EXHIBIT 15

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BUTTERWORTHS

Israel Discount Bank of New York v Hadjipateras and another

COURT OF APPEAL, CIVIL DIVISION
STEPHENSON, O'CONNOR AND ROBERT GOFF LJJ
24, 25 MAY 1983

Conflict of laws – Foreign judgment – Enforcement – Public policy – Plaintiff commencing proceedings in New York court for repayment of moneys under guarantee – Defendant taking no steps to defend action in New York – Plaintiff obtaining judgment in New York court and seeking summary judgment in England – Defendant contending that enforcement of New York judgment would be contrary to public policy on ground that guarantee obtained by undue influence – Whether fact that agreement obtained by undue influence ground for English court refusing to enforce foreign judgment based on agreement – Whether defendant can rely on public policy to assert that foreign judgment should not be recognised if defendant failed to raise public policy defence available to him in foreign court.

In July 1981 the defendant and his father each executed a guarantee in favour of a bank whereby each of them guaranteed the repayment of large sums of money lent by the bank to two Liberian companies. Those guarantees replaced earlier guarantees given by the defendant and his father when the defendant was 20 years old. The guarantees contained clauses whereby the defendant and his father submitted to the jurisdiction of the New York courts and whereby the proper law of the guarantee was to be New York law. In August 1981 the bank brought an action in the United States District Court, Southern District of New York, against the defendant and his father on their guarantees. In December 1981 the defendant swore an affidavit in another action setting up a defence of undue influence by his father in connection with the execution of the guarantee but did not raise that defence in the New York action. In October 1982 the New York court gave judgment in favour of the bank for a sum in excess of $US9m. The bank then issued a writ against the defendant in England for judgment under RSC Ord 14 for the sum awarded in the New York action. The respondent opposed the bank's application contending that he had an arguable case against the bank on the grounds, inter alia, that the enforcement of the New York judgment in England would be contrary to public policy since it was based on a transaction obtained by undue influence. The judge gave the defendant leave to defend on the basis that he had an arguable case that the New York judgment should not be enforced as a matter of public policy. The bank appealed.

Held – The fact that an agreement was obtained by undue influence, duress or coercion was a reason for an English court to treat a foreign judgment based on that agreement as being invalid or to refuse to enforce the foreign judgment as being contrary to English public policy. However, the refusal to enforce a foreign judgment because it was contrary to English public policy arose out of the fact that the law or practice of the foreign country differed from English public policy, and a defendant could therefore not rely on public policy to assert that a foreign judgment should not be recognised if the law and practice of the foreign country was the same as that in England and he had failed to raise a 'public policy' defence, such as undue influence, duress or coercion, which had been available to him in the foreign court. On the facts, New York law was to be assumed to be the same as English law, namely that undue influence was a defence to the agreements which the defendant claimed were invalid, and since the defendant had deliberately chosen not to argue that defence in the New York court because he thought he could do better defending the bank's claim in England he could not thereafter set up such a defence in England and claim that the foreign judgment was contrary to public policy. It followed that it would not be contrary to English public policy to enforce the judgment of the New York court. The appeal would accordingly be allowed (see p 131 *d* to *j*, p 133 *c d*, p 134 *a* to *d* and *g* to *j* and p 135 *g* to p 136 *c* and *e f*, post).

Dictum of Bovill CJ in *Ellis v M'Henry* (1871) LR 6 CP at 238 followed.

Rousillon v Rousillon (1880) 14 Ch D 351, *Re Macartney, Macfarlane v Macartney* [1921] 1 Ch 522 and *Meyer v Meyer* [1971] 1 All ER 378 distinguished.

Notes

For injunctions to restrain foreign proceedings, see 8 Halsbury's Laws (4th edn) paras 730, 787, and for cases on the subject, see 11 Digest (Reissue) 637–642, *1713–1753*.

For the means by which a defendant may resist an application for summary judgment under RSC Ord 14, see 37 Halsbury's Laws (4th edn) paras 413–415, and for cases on the subject, see 50 Digest (Repl) 410–414, *1183–1227*.

Cases referred to in judgments

Cow v Casey [1949] 1 All ER 197, [1949] 1 KB 474, CA.
Ellis v M'Henry (1871) LR 6 CP 228.
European Asian Bank AG v Punjab and Sind Bank [1983] 2 All ER 508, [1983] 1 WLR 642, CA.
Kaufman v Gerson [1904] 1 KB 591, [1904–7] All ER Rep 896, CA.
Kempson v Ashbee (1874) LR 10 Ch App 15.
Lloyds Bank plc v Ellis-Fewster [1983] 2 All ER 424, [1983] 1 WLR 559, CA.
Macartney, Re, Macfarlane v Macartney [1921] 1 Ch 522.
Meyer v Meyer [1971] 1 All ER 378, [1971] P 298, [1971] 2 WLR 401.
Rousillon v Rousillon (1880) 14 Ch D 351.
Tracomin SA v Sudan Oil Seeds Co Ltd (No 2) [1983] 2 All ER 129.
Verrall v Great Yarmouth BC [1980] 1 All ER 839, [1981] 1 QB 202, [1980] 3 WLR 258, CA.

Appeal

The plaintiff, Israel Discount Bank of New York (the bank), appealed against the order of Neill J made on 4 February 1983 giving the second defendant, George C Hadjipateras, unconditional leave to defend an action commenced by writ issued on 29 October 1982. Judgment was entered against the first defendant, Costas A Hadjipateras, on 4 February 1982. The facts are set out in the judgment of Stephenson LJ.

Gavin Lightman QC and *Nicholas Chambers* for the bank.
Simon Crookenden for the second defendant.

STEPHENSON LJ. This is an appeal by the plaintiff bank from an order of Neill J of 4 February 1983, giving the second defendant, Mr George Hadjipateras, unconditional leave to defend an action brought against him and his father, the first defendant, on guarantees.

On or about 23 July 1981 the second defendant and his father each executed a guarantee in favour of the bank whereby each of them guaranteed the repayment of large sums of money lent by the bank to two Liberian companies, Seabound Shipping Corp and Seaport Shipping Corp. These guarantees replaced earlier guarantees given by the second defendant and his father in 1980, when the second defendant was 20 years of age. In August 1981 Seabound and Seaport failed to make certain payments in accordance with the terms of the agreements between them and the bank. The bank demanded repayment of the loans; Seabound and Seaport failed to pay and the bank instituted legal proceedings.

The guarantees contained clauses whereby the guarantors, father and son, irrevocably submitted to the jurisdiction of the New York courts and whereby the proper law of the contracts was New York law. Accordingly, on 31 August 1981 the bank brought an action against the second defendant and his father on their guarantees in the United States District Court, Southern District of New York (the New York action). But on 11 September 1981 the bank also brought an action here in the High Court of Justice,

Queen's Bench Division, for recovery of the loan moneys and on the guarantees against the second defendant and his father among others (the English action).

On 1 October 1981 the second defendant and his father filed a short answer in the New York action denying liability. On 21 October that answer was amended. Fourteen affirmative defences were set up, including defences that the court lacked jurisdiction. In addition, certain counterclaims were made, which included a charge of fraud. The relief sought included a claim for punitive damages in the sum of $US20m.

On 10 December 1981 the second defendant swore an affidavit in the English action setting up a defence of undue influence in connection with the execution of the guarantee.

The only question raised by the bank's appeal is whether the second defendant has an arguable defence in law: might he, in the English action, successfully resist the claim under the guarantee with his plea of undue influence? That question is divided by the second defendant's notice into two parts: first, a plea that in July 1981 he signed the guarantee, including the clause giving jurisdiction to the New York court, under the undue influence of his father; and, second, that he submitted to the jurisdiction of the New York court later by serving an answer to the bank's claim in the New York action in October 1981 under the same influence.

It is conceded that for the purposes of these RSC Ord 14 proceedings (a) it was arguable that the guarantee signed by the second defendant in July 1981 was given in circumstances which amounted to undue influence by his father and (b) it was therefore arguable that the contractual submission to the jurisdiction of the New York courts contained in the guarantee was ineffective. There is no evidence as to the law of New York on undue influence, so it must be assumed to be the same as English law. The second defendant could therefore have raised it in the New York action unless he was prevented by the continuing undue influence of his father from doing so. Even if that influence must be presumed to have continued from July until October, it is conceded on the second defendant's behalf that it had terminated by 10 December 1981 when he swore the affidavit to which I have referred. Thereafter the second defendant took no steps to raise the plea of undue influence in the New York action; on the contrary, he took out a summons for a stay of the Ord 14 proceedings in the English action on 10 February 1982, on the ground that the New York action was lis alibi pendens, and his leading counsel on the hearing of that summons on 15 and 16 February recognised that any judgment obtained in the New York action might be enforceable, though he would not go so far as to concede it; and leading counsel for the bank then gave an undertaking not to proceed with the Ord 14 summons except on 7 days' notice.

The second defendant did nothing, except to join his father in failing to comply with orders of the New York Court of Appeals and in moving the New York district court unsuccessfully to dismiss the New York action for lack of subject matter of jurisdiction. On 19 October 1982 judgment in default was given against both the father and the second defendant. On 29 October 1982 the bank claimed in the second English action the sum of $US10,720,477·07 and judgment for that sum, which consisted of the amount of the New York judgment and some further interest. On 23 December 1982 the summons under Ord 14 was restored. The defendant's father did not oppose the bank's application for summary judgment, and on 4 February 1983 summary judgment was given against the father.

On those facts, can the second defendant raise with any hope of success in the English action the defence that he was not bound by the guarantee or by submission to the jurisdiction of the New York court because he agreed to both through the undue influence, not of the bank but of his father? I am clearly of the opinion that he cannot.

Neill J in the court below stated the general rule as to the enforcement of foreign judgments shortly and correctly thus:

> 'A foreign judgment in personam made by a court of competent jurisdiction is enforceable by action in England provided that it is for a definite sum of money and is final and conclusive. To this general rule there is an exception in the case of sums

payable in respect of taxes or penalties. Furthermore, a foreign judgment can be impeached (a) if the judgment was obtained by fraud or (b) if the registration or the enforcement of the judgment would be contrary to English public policy or (c) if the proceedings in which the judgment was obtained were contrary to natural justice.'

The judgment of 19 October 1982 is admittedly enforceable in this jurisdiction unless the second defendant can establish (i) that it was made without jurisdiction or (ii) that its enforcement would be contrary to public policy. Counsel on behalf of the second defendant has sought to raise further grounds for claiming that this judgment is unenforceable and should not be acted on by the courts of this country, but we have not allowed him to go beyond the two defences which were alleged below to be arguable defences entitling him to unconditional leave to defend.

The judge decided that the second defendant had no arguable case on jurisdiction but on public policy he said this:

'As at present advised, I feel bound to say that I regard the defence as unconvincing, but I do not feel able to say it is unarguable. With considerable hesitation, therefore, having regard to the history of this matter, I have finally come to the conclusion that it would not be right for me to give judgment for the bank against the second defendant on this summons. In other circumstances a conditional order might be appropriate, but the sum claimed here is in excess of $US10m. There will therefore be unconditional leave to defend . . .'

On jurisdiction, I agree with the judge. In the light of the bank's concessions this question, which I deal with first as the judge did, is whether, apart from the jurisdiction clause in the guarantee, the New York court acquired jurisdiction because the respondent voluntarily appeared and took part in the New York action. What the second defendant swore on 1 February 1983 relating to that was this; I will read paras 18, 19 and 20 of his affidavit:

'18. I was advised that my chances of defending the proceedings in England were far greater than defending the proceedings in New York. Although I was advised that there was a potential conflict of interest between my father and myself, at no juncture was it suggested to me that I could defend the proceedings in New York on the grounds of undue influence. The decision not to defend the proceedings in New York was taken by my father.

19. I was advised by Elborne Mitchell [a firm of solicitors] in January that they were unable to represent both my father and myself. I had made no decision about separate representation before because firstly, I understood that it was better to try and run both cases together, secondly, my father took all the decisions on what steps should be taken and thirdly, I neither have nor had any financial means and I had to discuss the case and seek financial help from other relatives.

20. I have to say that were it not for my respect for my father and the control he exercised over my actions and also that, as his youngest son, I was considerably under his influence, I would not have acted in the manner in which I did.'

Counsel for the second defendant submits on his behalf, first, that those steps by the second defendant stem directly from the signing of the guarantee by him when he was only 21, and cannot be regarded as an independent voluntary submission to the jurisdiction of the New York court, and, second, that the conduct of the New York proceedings was in his father's hands; the second defendant himself did what he was told by his father, so that the bank cannot take advantage of the submission, procured as it was by the undue influence of the father. Until discovery produces positive evidence, we should presume that the bank's knowledge of the undue influence exerted by the father, assumed to exist in July 1981, extended to knowledge of the father's influence over the conduct of the proceedings taken so soon after July 1981. Counsel relies on *Kempson v Ashbee* (1874) LR 10 Ch App 15, a case in which a young woman was held not to be

bound by a bond entered into under the influence of her stepfather six years after entering into a similar bond under his influence, because she had not become aware that the first bond might be invalid. I am afraid that I do not get help from that case, or from speculating on what discovery might fish out of the bank's files. The judge did not consider the evidence in the affidavit of the second defendant, which I have read, sufficient to raise an arguable case of undue influence in the conduct of the New York proceedings, and thought it fanciful to suggest that the bank, as plaintiff in those proceedings, was privy to, or had knowledge of, undue influence exerted by the father on the second defendant in those proceedings. He also accepted the bank's argument that it was inconsistent with the action taken in the English proceedings and the inaction in the New York proceedings to raise the defence of no voluntary submission or appearance. I agree that the submission and appearance cannot now be challenged by the second defendant, for the reasons given by the judge.

On public policy, I regret that I have to differ from the judge, my regret tempered by the hestitation which he expressed on deciding this point in the second defendant's favour. There is authority for holding that it would be contrary to public policy for our courts to enforce a judgment based on a transaction which may have been tainted by undue influence. In *Rousillon v Rousillon* (1880) 14 Ch D 351 it was held that if an agreement contrary to the policy of English law is entered into in a country by the law of which it is valid, an English court will not enforce it, and Fry J said (at 369):

> '[Counsel] has insisted that, even if the contract was void by the law of *England* as against public policy, yet, inasmuch as the contract was made in *France*, it must be good here, because the law of *France* knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this country. It appears to me, however, plain on general principles that this Court will not enforce a contract against the public policy of this country, wherever it may be made. It seems to me almost absurd to suppose that the Courts of this country should enforce a contract which they consider to be against public policy simply because it happens to have been made somewhere else.'

In *Re Macartney, Macfarlane v Macartney* [1921] 1 Ch D 522 at 528 Astbury J, having cited that passage from the judgment of Fry J in *Rousillon v Rousillon*, said that it 'applies directly to the non-enforceability of foreign judgments founded on contracts contrary to public policy or rights of that character' and he refused to enforce a judgment of the Court of Appeal in Malta condemning a putative father's estate to provide an allowance for his natural daughter—

> 'because the general recognition of the permanent rights of illegitimate children and their spinster mothers as recognised in Malta is contrary to the established policy of this country, especially having regard to the fact that the child's interest is not confined to minority.'

In *Kaufman v Gerson* [1904] 1 KB 591, [1904–7] All ER Rep 896 this court refused to enforce a contract, valid in France where it was made, against a woman who had been coerced into making it by threats that her husband would be prosecuted if she did not pay the balance of what he had criminally misappropriated from the plaintiff. She had undertaken to pay a considerable sum, and had already paid most of it by instalments. The Court of Appeal refused to enforce the contract obtained by means of such coercion, variously stating that it violated a moral principle which ought to be universally recognised, or that it contravened what the law of this country deemed an essential moral interest. There was in that case no French judgment, and the decision has not lacked critics.

In *Meyer v Meyer* [1971] 1 All ER 378, [1971] P 298 Bagnall J granted a wife forced to petition in a German court for the dissolution of her marriage to a Jew, a declaration that the resulting German decree of divorce was invalid as obtained by duress, and was contrary to natural justice.

I do not doubt that an agreement obtained by undue influence, like an agreement obtained by duress or coercion, may be treated by our courts as invalidating a foreign judgment based on the agreement, or as a ground for not enforcing it as contrary to the distinctive public policy of this country. We have to assume that the original guarantee and its jurisdiction clause were arguably so obtained, presumably by the bank or with the bank's connivance or knowledge, though not that the agreement to take part in the New York action was arguably so obtained. But what is plain here is that in those cases to which we have been referred the public policy involved was what English courts considered to be the distinctive public policy of this country, and it was only because the law or practice of the foreign country (Malta or France or Germany) differed from that policy that the question of the validity of the contract or judgment was raised in the court of this country. It was out of this conflict that those cases arose.

Counsel in his courageous argument for the second defendant has submitted that none of the judgments in those cases stresses the fact that the foreign law differed from our own; but there was no reason why they should. But for that fact, the judges would not have had the cases to consider or any question of public policy to decide. It is that fact which distinguishes those cases from the present case, because the law of New York must be assumed to allow undue influence as a defence to the agreements which the second defendant wants to argue are invalid; and, because he thinks he can do better defending the bank's claim in England, he has deliberately chosen not to argue that defence in the New York court, where it was available. But a defendant must take all available defences in a foreign court. The judgment of the Court of Common Pleas in *Ellis v M'Henry* (1871) LR 6 CP 228 at 238 is old authority for this rule, and the judgment of Leggatt J in *Tracomin SA v Sudan Oil Seeds Co Ltd (No 2)* [1983] 2 All ER 129[1] is a very recent illustration of it.

In *Ellis v M'Henry* Bovill CJ, giving the judgment of the court which consisted of himself, Willes, Keating and Brett JJ, said (LR 6 CP 228 at 238):

> 'The first action, however, is upon a judgment which was recovered after the deed was completed. In the view that we take of this case, the deed might have been set up as a defence to the action brought in Upper Canada; and it is averred, as a matter of fact, in the third replication, and not denied, that it might have been so pleaded. The question then arises, whether it can now be brought forward in the proceedings as an answer to the judgment. When a party having a defence omits to avail himself of it, or having relied upon it, it is determined against him, and a judgment is thereupon given, he is not allowed afterwards to set up such matters of defence as an answer to the judgment, which is considered final and conclusive between the parties.'

That is not, it is true, a judgment dealing with public policy, but it seems to me that that statement of the law, which is plainly good sense and in line with considerations of comity and the duty of the courts to put an end to litigation, is conclusive of this case.

It is impossible for the second defendant, who is at fault in not raising this defence in the New York court, to impeach the court's judgment. That failure, in my opinion, destroys both the defences which he wishes to argue, and it would not be contrary to public policy to enforce the judgment in the New York action or the agreement of guarantee and submission to the jurisdiction of the New York court on which that judgment is based. The law is clearly against the second defendant, and in my judgment this court should say so now by giving judgment against him.

We are not, in so doing, interfering with the judge's decision in what is essentially a matter for his discretion. When the judge thinks that there is a triable issue on evidence as opposed to law, it is not the intention of the new right of appeal given by the Supreme Court Act 1981, against a grant of unconditional leave to defend, that this court should often dissent from the judge's view that there is a triable issue of fact: see *Lloyds Bank plc*

1 Subsequently reversed on a different point: see [1983] 3 All ER 140

v Ellis-Fewster [1983] 2 All ER 424 at 426, [1983] 1 WLR 559 at 562 per Sir John Donaldson MR. Changes in economic circumstances rendering it more likely that defendants will have recourse to delaying tactics and changes in the relevant rules of court reducing the number of appellate courts before finality is reached, as well as the wording of Ord 14, r 3(1), indicate that these interlocutory appeals are by way of rehearing, and the discretionary aspect of an appeal against an order giving unconditional leave to defend is reduced to vanishing point. This is expounded in an illuminating judgment of this court (Slade and Robert Goff LJJ) given by Robert Goff LJ in *European Asian Bank AG v Punjab and Sind Bank* [1983] 2 All ER 508 at 515–516, [1983] 1 WLR 642 at 654, which concludes its comments on the new statutory jurisdiction with these words:

> 'If the judge has already decided, on the evidence, that there is a triable issue on a question of fact, it must in the very nature of things be unlikely that this court will interfere with his decision and decide that no trial should take place; because, where such a conclusion has already been reached by a judge, this court will be very reluctant to hold that there is no issue or question which ought to be tried. But where the appeal raises a question of law, this court may be more ready to interfere. Moreover, at least since *Cow v Casey* [1949] 1 All ER 197, [1949] 1 KB 474, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under Ord 14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand'. It may offend against the whole purpose of Ord 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal (see *Verrall v Great Yarmouth BC* [1980] 1 All ER 839 at 843, 845–846, [1981] 1 QB 202 at 215, 218 per Lord Denning MR and Roskill LJ). The policy of Ord 14 is to prevent delay in cases where there is no defence; and this policy is, if anything, reinforced in a case such as the present, concerned as it is with a claim by a negotiating bank under a letter of credit . . .'

Whatever the approach of this court to a judge's decision as to a triable issue of fact, it is (and I quote from the judgment of Sir John Donaldson MR in the *Lloyds Bank* case [1983] 2 All ER 424 at 426, [1983] 1 WLR 559 at 562) 'quite different if you are dealing with a triable issue which arises as a matter of law'.

I am clearly of opinion that there is no reason why we should not respect the judgment of the New York court and treat it as deciding the second defendant's liability to the bank on the guarantee, and put an end to this litigation now. I would accordingly allow the appeal, set aside the judge's order and give summary judgment for the bank against the second defendant.

O'CONNOR LJ. I agree that this appeal should be allowed. The appellant bank obtained judgment in the New York action for some $US10,700,000 on 19 October 1982. It commenced these proceedings on 29 October 1982 to enforce the judgment against the two Hadjipateras, father and son, Costas and George. Costas, the first defendant, submitted to the judgment under RSC Ord 14; George, the second defendant, sought leave to defend the English action enforcing the New York judgment. He sought leave on two grounds, submitting that to the knowledge of the bank he had been under the undue influence of his father at the time when the guarantees were entered into, and that in the result the submission to the New York jurisdiction contained in the guarantees was void, and that there had been no voluntary submission to the jurisdiction in New York.

The judge dismissed the idea that there had been no voluntary submission to the New York court. On the facts before him there quite plainly had been, but he gave unconditional leave to defend on the plea that the second defendant was at all times under the undue influence of his father, to the knowledge of the bank, and that in the

result the courts in this country would not enforce the New York judgment because it would be against public policy to enforce a judgment which had been obtained wrongly, according to the second defendant, because the guarantee was void as having been obtained when he was under the undue influence of his father. In my judgment there is a very short answer to that plea: it is that the point was never taken in the New York proceedings. We have no evidence in this case as to the law of New York; it is therefore the same as our own, and as at 10 October 1981, a year before judgment was entered in New York, the second defendant swore an affidavit in proceedings in this country raising the defence of undue influence. He never raised it in the New York action, though it was open to him to do so. In those circumstances he cannot complain that the judgment in New York is bad.

I can see no grounds for refusing to enforce the judgment here. The judge was influenced by a decision of this court in *Kaufman v Gerson* [1904] 1 KB 591, [1904–7] All ER Rep 896. That was a very extraordinary case. What had happened was that the plaintiff had provided Gerson with money in France for a particular purpose. Gerson had misappropriated the money to his own purposes; the plaintiff obtained an agreement by his wife to repay the money. She had in fact repaid some £800 of £1,000; he brought an action for the balance in this country. It was said that that agreement had been obtained by means which were against public policy in this country and that therefore it could not be enforced. It was a very exceptional case; it was said that the wife had been threatened that her husband would be prosecuted if she did not enter into the agreement. It is wholly different from the present case; the ratio of it was straightforward. The court in this country held that the agreement, according to French law, was a valid agreement, and they must have held that the English defence of coercion or duress could not have been raised in France. Be that as it may, it has no bearing on the facts of the present case; that problem simply does not arise, and in my judgment the judge in the present case fell into error in thinking that *Kaufman v Gerson* was of any help to the second defendant in the present proceedings.

I agree with Stephenson LJ that if this court comes to the conclusion that the law is clear and that the only defence is one of law, and the law is against the second defendant, we should interfere with the judge's ruling and order that judgment be entered for the bank.

ROBERT GOFF LJ. I agree.

Appeal allowed. Order of judge set aside and summary judgment entered for plaintiff in sums of principal and interest to be agreed. Leave to appeal to House of Lords refused. Execution stayed on terms.

Solicitors: *Cameron Markby* (for the bank); *McHale & Co* (for the second defendant).

Diana Brahams Barrister.

EXHIBIT 16

CIVIL JURISDICTION AND JUDGMENTS

FIFTH EDITION

BY

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2009

to take place there.[1] In the end he must show that it is positively unjust for him to be prevented from continuing in England and to be left instead to try his luck in the natural forum.[2]

It is comparatively easy to state the principle in general terms. It is also possible to identify particular factors which have been relied on by claimants seeking to rebut the *prima facie* case for a stay; but it is not always possible to predict the impact which they will have on a court. Nevertheless, cases decided before *Spiliada*, particularly where they were based on the earlier approach in *MacShannon* v. *Rockware Glass Ltd*,[3] are likely to be less reliable today.

The second limb of the *Spiliada* test: differences in matters of law and procedure

4.28 On the basis of the decision in *Spiliada*, the broad question appears to be whether the foreign court would be able to try the dispute between the parties in a manner which is procedurally and substantively fair: if it appears that it will be able to, the fact that the foreign system is said to be disadvantageous to the claimant is irrelevant.

It is convenient to consider ordinary procedural differences first. In general,[4] the fact that the foreign court would operate rules on documentary disclosure which were more[5] or less thorough than those of English law does not make it unjust for the case to be heard in that court.[6] It would appear to follow that the fact that the foreign court would allow the taking of depositions from potential witnesses, or provides for oral discovery, which would not be available against the claimant in England, is not a source of manifest injustice either.[7] The fact that the foreign court would proceed by inquisitorial rather than adversarial methods cannot properly be objected to,[8] and neither can the fact that the foreign court would appoint and rely on an independent expert to examine the facts.[9] It is thought that this general approach is wholly correct. All civilised systems of civil procedure strike their own balance to protect the rights of the parties and to get at and expose the truth. It is, therefore, inappropriate to point to an isolated difference by comparing a rule English law, and one of foreign law, each wrenched out of its context,

1. *Zambia* v. *Meer Care & Desai* [2006] EWCA Civ 390 (not sufficiently unjust, as evidence may be given by video link and trial may be followed in the same way); *cf. Cherney* v. *Deripaska* [2008] EWHC 1530 (Comm), [2009] 1 All ER (Comm) 333 (appeal dismissed without specific reference to this point: *Cherney* v. *Deripaska* [2009] EWCA Civ 849); *Pacific International Sports Clubs Ltd* v. *Soccer Marketing International Ltd* [2009] EWHC 1839 (Ch).

