costs orders on professional funders only where their involvement in and control over the proceedings and the size of their stake represented a risk of interference in the due administration of justice; (iii) that public policy required the principle of access to justice for claimants to triumph over all other public policy interests, save only where there was a risk to the due administration of justice in the case of professional funders; (iv) that the position of professional funders was analogous (a) to that of pure funders and (b) to that of solicitors acting under a conditional fee agreement; and (v) that subjecting professional funders to non-party costs orders would deter the funding of meritorious litigation and adversely affect access to the courts for those who could not afford to litigate. (2) The judge failed to pay sufficient regard (i) to the unfairness arising if professional funders were to benefit from the proceeds of successful claims but be immune from adverse costs consequences if claims were unsuccessful, thus placing them in a better position than ordinary parties to litigation; (ii) to the interests of, and injustice to, the successful party who risked being unable to recover any costs; (iii) to the effect which non-party costs orders would have in deterring professional funders from supporting speculative litigation; and (iv) to CPR r 25.14(2)(b) . (3) In all the circumstances the judge was wrong not to order MPC to pay all or a proportion of Borchard's costs of the action.

By an appellant's notice filed on 16 February 2004 Camomile, Furness, Manchester, DNOL and KNSM appealed the judge's order as to costs against MPC on similar grounds and on the additional ground, inter alia, that the judge failed to take into account that MPC's conduct had caused the defendants to incur very substantial costs, including but not limited to the costs of experts and the costs associated with that evidence, and that the causative link was a proper matter to be taken into account in the exercise of the discretion under section 51.

By an appellant's notice filed on 16 February 2004 Zim also appealed the judge's MPC costs order on similar grounds.

On 2 March 2004 MPC filed a respondent's notice seeking to support the judge's order for the reasons given in his judgment and for additional reasons.

By an appellant's notice filed on 16 February 2004 and pursuant to permission granted by Dyson LJ on 22 April 2004, Borchard appealed the judge's order as to the costs of the Part 20 proceedings on the grounds (i) that the judge took incorrect and/or irrelevant matters into account when deciding that there were no "exceptional" circumstances to justify departing from the normal costs order that the Part 20 proceedings should be regarded as separate from the main proceedings ("the separability principle") and that costs should follow the event in the Part 20 proceedings, and in deciding that a "cut through" costs order was inappropriate; (ii) that the judge failed to take certain relevant matters into account, in particular he ignored the balance of hardship to the Part 20 parties and failed to consider whether he ***3059** could spread the hardship by making a cut through order on the very exceptional and unusual facts of the case; (iii) that the judge was wrong in principle to ignore the impecuniosity of the claimant when considering the appropriate costs order between the Part 20 claimant and Part 20 defendants; (iv) that the judge applied too high a test for departing from the normal separability principle, namely "exceptional" cir-

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cumstances, when he should have applied the test under CPR r 44.32(b) read in the light of the overriding objective, namely "whether justice required a different order to be made"; and (v) that the judge misdirected himself on the question whether he could make an order that the costs of the defendants and Part 20 defendants be pooled and shared out pro rata.

By an undated respondent's notice Zim sought to support the judge's Part 20 costs order on the additional grounds, inter alia, that in all the circumstances it would be unjust to require the successful Part 20 defendant to look to the insolvent claimant for recovery of its costs and that it would be unjust to impose a costs sharing arrangement upon the successful Part 20 defendant which would result in it failing to recover all of its costs.

By a respondent's notice filed on 21 May 2004, DNOL and KNSM also sought to uphold the judge's Part 20 costs order and in the alternative cross-appealed for an order that Borchard should pay the whole or a fair share of the costs which they had incurred in preparing and adducing expert evidence for the trial.

The facts are stated in the judgment.

Charles Gibson QC and *Peter Irvin* for Borchard.

Steven Gee QC and *Hugh Mercer* for Camomile, Furness, DNOL and KNSM.

Vasanti Selvaratnam QC and *Fergus Randolph* for Zim.

Guy Mansfield QC and *Sarah Lambert* for MPC.

Cur. adv. vult.

26 May. LORD PHILLIPS OF WORTH MATRAVERS MR

handed down the following judgment of the court to which all members had contributed.

Introduction

1 The court is concerned with the considerable fall-out of a disastrous piece of litigation. The claimant, Mr Arkin, is and was a man without means. His lawyers were acting for him under conditional fee agreements. He was, however, only able to pursue his claim to judgment because of the financial support provided by a professional funder, Managers and Processors of Claim Ltd ("MPC"). Mr Arkin's claim failed. His lawyers have recovered nothing. MPC's support has cost them in excess of £1.3m, for no return. Very substantial costs have been incurred by the defendants and the Part 20 defendants. Together these amount to nearly £6m. This appeal is about those costs.

2 The four defendants, whom we shall call respectively "Borchard", "Camomile", "Furness" and "Manchester", and the active Part 20 defendants, namely the third, whom we shall call "DNOL", the fifth whom we shall call "KNSM" and the first and sixth, whom we shall call "Zim", ***3060** sought to persuade Colman J that MPC should be ordered to pay their costs. In a judgment delivered on 27 November 2003 the judge declined to make the order sought: see **Arkin** v **Borchard** Lines Ltd (No 2) [2004] 1 Lloyd's Rep 88 . They appeal against that judgment, pursuant to permission granted by the judge himself.

3 Pursuant to a judgment dated 16 December 2003 Colman J ordered that **Borchard** should pay 90% of Zim's costs and 80% of each of DNOL and KNSM's costs: see **Arkin** v **Borchard** Lines Ltd (No 3) [2004] 1 Lloyd's Rep 636 . **Borchard** appeals against that order, pursuant to permission granted by Dyson LJ.

The facts

4 At this point we shall set out the facts in outline. In due course we shall have to elaborate some of them in a little more detail. Mr Arkin and his wife founded and owned a company called BCL Shipping Line Ltd ("BCL"). It traded between 1988 and 1992. Its trade was the operation of liner services on varied routes to and from Haifa and Ashdod in Israel. In January 1989 BCL complained to the European Commission that two

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shipping conferences were infringing articles of the Treaty of Rome, which are now articles 81 or 82. We shall refer to them as such. The conferences in question were CONISCON and UKISCON. The defendants and the Part 20 defendants were members of one or both of these conferences, as were a number of other companies.

5 In November 1991 the European Commission issued a "statement of objections" indicating an intention to fine the conferences for breach of article 81. The members of the conferences other than Borchard joined together to defend themselves, instructing a single firm of solicitors to represent them and sharing the costs of so doing. There was a hearing in April 1992. In September 1993 the Commission determined that there was an insufficiently strong Community interest to justify proceeding to a decision because the conferences' agreements had been amended in a material respect in early 1991.

6 Meanwhile, in May 1992, BCL had ceased trading. In September 1993 BCL was struck off the Companies Register for failing to file accounts. The company was insolvent and was dissolved. Mr Arkin contended that the company's business had been destroyed by the unlawful activities of the two shipping conferences.

7 It was not until 1996 that Mr Arkin took the first steps that led to the litigation with which we are concerned. He got BCL restored to the register and placed in liquidation. He then took an assignment from the liquidator of claims against the members of the conferences for breaches of articles 81 and 82 on terms that he would share any recoveries with BCL's creditors on a 50/50 basis. He obtained legal aid and, on 18 April 1997, served the writ in these proceedings. For reasons which have always been unclear, he impleaded only four UK-based members of the UNISCON conference, Borchard, Camomile, Furness and Manchester (in fact the latter did not trade in the relevant market and played no effective role in the events complained of in the litigation with which we are concerned).

8 The statement of claim was served on 2 May 1997. It alleged that the four defendants acted collectively with the other members of the two ***3061** conferences to abuse a dominant position by predatory pricing and other activities that infringed article 82 and that they were guilty of price fixing that infringed article 81.

9 No sooner had Mr Arkin commenced proceedings than his legal aid was withdrawn. He had no resources to fund the litigation. He persuaded solicitors, and later counsel, to act for him on a conditional fee basis. The same course was not open to him in relation to expert evidence. However, under an agreement concluded on 2 August 2000, he persuaded MPC to agree to fund the expert evidence and the cost of organising documents on a contingent fee basis. MPC would only be paid if the claim succeeded. If it did, they would receive a share of the damages recovered.

10 On 27 July 2001 Borchard was granted permission to issue Part 20 notices against DNOL, KNSM and Zim.

11 The trial began on 20 February 2002 and, on 26 April 2002, it was adjourned part heard. On 23 May 2002 an application was made by the defendants and Part 20 defendants that MPC should provide security for their costs. The application was refused. On 10 April 2003 judgment was given in favour of the defendants and the Part 20 defendants. Mr Arkin was comprehensively defeated. On breach of duty the judge found that Mr Arkin had failed to prove infringement of articles 81 or 82. On causation the judge found that BCL's cessation of trading had not been proved to be attributable to events on the relevant market: see [2003] 2 Lloyd's Rep 225 .

The MPC appeal

MPC's role

12 MPC was founded in 1996 by the amalgamation of three firms that specialised in work relating to claims for compensation and, in particular, the quantification of loss. Its business was described by its managing director as "the managing and processing of compensation claims and providing assistance in claims assessment and litigation". As part of its business MPC responded

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to requests for assistance in funding litigation in circumstances where legal aid was not an option. In such circumstances, the funding was provided on terms that MPC would receive a percentage of the recovery if the claim succeeded and nothing if it did not.

13 Under their agreement with Mr Arkin, MPC undertook to instruct, engage and pay for one or more expert forensic accountant in the firm of Ernst & Young to provide a report on the quantum of BCL's loss attributable to the actions of the defendants. They also agreed to provide various services ancillary to this accountancy exercise, including secretarial services. Their agreed remuneration was 25% of recoveries from the litigation up to £5m and 23% thereafter. In addition they were to receive any payments in respect of costs of witnesses in relation to quantum recovered from the defendants. If the initial expert's report suggested that the damages recovered would be inadequate to enable MPC to cover their costs, they had an option to withdraw from the agreement. Thereafter, they were locked in. The agreement provided that Mr Arkin should have the conduct of the proceedings, but would need the consent of MPC to any settlement or compromise. In the event of dispute, the decision of leading counsel acting for Mr Arkin was to prevail.***3062**

14 The judge found that MPC took no part in the taking of decisions as to the conduct of Mr Arkin's case. Although MPC were kept well informed at all times, they did not attempt to control the litigation.

15 The judge accepted that, when MPC entered into the agreement, they estimated that their total outlay up to the end of the trial might amount to some £600,000. He also referred to evidence that suggested that MPC viewed the probable settlement range as being between US$5m and US$10m. While in argument counsel suggested that MPC may have had their sights on a very much larger recovery, we have seen nothing that invalidates the judge's assessment of the position.

The judge's approach

16 Although Mr Arkin's claim failed on every front, the judge observed that counsel had advised that Mr Arkin had a very strong claim and that he was not persuaded that it should have been blindingly obvious that, however strong the case might be on liability, it was doomed on causation of loss. He also observed that, if Mr Arkin had not entered into the MPC agreement, or an agreement with another professional funder on substantially similar terms, he could not have pursued his claim to trial. The judge's view of the implication of these facts appears from the following paragraph of his judgment [2004] 1 Lloyd's Rep 88 , para 71:

"It is indeed highly desirable that impecunious claimants who have reasonably sustainable claims should be enabled to bring them to trial by means of non-party funding. It is further highly desirable in the interests of providing access for such claimants to the courts that non-party funders, such as MPC should be encouraged to provide funding, subject always to their being unable to interfere in the due administration of justice, particularly in order to forward their own interest in their stake in the amount recovered. If all professional funders were by definition to be subject to non-party costs orders, there would be no such funders to provide access to the courts to those who could not otherwise afford it."

17 The judge examined a number of authorities and subjected two to detailed scrutiny. These were R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8) [2003] QB 381 and Hamilton v Al Fayed (No 2) [2003] QB 1175 . He concluded that these established that support of litigation furthered the important public policy objective of facilitating access to justice. Providing that such support was not attended by adverse features which would offend against the prohibition of champerty, such support was to be encouraged, not discouraged. Holding MPC liable for the defendants' costs would discourage the funding of litigation. Accordingly the applications for costs orders against MPC would be rejected.

18 The appellants attacked the judge's reasoning. Their counsel submitted that the judge had wrongly equated the test for deciding whether a funding agree-

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ment was champertous with the test for deciding whether costs should be ordered against a non-party. The two questions were not the same. The latter question required the court to have regard to the requirements of fairness. It was fair that a funder who, for profit, had supported a claim which had turned out to be without foundation, should be ***3063** required to indemnify the successful defendant against legal costs reasonably incurred in resisting the claim.

19 The appellants submitted that their case was supported by the authorities. We turn to consider these.

The authorities

20 Section 51(1) and (3) of the Supreme Court Act 1981 , as substituted by section 4 of the Courts and Legal Services Act 1990 , provides:

"(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings ... shall be in the discretion of the court."

"(3) The court shall have full power to determine by whom and to what extent costs are to be paid."

In Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965 the House of Lords held that this power was expressed in wide terms, leaving it to the rule making authority, if it saw fit to do so, to control its exercise by rules of court and to the appellate courts to establish principles for its exercise. In particular, there was no justification for implying a limitation on the power to award costs to the effect that an award could only be made against a party to the litigation.

21 CPR r 48.2 provides that where the court is considering whether to exercise its power under section 51 to make a costs order against a person who is not a party to the proceedings, that person must be added to the proceedings for the purposes of costs only. It was in accordance with this rule that MPC were added as 11th Part 20 defendants.

22 CPR r 44.3 deals with the discretion of the court in relation to awarding costs and the circumstances to be taken into account when exercising its discretion. CPR r 44.3(2)(a) provides that if the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. CPR r 44.3 goes on to set out circumstances that may lead the court not to follow the general rule. Broadly speaking CPR r 44.3 evidences a policy of using costs as a sanction for the conduct of legal proceedings that deviates from the "overriding objective" that is laid down by CPR Pt 1 . A party whose unreasonable conduct causes unnecessary costs to be incurred is at risk of being ordered to pay those costs, even if successful. This is not inconsistent with the main principle that underlies the general rule that the unsuccessful party pays the successful party's costs. It is important in the context of this appeal to bear that principle in mind.

23 "Cost shifting" under which costs usually follow the event is not a universal rule in common law jurisdictions. In particular, it is not a rule that applies in the United States. The main principle that underlies the rule is that if one party *causes* another unreasonably to incur legal costs he ought as a matter of justice to indemnify that party for the costs incurred. A defendant who has wrongfully injured a claimant and who has refused to pay the compensation due should pay the costs that he has *caused* the claimant to incur, so that the claimant receives a full indemnity. A claimant who brings an unjustified claim against a defendant so that the defendant is forced to incur legal costs in resisting that claim should indemnify the defendant in respect of the costs he has *caused* the defendant to incur. Causation is ***3064** usually a vital factor when considering whether to make an award of costs against a party.

24 Causation is also often a vital factor in leading a court to make a costs order against a non-party. If the non-party is wholly or partly responsible for the fact that litigation has taken place, justice may demand that he indemnify the successful party for the costs that he has incurred. There have been various circumstances in which the court has considered making an order for

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costs against a non-party. We shall confine our attention to those cases where this course has been urged on the ground that the non-party had supported the unsuccessful claimant.

25 By way of background we must refer to the decision of the Court of Appeal in Hill v Archbold [1968] 1 QB 686. In that case an issue arose as to whether a trade union, which had funded an unsuccessful libel action by two claimants, had been guilty of unlawful maintenance. Giving the leading judgment Lord Denning MR held that it had not. He said, at pp 694-695:

"Much maintenance is considered justifiable today which would in 1914 have been considered obnoxious. Most of the actions in our courts are supported by some association or other, or by the state itself. Comparatively few litigants bring suits, or defend them, at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies. This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side."

26 In McFarlane v EE Caledonia Ltd (No 2) [1995] 1 WLR 366 the conduct of a Scottish company was in issue. It had been formed to support personal injury claims on a contingency basis and had done so in relation to an unsuccessful claim for personal injury that had been brought in the English court. Its policy was not to accept liability for a successful adverse party's costs. Longmore J made an order for costs against the company. Citing Hill v Archbold, he observed that the exercise of this policy affected the contingency agreement with illegality under English law, quite apart from the additional illegality that arose out of the champertous nature of the agreement.

27 In Murphy v Young & Co's Brewery plc [1997] 1 WLR 1591 the plaintiff had brought an unsuccessful action for wrongful dismissal. This had been funded as to £25,000, the limit of the cover, under what would now be called before the event ("BTE") insurance against legal costs. The successful defendant sought an order for costs against the insurers. In the leading judgment Phillips LJ rejected this application, holding that legal expense insurance was in the public interest in that it not only provided desirable protection to the assured, but a potential source of meeting the costs of the adverse party. Agreeing, Sir John Balcombe distinguished the case from one in which a third party funded a particular claim and had a direct commercial interest in the outcome.

