EXHIBIT 91
Part 2

10 The application for the injunction became urgent in the meantime, by Ms. Miller's discovery of the website www.millenia-properties.com where two of the condominium units were seen to have been listed for sale. She therefore issued her *inter partes* summons for the injunction and for the appointment of a receiver on December 21st, 2006 and that became her application within these present proceedings before me. The rest of the present proceedings arise from Mr. Gianne's and Redwood's cross-summonses once again seeking to challenge the jurisdiction of this court to try Ms. Miller's claim in respect of the Redwood assets.

11 In the absence of jurisdiction in this court, there can be no basis upon which Ms. Miller's application for injunctive and other interim relief can be given. This court will not ordinarily grant injunctive relief in aid of foreign proceedings where there is no underlying cause of action in this jurisdiction upon which that relief can be based. This principle has been recognized before as being the law in this jurisdiction: see *Bass* v. *Bass* (3) and *Mercedes Benz A.G.* v. *Leiduck* (20). Those, taken together, are the issues arising from the summons and cross-summonses with which I am now concerned.

The defendants' objections

12 Mr. Hall-Jones and Mr. Alberga, Q.C. developed arguments for their objections based variously on grounds of lack of jurisdiction, *res judicata* and *forum non conveniens*. Separately, Mr. Hall-Jones also developed the objection on behalf of Mr. Gianne, that the writ which was in the end served upon him, not in California but as he travelled through the local airport in Grand Cayman, is defective and, for that reason as well, the proceedings in this cause of action should be dismissed or stayed. I will deal first with that issue.

Defective writ and personal service

13 Anticipating that personal service would have to be effected upon Mr. Gianne in California, the writ in this Cause 484 of 2006 was endorsed for service upon him at an address there. Service upon him as he passed through the airport here in Grand Cayman was, however, adventitiously effected by use of a copy of the writ as endorsed for service in California.

14 Having acquired the right to and having been found as a matter of fact by Harrison, Ag. J. to reside in the Cayman Islands (see the judgment of September 19th, 2006 in Cause 40 of 2006), Mr. Gianne does not complain of any prejudice in the manner of personal service bringing him before the courts here. Rather, the objection as taken on his behalf by Mr. Hall-Jones is a purely technical one. It is to the effect that before a writ which has been issued for service *ex juris* may be served within the jurisdiction, an office copy of that writ must be obtained instead,

endorsed for local service. For this proposition, Mr. Hall-Jones relies upon the Grand Court Rules O.6, r.6 which provides:

> "(1) One or more office copies of a writ may, at the request of the plaintiff, be issued at the time when the original writ is issued or at any time thereafter before the original writ ceases to be valid.
>
> (2) Without prejudice to the generality of paragraph (1) a writ for service within the jurisdiction may be issued as an office copy writ with one which is to be served out of the jurisdiction and a writ which is to be served out of the jurisdiction may be issued as an office copy writ with one for service within the jurisdiction.
>
> (3) An office copy of a writ is a true copy of the original writ with such differences only (if any) as are necessary having regard to the purpose for which the writ is issued and which has been sealed."

15 It will be immediately apparent that O.6, r.6 is enabling rather than restrictive in its language. In my view, nothing in it provides support for Mr. Hall-Jones' proposition. I am unable to conclude that it operates so as to negate the actual personal service upon Mr. Gianne within the jurisdiction. Rather, as sub-r. 6(3) contemplates, an office copy writ may be issued for service as necessary, having regard to the purpose contemplated. The sub-rule does not appear to address the sort of adventitious circumstances presented when Mr. Gianne was found at the airport here—circumstances which would not have been contemplated in advance so as to allow for the formal issuance of an office copy writ as amended for the particular purpose.

16 There is, moreover, the well-settled principle that, where a defendant has been properly, even if adventitiously, served within the jurisdiction, the court will only grant a stay of the action at his behest if he can positively show that to continue the action would be oppressive of him or an abuse of the process of the court and, on the other hand, that the stay would not cause injustice to the plaintiff: see *H.R.H. Maharanee Seethadevi* v. *Wildenstein* (31) and *St. Pierre* v. *South American Stores Ltd.* (30). In the absence of such showing, the starting point must be, and I so find, that Mr. Gianne was properly served within the jurisdiction.

17 In any event, if I am wrong to so conclude, as already observed the objection is purely technical in nature. If the service of the writ with the inaccurate endorsement for *ex juris* service amounts to a failure to comply with the Grand Court Rules, that failure can properly be treated simply as an irregularity and by virtue of O.2, r.1 ought not to operate to nullify the actual service upon Mr. Gianne. As there is no evidence that Mr. Gianne had suffered any prejudice as a result of the procedural irregularity, the discretion of the court should be exercised against setting aside the service upon him. He is, moreover, a necessary party to these

proceedings, provided they are otherwise found to be within the jurisdiction of the court and upon the application of the principles, to have been properly brought within this jurisdiction as the appropriate forum: see *The Goldean Mariner* (13).

18 Other arguments were raised by Mr. Hall-Jones going to the question whether leave to serve *ex juris* upon Mr. Gianne had been properly granted under O.11 of the Grand Court Rules. These are arguments which became largely subsumed within his further arguments on *forum non conveniens* and *lis alibi pendens* and will be dealt with in that context. Any factors which would point to California as the more appropriate forum including the case already pending there would be the factors militating against the grant of leave under O.11. Nonetheless, I record here that to the extent any of those arguments depend upon whether or not leave to serve out of the jurisdiction was properly granted, they are negated by the foregoing finding that there was proper service upon Mr. Gianne within this jurisdiction.

Lack of jurisdiction

19 The defendant also argued that this court has no jurisdiction to try Ms. Miller's claim on two distinct bases. I note here, however, that when developed, some of these arguments did not go so much to the question of jurisdiction in the court to try the claims as they did to the question of whether Ms. Miller's pleadings contain a reasonable cause of action with some chance of success when only the allegations in the pleadings are considered. The lack of such a cause of action would be the basis for staying the action or striking it out. In that sense, the application was one which should, strictly speaking, have been brought under O.18, r.18 of the Grand Court Rules. No objection was taken in that regard, however, and so I will deal with the arguments on the merits.

