Judgment 35/2009 **Winnetka Trading Corporation v Bank Julius Baer & Co Ltd – Court of Appeal (Civil Appeal 401) – 15 July 2009**

Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1857 – appeal from grant of anti-suit injunction – construction of jurisdiction clauses in three agreements between the Bank and its customer, Winnetka – whether the jurisdiction clause had been incorporated in the agreement between the parties – alleged oral representations that the clause would not be relied on by the Bank – legal principles for the grant of an anti-suit injunction – exclusive and non-exclusive jurisdiction clauses – transitive and intransitive uses of the word 'submit' – any ambiguity to be construed contra proferentem – appeal allowed - oral application for leave to appeal to the Judicial Committee refused

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

Civil 401

The 15th day of July, 2009 before The Hon Michael Jacob Beloff QC, presiding, Dame Heather Steel, DBE and John Vandeleur Martin, QC

WINNETKA TRADING CORPORATION

Appellant

-v-

BANK JULIUS BAER & CO LTD

Respondent

In the matter of the appeal, with leave, by the Appellant from the decision by the Royal Court on 18th November 2008 whereby the Respondent was granted an anti-suit injunction;.

THE COURT, having on the 13th and 14th July 2009 heard Advocates C J Hay and G S K Dawes for the respective parties thereon, this day GAVE JUDGMENT in the terms attached hereto and: -

1. ALLOWED the appeal from the said grant of an anti-suit injunction;
2. AWARDED costs to the Appellant on the standard recoverable basis; and
3. REFUSED an oral application on behalf of the Respondent for leave to appeal to the Judicial Committee of the Privy Council.

K H TOUGH
Registrar of the Court of Appeal

Judgment Delivered 15 July 2009
Approved Text 22 July 2009

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

(CIVIL DIVISION)

Wednesday 15 July 2009

Before:

The Hon Michael Beloff QC
Dame Heather Steel DBE
John Vandeleur Martin QC

Between:

WINNETKA TRADING CORPORATION

Appellant

v

BANK JULIUS BAER & CO LTD

Respondent

DETERMINATION

Advocate Christian J Hay, representing the Appellant
Advocate Gordon S K Dawes, representing the Respondent

Cases
United Capital Corporation v Bender [2006] JLR CA 269 para 157
Ashton v Ansol Limited (Judgment 9/2003 Civil Appeal No. 322)
Standard Bank v Agrinvest [2007] EWHC 2595 (Comm)
Donohue v Armco [2002] 4 LRC 478
S W Beresford v New Hampshire Insurance Co [1990] 1 LLR 454
British Aerospace Limited v Dee Howard [1993] 1 LLR 368
Sinochem International Ltd v Mobil Sales & ors [1999] Folio No.69
Chartbrook v Persimmon [2009] UKHL 38
Soho Supply Co v Gatoil [1989] 1 LLR Rep 588
Antec International Limited v Biosafety USA Inc [2005]
Highland Crusader Offshore Partners Ltd v Deutsche Bank AG [2009] EWCA Civ 725
Henderson v Marriett Syndicates [1994] 3 All ER 201

Texts
Dicey, Morris and Collins, Conflicts of Law 13th Edition [DMC] para 12-099, p.522-3
The Supreme Court Act 1981 ("SCA") Section 37(i)
Gee on Commercial Injunctions 5th Edition Chapter 14 p.395
Law Reform (Miscellaneous Provisions) (Guernsey) Law 1987, Part 1

Beloff JA

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Introduction

1. This is an appeal from a decision of the Deputy Bailiff sitting in the Royal Court dated 18th November 2008 granting the Respondent an anti-suit injunction ("the Decision"). The Order was that the Appellant cease prosecuting and withdraw, as soon as practicable, proceedings it has issued before the High Court in England.

Factual Background

2. The Appellant, Winnetka Trading Corporation ("Winnetka") is a Panamanian Company beneficially owned by French Nationals who are themselves resident in France, and it operates as an investment vehicle on their behalf. The Directors of Winnetka are Panamanian Corporations.

3. The Respondent, Bank Julius Baer and Co Ltd ("BJB") is a Swiss Registered Company which carries on business as a Bank through its branch in Guernsey and elsewhere. Unless I say otherwise, references in this judgment to "BJB" refer to its Guernsey branch.

4. Winnetka was introduced to BJB by a Mr Darren Porter, an Executive Director and Head of Portfolio Development of Julius Baer International Limited ("JBINT"),

5. JBINT is a Swiss registered company with offices in London. BJB and JBINT are sister companies, and are both wholly owned subsidiaries of the Julius Baer Group.

6. The formal relationship between Winnetka and BJB is set out in three documents.

7. The first, is a "Bank Account Mandate for Corporate Clients" ("the Bank Account Mandate") executed by Winnetka on 29th December 2005, the Corporate Directors of Winnetka having resolved on 20th December 2005 to open the bank account and authorised two of the beneficial owners, Jacob Hazout and Jean-Marie Valicon, to operate the account.