2. However, if *Mohammed* v. *Bank of Kuwait and the Middle East KSC* were correct, the burden of proof on matters relating to whether the claimant would get a fair trial at all (as distinct from the loss of mere remedies or other procedural advantages) lies on the defendant, as part of *his* obligation to show the foreign forum to be available. For reasons explained above, it is submitted that *Mohammed* is wrong, and this paragraph proceeds on that basis.

3. [1978] AC 705.

4. The matters set out below are dealt with at the level of generality. It is clear that the trial judge has a substantial margin of appreciation, and there will be cases where the general rule should and will be departed from.

5. As may be the case in the United States.

6. *Spiliada*, at p. 482; *The Waylink* [1988] 1 Lloyd's Rep 475 (Gibraltar).

7. But for a contrary view in relation to American anti-trust procedures, see *Midland Bank plc* v. *Laker Airways Ltd* [1986] QB 689.

8. *The El Amria* [1981] 2 Lloyd's Rep 119.

9. This was the basis for the attempt to sue in England in *The Atlantic Star* [1974] AC 436, and in the light of CPR r. 35.7, this would be a most unexpected objection to a stay of proceedings.

and to contend that the comparison shows that the claimant is exposed to the risk of an injustice if not permitted to proceed in England.[1]

There are nevertheless some particular instances of differences in civil procedural rules where, contrary to the general submission made above, the court has been open to persuasion that difference connotes an injustice which may be sufficient for it to refrain from ordering a stay.[2] In all cases the court will doubtless be insistent that it is making no adverse judgment on the foreign court and its procedure, but that the interests of justice must occasionally allow a comparison to be made between systems of civil procedure and the outcomes which they seem designed to produce.

For example, if there is evidence that the length of time before a case will come on hearing is very great, it may be inappropriate to order a stay: justice delayed may, in this context, be justice denied.[3] This may not be a major concern in a commercial dispute between two substantial entities, but in cases of personal injury, where the injured claimant is in urgent need of a decision on a claim for compensation, the prospect of having to cope with delay before the foreign court may be intolerably unjust. Indeed, there is good reason to suppose that the *Spiliada* principles should, and do, operate quite distinctively, and to the clear advantage of the claimant, in cases of personal injury. Certainly, the leading cases in which the House of Lords declined to order a stay in favour of the natural forum were cases of personal injury.[4] The leading authorities in the High Court of Australia, which adopt a notably critical view of the principle established by *Spiliada*, are cases of personal injury rather than commercial disputes;[5] and the one case in which the European Court was asked to consider the compatibility of the *Spiliada* principle with the Brussels I Regulation was a personal injury claim in which it was evidently to be supposed that, eight years after he had been rendered quadriplegic in a diving accident for which he blamed the defendants, the claimant could, and should, have been told to start, all over again, before the courts of Jamaica.[6] Seen from an English vantage point, the doctrine developed in *Spiliada* is perfectly well able to accommodate these atypical cases,[7] but it cannot be denied that what some may see as plain enough strikes others quite differently.

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1. *Spiliada*, at p. 482.

2. See too *Midland Bank plc* v. *Laker Airways Ltd* where the characteristic features of American anti-trust pre-trial investigation were thought, in the circumstances of a case with no real connection with America, to be sufficiently objectionable to justify an anti-suit injunction.

3. *The Vishva Ajay* [1989] 2 Lloyd's Rep 558; *Marconi Communications International Ltd* v. *PT Pan Indonesia Bank Ltd TBK* [2004] EWHC 129 (QB); [2004] 1 Lloyd's Rep 594 affirmed [2005] EWCA Civ 422 at [77]; but *cf. Radhakrishna Hospitality Service Private Ltd* v. *EIH Ltd* [1992] 2 Lloyd's Rep 249. In a personal injury case this may very well be a significant matter. On the other hand, if the English court can offer an expedited trial, this may be a relevant factor: *XN Corp Ltd* v. *Point of Sale Ltd* [2001] ILPr 525. It may also be possible to rely on Article 6 of the European Convention on Human Rights if this is the case; and if so, one never reaches the exercise of the court's discretionary power to stay: see para 4.11, above.

4. *Connelly* v. *RTZ Corp plc* [1998] AC 854; *Lubbe* v. *Cape plc* [2000] 1 WLR 1545.

5. *Oceanic Sun Line Special Shipping Co Ltd* v. *Fay* (1988) 165 CLR 197; *Régie Nationale des Usines Renault SA* v. *Zhang* (2003) 210 CLR 491: and not only that: the natural forum in those cases was, as it usually will be, a very long way away from the claimant's Australian home. A similar sentiment underpinned a defamation claim brought by a local claimant against a large foreign corporation, though the thrust of the case was more directed at choice of law: *Gutnick* v. *Dow Jones & Co Inc* (2003) 210 CLR 575. The one case which was not so openly hostile to *Spiliada* was a commercial dispute: *Voth* v. *Manildra Flour Mills Pty Ltd* (1991) 171 CLR 538, but its influence has clearly waned.

6. C–281/02 *Owusu* v. *Jackson* [2005] ECR I–1383.

7. Even if a court occasionally appears to go wrong in applying them.

amenable to the court's jurisdiction to grant an injunction as, having invoked the jurisdiction of the court, he remained subject to it.[1] In *Glencore International AG* v. *Exter Shipping Ltd*,[2] the respondent was party to proceedings before the court, as claimant and defendant, and yet sought to argue that his participation was insufficient to give the court jurisdiction over him for the purpose of ordering an injunction. The court was memorably scornful of such a contention: there had been a submission to the jurisdiction of the English courts, and that was that.[3] In *CNA Insurance Co Ltd* v. *Office Depot International*[4] the respondent underwent an apparent change of mind, after having submitted to the English court's jurisdiction and participated in the trial; its attempt to then pursue those claims in Florida was restrained by injunction on the ground that the change of heart had come too late, and that the injunction was needed to restrain unconscionable behaviour which threatened to undermine the jurisdiction of the English court.

The principles upon which an injunction is ordered and not ordered: general

5.39 Despite recent uncertainty, and notwithstanding more recent authority which appears to muddy the waters, an injunction may be obtained if the applicant has a legal right not to be sued in the foreign country: that is, there is a contract which is valid and binding between the parties and which, on its true construction,[5] applies to the particular proceedings, for proceedings to be brought in the foreign country, and that contract is broken by the bringing of the foreign proceedings. An injunction may also be granted if the applicant has an equitable right[6] not to be sued in the foreign country; he may also obtain an injunction if it is oppressive or vexatious for him to be sued there.[7] It is not sufficient merely to show that the natural forum is England,[8] though in the majority of cases this will be a necessary element of the claim for relief.[9] It is not necessary in every case for there to be proceedings already pending in the English court, though often there will be.

1. But for the conditions upon which a party may discontinue proceedings, see CPR Part 38.
2. [2002] EWCA Civ 528; [2002] 2 All ER (Comm) 1; (2002) 73 BYBIL 463.
3. For further illustration of the principle, see two cases from the Singapore Court of Appeal: *Bank of America National Trust & Savings Association* v. *Widjaya* [1994] 2 Sing LR 816; *Koh Kay Yew* v. *Inno-Pacific Holdings Ltd* [1997] 3 Sing LR 121.
4. [2005] EWHC 456 (Comm), [2005] Lloyd's Rep IR 658.
5. For an illustration of the principles of construction on agreements in this context, see above, paras 4.39 *et seq.*, above. But see in particular *Donohue* v. *Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425 (application to foreign statutory causes of action); *Bankgesellschaft Berlin AG* v. *First International Shipping Corp Ltd* [2001] 1 CL 61 (application to claim for ancillary relief); *Credit Suisse First Boston (Europe) Ltd* v. *Seagate Trading Co Ltd* [1999] 1 All ER (Comm) 261 (doubt as to the validity of the agreement).
6. This is not quite the same thing as having a cause of action, but having the basis for a suit.
7. It is unclear whether these are two distinct categories, or the one category with two forms of description; but for the view that there is a *single* category, see *Youell* v. *Kara Mara Shipping Co Ltd* [2000] 2 Lloyd's Rep 102; *Masri* v. *Consolidated Contractors International (UK) Ltd (No 3)* [2008] EWCA Civ 625, [2009] 2 WLR 669.
8. The case in which the House of Lords held, contrary to the proposition in the text, that this *was* enough (*Castanho* v. *Brown & Root (UK) Ltd* [1981] AC 557) is now unreliable. See below. If an injunction cannot be obtained, a claimant who has chosen to sue in two courts may in a proper case be required to elect between them: *Australian Commercial Research & Development Ltd* v. *ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65. Note that *Channel Tunnel Group Ltd* v. *Balfour Beatty Construction Ltd* [1993] AC 334 suggests that this degree of categorisation may be too rigid, and if the parties have agreed in advance that there may be parallel proceedings, no question of election between them should arise.
9. The doubt comes, as explained below, in relation to cases founded on a legal right not to be sued in a foreign court.

No reported case holds, clearly and precisely, that an applicant will forfeit any right[1] to an injunction if he has already submitted to the jurisdiction of the foreign court.[2] But if the applicant has taken a step in the foreign proceedings which goes beyond a challenge to that court's jurisdiction, it will be much more difficult to persuade an English court that the respondent should now be restrained from continuing with those proceedings. Whether this is put on the basis of the applicant's having waived his legal (or equitable) right not to be sued before the foreign court, or on the footing that, by appearing to answer the merits of the claim against him, the respondent is estopped from complaining to the English court about the proceedings in which he has appeared, or on some other basis, it still proceeds from broad common sense. It also reflects the fundamental rule of English law that, once a defendant has submitted to the jurisdiction of the English courts, he cannot then challenge its jurisdiction over him.[3] Of course, there will be room for debate where the applicant has appeared before the foreign court in such a way as makes it unclear whether he should be taken to have submitted to its jurisdiction,[4] and there may still be exceptional cases in which a submission by appearance should not forfeit the right to apply for an anti-suit injunction. But the principle of the matter seems reasonably clear: an applicant who has already submitted to the jurisdiction of a foreign court will and should find that this is a substantial obstacle to his obtaining an anti-suit injunction.

As said above, an applicant is neither entitled to an injunction, nor entitled to expect that he may obtain one, simply by showing that England is the natural forum for the proceedings: that may be necessary in some contexts, but it is not sufficient in any.[5] Of course, the result may be that, when the injunction is not ordered, proceedings run in parallel in two jurisdictions. But this is the kind of outcome which will, outside a closed system such as that put in place by the Brussels I Regulation, always be a risk and may be regrettable. That does not make it a wrong which has to be avoided.[6]

1. In the sense of a right to ask the court to exercise its discretion in his favour.

2. The point is not quite established by *Akai* v. *People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, though it is entirely consistent with it. In that case it was held that the appearance of the applicant before the Australian courts was not sufficient to establish that the Australian judgment was *res judicata* as against the applicant, and the application for an injunction proceeded on the basis of the applicant's having a legal right not to be sued in Australia. Had the applicant been held to have submitted, the status of the Australian judgment as *res judicata* would have rendered the application for an injunction baseless. To the same effect, see *Midgulf International Ltd* v. *Groupe Chimiche Tunisien* [2009] EWHC 963 (Comm).

3. As is implicit in CPR Part 11. And see *Akai* v. *People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90; *Glencore International AG* v. *Metro Trading International Inc* [2002] EWCA Civ 524, [2002] CLC 1090; *Masri* v. *Consolidated Contractors International (UK) Ltd (No 3)* [2008] EWCA Civ 625, [2009] 2 WLR 669.

4. *Akai* v. *People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90; *Advent Capital plc* v. *GN Ellinos Importers-Exporters Ltd* [2003] EWHC 3330 (Comm).

5. The suggestion that it was sufficient (*Castanho* v. *Brown & Root (UK) Ltd* [1981] AC 557 was disavowed in *SNI Aerospatiale* v. *Lee Kui Jak* [1987] AC 871 (PC, Brunei). See, accepting the conclusion even though the result would be that proceedings ran in two courts at the same time, *E.I. Du Pont de Nemours & Co* v. *Agnew (No 2)* [1988] 2 Lloyd's Rep 240; *TS Production LLC* v. *Drew Pictures Pty Ltd* [2008] FCAFC 194, (2008) 252 ALR 1 (but in this case, which was concerned with intellectual property rights, the inevitability of parallel litigation resulted from the strictly territorial nature of such rights); *Deutsche Bank AG* v. *Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725, [63] (in which the case before the US courts was not on all fours with that in England).

6. *Cf. Airbus Industrie GIE* v. *Patel* [1999] 1 AC 119; *Deutsche Bank AG* v. *Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725, [63].

Breach of a legal right not to be sued in the foreign court

5.40 If the applicant can show that he has a legal right not to be sued in the foreign court, he is entitled to ask the court to enforce that right by injunction. Authority that the existence of a legal right not to be sued is a sufficient justification for an anti-suit injunction,[1] and that this is a distinct and discrete basis for an injunction, can be traced to the decision of the House of Lords in *British Airways Board* v. *Laker Airways Ltd*,[2] though in truth the general principle goes much further back than this decision. In *British Airways Board* v. *Laker Airways Ltd*, an English company, acting by its liquidator, took proceedings in the United States, under American anti-trust legislation which permitted the victim of an unlawful conspiracy to recover treble damages against the alleged conspirators.[3] The English company, the respondent to the application for an anti-suit injunction, was within and therefore subject to[4] the personal jurisdiction of the English court. The House of Lords held that an injunction could be ordered if the applicant had a legal right not to be sued[5] in the foreign proceedings. Such a right, it said, might arise under an exclusive jurisdiction clause, or a binding arbitration clause, or under a binding settlement between parties with a clause forbidding proceedings being brought to subvert it.[6] There was, however, no such right shown on the facts of the case.[7]

There was no basis for the claimant in *British Airways Board* v. *Laker Airways Ltd* to assert that it had a legal right not to be sued, so the question of what law was to be resorted to in order test the basis for that assertion was not addressed. But on the footing that the legal right must lie in a contract or in an analogous legal relationship, it will be the law which governs that contract or analogous legal relationship which will govern the existence, validity and scope of the promise and which will, if the matter is in dispute, determine whether there is a legal right not to be sued.

However, a legal right in the requisite sense cannot be formulated as "the right to have the provisions of the Brussels I Regulation applied properly", and it follows that an application for an injunction formulated on such a basis must be misconceived.[8] The

1. Although we are considering injunctions to prevent a foreign action, an applicant may wish to bring proceedings in England for damages for breach of contract in suing overseas. It appears, despite the immediate difficulty which this may seem to create, that this collateral attack on the respondent is not problematic in principle. See *A/S D/S Svenborg* v. *Wansa* [1996] 2 Lloyd's Rep 559; aff'd [1997] 2 Lloyd's Rep 183. The action is probably confined to a claim for damages for breach of contract; and for recent support for the proposition, see *Union Discount Co* v. *Zoller* [2001] EWCA Civ 1755; [2002] 1 WLR 1517; *Donohue* v. *Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425, at [36], [48]. And see further below, paras 5.59 *et seq*.

2. [1985] AC 58.

3. If the costs of defending the proceedings do not ruin the defendants in the meantime.

4. At least, when served, which the applicant was entitled to do as of right.

5. Lord Diplock, at p. 81. See also *Pena Copper Mines* v. *Rio Tinto* (1912) 105 LT 846; *Ellerman Lines Ltd* v. *Read* [1928] 2 KB 144; *Tracomin* v. *Sudan Oil Seeds Co Ltd (No 2)* [1983] 1 WLR 1026.

6. See *ED & F Man Ltd* v. *Haryanto (No 2)* [1991] 1 Lloyd's Rep 429 and *National Westminster Bank Ltd* v. *Utrecht-America Finance Co* [2001] EWCA Civ 658; [2001] 3 All ER 733. For a legal right arising from a "no action" clause, see *Elektrim SA* v. *Vivendi Holdings 1 Corp* [2008] EWCA Civ 1178, [2009] 1 Lloyd's Rep 59.

7. Nor was there an equitable right not to be sued. For a case refusing to restrain a respondent from seeking to enforce a foreign judgment in a third state, see *ED & F Man Ltd* v. *Haryanto (No 2)* [1991] 1 Lloyd's Rep 429; *Mamidoil-Jetoil Greek Petroleum Co SA* v. *Okta Crude Oil Refinery AD* [2002] EWHC 2210 (Comm); [2003] 1 Lloyd's Rep 1.

8. *The Eras EIL Actions* [1995] 1 Lloyd's Rep 64. In *Airbus Industrie GIE* v. *Patel* the Court of Appeal lent some support to the argument that there was a legal right to the correct application of the Brussels Convention: [1997] 2 Lloyd's Rep 8, but this was disapproved (implicitly if not explicitly) by the House of Lords: [1999] 1

defendant to avail himself of it. The court held that it was not, at least in cases where the breach was fundamental and lay in depriving the defendant of notice of, or of an opportunity to take part in, the proceedings. However, in the case of procedural irregularity[1] of a less fundamental kind,[2] it may be that this objection may not be made to the English court. Clearly it will be difficult for a defendant to be sure how to proceed. If he appears before the foreign court to complain about the procedural irregularity he will, by his act of submission, confer undoubted jurisdiction upon the foreign court. Yet, if he does not do so, he may not be entitled to raise his objection before the English court at the recognition stage, if it is otherwise held that the foreign court had international jurisdiction over him.[3]

The proposition that recognition of a judgment could be opposed on the ground of a breach of substantial justice, though lent support by *Adams* v. *Cape*, is more controversial. As a court is not entitled to re-investigate the merits of a dispute, it may well be that there is little opportunity to examine the substance of a case.[4] But suppose the foreign court had refused to give effect to a choice of law contained in a contract.[5] If it is correct that such flagrant disregard of the generally accepted standards of private international law may be a reason for not staying proceedings in favour of such a court,[6] it might be thought that an identical complaint, but revealed *ex post*, would justify the conclusion that the judgment should be denied recognition on grounds of breach of substantial justice. No doubt a court would not rush to reach such a conclusion;[7] and no recent authority lends strong support to it. But parity of reasoning with the cases on stays of proceedings may still support it.

(5) Recognition of foreign judgment would be contrary to English public policy

7.65 A foreign judgment whose recognition would conflict with English public policy will not be recognised in England. The usual colourful examples are an order to pay damages for breach of a contract to kidnap or to sell narcotics, or those based on openly racist laws. No doubt there are others, such as where the judgment has been obtained in defiance of an English anti-suit injunction.[8] The rule as set out here is a rule preventing

1. When measured against the tolerant standards of English private international law.

2. Described in *Adams* v. *Cape*, as a breach of the rules of substantial justice which may, but would not necessarily, have given rise to a breach of natural justice.

3. See, taking the view that the defendant was not required to go to the foreign court and submit to its jurisdiction by taking the points about natural justice before it, *Cortés* v. *Yorkton Securities Inc* (2007) 278 DLR (4th) 740.

4. The view of the Ontario court in *Society of Lloyd's* v. *Saunders* [2001] ILPr 18 is that the defence is restricted to procedural fairness, and does not extend to the substantive merits of the claim.

5. But for the proposition that such a complaint falls under section 32 of the Civil Jurisdiction and Judgments Act 1982, see above, para 7.61. If that contention is not well founded, then this is the place in which the defence may gain a foothold.

6. *British Steamship Insurance Association* v. *Ausonia Assicurazioni SpA* [1984] 2 Lloyd's Rep 98; *Banco Atlantico SA* v. *British Bank of the Middle East* [1990] 2 Lloyd's Rep 504.

7. Which may be why the location of this objection within the scope of section 32 of the Civil Jurisdiction and Judgments Act 1982 is more attractive.

8. *Phillip Alexander Securities & Futures Ltd* v. *Bamberger* [1997] ILPr 73, 104; *National Navigation Co* v. *Endesa Generacion SA, The "Wadi Sudr"* [2009] EWHC 196 (Comm), [2009] 1 Lloyd's Rep 666; *WSG Nimbus Pte Ltd* v. *Board of Control for Cricket in Sri Lanka* [2002] 3 Sing LR 603. But *cf. Advent Capital plc* v. *GN Ellinas Imports-Exports Ltd* [2005] EWHC 1242 (Comm), [2005] 2 Lloyd's Rep 607. It may just be possible to extend this reasoning to a case where the judgment has been obtained in defiance of an anti-suit injunction

EXHIBIT 17

essential feature of a lottery, provided the scheme achieves the overall object of the distribution of money by chance. This scheme is designed to achieve that end and it is in my view a lottery.

Accordingly, in my judgment, the justices came to a correct decision and I would dismiss this appeal.

ASHWORTH J. I agree.

Appeal dismissed.

Certificate under section 1 (2) *of the Administration of Justice Act* 1960 *that a point of law of general public importance was involved in the decision, namely, whether in order to constitute a lottery which was unlawful under section* 41 *of the Betting, Gaming and Lotteries Act* 1963, (*a*) *there must be either a prize fund or profits in the hands of the promoter to which the participants have contributed and out of which prizes were provided; or* (*b*) *a prize or prizes in the hands of the promoter provided by a third party who was not a participant.*

Leave to appeal.

Solicitors: *Rowe & Maw; Director of Public Prosecutions.*

[COURT OF APPEAL]

H.R.H. MAHARANEE SEETHADEVI GAEKWAR OF BARODA *v.* WILDENSTEIN

[1969 B. No. 5240]

1972 March 7, 8, 9 — Lord Denning M.R., Edmund Davies and Stephenson L.JJ.

Practice—Writ—Service in England—Foreign parties resident in France—Action in England challenging authenticity of painting purchased from defendant in France—Defendant served while on short visit to England—Application to dismiss action as oppressive and abuse of process of court—Allegations of difficulty in bringing proceedings in France—International character of main issue—Burden on defendant to show English action would be oppressive of him and stay would not cause injustice to plaintiff—Whether burden discharged

In 1965 the plaintiff, an Indian princess resident in France but with long links with England and other countries, bought for £32,920 in France a painting stated to be by the 17th-century French artist François Boucher from the defendant, a French citizen and world-famous art expert connected with art dealer companies in London and New York. In December 1967 the painting was offered for sale by Sothebys in London and was illustrated in their catalogue with descriptive terms showing that in Sothebys' opinion it was a Boucher. It was not sold; and shortly afterwards it was shown to an English expert, who was said to be of opinion that it was not an original Boucher, and to Christie's of London who expressed their views in a letter which stated that it might fetch £750 at auction.

In September 1969 the plaintiff issued a specially indorsed writ in England claiming against the defendant rescission of the contract, return of the price, and damages; but it was not served on him until June 1970 when he was fleetingly in England for the Ascot races. He entered an unconditional appearance but applied to the master in chambers for an order that the action be dismissed as vexatious and an abuse of the process of the court. The master made the order asked for. On the plaintiff's appeal to Bridge J., affidavit evidence on her behalf was to the effect that her English experts were unwilling to give evidence, that in French law there was no right to subpoena them and bring them before the French court, and that there might be long delay in trying the issue in France. The defendant contended that the proper forum for trial was France and that it would be oppressive of him and his proposed witnesses to have the action tried in England. The judge ordered that the action be stayed, founding his decision on the ground that where a defendant was served with a writ while he was adventitiously within the jurisdiction, there was a presumption that the proceedings were oppressive of him and that the plaintiff had not shown that she would be handicapped if she could not sue in England.

On appeal by the plaintiff:—

Held, allowing the appeal, (1) that where the defendant had been properly served within the jurisdiction he could only justify a stay of the action if he could satisfy the court positively that to continue it would be oppressive of him or an abuse of the process of the court and negatively that the stay would not cause injustice to the plaintiff; and on the evidence he had not discharged that double burden (post, pp. 291E—H, 296B–D, 297F–H).

St. Pierre v. *South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382, C.A. and *Devine* v. *Cementation Co. Ltd.* [1963] N.I. 65 applied.

(2) That there was no basis in law for the proposition that where a defendant was served with proceedings when on a short visit to England the presumption arose that the proceedings were oppressive (post, pp. 292E, 296B–D, 298H—299D).

In re Norton's Settlement [1908] 1 Ch. 471, C.A. and dicta of Sir Gorell Barnes P. in *Logan* v. *Bank of Scotland (No. 2)* [1906] 1 K.B. 141, 152, C.A. explained.

(3) That as the issue whether or not the painting was a genuine Boucher was one of fact and supra-national in character and both parties were in a sense citizens of the world, there was no reason why the plaintiff should not bring her action within the jurisdiction where she had the right to bring her expert witnesses before the court on subpoena and where the

defendant would suffer no more than inconvenience (post, pp. 292G—293B, 294A–B, 298G–H).

Decision of Bridge J. reversed.

The following cases are referred to in the judgments:

Boys v. *Chaplin* [1971] A.C. 356; [1969] 3 W.L.R. 322; [1969] 2 All E.R. 1085, H.L.(E.).

Colt Industries Inc. v. *Sarlie* [1966] 1 W.L.R. 440; [1966] 1 All E.R. 673, Lyell J. and C.A.

Devine v. *Cementation Co. Ltd.* [1963] N.I. 65.

Egbert v. *Short* [1907] 2 Ch. 205.

Ewing v. *Orr Ewing* (1885) 10 App.Cas. 453, H.L.

Logan v. *Bank of Scotland (No. 2)* [1906] 1 K.B. 141.

Norton's Settlement, In re [1908] 1 Ch. 471, C.A.

St. Pierre v. *South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382, C.A.

Société Générale de Paris v. *Dreyfus Brothers* (1885) 29 Ch.D. 239.

Tyne Improvement Commissioners v. *Armement Anversois S/A. (The Brabo)* [1949] A.C. 326; [1949] 1 All E.R. 294, H.L.(E.).

The following additional cases were cited in argument:

Allen v. *Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229; [1968] 2 W.L.R. 366; [1968] 1 All E.R. 543, C.A.

Fehmarn, The [1958] 1 W.L.R. 159; [1958] 1 All E.R. 333, C.A.

Ionian Bank Ltd. v. *Couvreur* [1969] 1 W.L.R. 781; [1969] 2 All E.R. 651, C.A.

INTERLOCUTORY APPEAL from Bridge J.

By a specially indorsed writ issued on September 3, 1969, but not served until June 20, 1970, the plaintiff, the Maharanee Seethadevi Gaekwar of Baroda, giving her address as Claridges, Brook Street, London, W.1, claimed from Daniel Wildenstein, whose address on the writ was given as 147 New Bond Street, London, W. (a) rescission of a contract of sale of a painting purporting to be *La Poésie* by François Boucher; (b) payment to her of £32,920; (c) damages; and (d) interest pursuant to statute. The allegations in the statement of claim and matters relevant to each of the parties derived from the affidavit evidence before the court are sufficiently summarised in the judgments of the court.