20 The first argument is that nowhere in her statement of claim in this action does Ms. Miller assert a basis for a proprietary claim either *in rem,* or a tracing claim against property in the Cayman Islands—that is either the shares in Redwood or in the estate contracts for the purchase of the condominium units or in the units themselves. Without such a claim, it is said that her cause of action is merely in the nature of a claim for post-judgment relief without a court of competent jurisdiction—said to be exclusively the Los Angeles Family Court—having first declared the existence of her interest in the property in question. Further, it is argued that only that court can declare what is or is not community property as a matter of California law. As that is not a concept known to Cayman law, that issue is not one which is justiciable here.

21 Accordingly, it is submitted that only the Los Angeles Family Court can decide whether any assets found to be held by Mr. Gianne in the

Cayman Islands are to be deemed community property as a matter of California law and unless and until that court so decides and declares what Ms. Miller's interest in any such property is, she can have no basis for a claim before this court in respect of any such property.

22 The second basis for the lack of jurisdiction argument is pleaded as *res judicata*, relying upon the judgment of Harrison, Ag. J. by which he struck out Ms. Miller's Cause 40 of 2006. I now turn to consider these two arguments going to lack of jurisdiction before turning to consider the more general objections of *forum non conveniens* and *lis alibi pendens*. These latter I regard, not as matters going to whether the court has jurisdiction to try an action but rather to whether, in the exercise of discretion, it should defer to another court as the more natural or appropriate forum.

23 Pivotal to the first argument is whether the question of community property as a matter of California law is justiciable before this court. It is trite law that a question of foreign law is readily justiciable as an issue of fact. Questions of foreign law are thus amenable to being resolved by way of expert evidence as to their meaning and effect. Depending on what is made of that evidence, this court reaches a conclusion on the factual ramifications of foreign law and the rights which flow from them can be declared and recognized here.

24 This is the premise upon which Ms. Miller's statement of claim in this action is based. In it, she seeks to comply with the general rule that in order to be relied upon, foreign law must be pleaded in the same way as any other fact (Dicey, Morris & Collins, *The Conflict of Laws*, 14th ed., vol. 1, para. 9–003, at 256 (2006)). It is conceded that the validity, interpretation and effect of a marriage contract or settlement are governed in general by the proper law of the contract. In the absence of any reason to the contrary, the proper law of a marriage contract or settlement is the law of the matrimonial domicile: *Dicey, Morris & Collins, op. cit.*, vol. 2, para. 28R–030, at 1280.

25 In para. 6 of her pleading, Ms. Miller submits that California law governs the rights obtained by her in the property and assets of Mr. Gianne held as a result of the marriage, whether that property was possessed at the time of the marriage or acquired afterwards. In para. 7 she pleads that by California law all property and assets wherever situated, acquired by Mr. Gianne during the marriage become "community property" and that the respective interests of Mr. Gianne and herself in community property during the continuance of the marriage are equal interests (citing respectively ss. 760 and 751 of the California Family Code) directly to the point under discussion. In para. 8 she pleads that the effect of the application of the law of the State of California in the Cayman Islands is that any assets to which Mr. Gianne has title

(beneficial or legal), acquired by him during the marriage or with funds which represent community property are held by him as trustee for himself and her as joint tenants in equity. She argues that these pivotal issues of California law would all be determinable as issues of fact at the trial of her writ action in this cause.

26 The principle that in an English (or Cayman) court foreign law is to be treated as a matter of fact is well established. See, for a discussion of the development of the case law, *Bumper Dev. Corp.* v. *Metropolitan Police Commr.* (6) and *Phillips Petroleum Co.* v. *Quintin* (26). *Dicey, Morris & Collins*, *op. cit.*, vol. 1, para. 9–001, at 255, states the principle in this way in Rule 18(1):

> "In any case to which foreign law applies, the law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means."

Ms. Miller proposes to prove these issues of Californian law as matters of fact to the satisfaction of this court in the usual way by use of expert evidence. There is already on record in the form of affidavit, uncontroverted expert evidence to the same effect asserted in her statement of claim.

27 One of the consequences in this jurisdiction of a conclusion of fact as to the meaning and effect of California law could be a determination on the binding effect of the marriage contract as between the parties over property located here. For reasons which follow, this, as a matter of Cayman law, could, in my opinion, clearly be the result in respect of movable property such as the shares in Redwood or the estate contracts. It could also arguably be the case in respect of immovable property such as the real estate itself in the condominium units.

28 The case law, in this regard, comes primarily from the related cases in *De Nicols* v. *Curlier* (11) and in *In re De Nicols* (10). In the former (*De Nicols* v. *Curlier*), Kekewich, J. had held at first instance that the change of domicile of the parties (a French married couple) from France to England had not altered their legal position under French law with reference to property acquired during the marriage, even while they were domiciled in England.

29 The House of Lords decided, upholding Kekewich, J. and disagreeing with the Court of Appeal, that the large fortune amassed by the husband from the successful operation of a restaurant business in England did not devolve upon his death with his personal estate, but remained governed by French law and the rules of "*communauté de biens.*" Thus the wife was entitled to the share of her husband's personal estate to which she would have been entitled if they had remained domiciled in France. Before the House of Lords, the issues related only to the movable property which had been purportedly disposed of by the husband's will,

the parties having changed their domicile to England. This judgment is discussed in *Dicey, Morris & Collins*, *op. cit.*, vol. 2, paras. 28–048 – 28–052, at 1295, under Rule 158.

30 The matter came back before Kekewich, J. (in *In re De Nicols* (10)) when the question became whether the real and leasehold property acquired in England in the name of the husband, was also nonetheless governed by French law and subject to the community of property. It was held that having regard to the expert evidence to the effect that the term *"immeubles"* in the French Code was not confined to immovables in France, but included immovables wherever they may be located; and because the couple, who had not expressly opted out of the French regime, were deemed to have entered into an implied contract in favour of all community property, the real and leasehold property in England was also subject to the French law which governed the community of property and the wife was equally entitled.