8. The second agreement is a credit agreement dated 20th January 2006 ("the Credit Agreement") whereby BJB offered credit facilities to Winnetka up to €12,500,000 Euros, in

accordance with the terms and conditions set out in a letter dated 20th January 2006 and the standard credit conditions of the bank, a copy of which was attached to the letter. Acceptance of the credit facility was signified by the signature of two Corporate Directors endorsed on a copy of the letter.

9. The third is an "Investment Advisory and Dealing Services Mandate" ("the Investment Agreement"), entered into on 1st May 2006 by Winnetka appointing BJB as an investment adviser. The Investment Agreement incorporated portfolio guidelines, terms and conditions and a portfolio risk warning statement.

Jurisdiction Clauses

10. Each of the three agreements between BJB and Winnetka contains a Governing Law or Jurisdiction clause but each of the three clauses is different. (My emphasis added in each case.)

11. Clause 26 of the General Banking Conditions attached to the Bank Account Mandate provides:

> *"**26. Applicable law and jurisdiction***
>
> *This Mandate shall be governed by and construed in accordance with the laws of Guernsey and the parties hereby submit to the non-exclusive jurisdiction of the Courts of Guernsey".*

12. Clause 15 of the credit conditions attached to the Credit Agreement provides:

> *"**15. Applicable Law***
>
> *15.1 The Credit Agreement shall be governed by and construed in accordance with the Laws of Guernsey. The Client agrees that any legal action or proceedings arising out of or in connection with the Credit Agreement may be brought in the Royal Court of Guernsey and/or the High Court of Justice in England as the Bank may determine, and the Client irrevocably submits to the non-exclusive jurisdiction of those courts provided, however, that nothing herein shall preclude the Bank from instituting proceedings against the Client in any other country or place which may have jurisdiction for the purpose*

of protecting and enforcing the Bank's rights under the Credit Agreement.

15.2 The Client hereby irrevocably waives any objection which the client may now or hereafter have to the venue of any suit, action or proceedings relating to the Credit Agreement and further irrevocably waives any claim that Guernsey is not a convenient forum for any suit, action or proceedings."

13. Clause 15 of Part Two –of the Investment Agreement provides:

"*15. Governing Law*

The Mandate between the Client and the Bank including these terms and conditions shall be governed by the laws of the Island of Guernsey and the Client and the Bank hereby agree to submit to the jurisdiction of the Royal Court of Guernsey."*

(*"*The Mandate"* is defined in Clause 1 as being the Investment Agreement).

The Issues

14. Winnetka's contentions before the Royal Court as Respondent and renewed before us as Appellant were firstly that the jurisdiction clauses were not incorporated into the retainer because of an oral representation made to Mr Hazout by JBINT on behalf of BJB ("the incorporation issue"), secondly, that even if they were incorporated, on their proper construction, Winnetka was not obliged to bring proceedings in Guernsey ("the construction issue").

The High Court Proceedings

15. On 17th July 2008 Proceedings ("the English proceedings"), were commenced by Winnetka in the High Court of Justice, Chancery Division against JBINT as First Defendant and BJB as Second Defendant.

16. In the English proceedings, Winnetka alleged that BJB and JBINT, as agent for BJB, breached a number of terms, express and implied, of what it called "the retainer", the term

used to refer to the relationship between the parties created by, *inter alia,* the Bank Account Mandate, the Credit Agreement and the Investment Agreement.

17. Paragraph 26 of the Particulars of Claim pleads the four express terms which Winnetka alleged were breached by BJB:

> *26. By the retainer the 2nd Defendant and the 1st Defendant as the 2nd Defendant's agent owed the claimant express duties as follows:*
>
> *a) regularly to contact the claimant with advice on investments (Part One - Portfolio guidelines),*
>
> *b) to effect transactions in investments when requested (Part One – Portfolio guidelines),*
>
> *c) to execute correctly signed orders placed with it during business hours with requisite care (General Banking Conditions – clause 16),*
>
> *d) to act as investment adviser of the claimant's portfolio of securities, cash, other assets, liabilities etc (Investment advisory and dealing services mandate).*

18. These express duties pleaded at paragraphs 26(a), (b) and (d), all arise under the Investment Agreement into which the portfolio guidelines are incorporated. The General Banking Conditions in paragraph 26(c) form part of the Bank Account Mandate.

19. Paragraph 27 of the Particulars of Claim pleads three implied terms said to be required to give business efficacy and meaning to the retainer namely:

> *a) That the 1st and 2nd Defendant would act with all due skill, care and diligence in the execution of transactions undertaken,*
>
> *b) That the 1st and 2nd Defendant would so organise and control their affairs so as to provide proper risk management systems in the conduct of their business in relation to the claimant,*
>
> *c) That the 1st and 2nd Defendant would act in good faith in all transactions that it undertook for the claimant".*

20. The breach pleaded in paragraph 30 alleged a failure by BJB properly to carry out the instructions Winnetka gave BJB to purchase two tranches of shares in a pharmaceuticals company called Inyx to a total value of $9,454,000. Winnetka alleged that BJB paid out a total of $9,450,000, Winnetka only received 1,800,000 shares but not a further 3,301,523

shares which would together have constituted a full number, resulting in an overpayment of approximately $7,232,400.