The writ was served on the defendant at the racecourse, Ascot, Berkshire. He entered an unconditional appearance to the writ on July 3, 1970, but applied to Master Jacob in chambers for an order that the plaintiff's action be dismissed on the grounds that it was frivolous and vexatious and an abuse of the court; and the master made the order on October 20, 1970. The plaintiff appealed to Bridge J. in chambers who, on December 6, 1971, on reading affidavits of and on behalf of the defendant, including an affidavit by his expert in French law and affidavits on behalf of the plaintiff and her expert in French law, ordered that the action be dismissed.

In a note of his judgment taken contemporaneously he said:

"The defendant said the proceedings were vexatious and oppressive and an abuse of the process. The courts of England have jurisdiction to entertain an action in personam against any defendant who can be found

within the jurisdiction so that service upon him can be effected. Yet when a defendant is adventitiously so found the courts will not allow proceedings against him to continue in England if it be the case that in all other relevant respects—apart from the fact that he happened to be in the jurisdiction when the writ was served—the matter and circumstances of the dispute relevant to the proper forum for the litigation point to a foreign forum. I was referred to a large number of authorities and am indebted to counsel for their helpful argument. The essential principle on which the case turns is to be found in a passage of Sir Gorell Barnes P. in the Court of Appeal in *Logan* v. *Bank of Scotland (No.* 2) [1906] 1 K.B. 141, 152." His Lordship read the passage cited by Lord Denning M.R. in the Court of Appeal, and continued: "Are those principles applicable here? I leave aside the considerations mainly relied on by the plaintiff, namely, her desire to call as witnesses the two experts referred to and that the machinery of French law is so defective that justice is delayed and therefore denied.

"All the circumstances point to this being a French case. The parties reside in France. The transaction took place in France. The picture was painted by a French painter. The books are by French authors. Most of the experts in this field are French—certainly the defendant's are. French law is applicable. Mr. Dehn has argued the case very attractively for the plaintiff and has urged that people like the plaintiff and M. Wildenstein are sui generis—the jet set—international characters. I am paraphrasing: he did not use the expression 'jet set' but implied that wherever they happen to be, they could be sued. It does not in my view make any difference that the defendant visits the country regularly nor that the plaintiff has been resident here nor that the defendant was a director and is a shareholder of an English company. That company is not a party to the action. This case is therefore an example of what was raised in argument in *Logan's* case: the case really belongs in another jurisdiction. It is for the defendant to satisfy the court that the proceedings are vexatious and oppressive to him and can be stayed without injustice to the plaintiff. But a presumption arises that the proceedings are oppressive if the defendant is served when he appears to be here on a visit, unless there is something further which shows (1) an absence of oppression to the defendant or (2) injustice to the plaintiff. On the first aspect, I was pressed by Mr. Dehn with the argument that with plane travel there was no hardship to someone of M. Wildenstein's wide international interests to have to come here. I do not accept this, even from a country as near as France, even though we and the French are going to be brought nearer together. The crux is: does the plaintiff show that though in other respects the dispute is French she will be handicapped in the particular circumstances if she is not able to sue in England?

"This brings me to the other aspect of the evidence, namely, Francis Watson and a partner in Christie's, presumably Mr. Mostyn-Owen. To complete the history I should add that whereas Francis Watson expressed unwillingness ab initio to give evidence, Christie's were not asked whether they were willing until after the master's decision in October 1970 when they said firmly that they were not; and later Christie's solicitors said they objected to being involved in this unfortunate dispute. Mr. Dehn relies on

the evidence of an expert in French law for the proposition that there would be injustice to the plaintiff because by French law it would not be possible to secure the attendance of an unwilling witness and only by the process of subpoena could he be brought before the court and there would be injustice if he could not be. There are three reasons why I do not accept this. First, to some extent the evidence is in conflict. I am not satisfied that any significant difficulty is to be anticipated in getting the evidence of these two men before the French court as compared with getting it before the English court. It is common ground between the experts that the French court would entertain the evidence if they thought it was relevant. It could be requested by letter of request procedure; once such a request by the French court in an appropriate form is made, then under section 1 of the Foreign Tribunals Evidence Act 1856 an order would be made and the witnesses could be subpoenaed. Given witnesses who have expressed guarded or even clear opinions, one of whom has forgotten about the matter, how far even in England they could properly be subpoenaed is a matter of doubt . . . and I have put that on one side. Secondly, I feel considerable difficulty in accepting that any party to a dispute of this sort would be willing to go to court with witnesses who only expressed a view a long time ago and then said they were unwilling to give evidence. It is elementary that one needs a competent witness who is willing. Thirdly, there is a weakness in what is not said. There is no evidence that the plaintiff made inquiries to see if witnesses were available in France who were willing to give evidence in her favour. The presumption is therefore not rebutted on this ground.

"I am equally not prepared to hold that the presumption can be rebutted by the plaintiff by a general comparison between the French and English systems of judicial administration. I therefore reach, on more ample evidence, the same decision as the master."

The plaintiff appealed, on the grounds (1) that there was no evidence on which the judge could find that the action was oppressive or vexatious to the defendant: alternatively, such a finding was against the weight of the evidence and he misdirected himself in holding on the facts found that the defendant had discharged the burden of proving that the action was oppressive or vexatious; (2) that the judge was wrong in law in holding that the facts that the defendant was at the commencement of the action a director and shareholder of an English company of art dealers and that he visited England regularly were irrelevant in considering whether the action should be allowed to proceed; (3) that there was no evidence on which the judge could find and he was wrong in law in finding that the action could be stayed or dismissed without injustice or oppression to the plaintiff. Alternatively such a finding was against the weight of the evidence and he misdirected himself in holding on the facts that the action could be stayed or dismissed without injustice or oppression to the plaintiff; (4) that the judge failed to give any or any adequate weight to the evidence that by prosecuting her action in England the plaintiff would gain substantial advantages; (5) that the judge was wrong in law in holding that there was a presumption that proceedings were vexatious and oppressive if they were served on a defendant when he was in England on a visit; (6) that the judge ought to have found that the action was not frivolous, vexatious or

an abuse of the process of the court and to have allowed the plaintiff's appeal from the order of Master Jacob. A

Conrad Dehn Q.C. and *Peter Scott* for the plaintiff. The main advantages to the plaintiff of having the trial in England are: (1) that here there is a right to bring an unwilling expert witness before the court on subpoena and no such right in France; and (2) she is advised that the French rules of procedure in a case like the present would involve long delay before the B trial. The most recent statement of principle on an application to stay is by Scott L.J. in *St. Pierre* v. *South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382, 398, that mere inconvenience is not enough to deprive a plaintiff of the advantage of bringing in England an action which can otherwise properly be brought here and that the burden is on the defendant to satisfy the court (a) that the action would be oppressive of him and (b) that C to stay it here would not cause an injustice to the plaintiff. That was applied by Lord MacDermott C.J. in *Devine* v. *Cementation Co. Ltd.* [1963] N.I.L.R. 65, 68 (which was cited to Bridge J.).

It is agreed that the action is governed by French law and that probably the only issue at the trial will be whether the painting is a Boucher. That could be tried almost anywhere in the world for it is international in character. The defendant's case of oppression amounts to no more than D inconvenience to a busy man. Bridge J. ignored both the tests laid down in the *St. Pierre* case [1936] 1 K.B. 382 and instead produced the proposition that where there is snap service on a defendant when he is briefly within the jurisdiction a presumption of oppression arises which in some way shifts the burden of proof to the plaintiff; but there is no authority for such a presumption. The cases where service on a defendant temporarily within E the jurisdiction was criticised are distinguishable. What was said by Sir Gorell Barnes P. in *Logan* v. *Bank of Scotland (No. 2)* [1906] 1 K.B. 141, 152 was only an observation based on an instance taken in argument. In *Egbert* v. *Short* [1907] 2 Ch. 205, and *In re Norton's Settlement* [1908] 1 Ch. 471, there were obvious attempts to make a defendant temporarily in England fight an action here for ulterior motives, and they were properly treated as an abuse of the process of the court; also one of the grounds for F staying those actions was the fact that the plaintiff would obtain no legitimate advantage from trial in England, whereas in the present case she will have the two positive advantages of witnesses on subpoena as of right and a speedier trial. Moreover there is the great difference in modes and speed of travel in 1972 and the early years of this century. [Reference was also made to *Colt Industries Inc.* v. *Sarlie* [1966] 1 W.L.R. 440, and *Ionian* G *Bank Ltd.* v. *Couvreur* [1969] 1 W.L.R. 781.] The relevant time for considering whether the proceedings should be stayed is the time when they were started. At that date the defendant was a director of an English company carrying on business in London in the same field as that in which the transaction took place.

John Wilmers Q.C. and *Richard Rampton* for the defendant. In H approaching the substance of this appeal the court should put out of its mind any notion that our common law is superior to the law of France: see *per* Lord Simonds in *The Brabo* [1949] A.C. 326, 350. There is no

A presumption that our procedure is quicker and more efficient or that our system of expert evidence is better than that of France: see on the law's delays Lord Denning M.R. in *Allen* v. *Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229, 243 on justice turning sour because of delays. There is also no evidence that the French court would refuse to allow a party to bring before it all relevant evidence or that the plaintiff's expert witnesses would not be called.

B Neither party is resident in or connected primarily with this country and nothing in the action is connected with England: see *The Fehmarn* [1958] 1 W.L.R. 159. The plaintiff could have brought her action in France in 1968 and there has been much delay on her side. The defendant regards the action as an attack on his world reputation. The plaintiff should not be assisted to bring her action in England, when it is designed to get an unfair advantage over a defendant for whom it is oppressive to come here C and fight an action in the full glare of publicity. *Devine* v. *Cementation Co. Ltd.* [1963] N.I.L.R. 65, is distinguishable on its facts. It is oppressive to bring a foreigner before these courts and it should never be done lightly. It is also oppressive when a defendant having no connection with the United Kingdom and owing no allegiance to the Crown is served when he is fortuitously at Ascot.

D [STEPHENSON L.J. Does the court have to be quite so zealous when the defendant travels extensively all the time and the journey involved is only a couple of hours by air?]

Yes, because (i) his one-man business would come to a standstill for the duration of a trial which will inevitably last for weeks since all the evidence will have to be translated; (ii) all his witnesses will have to be brought here; and (iii) great expense will be incurred in preparing trans- E lations, none of which would be necessary at a trial in France. In *Boys* v. *Chaplin* [1971] A.C. 356, 406, Lord Pearson warned of the danger of "forum shopping." It is contrary to the comity of nations, when we are about to go into the Common Market, to allow an action to be brought here when France has a civilised system of law, all the expertise in the particular field is available in proper form, and there will be no hardship F on the plaintiff by having the trial where she is resident. It was right in the *St. Pierre* case [1936] 1 K.B. 382, where there was a genuine connection with England, that the onus of showing that it should not be tried here should rest on the defendant who was a person owing allegiance to the Crown. If the judge's view that in circumstances like the present the court should presume that it is vexatious and oppressive to bring the defendant here is not the law, it ought to be. The judge derived the presumption from G what was said in *Logan's* case [1906] 1 K.B. 141. *Colt Industries Inc.* v. *Sarlie* [1966] 1 W.L.R. 449, was a case on jurisdiction and the *Ionian Bank* case [1969] 1 W.L.R. 781 turned on lis alibi pendens; those cases do not assist. On the alleged delay in getting proceedings going in France the evidence before the court is that delay can be avoided by the diligence of lawyers.

H *Dehn* replied.

LORD DENNING M.R. The Maharanee of Baroda lives in France: but she has lived in England for long periods, and has had many flats and

large houses in this country. She is intimately connected with English social life. She frequently visits England for considerable periods, and has horses in training here. She has a stud farm in Ireland.

M. Daniel Wildenstein lives in Paris. He is an art dealer of international repute. In September 1970, the *Paris Match* published an article about him. It describes him as the greatest art dealer in the world. The business was founded by his grandfather in Paris and New York. It was extended to London by his father, who had a gallery in New Bond Street and a small flat above it. Daniel Wildenstein himself succeeded to it. He was at all material times a director of Daniel Wildenstein Ltd., the important art dealers of 147 New Bond Street in London. Daniel Wildenstein is also connected with the important New York house of Wildenstein Inc. He has another great interest, racehorses. He has a stud farm in Ireland, and he comes over to England from time to time for the races here.

Both the Maharanee and M. Wildenstein speak perfect English. In 1965, the Maharanee's son, the Prince of Baroda, was invited to go to the house of M. Daniel Wildenstein at 57 rue de La Boètie, Paris. He was told there were some beautiful old masters which the Maharanee might like to purchase. At the house he was shown a painting called *La Poésie*. It was said to be by a great French artist, François Boucher. After some negotiation, the picture was purchased by the Maharanee at a sum which in English money was put at £32,920. It was delivered to the Maharanee there in Paris—a purchase by her from M. Daniel Wildenstein.

In July 1966, M. Daniel Wildenstein gave a certificate of authenticity and value. It was on the notepaper of the English company—Wildenstein & Co. Ltd., 147 New Bond Street, London, W.1. The directors were named as M. Daniel Wildenstein (French) and Mr. Hunter, F.C.A. The certificate says (translated into English):

> "I, the undersigned, Daniel Wildenstein, director of Wildenstein & Co. Ltd., certify that the painting by François Boucher, *L'Etude ou la Poésie*, 0.95 x 1.25 m., belonging to Her Highness the Mabaranee of Baroda, has this day a value of 450,000 French francs. July 20, 1966. Daniel Wildenstein."

The Mabaranee brought the picture to England. On December 6, 1967, it was put up for sale by Sothebys in a catalogue of important old master paintings. At the beginning of the catalogue Sothebys set out a glossary saying that if the forename and surname of the artist is given, it means that, in the opinion of Sothebys, it is a work by the artist. There is a photograph of the picture. It says: *La Poésie* by François Boucher. It describes it as: "the property of Her Royal Highness the Mabaranee of Baroda—*La Poésie*, a girl in pale blue and white drapery reclining, holding a book and a lyre." That catalogue is a representation by Sotbebys that, in their opinion, it was a work by François Boucher.

The painting was not sold by Sothebys at that sale. I presume it did not reach the reserve price. Perhaps some people had doubts about its authenticity. A little later, the picture was shown to Mr. Francis Watson, who is the Surveyor of Her Majesty's Works of Art, but not of her pictures. He only saw it for a few minutes, but he is said to have expressed the view that it was not a Boucher. In July 1968 it was put in the hands of Christie's,

who are art dealers equal in repute to Sothebys. On October 18, 1968, Christie's wrote to the Maharanee's solicitors:

> "In confirmation of our telephone conversation, I am writing to say that in our opinion the painting of a female allegorical figure representing poetry, which was sent to us on July 26, cannot be regarded as an autograph work by François Boucher, but would appear to be a work from his immediate circle of followers. We think that it might make about £750 at auction and in the event of the owner deciding to sell we would not recommend a reserve of more than about £500/£600."

On September 3, 1969, the solicitors for the Maharanee issued a writ against M. Daniel Wildenstein. The statement of claim set out the circumstances in which she bought the picture, saying that it was represented to be by Boucher, but alleging that it was not by Boucher. She claimed rescission and repayment to her of the money which she had paid.

In the writ, the Maharanee gave her address as Claridge's in Brook Street—the hotel where she was staying at the time. M. Daniel Wildenstein's address was given as 147 New Bond Street, because he was at that time a director of the English company.

The writ was not served on M. Wildenstein at that time, because he was not in London. Those advising the Maharanee waited till he came over here. In June 1970, M. Daniel Wildenstein came over for the Ascot races. On Saturday, June 20, 1970, the writ was served on him at the racecourse at Ascot. His solicitors entered an appearance. They now seek to set the writ aside. The master and the judge have set it aside. The Maharanee appeals to this court.

In this case the writ has been properly served on the defendant in this country. This makes the case very different from those in which the defendant is in a foreign country and the plaintiff has to seek leave to serve him out of the jurisdiction. It is also different from those cases in which the plaintiff has already started an action in another country, and the question is whether he should be allowed to start another action in this country on the same subject matter. In this case the plaintiff has validly invoked the jurisdiction of our courts in this, the one and only action she has brought.

The principle applicable to such a case was stated by Scott L.J. in *St. Pierre* v. *South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382, 398:

> "The true rule about a stay under section 41 [of the Supreme Court of Judicature Act, 1925], so far as relevant to this case, may I think be stated thus: (1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (*a*) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (*b*) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant."

That passage was cited and applied by Lord MacDermott C.J. in the Court of Appeal of Northern Ireland in 1963 in *Devine* v. *Cementation Co. Ltd.* [1963] N.I. 65, 71. A

We have to apply that principle to this case when the plaintiff was only able to serve the defendant because he happened to be in this country on a short visit. There are only two cases in the books of this nature—*Egbert* v. *Short* [1907] 2 Ch. 205 and *In re Norton's Settlement* [1908] 1 Ch. 471. In each case the defendant was resident in India, but had returned to England on a short visit. Each case concerned an entirely Indian matter. In each case the action was not brought bona fide for the purpose of obtaining justice, but for the purpose of harassing and annoying the defendant. It would have been a great injustice to the defendant to compel him to fight it in England. So each action was stayed. B

A similar case was put by Sir Gorell Barnes P. in *Logan* v. *Bank of Scotland (No. 2)* [1906] 1 K.B. 141, 152: C

> "If, for instance, as was put in argument, a dispute of a complicated character had arisen between two foreigners in a foreign country, and one of them were made defendant in an action in this country by serving him with a writ while be happened to be here for a few days' visit, I apprehend that, although there would be jurisdiction in the court to entertain the suit, it would have little hesitation in treating the action as vexatious and staying it." D

The judge seems to have taken that instance given by Sir Gorell Barnes P. and founded on it a presumption which he stated in these words: "But a presumption arises that the proceedings are oppressive if the defendant is served when he appears to be here on a visit." I cannot agree with that statement. There is no such presumption. If a defendant is properly served with a writ while he is in this country, albeit on a short visit, the plaintiff is prima facie entitled to continue the proceedings to the end. He has validly invoked the jurisdiction of the Queen's courts; and he is entitled to require those courts to proceed to adjudicate upon his claim. The courts should not strike it out unless it comes within one of the acknowledged grounds, such as that it is vexatious or oppressive, or otherwise an abuse of the process of the court: see R.S.C., Ord. 18, r. 19. It does not become within those grounds simply because the writ is served on the defendant while he is on a visit to this country. If his statement of claim discloses a reasonable cause of action, he is entitled to pursue it here, even though it did arise in a foreign country. It is not to be stayed unless it would plainly be unjust to the defendant to require him to come here to fight it, and that injustice is so great as to outweigh the right of the plaintiff to continue it here. E F G

Mr. Wilmers likened this case to a road accident in Rome, when two Italian citizens were in collision. Suppose that one of them was served with an English writ while on a short boliday in England. I would agree that such an action would be stayed. The issue would be solely Italian. But here the main issue is whether this painting was a genuine Boucher or not. That issue is one of fact which is crucial to the case in French law as well as in English law. It is not solely a French issue. The art world is so international in character today that this issue has itself something H

of an international character. The parties on either side are citizens of the world. The Maharanee has associations, not only with France, but also with India, England and Ireland. M. Wildenstein himself has, of course, close associations with France, but also with America, England and Ireland. He was for years the principal director of the English company of Daniel Wildenstein Ltd., and was so at the beginning of this action. He has now ceased to be a director, but he is still a shareholder. If anybody could be said to have an international reputation, it is he.

Furthermore, there might be difficulties, if not injustice, in requiring the Maharanee to go to France to seek redress. We are told that the courts of France appoint their own court experts and might hesitate about receiving the opinion of experts from England. It would be a matter for their discretion. In any case, the French courts might not themselves see the witnesses or hear them cross-examined, but might only read their reports. It is true that even in England there may be difficulties. It appears that both the experts for the Maharanee are not willing to give evidence and may have to be subpoenaed. But there would be no difficulty in M. Wildenstein's experts, such as Professor Ananoff, giving evidence here orally with all the advantages that that carries with it. So there is no injustice in that regard in having it tried in England.

Apart from the admission of evidence, there is the question of delay. We have been shown a speech which was made by the Premier President de la Cour de Cassation on October 2, 1970, in which he greatly regretted the delays in the civil procedure in France. He gave instances, such as a case started on December 22, 1953, which was finally decided on March 5, 1970: another started in 1950 decided in 1968: another of 1957 decided in 1969. It is said that this is due to the delaying tactics of lawyers. We are used to something of the kind here, but somehow we get over them in less time. So it does appear that the delay would be a good deal greater in France than in England. I have no doubt that this case could be brought for trial in England within a year.

Weighing one thing with another, it appears to me that the case can be tried quickly, fairly and properly here. It is not like the Indian cases when it took weeks to travel. Paris and London are only one hour apart. The convenience of witnesses would be studied in every way. At any rate, the burden is on M. Wildenstein to show that it would be an injustice to him to have the case tried here. I do not think he has discharged that burden. The judge was, I think, in error, in raising the presumption that he did. We can review his discretion. On so doing, I think the case should continue in England. I would allow the appeal, accordingly.

EDMUND DAVIES L.J. Although these proceedings have not reached the stage of delivery of a defence, we know that, in the words used by the defendant himself in his first affidavit sworn on September 17, 1970:

> "If this matter comes to trial one of the main issues in it will be the question of whether the painting *La Poésie* is in fact by François Boucher."

Indeed, for all we know to the contrary from such affidavit evidence as is presently available, that may well be the only issue—apart, that is, from

the matter of damages in the event of the plaintiff succeeding in establishing liability. A

The nature of the contract, the circumstances in which it was made, the supra-national nature of the dispute to which it has given rise, the identity and internationally peripatetic habits of the parties, and the service of the writ in this action on the defendant at Ascot on June 20, 1970, are all matters already dealt with by Lord Denning M.R., and call for no further treatment by me. But one thing should be made clear: unless the B plaintiff knows full well that she has no cause of action (and that is not suggested), she did no wrong in taking out a High Court writ in the first place (foreigner though she is) and serving it here at the first available opportunity upon the defendant (foreigner though *he* also is). Both in taking it out and serving it (albeit when the defendant was only fleetingly on British soil) she was doing no more than our law permits, even though it may have ruined his day at the races. Some might regard her action C as bad form; none can legitimately condemn it as an abuse of legal process: see *Colt Industries Inc.* v. *Sarlie* [1966] 1 W.L.R. 440. But there are clear indications that Bridge J. thought otherwise, and that this notion coloured his approach to the whole case and, as I respectfully think, led him astray.

There are branches of our law in which the forum conveniens is a factor generally of decisive importance. One example is the case of administration D of estates and trusts: see *Ewing* v. *Orr Ewing* (1885) 10 App.Cas. 453, 505 *per* Lord Selborne. Another is the case where proceedings in respect of the same subject matter have already been instituted in another jurisdiction. Again, in determining whether leave to serve a writ out of the jurisdiction should be granted, Lord Simonds reasserted in *Tyne Improvement Commissioners* v. *Armement Anversois S/A. (The Brabo)* [1949] A.C. 326, E 350, which was cited to us by Mr. Wilmers, that, as Pearson J. said in *Société Générale de Paris* v. *Dreyfus Brothers* (1885) 29 Ch.D. 239, 242–243:

> " it ought always to be considered a very serious question . . . whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country. . . ." F

But such a consideration, while still relevant, is of itself by no means decisive of the problem involved in the present case. Scott L.J. said in *St. Pierre* v. *South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382, 398:

> " A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English G court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused."

In *In re Norton's Settlement* [1908] 1 Ch. 471, 479–480, Vaughan Williams L.J. had earlier said:

> ". . . . in order to justify a stay it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour H of proceedings in some other country. In my opinion it must be proved to the satisfaction of the court that either the expense or the difficulties of trial in this country are so great that injustice will be done—in this

A sense, that it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice in this country. Speaking generally, one may say that the litigant must show that some injustice will be done to him. There is also another consideration to be borne in mind. If the court, taking all the facts into consideration, comes to the conclusion that a plaintiff in commencing an action in this country has not done so on account of any legitimate advantage B which a trial in this country will give him, but for purposes entirely foreign to that legitimate purpose, then, apart from any question as to expense or inconvenience, in my opinion not only has the court jurisdiction, but it is its duty, to stay the proceedings."

While I have the report of that judgment before me, I had better advert to the point urged this morning by Mr. Wilmers, that for the present pro- C ceedings to be conducted in this country would of necessity involve a great deal of translation from French to English and thereby add to the expense of a trial. Even if that be right (and I must not be taken as accepting that this is established), it is worthy of note that Vaughan Williams L.J. added, at p. 482:

"I have gone into the matter at this length in order to make it quite D clear that questions of expense or inconvenience are not sufficient to justify the court in staying proceedings. It must be shown, further, that the expense and inconvenience are of such a character that to allow the action to go on would result in real injustice to the other litigant."

What I regard as the erroneous approach of the judge in the present E case is apparently derived from his application of some words of Sir Gorell Barnes P. in *Logan* v. *Bank of Scotland* (*No.* 2) [1906] 1 K.B. 141. Having said, at p. 150, that jurisdiction to stay should be exercised with very considerable caution, Sir Gorell Barnes P. later added, at p. 152:

"If . . . a dispute of a complicated character had arisen between two foreigners in a foreign country, and one of them were made defendant in an action in this country by serving him with a writ while he F happened to be here for a few days' visit, I apprehend that, although there would be jurisdiction in the court to entertain the suit, it would have little hesitation in treating the action as vexatious and staying it."

Basing himself on this passage, Bridge J. said:

"The courts of England have jurisdiction to entertain an action in G personam against any defendant who can be found within the jurisdiction so that service upon him can be effected. Yet when a defendant is adventitiously so found the courts will not allow proceedings against him to continue in England if it be the case that in all other relevant respects—apart from the fact that he happened to be in the jurisdiction when the writ was served—the matter and circumstances of the dispute relevant to the proper forum for the litigation point to a foreign forum."

H A later passage in the judgment is also of significance. I quote:

"It is for the defendant to satisfy the court that the proceedings are vexatious and oppressive to him and can be stayed without injustice

to the plaintiff. But a presumption arises that the proceedings are oppressive if the defendant is served when he appears to be here on a visit, unless there is something further which shows (1) an absence of oppression to the defendant or (2) injustice to the plaintiff. . . . The crux is: does the plaintiff show that though in other respects the dispute is French she will be handicapped in the particular circumstances if she is not able to sue in England? "

I have to say that in my judgment this is wrong, for there is in our law no such presumption as that to which Bridge J. referred, and the burden of proof is quite otherwise placed. The proper approach is that indicated by Scott L.J. in the *St. Pierre* case [1936] 1 K.B. 382, who added to the words already quoted the following, at p. 398:

> " In order to justify a stay two conditions must be satisfied, one positive and the other negative: (*a*) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (*b*) the stay must not cause an injustice to the plaintiff. On both "—and I stress those words—" the burden of proof is on the defendant."