28 The result in that case differed from that in TGA Chapman Ltd v Christopher [1998] 1 WLR 12, where a costs order was made against insurers. The insurers in question were the liability insurers of an unsuccessful and impecunious defendant. They were contingently liable to the claimants by reason of the provisions of the Third Parties (Rights against ***3065** Insurers) Act 1930. They funded and conducted the unsuccessful defence in their own interest. But for their intervention the action would not have been defended. All of these factors were material in leading the Court of Appeal to the conclusion that it was just to order the insurers to pay the successful claimants' costs.

29 We now come to one of the decisions to which Colman J attached particular importance. In Hamilton v Al Fayed (No 2) [2003] QB 1175 the claimant, an impecunious MP, brought a libel action against a well-known and extremely wealthy businessman. Most of his legal expenses were paid for out of a "fighting fund" to which several hundred donors had contributed. The action failed and the defendant sought an order that nine of the major contributors to the fighting fund, whose identities he had ascertained pursuant to a court order, should pay the costs which he was unable to recover from the claimant. The judge rejected this application and the claimant appealed.

30 The leading judgment in the Court of Appeal was given by Simon Brown LJ. After extensive consideration of authority, including the cases to which we have referred above, he identified that there was a conflict between two principles: on the one hand the de-

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sirability of the funded party obtaining access to justice; on the other, the desirability that the successful party should recover his costs. He considered that, where the funders were "pure funders" the former principle should prevail. There were indications that this result accorded with public policy. The statutory scheme under which lawyers could act under a conditional fee agreement ("CFA") encouraged litigation in circumstances where the defendant would have to pay the claimant's costs, including a success fee, if the claim succeeded, but would be unable to recover his costs if the claim failed. "If in these cases solicitors (or, indeed, barristers) are not to be liable for the other side's costs if their client's claim fails, why should the pure funder be?": see para 45. Where the legal aid fund supported a claim that failed, the successful defendant would not normally have recourse to the fund to recover his costs. Nor did the law require an impecunious claimant to put up security for costs as a condition of pursuing his claim:

"So long as the law continues to allow impoverished parties to litigate without their having to provide security for their opponent's costs, those sympathetic to their plight should not be discouraged from assisting them to secure representation": see para 48.

31 The term "pure funder" was one that Morland J had employed in the court below to describe a funder who contributes to costs as an act of charity, without control over how his donation is spent, who plays no part in the management of the trial and who has no interest in its outcome, other than the hope that his donation may be repaid if the claim succeeds. Morland J had commented, at paras 70-72, in passages cited with apparent approval by Simon Brown LJ [2003] QB 1175 , para 6, on the contrast between the pure funder and the professional funder:

"70. The position of the professional funder is very different. Almost always the funding arises out of a contractual obligation for example where the funder is a trade union, an insurer or professional or trade ***3066** association. Normally such a funder exercises considerable control management and supervision of the litigation ...

"71. ... It would be very exceptional that a situation would arise where it would not be just and reasonable to make a section 51 order against a professional funder.

"72. The reverse is the position in the case of a pure funder. It will be rare or very rare that it will be just and reasonable to make an order against him."

32 Simon Brown LJ recognised that one benefit of the principle that costs follow the event was that this deterred the bringing of actions that were likely to be lost: see Roache v News Group Newspapers Ltd [1998] EMLR 161 . The fact that lawyers would assess the merits carefully before appearing under a CFA, and that the Legal Services Commission required a similar exercise before approving the grant of legal aid were likely to achieve the same benefit. Pure funders were less likely to exercise the same careful judgment. None the less, the desirability of access to justice prevailed.

33 In a concurring judgment, Chadwick LJ observed [2003] QB 1175 , para 63:

"The starting point, as it seems to me, is to recognise that, where there is tension between the principle that a party who is successful in defending a claim made against him ought not to be required to bear the costs of his defence and the principle that a claimant should not be denied access to the courts on the grounds of impecuniosity, that tension has to be resolved in favour of the second of those principles ..." Hale LJ concurred, albeit with some reservation.

34 In Gulf Azov Shipping Co Ltd v Idisi [2004] EWCA Civ 292 this court refused an application for a costs order against an individual who had provided funding for an unsuccessful defendant. The court remarked, at para 54:

"We are not sure that the adjective 'pure' assists in the analysis. It is, we believe, designed to draw a distinction between those who assist a litigant without ulterior motive and those who do so because they have a personal interest in the outcome of the litigation. Public

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policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation. Intervention to this end will not normally render the intervener liable to pay costs. If the intervener has agreed, or anticipates, some reward for his intervention, this will not necessarily expose him to liability for costs. Whether it does will depend upon what is just, having regard to the facts of the individual case. If the intervention is in bad faith, or for some ulterior motive, then the intervener will be at risk in relation to costs occasioned as a consequence of his intervention."

35 Colman J [2004] 1 Lloyd's Rep 88 cited extensively from the judgment of this court in R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8) [2003] QB 381 . That judgment concerned fees paid by the successful claimants to a firm of accountants, Grant Thornton. The claimants had agreed to pay Grant ***3067** Thornton 8% "of the final settlement received". This was to constitute payment for Grant Thornton's accountancy and back-up services in relation to the assessment of quantum and for the retention and payment by Grant Thornton of independent expert witnesses. The defendant challenged the claimants' right to recover this payment as costs on the ground that the agreement in question was champertous and unenforceable. The court rejected this argument. Relevant to its decision was the fact that Grant Thornton did not attempt to exert any influence upon the conduct of this phase of the litigation, the fact that the 8% recovery did not exceed what would have been fair remuneration for Grant Thornton's services, indeed it acted as a cap on their fees, and the fact that the agreement to remunerate Grant Thornton in this way had been necessary in order to procure for the claimants access to justice. The court observed that the introduction of CFAs evidenced a radical shift in the attitude of public policy to the practice of conducting litigation on terms that the obligation to pay fees would be contingent on success.

36 The most recent decision, delivered after Colman J's judgment, was the one upon which the appellants placed most reliance. Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Associated Industrial Finance Pty Ltd, Third Party) [2004] 1 WLR 2807 was an appeal to the Privy Council from the Court of Appeal of New Zealand. In giving the advice of the Board, Lord Brown of Eaton-under-Heywood stated that there was no difference of approach on the part of the courts of England, New Zealand and, indeed, Australia when considering whether to make an award of costs against a non-party. The Board held that, in the circumstances of the case before it, justice required a costs order against a non-party. The non-party in question was a family company, "Associated", which had advanced moneys to the defendant in the litigation which was secured by a debenture. Associated had funded appeals to the Court of Appeal and to the Privy Council, in their own interest, and those appeals would not have been brought without their support. Lord Brown set out the principles to be derived from the English and Commonwealth authorities as follows, at para 25:

"(1) Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against. (2) Generally speaking the discretion will not be exercised against 'pure funders', described in para 40 of Hamilton v Al Fayed (No 2) [2003] QB 1175 , 1194 as 'those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course'. In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.

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(3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to ***3068** benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation, a concept repeatedly invoked throughout the jurisprudence: see, for example, the judgments of the High Court of Australia in Knight v FP Special Assets Ltd (1992) 174 CLR 178 and Millett LJ's judgment in Metalloy Supplies Ltd v MA (UK) Ltd [1997] 1 WLR 1613 . Consistently with this approach, Phillips LJ described the non-party underwriters in TGA Chapman Ltd v Christopher [1998] 1 WLR 12 , 22 as 'the defendants in all but name'. Nor, indeed, is it necessary that the non-party be 'the only real party' to the litigation in the sense explained in the Knight case, provided that he is 'a real party in ... very important and critical respects': see Arundel Chiropractic Centre Pty Ltd v Deputy Comr of Taxation (2001) 179 ALR 406 , 414 referred to in the Kebaro case [2003] FCAFC 5 at [96], [103] and [111]. Some reflection of this concept of 'the real party' is to be found in CPR r 25.13(2)(f) which allows a security for costs order to be made where 'the claimant is acting as a nominal claimant'. (4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests."

Discussion

37 If Colman J had had the benefit of the summary of the principles given by Lord Brown in the Dymocks Franchise Systems (NSW) Pty Ltd case we do not believe that he would have approached the fact that MPC were professional funders in the way that he did. After considering the passages from the judgment of Morland J in Hamilton v Al Fayed (No 2) [2003] QB 1175 , that we have quoted at para 31 above, he held [2004] 1 Lloyd's Rep 88 , para 21:

"It is, in my judgment, a misunderstanding of this passage and seriously inconsistent with the relevant principles to suggest that a third party costs order will necessarily be appropriate against a professional funder given that he is by definition not a pure funder. Whether such an order is appropriate in any given case must depend primarily on whether on the evidence before it on the application the court is satisfied that such an order is appropriate to reflect (i) the defendant's success and (ii) the risk of prejudice to the objective of protection of the due administration of justice. Specifically, I am unable to accept that the mere fact of a contract for a share in the proceeds of the litigation necessarily involves such material prejudice. Whether it does will depend on the legal and practical relationship between the professional funder and the claimant. If that relationship by reason of the terms of the funding agreement is such as not to give rise to any material opportunity to the funder to influence the conduct of the litigation to serve his own interests as distinct from the proper running of the trial and the funder does not in the event intervene or attempt to do so, there will be strong grounds for declining to make an order for costs against him where, but for such funding, access to the court would have been impossible."***3069**

38 While we do not dispute the importance of helping to ensure access to justice, we consider that the judge was wrong not to give appropriate weight to the rule that costs should normally follow the event. R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8) [2003] QB 381 , on which he strongly relied, was not a case in which there was any need to take this balancing factor into account. In our judgment the existence of this rule, and the reasons given to justify its existence, render it unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action. Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on

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the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed.

39 If a professional funder, who is contemplating funding a discrete part of an impecunious claimant's expenses, such as the cost of expert evidence, is to be potentially liable for the entirety of the defendant's costs should the claim fail, no professional funder will be likely to be prepared to provide the necessary funding. The exposure will be too great to render funding on a contingency basis of recovery a viable commercial transaction. Access to justice will be denied. We consider, however, that there is a solution that is practicable, just and that caters for some of the policy considerations that we have considered above.

40 The approach that we are about to commend will not be appropriate in the case of a funding agreement that falls foul of the policy considerations that render an agreement champertous. A funder who enters into such an agreement will be likely to render himself liable for the opposing party's costs without limit should the claim fail. The present case has not been shown to fall into that category. Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation.

41 We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.

42 If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs ***3070** proportionate. In the present case there was no such cap, and it is at least possible that the costs that MPC had agreed to fund grew to an extent where they ceased to be proportionate. Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest.

43 In the present appeal we are concerned only with a professional funder who has contributed a part of a litigant's expenses through a non-champertous agreement in the expectation of reward if the litigant succeeds. We can see no reason in principle, however, why the solution we suggest should not also be applicable where the funder has similarly contributed the greater part, or all, of the expenses of the action. We have not, however, had to explore the ramifications of an extension of the solution we propose beyond the facts of the present case, where the funder merely covered the costs incurred by the claimant in instructing expert witnesses.

44 While we have confined our comments to professional funders, it does not follow that it will never be appropriate to order that those who, for motives other than profit, have contributed to the costs of unsuccessful litigation, should contribute to the successful party's costs on a similar basis.

The result in this case

45 MPC will not have entered into the funding agreement with Mr Arkin on the assumption that they would be held liable to pay, or to contribute to, the defendants' costs should Mr Arkin's claim not succeed. They must,

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however, have contemplated that this was at least a possibility. At the hearing of the application against MPC for security for costs, which took place in the period during which the trial had been adjourned, it does not appear that MPC challenged the proposition that they were contingently at risk of a costs order. In his judgment on that application Colman J remarked that the magnitude of the risk that MPC would be ordered to contribute to the defendants' costs should Mr Arkin's claim fail seemed to him to be "very substantial". In these circumstances, we can see nothing unjust in applying the approach that we have outlined above. Accordingly, we propose to order that MPC pay £1.3m by way of contribution to defence costs. To whose benefit this payment should accrue, and the form of order necessary to ensure that it does, is a matter to which we shall revert after the second part of this judgment: see paras 83-84 below.

The costs order against Borchard

46 We now turn to **Borchard's** appeal against the order made by the judge on 16 December 2003 to the effect that it should pay 90% of Zim's costs and 80% of each of DNOL's and KNSM's costs: see **Arkin** v **Borchard** Lines Ltd (No 3) [2004] 1 Lloyd's Rep 636 . DNOL and KNSM, while resisting this appeal, are seeking in the alternative an order that **Borchard** should pay the whole or an appropriate part of the costs they incurred in preparing and adducing expert evidence for the purposes of the trial.

47 The judge's general approach, which we will examine in greater detail in due course, was that there was no particular feature of this case to take it outside the general rule that the costs of Part 20 proceedings should follow the event in the Part 20 proceedings, so that when the claimant's ***3071** claim failed and the Part 20 proceedings were as a consequence dismissed, the claimant in the Part 20 proceedings should pay the costs of the defendants to the Part 20 proceedings whom it had chosen to join.

The history of the litigation

48 In order to understand the reasons why Borchard came to join Zim and other conference members as Part 20 defendants in the summer of 2001 it is necessary to understand the course which the litigation had taken up to this point. For all practical purposes connected with the litigation we need only consider the two conferences as comprising four companies each: the UKISCON conference comprising Borchard, Furness, Camomile and Zim, and the CONISCON conference comprising Borchard, DNOL, KNSM and Zim. Zim, who were the Israeli national carrier and by far the single largest participant in each group, were not joined to the action by Mr Arkin, although at the relevant time they had an office in London at which service could have been effected. Instead, he limited himself to suing the three other companies in the UKISCON conference (we exclude the fourth defendants Manchester, for whom see para 7 above). As a result a direct claim by Mr **Arkin** against Zim, DNOL, and KNSM became effectively statute-barred soon after the writ was issued, but they were always answerable to a claim in Part 20 proceedings.

49 By the spring of 2000, when **Borchard's** amended defence was served, the litigation was limited to **Arkin's** claims for damages for breaches of duty committed during the six years immediately preceding the issue of the writ in April 1997. The general nature of Mr **Arkin's** claim is summarised in para 8 above. In essence he was saying that the companies we have mentioned, acting "collectively as both conferences", caused loss to BCL by the abuse of their dominant position. Part of his claim involved a contention that the conferences were not entitled to the benefit of a block EC exemption in favour of liner conferences for the reasons the judge summarised in para 31 of his main judgment [2003] 2 Lloyd's Rep 225 .

50 Zim was a very important participant in each conference, and Mr Arkin's decision to seek compensation from the three other extant members of the UKISCON conference, and not from Zim, created difficulties in terms of the documentary material and other evidence which would be available to the trial judge. These difficulties were accentuated because Mr Arkin developed a very detailed case to the effect that he was also entitled

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to rely on Zim's anti-competitive activities on a container route which embraced ports in South Africa, Greece, Turkey and Israel, in which none of the other participants in the two conferences were involved at all. Paras 4-10 of the "strike-out" judgment, delivered on 19 June 2001, shows how this case first surfaced in a single paragraph in a schedule to the amended statement of claim, was developed in further information served in January 2000, was further developed in the reply served in July 2000, and particularised in greater detail when yet further information was served and later amended in the ensuing months. These allegations created unusual difficulties from a procedural standpoint because Borchard and the other two defendants were being charged with legal liability in respect of matters in which they had not participated at all and in which the prime mover, Zim, was a non-party outside the jurisdiction of the English court. We will refer to these issues generally as "the ancillary market issues".***3072**

51 Furness (a member, like DNOL, of the Hamburg Sud group of companies) and Camomile (a member, like KNSM, of the P & O group of companies) decided from the outset to instruct the same firm of solicitors, Davies Arnold & Cooper ("DAC"). Borchard, which is a family-owned company, declined a suggestion that they should instruct the same firm, and they later turned down an overture from DAC to the effect that they should collaborate in preparing the evidence for the trial: in particular, they refused to share the cost of instructing expert witnesses. In August 2000 Miss Holmes, the DAC solicitor in charge of her clients' case, called on the Haifa offices of Mr David Malkoff while she was visiting Israel on other business. He was a lawyer for Zim who had defended most of the conference participants when they were collaborating in their response to BCL's complaints to the EC Commission in the late 1980s.

52 Mr Malkoff gave her access to such documents as he had in his office, which mainly related to the EC case, but when she asked for access to Zim's documents more generally (in so far as they related to activities that were relevant to the issues in this litigation), he told her that Zim had now closed their London office. All in all she did not receive a very positive response to her request.

53 The judge held a number of hearings in late 2000 and early 2001 to deal with different aspects of the case, and at one such hearing, on 28 February 2001, he discussed with counsel some outstanding issues relating to discovery of documents, and in particular a problem arising out of the non-availability of the minutes of a body called the Freight Marketing Committee, of which only two sets of minutes were in the possession of any of the parties. Counsel for Mr Arkin told the judge that there was no possibility that his client might be able to get any more of these minutes, and that Zim was the likely repository of these documents. The judge suggested that the effective way forward would be for his client either to approach Zim or to bring proceedings against them. Mr Arkin refused to take the latter course, and the upshot of further discussion between the judge and counsel was that the judge made an order dated 2 April 2001 in these terms:

"The claimant, by 1 March 2001, will write to Zim to ask for disclosure of the additional documents referred to in the claimant's application for disclosure (which application, for the avoidance of doubt, remains currently pending before the court). The defendants will also write to Zim informing Zim that they have no objections to Zim's production of those documents to the claimant, and the defendants will copy those letters to the claimant by 1 March 2001 ..." By the same order the judge directed that the matter should be set down for a seven-week trial starting on the first available date in January 2002.