31 As it relates to movables, the law laid down in *De Nicols* v. *Curlier* (11) by the House of Lords must be regarded as settled and that carries very persuasively over into this case insofar as the property immediately in question (the shares in Redwood or the estate contractual rights) may be concerned. These are as yet in the nature of movable property, perhaps best regarded as *choses in action.*

32 However, it must be recognized that the law, as stated in *In re De Nicols* as it relates to immovable property, is not so clearly settled. There it seems that Kekewich, J., confronted with the already then settled rule of private international law that the law of the *lex situs* governs immovables (see *Dicey, Morris & Collins*, *op. cit.*, vol. 1, Rule 40, para. 14R–099, at 611) based his decision on the ground that, under French law, couples who married without a pre-nuptial agreement specifying the matrimonial regime they wished to adopt were deemed to have entered into an "implied contract" in favour of community property. He held, therefore, that the couple should be treated as if they had entered into an express contract including the effect that the immovables located in England were governed by the French Code and regime of community of property. In effect, therefore, that they had elected not to have the law of the *lex situs* (in that case English law) govern the immovables.

33 This is not the same thing as a conclusion that as a result of the direct operation of the French Code upon all community property of the parties wherever located, the real property in England was governed by it, on the basis that the *lex fori* governed the matrimonial relationship and all its appurtenances. That would, at least arguably, have been a clearer, more practicable and acceptable way of arriving at the same result (see for instance, discussions in *Dicey, Morris & Collins*, *op. cit.*, vol. 2, paras. 28–021 – 28–029, at 1285).

34 It would, however, also have been difficult to reconcile that approach with the principle earlier decided in *Welch* v. *Tennent* (36) on appeal to the House of Lords from Scotland. In that case, the husband was domiciled in Scotland. Before the marriage, which was without a pre-nuptial agreement, the wife had owned immovables in England which she sold after the marriage, paying the proceeds to the husband. The parties subsequently separated and the wife claimed that, under the Scottish law of community of property, she was entitled to reclaim the proceeds of the sale of the immovables. The House of Lords held, however, that the rights of the parties in the English immovables were governed by English law as the *lex situs*, and that the wife's claim failed (notwithstanding that by then the property had changed its nature to become the proceeds of sale). The law of England, at that time, operated so as to vest an immediate estate in the husband of the wife's land in England, during their joint lives. Notwithstanding that the wife had taken her husband's Scottish domicile, the law of the *lex situs* thus continued to govern the immovables in England and the proceeds of sale were deemed to represent them.

35 Having regard to the decision in *Welch* v. *Tennent* and for other reasons discussed, the editors of *The Conflict of Laws* regard *In re De Nicols* (10) as not having definitively established that the law of the matrimonial domicile applies to immovables overseas in the same way as it does to movables (*op. cit.*, vol. 2, paras. 28–021 – 28–027, at 1285). They nonetheless posit (*op. cit.*, at vol. 2, paras. 28–028 and 28–029) that *In re De Nicols* should be followed, subject to the proviso that the law of the matrimonial domicile cannot give a party to a marriage any right in respect of land which is prohibited or not recognised by the *lex situs*. See, for example, *In re Pearse's Settlement* (25), where by the law of Jersey certain dispositions of land located in Jersey, by way of a trust created under a marriage settlement in England, were not capable of recognition.

36 Further support for the approach taken in *In re De Nicols* is also said in *Dicey, Morris & Collins*, *op. cit.*, vol. 2, para. 28–029, at 1288, to be found in *Chiwell* v. *Carlyon* (9). This case concerned a husband and wife domiciled in South Africa, who married there without a pre-nuptial agreement. Under South African law, this meant that the regime of community of property applied to both their movables and immovables wherever situated. The husband acquired land in England and the question before the English court was whether this land was subject to the community of property. Stirling, J. sent the case for the opinion of the Supreme Court of the Cape Colony, implicitly thus deciding that the rights of the spouses in the English land were to be determined by South African law. The Cape court gave an opinion that the English land was community property. Stirling, J. then gave judgment in accordance with that opinion.

37 For the sake of completeness, the judgment of the Privy Council in *Callwood* v. *Callwood* (7) should also be noted here. In it the issue was whether the Danish system of community of property in force in the Island of St. Thomas at the material time was, in the eye of Danish law, applicable to immovable property situated in the British Virgin Islands and so subject to English law.

38 The Privy Council approved of the approach taken by Kekewich, J. in *In re De Nicols* (10) and by Stirling, J. in *Chiwell* v. *Carlyon* (9) to the effect that the ascertainment of the effect which the foreign law of community of property has over immovables located in England is a matter of fact to be determined by reference to expert evidence. It was held ([1960] A.C. at 659) that—

> "... the question whether the system of community of property between spouses in force in a given country is regarded by the law of that country as applying to immovables situated outside it is, for the purposes of proceedings in an English court, a question of foreign law, and therefore of fact, to be determined by competent evidence as to the law of the foreign country concerned."

Having concluded that there was no reliable evidence as to the meaning and effect of the Danish law of community property, the Privy Council did not go on to conclude as to whether, in any event, that law could have been conclusively applied by a British court (the Supreme Court of the Windward Islands) as governing the disposition of the British property, rather than the *lex situs*. That question was left open expressly (*ibid.*, at 683).

39 From the foregoing discussion of the case law, it is at least settled, in the words of Rule 156 of *Dicey, Morris & Collins*, *op. cit.*, vol. 2, para. 28R–001, at 1280 that—

> "in the absence of a contract or settlement, the rights obtained by the husband and wife in each other's movable property as a result of the marriage, whether that property is possessed at the time of the marriage or acquired afterwards, are determined by the law of the matrimonial domicile. Where, at the time of the marriage, both parties are domiciled in the same country, the matrimonial domicile is (in the absence of special circumstances) that country."