This passage was cited with approval by Lord MacDermott C.J. in *Devine* v. *Cementation Co. Ltd.* [1963] N.I. 65, 68; and it is helpful to observe how he dealt with the striking facts of that case. He said, at p. 69:

> " . . . once it is conceded . . . that the proceedings in question are properly brought and that these courts have jurisdiction to entertain them, then the strange and unusual nature of the suit affords no ground in itself for a stay. As respects the law relating to liability, there can be no doubt that that is the law of Scotland. But, again, this, in itself, does not suffice to oust the jurisdiction of these courts or to justify a stay. It is also plain that the defendants will be put to considerable expense and inconvenience if the action proceeds in Northern Ireland. They will have to bring a number of witnesses over from Scotland and pay the expenses of getting them bere and accommodating them as long as necessary. On the other hand, it seems unlikely on the facts disclosed that the plaintiff's witnesses, who would have to be taken to Scotland if the action proceeded there, would be so numerous, though there can be no doubt, so far as the plaintiff is concerned, that the balance of convenience for him favours a trial in Northern Ireland. It is clear, however, that the test does not depend on the balance of convenience, but on whether the inconvenience and expense involved work an injustice; and that calls for a consideration of the position from the point of view of both parties."

The crucial point urged for the Maharanee was that, whatever the weight of her experts' evidence as against that of the French experts, there is no right under French law for a party to suhpoena any such witness. She was also advised that the action would take much longer to come on in France than in England. If that is indeed accurate (though it is to a degree challenged), I should have thought it would be positively to the advantage of the defendant also for the case to be tried here, for, as he said in his

third affidavit, "I regard the present action as a personal attack on my integrity as a dealer and expert. . . ." Accordingly, the sooner he has an opportunity of meeting and repelling that attack, the better from his point of view. Be that as it may, it was submitted that such matters, when considered in combination, would work for injustice to the plaintiff were the present action stayed.

Mr. Wilmers, on the other hand, echoes the warning against "forum-shopping" given by Lord Pearson in *Boys* v. *Chaplin* [1971] A.C. 356, 406, and has urged various matters which he submits establish that grave injustice would be done to the defendant were the stay granted below now removed. I am far from satisfied that they show anything of the sort. By no means all were supported by affidavit, and some of them (including the estimated length of the trial and the necessity for producing at the trial an array of Boucher originals) are no more than lawyers' speculations, which, while wholly well intentioned, may, for all we know, also prove to be quite mistaken. Lord Denning M.R. has already dealt with them, and I do not propose to go through them again. Instead, I respectfully adopt as my own and apply to the present case the following passage from the judgment of Lord MacDermott C.J., in *Devine's* case [1963] N.I. 65, 69:

> "If the facts and circumstances were sufficient to found a decision either way, this court would be slow to interfere with the determination of the learned judge in so far as it was a matter of the exercise of his discretion. But, in my opinion, this appeal ought not to be decided as an appeal from a discretionary order made in circumstances which would justify one view of the application as well as the other. The conclusion I have reached is that the learned judge had no sufficient material before him on which to stay the present action, having regard to the principles of law set out by Scott L.J." in the *St. Pierre* case [1936] 1 K.B. 382, 398.

For these reasons I concur in allowing this appeal and in the order proposed by Lord Denning M.R.

STEPHENSON L.J. I agree with my Lords that the judgment of Scott L.J. in *St. Pierre* v. *South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382, 398, correctly states the law governing such an application as this. The defendant has, therefore, to discharge the heavy burden of satisfying the court of two things: (1) that the continuance of the plaintiff's action would work an injustice because it would be oppressive or vexatious to the defendant or would be an abuse of the process of the court in some other way; and (2) that a stay of this action will not cause an injustice to the plaintiff. Unless the defendant proves both, the plaintiff is entitled to exercise her right to proceed with this action begun by the writ which she has served on him in this country. The defendant tries to show that the continuance of this action would be oppressive and vexatious to him by the matters alleged in paragraphs 2 to 5 of his third affidavit sworn on December 1, 1970. Those matters show inconvenience but nothing like oppression. If he were sued in France he would suffer much of the same inconvenience; for example, he would be unable to spend the days of the trial—I quote from his affidavit—"travelling extensively within France and

viewing paintings," and he would have to suspend work on the gazetteer, catalogue and dictionary to which he refers, except out of court hours. By the time this action comes on for trial he may have found, if he has not already found, a replacement for the late Mr. Huisman to help him in his work.

The further matters alleged in paragraphs 6 to 8 of that affidavit go to inconvenience and fall even further short of oppression. So do those alleged in paragraphs 1 to 6 of his first affidavit sworn on September 17, 1970. The balance of convenience may be overwhelmingly in favour of a French forum, but "A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought": *St. Pierre's* case [1936] 1 K.B. 382, 398 *per* Scott L.J.; *Devine* v. *Cementation Co. Ltd.* [1963] N.I. 65. The absence of any real connection between these proceedings and England does not of itself make it vexatious and oppressive for this action to be tried in England, as paragraph 4 of the defendant's second affidavit, sworn on October 16, 1970, suggests.

The defendant was properly served within the jurisdiction. But he may be able to prove that this action is not properly brought in that the continuance of it would be an abuse of the process of the court in some other way. The defendant has gone no further on his oath than to depose (in paragraph 7 of his first affidavit) that "in the premises" (which are the matters pointing to the convenience of a French forum and the inconvenience of an English forum) . . . "there is no bona fide reason why this action should be brought in England." His counsel has amplified that into an allegation that it is brought in England by the plaintiff with the sinister purpose of forcing the defendant to settle the proceedings by taking back the picture and repaying her the price rather than go to the trouble and expense—and publicity—of crossing the English Channel to defend them.

Bearing in mind all the circumstances of the parties referred to by my Lords, including their residence in France but also their travels to England and other countries, and all the circumstances of the case, including those deposed to in the affidavits filed on behalf of both parties and the nature of the main issue, I do not think that the defendant has discharged the burden of proving that the plaintiff's action in this court is an abuse of its process.

The consideration of this part of the defendant's case necessarily involves consideration of the reasons alleged on the plaintiff's behalf for her proceeding against the defendant in this country. They are, first, the need to compel two unwilling English experts to give evidence on her behalf with the difficulty of ensuring their attendance in a French court; and, second, the law's delays caused or permitted by French legal procedure, particularly where expert evidence is required. Both these matters of fact are supported by the two affidavits of M. Koenig sworn on the plaintiff's behalf, even if contradicted in part by the affidavits of M. Picarda sworn on behalf of the defendant.

Taking into account all the evidence and where the burden of proof lies, I do not think that the defendant has succeeded in proving that a trial in France would *not* cause an injustice to the plaintiff in one or both of

these respects—which is what he must do to get his stay; compare *Devine's* case *per* Lord MacDermott C.J. [1963] N.I. 63, 70. In *Devine's* case it was conceded that the plaintiff was acting bona fide, and that Scott L.J. in the *St. Pierre* case [1936] 1 K.B. 382, 398 correctly summarised the principles to be observed; but I cannot help thinking that if *Devine's* case had been cited to Bridge J., he would have been saved from the error of elevating the already quoted illustration given by Sir Gorell Barnes P. in *Logan* v. *Bank of Scotland* (*No.* 2) [1906] 1 K.B. 141, 152, into a principle that if a foreigner is served with a writ when he happens to be within the jurisdiction on a short visit and the case really belongs to a foreign jurisdiction, a presumption arises that the proceedings are oppressive, which transfers the burden of proof to the plaintiff's shoulders and requires him or her to prove that the defendant will not be oppressed if sued here, and that the plaintiff will suffer injustice if driven to sue in the foreign forum.

If, as I think in agreement with my Lords, there is no such principle or presumption, it is unnecessary to consider the validity of the judge's reasons for holding that the presumption has not been rebutted.

I agree with the judgments already delivered and I too would allow the appeal and let the action go on here.

Appeal allowed.
Defendant's application dismissed with costs in Court of Appeal and before judge and master.
Leave to appeal to House of Lords refused.

Solicitors: *Murray, Hutchins & Co.; Courts & Co.*

M. M. H.

[COURT OF APPEAL]

REGINA *v.* LIVERPOOL CORPORATION, EX PARTE LIVERPOOL TAXI FLEET OPERATORS' ASSOCIATION AND ANOTHER

1972 Feb. 11, 14

Lord Denning M.R., Roskill L.J. and Sir Gordon Willmer

Crown Practice—Prohibition—Local authority—Licensing of hackney carriages—Resolution to increase numbers after undertaking on behalf of local authority not to do so for specified period—Prohibition issued to stop acting on resolution until after hearing interested parties—Town Police Clauses Act 1847 (10 & 11 *Vict. c.* 89), *s.* 37

EXHIBIT 18

Companies Act 2006

2006 CHAPTER 46

PART 34

OVERSEAS COMPANIES

Introductory

1044 Overseas companies

In the Companies Acts an "overseas company" means a company incorporated outside the United Kingdom.

1045 Company contracts and execution of documents by companies

(1) The Secretary of State may make provision by regulations applying sections 43 to 52 (formalities of doing business and other matters) to overseas companies, subject to such exceptions, adaptations or modifications as may be specified in the regulations.

(2) Regulations under this section are subject to negative resolution procedure.

Annotations:

Commencement Information

I1 S. 1045 wholly in force at 1.10.2009; s. 1045 not in force at Royal Assent, see s. 1300; s. 1045 in force for specified purposes at 20.1.2007 by S.I. 2006/3428, **art. 3(3)** (subject to art. 5, Sch. 1 and with arts. 6, 8, Sch. 5); s. 1045 otherwise in force at 1.10.2009 by S.I. 2008/2860, **art. 3(q)** (with arts. 5, 7, 8, Sch. 2)

Registration of particulars

1046 Duty to register particulars

(1) The Secretary of State may make provision by regulations requiring an overseas company—

(a) to deliver to the registrar for registration a return containing specified particulars, and

(b) to deliver to the registrar with the return specified documents.

(2) The regulations—

(a) must, in the case of a company other than a Gibraltar company, require the company to register particulars if the company opens a branch in the United Kingdom, and

(b) may, in the case of a Gibraltar company, require the company to register particulars if the company opens a branch in the United Kingdom, and

(c) may, in any case, require the registration of particulars in such other circumstances as may be specified.

(3) In subsection (2)—

"branch" means a branch within the meaning of the Eleventh Company Law Directive (89/666/EEC);

"Gibraltar company" means a company incorporated in Gibraltar.

(4) The regulations may provide that where a company has registered particulars under this section and any alteration is made—

(a) in the specified particulars, or

(b) in any document delivered with the return,

the company must deliver to the registrar for registration a return containing specified particulars of the alteration.

(5) The regulations may make provision—

(a) requiring the return under this section to be delivered for registration to the registrar for a specified part of the United Kingdom, and

(b) requiring it to be so delivered before the end of a specified period.

(6) The regulations may make different provision according to—

(a) the place where the company is incorporated, and

(b) the activities carried on (or proposed to be carried on) by it.

This is without prejudice to the general power to make different provision for different cases.

(7) In this section "specified" means specified in the regulations.

(8) Regulations under this section are subject to affirmative resolution procedure.

Annotations:

Commencement Information

I2 S. 1046 wholly in force at 1.10.2009; s. 1046 not in force at Royal Assent, see s. 1300; s. 1046 in force for specified purposes at 20.1.2007 by S.I. 2006/3428, **art. 3(3)** (subject to art. 5, Sch. 1 and with arts. 6, 8, Sch. 5); s. 1046 otherwise in force at 1.10.2009 by S.I. 2008/2860, **art. 3(q)** (with arts. 5, 7, 8, Sch. 2)

1047 Registered name of overseas company

(1) Regulations under section 1046 (duty to register particulars) must require an overseas company that is required to register particulars to register its name.

(2) This may be—

(a) the company's corporate name (that is, its name under the law of the country or territory in which it is incorporated) or

(b) an alternative name specified in accordance with section 1048.

(3) Subject only to subsection (5), an EEA company may always register its corporate name.

(4) In any other case, the following provisions of Part 5 (a company's name) apply in relation to the registration of the name of an overseas company—

(a) section 53 (prohibited names);

(b) sections 54 to 56 (sensitive words and expressions);

(c) section 65 (inappropriate use of indications of company type or legal form);

(d) sections 66 to 74 (similarity to other names);

(e) section 75 (provision of misleading information etc);

(f) section 76 (misleading indication of activities).

(5) The provisions of section 57 (permitted characters etc) apply in every case.

(6) Any reference in the provisions mentioned in subsection (4) or (5) to a change of name shall be read as a reference to registration of a different name under section 1048.

Annotations:

Commencement Information

I3 S. 1047 wholly in force at 1.10.2009; s. 1047 not in force at Royal Assent, see s. 1300; s. 1047 in force for specified purposes at 20.1.2007 by S.I. 2006/3428, **art. 3(3)** (subject to art. 5, Sch. 1 and with arts. 6, 8, Sch. 5); s. 1047 otherwise in force at 1.10.2009 by S.I. 2008/2860, **art. 3(q)** (with arts. 5, 7, 8, Sch. 2)

1048 Registration under alternative name

(1) An overseas company that is required to register particulars under section 1046 may at any time deliver to the registrar for registration a statement specifying a name, other than its corporate name, under which it proposes to carry on business in the United Kingdom.

(2) An overseas company that has registered an alternative name may at any time deliver to the registrar of companies for registration a statement specifying a different name under which it proposes to carry on business in the United Kingdom (which may be

its corporate name or a further alternative) in substitution for the name previously registered.

(3) The alternative name for the time being registered under this section is treated for all purposes of the law applying in the United Kingdom as the company's corporate name.

(4) This does not—

(a) affect the references in this section or section 1047 to the company's corporate name,

(b) affect any rights or obligation of the company, or

(c) render defective any legal proceedings by or against the company.

(5) Any legal proceedings that might have been continued or commenced against the company by its corporate name, or any name previously registered under this section, may be continued or commenced against it by its name for the time being so registered.

Other requirements

1049 Accounts and reports: general

(1) The Secretary of State may make provision by regulations requiring an overseas company that is required to register particulars under section 1046—

(a) to prepare the like accounts and directors' report, and

(b) to cause to be prepared such an auditor's report,

as would be required if the company were formed and registered under this Act.

(2) The regulations may for this purpose apply, with or without modifications, all or any of the provisions of—

Part 15 (accounts and reports), and

Part 16 (audit).

(3) The Secretary of State may make provision by regulations requiring an overseas company to deliver to the registrar copies of—

(a) the accounts and reports prepared in accordance with the regulations, or

(b) the accounts and reports that it is required to prepare and have audited under the law of the country in which it is incorporated.

(4) Regulations under this section are subject to negative resolution procedure.

Annotations:

Commencement Information

I4 S. 1049 wholly in force at 1.10.2009; s. 1049 not in force at Royal Assent, see s. 1300; s. 1049 in force for specified purposes at 20.1.2007 by S.I. 2006/3428, **art. 3(3)** (subject to art. 5, Sch. 1 and with arts. 6, 8, Sch. 5); s. 1049 otherwise in force at 1.10.2009 by S.I. 2008/2860, **art. 3(q)** (with arts. 5, 7, 8, Sch. 2)

1050 Accounts and reports: credit or financial institutions

(1) This section applies to a credit or financial institution—

(a) that is incorporated or otherwise formed outside the United Kingdom and Gibraltar,

(b) whose head office is outside the United Kingdom and Gibraltar, and

(c) that has a branch in the United Kingdom.

(2) In subsection (1) "branch" means a place of business that forms a legally dependent part of the institution and conducts directly all or some of the operations inherent in its business.

(3) The Secretary of State may make provision by regulations requiring an institution to which this section applies—

(a) to prepare the like accounts and directors' report, and

(b) to cause to be prepared such an auditor's report,

as would be required if the institution were a company formed and registered under this Act.

(4) The regulations may for this purpose apply, with or without modifications, all or any of the provisions of—

Part 15 (accounts and reports), and

Part 16 (audit).

(5) The Secretary of State may make provision by regulations requiring an institution to which this section applies to deliver to the registrar copies of—

(a) accounts and reports prepared in accordance with the regulations, or

(b) accounts and reports that it is required to prepare and have audited under the law of the country in which the institution has its head office.

(6) Regulations under this section are subject to negative resolution procedure.

Annotations:

Commencement Information

I5 S. 1050 wholly in force at 1.10.2009; s. 1050 not in force at Royal Assent, see s. 1300; s. 1050 in force for specified purposes at 20.1.2007 by S.I. 2006/3428, **art. 3(3)** (subject to art. 5, Sch. 1 and with arts. 6, 8, Sch. 5); s. 1050 otherwise in force at 1.10.2009 by S.I. 2008/2860, **art. 3(q)** (with arts. 5, 7, 8, Sch. 2)

1051 Trading disclosures

(1) The Secretary of State may by regulations make provision requiring overseas companies carrying on business in the United Kingdom—

(a) to display specified information in specified locations,

(b) to state specified information in specified descriptions of document or communication, and

(c) to provide specified information on request to those they deal with in the course of their business.

(2) The regulations—

(a) shall in every case require a company that has registered particulars under section 1046 to disclose the name registered by it under section 1047, and

(b) may make provision as to the manner in which any specified information is to be displayed, stated or provided.

(3) The regulations may make provision corresponding to that made by—

section 83 (civil consequences of failure to make required disclosure), and

section 84 (criminal consequences of failure to make required disclosure).

(4) In this section "specified" means specified in the regulations.

(5) Regulations under this section are subject to affirmative resolution procedure.

Annotations:

Commencement Information

I6 S. 1051 wholly in force at 1.10.2009; s. 1051 not in force at Royal Assent, see s. 1300; s. 1051 in force for specified purposes at 20.1.2007 by S.I. 2006/3428, **art. 3(3)** (subject to art. 5, Sch. 1 and with arts. 6, 8, Sch. 5); s. 1051otherwise in force at 1.10.2009 by S.I. 2008/2860, **art. 3(q)** (with arts. 5, 7, 8, Sch. 2)

1052 Company charges

(1) The Secretary of State may by regulations make provision about the registration of specified charges over property in the United Kingdom of a registered overseas company.

(2) The power in subsection (1) includes power to make provision about—

(a) a registered overseas company that—

(i) has particulars registered in more than one part of the United Kingdom;

(ii) has property in more than one part of the United Kingdom;

(b) the circumstances in which property is to be regarded, for the purposes of the regulations, as being, or not being, in the United Kingdom or in a particular part of the United Kingdom;

(c) the keeping by a registered overseas company of records and registers about specified charges and their inspection;

(d) the consequences of a failure to register a charge in accordance with the regulations;

(e) the circumstances in which a registered overseas company ceases to be subject to the regulations.

(3) The regulations may for this purpose apply, with or without modifications, any of the provisions of Part 25 (company charges).

(4) The regulations may modify any reference in an enactment to Part 25, or to a particular provision of that Part, so as to include a reference to the regulations or to a specified provision of the regulations.

(5) Regulations under this section are subject to negative resolution procedure.

(6) In this section—

"registered overseas company" means an overseas company that has registered particulars under section 1046(1), and

"specified" means specified in the regulations.

Annotations:

Commencement Information

I7 S. 1052 wholly in force at 1.10.2009; s. 1052 not in force at Royal Assent, see s. 1300; s. 1052 in force for specified purposes at 20.1.2007 by S.I. 2006/3428, **art. 3(3)** (subject to art. 5, Sch. 1 and with arts. 6, 8, Sch. 5); s. 1052 otherwise in force at 1.10.2009 by S.I. 2008/2860, **art. 3(q)** (with arts. 5, 7, 8, Sch. 2)

1053 Other returns etc

(1) This section applies to overseas companies that are required to register particulars under section 1046.

(2) The Secretary of State may make provision by regulations requiring the delivery to the registrar of returns—

(a) by a company to which this section applies that—

(i) is being wound up, or

(ii) becomes or ceases to be subject to insolvency proceedings, or an arrangement or composition or any analogous proceedings;

(b) by the liquidator of a company to which this section applies.

(3) The regulations may specify—

(a) the circumstances in which a return is to be made,

(b) the particulars to be given in it, and

(c) the period within which it is to be made.

(4) The Secretary of State may make provision by regulations requiring notice to be given to the registrar of the appointment in relation to a company to which this section applies of a judicial factor (in Scotland).

(5) The regulations may include provision corresponding to any provision made by section 1154 of this Act (duty to notify registrar of certain appointments).

(6) Regulations under this section are subject to affirmative resolution procedure.

Annotations:

Commencement Information

I8 S. 1053 wholly in force at 1.10.2009; s. 1053 not in force at Royal Assent, see s. 1300; s. 1053 in force for specified purposes at 20.1.2007 by S.I. 2006/3428, **art. 3(3)** (subject to art. 5, Sch. 1 and with arts. 6, 8, Sch. 5); s. 1053 otherwise in force at 1.10.2009 by S.I. 2008/2860, **art. 3(q)** (with arts. 5, 7, 8, Sch. 2)

Supplementary

1054 Offences

(1) Regulations under this Part may specify the person or persons responsible for complying with any specified requirement of the regulations.

(2) Regulations under this Part may make provision for offences, including provision as to—

(a) the person or persons liable in the case of any specified contravention of the regulations, and

(b) circumstances that are, or are not, to be a defence on a charge of such an offence.

(3) The regulations must not provide—

(a) for imprisonment, or

(b) for the imposition on summary conviction of a fine exceeding level 5 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 5 on the standard scale.

(4) In this section "specified" means specified in the regulations.

Annotations:

Commencement Information

I9 S. 1054 wholly in force at 1.10.2009; s. 1054 not in force at Royal Assent, see s. 1300; s. 1054 in force for specified purposes at 20.1.2007 by S.I. 2006/3428, **art. 3(3)** (subject to art. 5, Sch. 1 and with arts. 6, 8, Sch. 5); s. 1054 otherwise in force at 1.10.2009 by S.I. 2008/2860, **art. 3(q)** (with arts. 5, 7, 8, Sch. 2)

1055 Disclosure of individual's residential address: protection from disclosure

Where regulations under section 1046 (overseas companies: duty to register particulars) require an overseas company to register particulars of an individual's usual residential address, they must contain provision corresponding to that made by Chapter 8 of Part 10 (directors' residential addresses: protection from disclosure).

Annotations:

Commencement Information

I10 S. 1055 wholly in force at 1.10.2009; s. 1055 not in force at Royal Assent, see s. 1300; s. 1055 in force for specified purposes at 20.1.2007 by S.I. 2006/3428, **art. 3(3)** (subject to art. 5, Sch. 1 and with arts. 6, 8, Sch. 5); s. 1055 otherwise in force at 1.10.2009 by S.I. 2008/2860, **art. 3(q)** (with arts. 5, 7, 8, Sch. 2)

1056 Requirement to identify persons authorised to accept service of documents

Regulations under section 1046 (overseas companies: duty to register particulars) must require an overseas company to register—

(a) particulars identifying every person resident in the United Kingdom authorised to accept service of documents on behalf of the company, or

(b) a statement that there is no such person.

Annotations:

Commencement Information

I11 S. 1056 wholly in force at 1.10.2009; s. 1056 not in force at Royal Assent, see s. 1300; s. 1056 in force for specified purposes at 20.1.2007 by S.I. 2006/3428, **art. 3(3)** (subject to art. 5, Sch. 1 and with arts. 6, 8, Sch. 5); s. 1056 otherwise in force at 1.10.2009 by S.I. 2008/2860, **art. 3(q)** (with arts. 5, 7, 8, Sch. 2)

1057 Registrar to whom returns, notices etc to be delivered

(1) This section applies to an overseas company that is required to register or has registered particulars under section 1046 in more than one part of the United Kingdom.

(2) The Secretary of State may provide by regulations that, in the case of such a company, anything authorised or required to be delivered to the registrar under this Part is to be delivered—

(a) to the registrar for each part of the United Kingdom in which the company is required to register or has registered particulars, or

(b) to the registrar for such part or parts of the United Kingdom as may be specified in or determined in accordance with the regulations.

(3) Regulations under this section are subject to negative resolution procedure.

Annotations:

Commencement Information

I12 S. 1057 wholly in force at 1.10.2009; s. 1057 not in force at Royal Assent, see s. 1300; s. 1057 in force for specified purposes at 20.1.2007 by S.I. 2006/3428, **art. 3(3)** (subject to art. 5, Sch. 1 and with arts. 6, 8, Sch. 5); s. 1057 otherwise in force at 1.10.2009 by S.I. 2008/2860, **art. 3(q)** (with arts. 5, 7, 8, Sch. 2)

1058 Duty to give notice of ceasing to have registrable presence

(1) The Secretary of State may make provision by regulations requiring an overseas company—

(a) if it has registered particulars following the opening of a branch, in accordance with regulations under section 1046(2)(a) or (b), to give notice to the registrar if it closes that branch;

(b) if it has registered particulars in other circumstances, in accordance with regulations under section 1046(2)(c), to give notice to the registrar if the circumstances that gave rise to the obligation to register particulars cease to obtain.

(2) The regulations must provide for the notice to be given to the registrar for the part of the United Kingdom to which the original return of particulars was delivered.

(3) The regulations may specify the period within which notice must be given.

(4) Regulations under this section are subject to negative resolution procedure.

Annotations:

Commencement Information

I13 S. 1058 wholly in force at 1.10.2009; s. 1058 not in force at Royal Assent, see s. 1300; s. 1058 in force for specified purposes at 20.1.2007 by S.I. 2006/3428, **art. 3(3)** (subject to art. 5, Sch. 1 and with arts. 6, 8, Sch. 5); s. 1058 otherwise in force at 1.10.2009 by S.I. 2008/2860, **art. 3(q)** (with arts. 5, 7, 8, Sch. 2)

1059 Application of provisions in case of relocation of branch

For the purposes of this Part—

(a) the relocation of a branch from one part of the United Kingdom to another counts as the closing of one branch and the opening of another;

(b) the relocation of a branch within the same part of the United Kingdom does not.

Changes to legislation:
There are outstanding changes not yet made by the legislation.gov.uk editorial team to Companies Act 2006. Any changes that have already been made by the team appear in the content and are referenced with annotations.