The approach to Zim in March 2001 and the strike-out application

54 On 1 March, therefore, the claimant's solicitors wrote to Zim, in pursuance of the judge's order, indicating a very large variety of documents of which they required disclosure. On 5 March Mr Tubb (of Borchard) told his solicitor Mr Reynolds that he had spoken to Mr Stramer (of Zim) who told him that the letter of 1 March had been referred to Mr Malkoff's office. Mr Tubb gained the impression, however, that Zim would be unlikely to reply to the letter in any event, and

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that is how things turned out. On 6 and ***3073** 7 March Borchard's solicitors and DAC both wrote to Zim along the lines suggested by the judge's order, but Zim did not respond to any of these letters, either.

55 The effect of these problems might have been mitigated if the defendants had succeeded in an application they now made to the judge for an order striking out the ancillary market issues, alternatively for summary judgment on this aspect of the case. On 19 June 2001 the judge dismissed this application, but during his judgment he showed himself well aware of the difficulties created by Zim's non-involvement in the litigation. He said, at para 50, that it could not be assumed that anything like all the relevant evidence from the defendants and Zim was before the court, and that further disclosure might well give rise to evidence which was further supportive of the claimant's case. He had referred earlier in his judgment to the role played by Mr Levy (of Zim), and he now said:

"it cannot be said that there is no realistic prospect of any further supportive evidence by means of further disclosure or by means of the cross-examination of witnesses who are likely to give evidence. For example, the defendants might be placed in a very questionable position if without good reason they failed to call Mr Levy, even though he was an employee of Zim and not of the defendants. Given that there is some, albeit slender evidence to support the claimant's allegation, it would be quite unfair to deny the claimant the opportunity for further disclosure and further investigation through cross-examination offered by a full trial. CPR r 24.2 has the purpose of anticipating the claim which is fanciful but not the claim which is merely improbable."

56 The judge had accepted, at para 45, that there was some uncertainty as to the minimum that needed to be proved in order to implicate in liability for the anti-competitive acts of a cartel member other members of the cartel if they had participated in arriving at an agreed overall anti-competitive policy and had also exchanged information about competitors, even if they had little or no knowledge of the specific anti-competitive conduct of that member. He took the view, however, that the law was clearly in a process of development, and that the outcome in any particular case would depend on the precise facts as to the availability of information to cartel members and their means of knowledge and actual knowledge of such facts.

The decision to join the Part 20 defendants and the phase 3 directions

57 This order created a dilemma for Borchard and the other two defendants. Mr Reynolds believes that Mr Tubb (who had died before Mr Reynolds made a witness statement about these events two years later) spoke to Mr Stramer at least twice in the week following the strike-out judgment. Nothing came of these conversations, and Mr Tubb then instructed his solicitors to seek to join Zim (and DNOL and KNSM, as the other two relevant members of CONISCON) as Part 20 defendants. On 27 July 2001 the judge granted this application. In giving detailed case management directions leading up to a trial commencing on 28 January 2002 the judge accepted an undertaking from DAC's clients that they would write to Zim forthwith to call for Zim to make available any relevant documents during the period April 2001 to May 2002. In other ***3074** words, Borchard sought to resolve the dilemma created by the judge's order by joining further parties, including Zim, as Part 20 defendants. DAC's clients, for their part, sought to proceed by way of further correspondence with Zim.

58 On 17 September 2001 the judge gave directions in the Part 20 proceedings. That hearing, of which we have been provided with a transcript, throws a vivid light on the attitude of all the defendants following the strike-out judgment, with the trial due to start in four and a half months' time. After referring to Miss Holmes's evidence about her visit to Haifa the previous year, Borchard's counsel told the judge:

"This rather seems to bear out Mr Reynolds's surmise ... that Zim are deliberately dragging their heels. That perhaps makes it all the more pressing that some sort of an order should be made that brings them here, albeit kicking and screaming, and makes it desirable that they

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should be forced to join the party or be bound by the result if they do not want to. What we discussed last time, what we would want to avoid particularly in a case where we cannot win, and you are never going to get any costs from the claimant, is to have to spend a lot of money pursuing Zim in separate proceedings where they may not even be bound by the result of the earlier proceedings and where a whole lot of new material and evidence may suddenly pop up which may show that the original result perhaps was wrong. They have not acted expeditiously. They have obviously been keeping tabs on the action as it goes along, as they must be able to see some potential liability even at the stage where interlocutory proceedings were going on."

59 Counsel then appearing for the second and third defendants, for his part, told the judge (after the judge had resolved to make an order for substituted service on Zim):

"Our position is we would like a [case management conference] earlier because we do want Zim to actively participate in the trial ... We do want Zim brought in. We do want them brought in as soon as possible and we do want a [case management conference] as soon as possible so that we can start marshalling our forces. So we would suggest if they are allowed 14 days to acknowledge service."

60 The next case management conference took place on 11 October 2001. By this time DAC had been instructed by DNOL and KNSM as well, and Zim was now represented by a firm of London solicitors. In the light of Zim's concerns about the imminence of the trial date, the judge postponed the start of the trial for two weeks and directed that the hearing would be divided into two phases. Phase 1 would be confined to issues of liability and questions in respect of the North European market. Phase 2, which would relate to all other issues, including the ancillary market issues, would be heard "not before the beginning of the April term". In further directions, given on 20 December 2001, the earliest date for the start of the phase 2 trial was now to be July 2002.

61 Further directions were given by the judge, in agreed terms, on 18 January 2002. These included what were called "Phase 3 directions" in these terms, so far as are material: ***3075**

"7. Issues of contribution, if relevant, shall be resolved in a third phase to the trial of this action, such phase to follow the judgment on matters of liability and quantum in the main action."

"8. Each defendant and Part 20 defendant shall be deemed to have served a Part 20 contribution notice on every other defendant and Part 20 defendant.

"9. In the event that the matter cannot be agreed between the parties, there shall be directions at a further [case management conference] for appropriate pleadings to be exchanged in respect of such contribution proceedings following the judgment on liability and quantum in the main action.

"10. Each Part 20 defendant to be bound by the judgment of the main action."

"12. Nothing in this part of the order is intended to affect the incidence of costs."

62 On 27 May 2002 the judge made an order directing that the balance of the trial of the phase 1 proceedings would be completed in the hearing now fixed for October 2002, and noting that the phase 2 proceedings had been discontinued. (We were told that Mr Arkin took this step following some unfavourable comments by the judge on the case he had heard so far.) The hearing of the phase 1 trial was completed on 31 October, and after a hearing arranged before Christmas for counsel's closing submissions, the judge delivered his main judgment on 10 April 2003, when he dismissed all the claimant's claims: see [2003] 2 Lloyd's Rep 225 . His judgment on the incidence of costs as between the defendants and the Part 20 defendants was delivered on 16 December 2003: see [2004] 1 Lloyd's Rep 636 .

The judge's reasons for his judgment on costs

63 In this costs judgment the judge accepted that what he called a cut-through order (see

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Sanderson v Blyth Theatre Co [1903] 2 KB 533) might be made in those cases where a claimant was impecunious and justice required that an unsuccessful defendant should pay the costs of a successful defendant direct. The judgment of this court in Johnson v Ribbins [1977] 1 WLR 1458 , however, showed that the impecuniosity of the claimant was not in itself a feature sufficient to justify a departure from the normal rule that the costs of third party proceedings should follow the event in those proceedings. He accepted that this type of order should not be regarded as inviolate, but he said that it would only be in exceptional cases that what he called "the separability principle", whereby Part 20 proceedings were treated as quite separate from the main proceedings, would justifiably be departed from. His judgment continued [2004] 1 Lloyd's Rep 636 , paras 34-36:

"34. Further, in the present case, the Part 20 proceedings were not such as would necessarily be conclusively determined by the result of the main action. I can see that in cases where, if the defendant lost to the claimant, it would inevitably follow that the third party must be liable to the defendant, to impose on the defendant the burden of the Part 20 defendant's costs as well as his own might amount to an injustice so great as to justify making an order that the Part 20 defendant should recover his ***3076** costs direct from the impecunious claimant. However, where, as in this case, there were likely to be discrete Part 20 issues arising out of the conference agreements and the conduct of Zim in relation to conference members, the Part 20 issues do no more than overlap on the issues in the main action. They are not co-extensive.

"35. Additionally, this is not a case where Borchard and the third party Part 20 defendants made common cause as to joinder. Quite the contrary. Borchard did not send letters before action or invite conditional acceptance of liability before commencing the Part 20 proceedings. Instead it pursued an arm's length approach to the Part 20 defendants which was consistent with the maintenance of the separate nature of the Part 20 proceedings. Further, Borchard has derived from the joinder of Zim the benefit of both factual and expert evidence, while adducing no expert evidence itself. It may well be that even if Zim had not been joined, the factual evidence would still have been available. However, the expert evidence would not.

"36. In these circumstances this would not, in my judgment, be an appropriate case in which to make a cut-through order confining the Part 20 defendants to recovery of their costs direct from Mr Arkin."

64 The judge then refused to make an order requiring Borchard to contribute to the costs incurred by the second and third defendants in instructing expert witnesses. He also refused to spare Borchard the obligation of paying the whole of the costs incurred by the Part 20 defendants in instructing expert witnesses. He said, at para 40:

"In reaching this conclusion I have very much in mind that Borchard was aware at the time when it joined the Part 20 defendants that it was facing an impecunious claimant and that absent a section 51(3) order against an outside funder (MPC) it was exposed to the risk of the court taking the approach to costs identified in Johnson v Ribbins [1977] 1 WLR 1458 . It made no attempt before the trial to co-operate with the other conference members as to the provision of or the cost of expert evidence and was content to pursue its defence by the cheapest means possible-reliance on the expert evidence adduced and paid for by others. There was a very low level of co-operation between Borchard and all the other parties as to how expert evidence was to be deployed by way of defence."

65 It is not easy to see how in reaching his ultimate conclusions the judge took into account some of the matters to which he had alluded at the beginning of his judgment. Thus in para 3 he recalled how Mr Arkin had made specific allegations against Zim in relation to the ancillary market issues, and how it had become clear at an early stage in the pre-trial hearings that evidence of central importance to the case against all the other defendants was likely to be in Zim's possession. In para 4 he described how he had himself raised the question of how the trial could be sensibly conducted in Zim's

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absence, and how he had given a strong indication that Zim ought to be joined. In para 5 he said he was satisfied that there was nothing intrinsically unreasonable in joining Zim:

"In particular, Zim occupied a central position in Mr Arkin's allegations of abusive conduct and, on the face of it, had evidence directly ***3077** material to those allegations. Secondly, although Zim had given a measure of co-operation to Ms Holmes of the second to fourth defendants' solicitors in the course of her visit to Israel in 2000, it was far from clear whether they had approached the process of disclosure of documents as effectively and searchingly as would have been the case if they had been a party to the proceedings. Thirdly, it was quite unrealistic for Borchard to fight the claim on the basis that if Mr Arkin succeeded, separate proceedings could be pursued against Zim. The risk of inconsistent findings was far too great to leave that to chance." He went on to say, at para 6, that Zim played a major part in the trial, did not cause increased costs by duplication of evidence given by other parties, and adduced evidence of facts, disclosed documents and made available factual witnesses who gave important evidence helpful to the court.

The practical effect of the judge's costs order

66 Borchard complained that the injustice of the judge's order can be seen in the following table, which shows the effect of his order when applied to the costs claimed by the various defendants and Part 20 defendants:

	Own costs		
Zim's costs	*DNOL/KNSM's costs*		
Total liability	Borchard		
£813,000	£1.62m		
£1.085m	£3.518		
Furness/Camomile	£1.83m		

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£915,000 each	DNOL/KNSM
£1.36m	
£271,000	£135,000 each
Zim	£1.8m
£180,000	
£180,000	

67 We have recited the facts as they appeared to Borchard. Borchard's own costs were lower than those of the other parties because it adduced no expert evidence and its factual evidence was attenuated by reason of Mr Tubb's untimely death. It appears that it did not join in the common defence to the EC Commission proceedings, either, because of its differences of opinion with other conference members at that time.

68 The costs of DAC's four clients (whom we will call "the DAC parties") were substantially greater because they bore the cost of instructing accountancy experts and shipping experts at the trial. Although DNOL/KNSM agreed to share the expense equally with Furness and Camomile from the time they were joined to the proceedings, Mr Steven Gee, who appeared for all the DAC parties, accepted that this internal costs sharing agreement would not necessarily be binding as against Borchard when costs came to be assessed.

69 Zim, for its part, instructed an economist, but the bulk of its costs represented legal costs and disbursements and the cost of advisory accountants who did not give evidence at the trial. The judge, as we have seen, praised Zim for not duplicating the costs of other parties. Zim adduced evidence from Mr Malkoff to the effect that Borchard had made no attempts to secure Zim's co-operation until after the Part 20 proceedings had been issued. He averred that Zim had expressed itself more than willing to co-operate with DAC, and that they would have been willing to help Borchard if it had approached them. Earlier, in October 2001, he had filed a witness statement in which he sought to soften the impression that might have arisen from Borchard's need to seek an order for substituted service and the delay that occurred in August and September 2001, culminating in an ***3078** acknowledgement of service filed by Zim on 2 October 2001 indicating an intention to challenge the jurisdiction of the English court.

70 He did not address the problems created earlier by

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Zim's failure to respond in any way to the letters sent to them, at the judge's direction, in early March 2001: see para 54 above. Instead he said that Zim was just starting to look for relevant documents in early October 2001, and he accepted that his clients were the only participant in either conference who were in a position to lead evidence dealing with the relevant facts relating to the route to South Africa.

71 When the judge made his ruling on the incidence of costs as between the defendants and the Part 20 defendants, the phase 2 proceedings had been discontinued and no expense had been incurred as between any of the parties in connection with the prospective phase 3 contribution proceedings other than the exchange of statements of case in the Part 20 proceedings whose effect has been helpfully set out in a single Part 20 case memorandum. We heard enough by way of submissions from counsel, however, to show us that even if the judge had held that all these parties had collective responsibility for breaches of articles 81 or 82 of the Treaty of Rome vis-à-vis BCL, there would have been plenty for them to argue about if and when the judge went on to consider how much of this collective liability should fall on each of them. Except for the costs of preparing their pleaded cases, however, the parties did not incur any expense in preparation for this potential dogfight.

How should the costs be apportioned justly?

72 How, then, should the costs have been justly apportioned between the various parties, given that they all took part in the successful defence to the claimant's claim? And was the judge wrong in the approach he adopted and the order he made?

73 As has often been said by this court, the CPR represents a new procedural code, and it is often unwise to place too much weight on decisions made under the former rules. The ground rules are very simply set out in CPR Pts 1, 20 and 44.

74 CPR rr 1.1 and 1.2 make it clear that the overriding objective of enabling the court to deal with cases justly must permeate the interpretation of any rule and the way in which the court exercises any power given to it by the Rules. CPR r 20.3(1) provides that a Part 20 claim should be treated as if it were a claim for the purposes of the CPR, and the note beneath CPR r 20.9(1)(c) refers back to the court's case management powers under CPR r 3.1(2)(e) and (j). And CPR r 44.3 provides:

"(1) The court has discretion as to-(a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid.

"(2) If the court decides to make an order about costs-(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order."

75 In the usual course of things the court will consider the incidence of costs in the main proceedings quite separately from the incidence of costs in the Part 20 proceedings, but nobody submitted that this was an inviolable rule. Even under the former regime, and long before the House of Lords ***3079** illuminated the wide scope of section 51 of the Supreme Court Act 1981 in Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965, this court had held that both the High Court and the county court had "full and ample power to make such orders as to costs as between plaintiffs, defendants and third and subsequent parties as the justice of the case may require": see Edginton v Clark [1964] 1 QB 367, 384 where Upjohn LJ said that the court would have been prepared to order that the plaintiff should pay the third party's costs directly if the defendants had invited them to.

76 Johnson v Ribbins [1977] 1 WLR 1458 is a good example of a case decided under the old regime. A legally-aided plaintiff had failed in her action against her mortgagees for negligently selling her hotel at a gross under-value. The mortgagees' third party claim against the estate agents who had advised them therefore fell to be dismissed. This court applied the normal rule (see RSCOrd 62, r 3(2)) that costs should follow the event in the third party proceedings, and said that the judge had been wrong to make an or-

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der that the legally-aided plaintiff, who had the benefit of the costs protection available to legally-aided parties, should pay the third party direct. Goff LJ said, at p 1464:

"Apart from the impact of legal aid the consideration of which, as we have already observed, is excluded by the Act itself, we can see nothing which the defendants can call in aid except the impecuniosity of the plaintiff, but it cannot be right to deprive a third party of an order for costs to which he is otherwise entitled against the defendant, because the defendant when looking to the plaintiff for reimbursement finds a person not worth powder and shot."