21. Winnetka's claim was also alternatively pleaded in tort, in paragraphs 30 and 31.

22. By way of defence BJB will apparently assert that it complied with the instructions of Winnetka and so would deny any liability to Winnetka (see paragraph 6 of an affidavit filed by Advocate Dawes in support of the anti-suit application).

The Applications in England and Guernsey

23. On 5th September 2008, BJB and JBINT lodged an application in the English proceedings seeking a stay on the basis that the claim ought to have been brought in the Royal Court.

24. On the 9th September 2008 BJB and JBINT issued a claim in the Royal Court for an anti-suit injunction and damages for breach of contract as to jurisdiction and applied, by application of even date, for an anti-suit injunction.

25. The application in the Royal Court was heard on the 10th November 2008 and judgment was handed down in writing on the 18th November 2008.

26. On 26th November 2008 Mr Justice Norris sitting in the Chancery Division in the High Court ordered a stay of the English proceedings but with permission to the Claimant Winnetka to apply to restore the same in the event of:

    (a) a successful appeal against the decision of the Royal Court of Guernsey of 18th November 2008; or

    (b) the determination by the Royal Court of Guernsey of a preliminary issue of whether clause 15 of the Investment Advisory and Dealing Services Mandate and/or clause 26 of the Bank Account Mandate were incorporated into the contract(s) between the Claimant and Defendant.

The Incorporation Issue

27. The Incorporation Issue is whether the jurisdiction clause was incorporated in the agreement between the parties. In my view the burden of establishing incorporation rests on BJB. Dicey, Morris and Collins, Conflicts of Law 13th Edition [DMC] para 12-099, p.522-3. BJB sufficiently discharged this burden by identifying the clause in the contract. It was then for Winnetka to displace the conclusion that the clause was so incorporated. This it seeks to do by relying on an alleged statement by Mr Porter to the alleged effect that the clause would not be relied on.

28. Neither the Royal Court nor we received "live" evidence from any witnesses so were absolved from forming a final view as to whether the jurisdiction clause was incorporated into the bank account mandate agreement.

29. DMC states however that under the common law of England a preliminary decision can be taken as to incorporation of a jurisdiction clause, without deciding the issue. Specifically:

> "*The difficulty arises in cases in which it is necessary to take a preliminary decision as to whether there is a jurisdiction clause in a contract in order to help identify the law which governs that contract. It has been held, and appears to be correct, that this preliminary assessment has to be undertaken by reference to English domestic law principles. But it should follow that once the law governing the contract has been identified by these means, it is that law which must be used to make the definitive assessment of whether the jurisdiction agreement in question is in fact one of the terms of the contract."* (Paragraph 12-090, p.517)

In relation to the words "*preliminary decision*", there is a footnote "But, it is submitted, not to decide".

30. I am satisfied that on this issue Guernsey law would follow the English common law. I can see no principled basis for there to be a distinction as between English and Guernsey law in the approach forming a preliminary view as to (or indeed) deciding whether a term to jurisdiction has or has not been incorporated into an agreement.

31. Winnetka relied upon an alleged explicit representation that the jurisdiction clauses were to be disregarded. The basis for that reliance is an affidavit of Ian Gordon Park sworn on 1st

October 2008. Mr Park is an English Solicitor instructed by Winnetka. In paragraph 6(b) of his affidavit, Mr Park described the introduction of Mr Hazout, a Computer Engineer of Winnetka looking for a bank to transact business on Winnetka's behalf, to Mr Porter of JBINT and referred to a meeting at JBINT's offices in London with Mr Hazout and Mr Valicon when the Bank Account Mandate was completed.

32. Mr Park said:

> *"Mr Porter produced this document [the Bank Account Mandate]. Mr Hazout said that he wanted to deal specifically with Mr Porter at the London bank and that he did not wish to travel to Guernsey or to have anything to do with the Guernsey branch of Bank Julius Baer and Co Limited (...). Mr Porter replied: "Don't worry, it is only a formality."Mr Hazout and Mr Valicon have a reasonable command of the English language, but their first language is French. All discussions, and all documents, were in English. Mr Hazout and Mr Valicon signed the documents relying on Mr Porter's assurance that "it was only a formality"."*

33. In reply, Mr Porter swore an affidavit dated 24th October 2008. In paragraph 11 he said:

> *"Further, Mr Park then says that I said to Mr Hazout, in relation to the mandate and Mr Hazout's supposed desire not to have anything to do with Guernsey "Don't worry, it is only a formality". I have no recollection of having ever made such a statement nor do I have any recollection of Mr Hazout saying he wanted nothing to do with [BJB] as relayed by Mr Park".*

34. In paragraph 12 of the affidavit Mr Porter said (contrary to Mr Park's assertion (see above para)) that the Bank Account Mandate was <u>not</u> produced by him at the meeting on 29th December 2005. Instead, he had previously e-mailed it to a management company called, Overseas Management Co, in Luxembourg and on 29th December Mr Hazout delivered it duly signed. Further Mr Valicon was not present at the meeting, the only other attendee being Mr Hazout's brother-in-law. Mr Porter exhibited a copy of his file note of that meeting which makes no reference to any discussion as to the jurisdiction governing the relationship. He also said that in his dealings with Mr Hazout, the latter has always demonstrated a competent grasp of the English language (paragraph 13).