By the application of that Rule to the circumstances of this case, Ms. Miller would be able to plead California law as governing community property in the Cayman Islands to the extent that that property comprises movables, as is asserted to be the case with the shares in Redwood and, as yet, with the contractual rights in the estate contracts themselves.

40 Further, on the authority of *In re De Nicols* (10), Ms. Miller would, at least arguably, be able to plead California law before this court as

governing the immovable proprietary interests in the condominium units themselves; to the extent that any such proprietary interests have become legally or beneficially vested in Mr. Gianne.

41 This points also, on the same basis, to an arguable case that she would be entitled to declaratory orders to the effect not only that Mr. Gianne holds the shares in Redwood and the estate contracts but also the condominium units as community property in trust subject to her entitlements. It is important to emphasize that the trial of these issues by this court would be different from any pleaded reliance upon a decision of the California court itself purporting to operate *in rem* over real property located in the Cayman Islands. Recognition and enforcement of such a judgment would be precluded by established principle identified in *Dicey, Morris & Collins*, *op. cit.*, vol. 1, para. 14R–099, at 611, as Rule 40:

> "(1) A court of a foreign country has jurisdiction to give a judgment *in rem* capable of enforcement or recognition in England if the subject-matter of the proceedings wherein that judgment was given was immovable or movable property which was at the time of the proceedings situate in that country.
>
> (2) A court of a foreign country has no jurisdiction to adjudicate upon the title to, or the right to possession of, any immovables situate outside that country."

(It must be noted, however, that Rule 40(2) is also there (at para. 14–105) described as a rule which "rests on a very slender basis of precedent, and its exact scope is a matter of doubt," and that, although Rule 40(2) is stated without exceptions, the position "to put it more precisely, [is that] none have yet been formulated.")

42 The question for this court on the present state of the pleadings, in the exercise of its jurisdiction, would essentially become: What is the effect of marriage under the laws of California upon property located in the Cayman Islands in the circumstances of this case?

43 On the authority of *Chiwell* v. *Carlyon* (9) and on the basis that California law would, as between the parties to the marriage, govern all community property located here, the approach could also be taken by this court of deferring to that court on the question whether property here is community property under California law and then deciding upon Ms. Miller's claim in this case accordingly. This was the approach which Mr. Hall-Jones and Mr. Alberga, Q.C. conceded in the end was the approach which could "most safely" be taken. It would involve, if not a stay of this action, at least an adjournment *sine die*, to allow for the Los Angeles Family Court's pronouncement on that question.

44 At this juncture, I will simply note as part of my conclusion to be further explained, that a pronouncement by that court, even if not strictly

expressed in monetary terms, could well continue to operate in furtherance of the stipulated judgment as a judgment *in personam* against Mr. Gianne in favour of Ms. Miller; it would not be a judgment *in rem*, albeit declaratory of her proprietary interests in the Cayman property and creating as between herself and Mr. Gianne an obligation *in personam* which is enforceable here. See *Pattni* v. *Ali* (24) for a most recent authoritative analysis of these principles.

45 So, in summary, as presently pleaded, Ms. Miller's case seeks relief based on this court's recognition and acceptance of California law as governing the community property located in the Cayman Islands. In my view, the authorities show that there is at least an arguable case that the jurisdiction exits in this court to grant the relief sought. Her pleadings satisfy the legal definition of a cause of which action is justiciable before this court. They reveal facts which she is required to plead and, if traversed, may be proved to recover the relief which she claims: *Letang* v. *Cooper* (18) and *Omni Secs. Ltd.* v. *Deloitte & Touche* (23).

Res judicata

46 An action may be struck out or stayed for being an abuse of the process of the court in the sense that it seeks to re-litigate matters which have already been decided, even though the matters are not strictly *res judicata*: *Stephenson* v. *Garnett* (34).

47 Here it is said, on behalf of Mr. Gianne, that Harrison, Ag. J.'s judgment in Cause 40 of 2006 decided, once and for all, that the Los Angeles Family Court is the appropriate forum for the adjudication of the plaintiff's claim, in the interests of all the parties and in the ends of justice. Upon analysis of the stipulated judgment, Harrison, Ag. J. concluded that the plaintiff should be held to her election contained in it and that having agreed that the Los Angeles Family Court would have exclusive jurisdiction, she should not now be allowed to argue that the courts of the Cayman Islands should have jurisdiction to entertain her claim.

48 I feel obliged to observe immediately that, apart from anything else, the sheer irony of that argument is stark: should it carry the day, the plaintiff would be precluded by the very judgment upon which she seeks to rely, from pursuing an action here which has become necessary because of Mr. Gianne's alleged disobedience of that judgment. Mercifully, I do not think that the law mandates such an outcome. In the first place, the power to stay or dismiss an action on the grounds of abuse of process is discretionary: see *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd. (No. 3)* (8).

49 The jurisdiction will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed: *Electric Dev. Co. of Ontario* v. *Att. Gen. (Ontario)* (12). The court must

not prevent a suitor from exercising his undoubted rights on any vague or indefinite principle: *Higgins* v. *Woodhall* (15). Accordingly, while the court will strike out a fresh action if it is clear that it is *res judicata*, the court must be careful not to bar an action which did not necessarily involve the same or identical issues decided previously: see *Stephenson* v. *Garnett* (34) and *Bank of Butterfield (Cayman) Ltd.* v. *Crang* (2). In a case where previous pleadings had been determined, not on the merits but on technical procedural grounds, the court will be obliged to consider the new pleadings to see whether they raise different substantive issues before deciding whether a plea of *res judicata* can succeed: *Prospect Properties Ltd.* v. *McNeill* (28).