Changes and effects yet to be applied to :

- Pt. 1 to Pt. 39 applied (with modifications) by S.I. 2009/2436 reg. 3 to reg. 5, Sch. 1 para. 21
- Pt. 1 to Pt. 39 applied (with modifications) by S.I. 2009/2437 reg. 18 to reg. 23
- Pt. 1 to Pt. 39 extended by S.I. 2009/1941 Sch. 3 para. 2

Changes and effects yet to be applied to the whole Act, associated Parts and Chapters:

- Act applied by S.I. 2009/2477 rule 58(2)(b)
- Act applied in part (with modifications) by SI 1989/638 reg. 18 Sch. 4 (as amended) by S.I. 2009/2399 reg. 19, reg. 23
- Act modified by S.I. 2009/317 art. 3, Sch.
- Act power to modify conferred by 1991 c. 56 s. 23(2E)-(2G) (as inserted) by 2010 c. 29 Sch. 5 para. 3

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 285A substituted for s. 285 by S.I. 2009/1632 reg. 3
- s. 307A inserted by S.I. 2009/1632 reg. 9(2), reg. 23
- s. 311A inserted by S.I. 2009/1632 reg. 11
- s. 319A inserted by S.I. 2009/1632 reg. 12(1)
- s. 322A inserted by S.I. 2009/1632 reg. 5(1)
- s. 324A inserted by S.I. 2009/1632 reg. 7
- s. 333A inserted by S.I. 2009/1632 reg. 13(4)
- s. 338A inserted by S.I. 2009/1632 reg. 17(1)
- s. 340A inserted by S.I. 2009/1632 reg. 18
- s. 340B inserted by S.I. 2009/1632 reg. 18
- s. 360A inserted by S.I. 2009/1632 reg. 8
- s. 360B inserted by S.I. 2009/1632 reg. 20
- s. 360C inserted by S.I. 2009/1632 reg. 21(1)
- s. 419A inserted by S.I. 2009/1581 reg. 2
- s. 444A(4) substituted by S.I. 2009/1581 reg. 10
- s. 472A inserted by S.I. 2009/1581 reg. 5
- s. 497A inserted by S.I. 2009/1581 reg. 6
- s. 498A inserted by S.I. 2009/1581 reg. 7
- s. 538A inserted by S.I. 2009/1581 reg. 8
- s. 1059A inserted by S.I. 2009/1802 art. 3
- s. 1170A inserted by S.I. 2009/1941 Sch. 1 para. 260(8)
- s. 1253DE(1)(a) text amended by S.I. 2010/2537 reg. 4(2)(a)
- s. 1253DE(1)(c) text amended by S.I. 2010/2537 reg. 4(2)(b)
- Sch. 11A para. 30 modified by S.I. 2009/317 art. 6(1), art. 6(6)(a)
- Sch. 11A para. 52 modified by S.I. 2009/317 art. 6(1), art. 6(6)(b)
- Sch. 11A para. 71 substituted by S.I. 2010/22 Sch. 2 para. 143(a)
- Sch. 11A para. 73 text amended by 2010 c. 4 (N.I.) Sch. 1 para. 27
- Sch. 11A para. 73 text amended by S.I. 2010/22 Sch. 2 para. 143(b)

Commencement Orders yet to be applied to the Companies Act 2006:
Commencement Orders bringing provisions within this Act into force:

- S.I. 2009/1802 art. 18, Sch. amendment to earlier commencing SI 2008/2860 Sch. 2 para. 105
- S.I. 2009/1941 art. 13(1) amendment to earlier commencing SI 2008/2860 Sch. 1
- S.I. 2009/2476 art. 2 amendment to earlier commencing SI 2008/2860 art. 3(c) Sch. 2
- S.I. 2009/1632 reg. 22 amendment to earlier commencing SI 2007/2194 Sch. 3 para. 23A (as inserted by SI 2007/3495 Sch. 5 para. 2(5))

Commencement Orders bringing legislation that affects this Act into force:

- S.I. 2009/296 art. 2, art. 3, Sch. commences (2009 c. 1)
- S.I. 2009/490 art. 2 commences (2008 c. 31)
- S.I. 2009/3250 art. 2 commences (2007 c. 29)
- S.I. 2010/10 art. 2 commences (2008 c. 30)
- S.I. 2010/862 art. 2, art. 3 commences (2008 c. 17)
- S.I. 2010/2169 art. 3 to art. 5 commences (2010 c. 29)
- S.R. 2010/101 art. 2 commences (2010 c. 4)

Companies Act 2006 c. 46

Part 37 COMPANIES: SUPPLEMENTARY PROVISIONS

Service addresses

This version in force from: **April 6, 2007** to **present**

(version 1 of 1)

1139 Service of documents on company

(1) A document may be served on a company registered under this Act by leaving it at, or sending it by post to, the company's registered office.

(2) A document may be served on an overseas company whose particulars are registered under section 1046–

(a) by leaving it at, or sending it by post to, the registered address of any person resident in the United Kingdom who is authorised to accept service of documents on the company's behalf, or

(b) if there is no such person, or if any such person refuses service or service cannot for any other reason be effected, by leaving it at or sending by post to any place of business of the company in the United Kingdom.

(3) For the purposes of this section a person's “registered address” means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection.

(4) Where a company registered in Scotland or Northern Ireland carries on business in England and Wales, the process of any court in England and Wales may be served on the company by leaving it at, or sending it by post to, the company's principal place of business in England and Wales, addressed to the manager or other head officer in England and Wales of the company.

Where process is served on a company under this subsection, the person issuing out the process must send a copy of it by post to the company's registered office.

(5) Further provision as to service and other matters is made in the company communications provisions (see section 1143).

Subject: Company law

Keywords: Companies; Documents; Foreign companies; Service

EXHIBIT 19

See also Practice Direction 6A, Practice Direction 6B

Part 6 SERVICE OF DOCUMENTS

Contents of this Part

I SCOPE OF THIS PART AND INTERPRETATION

Part 6 rules about service apply generally

6.1

This Part applies to the service of documents, except where –

(a) another Part, any other enactment or a practice direction makes different provision; or

(b) the court orders otherwise.

(Other Parts, for example, Part 54 (Judicial Review) and Part 55 (Possession Claims) contain specific provisions about service.)

Interpretation

6.2

In this Part –

(a) 'bank holiday' means a bank holiday under the Banking and Financial Dealings Act 1971[1] in the part of the United Kingdom where service is to take place;

(b) 'business day' means any day except Saturday, Sunday, a bank holiday, Good Friday or Christmas Day;

(c) 'claim' includes petition and any application made before action or to commence proceedings and 'claim form', 'claimant' and 'defendant' are to be construed accordingly; and

(d) 'solicitor' includes any other person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the conduct of litigation (within the meaning of that Act).

II SERVICE OF THE CLAIM FORM IN THE JURISDICTION

Methods of service

6.3

(1) A claim form may be served by any of the following methods –

(a) personal service in accordance with rule 6.5;

(b) first class post, document exchange or other service which provides for delivery on the next business day, in accordance with Practice Direction 6A;

(c) leaving it at a place specified in rule 6.7, 6.8, 6.9 or 6.10;

(d) fax or other means of electronic communication in accordance with Practice Direction 6A; or

(e) any method authorised by the court under rule 6.15.

(2) A company may be served –

(a) by any method permitted under this Part; or

(b) by any of the methods of service permitted under the Companies Act 2006[2].

(3) A limited liability partnership may be served –

(a) by any method permitted under this Part; or

(b) by any of the methods of service permitted under the Companies Act 2006[3] as applied with modification by regulations made under the Limited Liability Partnerships Act 2000[4].

Who is to serve the claim form

6.4

(1) The court will serve the claim form except where –

(a) a rule or practice direction provides that the claimant must serve it;

(b) the claimant notifies the court that the claimant wishes to serve it; or

(c) the court orders or directs otherwise.

(2) Where the court is to serve the claim form, it is for the court to decide which method of service is to be used.

(3) Where the court is to serve the claim form, the claimant must, in addition to filing a copy for the court, provide a copy for each defendant to be served.

(4) Where the court has sent –

(a) a notification of outcome of postal service to the claimant in accordance with rule 6.18; or

(b) a notification of non-service by a bailiff in accordance with rule 6.19,

the court will not try to serve the claim form again.

Personal service

6.5

(1) Where required by another Part, any other enactment, a practice direction or a court order, a claim form must be served personally.

(2) In other cases, a claim form may be served personally except –

(a) where rule 6.7 applies; or

(b) in any proceedings against the Crown.

(Part 54 contains provisions about judicial review claims and Part 66 contains provisions about Crown proceedings.)

(3) A claim form is served personally on –

(a) an individual by leaving it with that individual;

(b) a company or other corporation by leaving it with a person holding a senior position within the company or corporation; or

(c) a partnership (where partners are being sued in the name of their firm) by leaving it with –

(i) a partner; or

(ii) a person who, at the time of service, has the control or management of the partnership business at its principal place of business.

(Practice Direction 6A sets out the meaning of 'senior position'.)

Where to serve the claim form – general provisions

6.6

(1) The claim form must be served within the jurisdiction except where rule 6.7(2) or 6.11 applies or as provided by Section IV of this Part.

(2) The claimant must include in the claim form an address at which the defendant may be served. That address must include a full postcode, unless the court orders otherwise.

(Paragraph 2.4 of Practice Direction 16 contains provisions about postcodes.)

(3) Paragraph (2) does not apply where an order made by the court under rule 6.15 (service by an alternative method or at an alternative place) specifies the place or method of service of the claim form.

Service of the claim form on a solicitor within the jurisdiction or in any EEA state

6.7

(1) Subject to rule 6.5(1), where –

(a) the defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form; or

(b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction,

the claim form must be served at the business address of that solicitor.

('Solicitor' has the extended meaning set out in rule 6.2(d).)

(2) Subject to rule 6.5(1) and the provisions of Section IV of this Part, where –

(a) the defendant has given in writing the business address within any EEA state of a solicitor as an address at which the defendant may be served with the claim form; or

(b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within any EEA state,

the claim form must be served at the business address of that solicitor.

('Solicitor' has the extended meaning set out in rule 6.2(d).)

Service of the claim form where the defendant gives an address at which the defendant may be served

6.8

Subject to rules 6.5(1) and 6.7 –

(a) the defendant may be served with the claim form at an address within the jurisdiction which the defendant has given for the purpose of being served with the proceedings; or

(b) in any claim by a tenant against a landlord, the claim form may be served at an address given by the landlord under section 48 of the Landlord and Tenant Act 1987[5].

Service of the claim form where the defendant does not give an address at which the defendant may be served

6.9

(1) This rule applies where –

(a) rule 6.5(1) (personal service);

(b) rule 6.7 (service of claim form on solicitor); and

(c) rule 6.8 (defendant gives address at which the defendant may be served),

do not apply and the claimant does not wish to effect personal service under rule 6.5(2).

(2) Subject to paragraphs (3) to (6), the claim form must be served on the defendant at the place shown in the following table.

Nature of defendant to be served	Place of service
1. Individual	Usual or last known residence.
2. Individual being sued in the name of a business	Usual or last known residence of the individual; or
	principal or last known place of business.
	Usual or last known residence of the individual; or

Nature of defendant to be served	Place of service
4. Limited liability partnership	principal or last known place of business of the partnership.
	Principal office of the partnership; or
	any place of business of the partnership within the jurisdiction which has a real connection with the claim.
5. Corporation (other than a company) incorporated in England and Wales	Principal office of the corporation; or
	any place within the jurisdiction where the corporation carries on its activities and which has a real connection with the claim.
6. Company registered in England and Wales	Principal office of the company; or
	any place of business of the company within the jurisdiction which has a real connection with the claim.
7. Any other company or corporation	Any place within the jurisdiction where the corporation carries on its activities; or
	any place of business of the company within the jurisdiction.

(3) Where a claimant has reason to believe that the address of the defendant referred to in entries 1, 2 or 3 in the table in paragraph (2) is an address at which the defendant no longer resides or carries on business, the claimant must take reasonable steps to ascertain the address of the defendant's current residence or place of business ('current address').

(4) Where, having taken the reasonable steps required by paragraph (3), the claimant –

(a) ascertains the defendant's current address, the claim form must be served at that address; or

(b) is unable to ascertain the defendant's current address, the claimant must consider whether there is –

(i) an alternative place where; or

(ii) an alternative method by which,

service may be effected.

(5) If, under paragraph (4)(b), there is such a place where or a method by which service may be effected, the claimant must make an application under rule 6.15.

(6) Where paragraph (3) applies, the claimant may serve on the defendant's usual or last known address in accordance with the table in paragraph (2) where the claimant –

(a) cannot ascertain the defendant's current residence or place of business; and

(b) cannot ascertain an alternative place or an alternative method under paragraph (4)(b).

Service of the claim form in proceedings against the Crown

6.10

In proceedings against the Crown –

(a) service on the Attorney General must be effected on the Treasury Solicitor; and

(b) service on a government department must be effected on the solicitor acting for that department.

(Practice Direction 66 gives the list published under section 17 of the Crown Proceedings Act 1947[6] of the solicitors acting in civil proceedings (as defined in that Act) for the different government departments on whom service is to be effected, and of their addresses.)

Service of the claim form by contractually agreed method

6.11

(1) Where –

(a) a contract contains a term providing that, in the event of a claim being started in relation to the contract, the claim form may be served by a method or at a place specified in the contract; and

(b) a claim solely in respect of that contract is started,

the claim form may, subject to paragraph (2), be served on the defendant by the method or at the place specified in the contract.

(2) Where in accordance with the contract the claim form is to be served out of the jurisdiction, it may be served –

(a) if permission to serve it out of the jurisdiction has been granted under rule 6.36; or

(b) without permission under rule 6.32 or 6.33.

Service of the claim form relating to a contract on an agent of a principal who is out of the jurisdiction

6.12

(1) The court may, on application, permit a claim form relating to a contract to be served on the defendant's agent where –

(a) the defendant is out of the jurisdiction;

(b) the contract to which the claim relates was entered into within the jurisdiction with or through the defendant's agent; and

(c) at the time of the application either the agent's authority has not been terminated or the agent is still in business relations with the defendant.

(2) An application under this rule –

(a) must be supported by evidence setting out –

(i) details of the contract and that it was entered into within the jurisdiction or through an agent who is within the jurisdiction;

(ii) that the principal for whom the agent is acting was, at the time the contract was entered into and is at the time of the application, out of the jurisdiction; and

(iii) why service out of the jurisdiction cannot be effected; and

(b) may be made without notice.

(3) An order under this rule must state the period within which the defendant must respond to the particulars of claim.

(4) Where the court makes an order under this rule –

(a) a copy of the application notice and the order must be served with the claim form on the agent; and

(b) unless the court orders otherwise, the claimant must send to the defendant a copy of the application notice, the order and the claim form.

(5) This rule does not exclude the court's power under rule 6.15 (service by an alternative method or at an alternative place).

Service of the claim form on children and protected parties

6.13

(1) Where the defendant is a child who is not also a protected party, the claim form must be served on –

(a) one of the child's parents or guardians; or

(b) if there is no parent or guardian, an adult with whom the child resides or in whose care the child is.

(2) Where the defendant is a protected party, the claim form must be served on –

(a) one of the following persons with authority in relation to the protected party as –

(i) the attorney under a registered enduring power of attorney;

(ii) the donee of a lasting power of attorney; or

(iii) the deputy appointed by the Court of Protection; or

(b) if there is no such person, an adult with whom the protected party resides or in whose care the protected party is.

(3) Any reference in this Section to a defendant or a party to be served includes the person to be served with the claim form on behalf of a child or protected party under paragraph (1) or (2).

(4) The court may make an order permitting a claim form to be served on a child or protected party, or on a person other than the person specified in paragraph (1) or (2).

(5) An application for an order under paragraph (4) may be made without notice.

(6) The court may order that, although a claim form has been sent or given to someone other than the person specified in paragraph (1) or (2), it is to be treated as if it had been properly served.

(7) This rule does not apply where the court has made an order under rule 21.2(3) allowing a child to conduct proceedings without a litigation friend.

(Part 21 contains rules about the appointment of a litigation friend and 'child' and 'protected party' have the same meaning as in rule 21.1.)

Deemed service

6.14

A claim form served in accordance with this Part is deemed to be served on the second business day after completion of the relevant step under rule 7.5(1).

Service of the claim form by an alternative method or at an alternative place

6.15

(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.

(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.

(3) An application for an order under this rule –

(a) must be supported by evidence; and

(b) may be made without notice.

(4) An order under this rule must specify –

(a) the method or place of service;

(b) the date on which the claim form is deemed served; and

(c) the period for –

(i) filing an acknowledgment of service;

(ii) filing an admission; or

(iii) filing a defence.

Power of court to dispense with service of the claim form

6.16

(1) The court may dispense with service of a claim form in exceptional circumstances.

(2) An application for an order to dispense with service may be made at any time and –

(a) must be supported by evidence; and

(b) may be made without notice.

Notice and certificate of service relating to the claim form

6.17

(1) Where the court serves a claim form, the court will send to the claimant a notice which will include the date on which the claim form is deemed served under rule 6.14.

(2) Where the claimant serves the claim form, the claimant –

(a) must file a certificate of service within 21 days of service of the particulars of claim, unless all the defendants to the proceedings have filed acknowledgments of service within that time; and

(b) may not obtain judgment in default under Part 12 unless a certificate of service has been filed.

(3) The certificate of service must state –

(a) where rule 6.7, 6.8, 6.9 or 6.10 applies, the category of address at which the claimant believes the claim form has been served; and

(b) the details set out in the following table.

Method of service	Details to be certified
1. Personal service	Date of personal service.
	Date of posting, or

Method of service	Details to be certified
	leaving with, delivering to or collection by the relevant service provider.
3. Delivery of document to or leaving it at a permitted place	Date when the document was delivered to or left at the permitted place.
4. Fax	Date of completion of the transmission.
5. Other electronic method	Date of sending the e-mail or other electronic transmission.
6. Alternative method or place	As required by the court.

Notification of outcome of postal service by the court

6.18

(1) Where –

(a) the court serves the claim form by post; and

(b) the claim form is returned to the court,

the court will send notification to the claimant that the claim form has been returned.

(2) The claim form will be deemed to be served unless the address for the defendant on the claim form is not the relevant address for the purpose of rules 6.7 to 6.10.

Notice of non-service by bailiff

6.19

Where –

(a) the court bailiff is to serve a claim form; and

(b) the bailiff is unable to serve it on the defendant,

the court will send notification to the claimant.

III SERVICE OF DOCUMENTS OTHER THAN THE CLAIM FORM IN THE UNITED KINGDOM

Methods of service

6.20

(1) A document may be served by any of the following methods –

(a) personal service, in accordance with rule 6.22;

(b) first class post, document exchange or other service which provides for delivery on the next business day, in accordance with Practice Direction 6A;

(c) leaving it at a place specified in rule 6.23;

(d) fax or other means of electronic communication in accordance with Practice Direction 6A; or

(e) any method authorised by the court under rule 6.27.

(2) A company may be served –

(a) by any method permitted under this Part; or

(b) by any of the methods of service permitted under the Companies Act 2006.

(3) A limited liability partnership may be served –

(a) by any method permitted under this Part; or

(b) by any of the methods of service permitted under the Companies Act 2006 as applied with modification by regulations made under the Limited Liability Partnerships Act 2000.

Who is to serve

6.21

(1) A party to proceedings will serve a document which that party has prepared except where –

(a) a rule or practice direction provides that the court will serve the document; or

(b) the court orders otherwise.

(2) The court will serve a document which it has prepared except where –

(a) a rule or practice direction provides that a party must serve the document;

(b) the party on whose behalf the document is to be served notifies the court that the party wishes to serve it; or

(c) the court orders otherwise.

(3) Where the court is to serve a document, it is for the court to decide which method of service is to be used.

(4) Where the court is to serve a document prepared by a party, that party must provide a copy for the court and for each party to be served.

Personal service

6.22

(1) Where required by another Part, any other enactment, a practice direction or a court order, a document must be served personally.

(2) In other cases, a document may be served personally except –

(a) where the party to be served has given an address for service under rule 6.23(2)(a); or

(b) in any proceedings by or against the Crown.

(3) A document may be served personally as if the document were a claim form in accordance with rule 6.5(3).

Address for service

6.23

(1) A party to proceedings must give an address at which that party may be served with documents relating to those proceedings. The address must include a full postcode unless the court orders otherwise.

(Paragraph 2.4 of Practice Direction 16 contains provisions about postcodes.)

(2) A party's address for service must be –

(a) the business address either within the United Kingdom or any other EEA state of a solicitor acting for the party to be served; or

(b) where there is no solicitor acting for the party to be served, an address within the United Kingdom at which the party resides or carries on business.

(3) Where there is no solicitor acting for the party to be served and the party does not have an address within the United Kingdom at which that party resides or carries on business, the party must give an address for service within the United Kingdom.

(Part 42 contains provisions about change of solicitor. Rule 42.1 provides that where a party gives the business address of a solicitor as that party's address for service, that solicitor will be considered to be acting for the party until the provisions of Part 42 are complied with.)

(4) Any document to be served in proceedings must be sent or transmitted to, or left at, the party's address for service under paragraph (2) or (3) unless it is to be served personally or the court orders otherwise.

(5) Where, in accordance with Practice Direction 6A, a party indicates or is deemed to have indicated that they will accept service by fax, the fax number given by that party must be at the address for service.

(6) Where a party indicates in accordance with Practice Direction 6A that they will accept service by electronic means other than fax, the e-mail address or electronic identification given by that party will be deemed to be at the address for service.

(7) In proceedings by or against the Crown, service of any document in the proceedings on the Crown must be effected in the same manner prescribed in rule 6.10 as if the document were a claim form.

(8) This rule does not apply where an order made by the court under rule 6.27 (service by an alternative method or at an alternative place) specifies where a document may be served.

Change of address for service

6.24

Where the address for service of a party changes, that party must give notice in writing of the change as soon as it has taken place to the court and every other party.

Service on children and protected parties

6.25

(1) An application for an order appointing a litigation friend where a child or protected party has no litigation friend must be served in accordance with rule 21.8(1) and (2).

(2) Any other document which would otherwise be served on a child or a protected party must be served on the litigation friend conducting the proceedings on behalf of the child or protected party.

(3) The court may make an order permitting a document to be served on the child or protected party or on some person other than the person specified in rule 21.8 or paragraph (2).

(4) An application for an order under paragraph (3) may be made without notice.

(5) The court may order that, although a document has been sent or given to someone other than the person specified in rule 21.8 or paragraph (2), the document is to be treated as if it had been properly served.

(6) This rule does not apply where the court has made an order under rule 21.2(3) allowing a child to conduct proceedings without a litigation friend.

Deemed Service

6.26

A document, other than a claim form, served in accordance with these Rules or any relevant practice direction is deemed to be served on the day shown in the following table –

Method of service	Deemed date of service
1. First class post (or other service which provides for delivery on the next business day)	The second day after it was posted, left with, delivered to or collected by the relevant service provider provided that day is a business day; or
	if not, the next business day after that day.
2. Document exchange	The second day after it was left with, delivered to or collected by the relevant service provider provided that day is a business day; or
	if not, the next business day after that day.
3. Delivering the document to or leaving it at a permitted address	If it is delivered to or left at the permitted address on a business day before 4.30p.m., on that day; or
	in any other case, on the next business day after that day.
4. Fax	If the transmission of the fax is completed on a business day before 4.30p.m., on that day; or
	in any other case, on the next business day after the day on which it was transmitted.
5. Other electronic method	If the e-mail or other electronic transmission is sent on a business day before 4.30p.m., on that day; or
	in any other case, on the next business day after the day on which it was sent.
6. Personal service	If the document is served personally before 4.30p.m. on a business day, on that day; or
	in any other case, on the next business day after that day.

(Paragraphs 10.1 to 10.7 of Practice Direction 6A contain examples of how the date of deemed service is calculated.)

Service by an alternative method or at an alternative place

6.27

Rule 6.15 applies to any document in the proceedings as it applies to a claim form and reference to the defendant in that rule is modified accordingly.

Power to dispense with service

6.28

(1) The court may dispense with service of any document which is to be served in the proceedings.

(2) An application for an order to dispense with service must be supported by evidence and may be made without notice.

Certificate of service

6.29

Where a rule, practice direction or court order requires a certificate of service, the certificate must state the details required by the following table –

Method of Service	Details to be certified
1. Personal service	Date and time of personal service.
2. First class post, document exchange or other service which provides for delivery on the next business day	Date of posting, or leaving with, delivering to or collection by the relevant service provider.
3. Delivery of document to or leaving it at a permitted place	Date and time of when the document was delivered to or left at the permitted place.
4. Fax	Date and time of completion of the transmission.
5. Other electronic method	Date and time of sending the e-mail or other electronic transmission.
6. Alternative method or place permitted by the court	As required by the court.

IV SERVICE OF THE CLAIM FORM AND OTHER DOCUMENTS OUT OF THE JURISDICTION

Scope of this Section

6.30

This Section contains rules about –

(a) service of the claim form and other documents out of the jurisdiction;

(b) when the permission of the court is required and how to obtain that permission; and

(c) the procedure for service.

('Jurisdiction' is defined in rule 2.3(1).)

Interpretation

6.31

(1) For the purposes of this Section –

(a) 'the Hague Convention' means the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters signed at the Hague on 15 November 1965[7];

(b) 'the 1982 Act' means the Civil Jurisdiction and Judgments Act 1982[8];

(c) 'Civil Procedure Convention' means the Brussels and Lugano Conventions (as defined in section 1(1) of the 1982 Act) and any other Convention (including the Hague Convention) entered into by the United Kingdom regarding service out of the jurisdiction;

(d) 'the Judgments Regulation' means Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[9], as amended from time to time and as applied by the Agreement made on 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[10];

(e) 'the Service Regulation' means Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)[11], and repealing Council Regulation (EC) No. 1348/2000[12], as amended from time to time and as applied by the Agreement made on 19 October 2005 between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents on civil and commercial matters[13];

(f) 'Commonwealth State' means a state listed in Schedule 3 to the British Nationality Act 1981[14];

(g) 'Contracting State' has the meaning given by section 1(3) of the 1982 Act;

(h) 'Convention territory' means the territory or territories of any Contracting State to which the Brussels or Lugano Conventions (as defined in section 1(1) of the 1982 Act) apply; and

(i) 'domicile' is to be determined –

(i) in relation to a Convention territory, in accordance with sections 41 to 46 of the 1982 Act; and

(ii) in relation to a Member State, in accordance with the Judgments Regulation and paragraphs 9 to 12 of Schedule 1 to the Civil Jurisdiction and Judgments Order 2001[15].

(j) 'the Lugano Convention' means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark and signed by the European Community on 30th October 2007.

Service of the claim form where the permission of the court is not required – Scotland and Northern Ireland

6.32

(1) The claimant may serve the claim form on a defendant in Scotland or Northern Ireland where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the 1982 Act and –

(a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom; and

(b)

(i) the defendant is domiciled in the United Kingdom;

(ii) the proceedings are within paragraph 11 of Schedule 4 to the 1982 Act; or

(iii) the defendant is a party to an agreement conferring jurisdiction, within paragraph 12 of Schedule 4 to the 1982 Act.