35. Mr Park swore a second affidavit on 29th October 2008 in which he replied to a number of matters raised by Mr Porter in his affidavit.

36. As Mr Park was reporting, at second hand, the evidence of Mr Hazout, before the Deputy Bailiff Advocate Dawes for BJB reasonably criticised the absence of any affidavit by Mr Hazout himself. Advocate Hay for Winnetka said Mr Hazout could not swear an affidavit during the time period allowed by the Royal Court because he was away. In the Deputy Bailiff's view, Advocate Hay gave no adequate explanation as to why he could not have applied for extra time, or for leave to file an affidavit by Mr Hazout out of time. This explanation or excuse offered to the Deputy Bailiff cannot prevail in the Court of Appeal: indeed it is not relied on. Advocate Hay said that in his view the Court of Appeal would not have admitted such evidence at this stage. Given that the proceedings were interlocutory, this view might have been over cautious. But in any event we have to deal with the evidence as it stands, not what might have been, before us.

37. In my view, Winnetka has not discharged the evidential burden which lies upon it.

38. First, Mr Hazout's evidence is hearsay. Hearsay evidence, in particular when contradicted by direct evidence, carries little weight.

39. Secondly, the evidence is on its face fragile. The hearsay statement makes no reference to the "jurisdiction" clause at all. The ambiguous phrase attributed to Mr Porter "*It's only a formality"* would, if Winnetka's argument was to succeed, need to have been attached to the jurisdiction clause: it was not. Further the reference to formality *prima facie* could only apply to the Bank Mandate and not to an agreement, the Investment Agreement, still to be entered into. The natural meaning of the interchange (on the hypothesis that it took place at all) is that the identity of the Guernsey branch as a counterparty was a formality; the investment business would actually be undertaken by Mr Porter in London. That could not, however, involve any agreement by Mr Porter to waive reliance on the jurisdiction clause. If anything, the Bank Mandate was being affirmed as the instrument which governed the transaction between the parties: the arrangement of business under its provisions was to be a distinct matter.

40. Thirdly, the inherent probabilities are inconsistent with Mr Hazout's version of events. I can discern no reason why the Bank should voluntarily disclaim reliance on a standard form of jurisdiction clause at the behest of a single new customer, nor is it clear how Mr Porter would have had authority to do so on BJB's behalf.

41. In these circumstances it is unnecessary for me to explore whether the Deputy Bailiff's reliance on perceived inconsistencies both in the evidence adduced on Winnetka's behalf on the incorporation issue, and between that evidence and the pleaded case was well founded.

42. I note that in any event, Winnetka may apply to have the question of incorporation taken as a preliminary issue, if it considers that to be an appropriate and cost-effective manner to proceed, and the Royal Court agrees. BJB and JBINT have undertaken not to oppose such an application to the Royal Court if the litigation proceeds in Guernsey (see para 32 of the judgment of Norris J). The existence or relevance of such inconsistencies could be revisited at that juncture.

43. I therefore proceed on the basis that the jurisdiction clause was incorporated in the agreement, and now consider its meaning and effect.

Anti-Suit Injunctions

44. Before doing so I set out the legal backcloth.

45. The power to grant an anti-suit injunction is an aspect of the power to grant injunctions. In the Courts of England and Wales this derives from Section 37(i) of The Supreme Court Act 1981 ("SCA"); which recognises in statutory form the inherent power of the Court to grant injunctive relief. In Australia this derives from the inherent power of the Court to restrain abuse of process (Gee: Commercial Injunctions 5th Edition ("Gee") p.395).

46. In Guernsey there is no express statutory power to grant injunctions, but the existence of such a common law power is recognised in the statutory power to grant interim injunctions contained in the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987.

Judgment Delivered 15 July 2009
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PART 1

Interim Injunctions

> 1. (1) If proceedings have been or are to be instituted before the Court, the Court may, by order, at any time before it makes a final judgment in the proceedings or before the proceedings are otherwise concluded, on the application of any person who is, or as the case may be will be, a party to the proceedings (such person being referred to in this Part of this Law as "the applicant"), grant an injunction addressed to another person (such other person being referred to in this Part of this Law as "the respondent") requiring the respondent to do or not to do anything.

47. Whether or not that power should in Guernsey be limited to discrete categories of case or be the servant of justice in the widest sense has not been finally decided cf: *United Capital Corporation v Bender* [2006] JLR CA 269 para 157; but the existence of the specific power to grant an anti-suit injunction was recognised by this Court in a composition of three distinguished commercial lawyers in *Ashton v Ansol Limited* (Judgment 9/2003 Civil Appeal No. 322)

48. It is common ground (and I shall assume) that in respect of this case the Brussels Convention does not apply to Guernsey, a jurisdiction outwith its reach. It is therefore necessary to consider the Court's approach to the grant of such injunctions without reference to that Convention and the copious jurisprudence which interprets it. It is also common ground that England was a forum, in which, ignoring the jurisdiction clause, Winnetka had a right to bring its claim.