77 In the ordinary run of cases under the CPR the same principle will be applied. A successful Part 20 defendant should not be deprived of his prima facie right to an order for costs against a Part 20 claimant merely on the ground of the claimant's impecuniosity: see Goff LJ [1977] 1 WLR 1458 , 1465-1466. The fact that in an appropriate case a defendant may, and a Part 20 defendant may not, obtain an order for security for costs against a claimant may be a relevant factor in some cases, but in the present litigation DAC endeavoured but failed to obtain such an order against Mr Arkin, so that the point does not arise. The issue that has to be determined on the peculiar facts of the present litigation is whether the interests of justice deemed that some different order should be made (see CPR r 44.3(2)) as between the various conference participants who successfully beat off the claimant's claim.

78 In our judgment the judge fell into error in the exercise of his discretion by apparently giving no weight to the important matters to which he alluded in paras 3-5 of his judgment [2004] 1 Lloyd's Rep 636 (see para 64 above) and by failing to take into consideration the very unusual circumstances of the claim. This was akin to being a conspiracy claim in which it was being asserted that the various conference participants bore collective responsibility pursuant to articles 81 and 82 of the Treaty of Rome for the losses BCL had suffered at the hands of any of them, so long as they were implementing conference policy. And not only that: it was also being asserted that they bore collective responsibility in relation to the ancillary market issues, about which none of them, apart from Zim, knew anything at all. The fact that Mr Arkin chose to sue only three of them, and did not sue
***3080** Zim or the other parties to the CONISCON conference, must not be permitted to produce an unjust result, so far as the incidence of costs as between the conference parties is concerned.

79 As the judge indicated, Zim were joined after he had intimated that he could not see how he could try the case, and particularly the ancillary issues, fairly in the absence of Zim's documents and the oral evidence of Mr Levy. Although Mr Malkoff was to assert in the autumn of 2001 how co-operative his clients would have been willing to be in the absence of joinder, their previous conduct (see paras 50-54 above) did not evidence such willingness in any great measure and, after the failure of the judge-inspired correspondence in March 2001 and the judge's refusal to strike out the ancillary market issues in mid-June 2001, Borchard had to take urgent action to protect its position with the trial date in January 2002 looming ever nearer. The fact that the DAC defendants prudently decided to shelter behind Borchard's coat-tails once they knew that Borchard was intent on embarking on Part 20 proceedings-their solicitors were shown the Part 20 claim in draft in early July 2001-does not in our judgment mean that justice requires them to be treated more favourably. Their enthusiasm for what Borchard had done is amply evidenced by what their then counsel told the judge on 17 September 2001 (see para 59 above), and by their willingness to join in the agreed order for the phase 3 trial whereby all the conference participants were deemed to be seeking contribution from all the others without further order.

Our conclusions on Borchard's appeal

80 In our judgment justice demands that we should set aside the judge's order, which produces a very unfair result. But what should we put in its place? We were persuaded by the submissions we received, particularly from Zim, that the sharing of costs liability in accordance with the conference participants' trade share would

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be unjust. We see no merit in remitting the matter for the judge to decide, however, since we would have to indicate the basis on which he should decide it, and short of allowing him to embark on an expensive additional further hearing we can decide the matter just as well ourselves.

81 Were it not for one matter, we would have considered it fair to allow the six parties' costs to lie where they fall. The reason why we do not consider that to be a just solution is that it would permit Borchard, who incurred no costs in instructing experts (whether in an evidential or in an advisory capacity), to benefit from the costs incurred by its fellow conference members who did bear this expense.

82 We therefore direct that on the assessment of the defendants' and Part 20 defendants' costs an inquiry should be made into the costs incurred by the DAC parties and Zim in and about instructing experts, whether such experts were to act in an evidentiary or an advisory role, such costs to include the legal costs associated with giving such instructions. Once the total of those costs has been ascertained, they should be borne equally by Borchard, the four DAC parties and Zim as to a one-sixth share apiece. Subject to this, these six parties should bear their own costs both in the main proceedings and in the Part 20 proceedings, and the appeal of Borchard and the cross-appeal of the DAC parties will be allowed to this extent. ***3081**

The distribution of MPC's liability for costs between the six parties

83 We consider it just that the £1.3m which we have ordered MPC to pay should be divided between the six parties in proportion to the amount each has borne in respect of the costs of its defence and the Part 20 proceedings excluding the costs of and occasioned by the Part 20 costs applications and appeal. This is to be ascertained after taking into account any payments made between the six parties in respect of instructing of experts under our order. We considered, and discarded, the idea that MPC's liability should be divided into six equal parts. Although this solution would have been easier to administer, it would not have afforded justice to those who contributed more heavily to the costs of the successful defence.

84 We will hear counsel as to the terms of the order we should make in order to put our judgment into effect. It may be desirable that in the first instance MPC should pay the £1.3m into a fund to be controlled by the six parties' solicitors, and that its ultimate disposition should await the final ascertainment or agreement of the costs liabilities, with interim payments out of the fund being made by agreement, or in default of agreement, by the Commercial Court.

*Order accordingly.*I C

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1. Supreme Court Act 1981, s. 51, as substituted: see post, para 20.

2. CPR r 44.3: see post, para 74.

END OF DOCUMENT

EXHIBIT 60

Zuckerman on Civil Procedure

Principles of Practice

Adrian Zuckerman
Professor of Civil Procedure at the University of Oxford and
Fellow of University College, Oxford

THOMSON
SWEET & MAXWELL

CHAPTER 26

COSTS

BASIC CONCEPTS

Introduction

The subject of costs, which would deserve only modest attention in a well-balanced system, requires extensive treatment in England. Far from being of incidental aspect, the various aspects of litigation costs occupy a central place in the administration of civil justice. There is probably no other country where litigants devote so much time, effort and money to litigation over who should bear the costs of proceedings. There is no other system where the courts at all levels are called upon to adjudicate as many disputes over costs. Never before has the eventual incidence of costs been so crucial as to drive litigants to seek court adjudication on costs even before commencing proceedings, or soon after. Today the fear of costs is no longer confined to private litigants of modest means, it affects even the rich and even mighty Government departments. Disputes over who should bear the costs and their calculation can themselves give rise to further litigation, which could be as extensive and costly as the resolution of the substantive dispute. Paradoxically, practice under the CPR has made disputes over costs more frequent and time consuming. This is due to the fact that costs are used as both a stick and a carrot in an attempt to promote reasonable litigation practices. Therefore, cost considerations now permeate case management decisions and the exercise of discretion in procedural matters generally. The two key principles that used to make costs outcome reasonably predictable have now been seriously eroded. It is no longer possible to rely with any confidence on the assumption that the successful party is awarded his costs to be paid by the unsuccessful party, or on the rule that a party who fails to beat a CPR 36 offer to settle will have to pay the other party's costs. Costs orders are discretionary and fact-based, with the result that they are open to argument in almost every case. It is therefore necessary to preface this subject by saying something about the phenomenon of high litigation costs. **26.1**

It is natural that providers of professional services should tend to generate an upward pressure on the cost of their services. Such a tendency is normally counterbalanced by resistance on the part of the users of professional services. In an efficient market, the price of the service will reach a level that accommodates the interests of both users and providers. This is not, however, the case in the area of litigation legal services. The reasons are many and complex and include such factors as restrictions on the size of the legal profession, inevitable limitations on the choice of whether or not to litigate, and the need to uphold the interests of the administration of justice. In his report on Access to Justice Lord Woolf found that the cost of litigation was too high and unpredictable and that there was a pressing **26.2**

need to bring it under control in order to combat distortions of access to justice.[1] The report accepted that the matter could not be left to market forces and recommended a number of measures designed to keep litigation costs under control.

26.3 The goal of keeping down the cost of litigation forms a central part of the overriding objective and is therefore one of the principal aims of court control of litigation. As a result, cost considerations can influence most case management decisions.[2] Furthermore, under the CPR the court may express its approval or disapproval of the way that the parties or their legal representatives have conducted themselves before and during litigation by means of adverse costs orders. Whenever the court makes an interim or a final decision, it may look back and assess the parties' conduct in order to determine who should pay the costs of the proceedings and on what basis they should be calculated. Costs have been elevated to hitherto unknown prominence, prompting Morland J. to observe[3]:

> "This appeal has revealed in stark terms a trend in litigation, which in my judgment I condemn as deplorable, satellite litigation about costs which is hugely wasteful of both professional time and expensive resources. If the trend were allowed to continue, it would tend to render nugatory the 'overriding objective' of the CPR."

26.4 The allocation of costs between parties to litigation continues to be governed by the traditional indemnity principle, which has three limbs. First, the successful party is normally entitled to recover his litigation costs from the unsuccessful party. Second, the receiving party is not entitled to claim as costs more than he has actually spent or is duty bound to pay. Third, the receiving party is only entitled to recover costs that were reasonably incurred and that are reasonable in amount. However, in addition to the extensive discretion that governs the application of these principles, they have been modified to accommodate the general CPR principles. The overriding objective embodies a requirement of proportionality, which is now superimposed on the requirements that costs should have been reasonably incurred and reasonable in amount. There are two bases for calculating costs: *the standard basis* and *the indemnity basis*. Both bases are subject to the twin condition of reasonableness, but only the standard basis is subject to an additional requirement of proportionality. Under the CPR fixed costs have been introduced to a limited extent. Equally significant are the changes brought about by conditional fee agreements (CFAs). The indemnity principle has had to be cut back in order to enable successful CFA clients, to recover solicitors' fees which they are not themselves liable to meet. This means that CFA solicitors have a direct interest in costs recovery and may become the real party to costs proceedings.

26.5 These innovations have added to the complexity of an already intricate subject. Furthermore, in addition to rules of court and the common law, costs are also dealt with by the regulatory codes of the relevant professional bodies, the Bar

[1] Interim Report, ch.25. See discussion in Chapter 1, The Overriding Objective.

[2] For the principles of case management see Chapter 10, Court Management and Party Compliance.

[3] *Giambrone v JMC Holidays Ltd* [2002] EWHC, QB 2932 at [3], [2003] 1 All E.R. 982 at [3].

EXHIBIT 61

[2003] EWHC 391 (Ch) [2003] 1 W.L.R. 1680 (2003) 100(15) L.S.G. 26 Times, March 10, 2003 Official Transcript

[2003] EWHC 391 (Ch)

***1680 Parker v C S Structured Credit Fund Ltd and another**

Chancery Division

Gabriel Moss QC sitting as a deputy High Court judge

2003 Feb 11, 12

Practice—Discovery—Jurisdiction to order—Application for disclosure of information capable of providing basis for freezing order application—No other material supporting application for freezing order—Whether jurisdiction to order disclosure— CPR r 25.1(1)(g)

There is no free-standing jurisdiction under CPR r 25.1(1)(g)1 to order disclosure of information which may, in a remote sense be relevant to a possible application for a freezing injunction (post, para 25).

The following case is referred to in the judgment:

- Gidrxslme Shipping Co Ltd v Tantomar-Transportes Maritimos Lda [1995] 1 WLR 299;[1994] 4 All ER 507

argument:

No additional cases were cited in argument.

The following additional case, although not cited, was referred to in the claimant's skeleton

- Crompton (Alfred) Amusement Machines Ltd v Customs and Excise Comrs (No 2) [1974] AC 405; [1973] 3 WLR 268; [1973] 2 All ER 1169, HL(E)

Application By a claim form issued under CPR Pt 7 on 2 October 2002, the claimant, Andrew Frederick **Parker**, brought an action against the defendants, CS **Structured Credit** Fund Ltd and Elegant Hotels Ltd, for damages for breach of contract in relation to the alleged breach of a share sale agreement. By a counterclaim, the first defendant claimed that the sale agreement had been rescinded. The claimant believed that certain information existed, relevant to the claim for rescission, which showed that there had been an actual or proposed sale of property by the second defendant at an undervalue.

By an amended application notice dated 14 November 2002, the claimant applied for disclosure of information from the defendants relating to the alleged prospective or actual sale of property, by virtue of: (i) an order pursuant to CPR r 25.1(1)(g), on the basis that the property was or could be the subject of an application for a freezing injunction; alternatively, (ii) standard disclosure pursuant to CPR r 31.5 ; alternatively, (iii) specific disclosure pursuant to CPR r 31.12 .

The facts are stated in the judgment.

Representation

- Hilton Mervis , solicitor, for the defendants.
- Stanley Brodie QC for the claimant.

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GABRIEL MOSS QC

1 This is an amended application by Mr **Parker**, the claimant in the present proceedings. The defendants are C S **Structured Credit** Fund Ltd (the first defendant) and Elegant Hotels Ltd (the second defendant).***1681**

2 The amended application seeks disclosure primarily under CPR r 25.1(1)(g) . Alternatively, it seeks disclosure by way of standard disclosure. In the further alternative, it seeks specific disclosure. The disclosure that Mr Parker is interested in relates to documents which concern an actual or potential transaction for the sale or exchange of certain hotels owned by the second defendant. The first defendant appears to be a majority shareholder in the second defendant. The amended application asserts that these documents are relevant to the issues in the case and, in particular, to the claim for rescission made by the defendants.

3 It would not be appropriate in this judgment to deal comprehensively with the issues that now appear in the pleadings served by the parties. Those pleadings appear to have closed and the parties should shortly be seeking a case management conference ("CMC") with a view to the efficient case management of the proceedings.

4 Briefly, Mr Parker's complaint concerns an alleged breach of a share sale agreement (the relevant details of which are set out in the particulars of claim). The share sale agreement provided that Mr Parker would, with effect from 5 May 1999, sell certain shares in the second defendant to the first defendant. The share sale agreement provided that Mr Parker would receive a sum of over US $5m immediately and that he might receive certain further consideration in certain events.

5 I do not need to go into all the details or the disputes relating to the conditions relating to the drawing up of accounts which constitute the conditions precedent to Mr Parker's entitlement to further sums. There is a dispute about whether those conditions have been met or not and, in particular, as to whether the accounts which were actually drawn up complied with the agreement, and whether or not accounts complying with the agreement ought to have shown a profit or a loss. Those questions are central issues thrown up by the pleadings.

6 Mr Parker alleges, amongst other things, that accounts complying with the agreement were not finalised within a reasonable time. There is a conflict in the evidence and correspondence in relation to that and as to any blame to be attributed to any delay. I am, of course, not in any position to make any finding about that issue. It is clearly one that will have to be decided at trial or possibly in a summary judgment application mentioned in passing by Mr Mervis, the solicitor advocate for the defendants.

7 Mr Parker's primary claim is to have paid to him the balance due on the basis that the preconditions were met, or should have been met, had the defendants complied with the agreement. He also claims that he should have received more shares in the second defendant than he has in fact received—and again there is an issue about that, depending on the accounts and the financial position of the second defendant.

8 There is a further issue about whether the first defendant rightly or wrongly exercised certain option rights contained in the agreement. There is an allegation of a failure to remedy alleged breaches made by Mr **Parker** and an allegation of a repudiatory breach, which Mr **Parker** alleges he accepted. Mr **Parker** claims damages from the first defendant in a sum of over US $1m and he claims the value of a substantial block of shares from the first and/or second defendants pursuant to the agreement.

9 The defence and counterclaim puts in issue the matters alleged by Mr Parker. In the counterclaim the first defendant claims that the share sale agreement has effectively been rescinded under the terms of the agreement and that Mr Parker is obliged to

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pay a sum of over US $5m to the first defendant. Other items of alternative relief are claimed which I need not go into at present.

10 There is a reply by Mr Parker and a defence to the counterclaim. The application for disclosure of documents concerning an alleged prospective or actual sale of property by the second defendants was originally made under CPR r 25.1(1)(g) and was supported by a witness statement of Colin Shrago, dated 14 November 2002. This referred to the relevant part of the CPR , summarised Mr Parker's case and referred to certain correspondence as a result of which it is said that Mr Parker's ***1682** suspicions that there was an actual or proposed transaction "at what may well be an undervalue" had been confirmed.

11 In his witness statement, Mr Shrago asserts that the information is of a character which would have to be provided to Mr Parker in documentation covered by discovery obligations in any event. He suggests that it was impossible to see how providing the information early could cause the defendants any prejudice or increased costs, unless of course Mr Parker's suspicions prove to be well founded.

12 Mr Parker himself put in a witness statement dated 24 November 2002, after he had seen witness statements from the defendants, to which I shall refer shortly. In this witness statement he refers to an admission by the defendants that they intend selling certain of the hotels owned by the second defendant. He refers further to the fact that the defendants' witness statements say that Mr Parker is not entitled to the information because it is commercially confidential information. He refers to the fact that they refer to him as a known hotelier and someone who is considered to be a competitor of the second defendant and that he would use the information to his commercial advantage. I should interject here that during the submissions of Mr Brodie, who appeared for Mr **Parker**, it was stated that Mr **Parker** was now in the hotel business in England.

13 Mr **Parker**, in his witness statement, suggests that if the rescission being claimed by the defendants took place certain shares would be returned to him and as a result he would be a substantial but not controlling shareholder in the second defendant. He asserts that he would have no incentive to harm the company and that he in fact has no intention of harming the company. He puts forward his willingness to give an undertaking to keep any information provided confidential and not to use it for any extraneous purpose.