(2) The claimant may serve the claim form on a defendant in Scotland or Northern Ireland where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under any enactment other than the 1982 Act notwithstanding that –

(a) the person against whom the claim is made is not within the jurisdiction; or

(b) the facts giving rise to the claim did not occur within the jurisdiction.

Service of the claim form where the permission of the court is not required – out of the United Kingdom

6.33

(1) The claimant may serve the claim form on the defendant out of the United Kingdom where each claim against the defendant to be served and included in the claim form is a claim which the court has power to determine under the 1982 Act or the Lugano Convention and –

(a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the |United Kingdom or any other Convention territory; and

(b)

(i) the defendant is domiciled in the United Kingdom or in any Convention territory;

(ii) the proceedings are within article 16 of Schedule 1 to the 1982 Act or article 22 of the Lugano Convention; or

(iii) the defendant is a party to an agreement conferring jurisdiction, within article 17 of Schedule 1 to the 1982 Act or article 23 of the Lugano Convention.

(2) The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the Judgments Regulation and –

(a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Member State; and

(b)

(i) the defendant is domiciled in the United Kingdom or in any Member State;

(ii) the proceedings are within article 22 of the Judgments Regulation; or

(iii) the defendant is a party to an agreement conferring jurisdiction, within article 23 of the Judgments Regulation.

(3) The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine other than under the 1982 Act or the Lugano Convention or the Judgments Regulation, notwithstanding that –

(a) the person against whom the claim is made is not within the jurisdiction; or

(b) the facts giving rise to the claim did not occur within the jurisdiction.

Notice of statement of grounds where the permission of the court is not required for service

6.34

(1) Where the claimant intends to serve a claim form on a defendant under rule 6.32 or 6.33, the claimant must –

(a) file with the claim form a notice containing a statement of the grounds on which the claimant is entitled to serve the claim form out of the jurisdiction; and

(b) serve a copy of that notice with the claim form.

(2) Where the claimant fails to file with the claim form a copy of the notice referred to in paragraph (1)(a), the claim form may only be served –

(a) once the claimant files the notice; or

(b) if the court gives permission.

Period for responding to the claim form where permission was not required for service

6.35

(1) This rule sets out the period for –

(a) filing an acknowledgment of service;

(b) filing an admission; or

(c) filing a defence,

where a claim form has been served out of the jurisdiction under rule 6.32 or 6.33.

(Part 10 contains rules about acknowledgments of service, Part 14 contains rules about admissions and Part 15 contains rules about defences.)

Service of the claim form on a defendant in Scotland or Northern Ireland

(2) Where the claimant serves on a defendant in Scotland or Northern Ireland under rule 6.32, the period –

(a) for filing an acknowledgment of service or admission is 21 days after service of the particulars of claim; or

(b) for filing a defence is –

(i) 21 days after service of the particulars of claim; or

(ii) where the defendant files an acknowledgment of service, 35 days after service of the particulars of claim.

(Part 7 provides that particulars of claim must be contained in or served with the claim form or served separately on the defendant within 14 days after service of the claim form.)

Service of the claim form on a defendant in a Convention territory within Europe or a Member State

(3) Where the claimant serves the claim form on a defendant in a Convention territory within Europe or a Member State under rule 6.33, the period –

(a) for filing an acknowledgment of service or admission, is 21 days after service of the particulars of claim; or

(b) for filing a defence is –

(i) 21 days after service of the particulars of claim; or

(ii) where the defendant files an acknowledgment of service, 35 days after service of the particulars of claim.

Service of the claim form on a defendant in a Convention territory outside Europe

(4) Where the claimant serves the claim form on a defendant in a Convention territory outside Europe under rule 6.33, the period –

(a) for filing an acknowledgment of service or admission, is 31 days after service of the particulars of claim; or

(b) for filing a defence is –

(i) 31 days after service of the particulars of claim; or

(ii) where the defendant files an acknowledgment of service, 45 days after service of the particulars of claim.

Service on a defendant elsewhere

(5) Where the claimant serves the claim form under rule 6.33 in a country not referred to in paragraph (3) or (4), the period for responding to the claim form is set out in Practice Direction 6B.

Service of the claim form where the permission of the court is required

6.36

In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply.

Application for permission to serve the claim form out of the jurisdiction

6.37

(1) An application for permission under rule 6.36 must set out –

(a) which ground in paragraph 3.1 of Practice Direction 6B is relied on;

(b) that the claimant believes that the claim has a reasonable prospect of success; and

(c) the defendant's address or, if not known, in what place the defendant is, or is likely, to be found.

(2) Where the application is made in respect of a claim referred to in paragraph 3.1(3) of Practice Direction 6B, the application must also state the grounds on which the claimant believes that there is between the claimant and the defendant a real issue which it is reasonable for the court to try.

(3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.

(4) In particular, where –

(a) the application is for permission to serve a claim form in Scotland or Northern Ireland; and

(b) it appears to the court that the claimant may also be entitled to a remedy in Scotland or Northern Ireland, the court, in deciding whether to give permission, will –

(i) compare the cost and convenience of proceeding there or in the jurisdiction; and

(ii) (where relevant) have regard to the powers and jurisdiction of the Sheriff court in Scotland or the county courts or courts of summary jurisdiction in Northern Ireland.

(5) Where the court gives permission to serve a claim form out of the jurisdiction –

(a) it will specify the periods within which the defendant may –

(i) file an acknowledgment of service;

(ii) file or serve an admission;

(iii) file a defence; or

(iv) file any other response or document required by a rule in another Part, any other enactment or a practice direction; and

(b) it may –

(i) give directions about the method of service; and

(ii) give permission for other documents in the proceedings to be served out of the jurisdiction.

(The periods referred to in paragraphs (5)(a)(i), (ii) and (iii) are those specified in the Table in Practice Direction 6B.)

Service of documents other than the claim form – permission

6.38

(1) Unless paragraph (2) or (3) applies, where the permission of the court is required for the claimant to serve the claim form out of the jurisdiction, the claimant must obtain permission to serve any other document in the proceedings out of the jurisdiction.

(2) Where –

(a) the court gives permission for a claim form to be served on a defendant out of the jurisdiction; and

(b) the claim form states that particulars of claim are to follow,

the permission of the court is not required to serve the particulars of claim.

(3) The permission of the court is not required if a party has given an address for service in Scotland or Northern Ireland.

Service of application notice on a non-party to the proceedings

6.39

(1) Where an application notice is to be served out of the jurisdiction on a person who is not a party to the proceedings rules 6.35 and 6.37(5)(a)(i), (ii) and (iii) do not apply.

(2) Where an application is served out of the jurisdiction on a person who is not a party to the proceedings, that person may make an application to the court under Part 11 as if that person were a defendant, but rule 11(2) does not apply.

(Part 11 contains provisions about disputing the court's jurisdiction.)

Methods of service – general provisions

6.40

(1) This rule contains general provisions about the method of service of a claim form or other document on a party out of the jurisdiction.

Where service is to be effected on a party in Scotland or Northern Ireland

(2) Where a party serves any document on a party in Scotland or Northern Ireland, it must be served by a method permitted by Section II (and references to 'jurisdiction' in that Section are modified accordingly) or Section III of this Part and rule 6.23(4) applies.

Where service is to be effected on a defendant out of the United Kingdom

(3) Where the claimant wishes to serve a claim form or any other document on a defendant out of the United Kingdom, it may be served –

(a) by any method provided for by –

(i) rule 6.41 (service in accordance with the Service Regulation);

(ii) rule 6.42 (service through foreign governments, judicial authorities and British Consular authorities); or

(iii) rule 6.44 (service of claim form or other document on a State);

(b) by any method permitted by a Civil Procedure Convention; or

(c) by any other method permitted by the law of the country in which it is to be served.

(4) Nothing in paragraph (3) or in any court order authorises or requires any person to do anything which is contrary to the law of the country where the claim form or other document is to be served.

(A list of the countries with whom the United Kingdom has entered into a Civil Procedure Convention, and a link to the relevant Convention, may be found on the Foreign and

Commonwealth Office website at – http://www.fco.gov.uk/en/about-the-fco/publications/treaties/lists-treaties/bilateral-civil-procedure.)

Service in accordance with the Service Regulation

6.41

(1) This rule applies where the claimant wishes to serve the claim form or other document in accordance with the Service Regulation.

(2) The claimant must file –

(a) the claim form or other document;

(b) any translation; and

(c) any other documents required by the Service Regulation.

(3) When the claimant files the documents referred to in paragraph (2), the court officer will –

(a) seal(GL) the copy of the claim form; and

(b) forward the documents to the Senior Master.

(4) Rule 6.47 does not apply to this rule.

(The Service Regulation is annexed to Practice Direction 6B.)

(Article 20(1) of the Service Regulation provides that the Regulation prevails over other provisions contained in any other agreement or arrangement concluded by Member States.)

Service through foreign governments, judicial authorities and British Consular authorities

6.42

(1) Where the claimant wishes to serve a claim form or any other document on a defendant in any country which is a party to a Civil Procedure Convention providing for service in that country, it may be served –

(a) through the authority designated under the Hague Convention (where relevant) in respect of that country; or

(b) if the law of that country permits –

(i) through the judicial authorities of that country, or

(ii) through a British Consular authority in that country (subject to any provisions of the applicable convention about the nationality of persons who may be served by such a method).

(2) Where the claimant wishes to serve a claim form or any other document on a defendant in any country with respect to which there is no Civil Procedure Convention providing for service in that country, the claim form or other document may be served, if the law of that country so permits –

(a) through the government of that country, where that government is willing to serve it; or

(b) through a British Consular authority in that country.

(3) Where the claimant wishes to serve the claim form or other document in –

(a) any Commonwealth State which is not a party to the Hague Convention;

(b) the Isle of Man or the Channel Islands; or

(c) any British overseas territory,

the methods of service permitted by paragraphs (1)(b) and (2) are not available and the claimant or the claimant's agent must effect service direct, unless Practice Direction 6B provides otherwise.

(A list of British overseas territories is reproduced in paragraph 5.2 of Practice Direction 6B.)

Procedure where service is to be through foreign governments, judicial authorities and British Consular authorities

6.43

(1) This rule applies where the claimant wishes to serve a claim form or any other document under rule 6.42(1) or 6.42(2).

(2) Where this rule applies, the claimant must file –

(a) a request for service of the claim form or other document specifying one or more of the methods in rule 6.42(1) or 6.42(2);

(b) a copy of the claim form or other document;

(c) any other documents or copies of documents required by Practice Direction 6B; and

(d) any translation required under rule 6.45.

(3) Where the claimant files the documents specified in paragraph (2), the court officer will –

(a) seal(GL) the copy of the claim form or other document; and

(b) forward the documents to the Senior Master.

(4) The Senior Master will send documents forwarded under this rule –

(a) where the claim form or other document is being served through the authority designated under the Hague Convention, to that authority; or

(b) in any other case, to the Foreign and Commonwealth Office with a request that it arranges for the claim form or other document to be served.

(5) An official certificate which –

(a) states that the method requested under paragraph (2)(a) has been performed and the date of such performance;

(b) states, where more than one method is requested under paragraph (2)(a), which method was used; and

(c) is made by –

(i) a British Consular authority in the country where the method requested under paragraph (2)(a) was performed;

(ii) the government or judicial authorities in that country; or

(iii) the authority designated in respect of that country under the Hague Convention,

is evidence of the facts stated in the certificate.

(6) A document purporting to be an official certificate under paragraph (5) is to be treated as such a certificate, unless it is proved not to be.

Service of claim form or other document on a State

6.44

(1) This rule applies where a claimant wishes to serve the claim form or other document on a State.

(2) In this rule, 'State' has the meaning given by section 14 of the State Immunity Act 1978[16].

(3) The claimant must file in the Central Office of the Royal Courts of Justice –

(a) a request for service to be arranged by the Foreign and Commonwealth Office;

(b) a copy of the claim form or other document; and

(c) any translation required under rule 6.45.

(4) The Senior Master will send the documents filed under this rule to the Foreign and Commonwealth Office with a request that it arranges for them to be served.

(5) An official certificate by the Foreign and Commonwealth Office stating that a claim form has been duly served on a specified date in accordance with a request made under this rule is evidence of that fact.

(6) A document purporting to be such a certificate is to be treated as such a certificate, unless it is proved not to be.

(7) Where –

(a) section 12(6) of the State Immunity Act 1978 applies; and

(b) the State has agreed to a method of service other than through the Foreign and Commonwealth Office,

the claim form or other document may be served either by the method agreed or in accordance with this rule.

(Section 12(6) of the State Immunity Act 1978 provides that section 12(1) enables the service of a claim form or other document in a manner to which the State has agreed.)

Translation of claim form or other document

6.45

(1) Except where paragraph (4) or (5) applies, every copy of the claim form or other document filed under rule 6.43 (service through foreign governments, judicial authorities etc.) or 6.44 (service of claim form or other document on a State) must be accompanied by a translation of the claim form or other document.

(2) The translation must be –

(a) in the official language of the country in which it is to be served; or

(b) if there is more than one official language of that country, in any official language which is appropriate to the place in the country where the claim form or other document is to be served.

(3) Every translation filed under this rule must be accompanied by a statement by the person making it that it is a correct translation, and the statement must include that person's name, address and qualifications for making the translation.

(4) The claimant is not required to file a translation of a claim form or other document filed under rule 6.43 (service through foreign governments, judicial authorities etc.) where the claim form or other document is to be served –

(a) in a country of which English is an official language; or

(b) on a British citizen (within the meaning of the British Nationality Act 1981[17]),

unless a Civil Procedure Convention requires a translation.

(5) The claimant is not required to file a translation of a claim form or other document filed under rule 6.44 (service of claim form or other document on a State) where English is an official language of the State in which the claim form or other document is to be served.

(The Service Regulation contains provisions about the translation of documents.)

Undertaking to be responsible for expenses

6.46

Every request for service filed under rule 6.43 (service through foreign governments, judicial authorities etc.) or rule 6.44 (service of claim form or other document on a State) must contain an undertaking by the person making the request –

(a) to be responsible for all expenses incurred by the Foreign and Commonwealth Office or foreign judicial authority; and

(b) to pay those expenses to the Foreign and Commonwealth Office or foreign judicial authority on being informed of the amount.

Proof of service before obtaining judgment

6.47

Where

(a) a hearing is fixed when the claim form is issued;

(b) the claim form is served on a defendant out of the jurisdiction; and

(c) that defendant does not appear at the hearing,

the claimant may not obtain judgment against the defendant until the claimant files written evidence that the claim form has been duly served in accordance with this Part.

V SERVICE OF DOCUMENTS FROM FOREIGN COURTS OR TRIBUNALS

Scope of this Section

6.48

This Section –

(a) applies to the service in England and Wales of any document in connection with civil or commercial proceedings in a foreign court or tribunal; but

(b) does not apply where the Service Regulation (which has the same meaning as in rule 6.31(e)) applies.

Interpretation

6.49

In this Section –

(a) 'convention country' means a country in relation to which there is a Civil Procedure Convention (which has the same meaning as in rule 6.31(c));

(b) 'foreign court or tribunal' means a court or tribunal in a country outside of the United Kingdom; and

(c) 'process server' means –

(i) a process server appointed by the Lord Chancellor to serve documents to which this Section applies, or

(ii) the process server's agent.

Request for service

6.50

The Senior Master will serve a document to which this Section applies upon receipt of –

(a) a written request for service –

(i) where the foreign court or tribunal is in a convention country, from a consular or other authority of that country; or

(ii) from the Secretary of State for Foreign and Commonwealth Affairs, with a recommendation that service should be effected;

(b) a translation of that request into English;

(c) two copies of the document to be served; and

(d) unless the foreign court or tribunal certifies that the person to be served understands the language of the document, two copies of a translation of it into English.

Method of service

6.51

The Senior Master will determine the method of service.

After service

6.52

(1) Where service of a document has been effected by a process server, the process server must –

(a) send to the Senior Master a copy of the document, and

(i) proof of service; or

(ii) a statement why the document could not be served; and

(b) if the Senior Master directs, specify the costs incurred in serving or attempting to serve the document.

(2) The Senior Master will send to the person who requested service –

(a) a certificate, sealed with the seal of the Senior Courts for use out of the jurisdiction, stating –

(i) when and how the document was served or the reason why it has not been served; and

(ii) where appropriate, an amount certified by a costs judge to be the costs of serving or attempting to serve the document; and

(b) a copy of the document.

Footnotes

1. 1971 c. 80.
~~1990 c. 41. 1985 c. 6.~~
2. 2006 c. 46.
3. 2006 c. 46.
4. 2000 c. 12.
5. 1987 c. 31.
6. 1947 c. 44.
7. Cmnd. 3986.
8. 1982 c. 27.
9. OJ No L 12, 16.1.2001, p.1.
10. OJ No L 299, 16.11.2005, p.62.
11. OJ No L324, 10.12.2007, p.79.
12. OJ No L160, 30.6.2000, p.37.
13. OJ No L300, 17.11.2005, p.53.
14. 1981 c. 61.
15. S.I. 2001/3929.
16. 1978 c. 33.
17. 1981 c. 61.

See also Part 6, Practice Direction 6A

PRACTICE DIRECTION 6B – SERVICE OUT OF THE JURISDICTIONThis Practice Direction supplements Section IV of CPR Part 6

Contents of this Practice Direction

Scope of this Practice Direction

1.1

This Practice Direction supplements Section IV (service of the claim form and other documents out of the jurisdiction) of Part 6.

(Practice Direction 6A contains relevant provisions supplementing rule 6.40 in relation to the method of service on a party in Scotland or Northern Ireland.)

Service out of the jurisdiction where permission of the court is not required

2.1

Where rule 6.34 applies, the claimant must file practice form N510 when filing the claim form.

Service out of the jurisdiction where permission is required

3.1

The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –

General Grounds

(1) A claim is made for a remedy against a person domiciled within the jurisdiction.

(2) A claim is made for an injunction(GL) ordering the defendant to do or refrain from doing an act within the jurisdiction.

(3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –

(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

(4) A claim is an additional claim under Part 20 and the person to be served is a necessary or proper party to the claim or additional claim.

Claims for interim remedies

(5) A claim is made for an interim remedy under section 25(1) of the Civil Jurisdiction and Judgments Act 1982.

Claims in relation to contracts

(6) A claim is made in respect of a contract where the contract –

(a) was made within the jurisdiction;

(b) was made by or through an agent trading or residing within the jurisdiction;

(c) is governed by English law; or

(d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.

(7) A claim is made in respect of a breach of contract committed within the jurisdiction.

(8) A claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (6).

Claims in tort

(9) A claim is made in tort where

(a) damage was sustained within the jurisdiction; or

(b) the damage sustained resulted from an act committed within the jurisdiction.

Enforcement

(10) A claim is made to enforce any judgment or arbitral award.

Claims about property within the jurisdiction

(11) The whole subject matter of a claim relates to property located within the jurisdiction.

Claims about trusts etc.

(12) A claim is made for any remedy which might be obtained in proceedings to execute the trusts of a written instrument where –

(a) the trusts ought to be executed according to English law; and

(b) the person on whom the claim form is to be served is a trustee of the trusts.

(13) A claim is made for any remedy which might be obtained in proceedings for the administration of the estate of a person who died domiciled within the jurisdiction.

(14) A probate claim or a claim for the rectification of a will.

(15) A claim is made for a remedy against the defendant as constructive trustee where the defendant's alleged liability arises out of acts committed within the jurisdiction.

(16) A claim is made for restitution where the defendant’s alleged liability arises out of acts committed within the jurisdiction.

Claims by HM Revenue and Customs

(17) A claim is made by the Commissioners for H.M. Revenue and Customs relating to duties or taxes against a defendant not domiciled in Scotland or Northern Ireland.

Claim for costs order in favour of or against third parties

(18) A claim is made by a party to proceedings for an order that the court exercise its power under section 51 of the Senior Courts Act 1981 to make a costs order in favour of or against a person who is not a party to those proceedings.

(Rule 48.2 sets out the procedure where the court is considering whether to exercise its discretion to make a costs order in favour of or against a non-party.)

Admiralty claims

(19) A claim is –

(a) in the nature of salvage and any part of the services took place within the jurisdiction; or

(b) to enforce a claim under section 153, 154,175 or 176A of the Merchant Shipping Act 1995.

Claims under various enactments

(20) A claim is made –

(a) under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph; or

(b) under the Directive of the Council of the European Communities dated 15 March 1976 No. 76/308/EEC, where service is to be effected in a Member State of the European Union.

Documents to be filed under rule 6.43(2)(c)

4.1

The claimant must provide the following documents for each party to be served out of the jurisdiction –

(1) a copy of the particulars of claim if not already contained in or served with the claim form;

(2) a duplicate of the claim form, of the particulars of claim (if not already contained in or served with the claim form) and of any documents accompanying the claim form;

(3) forms for responding to the claim; and

(4) any translation required under rule 6.45 in duplicate.

4.2

Some countries require legalisation of the document to be served and some require a formal letter of request which must be signed by the Senior Master. Any queries on this should be addressed to the Foreign Process Section (Room E02) at the Royal Courts of Justice.

Service in a Commonwealth State or British overseas territory

5.1

The judicial authorities of certain Commonwealth States which are not a party to the Hague Convention require service to be in accordance with rule 6.42(1)(b)(i) and not 6.42(3). A list of such countries can be obtained from the Foreign Process Section (Room E02) at the Royal Courts of Justice.

5.2

The list of British overseas territories is contained in Schedule 6 to the British Nationality Act 1981. For ease of reference, these are –

(a) Anguilla;

(b) Bermuda;

(c) British Antarctic Territory;

(d) British Indian Ocean Territory;

(e) British Virgin Islands;

(f) Cayman Islands;

(g) Falkland Islands;

(h) Gibraltar;

(i) Montserrat;

(j) Pitcairn, Henderson, Ducie and Oeno;

(k) St. Helena and Dependencies;

(l) South Georgia and the South Sandwich Islands;

(m) Sovereign Base Areas of Akrotiri and Dhekelia; and

(n) Turks and Caicos Islands.

Period for responding to a claim form

6.1

Where rule 6.35(5) applies, the periods within which the defendant must –

(1) file an acknowledgment of service;

(2) file or serve an admission; or

(3) file a defence,

will be calculated in accordance with paragraph 6.3, 6.4 or 6.5.

6.2

Where the court grants permission to serve a claim form out of the jurisdiction the court will determine in accordance with paragraph 6.3, 6.4 or 6.5 the periods within which the defendant must –

(1) file an acknowledgment of service;

(2) file or serve an admission; or

(3) file a defence.

(Rule 6.37(5)(a) provides that when giving permission to serve a claim form out of the jurisdiction the court will specify the period within which the defendant may respond to the claim form.)

6.3

The period for filing an acknowledgment of service under Part 10 or for filing or serving an admission under Part 14 is the number of days listed in the Table after service of the particulars of claim.

6.4

The period for filing a defence under Part 15 is –

(1) the number of days listed in the Table after service of the particulars of claim; or

(2) where the defendant has filed an acknowledgment of service, the number of days listed in the Table plus an additional 14 days after the service of the particulars of claim.

6.5

Under the State Immunity Act 1978, where a State is served, the period permitted under paragraphs 6.3 and 6.4 for filing an acknowledgment of service or defence or for filing or serving an admission does not begin to run until 2 months after the date on which the State is served.

6.6

Where particulars of claim are served out of the jurisdiction any statement as to the period for responding to the claim contained in any of the forms required by rule 7.8 to accompany the particulars of claim must specify the period prescribed under rule 6.35 or by the order permitting service out of the jurisdiction under rule 6.37(5).

Period for responding to an application notice

7.1

Where an application notice ~~or order~~ is served out of the jurisdiction, the period for responding is 7 days less than the number of days listed in the Table.

Further information

7.2

Further information concerning service out of the jurisdiction can be obtained from the Foreign Process Section, Room E02, Royal Courts of Justice, Strand, London WC2A 2LL (telephone 020 7947 6691).