49. A useful summary of the principles applied by the Court of England and Wales is to be found in the judgment of Mr Justice Teare in *Standard Bank v Agrinvest* [2007] EWHC 2595 (Comm), which I would endorse as representing the law of Guernsey.

> "25. The relevant principles for the grant of an anti-suit injunction are set out in SNIA v Lui Kui Jack [1987] AC 871 and Turner v Grovitt [2002] 1 WLR 107. They have been summarised by Cooke J. in Trafigura Beheer BV v Kookmin Bank Co [2005] EWHC 2350 (Comm) at para.42 (and adopted by Field J. in his decision in the same case [2006] EWHC 1921 (Comm) at para.44) as follows:

"(i) The Court will grant an injunction where the pursuit of the foreign proceedings is "unconscionable", as is made clear by the House of Lords in Turner v Grovit [2002] 1 WLR 107 at paragraphs 22-29, per Lord Hobhouse. The injunction is a personal remedy for the wrongful conduct of another party – a fault based remedial concept, in respect of conduct which the Court may describe as "vexatious" or "oppressive", but deriving from "the basic principle of justice".

(ii) The Court will readily grant an injunction to restrain proceedings which are brought in breach of an exclusive jurisdiction clause save in circumstances where the Brussels Regulation applies – see Through Transport Mutual v India Assurance Co, [2005] 1 LLR 67 at paragraphs 67 – 68. This is an example of the wider principle that an English court will grant an injunction to prevent the pursuit of foreign proceedings which are vexatious, oppressive or unconscionable – see SNIA v Lee Kui Jack [1987] AC 871

(iii) Absent an agreement to the exclusive jurisdiction of the English Court, or some other special factor, a person has no right not to be sued in a particular forum. Where suit is brought in a foreign forum, the question whether or not that forum is an appropriate forum is a factor in assessing the conduct of the party suing there, for the purposes of considering whether to grant a restraining injunction, but if it is the only factor, it is easily overridden by other considerations (per Lord Hobhouse at para 25 of Turner (ibid)).

(iv) To grant an injunction, the English Court must have a sufficient legitimate interest in the foreign proceedings, which means that if there is no contractual reason to prevent suit there, there must be proceedings in this country which require protection (per Lord Hobhouse at para 27 of Turner (ibid), by reference to the House of Lords' decision in Airbus Industries GIE v Patel [1999] 1 AC 119.

(v) English law attaches a high importance to international comity and perception of the foreign court of an interference in its proceedings, albeit indirect. There must therefore be a clear need for protection of the English proceedings (per Lord Hobhouse at para 29 of Turner (ibid)) if an injunction is to be granted.

(vi) An injunction should not be granted if its effect would be to deprive the claimant in the foreign action of an advantage in that forum of which it would be unjust to deprive him (Snia v Lee Kui Jak (ibid) at p896)."

50. The presence of a jurisdiction clause is a basis, but not the only basis, for grant of an anti-suit injunction. No previous Guernsey case has considered the impact of such a clause in this context.

51. A distinction – the dimensions of which will require consideration – arises between the impact of an exclusive and that of a non-exclusive jurisdiction clause. If it is an exclusive jurisdiction clause, it requires strong reasons, which I infer to be rooted in a public policy to ensure justice, to displace it.

52. This appears from *Donohue v Armco* [2002] 4 LRC 478 where Lord Bingham of Cornhill said: -

> [24] If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with *the contractual bargain*, unless *the party suing in the non- contractual forum (the burden being on him)* can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from if. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in *The Eleftheria* [1969] 2 All ER 641 at 645-646 Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion, and his judgment has been repeatedly cited and applied. Brandon J did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material. (I am mindful that the principles governing the grant of injunctions and stays are not the same: see *SNI Aerospatiale* [1988] LRC (Comm) 865 at 880-881. Considerations of comity arise in the one case but not in the other. These differences need not, however, be explored in this case.)
>
> [25] Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause.

53. Advocate Hay for Winnetka did not suggest the existence of any such strong reasons in the present case: he pinned his appeal to the proposition that the clause was not such a clause.

54. It follows that the first question which we have to decide under this head is whether the clause relied on is an exclusive jurisdiction clause or not.

55. While Winnetka's pleaded case refers to all of the agreements as constituting the retainer, and to the second and third as containing express terms which were breached, on analysis no particular breach of the credit agreement was pleaded, so that attention must be focussed on the jurisdiction clause in the investment agreement.

56. The rules of construction which apply to such clauses are those which apply to any contractual provision. As stated by Hobhouse J in *S W Beresford v New Hampshire Insurance Co* [1990] 1 LLR 454 "*It is a matter of construing the words used in accordance with their natural meaning and in the light of the surrounding circumstances in which the contract was made*". Reference to other cases, unless they contain identical phrases which have received a consistent interpretation by Courts whose judgments are of compelling or persuasive authority, unaffected by the particular contractual contexts, is of secondary if any assistance.