50 With the foregoing principles in mind, it is plain from a reading of Harrison, Ag. J.'s judgment that he was concerned only with whether or not the plaintiff should have been allowed to prosecute her action in this jurisdiction *in personam* against Mr. Gianne for fraudulent misrepresentation in breach of the stipulated judgment. Convinced that California was the appropriate forum for the trial of that particular contest, based as it was primarily upon the construction of the judgment of a California court, he dismissed her claim. That, in my judgment, can give rise to no plea of *res judicata* in bar to her present action, which is one going to the issue of whether or not she has a proprietary claim in respect of the Cayman property—and therefore a claim which Mr. Gianne should, *in personam,* be obliged to honour.

51 Harrison, Ag. J.'s judgment does not create an estoppel *per rem judicatam* in any of the three senses developed in the case law: "cause of action estoppel," "issue estoppel," or "estoppel in the wider sense" recognizing an abuse of process where in subsequent proceedings matters are raised which could and therefore should have been litigated in earlier proceedings: see *Republic of India* v. *India SS. Co.* (16) for a recent discussion of the case law on the subject by the House of Lords.

52 In this action, if the plaintiff succeeds in establishing her claim based directly on the meaning and effect of California law, she will be seeking not only the recognition and enforcement of the stipulated judgment itself as a judgment *in personam* against Mr. Gianne, but also declaratory orders as to her entitlement to her share of the community property located in the Cayman Islands. These would be orders which would bind Mr. Gianne and Redwood as defendants to her action and which, if not obeyed, could become the subject of further enforcement process. The plea of *res judicata* is denied.

Amended statement of claim

53 In further response to the defendants' challenge to jurisdiction, Mr. Lowe, on behalf of Ms. Miller, applied during the arguments to amend

the statement of claim to plead the stipulated judgment itself as being a final and conclusive judgment capable of being recognized and enforced by this court.

54 The amended pleading would rely on para. 18 of the stipulated judgment which provides, in effect, that in the event community property is discovered to exist contrary to the warranties given by Mr. Gianne that he had fully disclosed all such properties, then he would be required immediately to transfer, at the sole discretion of Ms. Miller as the injured party, either one half of the discovered property itself or one half of its market value.

55 On the basis of that pleading and the factual conclusion which she anticipates from this court as to Mr. Gianne's interests in Redwood and its assets, the relief sought by Ms. Miller would also therefore be amended to include an order directing Mr. Gianne to transfer half of the community property in the Cayman Islands or to pay to her the market value of her half share.

56 The application to amend was objected to by Mr. Hall-Jones and Mr. Alberga, Q.C., not on grounds of prejudice to their respective clients, but on the ground that the stipulated judgment itself may not be relied upon for enforcement purposes in this jurisdiction. First, it is said that the stipulated judgment may not operate as a "final and conclusive judgment" within the recognized meaning of that expression for the present purposes. Two main reasons for this were cited. The first was that the stipulated judgment could not have and does not purport to declare the Cayman Islands property as being in the nature of community property. It is said that such a determination is a necessary prerequisite to the recognition and enforcement of the stipulated judgment itself as being a final and conclusive judgment *in rem* over what is alleged to be community property in the Cayman Islands. Until that is done, the stipulated judgment can operate only as a judgment *in personam* against Mr. Gianne.

57 The second ground of this objection is related to the first and is to the effect that only the Los Angeles Family Court can determine whether or not Mr. Gianne has acted in breach of the stipulated judgment so as to trigger the provisions of para. 18 and so as to create that specific liability *in personam*. As that determination is a prerequisite to reliance on para. 18, there is no final and conclusive judgment in that regard which can be recognized and enforced here. Further, that before the stipulated judgment—which is undoubtedly a foreign judgment *in personam* against Mr. Gianne—may be enforced here, it must be for an amount due under the judgment which is a debt for a definite sum of money as well as being final and conclusive, but not otherwise. The oft-cited Rule 35 of *Dicey, Morris & Collins, op. cit.*, vol. 1, para. 14R–018, at 574 to that effect is

relied upon in support of the foregoing propositions (citing *Sadler* v. *Robins* (29) and *Nouvion* v. *Freeman* (22)).

58 A still further argument, less forcefully presented by Mr. Hall-Jones than those, was to the effect that the amendment should not be granted in the form now pleaded because the plaintiff will need to re-amend if and when she does obtain the further declaratory orders which she needs from the Los Angeles Family Court. This last argument I can readily address by saying that it is one going more to form than to substance. If the stipulated judgment as it stands is capable of recognition and enforcement at common law in this jurisdiction by Ms. Miller suing upon it as she seeks to do, no further declaratory orders of the Los Angeles court would be required. If not, no harm can be done by allowing the proposed amendment now even if further amendments may become necessary later on, after further pronouncements in furtherance of the stipulated judgment by the Los Angeles court.

59 Viewed as a judgment *in personam* against Mr. Gianne, in my view the stipulated judgment is very arguably a final and conclusive judgment within the meaning of that phrase settled long ago in *Nouvion* v. *Freeman* (22). The test was recently most authoritatively reaffirmed in *Pattni* v. *Ali* (24) by the Privy Council (2005–06 MLR 586, at para. 39). Adopted for present purposes, the effect of the test is as follows: Mr. Gianne submitted on the merits of his case to the jurisdiction of the Los Angeles Family Court in the divorce proceedings and is bound by the final and conclusive judgment which resulted, subject only to certain defences such as fraud, failure to comply with natural justice, public policy and inconsistency, none of which defences arise here. The evidence is that in the Los Angeles Family Court where it was pronounced, the stipulated judgment conclusively and finally established the obligations between the parties in respect of community property wherever it may be and in whatever form, so as to make the stipulated judgment *res judicata* as between them.

60 The more difficult question is whether the stipulated judgment must first be regarded as a judgment debt for a definite sum of money as between the parties, before it can be recognised and enforced by being sued upon here. Until recently, it was plain enough, as cited above in respect of Rule 35 of *Dicey, Morris & Collins*, from *Sadler* v. *Robins* (29), that that was a pre-requisite of the common law, the regime to which resort would ordinarily be taken by suing upon the foreign judgment, in the absence, like here, of a statutory scheme for reciprocal recognition and enforcement. However, the outcome in *Pattni* v. *Ali* (24) and clear pronouncements of principles in that case by their Lordships, must now be regarded as having, at the very least, cast doubt upon the longstanding rule from *Sadler* v. *Robins*.