14 The only evidence (if one can call it that) in relation to the proposed sale of certain assets of the second defendant was contained originally in Mr Shrago's witness statement to which I have referred above. In hearsay from his client he states that Mr Parker learned from "sources close to the defendants"—those being sources which he "does not wish to disclose"—that the second defendant was seeking to sell or alternatively exchange for other property three of the hotels in the group "at what may well be an undervalue". It is elementary that the rules require sources of information to be given and Mr Shrago's affidavit plainly does not comply with the rules in declining to disclose the source of information of Mr Parker in relation to this statement.

15 It follows that the suggestion made here is not proper evidence and must either be disregarded or must be given no weight or very little weight.

16 The defendants, in the witness statements of Marcello Felice Maria Pigozzo, Paul Roy Bannier, as well as Mark Owen Bastian, accept that there is a proposed transaction. Mr Pigozzo, in his witness statement of 22 November 2002, confirms that the second defendant, acting by its board of directors, is intending to sell certain of its hotels. He asserts that the proposed sale is at arm's length and, in the opinion of the board of the second defendant, is at full market value and represents a good commercial deal for the second defendant. It is perfectly true,

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and he points this out himself, that he does not back up his assertions with any concrete evidence. However, this has to be seen in the light of the fact that no proper evidence had been adduced by Mr Parker of any alleged undervalue or indeed any other alleged impropriety in the proposed transaction.

17 The reason why concrete evidence or details are not given is asserted by Mr Pigozzo to be the fact that the information is commercially sensitive. That seems to me to be entirely credible. Information about a proposed sale or exchange of the type that appears to be envisaged here is something which I would expect to be commercially sensitive.

18 In normal circumstances the board might not—certainly at the stage of negotiations—wish to share such information with a minority shareholder or alleged creditor such as Mr Parker. There appears to be nothing improper in the board ***1683** taking that approach nor, in the absence of any credible evidence of any impropriety, does there seem to me to be any requirement for the board to put forward positive evidence to meet a bare and unsubstantiated allegation that the proposed sale would be at an undervalue. No adverse inference can be drawn from the lack of concrete information or evidence in relation to the evidence of Mr Pigozzo that the proposed transaction would be at a proper value.

19 The witness statement of Mr Bannier is consistent with that of Mr Pigozzo. Mr Bastian deals with matters concerning the shareholdings, on which I do not need to elaborate in this judgment.

20 There is also evidence, filed in the application, relating to the alleged delay and the reasons for the alleged delay in producing accounts. I have already pointed out that I am not in a position to make any finding at all about the accounts or the alleged delay, and I need not go into any detail in relation to that evidence. There is a further witness statement of Carla Bodden which deals with certain matters to do with the first defendant and its connections. That again is not a matter that I need to go into at great length at present. In particular, Mr Brodie expressly disclaimed any suggestion that he might be alleging that there is anything shadowy or suspicious about the defendants. Accordingly, there is no need to go into their connections or roots.

21 The application originally based itself on CPR r 25.1(1)(g) and the preliminary question arises as to whether I have jurisdiction under that provision to order the type of disclosure sought by Mr Parker. Mr Brodie tells me that there is no authority dealing with this question. He accepts that the *Civil Court Practice 2002* notes are unhelpful to him on the interpretation of the provision, but he insists that it does provide me with jurisdiction to make the type of order that he seeks.

22 Part 25 of the CPR deals with interim remedies and security for costs. Rule 25.1(1) lists a number of interim remedies which the court has power to grant. At sub-paragraph (f) the remedy now known as a "freezing injunction" is referred to. Sub-paragraph (g) states:

"an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction." Mr Brodie's submission is that this creates a free-standing right to order disclosure of documents irrespective of whether the applicant has sufficient material to seek a freezing injunction. He focuses in particular on the word "may".

23 Looking first of all, as a matter of construction, at the language used, it seems to me that it is dealing with a situation where there is either an application for a freezing injunction on foot or one where it is at least likely that there will be such an application. In other words, the provision assumes that there is some credible material on which such an application might be based. In the present case, Mr Brodie candidly admits that he does not have the

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material with which to apply for a freezing injunction. He would like to have the information that he seeks and then consider the position. In my judgment, that is not the type of situation with which this provision is dealing. Otherwise anyone who is a claimant could come along and say they cannot be completely sure that they do not need a freezing injunction and would like to have every piece of information at the earliest possible stage which might be relevant to that question.

24 Mr Mervis justifiably described this approach as seeking to have a fishing expedition. Although there is no authority that I have been referred to directly in point, Mr Brodie appeared to place some reliance on Gidrxslme Shipping Co Ltd v Tantomar-Transportes Maritimos Lda [1995] 1 WLR 299 , a decision of Colman J. That case, of course, goes back to before the CPR. However, Mr Brodie appeared to be submitting that the case suggests that there was a free-standing right before the CPR to order disclosure in a situation such as the present, and that the CPR should not be interpreted as having done away with that right, but rather, as I understand his ***1684** contentions about sub-paragraph (g), the CPR has preserved that free-standing right in terms of that sub-paragraph. However, the Gidrxslme case does not, in my judgment, demonstrate any such thing. What it does show is that the court had, before the CPR, the ability to order disclosure as a power ancillary to and in support of either a freezing injunction or in support of the execution of a judgment or award: see the Gidrxslme case, at p 310. Accordingly, I do not consider that the Gidrxslme case assists Mr Brodie at all.

25 In the absence of any apparent authority one way or the other, I hold that CPR r 25.1(1)(g) does not create a free-standing jurisdiction to order disclosure of information which may, in some remote sense, be relevant to some possible application for a freezing injunction.

26 I turn now to Mr Brodie's alternative grounds introduced by amendment. It will be recalled that Mr Shrago, in his evidence in support of the application, suggested that the type of disclosure being sought would have to be given sooner or later as being relevant to the issues in the litigation and that it did no harm to the defendants to provide the disclosure earlier rather than later. It seems to me that even if that were entirely correct one would still have to have some grounds for the application and the application would have to be supported by some credible evidence. In my judgment, it is not possible to make an application for disclosure, either standard disclosure or specific disclosure, ahead of its proper time, merely because it will cause no damage to the defendants. The claimant has to have some proper basis for invoking the powers and discretion of the court. The question therefore arises in the present case whether the claimant has made out a proper case for bringing forward standard or specific disclosure of documents relating to the proposed transaction.

27 I ought to make clear that I am not necessarily satisfied that Mr Shrago is right in saying that information about this proposed transaction will become disclosable in the ordinary way. If, for example, the transaction does not complete, there may be a serious question as to whether it has any relevance to the issues at all. That is a matter on which I can come to no concluded view, and I must leave to a later point in the litigation. Even assuming that the disclosure that is sought will inevitably be relevant on some issue or other at some stage or other, later in the litigation, it is difficult to see how it can be sought at present, given the lack of any credible evidence of impropriety, and therefore the lack of any credible evidence which makes such disclosure urgent. On that basis alone it seems to me that the claimant has not made out a case for the court to exercise its undoubted powers and discretion to bring forward disclosure, even on the assumption that such disclosure will inevitably have to be given. Even if that were wrong, it seems to me that it is not correct to say that such disclosure will be completely harmless to the defendants. Bringing for-

[2003] EWHC 391 (Ch) [2003] 1 W.L.R. 1680 (2003) 100(15) L.S.G. 26 Times, March 10, 2003 Official Transcript

ward general disclosure would disrupt the smooth operation of the CPR in the light of the stage that the proceedings have now reached.

28 The parties, as I understand it, have filled out their allocation questionnaires and are now considering dates for a CMC. Given what is said on the claimant's behalf as to the urgency on obtaining disclosure, it is perhaps interesting that an expedited CMC has not been applied for, for example at the time of serving the reply. Nevertheless, if the claimant considers that disclosure is urgent, then he has the remedy of applying to have the date for the CMC expedited. So far no such application has been made or indicated. During the hearing I offered to assist the parties in this regard if they could agree that they wanted an expedited CMC. On the defendants' side, 25 February was the earliest date at which they could conveniently attend the CMC. My offer during the hearing to direct that the CMC be heard urgently and, if possible, put in for that date was not accepted by the claimant's side.

29 Mr Brodie told me this morning that his inquiries overnight had revealed that the master could not give a date until March. In any event, what the parties must do next is to attend the CMC and to make proper preparations for it. Mr Mervis pointed out that this involves taking instructions, seeing counsel and preparing ***1685** properly for the event. He argues, convincingly, that those preparations would be disrupted if the disclosure obligation were brought forward in such a way that the normal order of things could not take place within time periods which would be reasonable for his side. If I were to order advanced disclosure, I fear that the defendants' preparations would be affected and dislocated, and that would not be fair to them.

30 It seems to me there would have to be a strong case made out by the claimant on credible evidence if I were going to be persuaded to take such a course. As I have already pointed out, there is no credible evidence in the present case of anything untoward and, therefore, there is no reason at all why I should take the risk of any hardship to the defendants.

31 There is something to be said for the CMC as a matter of good case management going directly before a judge at a relatively early date. The parties have been locked in extremely vigorous combat and it is unlikely that any result before a master will be allowed to be a final result in this case. There is much to be said for the CMC to be before a judge so that a firm hand can be exercised in relation to these proceedings without very much hope of a rerun of the arguments. If the parties find that a helpful indication they may of course act upon it in the way in which they launch their application in relation to the CMC.

32 In conclusion, therefore, it seems to me that this is a hopeless application for disclosure. It is not backed by credible evidence. For the primary ground it does not even have jurisdiction; the alternative grounds have no proper basis and would not be a proper exercise of the discretion because it might adversely and unfairly affect the defendants. Accordingly, I dismiss the application and will hear the parties in relation to costs and any consequential matters.

Representation

• Solicitors: Druces & Attlee; S J Berwin & Co .

Application dismissed.

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1. CPR r 25.1(1)(g) : see post, para 22 .

EXHIBIT 62

Evidence (Proceedings in Other Jurisdictions) Act 1975

CHAPTER 34

ARRANGEMENT OF SECTIONS

ELIZABETH II

Evidence (Proceedings in Other Jurisdictions) Act 1975

1975 CHAPTER 34

An Act to make new provision for enabling the High Court, the Court of Session and the High Court of Justice in Northern Ireland to assist in obtaining evidence required for the purposes of proceedings in other jurisdictions; to extend the powers of those courts to issue process effective throughout the United Kingdom for securing the attendance of witnesses; and for purposes connected with those matters.

[22nd May 1975]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Evidence for civil proceedings

Application to United Kingdom court for assistance in obtaining evidence for civil proceedings in other court.

1. Where an application is made to the High Court, the Court of Session or the High Court of Justice in Northern Ireland for an order for evidence to be obtained in the part of the United Kingdom in which it exercises jurisdiction, and the court is satisfied—

(*a*) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ("the requesting court") exercising jurisdiction in any other part of the United Kingdom or in a country or territory outside the United Kingdom; and

(*b*) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,

the High Court, Court of Session or High Court of Justice in Northern Ireland, as the case may be, shall have the powers conferred on it by the following provisions of this Act.

Power of United Kingdom court to give effect to application for assistance.

2.—(1) Subject to the provisions of this section, the High Court, the Court of Session and the High Court of Justice in Northern Ireland shall each have power, on any such application as is mentioned in section 1 above, by order to make such provision for obtaining evidence in the part of the United Kingdom in which it exercises jurisdiction as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.

(2) Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, in particular, make provision—

(*a*) for the examination of witnesses, either orally or in writing;

(*b*) for the production of documents;

(*c*) for the inspection, photographing, preservation, custody or detention of any property;

(*d*) for the taking of samples of any property and the carrying out of any experiments on or with any property;

(*e*) for the medical examination of any person;

(*f*) without prejudice to paragraph (*e*) above, for the taking and testing of samples of blood from any person.

(3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.

(4) An order under this section shall not require a person—

(*a*) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or

(*b*) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power.

(5) A person who, by virtue of an order under this section, is required to attend at any place shall be entitled to the like conduct money and payment for expenses and loss of time as on attendance as a witness in civil proceedings before the court making the order.

Privilege of witnesses.

3.—(1) A person shall not be compelled by virtue of an order under section 2 above to give any evidence which he could not be compelled to give—

(*a*) in civil proceedings in the part of the United Kingdom in which the court that made the order exercises jurisdiction; or

(*b*) subject to subsection (2) below, in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.

(2) Subsection (1)(*b*) above shall not apply unless the claim of the person in question to be exempt from giving the evidence is either—

(*a*) supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled); or

(*b*) conceded by the applicant for the order;

and where such a claim made by any person is not supported or conceded as aforesaid he may (subject to the other provisions of this section) be required to give the evidence to which the claim relates but that evidence shall not be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim.

(3) Without prejudice to subsection (1) above, a person shall not be compelled by virtue of an order under section 2 above to give any evidence if his doing so would be prejudicial to the security of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it would be so prejudicial for that person to do so shall be conclusive evidence of that fact.

(4) In this section references to giving evidence include references to answering any question and to producing any document and the reference in subsection (2) above to the transmission of evidence given by a person shall be construed accordingly.

Extension of powers of High Court etc. in relation to obtaining evidence for proceedings in that court.
1925 c. 49.
1854 c. 34.

4. Section 49 of the Supreme Court of Judicature (Consolidation) Act 1925 (which enables the High Court to order the issue of a subpoena in special form, enforceable throughout the United Kingdom, for the attendance of a witness at a trial) and the Attendance of Witnesses Act 1854 (corresponding provisions for Court of Session and High Court of Justice in Northern Ireland) shall have effect as if references to attendance at a trial included references to attendance before an examiner or commissioner appointed by the court or a judge thereof in any cause or matter in that court, including an examiner or commissioner appointed to take evidence outside the jurisdiction of the court.

Evidence for criminal proceedings

Power of United Kingdom court to assist in obtaining evidence for criminal proceedings in overseas court.

5.—(1) The provisions of sections 1 to 3 above shall have effect in relation to the obtaining of evidence for the purposes of criminal proceedings as they have effect in relation to the obtaining of evidence for the purposes of civil proceedings except that—

(*a*) paragraph (*a*) of section 1 above shall apply only to a court or tribunal exercising jurisdiction in a country or territory outside the United Kingdom;

(*b*) paragraph (*b*) of that section shall apply only to proceedings which have been instituted; and

(*c*) no order under section 2 above shall make provision otherwise than for the examination of witnesses, either orally or in writing, or for the production of documents.

(2) In its application by virtue of subsection (1) above, section 3(1)(*a*) and (*b*) above shall have effect as if for the words "civil proceedings" there were substituted the words "criminal proceedings".

(3) Nothing in this section applies in the case of criminal proceedings of a political character.

Evidence for international proceedings

Power of United Kingdom court to assist in obtaining evidence for international proceedings.
1911 c. 6.
1946 c. 13 (N.I.).

6.—(1) Her Majesty may by Order in Council direct that, subject to such exceptions, adaptations or modifications as may be specified in the Order, the provisions of sections 1 to 3 above shall have effect in relation to international proceedings of any description specified in the order.

(2) An Order in Council under this section may direct that section 1(4) of the Perjury Act 1911 or section 1(4) of the Perjury Act (Northern Ireland) 1946 shall have effect in relation to international proceedings to which the Order applies as it has effect in relation to a judicial proceeding in a tribunal of a foreign state.

(3) In this section "international proceedings" means proceedings before the International Court of Justice or any other court, tribunal, commission, body or authority (whether consisting of one or more persons) which, in pursuance of any international agreement or any resolution of the General Assembly of the United Nations, exercises any jurisdiction or performs any functions of a judicial nature or by way of arbitration, conciliation or inquiry or is appointed (whether permanently or temporarily) for the purpose of exercising any jurisdiction or performing any such functions.

Supplementary

Rules of court. 1925 c. 49. 1962 c. 30.

7. The power to make rules of court under section 99 of the Supreme Court of Judicature (Consolidation) Act 1925 or section 7 of the Northern Ireland Act 1962 shall include power to make rules of court—

(*a*) as to the manner in which any such application as is mentioned in section 1 above is to be made;

(*b*) subject to the provisions of this Act, as to the circumstances in which an order can be made under section 2 above; and

(*c*) as to the manner in which any such reference as is mentioned in section 3(2) above is to be made;

and any such rules may include such incidental, supplementary and consequential provision as the authority making the rules may consider necessary or expedient.

Consequential amendments and repeals.

8.—(1) The enactments mentioned in Schedule 1 to this Act shall have effect subject to the amendments there specified, being amendments consequential on the provisions of this Act.

(2) The enactments mentioned in Schedule 2 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(3) Nothing in this section shall affect—

(*a*) any application to any court or judge which is pending at the commencement of this Act;

(*b*) any certificate given for the purposes of any such application;

(*c*) any power to make an order on such an application; or

(*d*) the operation or enforcement of any order made on such an application.

(4) Subsection (3) above is without prejudice to section 38(2) of the Interpretation Act 1889 (effect of repeals). 1889 c. 63.

Interpretation.

9.—(1) In this Act—

"civil proceedings", in relation to the requesting court, means proceedings in any civil or commercial matter;

"requesting court" has the meaning given in section 1 above;

"property" includes any land, chattel or other corporeal property of any description;

"request" includes any commission, order or other process issued by or on behalf of the requesting court.