57. It is not disputed that the clause was to be 'interpreted according to Guernsey Law': the parties have chosen that law as of general application to the mutual obligations of the parties under the agreement. (DMC para 12 – 092)

58. Advocate Dawes contended that the relevant clause properly interpreted meant that Guernsey was the only forum in which disputes between the parties could be litigated. He argued that:

(i) The mutual agreement to submit to Guernsey jurisdiction meant mutual agreement to submit all disputes only to Guernsey jurisdiction.

(ii) This interpretation was fortified by the unambiguous choice of Guernsey Law, which, presumptively, could best be decided by Guernsey judges rather than by judges elsewhere with the assistance of experts on Guernsey Law.

(iii) Since Guernsey Law was an available jurisdiction, the parties must have intended to add something by a specific reference to it.

The second and third submissions were to an extent supported by dicta of Waller J in *British Aerospace Limited v Dee Howard* [1993] 1 LLR 368 and Rix J *Sinochem International Ltd v Mobil Sales & ors* [1999] Folio No.69.

59. Rix J in *Sinochem International Ltd v Mobil Sales & ors* said at paragraph 32:

> "*The test which has been developed for distinguishing an exclusive from a non-exclusive jurisdiction clause is whether on its proper construction the clause obliges the parties to resort to the relevant jurisdiction, irrespective of whether the word "exclusive" is used ... or to put the issue in another way: is the obligation contained in the clause the intransitive one to submit to a jurisdiction if it is chosen by the other contracting party or is it the transitive one to submit all disputes to the chosen jurisdiction?*"

60. As that quotation recognises, conceptually there are at least two possibilities as to the nature of the obligations imposed by a jurisdiction clause, which identifies a particular jurisdiction. One is that a party agrees, if sued by the other party, to submit to that jurisdiction if and when chosen by that other party as a forum for its litigation. Another is that a party agrees that it and the other party can only sue in that jurisdiction. [The distinction has been captured in a vocabulary which is accurate, if opaque, by reference to the intransitive and transitive uses of the word "submit".]

61. The verb "submit" has a different meaning according to which use is engaged. When used transitively, it means "refer": so an obligation to submit disputes for resolution by a defined court: i.e. an obligation to refer disputes to that court. When used intransitively, however, it means "yield": i.e. an obligation to submit to a defined jurisdiction is an obligation to yield to that jurisdiction. An agreement to refer disputes to an identified court ordinarily gives that court exclusive jurisdiction: the parties are not at liberty to take their disputes elsewhere. An

agreement to yield to the jurisdiction of an identified court only comes into play if that court asserts jurisdiction over the dispute; absent that, there is nothing to yield to and the parties are at liberty to litigate in any other suitable forum. Such agreements therefore are normally to be construed as conferring non-exclusive jurisdiction on the nominated court. To transpose the language of Hobhouse J in *Beresford*:

> "*Such a clause, even though creating no obligation to sue only in [Guernsey] is a contractual acknowledgment of the jurisdiction of [the Guernsey Courts] and a contractual agreement to the invocation of that jurisdiction*".

62. Advocate Dawes' repeated mantra that the purpose of engaging a jurisdiction is to submit disputes to it is true only so far as it goes: it ignores the fundamental difference between submitting disputes to the jurisdiction and submitting oneself to the jurisdiction.

63. Advocate Hay points out that in the cases where an obligation to submit all disputes to a particular jurisdiction has been held to flow from true construction of the operative words, express reference has been made to submission of disputes or some similar words; and that, absent such words, the courts have preferred a construction that recognises the lesser or contingent obligation, see e.g Waller J in *British Aerospace*.

64. I am in the event, persuaded that we should follow the thrust of the English case law. I accept of course that the absence of the word 'exclusive' is not dispositive. [Gee at p 410 and cases there cited.] But to exclude a party's option to sue in an otherwise competent jurisdiction would require, in my view, clearer words than are here to be found. Any ambiguity in the concept of submission ought to be construed contra proferentem in the context of what was a standard clause of BJB and not, as in *British Aerospace*, the product of inter-partes negotiation.

65. The force of the argument that both the choice of Guernsey Law and the reference to an already available jurisdiction, point to exclusivity (see para 54 (iii) above) is extinguished when it is noted that in the jurisdiction clause of the Bank Account Mandate both factors

happily co-exist within a provision where only non-exclusive jurisdiction is conferred on Guernsey.

66. There is no relevant matrix here engaged (as to what constitutes matrix see now *Chartbrook v Persimmon* [2009] UKHL 38). The three agreements appear to have to be disconnected. Each has its own origins and purpose. It is adventitious that all were involved in constituting the relationship between these parties. No one, in my view, assisted in construction of another save in the elementary sense, already alluded to, as illustrating that different words can be used to achieve different ends. Nor can any particular circumstances of this particular relationship be used to modify the meaning of what are standard clauses applicable equally to a whole range of potential clients of BJB.