TABLE

Place or country	number of days
Afghanistan	23
Albania	25
Algeria	22
Andorra	21
Angola	22
Anguilla	31
Antigua and Barbuda	23
Antilles (Netherlands)	31
Argentina	22
Armenia	21
Ascension Island	31
Australia	25
Austria	21
Azerbaijan	22
Azores	23
Bahamas	22
Bahrain	22
Balearic Islands	21
Bangladesh	23
Barbados	23
Belarus	21
Belgium	21
Belize	23
Benin	25
Bermuda	31
Bhutan	28
Bolivia	23
Bosnia and Herzegovina	21

Place or country	number of days
Botswana	23
Brazil	22
British Virgin Islands	31
Brunei	25
Bulgaria	23
Burkina Faso	23
Burma	23
Burundi	22
Cambodia	28
Cameroon	22
Canada	22
Canary Islands	22
Cape Verde	25
Caroline Islands	31
Cayman Islands	31
Central African Republic	25
Chad	25
Chile	22
China	24
China (Hong Kong)	31
China (Macau)	31
China (Taiwan)	23
China (Tibet)	34
Christmas Island	27
Cocos (Keeling) Islands	41
Colombia	22
Comoros	23
Congo (formerly Congo Brazzaville or French Congo)	25
Congo (Democratic Republic)	25
Corsica	21
Costa Rica	23
Croatia	21
Cuba	24
Cyprus	31
Czech Republic	21
Denmark	21
Djibouti	22
Dominica	23
Dominican Republic	23
East Timor	25
Ecuador	22
Egypt	22

Place or country	number of days
El Salvador	25
Equatorial Guinea	23
Eritrea	22
Estonia	21
Ethiopia	22
Falkland Islands and Dependencies	31
Faroe Islands	31
Fiji	23
Finland	24
France	21
French Guyana	31
French Polynesia	31
French West Indies	31
Gabon	25
Gambia	22
Georgia	21
Germany	21
Ghana	22
Gibraltar	31
Greece	21
Greenland	31
Grenada	24
Guatemala	24
Guernsey	21
Guinea	22
Guinea-Bissau	22
Guyana	22
Haiti	23
Holland (Netherlands)	21
Honduras	24
Hungary	22
Iceland	22
India	23
Indonesia	22
Iran	22
Iraq	22
Ireland (Republic of)	21
Ireland (Northern)	21
Isle of Man	21
Israel	22
Italy	21
Ivory Coast	22

Place or country	number of days
Jamaica	22
Japan	23
Jersey	21
Jordan	23
Kazakhstan	21
Kenya	22
Kiribati	23
Korea (North)	28
Korea (South)	24
Kosovo	21
Kuwait	22
Kyrgyzstan	21
Laos	30
Latvia	21
Lebanon	22
Lesotho	23
Liberia	22
Libya	21
Liechtenstein	21
Lithuania	21
Luxembourg	21
Macedonia	21
Madagascar	23
Madeira	31
Malawi	23
Malaysia	24
Maldives	26
Mali	25
Malta	21
Mariana Islands	26
Marshall Islands	32
Mauritania	23
Mauritius	22
Mexico	23
Micronesia	23
Moldova	21
Monaco	21
Mongolia	24
Montenegro	21
Montserrat	31
Morocco	22
Mozambique	23

Place or country	number of days
Namibia	23
Nauru	36
Nepal	23
Netherlands	21
Nevis	24
New Caledonia	31
New Zealand	26
New Zealand Island Territories	50
Nicaragua	24
Niger (Republic of)	25
Nigeria	22
Norfolk Island	31
Norway	21
Oman (Sultanate of)	22
Pakistan	23
Palau	23
Panama	26
Papua New Guinea	26
Paraguay	22
Peru	22
Philippines	23
Pitcairn, Henderson, Ducie and Oeno Islands	31
Poland	21
Portugal	21
Portuguese Timor	31
Puerto Rico	23
Qatar	23
Reunion	31
Romania	22
Russia	21
Rwanda	23
Sabah	23
St. Helena	31
St. Kitts and Nevis	24
St. Lucia	24
St. Pierre and Miquelon	31
St. Vincent and the Grenadines	24
Samoa (U.S.A. Territory) (See also Western Samoa)	30
San Marino	21
Sao Tome and Principe	25
Sarawak	28
Saudi Arabia	24

Place or country	number of days
Scotland	21
Senegal	22
Serbia	21
Seychelles	22
Sierra Leone	22
Singapore	22
Slovakia	21
Slovenia	21
Society Islands (French Polynesia)	31
Solomon Islands	29
Somalia	22
South Africa	22
South Georgia (Falkland Island Dependencies)	31
South Orkneys	21
South Shetlands	21
Spain	21
Spanish Territories of North Africa	31
Sri Lanka	23
Sudan	22
Surinam	22
Swaziland	22
Sweden	21
Switzerland	21
Syria	23
Tajikistan	21
Tanzania	22
Thailand	23
Togo	22
Tonga	30
Trinidad and Tobago	23
Tristan Da Cunha	31
Tunisia	22
Turkey	21
Turkmenistan	21
Turks & Caicos Islands	31
Tuvalu	23
Uganda	22
Ukraine	21
United Arab Emirates	22
United States of America	22
Uruguay	22
Uzbekistan	21

Place or country	number of days
Vanuatu	29
Vatican City State	21
Venezuela	22
Vietnam	28
Virgin Islands – U.S.A	24
Wake Island	25
Western Samoa	34
Yemen (Republic of)	30
Zaire	25
Zambia	23
Zimbabwe	22

Annex

Service Regulation (Rule 6.41) (PDF - opens in new window)

EXHIBIT 20

A Court of Justice of the European Communities

Owusu *v* Jackson and others

(Case C-281/02)

2004 May 4; Dec 14;
B 2005 March 1

Acting President P Jann
Presidents of Chamber CWA Timmermans and A Rosas
Judges C Gulmann, J-P Puissochet, R Schintgen, N Colneric, S von Bahr and JN Cunha Rodrigues
Advocate General P Léger

Conflict of laws — Jurisdiction under European Convention — Forum non conveniens — One only of several defendants domiciled in contracting state — Courts of that state having jurisdiction under Convention vis-à-vis that defendant — Action having close ties with non-contracting state and none with any other contracting state — Whether discretion to decline jurisdiction in favour of non-contracting state — Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (as amended), art 2

C

The claimant, domiciled in the United Kingdom, who had hired from the first defendant, also domiciled in the United Kingdom, a holiday villa in Jamaica which
D had access to a private beach, suffered severe injuries on diving from the beach onto a submerged sandbank, and brought an action in England for damages against the first defendant and other defendants, Jamaican companies of which one owned the beach and others had licences in connection with its use. The defendants invited the judge to decline jurisdiction in favour of the courts of Jamaica, on the basis of the doctrine of forum non conveniens, but the judge refused on the grounds that, despite the connecting factors with Jamaica, article 2 of the Brussels Convention on Jurisdiction
E and the Enforcement of Judgments in Civil and Commercial Matters 1968 (as amended)[1] obliged him to assume jurisdiction vis-à-vis the first defendant in view of that defendant's domicile, and that if he did not try the action against the other defendants also, there would be a risk of conflicting decisions in different jurisdictions. On the defendants' appeal and reference by the Court of Appeal to the Court of Justice of the European Communities for a preliminary ruling, the principal question referred was whether, where the case before a court of a Brussels
F Convention contracting state had connecting factors with a non-contracting state but none with any other contracting state, the court could exercise a discretionary power, available under its national law, to decline jurisdiction in favour of the courts of the non-contracting state.

On the reference—

Held, that since article 2 of the Convention was mandatory and the Convention contained no express exception relating to forum non conveniens, it was not open to
G a court of a contracting state to decline jurisdiction conferred on it by article 2 on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other contracting state was in issue or the proceedings had no connecting factor with any other contracting state (post, paras 35, 37, 46, operative part).

The following cases are referred to in the judgment:

H *Azienda Agricola Ettore Ribaldi v Azienda di Stato per gli interventi nel mercato agricolo (AIMA)* (Joined Cases C-480–482, 484, 489–491 and 497–499/00) (not yet reported) 25 March 2004, ECJ

[1] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (as amended), art 2: see post, para 4.

Bacardi-Martini SAS v Newcastle United Football Co Ltd (Case C-318/00) [2003] ECR I-905, ECJ
Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG (Wabag) (Case C-256/00) [2003] 1 WLR 1113; [2002] ECR I-1699, ECJ
Djabali v Caisse d'Allocations Familiales de l'Essonne (Case C-314/96) [1998] ECR I-1149, ECJ
Erich Gasser GmbH v MISAT Srl (Case C-116/02) [2005] 1 QB 1; [2004] 3 WLR 1070, ECJ
GIE Groupe Concorde v Master of the vessel Suhadiwarno Panjan (Case C-440/97) [1999] ECR I-6307, ECJ
Gmurzynska-Bscher v Oberfinanzdirektion Köln (Case C-231/89) [1990] ECR I-4003, ECJ
Harrods (Buenos Aires) Ltd, In re [1992] Ch 72; [1991] 3 WLR 397; [1991] 4 All ER 334, CA
Marc Rich and Co AG v Società Italiana Impianti PA (Case C-190/89) [1991] ECR I-3855, ECJ
Mund & Fester v Hatrex Internationaal Transport (Case C-398/92) [1994] ECR I-467, ECJ
Rechnungshof v Österreichischer Rundfunk (Joined Cases C-465/00 and 138 and 139/01) [2003] ECR I-4989, ECJ
Spiliada Maritime Corpn v Cansulex Ltd [1987] AC 460; [1986] 3 WLR 972; [1986] 3 All ER 843; [1987] 1 Lloyd's Rep 1, HL (E)
Tatry, Owners of cargo lately laden on board the ship v Owners of the ship Maciej Rataj (Case C-406/92) (Note) [1999] QB 515; [1999] 2 WLR 181; [1994] ECR I-5439, ECJ
Turner v Grovit (Case C-159/02) [2005] 1 AC 101; [2004] 3 WLR 1193; [2005] ICR 23; [2004] All ER (EC) 485, ECJ
Universal General Insurance Co (UGIC) v Group Josi Reinsurance Co SA (Case C-412/98) [2001] QB 68; [2000] 3 WLR 1625; [2000] ECR I-5925, ECJ

REFERENCE by the Court of Appeal

In proceedings between the claimant, Andrew Owusu, and the defendants, NB Jackson (trading as Villa Holidays Bal-Inn Villas), Mammee Bay Resorts Ltd, Mammee Bay Club Ltd, The Enchanted Garden Resorts & Spa Ltd, Consulting Services Ltd and Town & Country Resorts Ltd, the Court of Appeal, by order of 5 July 2002, referred to the Court of Justice, for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, two questions (see post, para 22) on the Convention of 1968 (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; amended text at p 77), the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L388, p 1), and the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L285, p 1).

The Judge Rapporteur was Judge Schintgen. The facts are stated in the judgment.

Richard Plender QC and *Philip Mead* for the claimant.

Bernard Doherty and *Colin Thomann* for the first defendant.

P Sherrington, S Armstrong and *L Lamb*, solicitors, for the third, fourth and sixth defendants.

A *D Lloyd-Jones QC* and *K Manji*, agent, for the United Kingdom Government.

R Wagner, agent, for the German Government.

A-M Rouchaud-Joët and *M Wilderspin*, agents, for the Commission of the European Communities.

B The opinion of **MR ADVOCATE GENERAL LÉGER**, delivered on 14 December 2004, is not included in this report.

1 March 2005. **THE COURT (GRAND CHAMBER)** delivered the following judgment in Luxembourg.

1 This reference for a preliminary ruling concerns the interpretation of C article 2 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as amended) ("the Brussels Convention").

2 The reference was made in the course of proceedings brought by the claimant, Mr Owusu, against the first defendant, Mr Jackson (trading as Villa Holidays Bal-Inn Villas), and several companies governed by Jamaican D law, following an accident suffered by the claimant in Jamaica.

Legal background

The Brussels Convention

3 According to its Preamble, the Brussels Convention is intended to facilitate the reciprocal recognition and enforcement of judgments of courts E or tribunals, in accordance with article 293 EC, and to strengthen in the Community the legal protection of persons therein established. The Preamble also states that it is necessary for that purpose to determine the international jurisdiction of the courts of the contracting states.

4 The provisions relating to jurisdiction appear in Title II of the Brussels Convention. According to article 2:

F "Subject to the provisions of this Convention, persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state. Persons who are not nationals of the state in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that state."

5 However, article 5(1)(3) provides that a defendant may be sued in G another contracting state, in matters relating to a contract, in the courts for the place of performance of the obligation in question, and, in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.

6 The Brussels Convention is also intended to prevent conflicting decisions. Thus, according to article 21, which concerns lis pendens:

H "Where proceedings involving the same cause of action and between the same parties are brought in the courts of different contracting states, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established,

any court other than the court first seised shall decline jurisdiction in favour of that court." A

7 Article 22 provides:

"Where related actions are brought in the courts of different contracting states, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings. A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions. For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings." B C

National law

8 According to the doctrine of forum non conveniens, as understood in English law, a national court may decline to exercise jurisdiction on the ground that a court in another state, which also has jurisdiction, would objectively be a more appropriate forum for the trial of the action, that is to say, a forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice: judgment of the House of Lords in *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460, particularly at p 476, per Lord Goff of Chieveley. D

9 An English court which decides to decline jurisdiction under the doctrine of forum non conveniens stays proceedings so that the proceedings which are thus provisionally suspended can be resumed should it prove, in particular, that the foreign forum has no jurisdiction to hear the case or that the claimant has no access to effective justice in that forum. E

The main proceedings and the questions referred for a preliminary ruling

10 On 10 October 1997, the claimant, a British national domiciled in the United Kingdom, suffered a very serious accident during a holiday in Jamaica. He walked into the sea, and when the water was up to his waist he dived in, struck his head against a submerged sandbank and sustained a fracture of his fifth cervical vertebra which rendered him tetraplegic. F

11 Following that accident, the claimant brought an action in the United Kingdom for breach of contract against the first defendant, who is also domiciled in that state. The first defendant had let to the claimant a holiday villa in Mammee Bay, Jamaica. The claimant claims that the contract, which provided that he would have access to a private beach, contained an implied term that the beach would be reasonably safe or free from hidden dangers. G

12 The claimant also brought an action in tort in the United Kingdom against several Jamaican companies, including the third defendant, Mammee Bay Club Ltd, the owner and occupier of the beach at Mammee Bay which provided the claimant with free access to the beach; the fourth defendant, The Enchanted Garden Resorts & Spa Ltd, which operates a holiday complex close to Mammee Bay, and whose guests were also licensed to use the beach, and the sixth defendant, Town & Country Resorts Ltd, H

A which operates a large hotel adjoining the beach, and which has a licence to use the beach, subject to the condition that it is responsible for its management, upkeep and control.

13 According to the file, another English holidaymaker had suffered a similar accident two years earlier in which she, too, was rendered tetraplegic. The action in tort against the Jamaican defendants therefore embraces not only a contention that they failed to warn swimmers of the B hazard constituted by the submerged sandbank, but also a contention that they failed to heed the earlier accident.

14 The proceedings were commenced by a claim form issued out of the Sheffield District Registry of the High Court of England and Wales, Civil Division, on 6 October 2000. They were served on the first defendant in the United Kingdom and, on 12 December 2000, leave was granted to the C claimant to serve the proceedings on the other defendants in Jamaica. Service was effected on the third, fourth and sixth defendants, but not on Mammee Bay Resorts Ltd or Consulting Services Ltd.

15 The first, third, fourth and sixth defendants applied to the court for a declaration that it should not exercise its jurisdiction in relation to the claim against them. In support of their applications, they argued that the case had closer links with Jamaica and that the Jamaican courts were a forum with D jurisdiction in which the case might be tried more suitably for the interests of all the parties and the ends of justice.

16 By judgment of 16 October 2001, the deputy High Court judge in Sheffield held that it was clear from *Universal General Insurance Co (UGIC) v Group Josi Reinsurance Co SA* (Case C-412/98) [2001] QB 68, 85, paras 59–61, that the application of the jurisdictional rules in the Brussels E Convention to a dispute depended, in principle, on whether the defendant had its seat or domicile in a contracting state, and that the Convention applied to a dispute between a defendant domiciled in a contracting state and a claimant domiciled in a non-contracting state. In those circumstances, the decision of the Court of Appeal in *In re Harrods (Buenos Aires) Ltd* [1992] Ch 72, which accepted that it was possible for the English courts, applying the doctrine of forum non conveniens, to decline to exercise the F jurisdiction conferred on them by article 2 of the Brussels Convention, was bad law.

17 Taking the view that he had no power himself under article 2 of the Protocol of 3 June 1971 to refer a question to the Court of Justice for a preliminary ruling to clarify that point, the judge held that, in the light of the principles laid down in the *UGIC* case, it was not open to him to stay the G action against the first defendant since he was domiciled in a contracting state.

18 Notwithstanding the connecting factors that the action brought against the other defendants might have with Jamaica, the judge held that he was also unable to stay the action against them, in so far as the Brussels Convention precluded him from staying proceedings in the action against the first defendant. Otherwise, there would be a risk that the courts in two H jurisdictions would end up trying the same factual issues on the same or similar evidence and reach different conclusions. He therefore held that the United Kingdom, and not Jamaica, was the state with the appropriate forum to try the action and dismissed the applications for a declaration that the court should not exercise jurisdiction.

19 The first, third, fourth and sixth defendants appealed against that order. The Court of Appeal (England and Wales), Civil Division, states that, in this case, the competing jurisdictions are a contracting state and a non-contracting state. If article 2 of the Brussels Convention is mandatory, even in this context, the first defendant must be sued in the United Kingdom before the courts of his domicile and it is not open to the claimant to sue him under article 5(3) of the Brussels Convention in Jamaica, where the harmful event occurred, because that state is not another contracting state. In the absence of an express derogation to that effect in the Convention, it is therefore not permissible to create an exception to the rule in article 2. According to the referring court, the question of the application of forum non conveniens in favour of the courts of a non-contracting state, when one of the defendants is domiciled in a contracting state, is not a matter on which the Court of Justice has ever given a ruling.

20 According to the claimant, article 2 of the Brussels Convention is of mandatory application, so that the English courts cannot stay proceedings in the United Kingdom against a defendant domiciled there, even if the English court takes the view that another forum in a non-contracting state is more appropriate.

21 The referring court points out that if that position were correct it might have serious consequences in a number of other situations concerning exclusive jurisdiction or lis pendens. It adds that a judgment delivered in England, deciding the case, which was to be enforced in Jamaica, particularly as regards the Jamaican defendants, would encounter difficulty over certain rules in force in that country on the recognition and enforcement of foreign judgments.

22 Against that background, the Court of Appeal decided to stay its proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> "(1) Is it inconsistent with the Brussels Convention, where a claimant contends that jurisdiction is founded on article 2, for a court of a contracting state to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that state in favour of the courts of a non-contracting state, (a) if the jurisdiction of no other contracting state under the 1968 Convention is in issue, (b) if the proceedings have no connecting factors to any other contracting state? (2) If the answer to question 1(a) or (b) is yes, is it inconsistent in all circumstances or only in some and if so which?"

On the questions referred

The first question

23 In order to reply to the first question, it must first be determined whether article 2 of the Brussels Convention is applicable in circumstances such as those in the main proceedings, that is to say, where the claimant and one of the defendants are domiciled in the same contracting state and the case between them before the courts of that state has certain connecting factors with a non-contracting state, but not with another contracting state. Only if it is will the question arise whether, in the circumstances of the case in the main proceedings, the Brussels Convention precludes the application by a court of a contracting state of the forum non conveniens doctrine where

A article 2 of that Convention permits that court to claim jurisdiction because the defendant is domiciled in that state.

The applicability of article 2 of the Brussels Convention

24 Nothing in the wording of article 2 of the Brussels Convention suggests that the application of the general rule of jurisdiction laid down by
B that article solely on the basis of the defendant's domicile in a contracting state is subject to the condition that there should be a legal relationship involving a number of contracting states.

25 Of course, as is clear from the Jenard report on the Convention, OJ 1979 C59, p 1, at p 8, for the jurisdiction rules of the Brussels Convention to apply at all the existence of an international element is required.

26 However, the international nature of the legal relationship at issue
C need not necessarily derive, for the purposes of the application of article 2, from the involvement, either because of the subject matter of the proceedings or the respective domiciles of the parties, of a number of contracting states. The involvement of a contracting state and a non-contracting state, for example because the claimant and one defendant are domiciled in the first state and the events at issue occurred in the second,
D would also make the legal relationship at issue international in nature. That situation is such as to raise questions in the contracting state, as it does in the main proceedings, relating to the determination of international jurisdiction, which is precisely one of the objectives of the Brussels Convention, according to the third recital in its Preamble.

27 Thus, the Court of Justice has already interpreted the rules of jurisdiction laid down by the Brussels Convention in cases where the
E claimant was domiciled or had its seat in a non-contracting state while the defendant was domiciled in a contracting state: see *Marc Rich and Co AG v Società Italiana Impianti PA* (Case C-190/89) [1991] ECR I-3855; *Owners of cargo lately laden on board the ship Tatry v Owners of the ship Maciej Rataj* (Case C-406/92) (Note) [1999] QB 515, and *Universal General Insurance Co (UGIC) v Group Josi Reinsurance Co SA* (Case C-412/98)
F [2001] QB 68, 85, para 60.

28 Moreover, the rules of the Brussels Convention on exclusive jurisdiction or express prorogation of jurisdiction are also likely to be applicable to legal relationships involving only one contracting state and one or more non-contracting states. That is so, under article 16 of the Convention, in the case of proceedings which have as their object rights in rem in immovable property or tenancies of immovable property between
G persons domiciled in a non-contracting state and relating to an asset in a contracting state, or, under article 17, where an agreement conferring jurisdiction binding at least one party domiciled in a non-contracting state opts for a court in a contracting state.

29 Similarly, as the Advocate General pointed out in paras 142–152 of his opinion, whilst it is clear from their wording that the Brussels Convention rules on lis pendens and related actions or recognition and
H enforcement of judgments apply to relationships between different contracting states, provided that they concern proceedings pending before courts of different contracting states or judgments delivered by courts of a contracting state with a view to recognition and enforcement thereof in another contracting state, the fact nevertheless remains that the disputes

with which the proceedings or decisions in question are concerned may be international, involving a contracting state and a non-contracting state, and allow recourse, on that ground, to the general rule of jurisdiction laid down by article 2.

30 To counter the argument that article 2 applies to a legal situation involving a single contracting state and one or more non-contracting states, the defendants in the main proceedings and the United Kingdom Government have cited the principle of the relative effect of treaties, which means that the Brussels Convention cannot impose any obligation on states which have not agreed to be bound by it.

31 In that regard, suffice it to note that the designation of the court of a contracting state as the court having jurisdiction on the ground of the defendant's domicile in that state, even in proceedings which are, at least in part, connected, because of their subject matter or the claimant's domicile, with a non-contracting state, is not such as to impose an obligation on that state.

32 The first defendant and the United Kingdom Government have also emphasised, in support of the argument that article 2 of the Brussels Convention applies only to disputes with connections to a number of contracting states, the fundamental objective pursued by the Convention which is to ensure the free movement of judgments between contracting states.

33 The purpose of the fourth indent of article 220 of the EC Treaty (now the fourth indent of article 293 EC), on the basis of which the member states concluded the Brussels Convention, is to facilitate the working of the common market through the adoption of rules of jurisdiction for disputes relating thereto and through the elimination, as far as is possible, of difficulties concerning the recognition and enforcement of judgments in the territory of the contracting states: *Mund & Fester v Hatrex Internationaal Transport* (Case C-398/92) [1994] ECR I-467, 478, para 11. In fact it is not disputed that the Brussels Convention helps to ensure the smooth working of the internal market.

34 However, the uniform rules of jurisdiction contained in the Brussels Convention are not intended to apply only to situations in which there is a real and sufficient link with the working of the internal market, by definition involving a number of member states. Suffice it to observe in that regard that the consolidation as such of the rules on conflict of jurisdiction and on the recognition and enforcement of judgments, effected by the Brussels Convention in respect of cases with an international element, is without doubt intended to eliminate obstacles to the functioning of the internal market which may derive from disparities between national legal systems on the subject: see, by analogy, as regards harmonisation Directives based on article 95 EC intended to improve the conditions for the establishment and working of the internal market, *Rechnungshof v Österreichischer Rundfunk* (Joined Cases C-465/00 and 138 and 139/01) [2003] ECR I-4989, 5034–5035, paras 41 and 42.

35 It follows from the foregoing that article 2 of the Brussels Convention applies to circumstances such as those in the main proceedings, involving relationships between the courts of a single contracting state and those of a non-contracting state rather than relationships between the courts of a number of contracting states.

A **36** It must therefore be considered whether, in such circumstances, the Brussels Convention precludes a court of a contracting state from applying the forum non conveniens doctrine and declining to exercise the jurisdiction conferred on it by article 2 of that Convention.

The compatibility of the forum non conveniens doctrine with the Brussels Convention

B **37** It must be observed, first, that article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention: see, as regards the compulsory system of jurisdiction set up by the Convention, *Erich Gasser GmbH v MISAT Srl* (Case C-116/02) [2005] 1 QB 1, 35, para 72, and *Turner v Grovit* (Case C C-159/02) [2005] 1 AC 101, 113, para 24. It is common ground that no exception on the basis of the forum non conveniens doctrine was provided for by the authors of the Convention, although the question was discussed when the Convention of 9 October 1978 on the Accession of Denmark, Ireland and the United Kingdom was drawn up, as is apparent from the report on that Convention by Professor Schlosser, OJ 1979 C59, p 71, at D pp 97–98, paras 77 and 78.

38 Respect for the principle of legal certainty, which is one of the objectives of the Brussels Convention (see, inter alia, *GIE Groupe Concorde v Master of the vessel Suhadiwarno Panjan* (Case C-440/97) [1999] ECR I-6307, 6350, para 23, and *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG (Wabag)* (Case C-256/00) [2003] 1 WLR 1113, 1130, para 24), would not be fully guaranteed if the court having E jurisdiction under the Convention had to be allowed to apply the forum non conveniens doctrine.

39 According to its Preamble, the Brussels Convention is intended to strengthen in the Community the legal protection of persons established therein, by laying down common rules on jurisdiction to guarantee certainty as to the allocation of jurisdiction among the various national courts before F which proceedings in a particular case may be brought: *Besix*, para 25.

40 The court has thus held that the principle of legal certainty requires, in particular, that the jurisdictional rules which derogate from the general rule laid down in article 2 should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the state in which he is domiciled, he may be sued: the *GIE Groupe Concorde* case [1999] ECR I-6307, 6350–6351, para 24, G and the *Besix* case [2003] 1 WLR 1113, 1130, para 26.

41 Application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of article 2, and consequently to undermine the principle of legal certainty, which is the basis of the H Convention.

42 The legal protection of persons established in the Community would also be undermined. First, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee

before which other court he could be sued. Second, where a plea is raised on the basis that a foreign court is a more appropriate forum to try the action, it is for the claimant to establish that he will not be able to obtain justice before that foreign court or, if the court seised decides to allow the plea, that the foreign court has in fact no jurisdiction to try the action or that the claimant does not, in practice, have access to effective justice before that court, irrespective of the cost entailed by the bringing of a fresh action before a court of another state and the prolongation of the procedural time limits.

43 Moreover, allowing forum non conveniens in the context of the Brussels Convention would be likely to affect the uniform application of the rules of jurisdiction contained therein in so far as that doctrine is recognised only in a limited number of contracting states, whereas the objective of the Brussels Convention is precisely to lay down common rules to the exclusion of derogating national rules.

44 The defendants in the main proceedings emphasise the negative consequences which would result in practice from the obligation the English courts would then be under to try this case, inter alia as regards the expense of the proceedings, the possibility of recovering their costs in England if the claimant's action is dismissed, the logistical difficulties resulting from the geographical distance, the need to assess the merits of the case according to Jamaican standards, the enforceability in Jamaica of a default judgment and the impossibility of enforcing cross-claims against the other defendants.

45 In that regard, genuine as those difficulties may be, suffice it to observe that such considerations, which are precisely those which may be taken into account when forum non conveniens is considered, are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in article 2 of the Brussels Convention, for the reasons set out above.

46 In the light of all the foregoing considerations, the answer to the first question must be that the Brussels Convention precludes a court of a contracting state from declining the jurisdiction conferred on it by article 2 of that Convention on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other contracting state is in issue or the proceedings have no connecting factors to any other contracting state.

The second question

47 By its second question, the referring court seeks essentially to know whether, if this court takes the view that the Brussels Convention precludes the application of forum non conveniens, its application is ruled out in all circumstances or only in certain circumstances.

48 According to the order for reference and the observations of the defendants and the United Kingdom Government, that second question is asked in connection with cases involving identical or related proceedings pending before a court of a non-contracting state, or a convention granting jurisdiction to such a court, or a connection with that state of the same type as those referred to in article 16 of the Brussels Convention.

49 The procedure provided for in article 234 EC is an instrument of co-operation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases on which they

A are called to adjudicate: see, inter alia, *Gmurzynska-Bscher v Oberfinanzdirektion Köln* (Case C-231/89) [1990] ECR I-4003, 4017, para 18; *Djabali v Caisse d'Allocations Familiales de l'Essonne* (Case C-314/96) [1998] ECR I-1149, 1162, para 17, and *Bacardi-Martini SAS v Newcastle United Football Co Ltd* (Case C-318/00) [2003] ECR I-905, 932, para 41.