1959 c. 22.

1959 c. 25. (N.I.)

(2) In relation to any application made in pursuance of a request issued by the High Court under section 85 of the County Courts Act 1959 or the High Court of Justice in Northern Ireland under section 58 of the County Courts Act (Northern Ireland) 1959, the reference in section 1(*b*) above to proceedings instituted before the requesting court shall be construed as a reference to the relevant proceedings in the county court.

(3) Any power conferred by this Act to make an Order in Council includes power to revoke or vary any such Order by a subsequent Order in Council.

(4) Nothing in this Act shall be construed as enabling any court to make an order that is binding on the Crown or on any person in his capacity as an officer or servant of the Crown.

(5) Except so far as the context otherwise requires, any reference in this Act to any enactment is a reference to that enactment as amended or extended by or under any other enactment.

Short title, commencement and extent.

10.—(1) This Act may be cited as the Evidence (Proceedings in Other Jurisdictions) Act 1975.

(2) This Act shall come into operation on such day as Her Majesty may by Order in Council appoint.

(3) Her Majesty may by Order in Council make provision for extending any of the provisions of this Act (including section 6 or any Order in Council made thereunder), with such exceptions, adaptations or modifications as may be specified in the Order, to any of the Channel Islands, the Isle of Man, any colony (other than a colony for whose external relations a country other than the United Kingdom is responsible) or any country or territory outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of Her Majesty's Government in the United Kingdom.

SCHEDULES

SCHEDULE 1

Section 8(1).

CONSEQUENTIAL AMENDMENTS

The Perjury Act 1911

1911 c. 6.

In the Perjury Act 1911 after section 1 there shall be inserted—

"False unsworn statement under Evidence (Proceedings in Other Jurisdictions) Act 1975.

1A. If any person, in giving any testimony (either orally or in writing) otherwise than on oath, where required to do so by an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975, makes a statement—

(*a*) which he knows to be false in a material particular, or

(*b*) which is false in a material particular and which he does not believe to be true,

he shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both."

The False Oaths (Scotland) Act 1933

1933 c. 20.

In section 2 of the False Oaths (Scotland) Act 1933 after paragraph (*c*) there shall be inserted "or

(*d*) in any declaration not falling within paragraph (*a*), (*b*) or (*c*) above, which he is required to make by an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975,".

The Administration of Justice (Scotland) Act 1933

1933 c. 41.

In section 6(3)(*f*) of the Administration of Justice (Scotland) Act 1933 for the words "under the Foreign Tribunals Evidence Act 1856 or under the Evidence by Commission Act 1859" there shall be substituted the words "under the Evidence (Proceedings in Other Jurisdictions) Act 1975".

The Perjury Act (Northern Ireland) 1946

1946 c. 13 (N.I.).

In the Perjury Act (Northern Ireland) 1946 after section 1A there shall be inserted—

"False unsworn statement under Evidence (Proceedings in Other Jurisdictions) Act 1975.

1AA. If any person, in giving any testimony (either orally or in writing) otherwise than on oath, where required to do so by an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975, makes a statement—

(*a*) which he knows to be false in a material particular, or

(*b*) which is false in a material particular and which he does not believe to be true,

SCH. 1

he shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both."

1972 c. 18. *The Maintenance Orders (Reciprocal Enforcement) Act* 1972

In section 44(2) of the Maintenance Orders (Reciprocal Enforcement) Act 1972 for the words from the beginning to "dominions)" there shall be substituted the words "the Evidence (Proceedings in Other Jurisdictions) Act 1975".

SCHEDULE 2

Section 8(2).

REPEALS

Chapter	Short title	Extent
19 & 20 Vict. c. 113.	The Foreign Tribunals Evidence Act 1856.	The whole Act.
22 Vict. c. 20.	The Evidence by Commission Act 1859.	The whole Act.
33 & 34 Vict. c. 52.	The Extradition Act 1870.	Section 24.
48 & 49 Vict. c. 74.	The Evidence by Commission Act 1885.	The whole Act.
53 & 54 Vict. c. 37.	The Foreign Jurisdiction Act 1890.	In Schedule 1 the entries relating to the Foreign Tribunals Evidence Act 1856, the Evidence by Commission Act 1859 and the Evidence by Commission Act 1885 but without prejudice to any Order in Council made in respect of any of those Acts before the commencement of this Act.
4 & 5 Eliz. 2. c. 2.	The German Conventions Act 1955.	Section 1(3).
10 & 11 Eliz. 2. c. 30.	The Northern Ireland Act 1962.	In Schedule 1 the entry relating to the Evidence by Commission Act 1859.
1963 c. 27.	The Oaths and Evidence (Overseas Authorities and Countries) Act 1963.	Section 4.
1966 c. 41.	The Arbitration (International Investment Disputes) Act 1966.	In section 3(1), paragraph (*b*) together with the word "and" immediately preceding that paragraph. In section 7(*e*), subsection (2) of the section 3 there set out.
1968 c. 64.	The Civil Evidence Act 1968.	Section 17(2).
1971 c. 36 (N.I.).	The Civil Evidence Act (Northern Ireland) 1971.	Section 13(2).

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EXHIBIT 63

[1985] 1 W.L.R. 331 [1985] 1 All E.R. 716 [1985] E.C.C. 531 (1985) 82 L.S.G. 1638 (1985) 129 S.J. 189 [1985] 1 W.L.R. 331 [1985] 1 All E.R. 716 [1985] E.C.C. 531 (1985) 82 L.S.G. 1638 (1985) 129 S.J. 189

Sedgwick Group Plc v Johns-Manville Fibreboard Corp

Also known as:
Asbestos Insurance Coverage Cases, Re

House of Lords

28 February 1985

Case Analysis

Where Reported [1985] 1 W.L.R. 331; [1985] 1 All E.R. 716; [1985] E.C.C. 531; (1985) 82 L.S.G. 1638; (1985) 129 S.J. 189;

Case Digest

Subject: Civil evidence

Keywords: Letters rogatory, Documents, Procedure

Catchphrases: Letters rogatory, production of documents, requirements

Abstract: The Evidence (Procedure in Other Jurisdictions) Act 1975 s.2(1) provides for letters rogatory, i.e letters of request from a foreign court to the High Court for an order for evidence to be obtained in England. The Evidence (Procedure in Other Jurisdictions) Act 1975 s.2(4)(b) is to be construed strictly, and provides that although several documents may be described compendiously in letters rogatory, the exact document in each case must be clearly indicated, and be shown to exist or to have existed. The Superior Court of California issued letters rogatory requiring the assistance of the High court in securing certain documents in an action between asbestos manufacturers and insurers. They also requested the examination of three individual appellants.

Held, that (1) in relation to documents, the Evidence (Procedure in Other Jurisdictions) Act 1975 s.2(4)(b) was to be construed strictly and so as not to permit mere "fishing" expeditions. Although several documents might be described compendiously in letters rogatory, the exact document in each case must be clearly indicated, and be shown to exist or to have existed; (2) where letters rogatory requested the examination of a witness, it was inappropriate for the English court to consider in detail whether evidence would be relevant and admissible in the requesting court. (Westinghouse Electric Corp Uranium Contract Litigation MDL Docket 235 (No.2) [1978] A.C. 547 applied).

Judges: Lord Fraser of Tullybelton; Lord Wilberforce; Lord Keith of Kinkel; Lord Roskill; Lord Bridge of Harwich

[1985] 1 W.L.R. 331 [1985] 1 All E.R. 716 [1985] E.C.C. 531 (1985) 82 L.S.G. 1638 (1985) 129 S.J. 189 [1985] 1 W.L.R. 331 [1985] 1 All E.R. 716 [1985] E.C.C. 531 (1985) 82 L.S.G. 1638 (1985) 129 S.J. 189

Appellate History

reversing

[1985] 1 W.L.R. 331; [1985] 1 All E.R. 716; [1985] E.C.C. 531; (1985) 82 L.S.G. 1638; (1985) 129 S.J. 189

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applying

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CA

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Westinghouse Electric Corp Uranium Contract Litigation MDL Docket 235 (No.2)

Also known as:
Rio Tinto Zinc Corp v Westinghouse Electric Corp (Nos.1 and 2)

House of Lords

01 December 1977

Case Analysis

Where Reported [1978] A.C. 547; [1978] 2 W.L.R. 81; [1978] 1 All E.R. 434; [1978] 1 C.M.L.R. 100; (1978) 122 S.J. 32;

Case Digest

Subject: Civil evidence

Keywords: Civil law, Extraterritoriality, Foreign jurisdictions, Letters of request, Self incrimination

Catchphrases: Discovery, proceedings in foreign court

Abstract: At the request of a foreign tribunal, the High Court will order the production of specific documents in the possession of a person not party to the foreign proceedings, provided that those proceedings are not penal; but such person is entitled to claim privilege against self-incrimination if the evidence required is likely to render such person liable to financial sanctions under the Treaty of Rome. W was the defendant in proceedings for breach of contract in the United States, W having failed to complete its contract to build power stations and supply them with uranium. W's defence to such proceedings was effectively that the contracts were frustrated due to the supervening circumstances that the cost of uranium had risen steeply in price. W discovered that there appeared to be in operation an international cartel amongst uranium producers regulating the supply and price of uranium; W wished to adduce evidence of the existence of the cartel in its defence. A United States court issued letters rogatory to the High Court seeking orders requiring representatives of an English company, RTZ, to attend for oral examination in London and for RTZ to produce certain scheduled documents for use at the trial in the US court. RTZ claimed privilege against such orders on the ground that their evidence might expose them to penalties under the Treaty of Rome 1957 Art.85 and Art.86. That claim was upheld by the High Court and the Court of Appeal. The judge of the US court upheld a claim by witnesses to privilege under the Fifth Amendment. The US Department of Justice then applied for an order in the US court compelling testimony, which could not be used against the witnesses, on the grounds that it was required for a grand jury investigation into violations of the US anti-trust laws and with a view to issuing criminal proceedings.

Held, that (1) the master's order rightly gave effect to the letters rogatory in respect of the production of documents and the witnesses sought to be examined; (2) RTZ was entitled to claim privilege; and (3) the inter-

vention of the Department of Justice changed the character of the letters rogatory, as execution was now being sought for the purposes of exercising extraterritorial jurisdiction of the US court in a penal matter. (Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd [1939] 2 K.B. 395 applied; Radio Corp of America (RCA) v Rauland Corp (No.2) [1956] 1 Q.B. 618 considered.

Judges: Lord Wilberforce; Viscount Dilhorne; Lord Diplock; Lord Fraser of Tullybelton; Lord Keith of Kinkel

Appellate History

affirming

[1978] A.C. 547; [1978] 2 W.L.R. 81; [1978] 1 All E.R. 434; [1978] 1 C.M.L.R. 100; (1978) 122 S.J. 32; Times, December 2, 1977

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***1351 Possfund Custodian Trustee Ltd. and Another v Diamond and Others**

Ch. 1992 P. No. 4177Ch. 1995 P. No. 1919

Chancery Division

Lightman J.

1996 March 20, 21, 22, 25, 26; April 2

Negligence—Duty of care to whom?—Company prospectus—Prospectus misrepresenting value of company—Shares bought in market after flotation in reliance on prospectus—Whether directors and advisers owing duty to purchasers in aftermarket

In April 1989 the directors of the eighth defendant, a company which arranged and provided mechanical breakdown insurance for new and used cars, issued a prospectus in connection with the flotation of shares in the company at a substantial premium on the unlisted securities market ("U.S.M."). The plaintiffs in the first action had both subscribed for that issue and bought further shares in the U.S.M. in the period 2 May to 11 July 1992 ("the aftermarket"). The plaintiffs in the second action had also subscribed to the issue and/or acquired shares in the aftermarket. The plaintiffs alleged that the prospectus materially misrepresented the company's financial position by substantially understating its liabilities, and that the shares were in truth valueless. The plaintiffs sought to recover damages for, inter alia, negligence against the directors, auditors and financial advisers of the company in respect of the alleged misrepresentations in the prospectus. After the two actions had been consolidated, the directors, auditors and financial advisers issued summonses for an order under R.S.C.,

Ord. 18, r. 19 striking out the claims in respect of aftermarket purchases as disclosing no cause of action.

On the hearing of the summonses: —

Held, dismissing the applications, that it was arguable that persons responsible for the issue of a modern prospectus owed a duty of care to purchasers in an aftermarket; that whether the defendants were to be taken to have intended to assume such a duty towards any particular plaintiff or class of plaintiffs was in all cases to be objectively established by the plaintiff proving either express communication to him of such intention or that he reasonably relied on the material representation and believed that the representor intended him to act upon it; and that, accordingly, the plaintiffs' claims merited full consideration at trial (post, pp. 1364D–G, 1365A, H–1366A, B–D, F–G, H–1367A).

Peek v. Gurney (1873) L.R. 6 H.L. 377, H.L.(E.) distinguished.

Al-Nakib Investments (Jersey) Ltd. v. Longcroft [1990] 1 W.L.R. 1390 doubted.

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***1352**

- Chanel Ltd. v. F.W. Woolworth & Co. Ltd. [1981] 1 W.L.R. 485; [1981] 1 All E.R. 745, C.A.

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- Marc Rich & Co. A.G. v. Bishop Rock Marine Co. Ltd. [1996] A.C. 211; [1995] 3 W.L.R. 227; [1995] 3 All E.R. 307, H.L.(E.)
- Murphy v. Brentwood District Council [1991] 1 A.C. 398; [1990] 3 W.L.R. 414; [1990] 2 All E.R. 908, H.L.(E.)
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SUMMONSES

By summonses respectively dated 6 and 13 December 1995 and 4 March 1996 the seventh, ninth and tenth defendants, George Brian Phillips, Allied Provincial Corporate Services Ltd. ("A.P.C.S.") and Arthur Andersen & Co. (a firm) ("A.A."), applied pursuant to R.S.C.,Ord. 18, r. 19 to strike out as disclosing no cause of action so much of the statements of claim in consolidated actions by (1) **Possfund** Custodian Trustee Ltd. and Britel Fund Trustees Ltd. and (2) Irene Maud Parr and 75 other shareholders in the eighth defendant, **Diamond** Group Holdings Plc. ("**Diamond**"), a company to which A.P.C.S. were financial advisers and of which Mr. Phillips was formerly a non-executive director and A.A. were auditors, as related to purchases by the plaintiffs of 5p ordinary shares in **Diamond**, made between 2 May and 11 July 1989 in the Unlisted Securities Market. The third party, McGrigor Donald (a firm), who were solicitors to the placing of shares in **Diamond** in 1989, and the first to sixth defendant former directors of **Diamond**, Victor Derek **Diamond**, Clive Brown Miller, Ian King, Michael John Vernon Houseley, James Kenneth Downes and Robert Barr, did not appear and were not represented. The summonses were heard in chambers but judgment was given by Lightman J. in open court.

The facts are stated in the judgment.

Representation

- Robin Potts Q.C. and Philip Gillyon for A.P.C.S.
- Mark Barnes Q.C. and Rhodri Davies for A.A.
- Andrew Thornton for Mr. Phillips.
- Charles Falconer Q.C. and Martin Moore for the plaintiffs

Cur. adv. vult.

LIGHTMAN J.

2 April. handed down the following judgment.

IntroductionA.

Nature of claims in actions

The applications before me raise the novel and important question of law whether it is arguable today that those responsible for the issue of a company's prospectus owe a duty of care to subsequent purchasers of that company's shares in the market.

These two actions commenced in 1992 ("the 1992 action") and 1995 ("the 1995 action") by different plaintiffs against the same defendants arise out of a placing of shares in the eighth defendant, **Diamond** Group Holdings Plc. ("**Diamond**"), on the Unlisted Securities Market ("the U.S.M.") in April 1989 ("the placing") in respect of which the majority of the plaintiffs were subscribers and out of subsequent purchasers by certain of the plaintiffs of **Diamond's** shares ("the aftermarket purchasers") on the U.S.M. 5,177, 726 ordinary 5p shares in **Diamond** were placed at 85p per share. The shares placed amounted to 27\51 per cent. of the issued share capital of **Diamond**, as enlarged by the issue.

Diamond's main business was the provision and ar-

ranging of mechanical breakdown insurance for the purchase of new and used cars. On 19 April 1989 **Diamond** issued a prospectus in connection with the flotation of its shares on the U.S.M. The plaintiffs contend that (1) when subscribing for and purchasing shares in **Diamond** (shares which in truth were valueless), they relied on (as they were intended to) the prospectus, (2) the prospectus materially misrepresented **Diamond's** financial position (in the main because it very substantially understated its liabilities by failing to disclose adequately, or at all, **Diamond's** liability to pay substantial extra premiums to the syndicates at Lloyd's) and (3) the first to seventh defendants (the directors at the time of the placing), the eighth defendant, **Diamond**, the ninth defendant, Allied Provincial Corporate ***1354** Services Ltd. ("A.P.C.S.") (the financial advisers for the placing), and the tenth defendant, Arthur Andersen ("A.A.") (**Diamond's** auditors and the reporting accountants for the placing), in respect both of the placing and aftermarket purchases owed them duties of care which they broke and thereby caused the plaintiffs' loss. In both actions the plaintiffs claim: (1) against all the defendants in respect of the shares subscribed in the placing statutory compensation under section 67 of the Companies Act 1985; (2) in respect of the shares subscribed in the placing and the aftermarket purchases, common law damages for (a) deceit against the first four defendants and Diamond, (b) negligence against the first to ninth defendants in causing or procuring the publication of the prospectus and (c) negligence against A.A. in respect of their financial report which they consented to being included in the prospectus.