67. As to perceived commercial purpose, a useful aid to construction (see again Hobhouse J in *Beresford*), BJB could (for example, by use of the word "exclusive") have ensured that whether as claimant or respondent, it would find itself in the Guernsey Courts. However there is no reason why it should not have chosen to ensure that result if it were claimant eg; for unpaid fees but to have (while indicating the availability of Guernsey jurisdiction) allowed an international clientèle a freer choice. I deem it unlikely that Guernsey Law, being a particular law of a small jurisdiction, or Guernsey Courts, also enjoying the latter quality, would have been included as a perceived bonus for such clientèle, who could be excused lack of knowledge of its virtues. (Compare the reasoning of Staughton LJ in *Soho Supply Co v Gatoil* [1989] 1 LLR Rep 588 on reason for there choosing England as an available forum for dispute resolution.)

68. *Sohio Supply Co v Gatoil* [1989] 1LLR. 588 is indeed the case most helpful to Advocate Dawes in the sense that no express use of a transitive verb was to be found but nevertheless the clause was held to confer exclusive jurisdiction on the English Court. I would however make the following observations. Firstly, the words used ("*The Agreement shall be governed by the laws of England under the jurisdiction of the English Courts without resort to*

arbitration") were significantly different from those in the clause we have to construe, secondly, the use of the passive tense did not admit immediate translation into either transitive or intransitive but its notional conversion into an active tense shows that the obligation fell on the transitive side of the boundary. Thirdly, the clause was the product of negotiation between two major commercial entities. Fourthly, the perceived commercial purpose cannot be read across into the clause we have to construe.

69. Advocate Dawes had, however, a second string to his bow. He suggested that the difference in consequence between an exclusive and non-exclusive jurisdiction clause is narrowing. He relied on dicta to this effect in: *Beresford*, Hobhouse J, *British Aerospace*, Waller J, *Antec v Biosafety*, Gloster J, and in the English application Norris J, where he observed:

> "*In short, the difference between an exclusive-jurisdiction clause and a non exclusive-jurisdiction clause is much narrower than it once might have appeared to be. The present rules appear to be that the fact the parties have freely negotiated a contract providing for the non-exclusive jurisdiction of a particular court creates a strong prima facie case that the court is the correct one in which to conduct disputes*.,(para 18)

70. Advocate Dawes also pointed to a passage in DMC:

> *"Where the court finds that the agreement confers non-exclusive jurisdiction on the designated court (whether England or a foreign court), it is more difficult to argue that the institution of proceedings is a breach of contract; and on that footing, an application for a stay of proceedings in favour of that foreign court will be determined on the basis of Spiliada Maritime Corp v Consulex Ltd. But the fact that a court was contractually chosen by the parties will be taken as clear evidence that it is an available forum, and that, in principle at least, it is not open to either party to object to the exercise of its jurisdiction at least on grounds which should have been foreseeable when the agreement was made. However, the position is sometimes more complex. It may be that, on its true construction, though the court was given non-exclusive jurisdiction, the parties agreed that if either were to invoke it, the other would submit to the jurisdiction of the named court for the sole determination of the dispute. It would follow that proceedings taken in a foreign court would breach such a jurisdiction agreement if they sought to prevent the other party from invoking the jurisdiction agreement,* or if they aimed to frustrate or prevent the other party having recourse to it. *The question is therefore whether the effect of instituting proceedings in the foreign court, or doing so and refusing to appear to defend the claim made in England, may, on a true construction of the jurisdiction agreement, be seen as a breach of it. Certainly the question of exclusivity or non-exclusivity is a guide to the answer, but it is not always definitive."* (para 12-093 p.519)

71. I am unpersuaded that the dicta in these various judgments cited should be interpreted in the way that Advocate Dawes submits. In both an exclusive and non-exclusive jurisdiction clause, in order for a party to be in breach, an obligation must exist; absent an obligation, there can be no breach although the nature of the obligation is different. An obligation arises, as I have already noted, in the context of non exclusive jurisdiction clauses, in that once a party has exercised a choice of the jurisdiction indicated the other party has to respect that choice. If it does not do so, that party is in breach of that second tier obligation. In all the cases cited to us by Advocate Dawes, there were other proceedings already afoot in the jurisdiction indicated in the relevant jurisdiction clause. The fourth of the propositions summarised by Mr Justice Teare in *Standard Bank* (see para 48) emphasises the importance of that factor.

72. DMC contemplate only that the same principle would be extended to where choice of another jurisdiction is intended to frustrate the other party in exercise of its choice of the jurisdiction referred to in the relevant clause. But in the present case BJB had no claim which it either had (or would seek) to institute in Guernsey arising out of the present dispute.

73. The apparent alignment in the Courts of England and Wales by puisne judges of the two types of clause is not justified and is contradicted by the essential contractual difference between these clauses.

74. Those English judges may have had in mind that when a single jurisdiction (and a single law) was specified, albeit not exclusively, this indicated a mutually preferred choice, and that presumptive effect should be given to that choice in the absence of countervailing factors. This, I accept, would explain the elastic language used in the dicta see e.g. Gloster J in *Antec International Limited v Biosafety USA Inc* [2005].