61 In *Pattni* v. *Ali*, Mr. Pattni brought proceedings in the Isle of Man to

enforce a judgment earlier given in his favour by the Kenyan High Court in which it had been declared, as between himself and the defendants, that he was the lawful owner of the shares in an Isle of Man company called World Duty Free Company Ltd. ("World Duty Free"), which had carried on business in Kenya. The shares of World Duty Free were held by Mr. Ali and by Dinky S.A. The Kenyan judgment was held to have been validly, finally and conclusively decided as creating obligations upon the defendants, *in personam*, to transfer the shares in World Duty Free to the plaintiff. Rather than seeking or purporting to adjudicate *in rem* by ordering the actual transfer of the shares themselves (regarded as an impermissible proposition because the share register was outwith the Kenyan jurisdiction in the Isle of Man) the Kenyan court's decision determined, *inter partes* and *in personam*, the parties' rights and duties in relation to them. In other words, the Kenyan order was (2005–06 MLR 586, at para. 33, *per* Lord Mance)—

> "... a classic order *in personam*, for specific performance in terms reflecting and predicating the judge's findings of an agreement for sale and of its breach by Mr. Ali and Dinky which are findings central to Mr. Pattni's claim in the Isle of Man to rectify World Duty's register."

62 The Privy Council, in allowing Mr. Pattni's appeal, declared that the courts of the Isle of Man had jurisdiction and the right to recognize and enforce the Kenyan judgment by way of *in personam* orders directing Mr. Ali (as a shareholder of World Duty Free and director of Dinky S.A. and Dinky S.A. itself as the majority shareholder) to grant specific performance, among other things, by the rectification of the share register of World Duty Free.

63 In their Lordships' judgment (*ibid.*, at para. 30) is to be found the following far-reaching statement of principle:

> "As presently advised, though the arguments did not address the point (or, it may be, need to under the terms of the two preliminary issues presently in issue), their Lordships would think it clear that, where a court in state *A* makes, as against persons who have submitted to its jurisdiction, an *in personam* judgment regarding contractual rights to either movables or intangible property (whether in the form of a simple chose in action or shares) situate in state *B*, the courts of state *B* can and should recognize the foreign court's *in personam* determination of such rights as binding and should itself be prepared to give such relief as may be appropriate to enforce such rights in state *B*. The extent to which this was possible might be limited by the law of state *B*, as the *situs* or in the case of shares as the place of incorporation of the relevant company (in this case, as both). For example, if a person to whom a court in state *A* held that

shares had been contractually agreed to be transferred was not eligible under the company's constitution to be registered as their legal owner, there could be no actual registration in state *B*, but no such suggestion appears in this case."

No such suggestion appears in this case either as an impediment to the enforcement of the stipulated judgment (seen in its present state or as may be later expanded) as a judgment of a foreign court declaring rights between parties *in personam* and obligating Mr. Gianne to honour Ms. Miller's entitlement to movable community property in this jurisdiction.

64 While the prefatory words of Lord Mance above suggest that that pronouncement of principle was not the subject of arguments directly on point, the principle cannot be regarded as mere *obiter dictum*; it was central to the decision taken by which the appeal was allowed and the Kenyan judgment declared to be enforceable. The fact, therefore, that the long-standing rule derived from *Sadler* v. *Robins* (29) (itself described by *Dicey, Morris & Collins, op. cit.*, vol. 1, at 574, note 62, as a limitation worthy of being reconsidered) appears not to have been the subject of arguments before their Lordships, is no basis for doubting that it has been disapproved.

65 Further, clear indication by way of high judicial authority that *Sadler* v. *Robins* should no longer represent the law on enforcement of foreign judgments *in personam* at common law is to be found in the judgment of the Supreme Court of Canada in *Pro Swing Inc.* v. *Elta Golf Inc.* (27). There the majority of the court held (in the context of an application to enforce a trademark judgment) that the traditional common law rule that limits the recognition and enforcement of foreign orders to final money judgments should be changed. Further, that the appropriate modern conditions for recognition and enforcement can be expressed generally as follows. The judgment must have been rendered by a court of competent jurisdiction and must be final and conclusive, and it must be of a nature that the principles of comity require the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether to enforce one.

66 This invocation by the Canadian Supreme Court of equitable principles is derived from an examination of the history of the traditional common law limitations set now against the realities of modern day commerce and the global mobility of people and assets. Those are realities which exist no less so in our jurisdiction.

67 Moreover, the jurisdiction in the courts to provide relief by way of recognition and enforcement of foreign non-monetary judgments may

well have existed in equity even before the emergence of the rule in *Sadler* v. *Robins* (29) in 1808. See, for instance *Morgan's Case* (21). The inclination in modern jurisprudence to grant recognition and enforcement by way of equitable remedies such as specific performance, injunctive or declaratory relief and pleas of *res judicata*, may well be regarded as a re-emergence of that jurisdiction which has always existed in equity, even if rendered dormant over the years in deference to the limitations of the traditional common law rule. For an elucidatory discussion on the subject, see White, *Enforcement of Foreign Judgments in Equity*, (1980–82) 9 *Sydney Law Review* at 630–648.

68 The consequence of all this is, in my view, the appropriate conclusion that Ms. Miller should be allowed to seek the recognition and enforcement of the stipulated judgment itself in this jurisdiction, notwithstanding that it is not a judgment for a debt by way of a definite sum of money. It is highly arguable that this court, in the exercise of its equitable jurisdiction, will be able to recognize and enforce the orders and declarations of the California court (whether as presently contained in the stipulated judgment or as may be later expanded) *in personam*, as to the entitlement to property located here and declared to be community property. The fact that this form of pleading is one not previously settled as a matter of Cayman law, is no bar to the amendment, provided that it is *prima facie* arguable: *Grupo Torras S.A.* v. *Bank of Butterfield Intl. (Cayman) Ltd.* (14).