The plaintiffs define the term "aftermarket" to mean the period after the placing during which the most recent published financial information relating to Diamond was contained in the prospectus and, as so defined, the aftermarket in relation to Diamond extended over the period from 2 May to 11 July 1989.

Diamond is in receivership. Judgment in default of defence has been entered against the second defendant, Mr. Miller, who lives in Florida. Third party proceedings have been commenced against McGrigor Donald, a firm of solicitors, who were the solicitors to the placing.B.

History of proceedings

In the 1992 action (begun on 1 May 1992) the plaintiffs ("**Possfund**" and "Britel") allege that they subscribed for 250,000 shares in the placing at a total cost of £213,112 and that thereafter they purchased a further 670,000 shares by 16 purchases in the market at a total cost of £618,752. In 1993 A.A. applied by summons to strike out the paragraphs in the statement of claim containing the allegations against them of a breach of a common law duty of care in respect of the placing and the aftermarket purchases on the ground that the statement of claim disclosed no reasonable cause of action. Argument was, however, confined to the issue whether the claim in respect of aftermarket purchases was maintainable. The hearing before Harman J. took place on 16 November 1993. At the preliminary stage, after a hearing lasting about half a day, Harman J. dismissed the application with costs. In his judgment he expressed "grave doubts about the soundness of the claims advanced" but stated that he could not "be satisfied upon this particular application by one of these 10 defendants that substantial savings will be caused" by striking out the paragraphs in question. The critical factor was that the same allegations were made against A.P.C.S. as against A.A. and A.P.C.S. (plainly with full knowledge of A.A.'s application) decided not to join in the application, and, since A.P.C.S. had not joined in the application, whatever its outcome, the same areas of fact and law would still have to be investigated at the trial. He rejected an application by A.A. after judgment for an opportunity to join A.P.C.S. and in effect have another chance: A.A. had already had its bite of the cherry and it was too late.

The 1995 action was commenced on 31 March 1995 (effectively on the last day before expiration

of the statute of limitation). Originally there were 94 plaintiffs, but there are now (following various amendments) 75 plaintiffs or joint plaintiffs, including three nominee companies (the 12th, 49th and 94th plaintiffs). In brief (1) the total claim in the 1995 action is ***1355** for about £935,000, of which about £270,000 relates to aftermarket purchases, and (2) nine plaintiffs, and 11 beneficiaries of nominee plaintiffs, are solely concerned with aftermarket purchases.

Service of proceedings was delayed until July 1995. By letter dated 24 August 1995 the defendants requested particulars, in particular as to which of the plaintiffs made claims in respect of the placing and which in respect of aftermarket purchases, and intimated that an application would be made to strike out all aftermarket claims. These particulars were given on 14 November 1995. A.P.C.S. issued a summons seeking an order under R.S.C., Ord. 18, r. 19 striking out the claims in the two actions in respect of aftermarket purchases as disclosing no cause of action (i.e. bound in law to fail) on 6 December 1995. A.A. followed suit on 13 December 1995, and the seventh defendant, Mr. Phillips (formerly a non-executive director of Diamond), evidently a late convert to this course of action, did likewise on 4 March 1996. At the hearing before me his counsel sensibly only made a fleeting appearance to adopt in advance the arguments of counsel for A.A. and A.P.C.S. For completeness I should add that by order dated 29 August 1995 the two actions were consolidated. The pleadings in the two actions remain separate, but (save to the extent I indicate later) the two statements of claim are practically identical.II.

The applications to strike out: the preliminary stageA.

The principles

The House of Lords in Williams and Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd. [1986] A.C. 368 held that there should be two stages on an application to strike out involving (as does the present application) a prolonged and serious argument. There is the preliminary stage, when the court has to decide whether to allow the application to proceed. If the court decides to allow the application to proceed, there is then the substantive stage when the court hears the application on its merits. The preliminary stage operates as a filter designed to ensure that the court's time and the parties' costs are not wasted on inappropriate or oppressive (often lengthy and expensive) applications.

The relevant principles were stated as follows:

“My Lords, if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself:” per Lord Templeman, at pp. 435–436.

“If on an application to strike out it appears that a prolonged and serious argument will be necessary there must at the least, be a serious risk that the court time, effort and expense devoted to it will be lost since the pleading in question may not be struck out and the whole matter will require to be considered anew at the trial. This consideration, as well as the context in which Ord. 18, r. 19 occurs and the authorities upon it, justifies a general rule that the judge should decline to proceed with the argument unless he not only considers it likely that he may reach the conclusion that the pleading should be struck out, but also is satisfied that striking out will obviate the necessity for a trial or will so substantially cut down or simplify ***1356** the trial as to make the risk of proceeding with the hearing sufficiently worth while:” per Lord Mackay of Clashfern at p. 441.B.

Application of the principles

Mr. Falconer, for the plaintiffs, submitted that at the preliminary stage the defendants' summonses

should be dismissed on four grounds and accordingly should not proceed to the substantive stage. After full argument I rejected this submission, but indicated that I would give my reasons in this judgment, which I now do. Mr. Falconer relied on four grounds, and I shall deal with each in turn.(1)

Abuse of process

Mr. Falconer contended that to bring a second application to strike out on the same grounds as the earlier application dismissed by Harman J. was an abuse of process. In the special circumstances of this case I disagree.

Whilst the doctrine of res judicata may at least ordinarily be inapplicable in respect of an earlier interlocutory decision (see Dombey & Son Ltd. v. Playfair Bros. [1897] 1 Q.B. 368)

"Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounters:" *per* Buckley L.J. in Chanel Ltd. v. F.W. Woolworth & Co. Ltd. [1981] 1 W.L.R. 485, 492–493.

This principle applies where in the previous battle the substantive issue between the parties has been decided, and not where on account of some remedial procedural error or omission the substantive issue has had to be left undecided, as in Dombey & Son Ltd. v. Playfair Bros. [1897] 1 Q.B. 368. The substantive issue was decided by Harman J.; he decided it on the merits as fought by A.A.; the absence of A.P.C.S. was not a technicality, but a matter of substance critically affecting the balancing exercise the judge was required to make. This is reflected in the judge's refusal after judgment to allow a further hearing after efforts had been made to secure the consent of A.P.C.S. to their joinder in the application. The principle stated by Buckley L.J. accordingly precluded a fresh application by A.A. unless one of the stated conditions could be satisfied.

Where one defendant has made an application, e.g. to strike out, and another defendant, to whom a like application on the same ground is available, deliberately refrains from joining in the application, and the application is refused, then ordinarily that other defendant will be subject to a similar bar (consider House of Spring Gardens Ltd. v. Waite [1991] 1 Q.B. 241). A.P.C.S., as Mr. Potts (for A.P.C.S.) put it, (and no doubt Mr. Phillips) made the tactical decision not to join in the application by A.A. A.P.C.S. and Mr. Phillips can be in no better position in this regard than A.A. This principle therefore, as it seems to me, precluded a second application to strike out the 1992 action by A.A., A.P.C.S. or Mr. Phillips unless one of the stated preconditions for a fresh application could be satisfied.

After anxious consideration I have however reached the conclusion that the commencement of the 1995 action and its consolidation with the 1992 action constitute a sufficient change of circumstances. The mere fact ***1357** that a fresh action is brought by a new plaintiff maintaining the same claim is not necessarily sufficient to release a defendant from such a constraint in a previous action. Indeed the circumstances may justify the extension of the constraint to the new action and prevent a striking out claim in both actions. It is likely that justice and convenience will require that the question of law be decided in both actions at the same time and accordingly that there be a joint hearing or no hearing. The decision in each case must be reached on consideration of the facts of that case and with regard to the considerations of justice and convenience. Justice to A.A.,A.P.C.S. and Mr. Phillips does require that they be entitled to proceed with the application in the 1995 action because of the substantial value of the claim made and number of the plaintiffs making the claim, each of which claim will require (or at least may require) detailed investigation at trial unless the application succeeds. There would be a substantial objection to the judge deciding the question of law on a striking out ap-

plication in the 1995 action without at the same time allowing it to be decided at the same time in the 1992 action.

Some reinforcement of this conclusion (if needed) may be found in the fact that Harman J. saw much in the merits of the application before him, and only dismissed it with some obvious regret because of the non-joinder of A.P.C.S., an obstacle not present on the current joint applications by A.A. and A.P.C.S. (together with Mr. Phillips) in both actions. I am not persuaded that there is any countervailing disadvantage to the plaintiffs, save that an adverse decision on the application to strike out is likely to prejudice their negotiating position in any settlement discussions. As regards this factor, I see every reason and advantage in negotiations taking place (if this is possible) on a realistic (and indeed correct) basis as to the prospects of a plaintiff's claims.(2)

Soundness of the statements of claim

Mr. Falconer submitted that the court should not harbour any doubts as to the soundness of the statements of claim, on the ground that they are plainly sound. Mr. Potts (for A.P.C.S.) and Mr. Barnes (for A.A.) submitted that the court should not harbour any doubts, for they are plainly unsound. At this stage (since I shall go into this matter in detail later) I shall only say that, for the purposes of applying the principles in the Williams and Humbert Ltd. case [1986] A.C. 368, I was in serious doubt as to the soundness of the pleadings as they then stood.(3)

Saving of costs or simplification of trial

The observations of Lord Templeman and Lord Mackay were made in the context where there were only two parties to the proceedings, and they did not need to consider whether it was sufficient to justify proceeding to the substantive stage that an application (if successful) would achieve a substantial saving in the costs of one of numerous defendants or simplify and reduce the burdens of the trial for that defendant, even if it did not have any substantial effect on the trial as a whole. Harman J. does appear to have taken the view that it was insufficient: the application before him would plainly have achieved savings and reduced the burdens for A.A. but, since the overall costs and burdens of the trial would not be substantially reduced, he dismissed the application. I understand however that the contrary was not argued. In my view, the court can and should consider the effect of applications (if successful) both on the trial as a ***1358** whole and on the particular defendant making the application, and if the beneficial impact on the particular defendant is substantial, then, that defendant can satisfy this requirement and the court should not refuse to proceed to the substantive stage because of the limited effect of the order (if made) on the trial as a whole.

On the facts of this case, I am amply satisfied that the application (if successful) will effect substantial savings and reduce the burdens of the trial for each of A.P.C.S., A.A. and Mr. Phillips. In respect of the aftermarket purchases, these defendants will be saved the need (1) to examine the relevant plaintiffs' documents revealed on discovery, (2) to test or investigate their evidence as to reliance or (3) to adduce or test expert evidence as to the value of the shares at the dates of the various aftermarket purchases. The application, if successful, will open the way to negotiations for settlement better informed as to the plaintiffs' prospects at trial as against them (and the other defendants) if (as is at least possible) the parties want to settle. If necessary I would also have decided that the applications (if successful) would achieve substantial savings in respect of the trial as a whole.(4)

Importance of questions of law

There is no doubt that the court will consider how far it is appropriate on an application under Ord. 18, r. 19 to decide an important issue of law which requires detailed and considered examination appropriate to a trial or a trial of a preliminary issue of law.

In this case, the question whether persons in the position of the defendants can be under a duty to aftermarket purchasers is by common consent important, and involves careful consideration of the authorities, But, as will appear later, on the pleadings as they stood when I had to decide whether to proceed to the substantive stage, the issue whether the plaintiffs' claim disclosed a cause of action did not appear particularly difficult, or inappropriate to be dealt with, at this interlocutory stage. This factor in the circumstances did not appear an objection of any real weight to proceeding to the substantive stage.III.

The applications to strike out: the substantive stage

It is common ground for the purposes of these applications that the plaintiffs' pleadings disclose a cause of action in respect of the placing. The issue is whether such a cause of action is disclosed in respect of the aftermarket purchases.

I propose to approach this question in three stages. First I shall consider in outline the common law and statutory schemes providing protection to investors in respect of prospectuses. Second, I shall examine the pleadings. Third, I shall look in more detail at the authorities so far as they provide guidance on the scope of the common law duty of care owed to investors and in particular whether it is arguable that the tort of negligence provides the protection pleaded by the plaintiffs.A.

The common law and statutory scheme

In the 19th century, when the issue of prospectuses first became a common feature of commercial life, the common law allowed a claim in damages to the investor who incurred a loss after investing in reliance on the contents of a false or misleading prospectus (in the absence of a breach of a fiduciary or contractual duty owed to the investor) only if he ***1359** could establish the tort of deceit: see Derry v. Peek (1889) 14 App.Cas. 337. The prospectus was an invitation issued to the public to subscribe for shares, and not to purchase shares in the market, and without more the prospectus could only found liability if relied on for the purpose for which it was issued, namely making the decision whether to subscribe, and not if relied on for the purpose of deciding whether or not to make purchases in the market: see Peek v. Gurney (1873) L.R. 6 H.L. 377. The principle was graphically expressed in the expression that the representations contained within the prospectus were exhausted upon the allotment being completed.

The legislature evidently considered that the common law provided inadequate protection to placees, and the Directors Liability Act 1890 (53 & 54 Vict. c. 64) provided that (1) directors, promoters and persons authorising the issue of a prospectus should be liable to pay compensation to all persons who should subscribe for shares on the faith of a prospectus for the loss or damage they sustained by reason of any untrue statement in the prospectus, and (2) they should have a statutory defence (in respect of which the onus should be upon them) that they had reasonable grounds to believe and did believe that the statement was true or the fair representation of the views of an expert. No statutory protection was afforded to aftermarket purchasers.

The provisions of the Act of 1890 were brought into the mainstream of companies legislation in 1908 in the form of section 84 of the Companies (Consolidation) Act 1908 and re-enacted by section 37 of the Companies Act 1929, in each case without any material change.

The Companies Act 1948 supplemented the previous statutory provisions in three relevant respects. First, it provided that it should be unlawful to make an invitation to the public to subscribe for shares without issuing a prospectus containing certain specified information. Second, it added experts who consented to the use of their reports in the prospectus to the class of those liable to persons subscribing on the faith of a prospectus, and such experts were likewise afforded a statutory defence if they could prove the existence of reasonable grounds for be-

lieving their statements to be true. Third, section 45(1) introduced the provision (now in section 58 of the Companies Act 1985) whereby the protection previously afforded to subscribers was extended to cover the loophole that might otherwise exist where shares were first allotted to an issuing house for sale to the public. This was done by deeming the offer for sale to the public to be an offer for subscription and the purchasers to be subscribers.

In 1963 the House of Lords in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465 established that at common law a cause of action exists enabling the recovery of damages in respect of a negligent misrepresentation occasioning damage and loss where the necessary proximity exists between the representor and representee. It is clearly established (and indeed common ground on these applications) that in a case such as the present, where the defendants have put a document into more or less general circulation and there is no special relationship alleged between the plaintiffs and the defendants, foreseeability by the defendants that the plaintiffs would rely on the prospectus for the purpose of deciding whether to make aftermarket purchases is not sufficient to impose upon the defendants a duty of care to the plaintiffs in respect of such purchases: see Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605. The imposition of a duty of care in such a situation requires a closer relationship between representor and representee, and its imposition must be fair, just and ***1360** reasonable. I shall come back to consider whether in this context the existence of an intention on the part of the defendants that investors should rely on the prospectus for this purpose is sufficient to establish the necessary proximity, for that is the crux of the present applications.

The Companies Act 1985 (in force at the time of the prospectus) in sections 56 to 71 re-enacted the provisions of the Act of 1948 (for present purposes) without any material change. Section 67 contains the provisions for payment of compensation to placees.

Following Professor Gower's Review of Investor Protection (1984) (Cmnd. 9125) there was enacted the Financial Services Act 1986. This Act drew a sharp distinction between listing particulars (which effectively replace prospectuses) in respect of shares to be admitted to the Official List of the Stock Exchange ("listed securities") and prospectuses in respect of unlisted securities, which include shares to be listed on the U.S.M. Part IV of the Act related to listed securities and Part V to unlisted. Part IV was brought into force, but Part V never was. In the case of listed securities, the Act and the listing rules (which the Act required to be complied with) required listing particulars to be constantly updated in respect of any information affecting, inter alia, the value of the listed securities. Section 150(1) gave a remedy against the "persons responsible" for listing particulars:

"to any person who has acquired any of the securities in question" — i.e. the listed securities — "and suffered loss in respect of them as a result of any untrue or misleading statement in the [listing] particulars or any omission from them of any matter required to be included…"

In short, protection was afforded to all purchasers of listed securities (whether placees or aftermarket purchasers) relying on the continuing and updated representations in the listing particulars and the updates.