50 Thus, the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be B delivered but rather that it is necessary for the effective resolution of a dispute: see, to that effect, *Djabali*, para 19; *Bacardi-Martini*, para 42, and *Azienda Agricola Ettore Ribaldi v Azienda di Stato per gli interventi nel mercato agricolo (AIMA)* (Joined Cases C-480–482, 484, 489–491 and 497–499/00) (not yet reported), 25 March 2004, para 72.

51 In the present case, it is common ground that the factual C circumstances described in paragraph 48 of this judgment are not the same as those of the main proceedings.

52 Accordingly there is no need to reply to the second question.

Costs

53 Since these proceedings are, for the parties to the main proceedings, D a step in the action pending before the national court, the decision on costs is 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 (grand chamber) rules:

The Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by E 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, precludes a court of a contracting state from declining the jurisdiction conferred on it by article 2 of that Convention on the ground that a court of a non-contracting state would F be a more appropriate forum for the trial of the action, even if the jurisdiction of no other contracting state is in issue or the proceedings have no connecting factors to any other contracting state.

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EXHIBIT 21

LLOYD'S
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COURT OF APPEAL

Mar. 26, 27, 28 and 29, 1984

CORDOBA SHIPPING CO. LTD.
v.
NATIONAL STATE BANK, ELIZABETH, NEW JERSEY

(THE "ALBAFORTH")

Before Lord Justice ACKNER and Lord Justice ROBERT GOFF

Practice — Jurisdiction — Alleged negligent misstatement — Whether tort committed within jurisdiction — Whether proper case for service of writ out of jurisdiction.

On or about Sept. 5, 1979, the owners let their vessel *Albaforth* to the charterers Maro Shipping Ltd. (Maro). That fixture was negotiated and concluded by telephone and telex between two firms of brokers, Bulk Chartering Brokers Ltd. (Bulk) acting for the owners and Thornton Chartering Ltd. (Thornton) for Maro.

Maro's obligations under the charter were guaranteed by International Trader Inc. (I.T.I.) and before concluding the fixture Bulk required to be provided with a banker's status report on the guarantor I.T.I.

On Sept. 5 the bank sent a telex to Bulk stating inter alia —

> . . . re (ITI) excellent account of our bank. Our experience has always been favourable . . .

The owners alleged that in reliance upon that telex they accepted I.T.I. as guarantors.

The charter was not a success, a large part of the hire not being paid. Cheques provided by I.T.I. drawn on a Connecticut bank were later dishonoured and when the vessel was redelivered at the end of 1979 there was over $300,000 overdue including unpaid bunkers.

The owners brought proceedings in Connecticut against Maro and I.T.I. and in arbitration proceedings in New York against Maro obtained an award of $349,939 plus interest. That award was not honoured. The owners then brought proceedings for the enforcement of the award and guarantee against Maro and I.T.I. and judgment was entered for them in the sum of $403,863.43 plus interest. I.T.I. paid a little under $10,000 and the owners therefore commenced these proceedings against the defendants bank.

The owners claimed damages against the bank for negligent misstatement contained in a telex dated Sept. 5 in reliance upon which the owners had contracted with a third party and had suffered loss.

Mr. Justice Parker gave the owners leave to serve the writ out of the jurisdiction.

The defendants applied to set aside that service.

———*Held*, by STAUGHTON, J., that the ex parte order for leave to serve the writ out of the jurisdiction would be discharged and the purported service of the writ would be set aside.

The owners appealed.

———*Held*, by C.A. (ACKNER and ROBERT GOFF, L.JJ.), that (1) on the facts and the evidence the alleged tort was committed within the jurisdiction and the learned Judge was fully entitled to reach that conclusion (*see* p. 93, col. 1);

———*Diamond v. Bank of London and Montreal Ltd.*, [1979] 1 Lloyd's Rep. 335, applied.

(2) the jurisdiction in which a tort had been committed was prima facie the natural forum for the determination of the dispute; here England was the natural forum and the learned Judge was in error in deciding that its choice could be criticized as being an example of forum shopping and in paying attention to the proceedings which the owners brought against Maro and I.T.I. in New York and Connecticut and the learned Judge's exercise of his discretion would be set aside (*see* p. 94, col. 2);

(3) in the circumstances there were good reasons to allow the service of the writ out of the jurisdiction and the appeal would be allowed (*see* p. 97, cols. 1 and 2).

The following cases were referred to in the judgments:

Boys v. Chaplin, (H.L.) [1971] A.C. 356;

Diamond v. Bank of London and Montreal Ltd., (C.A.) [1979] 1 Lloyd's Rep. 335; [1979] Q.B. 333;

Distillers Co. (Biochemicals) Ltd. v. Laura Ann Thompson, (H.L.) [1971] A.C. 458;

Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., (H.L.) [1963] 1 Lloyd's Rep. 485; [1964] A.C. 465;

Rasheed (Amin) Corporation v. Kuwait Insurance Co., (H.L.) [1983] 2 Lloyd's Rep. 365; [1984] A.C. 50.

This was an appeal by the plaintiff owners, Cordoba Shipping Co. Ltd. from the decision of Mr. Justice Staughton given in favour of the defendant bank the National State Bank, Elizabeth, New Jersey and holding that the ex parte order made by Mr. Justice Parker, giving the owners leave to serve out of jurisdiction a writ claiming damages against the bank for

negligent misstatement, would be discharged and the purported service of the writ be set aside.

Mr. Bernard Rix, Q.C. and Mr. Hugo Page (instructed by Messrs. Ince & Co.) for the plaintiffs; Mr. Leslie Joseph, Q.C. and Mr. Gerald Rabie (instructed by Messrs. Marriott Harrison & Co.) for the defendants.

The further facts are stated in the judgment of Lord Justice Ackner.

JUDGMENT

Lord Justice ACKNER: On Oct. 22, 1982, Mr. Justice Staughton discharged an ex parte order made by Mr. Justice Parker (as he then was) giving the appellants (the owners) leave to serve out of the jurisdiction a writ claiming damages against the respondents, a New Jersey bank (the bank) for —

> . . . negligent misstatement . . . contained in a telex dated 5th September 1979 sent by the Defendants to the Plaintiffs, in reliance upon which the Plaintiffs contracted with a third party and have suffered loss.

He further set aside the purported service of the writ.

The facts are simple enough. The owners are a Liberian company, and *Albaforth* belongs to them. The owners have agents in London, River Plate Shipping and Trading Agency Ltd. ("River Plate"). River Plate has a broking subsidiary based at the same London address, Bulk Chartering Brokers Ltd. ("Bulk").

On or about Sept. 5, 1979, the vessel was chartered to Maro Shipping Ltd. ("Maro"), a Liberian company. The fixture was negotiated and concluded by telephone and telex between the two firms of brokers in London, viz Bulk acting for the owners and Thornton Chartering Ltd. ("Thornton") for Maro. Maro's obligations under the charter-party were guaranteed by International Trader Inc., a Connecticut company ("I.T.I."). I.T.I. and Maro were in common ownership and/or control by one Herman. Before concluding the fixture, the owners' brokers required to be provided with a banker's status report on the guarantor, I.T.L.

On Sept. 5, 1979, the bank sent a telex to Bulk in London in these terms:

> . . . Confirming our telephone conversations of today re International Traders Inc. Stamford Conn. excellent account of our bank Our experience has always been favourable Have opened letters of credit for them in low seven figures stop Have made advance in low six figures stop Has chartered many vessels and there has been no delay in freight payments.

This, as the learned Judge observed, was a reference in glowing terms. The owners said that, in reliance upon it, they accepted I.T.I. as guarantors.

The charter-party was not a success, a large part of the hire not being paid. Cheques were provided by I.T.I. drawn on Hartford Bank, Connecticut, but they were later dishonoured, and, when the vessel was redelivered at the end of 1979, there was over $300,000 overdue, including unpaid bunkers. The owners brought proceedings, both against Maro and I.T.I. in Connecticut for the purpose of a pre-judgment attachment (a remedy somewhat similar to our *Mareva* injunction) at Hartford Bank. At about the same time they brought similar proceedings against Maro and I.T.I. for attachment of any assets they had in the defendant bank. The owners were obliged by the terms of the charter-party, which was on the New York Produce Exchange form, to obtain their substantive remedy through arbitration proceedings in New York against Maro, and they obtained an award on Oct. 5, 1980, in the sum of $349,939.62 plus interest, and the arbitrator's fees and expenses. This award was not honoured. The owners then took proceedings for the enforcement of the award and the guarantee in the United States District Court for the Southern District of New York against Maro and I.T.I. Judgment was entered for them in the sum of $403,863.43 plus interest. All they apparently achieved was a little under $10,000 paid by I.T.I. They therefore began these proceedings against the bank.

Before Mr. Justice Staughton it was contended, inter alia, that the owners could not show a good arguable case that the reference given in the telex was untrue and given negligently. Mr. Justice Staughton found on this point in favour of the owners, and, although in the respondents' notice his decision was attacked, Mr. Joseph conceded the point before this appeal was called on. The matters which Mr. Justice Staughton and we were called upon to decide are as follows.

(1) *Was the alleged tort committed within the jurisdiction?*

While anxious to keep the point open, Mr. Joseph accepted that we were bound by the decision of this Court in *Diamond v. Bank of London and Montreal Ltd.*, [1979] 1 Lloyd's Rep. 335; [1979] Q.B. 333, where it was held that the tort of negligent misrepresentation is committed where the representation is received and acted upon. There is no question as to where the

reference was received. The telex was addressed to River Plate Shipping, London, England, for the attention of Mr. Newman, who is a director of Bulk and who duly received the telex. Before Mr. Justice Staughton there was an issue as to *who* on behalf of the owners took the decision to rely on the bank's telex and conclude the charter-party. The learned Judge commented upon the apparent reticence of the owners in their affidavits to deal with this issue, but, having referred in some detail to the affidavit of the owners' solicitors, concluded that Mr. Konialidis, a director of River Plate, was the directing mind of the owners for the purpose of the conclusion of the charter-party. He had delegated to a Mr. Rendall, a director of River Plate, authority to instruct the broker to conclude the charter-party fixture on the owners' behalf if he considered that the credit reference given for I.T.I. was satisfactory. It was Mr. Rendall in London who was the person who relied on the bank's telex. He accordingly held that the alleged tort was committed within the jurisdiction. On the material before him the Judge was fully entitled to reach these conclusions.

Mr. Joseph on behalf of the owners, who did not appear before Mr. Justice Staughton, has in the respondents' notice taken a somewhat different point. He contends that there is no, or no satisfactory, evidence that any *reliance* was placed in England upon the bank's reference, because the owners failed to make out a good arguable case that they received the telex containing the reference before agreeing the fixture. Their contention is as follows. On Sept. 5, Bulk sent a telex to Thornton Chartering, Maro's brokers in London, the opening words of which read as follows:

> . . . Pleased to confirm hve fxd with subs as follows:— Albaforth/Maro to be guaranteed by International Traders Inc. of Stamford, Ct Sub ows approval of chrs to be lifted by 11.00 N.Y. 5 Sept.

There was no timing on this telex. The only clue is that 11 00 hours New York time equals 16 00 hours British time in September.

In our bundle there is what appears to be a working draft of this telex, understandably enough because I have only quoted a very small part, there being a great deal of detail which follows the quotation which I have made. In the course of this appeal Mr. Joseph asked to see the original of this draft and discovered to his and everybody else's surprise that it contained on its back, in manuscript, the following statement:

> Dly [delivery] dropping tugs at mouth of Calumet River $8,500.00 semi-monthly Delete subjects.

In the top right-hand corner of this document, in manuscript, there was written "5-30 pm".

The bank's telex of Sept. 5 containing the reference was timed 12 55 hours New York time, i.e., 5 55 p.m. British time. Mr. Joseph's point was that, if subjects were deleted at 5 30, then there was a firm fixture at this time, that is, prior to the receipt of the bank's reference. The deletion of subjects, it is accepted, means that the corporation featuring as charterers is approved. It is apparent, however, that only two of the comments on the back of the draft were incorporated into the draft and into the telex sent by Bulk to Thorntons on Sept. 5, namely, delivery on dropping the tugs, etc. (the original provision had been delivery on sailing Chicago, and $8500 payable semi-monthly); it had originally read $8600 payable monthly. There was, however, no deletion of "sub ows approval of chrs". Accordingly, there can be no substance in Mr. Joseph's submission that, had Mr. Justice Staughton's attention been drawn to the writing on the back of the draft, he would have concluded that the owners could not have made out a good arguable case that their brokers in London had relied upon the reference before concluding a fixture.

(2) *Is this a proper case, as a matter of discretion, for service out of the jurisdiction?*

The owners having established that the Court had jurisdiction to give leave to serve the writ out of the jurisdiction because the action was founded on a tort committed within the jurisdiction (R.S.C., O. 11 (1) (i) (h)), the owners still had to satisfy the Court that it was a proper case for the exercise of the Court's discretion. This they failed to do and hence this appeal.

Mr. Justice Staughton was satisfied (and this was not contested by Mr. Joseph) that an English Court would only apply English law to this case. In English law, since *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1963] 1 Lloyd's Rep. 485; [1964] A.C. 465, a negligent misrepresentation by a bank as to creditworthiness is actionable. As regards New Jersey law, Mr. Justice Staughton concluded that it had not been proved to him that the law was different from English law, but "that the point is open to argument in New Jersey". Mr. Rix has provided us with material, additional to that which was before the learned Judge, which gives further weight to the proposition that there is no difference between English and New Jersey law on this issue, but he accepts that the principle has not yet been finally settled.

As regards witnesses, Mr. Justice Staughton saw no clear preponderance in numbers either way. The basis on which he decided the issue of

discretion adversely to the owners was as follows:

> . . . Previous proceedings and forum shopping. As has been stated, the previous proceedings all occurred in the United States. To my mind the natural forum in which the plaintiffs would have continued their efforts to recover compensation would have been in the United States. It was there that they started because they had agreed to New York arbitration. It is there that they must, so far as I know, ultimately enforce any judgment that they may obtain against the defendants. I suspect that this action was only started in this country because the plaintiffs concluded that they would have an advantage here as described in the previous section. It is a case of forum shopping . . .
>
> Even if that were not the case, I would conclude that the natural forum for this action, in view of the history of events, is in the United States. Mr Donaldson proposed the test: Have the plaintiffs, by starting this action, shown a serious deviation from what one would otherwise do? That is not the overall test under Order 11, as already explained; but if it were I would answer it Yes. This action belongs to the United States; to the United States it must go.

The learned Judge's attention was not invited to the Privy Council case of *Distillers Co. (Biochemicals) Ltd. v. Laura Ann Thompson*, [1971] A.C. 458. That was a case in which an English company, the manufacturers of a drug marketed under the name of "Distaval" which contained the drug "Thalidomide", had sold the drug in Australia, as a result of which it was alleged that a woman who was pregnant suffered, as did the child to whom she subsequently gave birth. She sought to sue Distillers in Australia on the basis that they committed negligence by virtue of their failure, when they sold the drug, to give a warning of its dangerous characteristic. It was held that, since the complaint that the English company had failed to warn the mother of the dangers of the drug occurred when she purchased the drug in New South Wales, her cause of action arose within that jurisdiction. In giving the opinion of the Privy Council Lord Pearson said:

> . . . The defendant has no major grievance if he is sued in the country where most of the ingredients of the cause of action against him took place . . . [— (467D).] But when the question in which country's courts should have jurisdiction to try the action, the approach should be different: the search is for the most appropriate court to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor . . . [— (467F).] It is manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did the wrong . . . [468D].

These quotations make it clear that the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of the dispute.

England is thus the natural forum for the resolution of this dispute. The law is certain and it is therefore only the facts which will be in issue, whereas in New Jersey there will be argument on the law. Even though it is still probable it will be determined to be the same as English law, time and money will be expended in establishing this.

Given that England is the natural forum, Mr. Justice Staughton was in error in deciding that its choice could be criticized as being an example of forum shopping. Moreover, with respect, I think he was also in error in paying any regard to the proceedings which the owners had taken against Maro and I.T.I. in New York and Connecticut. The owners were obliged to proceed by arbitration in New York against Maro, having regard to the terms of the charter-party. The action against the guarantors was pursued in Connecticut, since that was where they were thought to have assets. The causes of action and the parties were quite different.

In view of these errors, I reach the conclusion that the Judge's exercise of his discretion must be set aside and that this Court thus becomes entitled to exercise an original discretion of its own. In considering whether or not to exercise discretion, I would respectfully adopt and follow the observations made by Lord Wilberforce in his speech in *Amin Rasheed Corporation v. Kuwait Insurance Co.*, [1983] 2 Lloyd's Rep. 365; [1984] A.C. 50 at pp. 375 and 72:

> The rule [r. 4 (2)] does not state the considerations by which the court is to decide whether the case is a proper one, and I do not think that we can get much assistance from cases where it is sought to stay an action started in this country, or to enjoin the bringing of proceedings abroad. The situations are different . . . The intention must be to impose upon the plaintiff the burden of showing good reasons why service of a writ, calling for appearance before an English court, should, in the circumstances, be permitted upon a foreign defendant. In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, . . .

availability of witnesses and their evidence and expense.

In the light of the matters to which I have already referred — in particular that in England the only issues will be factual ones and that the expense of determining these will be no greater in England than in New Jersey — I am satisfied that there are good reasons to allow service of the writ out of the jurisdiction, and I would therefore allow this appeal.

Lord Justice ROBERT GOFF: The learned Judge decided to set aside the order made ex parte by Mr. Justice Parker (as he then was), granting leave to the appellants to serve proceedings on the respondents out of the jurisdiction in the State of New Jersey. His reasoning was as follows. First, he held, following the reasoning of this Court in *Diamond v. Bank of London and Montreal Ltd.*, [1979] 1 Lloyd's Rep. 335; [1979] Q.B. 333, that the alleged tort, if committed, was committed within the jurisdiction. Second, he held that, on the affidavit evidence before him, the appellants had made out a good arguable case that the tort alleged by them had been committed by the respondents. It followed from these two conclusions that, in his opinion, the case fell within O. 11, r. 1 (1) (h) of the Rules of the Supreme Court, the action being sufficiently established as founded on a tort committed within the jurisdiction. So, subject to the exercise of discretion, jurisdiction was established. The Judge then turned to consider whether this was a proper case, as a matter of discretion, for service out of the jurisdiction. He concluded that it was not. In this connection he considered a number of factors: the system of law which the English Court would apply — he considered that that must be English law; the witnesses who might be called — this factor does not appear to have influenced his decision; and, lastly, what the Judge called "previous proceedings and forum shopping", which he regarded as the decisive factor. Under this last heading the Judge's reasoning and conclusion were as follows:

> As has been stated, the previous proceedings all occurred in the United States. To my mind the natural forum in which the plaintiffs would have continued their efforts to recover compensation would have been in the United States. It was there that they started because they had agreed to New York arbitration. It is there that they must, so far as I know, ultimately enforce any judgment that they may obtain against the defendants. I suspect that this action was only started in this country because the plaintiffs concluded that they would have an advantage here as described in the previous section. It is a case of forum shopping. That is to be discouraged, as Lord Pearson said in *Boys v. Chaplin*, [1971] A.C. 356 at page 406, although Lord Denning, Master of the Rolls, has expressed a different view.
>
> Even if that were not the case, I would conclude that the natural forum for this action, in view of the history of events, is in the United States. Mr Donaldson proposed the test: Have the plaintiffs, by starting this action, shown a serious deviation from what one would certainly otherwise do? That is not the overall test under Order 11, as already explained; but if it were I would answer it Yes. This action belongs to the United States; to the United States it must go.

For the appellants before this Court Mr. Rix concentrated his attack on the above passage in the Judge's judgment. Having listened to his argument, to which I am much indebted, I have been persuaded that the Judge's conclusion that the natural forum for the action was in the United States (by which I understand him to mean in New Jersey) cannot be sustained.

In considering this aspect of the case the starting point must, I consider, be the decision of the Privy Council in *Distillers Co. (Biochemicals) Ltd. v. Laura Ann Thompson*, [1971] A.C. 458, a case which was not apparently cited to the Judge. The question in that case was whether the Supreme Court of New South Wales had jurisdiction to determine the respondent's claim against the appellants under s. 18 (4) of the Common Law Procedure Act, 1899, which required that there must be "a cause of action which arose within the jurisdiction". The assumed facts were, in summary, that the respondent was a thalidomide child whose mother had, while pregnant with her, purchased and taken in New South Wales the drug Distaval (containing Thalidomide), a preparation manufactured by the appellants in England and sold by them in England to an Australian company which marketed the produce in Australia, with the result that the respondent was born with no arms and with defective eyesight. It was held by Mr. Justice Taylor in New South Wales that, on the assumed facts, a cause of action did arise within the jurisdiction of the Courts of that State; and his decision was affirmed in turn by the Court of Appeal of New South Wales and by the Privy Council, whose advice was delivered by Lord Pearson.

In considering the question whether there was a cause of action which arose within the jurisdiction, Lord Pearson said that there seemed to be three possible theories, which he summarized as follows (at p. 466):

. . . (i) that the "cause of action" must be the whole cause of action, so that every part of it, every ingredient of it, must have occurred within the jurisdiction; (ii) that it is necessary and sufficient that the last ingredient of the cause of action, the event which completes a cause of action and brings it into being, has occurred within the jurisdiction; and (iii) that the act on the part of the defendant which gives the plaintiff his cause of complaint must have occurred within the jurisdiction.

Of these theories, Lord Pearson preferred the third. He pointed out (at p. 467) that—

. . . when the question is which country's courts should have jurisdiction to try the action . . . the search is for the most appropriate court to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor.

He considered (at p. 468) that it was—

. . . manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did the wrong.

The right approach, he concluded, was when the tort was complete, to—

. . . look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?

On the assumed facts in the case before the board, he considered that there was negligence by the appellants in New South Wales, viz. failing to give a warning that the goods would be dangerous if taken by an expectant mother in the first three months of pregnancy, causing injury to the respondent in New South Wales. It followed that in substance the cause of action arose in New South Wales.

That decision was applied by this Court in *Diamond v. Bank of London and Montreal*, a case concerned with an allegation of negligent misrepresentation made in telex messages and telephone conversations originating outside this country, but received and acted upon in this country. The Court held that the substance of the tort was committed in this country, where the misrepresentations were received and acted on, and so the case fell within O. 11, r. 1 (1) (h). Lord Denning, M.R., said (at pp. 337 and 346):

. . . The truth is that each tort has to be considered on its own to see where it is committed. In many torts the place may be where the damage is done. Such as in *Distillers Co. (Biochemicals) Ltd. v. Laura Ann Thompson*, [1971] A.C. 458. Distillers sent the thalidomide drug out from England to Australia. A woman took it in Australia with the result that her baby was born deformed. It was held that the tort was committed in New South Wales. Every tort must be considered separately. In the case of fraudulent misrepresentation it seems to me that the tort is committed at the place where the representation is received and acted upon; and not the place from which it was sent. Logically, it seems to me, the same applies to a negligent misrepresentation by telephone or by telex. It is committed where it is received and acted upon.

Now it follows from those decisions that, where it is held that a Court has jurisdiction on the basis that an alleged tort has been committed within the jurisdiction of the Court, the test which has been satisfied in order to reach that conclusion is one founded on the basis that the Court, so having jurisdiction, is the most appropriate Court to try the claim, where it is manifestly just and reasonable that the defendant should answer for his wrongdoing. This being so, it must usually be difficult in any particular case to resist the conclusion that a Court which has jurisdiction on that basis must also be the natural forum for the trial of the action. If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum. Certainly, in the present case, I can see no factors which could displace that conclusion. With all respect, I do not consider that the factors which impressed the learned Judge are capable of achieving that result. He relied, first, on the proceedings which the appellants had previously commenced in the United States. These were: (1) proceedings commenced by the appellants against the charterers (Maro Shipping Ltd.) and their guarantors (International Traders Inc.) in the Courts of Connecticut and New Jersey, with a view to obtaining orders for pre-trial attachment of assets of those companies in banks in those two States; and (2) arbitration proceedings against the charterers in New York, under the arbitration clause in the charter, and the registration of the arbitration award as a judgment in New York as required by the award. I cannot for my part see that these proceedings can have any bearing upon the identification of the natural forum for trial of the present action between the appellants and the respondents. Next, the Judge relied upon the fact that it was in the United States that, so far as he knew, the appellants would have to enforce any judgment they might obtain against the respondents. This, however, simply reflects the

fact that the respondents are resident and carry on business outside the jurisdiction, which is the reason why it is necessary for the appellants to invoke the Court's powers under R.S.C., O. 11, r. 1 (1) (h). I do not consider that this factor of itself carries much weight. Lastly, the Judge expressed the opinion that the action was only started in this country because the appellants concluded that they would have an advantage here in that, on the evidence before him, English law provided a more clearly established remedy for damages for negligent misrepresentation than did the law of the State of New Jersey. I feel bound to say that I can discern no evidence upon which the Judge could properly form any such view. This country was an obvious place for the appellants to start proceedings, especially having regard to the facts that the substance of the alleged tort was committed here in relation to a transaction which was negotiated and concluded here through brokers carrying on business here. The expression "forum shopping", invoked by the Judge, is not a term of art; but, whatever may be its precise meaning, I consider it to be inapplicable to the present case, where the forum chosen is, on the authorities, the natural forum for the trial of the action.

It follows that, in my judgment, the learned Judge erred in concluding that the action "belongs in the United States". His conclusion on this point must vitiate the exercise of his discretion against granting leave to the appellants to serve proceedings on the respondents outside the jurisdiction. Furthermore, I can for my part see no reason why this Court should not, in the exercise of its discretion, hold that this is a proper case to give such leave. For the respondents, Mr. Joseph referred us to a number of factors upon which he relied to show that the case was not closely connected with this country; but all these factors were, at best, peripheral. I am satisfied, not only that the case falls within O. 11, r. 1 (1) (h), so that there is the necessary jurisdiction, but also that beyond doubt the English Courts provide the natural forum for the trial of the action and that this is a case where the Court should exercise its discretion to allow service of proceedings outside the jurisdiction.

Mr. Joseph also sought, in the course of his argument, to attack the Judge's conclusion that, on the affidavit evidence before him, the appellants had made out a good arguable case, in particular the question whether the appellants had relied upon the respondents' representation in this country. However, for the reasons already given by Lord Justice Ackner, I would not disturb the Judge's conclusion on this point.

For these reasons I, too, would allow the appeal.

[*Order: Appeal allowed with costs here and below; writ extended for nine months; application for leave to appeal to the House of Lords refused.*]