69 For the foregoing reasons and absent any showing of potential prejudice to the defendants, as to which see *Swiss Bank & Trust Corp. Ltd.* v. *Iorgulescu* (35), leave to amend is granted. There is also the further perspective from which this issue might be viewed as conceded by Mr. Hall-Jones and Mr. Alberga, Q.C.

70 This court can well anticipate that the Los Angeles Family Court will endeavour to ascertain and identify the value of the community property and express the value which it determines should be ascribed to Ms. Miller's share of it. This "wait and see" approach is not indispensable to Ms. Miller's action being prosecuted here but, in the event it should ultimately be decided that Cayman law has not evolved beyond *Dicey, Morris & Collins*, Rule 35, as discussed above, by reference in particular to *Pattni* v. *Ali* (24) and *Pro Swing Inc.* v. *Elta Golf Inc.* (27), it is an approach which should yield a monetary judgment, enforceable even within the strictures of the Rule 35 regime and even if the final arithmetic calculations as to the value of Ms. Miller's share at a given point in time must be undertaken by this court: see *Beatty* v. *Beatty* (4). There would then be a final and conclusive judgment of the Los Angeles Family Court in respect of what it would deem to be Ms. Miller's monetary share of community property capable of enforcement by a simple arithmetic process here.

Forum non conveniens

71 Where a plaintiff has sued as of right within the jurisdiction, the onus shifts to the defendants to show that some other jurisdiction is the more appropriate forum for the trial of the issues raised in the action: see *KTH Capital Management Ltd.* v. *China One Fin. Ltd.* (17) and *Brasil Telecom S.A.* v. *Opportunity Fund* (5). In both of those judgments the seminal words of Lord Templeman from *Spiliada Maritime Corp.* v. *Cansulex Ltd.* (33) ([1987] A.C. at 464–465) were adopted:

> "Where the plaintiff is entitled to commence his action in this country, the court, applying the doctrine of forum non conveniens will only stay the action if the defendant satisfies the court that some other forum is more appropriate. Where the plaintiff can only commence his action with leave, the court, applying the doctrine of forum conveniens will only grant leave if the plaintiff satisfies the court that England is the most appropriate forum to try the action. But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere."

72 Having regard to these principles, the starting point is to recognize that the plaintiff here has been found to have brought her action as of right in this jurisdiction, by having effected personal service directly upon both defendants here. This is notwithstanding that she had already directly obtained leave from Henderson, J. to serve out of the jurisdiction upon Mr. Gianne, a decision upon which she could otherwise, it seems to me, have relied as having also already decided the question of *forum conveniens*. That was not, however, the basis of her response to the challenge here, which also depends on the argument that as there are already proceedings brought by her in the Los Angeles Family Court, there is a *lis alibi pendens* pointing to California as the appropriate forum and primarily for that reason, the action here should be stayed pending the outcome of that action.

73 This, in my view in the particular circumstances of this case, is an issue to be considered in the context of the now settled law that the existence elsewhere of contemporaneous proceedings is no more than a factor relevant to the determination of the appropriate forum.

74 It is necessary to look once again at the case law. In *Société Nationale Indus. Aerospatiale* v. *Lee Kui Jak* (32), the Privy Council held that in considering whether an injunction should be granted to restrain a plaintiff from beginning or pursuing an action in another jurisdiction, the court did not proceed on the same principles as those applied when granting a stay of proceedings on the grant of *forum non conveniens*, that

the authorities showed that an injunction would be granted where justice required that a plaintiff amenable to the jurisdiction of the court should be restrained from proceeding in a foreign jurisdiction, and that, although the question of whether the plaintiff's action was oppressive or vexatious was material in determining whether the interests of justice required the plaintiff to be restrained from proceeding in the foreign jurisdiction, the court had also to consider the injustice to the plaintiff if restricted to the natural forum for determining the dispute, if that restriction would unjustly deprive him of advantages available in the foreign forum.

75 In *The Abidin Daver* (1) in the House of Lords, Lord Diplock had only shortly before stated the same principle, if with somewhat different emphasis, that where proceedings were pending in a foreign court between the parties, and the defendant in the foreign proceedings commenced proceedings as plaintiff in England, then the additional inconvenience or expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different jurisdictions, where the same facts would be in issue and the testimony of the same witnesses required, could only be justified if the would-be plaintiff in England could establish objectively by cogent evidence that there was some personal or juridical advantage that would be available to him only in the English action and which was of such importance that it would cause injustice to deprive him of it. (See also *Dicey, Morris & Collins, op. cit.*, vol. 1, Rule 3, paras. 12–035 – 12–037, at 482, and *KTH Capital Management Ltd.* v. *China One Fin. Ltd.* (17).)

76 Those are the modern restatements of the principles but, ever since *McHenry* v. *Lewis* (19), it has been settled that there is no presumption that a multiplicity of actions in more than one jurisdiction is vexatious. Where, by virtue of the different legal regimes, there are different forms of procedure and different remedies, a special case must be made out before a court will interfere to restrain one set of proceedings or the other. For reasons already identified, it is not, in my view, difficult to conclude that Ms. Miller's actions satisfy the principles.

77 The risk of dissipation of the assets represented by the shares in Redwood and the estate contracts which it holds are already manifest. These risks have already been recognized in Henderson, J.'s injunctive order. Should Ms. Miller's action here be stayed or dismissed, the underlying basis for injunctive relief would be destroyed (see *Bass* v. *Bass* (3)). Those considerations by themselves are sufficient to establish genuine juridical advantages which would be lost if this action were stayed or dismissed but to which Ms. Miller would otherwise be entitled.

78 At the same time, her action before the Los Angeles Family Court allows her to seek declaratory orders in furtherance of the stipulated judgment, should that become necessary for enforcement of her claim

here. Such orders, in particular any which further declare her entitlement in respect of property in this jurisdiction as community property, may well enhance her ability to enforce claims brought in this action in this court. In all the circumstances of this case, those factors suffice to persuade me that I should not invoke the strictures of the *lis alibi pendens* rule to compel Ms. Miller to elect as between her action here and that in California.