In the case of unlisted securities, there is no equivalent statutory provision for updating the prospectus, but the U.S.M. does in fact require an undertaking to like effect from a company admitted to the U.S.M. Section 166(1) provides that persons responsible for a prospectus "shall be liable to pay compensation to any person who has acquired the securities to which the prospectus relates and suffered loss in respect of them as a result of any untrue or misleading statement in the prospectus…"

For the purpose of determining the ambit of the duty of care under the tort of negligence, I have been invited to consider whether section 166 (albeit

not brought into force, but later repealed and re-enacted in 1995) gave a statutory cause of action to aftermarket purchasers. All I shall say is that, as present advised, I do not think that it does. The reference to the "person who has acquired the securities to which the prospectus relates," as it seems to me, naturally refers to the placee in respect of the shares orginally allotted to him.

To complete the legislative history, the Public Offers of Securities Regulations 1995 (S.I. 1995 No. 1537), made pursuant to the European Community Council Directive (89/298/E.E.C.) (in force on 19 June 1995), laid down a detailed regime in respect of public offers of securities. Any public offer must be accompanied by a prospectus to be made available to the public during the period of the offer, a supplementary prospectus must be published in the event of any significant change or matter arising during the period of the offer, and a remedy in respect of misleading statements in prospectuses for unlisted securities is provided "to any ***1361** person who has acquired the securities to which the prospectus relates." This provision for compensation is to like effect to that contained in section 166 and is, I think, likewise limited in operation and scope.B.

Pleadings

Since these applications turn on the sufficiency of the pleadings, I think it right to set out the relevant passages in the pleadings in the two actions.(1)

The 1992 action

(a) The statement of claim in the 1992 action (so far as material) reads:

"*Part IV: The purpose of the prospectus*

"5.1The purpose and object of the prospectus was to provide information on the company and its subsidiaries to prospective placees and provide encouragement to prospective placees to invest in the shares of the company by participating in the placing. Prospective placees were persons to whom the prospectus was sent (whether directly or as a result of an inquiry made by the recipient however prompted). The plaintiffs were prospective placees.

"5.2Further and in the alternative, the purpose and object of the prospectus was to provide the financial background to the company and its subsidiaries on the strength of which or in the context of which a market in the shares of the company was established and maintained, and, in particular, to induce or encourage the persons mentioned in paragraph 5.3 below to purchase shares on the aftermarket, so as to ensure or attempt to ensure a satisfactory market in the shares after the commencement of dealings at least until further or other financial information was provided to the public by or on behalf of the company.

"5.3In any event, and for the aforesaid purposes or either of them, the persons to whom such information was to be given and who were intended to consider and act upon the statements made in the prospectus were prospective placees (as defined in

paragraph 5.1 above) who either: 5.3.2 would purchase further shares in the aftermarket notwithstanding that they obtained their desired number of shares in the placing, or 5.3.3 would obtain in the placing less than the number of shares desired and would purchase further shares in the aftermarket, or 5.3.4 would not seek to participate in the placing but would purchase further shares in the aftermarket."

The plaintiffs then go on to set out the facts and matters relied on in support of the allegations contained in paragraphs 5.1 and 5.2. It is sufficient to say that the substance of these particulars amounted to the following: (1) the advantages of permission being granted to deal with the shares in the U.S.M. for placees in respect of the marketability of their shares and for **Diamond** in respect of access to the equity capital markets; and (2) the references in the prospectus to (a) the future prospects of **Diamond** and certain imminent acquisitions, (b) the agreement by the directors (other than Mr. Phillips), in order to maintain an orderly market in the shares in

Diamond, to restrict for a period the sales of their own holdings and not to compete with **Diamond**.

None of the particulars provided any support for the allegations of purpose and intent pleaded in paragraphs 5.2 and 5.3. The particulars ***1362** merely reflect inducements to prospective investors to take up the invitations proffered with the prospectus and communicate the information required to be provided to such investors to enable an informed decision to be made whether to do so.

(b) Further and better particulars in the 1992 action were served at the request of the ninth and tenth defendants. These took the matter no further.

(c) Voluntary further and better particulars were served supplementing the particulars already given to the tenth defendant. These contained only one relevant and potentially supportive particular under paragraph 5.2. It reads as follows: —

"7(a)(ii)The fact that the purpose set out in paragraph 5.2 of the amended statement of claim is acknowledged by those experienced as advisers in relation to the flotation of companies as one of the purposes of a prospectus issued in connection with a placing, the other purpose being as set out in paragraph 5.1 of the amended statement of claim."

I should add that the defendants have long made discovery in the 1992 action and accordingly there is no scope for that frequently met excuse for serving inadequate particulars that full particulars cannot be served until after discovery.(2)

The 1995 action

The statement of claim in the 1995 action contains provisions identical to paragraphs 5.1 and 5.2 in the 1992 action, but paragraph 5.3 is in different terms. It reads:

"In any event, the persons to whom such information was given and who were intended to consider and act upon the statements made in the prospectus were all or any of the following:(i)members of the public (including the Group B plaintiffs);(ii)members of the public who were employees of the company or its subsidiaries (including Group B plaintiffs);(iii)connected brokers (including those of the Group A plaintiffs);(iv)stockbrokers and other financial institutions and intermediaries (including those of the Group A plaintiffs) who would purchase shares."

The plaintiffs then proceed to set out identical particulars to those to be found in the 1992 statement of claim, but do not incorporate paragraph 7(a)(ii) of the voluntary particulars.(3)

Sufficiency of pleadings

Leaving aside the voluntary particulars, the particulars relied on (as I have said) were quite inadequate to establish any properly arguable or pleadable purpose of the prospectus or intention upon the part of the defendants to induce aftermarket purchases. The one paragraph in the voluntary particulars alone went any way in this direction, but (1) the voluntary particulars were relied on only in the claim against A.A. in the 1992 action and were not relied on against the other defendants in the 1992 action or in the 1995 action at all, and (2) paragraph 7(a)(ii) appeared objectionable as close to unintelligible and totally uncommunicative. Unfortunately no request for particulars was ever made in respect of these particulars. Perhaps A.A. had abandoned hope of any sensible clarification.***1363**

When it became apparent from the plaintiffs' submissions that paragraph 7(a)(ii) and the (as yet unrevealed) expert evidence in support intended to be adduced at the trial constituted the whole thrust of their case on the applications before me, of my own motion I directed the plaintiffs to provide full further and better particulars of paragraph 7(a)(ii), and in the exceptional circumstances of this case (in order to show the substance and bona fides of this contention as to which the earlier pleadings left me in some real doubt), I also ordered the plaintiffs to file an affidavit from their expert substantiating their case on this score. Mr. Falconer objected to

the order for service of the affidavit: such an order (he said) was quite novel on such an application — it was a procedural innovation. But everything is new once. In future, the same order may be made again if the exceptional circumstances justify it. Such order will then not be novel, but it will be none the better or worse for that. Not only do I possess jurisdiction to make such an order, but I ought to exercise such jurisdiction when (as in this case) justice and convenience so require.

Mr. Falconer after an adjournment provided both the particulars and the affidavit. Put very shortly, his case thus revealed is that, whatever the situation at the time of the decision in Peek v. Gurney, L.R. 6 H.L. 377, by 1989 company and commercial practice in respect of prospectuses and market conditions and perceptions had changed and with them the purpose of a prospectus: the established purpose of a prospectus and its contents were no longer confined to inducing investors to become placees, but extended to inducing the public to make aftermarket purchases. A significant factor in this context was the requirement of the Stock Exchange for the entire prospectus to be printed on Extel cards for Extel Statistical Services Ltd. for the purposes of that company making them available to all subscribers and investors who want to look at them. Read in this light and against this background, the intention of the defendants reasonably to be inferred and as reasonably understood by the plaintiffs was to induce the plaintiffs, as well as to accept shares on the allotment, to make aftermarket purchases. The affidavit in support is from Mr. John Herring, a director of Kleinwort Benson Securities Ltd. His affidavit verifies the particulars and is to the effect that in the market today a prospectus is perceived as intended to be acted upon for the purposes of aftermarket purchases and that indeed is the intention of those who prepare and are responsible for them.

Mr. Barnes for A.A. accepted that the particulars did now furnish a sufficiently pleaded case that the purpose of the prospectus and the intention of the defendants was to induce such purchases. Mr. Gillyon for A.P.C.S. objected to the pleadings as still insufficiently particularising the facts relied on in support of the contention. I think that the pleading is sufficient.

The plaintiffs' case, as Mr. Falconer made clear and as is now apparent from the pleadings, is one applicable to any ordinary prospectus today and turns exclusively on expert evidence as to the perception in current practice of the purpose of a prospectus. The defendants know sufficiently the case they have to meet from the particulars, supplemented by the affidavit of Mr. Herring.C.

Intent and proximity

The issue before me is accordingly whether it is arguable that persons responsible for a prospectus owe a duty of care to (and may be liable in ***1364** damages at the instance of) an aftermarket purchaser if it is established that such purchaser was intended to rely on the prospectus for this purpose, and in particular whether the necessary proximity exists in such a situation between those responsible for the prospectus and the purchaser.(1)

Intention

For the purpose of the torts of deceit and negligent misrepresentation, it is necessary to establish a material misrepresentation intended to influence, and which did in fact influence, the mind of the representee and on which the representee reasonably relied.

There has been much argument before me whether the required intention of the representor should be objectively ascertained, as the intention reasonably to be inferred from his words or action (or inaction), or whether the subjective intention of the representor to induce is sufficient. The authorities and textbooks do not provide any clear guidance. For example in *Halsbury's Laws of England*, 4th ed., vol. 31 (1980), p. 634, para. 1042 it is stated that the intention may be actual or presumptive; whilst

in *Clerk & Lindsell on Torts*, 17th ed. (1995), p. 282, para. 7–65 it is categorically stated that: "The defendant's intention must be assessed objectively." A footnote makes reference to a dictum of Lord Goff of Chieveley in Henderson v. Merrett Syndicates Ltd. [1995] 2 A.C. 145, 181B to the effect that in determining whether a party has "assumed responsibility" an objective test of intention must be applied.

Whether or not theoretically a subjective intention is sufficient, for all practical purposes, as it seems to me, the intention must in all cases be objectively established. Such intent is objectively established if the representor expressly communicates intent to the representee. On the other hand, where it is not expressly communicated, the representee must establish that he reasonably relied on the representation and that he reasonably believed that the representor intended him to act upon it. Accordingly, if the subjective intention of the representor is not expressly communicated to him, the existence of a subjective intention alone is insufficient to found an action unless the existence of such an intention on the part of the representor was reasonably to be inferred by the representee, i.e. the objective test must be satisfied. If in all cases the objective test must be satisfied, the subjective (uncommunicated) intention of the representor adds nothing as a matter of law. As a matter of fact, if established it may perhaps assist in establishing what reasonable inference should be drawn from his conduct; and of course it is relevant if the actual state of mind of the representor is in issue (e.g. a fraudulent intent).(2)

Proximity

The law has drawn a distinction between representations made to specific persons for specific purposes and representations to the public (or sections of the public, e.g. investors). In the case of the former, in general it is sufficient to establish a duty on the part of the representor that he should reasonably have foreseen that the persons concerned would rely on his representation for the purposes in question. But in the latter, generally it is necessary to establish a proximity between the representor and representee beyond the mere foreseeability of reliance by the representee ***1365** to render it fair, just and reasonable that such a duty be imposed in respect of the representation. As it seems to me, it is at least well arguable that the necessary proximity in such a case is established if the reliance by the members of public for the purpose in question is intended by the representor. Intention, if not sufficient to establish the necessary proximity, is at least a very important factor: see Slade L.J. in Morgan Crucible Co. Plc. v. Hill Samuel & Co. Ltd. [1991] Ch. 295, 320B–C. The requirements for imposition of a duty of care of fairness, justice and reasonableness are to a large degree directed to protecting against potential far-reaching foreseen, but unintended, consequences: where the consequences are intended, rarely can the representor on these grounds object to his being held responsible for the deliberate consequences of his words. Some support for this veiw may be found in passages in the judgments of the Court of Appeal in Morgan Crucible Co. Plc. v. Hill Samuel & Co. Ltd. and Galoo Ltd. v. Bright Grahame Murray [1994] 1 W.L.R. 1360, 1382–1383.(3)

Negligence and prospectus

In Peek v. Gurney, L.R. 6 H.L. 377 the House of Lords held that (at common law) the object of a prospectus was to provide the necessary information to enable an investor to make an informed decision whether to accept the offer thereby made to take up shares on the proposed allotment, but not a decision whether to make aftermarket purchases. The later legislation (including the Acts of 1948 and 1985 which required and regulated the contents of prospectuses) had the same objective. The Act of 1986 recognises a wider object in the case of listing particulars in respect of listed securities: the object includes properly informing aftermarket purchasers and creates a corresponding duty of care. Parliament refrained from so widening the object of a prospectus in unlisted securities. The question before me is whether it is properly arguable that the

common law can, in changed market conditions, recognise a duty of care in case of prospectuses for unlisted securities which is substantially equivalent to the duty of care statutorily created in respect of listed securities, but statutorily withheld from unlisted.

The starting point in determining the ambit of the duty of care in respect of a prospectus is the statutory purpose of the prospectus. In the same way the starting point in determining the ambit of the duty of auditors in respect of their audit and audit report is the limited statutory purpose of that statutory requirement, namely to enable shareholders to exercise their class rights in general meeting in an informed manner: see Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605, 629–630. But that is only the beginning: it is not necessarily also the end. It does not necessarily preclude a superadded purpose if a superadded purpose can positively be shown to exist. The burden of establishing such a superadded purpose may be heavy or indeed overwhelming, but whether the burden can or cannot be discharged is a matter for the trial.

But, the plaintiffs say, the prospectus must be examined in the light of changed market practice and philosophy current at its date of preparation and circulation. The plaintiffs claim that there has developed and been generally recognised an additional purpose, an additional perceived intention on the part of the issuer and other parties to a prospectus, namely to inform and encourage aftermarket purchasers, and that this is the basis for the pleaded purpose attributed by the plaintiffs to the ***1366** prospectus. If this is established, then it does seem to me to be at least arguable that a duty of care is assumed and owed to those investors who, as intended, rely on the contents of the prospectus in making such purchases. No doubt the court should think carefully before recognising a duty, in the case of unlisted securities, which has been withheld by the legislature. Though the plaintiffs may find some support in the recurring provision in the legislation that it should not affect any liability which a party may incur apart from the legislation (see e.g. section 160 of the Financial Services Act 1986), I do not think that it provides the complete answer. What is significant is that the courts have since 1873 (before any legislation) recognised a duty of care in case of prospectuses when there is sufficient direct connection between those responsible for the prospectuses and the party acting in reliance (see Peek v. Gurney, L.R. 6 H.L. 377), and the plaintiffs' claim may be recognised as merely an application of this established principle in a new factual situation. It is highly questionable whether (as contended for by the defendants) recognition of such a duty involves recognition of a novel category of negligence or a massive extension of a duty of care.

I can find nothing in the authorities or textbooks which precludes the finding of such a duty and at least some potential support in them.

(a) As regards the authorities, in the decisions limiting the duty of care to placees, the only pleaded allegation of the purpose of the issue of the prospectus was the inducement to take up the allotted shares: see e.g. Peek v. Gurney L.R., 6 H.L. 377, 395–396 and Al-Nakib Investments (Jersey) Ltd. v. Longcroft [1990] 1 W.L.R. 1390. In Peek v. Gurney itself support may be found in the speeches of Lord Chelmsford (at pp. 398–400) and Lord Cairns (at pp. 412–413) for the proposition that the necessary direct connection between issuers and aftermarket purchases may be found where the intention is established that aftermarket purchasers rely on the prospectus. How the intention is manifested, whether by sale of the prospectus to prospective aftermarket puchasers (as in Scott v. Dixon (1859) 29 L.J.Ex. 62n.) or by other means (as in Andrews v. Mockford [1896] 1 Q.B. 372), surely cannot be crucial. Both these last two cited cases are cases of fraudulent misrepresentation, but it is not self-evident to me that, if the issuers of a prospectus intend investors to rely on it, the issue of proximity should depend on whether the representation was fraudulent or negligent. In the case of fraudulent representations, the authorities cited above do sup-

port the proposition that intended reliance is sufficient: see also Clerk & Lindsell, 17th ed., pp. 713–714, para. 14.02.

(b) In *Gower's Modern Company Law*, 5th ed. (1992), p. 498, the view is expressed that the holding in Peek v. Gurney, L.R. 6 H.L. 377 "that an investor who, in reliance on a false prospectus, bought shares on the market had no remedy… seemed outmoded once prospectuses specifically stated that one of their purposes was to lead to admission to listing on the Exchange;" and the hope is expressed "that Al-Nakib [1990] 1 W.L.R. 1390, which resurrects it, will be reviewed by a higher court." That passage in this authoritative work supports the view that the plaintiffs' claim as to the purpose of the prospectus and the duty of care owed today in respect of the prospectus — a prospectus which specifically states that, as part of the same exercise as allotment, the facility will be available for shares in Diamond to be dealt with on the U.S.M. — sufficiently merits full consideration at trial.***1367** IV.

Conclusion

I accordingly refuse the defendants the relief which they seek. I cannot however part with this case without expressing my deep indebtedness to all counsel involved who have saved me from worse errors than may be apparent in this judgment.Order accordingly.
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