> "*The fact that the parties have freely negotiated a contract providing for the non-exclusive jurisdiction of the English courts and English law creates a strong prima facie case that the English jurisdiction is the correct one ... the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there*

> *are overwhelming, or at least very strong, reasons for departing from this rule …"* [para 7]

75. I find the principled basis for such approach elusive; and would reject it as inapplicable in Guernsey. For breach of a jurisdiction clause to be the trigger for an anti- suit injunction, some form of obligation has to be identified as arising from the clause. There can be no breach of the "spirit" of a clause.

76. I am comforted by the fact that the most recent learning is consistent with my approach. In *Highland Crusader Offshore Partners Ltd v Deutsche Bank AG* [2009] EWCA Civ 725 the English Court of Appeal held:

> "*In determining an application for an anti-suit injunction, there was no general presumption that where there was a contractual non-exclusive jurisdiction clause parallel proceedings commenced in a non-contractual jurisdiction were to be regarded as matters unforeseeable at the time of the contract or other exceptional circumstances. By contracting for non-exclusive jurisdiction, parties had to have anticipated and accepted the possibility of some parallel proceedings, and the court was to exercise its discretion in deciding whether or not to grant an anti-suit injunction."*

77. Advocate Hay also contended that the claim in tort in any event did not engage the jurisdiction clause at all. That submission, in the event unnecessary to Winnetka's appeal, I reject.

78 There is no doubt that English Law recognises *"the possibility of concurrent claims arising from breach of duty under the two rubrics of the law"* i.e. contract and tort. *Henderson v Marriett Syndicates* [1994] 3 All ER 201. It is (I shall assume) a moot point as to whether Guernsey would on this issue follow English Law or Civil Law which is to contrary effect. However, the issue before us is not whether such claims can exist side by side, but whether the jurisdiction clause, whatever its intrinsic nature (exclusive or not) applies to claims in tort as well as to claims in contract arising out of the retainer. In my view it does. It would be extraordinary if the parties had opted for Guernsey jurisdiction whether in any event, or only if BJB sued in Guernsey, for claims in contract, but not those in tort which arise out of

essentially the same facts, involve the same parties, and when the alleged duty of care arose out of the relationship constituted by the agreements.

79. DMC states:

> *".....the court may presume the agreement was intended to apply to all disputes arising between the parties and which are connected with the contract in which the agreement was contained. Accordingly, if the claimant seeks to frame his claim in tort, or in equity, and contends that the jurisdiction agreement does not extend to non-contractual claims, he will need to persuade the court that the parties intended to permit the claimant to frame a claim to fall outside the jurisdiction agreement: in the absence of a sensible commercial justification for such an intention (which would pave the way for the possibility of inconsistent judgments), the court is likely to interpret the dispute as one falling within the scope of the agreement." (*para 12-094, p.520)

80. BJB founded its initial case on the exclusive nature of the jurisdiction clause and pleads breach in paragraphs 7, 8, and 9 of its summons. Even in its proposed amendment i.e. that a breach would arise in any event once BJB had signalled its objection to proceedings in another Court, it had to seek to identify an obligation of which in this instance the continuation as distinct from institution of proceedings would involve a breach, relied on the clause. [Such an obligation, in my view, cannot be spelt out of the language of the clause itself.]

81. In those circumstances the plea that an injunction should be granted on forum non-conveniens grounds without reference to the jurisdiction clause, even if permissible, was unpromising.

82. Advocate Dawes argued that there are no good reasons for favouring England on conventional *forum conveniens* grounds for a number of reasons;

(1) Winnetka is a Panamanian company with no place of business in England & Wales.

(2) The individuals behind Winnetka are not English and are not resident or domiciled there, nor are any likely witnesses for Winnetka.

(3) There is no dispute but that Guernsey law is the governing law.

(4) The relevant branch of BJB is located in Guernsey.

(5) A number of witnesses are resident in Guernsey.

(6) JBInt will submit to Guernsey jurisdiction and give an address for service in Guernsey.

(7) The claim against JBInt is not a reason for permitting Winnetka to litigate in England.

83. These arguments fall far short of satisfying the tests for restraining proceedings which Winnetka are otherwise entitled to institute in England. There are potent factors of convenience in favour of the case being heard in London. As Mr Park says "*The transactions were carried out in London and the negligence alleged by Winnetka took place in London*" (Affidavit Para 6). He adds:

> "*The Respondent asserts that without doubt London is the most convenient forum in which to conduct the proceedings. All transactions took place in London and all material witnesses, other than Mr Hazout, are based in London. All of the documents can be found in London. Mr Hazout, as the representative of the Respondent is resident in France but finds it cheaper and more cost effective to travel to London. Mr Hazout has other business reasons to travel to London: he has no other business reason to travel to Guernsey.* (para 13)
>
> *The cost of conducting the proceedings in Guernsey will exceed the cost of conducting the proceedings in London.*" (para 14)

84. Advocate Dawes faintly argued that that notwithstanding the order of the Royal Court, Winnetka has not discontinued the English proceedings and is in contempt of the Royal Court. While it would have been prudent for Winnetka to have applied for a stay of the injunction pending their Appeal, such a stay would inevitably have been granted and any contempt is of the most technical kind, and easily curable.

85. For these reasons I would allow the Appeal.

Steel JA I agree

Martin JA I agree-