79 The other issues of *forum non conveniens* really go to the more usual question of what is the natural or more convenient forum. In the famous words of Lord Goff in *Spiliada Maritime Corp.* v. *Cansulex Ltd.* (33), the question is ([1987] A.C. at 476) ". . . in which [forum] the case may be tried more suitably for the interests of all the parties and the ends of justice." Notwithstanding the foregoing conclusions on *lis alibi pendens*, if California is shown in that sense very clearly to be the more appropriate forum for the resolution of Ms. Miller's claim, then, the argument goes, the present action should be stayed or dismissed and she would be required to prosecute her action there.

80 On behalf of the defendants, much was made of the likely inconvenience and costs to arise from having to bring witnesses, including expert witnesses, from California to testify here. As was pointed out in response, however, and as is readily apparent from the evidence, logistical and financial concerns would no less attend having to take to California the very many witnesses (and their documents) located here and who have become involved with the defendants and their affairs. There would doubtless also be the need then for Cayman legal expert evidence in the same way expert legal evidence of California law may be required here.

81 Far from the balance of convenience being weighted clearly in favour of California, there are compelling factors in favour of Cayman as the natural forum. That, however, in the end must plainly, from my point of view, be regarded as being a secondary consideration in this case. In this context also, the importance to Ms. Miller of being able to preserve the assets here with a view to the ultimate enforcement of her claim through the auspices of this or the California court as may be required, must be considered. I am persuaded that the ends of justice require that, as yet, she should be allowed to maintain both actions.

82 This conclusion does not, however, necessarily involve the unwarranted consequences of a multiplicity of actions deprecated by Lord Diplock in *The Abidin Daver* (1). As a safeguard, I will adopt the concession made by counsel for the defendants so that their clients will not be dragged into unnecessary expense in defending here, even while Mr. Gianne may be responding to the Los Angeles Family Court.

83 Accordingly, I direct that this action be adjourned, in the sense that no further steps be taken in it, without the leave of the court, such leave to

be given only upon the court here being satisfied that having regard to the state of the proceedings before the Los Angeles Family Court, the grant of leave to proceed here would be appropriate.

Conclusions

84 My conclusions in this case may be summarized as follows:

(i) The writ was properly and validly served by way of personal service upon Mr. Gianne within the jurisdiction;

(ii) This court has jurisdiction to try Ms. Miller's claim as presently pleaded in her statement of claim relying upon the operation of California law over community property which may be situated in the Cayman Islands and as that law may be applied *in personam* as between herself and Mr. Gianne;

(iii) The meaning and effect of California law for those purposes will be a matter of fact to be determined by this court by way of expert evidence;

(iv) The defendants have failed to establish by reliance on the judgment of Harrison, J., a plea of *res judicata* in bar to Ms. Miller's present claim;

(v) Ms. Miller's application to amend her statement of claim in this action seeking recognition and enforcement of the stipulated judgment as a foreign judgment by reliance on the doctrine of estoppel and as creating an obligation in Mr. Gianne *in personam* to transfer one half of any community property found to be held by him in this jurisdiction (or its value) is granted;

(vi) The appropriate forum for the trial of the issues pleaded in Ms. Miller's statement of claim is this court.

85 However, as a matter of convenience and in the exercise of discretion in the context of its case management jurisdiction, this court can and does direct that further steps in this action be postponed until after the determination of Ms. Miller's application to the Los Angeles Family Court for a declaration as to whether the Cayman Islands property is in fact community property and as to what obligations are imposed upon Mr. Gianne as a matter of California law in respect of it. Otherwise, further steps may be taken only by leave of the court.

86 The order granted by Henderson, J. (as amended by my findings herein) will remain in place until further order. However, given the as yet unsettled nature of the putative rights of Redwood under the estate contracts (and thus of Mr. Gianne's rights) and out of concerns expressed that to do so would jeopardize the settlement of those rights, I refuse, at this point in time, Ms. Miller's application for the appointment of a receiver over Redwood and its assets.

87 Liberty to apply, in particular if the need arises to dispose of any of the assets restrained by this order. I am prepared to hear further submissions as to the actual wording of the order to arise from this ruling. The costs of this application to Ms. Miller in any event are to be taxed if not agreed. And, given the financial hardship described in her affidavit as already imposed by having to pursue her claim, I am open to arguments as to whether they should be paid forthwith by Mr. Gianne.

Application adjourned.

Attorneys: *Ritch & Conolly* for the plaintiff; *Diamond Law Associates* for the first and second defendants.

[2007 CILR 46]

IN THE MATTER OF BANCREDIT CAYMAN LIMITED

GFN S.A., ARTAG MERIDIAN LIMITED and CARIBBEAN ENERGY COMPANY v. BANCO LEON S.A. and LIQUIDATORS OF BANCREDIT CAYMAN LIMITED

GRAND COURT (Levers, J.): April 2nd, 2007

Companies—compulsory winding up—costs—security for costs—no security ordered in appeal against liquidators' rejection of proof of debt—no jurisdiction either inherent or under Insolvency Rules 1986—no jurisdiction under Grand Court Rules, O.23, r.1 or Companies Law (2004 Revision), s.74, since application made in course of ongoing winding-up proceedings, rather than by invoking jurisdiction by originating process

The applicants appealed against the refusal of the liquidators of Bancredit Cayman Ltd. to accept proofs of debt submitted by the applicants, and against their refusal to expunge other proofs of debt.

In 2003, the Bancredit group became insolvent. At that time, Banco Leon S.A. took over Bancredit and promissory notes were transferred to the first applicant, which therefore claimed to be a creditor of the company. The liquidators of Bancredit Cayman refused to admit the applicants' proof of debt, alleging fraud on the part of the applicants' directors in obtaining the promissory notes, but did admit proofs of debt from two other companies, which the applicants claimed were invalid.

The applicants appealed against the refusal of their own proof of debt,